EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107522/2017

Held in Glasgow on 1, 2, 3, 4, 8, 9, and 10 July 2019

Employment Judge M Robison
Tribunal Member Mr I Macfarlane
Tribunal Member Mr P O'Donnell

Mr C Richardson	**Claimant in person**
Royal Mail Group Limited	**Respondent Represented by Dr A Gibson**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claims do not succeed and are therefore dismissed.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 28 November 2017, claiming unfair dismissal and disability discrimination. The respondent entered a response resisting the claim.

2. Following a number of case management preliminary hearings, a medical report (dated 21 June 2018) was obtained from the claimant's psychiatrist who confirmed that the claimant was fit to prepare for and attend the hearing, as well

as ask cross examination questions. However, she recommended half days and frequent breaks. The hearing therefore ran over seven days, finishing at the latest at 12.30 each day, with additional breaks as and when required.

3. During the course of the case management preliminary hearings, it was confirmed that the issues for determination were: whether the claimant had been unfairly dismissed (in terms of section 98 of the Employment Rights Act 1996); and in being dismissed had he been unfavourably treated because of something arising in consequence of his disability (in terms of section 15 of the Equality Act 2010).

4. It was also decided that this hearing should relate to liability only, given the claim relating to pension, with a separate remedy hearing should that be required.

5. During the hearing, the Tribunal heard evidence for the respondent from Mr Iain Malloch, investigating manager in respect of the conduct case; Mr Henry Aitchison, dismissing manager; Ms Julie Fisher, appeal manager; Mr Simon Walker, bullying and harassment complaint investigator; and Mr Stuart Tonner, fact-finding manager in the case of JB2. The Tribunal then heard evidence from the claimant, and from Mr Gregor Paterson, some time line manager of the claimant, in respect of whom he had requested a witness order.

6. As discussed during the hearing, the identity of the respondent's employees, not involved directly in decision-making, is identified through initials, including JB1 and JB2.

7. The Tribunal was referred by the parties to a number of productions from a joint file of productions. These documents are referred to by page number.

Findings in Fact

8. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

9. The claimant commenced permanent employment with the respondent on 25 August 1995 as a "postman" (operational grade OPG). Latterly, he worked out of the Falkirk delivery office.

10. The claimant was very rarely absent on sick-leave. From August 2009, his record shows only two absences totalling five days of sickness absence, until 11 May 2016 (page 38).

11. In or around early to mid-2016, the claimant began to have mental health problems, which he described as anxiety, depression and paranoia. He was absent on sick leave on four occasions from 12 November 2016 (page 38), totalling 15 days. Around this time adjustments were made including decreasing his duty span, allowing him considerable time off and adjusting his work patterns (page 122 and Gregor Paterson's evidence). He is recorded as being absent with "depression" from 23 January 2017 to 18 March 2017, for a total of 55 days. The claimant's record shows that he was suspended on 20 March 2017, although there is no other paperwork confirming the position (page 38).

12. In or around December 2016, during an absence management meeting which took place because of his absence record (page 111), the claimant's manager at the time, Gregor Paterson, expressed concern about the claimant's health. The claimant gave his consent for a referral to occupational health.

13. Mr Paterson received a report from the occupational health adviser dated 28 December 2016 (page 39-40). That report, by Janet Hardy, noted that the claimant was currently at work with health issues, with the claimant reporting that he had symptoms of anxiety and depression with paranoid thoughts and related headaches that worsened about six months before. It is noted that the claimant had been prescribed medication by his GP, which was increased three months before and that he was by then "feeling slightly better", his paranoid thoughts having become more manageable and headaches decreased. He advised her that he had no history of mental health issues; no causative triggers either in his personal life or at work to account for his current symptoms; his mood was variable; concentration and motivation levels were lacking; and his sleeping

pattern disturbed. She confirmed that he was aware of counselling via Feeling First Class if required.

14. While in her view the claimant would be classed as disabled, Ms Hardy stated that he was fit for work with no adjustments being required at that time, concluding that, "with ongoing support and medication from his GP Mr Richardson will make a good recovery. It is possible that his medication may need to be increased, or changed if he fails to respond further. Most individuals with a mental health episode will get better, responding favourably at least to medication. With time, recovery is usually complete".

15. The claimant went on sick leave on 23 January 2017, the stated reason being depression. On 27 January 2017, the claimant attended an absence management meeting. That meeting was due to be held by the then delivery office manager (DOM) Stuart Tonner, but he was held up in Perth. Alternatively it was to be undertaken by another manager, David McIntosh, but because he knew the claimant well, he asked Gregor Paterson to conduct the interview. Gregor Paterson was already aware that the claimant had been making threats and therefore he asked David McIntosh if he would accompany him at the meeting.

16. The claimant is noted (page 41) as appearing "in an agitated state from the outset". He advised that he believed he was being talked about constantly in the workplace, although he was reluctant to reveal names. He asked for and was given the bullying and harassment policy and the appropriate complaints forms. He went on to say that he was "happy to spend the rest of his life in jail to get revenge" on the people concerned. The claimant eventually advised that they were PM, PW (the CWU rep) and SF.

17. Following the meeting, because of the nature of the threat, Gregor Paterson took advice from Security and HR, as a result of which the three named individuals were informed. The building access security codes were changed.

18. Gregor Paterson contacted Janet Hardy, who advised that the claimant would require himself to take action by contacting his doctor. Mr Paterson was surprised to hear that because in his view the claimant did not realise how unwell he was.

19. The Police were also informed. The claimant was subsequently charged in connection with the threats made and convicted of a breach of section 38 of the Criminal Justice and Licensing Act 2010 (behaving in a threatening or abusive manner likely to cause a reasonable person to suffer fear or alarm) and admonished.

20. The claimant was not advised directly that he should not return in the meantime to the Falkirk delivery office, although it was understood by management there that he had been informed by the Police that he should not return.

21. A further absence management interview took place on Tuesday 14 February at Grangemouth delivery office, conducted by the DOM at that time, Iain Malloch (pages 42-43). When asked about the cause of his absence, the claimant said that it went back to April 2016 and that he thought PW was spreading rumours; that PW and SG were making fun of him having headaches; that PW referred to him as “the Jimmy Savile of the Post Office”, but was told by AC that the claimant had overheard. He advised that SG and JB1 were talking about him; that BG had said “it’s all over Facebook now”. He believed that RM had asked PW to find out if he could sack him. He said he believed this was a form of bullying and harassment. Then he is noted as saying “If it doesn’t get resolved I’ll take matters into my own hands to get justice. I can go to Liverpool to get a gun easy. And I’ll go to jail for the rest of my life as long as I get justice”. He advised that he also believed that people outwith work were talking about him, for example at the gym and at supermarkets. Iain Malloch advised that the matter should be dealt with through the correct procedures and he encouraged the claimant to seek medical help, although the claimant was reluctant to do so.

22. On 23 February 2017, the claimant entered the Falkirk delivery office (because his sick note had run out and he assumed that he would require to resume duty). Although the access security codes had been changed, he was advised by a

colleague of the new codes. Although Iain Malloch said he should not have been on the premises, the claimant advised that he was not aware of that. He said that he had not been told by the Police that he should not enter the premises. When asked by Iain Malloch if he still wanted to carry out his threats, he is noted as answering, "Well now no, now that the tablets are working and I've been off of work for 5 weeks and not had to think about it. But now you're suggesting I might lose my job…"

23. Iain Malloch again encouraged him to go urgently to a doctor and seek support (pages 44-46). The claimant agreed to accept a referral to occupational health for counselling. Iain Malloch made a referral to OH Assist (27 February 2017).

24. An OH report dated 24 March 2017 noted that the claimant remained under the care of his GP, had been referred to a specialist and was waiting for his first appointment to take place. His medicine had been changed and he reported benefitting from that. The OH Adviser, Kathy Woodcock, concluded, "given the nature of his condition counselling via OH Assist is not appropriate as he is best served by the treatment he is receiving locally and the specialist support that will hopefully soon be in place. I will be closing my input into his case".

25. She confirmed that the claimant was not yet fit to return to work because he was not yet in control of his more debilitating symptoms. She said outlook depended on future treatment and a resolution to his work concerns (page 49 – 50).

26. On or around 3 April 2017, the claimant submitted a bullying and harassment complaint form and supplementary paper apart (pages 51-57), in which he repeated his claims about colleagues talking about him. He added that SF had started the rumours; had said "there's no smoke without fire"; that LM said that he would be charged if the police got his phone. He had asked managers if people were talking about him but they said they were not.

27. He said that he did his own investigation by looking up a couple of things on-line and he heard PW, JB and SG and PM talking about the subjects he had researched. He thought the managers then started to act because he heard PW

say “why should I lose my job over something Colin did”. He said that Stuart Toner told the union rep PW that he wouldn’t lose his job and he would sort it. The claimant said that he had reported the matter to management but nothing was done about it.

28. He was aware that his mental health had deteriorated but advised that he was receiving stronger medication, and felt able to deal with it, and made a report to the police, and intended to sue.

29. He listed the following people to be investigated for bullying and harassment, namely, managers RM and ST, as well as PW, SF, PM, JB1 and SG. He named the following witnesses: managers KF, BF, GP and DM, as well as GM, LM, AC, HS, DW and RM.

30. In accordance with usual practice, the claimant was contacted by telephone by the employee relations case management team (page 58 – 60). The bullying and harassment complaint was then allocated to Simon Walker, independent casework manager, who investigated the complaint.

31. On 20 April 2017, Simon Walker interviewed the claimant and took notes (pages 71 – 75). During the course of the interview in addition to the above complaints, the claimant also raised concerns about his belief that his colleagues had contacted the police about him, and that he was being monitored by them, and that they were accessing his internet searches and passing that info onto PW.

32. On 26 and 27 April 2017 Simon Walker interviewed the following people in person: PW (page 70 – 79), SF (pages 80-82), PM (pages 83-85), AC (pages 86-87), SC (pages 88-89), JB1 (pages 90- 91), LM (pages 92-94), HS (pages 95-96), DW (pages 97- 98) and (101-104) and RM (page 105-108). He spoke on the telephone to BF (page 110). He received answers to written questions in e-mail responses from GP (page 111-113) and KF (page 114- 115). The respondents ST and DM were also interviewed (pages 116-124).

33. During the course of the interviews, three members of staff expressed concern for the safety of their families, and about the delay in the respondent dealing with

the matter. Equally it was clear that the claimant had been a respected colleague and that his colleagues hoped his health would improve.

34. All of the comments which were alleged to have been made were denied, and all those interviewed denied being aware of anyone starting or spreading rumours about the claimant. During the course of the investigation, Simon Walker also asked about whether rumours were being spread about the claimant being homosexual. This related to an e-mail response dated 3 May 2017 from David McIntosh, who referred to a discussion with PM when he made the comment "I mean I'm not homophobic" (page 123). Simon Walker followed up that response in a telephone interview with PM who said that he could not remember if he did make that comment but put it down to being in shock to be told that the claimant thought he was a threat to him.

35. The claimant was advised by letter dated 10 May 2017 that his bullying and harassment complaint had not been upheld (page 129). Case reports in respect of the claims against the "respondents" were enclosed (pages 131-155).

36. Simon Walker advised that, having not upheld the complaints, he had gone on to consider whether they had been raised in good faith, in reference to the bullying and harassment procedure, which states "for a complaint to be deemed as not made in good faith there must be reasonable grounds for that belief with supporting evidence. For example, where a complaint is brought that is untrue and/or aims to annoy, irritate, distress, damage or otherwise harm the reputation and or integrity of the person against whom it has been made". He decided that there was sufficient evidence to conclude that the claimant had not raised at least one of his complaints in good faith, because his claims "have not been supported by any credible witness evidence" and that he had raised the complaint to "annoy, irritate, distress, damage or otherwise harm the reputation of a number of colleagues" (page 155).

37. Simon Walker recommended that the claimant be further investigated under the conduct procedures. He went on, "however I add the caveat that any such investigation take into account existing, and potentially new, medical advice in

respect of the mental health of Mr Richardson at the material time he suggests these events occurred" (page 156).

38. On 8 May 2017, the claimant attended a fact-finding interview with regard to the threats made in the management meetings. This was conducted by Iain Malloch, with notes taken by CB (pages 127 – 129). The claimant denied saying he was "happy to spend the rest of his life in jail to get revenge" to David McIntosh and Gregor Paterson, but claimed to have said it to RB outside the office. He admitted that at a previous interview with Iain Malloch he had said that he would take matters into his own hands and that he could get a gun from Liverpool, which he attributed to the fact that he was "suffering badly from mental health at the time". He confirmed that he had appeared in court on a charge similar to breach of the peace when social work reports were obtained. He said that he was "still on medication and it's helping". He also said "I am still having to medicate as I have problems with my mental health. My lawyer said I should be receiving some low level of disciplinary action because my mental health is a disability. I don't want to go back to Falkirk but would want to work in another unit, such as here in Grangemouth. I would happily go to another office outwith the area, for example Cumbernauld".

39. On 30 June 2017, the claimant attended a fact finding interview (conducted by Paul Turner, Stirling DOM, who took notes (pages 161- 162)), in regard to the bad faith bullying and harassment complaint allegation.

40. The claimant was requested to attend a formal conduct meeting in an undated letter (page 163-164) from Henry Aitchison, who was appointed to conduct the disciplinary hearing. The claimant was advised that consideration would be given to the following "notifications" (ie allegations), "1. On 27 January 2017, using threatening behaviour towards colleagues in that you made reference to getting hold of a gun and taking justice against your colleagues into your own hands 2. Raising a Bullying and Harassment case on 3 April 2017 against colleagues and which was found to be 'not in good faith'".

41. On 2 August 2017, the claimant attended a disciplinary hearing conducted by Henry Aitchison, who took his own notes (pages 167-169). CB attended as an observer.

42. With regard to the threats the claimant is noted as saying "I was having mental health issues and did not know where to turn and I wanted them to be afraid….[I am] in a more stable state now after getting some medication. The court admonished me because of my mental health state". He confirmed that he could get a gun because he knew of people who had been offered them.

43. At this hearing as well as repeating other complaints, he added that he thought he was being accused of paedophilia (in reference to the "Jimmy Savile" comment) and said that BF asked about his DVDs and if there were animal ones; that RM witnessed the BF [incident] about the animal DVDs, and that LM said PW had referred to the police getting his phone. He explained that OH had got in touch with his doctor, who had put him on stronger medication. He said his doctor thought he was doing too much (working 80 hours a week, then doing crossfit, judo and trail running) and attributed his condition to stress.

44. With regard to the outcome of the bullying and harassment complaint, the claimant said that it was "farcical" not to have upheld it. He claimed managers were involved in a cover up, given the number of people involved. In answer to a question from Henry Aitchison: "Given what you said about getting hold of a gun and taking revenge on your colleagues and also the B and H case being raised in bad faith, why should I not choose to dismiss you" he responded, "I've been here 20 years and never had a case against me. I have worked all the overtime for managers and there has been a cover up and I am not happy about it".

45. On 7 August 2017, HA followed up the comments made about LM and RM. LM denied the phone conversations and RM admitted witnessing a conversation about DVDs, responding, "Yes I remember BF speaking to Colin about DVDs but cannot recall specifically what it was about but it was said in jest".

46. The claimant was advised (in an undated letter page 172) that the outcome was that he was dismissed as at 7 August 2017. The decision report was enclosed (pages 174 – 178).

47. Henry Aitchison upheld notification 1 (page 175) noting, “Mr Richardson made reference to him having mental health issues at the time of the incident. He readily accepted that he made the comments and at interview he convinced me that he did in fact know individuals who could indeed provide a gun. As such, I cannot dismiss this as an idle threat. Mr Richardson did tell me that he could get a gun but would not tell me who would provide this….Mr Richardson has said on more than one occasion that he would take revenge on his colleagues as a result of them talking about him in the workplace. At formal interview I did not detect that his stance had changed other than he accepted that he had significant mental health issues. He was clearly agitated at interview and there is a refusal to accept the outcome of an independent investigation which determined that there is no evidence to support his allegations. As such it is difficult for me to determine that there is no risk to our employees. I also accept that this is related to mental health issues however it is inconceivable that I could consider a return to work given even with a minimal risk to our employees”.

48. In conclusion, he said, “I have considered all of the information available and I am mindful of the significant mental health issues faced by Mr Richardson. That said, I have a responsibility to reach a decision which places the safety of our employees as a priority. Following my investigations I do not have confidence that Mr Richardson does not pose a risk, even if this is a small risk, the consequences should he decide to follow through with his suggestion are intolerable. As such for this notification alone my decision would be summary dismissal. I have considered whether a lesser penalty or disciplinary transfer would be appropriate however, again, I have a responsibility to protect all of our employees and I do not have confidence that Mr Richardson poses a zero risk to our people”.

49. With regard to notification 2, he concluded, “I have considered this as less serious but there is a real concern that Mr Richardson refuses to accept the decision. There is limited at best, evidence to support any of his allegations and as such I

understand why the decision has been reached to find this in bad faith. Given the mental health issues and current treatment, this would likely attract a penalty short of dismissal and a disciplinary transfer, however notification 1 cannot be overlooked and as such the decision will be summary dismissal".

50. The claimant intimated his intention to appeal, referring to new evidence (page 173). This was followed up by a letter setting out his grounds of appeal in more detail (pages 183 – 184), with a handwritten addition (page 185).

51. On 30 August 2017, the appeal was heard by Julie Fisher, who took notes (pages 188-192) which the claimant was asked to approve. This was a rehearing of the case.

52. Given additional matters raised by the claimant during the appeal hearing, on 25 September 2017, Julie Fisher interviewed LS (page 195). The claimant was asked for his comments on the note of the interview (page 196).

53. By letter dated 6 October 2017, the claimant was advised that his appeal was not upheld (page 197). He was provided with a copy of the appeal decision document (pages 198 – 205).

54. In regard to the claimant's suggestion regarding a transfer, she concluded (page 201) that, "Whilst it may not have been considered Mr Richardson was an immediate risk to Royal Mail staff by attending for interviews at an alternative site to his substantive office, clearly Mr Aitchison had to take account of the seriousness of the threats made by Mr Richardson and as commented above these behaviours had to be taken seriously….it was clear Mr Richardson intended his colleagues to be afraid and this is a very serious matter and not one that could be overlooked by simply moving Mr Richardson to another site".

55. She concluded: "I have noted Mr Richardson's length of service and clear conduct record when arriving at my decision as well as his medical condition. I feel that these have been given due consideration; however it must also be recognised that Royal Mail must be able to trust that staff at all levels can be relied upon to work professionally at all times and treat each other with dignity and respect.

Despite Mr Richardson's medical issues this cannot be considered as justification for such extreme behaviours in threatening his colleagues and with his intent to cause those colleagues to be afraid. This clearly cannot be tolerated in the workplace and I believe Mr Aitchison has given full consideration to all of the evidence in the case and has arrived at a reasonable conclusion….I have considered the points of mitigation that were raised against the request that the penalty be reduced, however I do not believe that I was offered any new evidence to change the circumstances of the case or the application of the penalty. I do recognise that there has been a serious penalty applied in this case, however I also have to consider the seriousness of Mr Richardson's actions at the time of the incident and indeed his mitigation at his conduct meeting. Clearly the threats made were not idle threats and Mr Richardson confirmed he intended to cause fear and this is simply unacceptable and extreme behaviour. Staff have a right to come to work and be treated in an acceptable manner by their colleagues and if there are issues then processes are in place to raise concerns; however here Mr Richardson has taken matters into his own hands and has acted in the most unacceptable and disturbing manner by threatening to get a gun and take justice into his own hands…"

56. In or around 10 August 2017, another employee, JB2, was advised, following a disciplinary hearing regarding "threatening behaviour towards a colleague", that the decision was a two year serious warning and transfer to another unit within the area (pages 206 – 207). That individual, who also had 20 years' service with the respondent, had threatened a manager. Although the catalyst for the threat was not resolved, that is resentment over workload, JB2 stated that he regretted his actions which he conceded were "out of order".

Relevant law

57. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind

such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

58. Section 98(4) provides that 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, depends on whether, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

59. In a dismissal for misconduct, in *British Homes Stores Ltd v Burchell* [1980] ICR 303 the EAT held that the employer must show that: he believed the employee was guilty of misconduct; he had in his mind reasonable grounds upon which to sustain that belief, and at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

60. Subsequent decisions of the EAT, following the amendment to the burden of proof in the Employment Act 1980, make it clear that the burden of proof is on the employer in respect of the first limb only and that the burden is neutral in respect of the remaining two limbs, these going to "reasonableness" under section 98(4) (*Boys and Girls –v- McDonald* [1996] IRLR 129, *Crabtree –v- Sheffield Health and Social Care NHS Trust* EAT 0331/09).

61. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed as well as the penalty of dismissal were within the band of reasonable responses (*Iceland Frozen Foods Ltd –v- Jones* [1982] IRLR 439). The Court of Appeal has held that the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached (*Sainsbury v Hitt* 2003 IRLR 23). The relevant question is whether the investigation falls within the range of reasonable responses that a reasonable employer might have adopted.

62. The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

63. Section 15 of the Equality Act 2010 states that a person discriminates against a disabled person if he treats the disabled person unfavourably because of something arising in consequence of that person's disability; unless it can be shown that the treatment was a proportionate means of achieving a legitimate aim.

Respondent's submissions

64. Dr Gibson lodged written submissions which he supplemented with oral submissions. In his written submissions, he set out the issues and proposed findings in fact. With regard to the unfair dismissal claim, he submitted that claimant was dismissed for a potentially fair reason of conduct, that the respondent had a genuine belief that the claimant was guilty of misconduct, and that belief was based on reasonable grounds.

65. He submitted that the investigation carried out was reasonable and appropriate given that this is a case where there are no significant facts in dispute. With regard to the claimant's submission that the failure to obtain a further OH report meant that the investigation is flawed, the conduct was admitted by the claimant and it was obvious to the respondent that the threats were connected to the claimant's mental health problems and being put forward as mitigation. He submitted that this only goes to the question of the assessment of ongoing risk, and not whether the respondent conducted a reasonable investigation into the conduct itself. Referring to *Governing Body of Hastingsbury School v Clarke* UKEAT/0373/07, the respondent had investigated the claimant's ill-health before dismissing him,

since they had two OH reports regarding the claimant's mental health at the time of the incident.

66. Dr Gibson submitted that the decision to dismiss fell within the band of reasonable responses. The decision-makers balanced the fact that the threats were linked to the claimant's illness against the claimant's continuing insistence that he was "provoked". The claimant sought to argue that he was better and would not present a risk in the future, whilst also clearly continuing to display delusional beliefs surrounding his grievance in the face of overwhelming evidence that he was delusional. Mr Aitchison (and Ms Fisher) fully took into account the mitigating circumstances pertaining at January and February 2017. He had the OH reports as well as the bullying and harassment documentation. He considered that the fact that the claimant was telling him he knew how to get a gun was not an idle threat made out of bravado. The threats themselves were of the most serious imaginable and had understandable significant impact on the persons threatened.

67. The outcome may have been different if the claimant had said to the decision makers that his threats were made because he was unwell, that he accepted his bullying and harassment allegations were made whilst unwell, that the threat to get a gun from Liverpool was an empty threat, that he no longer bore any ill will towards the persons he threatened and that he regretted the alarm that he caused. That was not and still is not the claimant's position.

68. The threats were extremely concerning to the persons he made them about; the decision makers had evidence of the impact upon the three individuals in question. There is no question that these individuals could not have worked with the claimant again; or that he could be allowed back to work anywhere else. Whilst dismissal would not guarantee the safety of the employees who had been threatened, it was the limit of what was within the powers of the respondent.

69. The respondent took account of the claimant's mental health alongside business needs, which outweigh the former, given even minimal risk to their employees.

70. The claimant's argument that the respondent should have got an up to date OH report is a red herring. The ongoing risk was evidenced by the undisputed fact that the claimant continued to believe, in the face of overwhelming evidence to the contrary, that he had been bullied and harassed; he utterly failed to display any insight that his allegations were a manifestation of his paranoia and continued to harbour and display clear feelings of hostility towards his colleagues. An OH report was not required to inform the decision makers of that undisputed fact.

71. Relying on *Moore v C and A Modes* 1981 IRLR 71 EAT, he argued that it would be "unreal" to expect any employer in any line of work to be able to overlook conduct of the nature involved in this case. However, the nature of the work carried out by the respondent is an additional factor; employees work to a large extent on their own, unsupervised and out and about in the community. They are highly visible in uniforms and liveried vans. The claimant's argument is that his criminal conduct could be overlooked by a transfer to another office. That places an "unreal" expectation on the respondent.

72. With regard to the inconsistency argument, the claimant's conduct occurred prior to JB's so the claimant cannot argue that he believed that certain categories of conduct would be overlooked or would not lead to dismissal. The crux here was the fact that JB admitted the misconduct and showed remorse whereas the claimant did not. While both may have been provoked, JB's conduct was a one off incident in the heat of the moment which he regretted so was therefore conduct which could be remedied with a move, in contrast with the claimant's which was carried out in the cold light of day and repeated threats creating real and justifiable doubt whether his conduct could be remedied with a move.

73. Dr Gibson set out the facts to support his submission that dismissal was also procedurally fair. He argued that the fact that there was no reference to the meeting of 14 February did not render the procedure unfair.

74. With regard to the disability claim, the respondent does not concede that he was dismissed because of something arising in consequence of his disability. Whilst the making of threats had to a large extent arisen in consequence of his disability,

there are adminicles of evidence which point away from that and towards the making of the threats in a premeditated and vindictive way – respondent's reason was because he stated that he had intended to cause the persons he had threatened fear. The respondent's submission is that whilst his disability was a significant factor in his dismissal, his dismissal arose from other factors which go beyond his disability. Not everyone who suffers from anxiety depression and paranoia would have made such extreme and alarming threats with a clear motivation to cause fear.

75. Dr Gibson submitted that the respondent has shown that the treatment was a proportionate means of achieving a legitimate aim, that being to ensure the ongoing health and safety of staff, to ensure that incidences of gross misconduct are dealt with appropriately and to protect the reputation of the organisation. In support of his argument that dismissal was proportionate, he relied on his submissions in regard to the band of reasonable responses and the respondent's position regarding the transfer.

76. In support of his submissions he also relied on *Hensman v MOD*, UKEAT/0067/19, which he submitted meant that this Tribunal must, when conducting the appropriate balancing exercise, assess the particular considerations weighing on the respondent's mind. These were the very serious nature of the threats;his intention to cause fear and alarm; the thought out nature of the threats; that he knew where to get a gun; the continuing delusional beliefs and resultant hostility being displayed by the claimant in his unwillingness to accept the bullying and harassment investigation outcome; and the fact that simply removing him to another office would not remove the threat, give proper expression to the conduct code or protect the reputation of the business.

Claimant's submissions

77. The claimant explained that it was not clear what was intended of him when he was asked to make submissions. He was given time to read over Dr Gibson's written submissions, but concluded that he did not understand them. He was invited to make any comments he wished regarding his case following his oral

submissions but made no further comments. Mr Richardson agreed that his case was set out in the ET1 claim form, which he had drafted with the help of a solicitor, and that he was content to rely on that as his written submissions. It was noted that the case was also clearly set out in his letter of appeal, which we understood had also been drafted with the help of a solicitor.

78. From these documents, we understood the claimant's submissions to be as follows.

79. In the letter of appeal, the claimant raised concerns about the investigation and decision-making process which failed to take into account a number of important mitigating factors. That letter stated as follows:

> "As Royal Mail are well aware, from January 2017, I was suffering with a severe mental and psychotic condition which involved depression and paranoia. I have since received an intensive course of medication and have attended specialist psychiatrists to help me deal with my illness.
>
> During the investigation and disciplinary process, I don't believe that sufficient consideration was given to my psychological condition at the time of the incidents in January and February 2017. My psychological illness had a severe impact on my life at this time and is the reason behind why I made such comments in January 2017. As I was not in my right mind at this time, it led me to saying things that I would not ordinarily have said. I believe that this is a significant mitigating factor that was not considered when arriving at the decision to dismiss me.
>
> I feel that the Royal Mail has not sufficiently investigated my mental health condition, nor do they understand the impact it had on my life at that time. I was fully cooperative with the Royal Mail in regards to obtaining counselling and medical records. Aside from the OH Assist report in March 2017, Royal Mail have made no further effort to investigate the extent of my medical condition, how this would have affected my behaviour or whether my condition has improved since then. This failure to get a further

medical report prior to my dismissal on my state of mental health was a material failing and makes the procedure adopted unreasonable.

My mental health has significantly improved since February/March 2017 because of the treatment I have received and I believe that I no longer pose a threat to my colleagues because of this improvement. As such any suggestion that I pose a threat to staff is completely unfounded and there was no evidence before you which could allow you to have come to this conclusion.

Allegation 1: although I have admitted to the comments that were made in January 2017, I believe that there were a number of factors that weren't considered by Royal Mail when investigating this allegation. I have never intended to follow through on any threat made in January 2017 and this was never investigated or considered by Royal Mail in its decision to dismiss me. I made these comments when I was in a poor mental and psychological state. In addition to my mental health, I believe I was provoked to make such statements by individuals involved as they were making derogatory comments about me to other members of staff.

The decision letter states you did not detect a change in my stance as regards the threat made in January. However there was no evidence available to you to support this finding. You did not ask me whether I would intend to carry out the threats as made. I have no intention of doing so, nor have I since my mental health has improved. Furthermore evidence was before you (the note of a discussion between me and Iain Malloch of 23 February) which confirmed that I had no intention as at that date of following through on my threat (see the 2nd last entry under my initials on page 1). As such, there was no basis for you to draw this conclusion and it is mere speculation on your part.

Allegation 2: I do firmly believe that my colleagues were making derogatory comments about me and I did witness this personally. I understand that Royal Mail stated that they could not uphold my

complaints due to a lack of available evidence. I believe that Royal Mail are unreasonably jumping to this conclusion based on the fact that they could not obtain evidence that supports my position. I believe this is unfair and unreasonable. I made the complaint in good faith based on what I had witnessed personally and my genuine belief as to what had occurred.

Alternatives to dismissal: I also believe that Royal Mail did not take into consideration possible alternatives to dismissal. In particular, no consideration was given to redeployment in another work location which would mean I no longer required to work with the colleagues who were the subject of my threatening language in January".

80. The claimant submits in his ET1 that Royal Mail's handling of his disciplinary fails to take into account a number of relevant mitigating factors, including his mental health. He submits that Royal Mail has not property considered the two allegations put to him and has failed in its duty to carry out a reasonable investigation.

81. With regard to the first allegation, although he did admit to making the statements, Royal Mail entirely disregarded the significant mitigating circumstances surrounding these comments. When investigating allegations of misconduct the law requires that the employer investigates and takes into account all relevant and mitigating circumstances surrounding the act of misconduct in question. Since making these statements in January, he had made it clear to Royal Mail that he was suffering from a severe mental and psychotic illness, which included depression and paranoia. Since Royal Mail were aware of his condition, they were under an obligation to fully investigate his ill health before making a decision to dismiss him. The only report Royal Mail has regarding his health was the OH Assist report which dates back to March 2017. This report made the organisation entirely aware of the fact that the claimant was suffering from severe mental health problems in the early part of 2017. However, no allowance appears to have been made for the fact that he was unwell when these statements were made. Royal Mail did not make any further investigation into his health when he was dismissed, nor did they consider that his health had improved since that time.

They have therefore failed to properly investigate his ill health, rendering the decision to dismiss him unfair. This is of particular relevance given at the disciplinary hearing he made clear he understood the comments were inappropriate and following his recovery from his mental health issues there would be no repeat of such behaviour. His comments at the disciplinary hearing were consistent with earlier remarks made by him to management.

82. In addition, the following factors are also relevant: the comments were made under provocation by other Royal Mail employees, who he believed were making derogatory remarks about him. He never intended at the time or any time thereafter to follow through, but he just wanted the comments to stop since he had been reporting them to management for over a year but they had still continued; lack of consideration of his unblemished disciplinary record and over 21 years of service with the organisation. When considering these factors cumulatively they amount to significant mitigating circumstances that were not considered by Royal Mail through the disciplinary process nor following the receipt of the letter of appeal. No reasonable employer would have dismissed him had these mitigating factors been taken into account especially one that likes to publicly promote the fact that they are one of the better employers for people with mental health problems and sponsor mental health charities; such that he was treated shockingly.

83. With regard to allegation 2, the claimant stated that the allegation was entirely unfounded and was not properly investigated at any stage. Looking at the decision report by Henry Aitchison, it appears he has relied solely on the bullying and harassment report to conclude that he acted in bad faith. Henry Aitchison did not make any further investigation into this matter. The bullying and harassment case report only arrives at this conclusion that there is no other evidence found to support the allegations despite the fact that the claimant witnessed colleagues making such derogatory statements. No evidence has been produced by Royal Mail to suggest that he acted in bad faith. Although he appreciated that Royal Mail could not find evidence to support his complaint, it is unreasonable to jump to the conclusion that he acted in bad faith without any supporting evidence. Again given his state of mental health it was unreasonable for Royal Mail not to investigate

the impact this would have in respect of his views and perception of matters. This allegation has no bearing and would not have been relied on by a reasonable employer.

84. With regard to procedure, the claimant had a number of concerns. Mr Aitchison stated in the disciplinary letter that he did not detect that the claimant's stance had changed in regard to carrying through the threats made. This is despite not clarifying with him at the formal interview on 2 August. In earlier interview notes (on 23 February) he made it clear that he never intended to follow through with these threats. Mr Aitchison has therefore not fully considered the evidence available to him and arrived at a conclusion not supported by evidence. Another concern with Mr Aitchison's decision was his question at the meeting, "given what you have said about getting hold of a gun and taking revenge on your colleagues and also the bullying and harassment case being in bad faith, why should I choose not to dismiss you". This comment suggests that Mr Aitchison had predetermined that dismissal was the appropriate sanction before he considered all the evidence available to him. This was unreasonable.

85. Further, it would be reasonable to consider redeployment to another office as an alternative to dismissal if there were genuinely held concerns (based on a reasonable investigation) that he may pose a danger to his colleagues. This was not considered at the appeal despite the fact that it was raised in the appeal letter.

86. Also around the same time JB2 assaulted a manager which would also have been gross misconduct but he was moved office for about four months and then he has been transferred back to Falkirk. He takes from this that either Royal Mail did not want him finding out the truth about the bullying and harassment or they sacked him solely for having mental health problems since JB2 did not get sacked for actually assaulting an employee whereas he made a threat which he did not intend to carry out.

Tribunal's deliberations and decision

Observations on the witnesses and the evidence

87. The Tribunal found the respondent's witnesses to be credible and reliable. They all gave their evidence in a clear and straightforward manner.

88. The claimant repeated in evidence that he could not recall details from 2016/17 and when asked about the documentary evidence, accepted that this must accurately set out the position. In fact, there was very little, if any, dispute on any facts in this case, and certainly not in respect of the pivotal facts.

89. There were however a number of alleged facts which the respondent relied on which the claimant challenged and which he insisted were incorrect.

90. We did note that two of the very few facts which he disputed were confirmed by Mr Paterson, namely that he had not issued the specific threat about the gun in the management meeting with Mr Paterson, and it was possible that Mr Paterson had been told that by RB about the reference to the gun; and also Mr Paterson confirmed that he probably did not tell the claimant to return to the delivery office at the meeting, or even after the meeting that day. Indeed, there was no written documentation to that effect.

91. This was important to the claimant because his evidence was that once he knew he was not to attend the Falkirk delivery office (following the meeting with Mr Malloch when his sick line was up) he did not do so.

92. That having been said, although the claimant also insisted that he had not received sufficient support from the respondent, it is clear from the evidence (and the notes of meetings etc) that offers of help and support were being made. There were a number of things that he said that he did not recall, and clearly this is one of them. He only recalled Gregor Paterson supporting him. However we put that down to a lack of recall at a time when the claimant was ill.

93. What we took from all this was that the claimant was an honest witness and that by and large he was correct in his understanding where he was insistent. However, nothing turned on these particular facts.

94. However, there was still a gulf in regard to the bullying and harassment allegations. Although he put the threats and other inappropriate behaviour, such as his belief that the police were monitoring him, down to his mental illness, he did not accept, and still does not accept, that he was not the victim of bullying and harassment, because he insists that he overhead colleagues, situated close to him, talking about him. Although his health is currently improved, he still does not put this down to his illness.

95. We did note however that Mr Paterson was clear in his evidence that he had not heard other colleagues talking about him; that he explained that he had heard through managers that the claimant was claiming that colleagues were talking about them, but he was not a witness to any malicious comments about the claimant.

96. However, we took the view from the way that the claimant gave his evidence that he genuinely believed that what he said in evidence was the truth; and in particular that he genuinely believed that he had been the victim of bullying and harassment even if there was no evidence to substantiate that belief.

97. Consequently, we accepted the evidence of all of the witness as credible, and essentially reliable, and noted that no pivotal facts, beyond the central claim relating to the bullying and harassment, were in dispute.

Unfair dismissal

98. Turning to the substantive case, the first issue to consider was whether the respondent had shown that the claimant had been dismissed and that the reason for the dismissal was misconduct.

99. The first limb of the Burchell test requires the employer to show that they believed that the employee was guilty of misconduct. Dr Gibson submitted, and the

claimant did not deny, that the reason for the claimant's dismissal was (gross) misconduct, which is a potentially fair reason for dismissal. We accepted that the respondent had proved that they were relying on this potentially fair reason for dismissal.

Reasonableness of decision to dismiss

100. The main question is of course whether the respondent acted reasonably in dismissing the claimant for misconduct. The question is whether it was reasonable in all the circumstances for the respondent to dismiss the claimant for misconduct, and not whether this Tribunal would have dismissed the claimant in these circumstances. The question is whether the dismissal was within the band of reasonable responses available to the respondent in all the circumstances.

Reasonable grounds for belief

101. In determining whether or not dismissal was reasonable in all the circumstances, we considered the second limb of the Burchell test, that is whether or not the respondent had in mind reasonable grounds upon which to sustain the belief that the claimant was guilty of misconduct.

102. The respondent's evidence was that they genuinely believed that the claimant was guilty of the conduct which led to dismissal. The claimant did not deny acting in the way that was alleged in regard to the threats.

103. The respondent's based their belief on the claimant's admission, as well as the fact that the claimant had been charged and convicted in connection with the threat. The respondent had OH reports indicating that the claimant had mental health issues at the time, and took that into account.

104. Although the claimant did not accept that the bullying and harassment allegations had been made in bad faith, he was dismissed for the threats, rather than in regard to the outcome of the bullying and harassment investigation.

105. Given these facts, we accepted that the respondent had a genuine belief based on reasonable grounds that the claimant was guilty of misconduct.

The investigation

106. The claimant argued that there had been insufficient investigation in this case to justify dismissal in the circumstances. This of course relates to the third limb of the Burchell test. The question is whether at the stage at which the respondent formed the belief that the claimant was guilty of misconduct justifying dismissal, they had carried out as much investigation into the matter as was reasonable in the circumstances. The range of reasonable responses test applies to the question of the investigation as well as other procedural aspects leading up to dismissal.

107. Dr Gibson argued that the level of investigation was sufficient, given that the claimant admitted the conduct and that this is not a case where there are any significant facts in dispute.

108. The claimant argued however that there had been a failure to sufficiently investigate the state of his mental health, and that a further OH report ought to have been obtained. Dr Gibson submitted that the issue of a further OH report does not go to the question of the reasonableness of the investigation. There had been an investigation into whether the claimant's ill-health did contribute to the claimant's behaviour by Iain Malloch carrying out the second OH report.

109. We accepted Dr Gibson's submissions in this regard. It could not be said that the level of investigation into the misconduct which led to the dismissal was lacking because no further OH report was obtained by the dismissing officer or by the appeal officer. The respondent did have two OH reports relating to the state of the claimant's mental health around the time of the incidents. Although these were rather limited in scope, the claimant had also put the threats down to his mental health so to that extent no further investigation into the facts surrounding the circumstances of the misconduct was required.

110. Dr Gibson understandably focused on the misconduct which led to the dismissal. The claimant however argued that there was insufficient investigation into the conclusion that the bullying and harassment allegations where made in bad faith, as set out in his appeal letter and his ET1.

111. We had some sympathy with this argument. We did not necessarily agree with Mr Walker's logic when it came to his conclusion regarding the bad faith. It seemed to us that either accusations of bullying and harassment were made in bad faith or they were not. We thought it was rather odd that this was his conclusion in respect of just one comment. This was on the basis that he felt able to conclude that it was untrue because there were said to be witnesses all of whom denied it. The claimant himself rightly pointed out that he had alleged that there were other comments made in the presence of witnesses (eg no smoke without fire and the comment made by BF about the DVD). Mr Walker however said that he had also taken into account the distasteful nature of the comment (alluding as it was understood to paedophilia). In our view, either none or all of the accusations would be attributed to bad faith. Although the policy states that there requires to be evidence to support the bad faith conclusion, it was not clear beyond concluding that the one comment was untrue, what evidence this was based on.

112. Indeed, we noted that this conclusion had been reached with a caveat. Mr Walker said that this was the only time he had ever included such a caveat. We understood from Mr Walker's evidence that while he had taken the claimant's mental health into account when he came to this conclusion, he "couldn't be satisfied that it was at a time when the claimant was in a better state of mind". We understood that he had intended that another person considering the case would "get the exact date". Although Dr Gibson did not agree, referring as he did to the outcome letter which mentioned "potentially new" medical evidence, we noted that in response to a question from the Employment Judge if he would have been surprised to find that the decision had been made without a further medical report, he responded "that the whole purpose of putting it in was hopefully for it to be observed" but that it was for "others to determine whether it was necessary or not".

113. Although Dr Gibson did not focus on the fact-finding meeting regarding this allegation, we noted that, as asserted by the claimant, no further investigation was undertaken, no further OH report was obtained, but that the respondent simply relied on the outcome report to confirm the decision of Mr Walker. The "investigation" meeting into that allegation paid only lip-service to the need to further investigate the circumstances, despite Mr Walker's caveat.

114. Notwithstanding our misgivings about the "bad faith" conclusion, the fact remains that the claimant was not dismissed for that conclusion. Rather he was dismissed because of the conclusions in the first allegation.

115. This was clear from the dismissal letter and indeed Mr Aitchison's evidence, Dismissal was in respect of the threats, which the claimant admitted.

116. We therefore accepted that this extent of investigation, given the reason for dismissal, fell within the range of reasonable responses open the respondent.

117. Whether the sanction of dismissal was reasonable (and indeed proportionate, given the claim under the Equality Act), in the absence of a further medical report and given the surrounding circumstances is another question, discussed below.

Reasonableness of the sanction of dismissal

118. We therefore turned to consider whether the sanction of dismissal was reasonable in all the circumstances, having regard to equity and the merits of the case.

119. We accepted the failure to obtain an up to date OH report was relevant for this question, and specifically in respect of the ongoing risk. The claimant argued that there had been a failure to take account of his mental health both at the time of the incident and as mitigation in regard to the decision to dismiss.

120. Dr Gibson submitted that dismissal fell within the band of reasonable responses despite the failure to obtain an up to date medical report. His position was that the respondent had no need of a further medical report. They were aware of his

mental health circumstances. The claimant sought to argue that he was better, and they took account of that. However, they relied on the fact that he continued to refuse to accept the outcome of the bullying and harassment investigation and his insistence that he was provoked into making the threats. Dr Gibson argued that there was "overwhelming" evidence that there had been no bullying and harassment; and that the claimant's failure to acknowledge that, was a manifestations of his paranoia.

121. We were not of the view that it was as self-evident as Dr Gibson believed that the claimant's failure to accept the outcome of the bullying and harassment investigation must be put down to the state of his mental health. The claimant's position was that his mental health is currently much improved and yet he still took issue with the conclusions of the bullying and harassment report. He said that this was because he could not discount what he had himself overheard and witnessed.

122. While it may be that what he insists he overheard could be put down to him being delusional, we did not agree that it was self-evidently so. We are not experts in psychiatry, but we did question why it was that the claimant would readily put the threats down to his mental health, would accept that to believe that he was being monitored by the police was "delusional", but that he absolutely insisted on the veracity of his bullying and harassment allegations. It was not clear to us what would explain his readiness to attribute some but not all of these incidents to his mental health. That is a question which might have been answered by a psychiatrist in a medical report. It may have assisted this Tribunal and it would have ensured that the respondent was fully informed before making any decision to dismiss.

123. As discussed above, we have accepted that the claimant is an honest witness. In respect of only the few facts which he disputed, there was some support for his position, particularly given the evidence of Mr Paterson. He otherwise readily accepted that he could not recall the details of what happened, and accepted what was stated in the documentary evidence.

124. We would be very surprised if in any workplace there was no office gossip or grapevine rumours regarding the claimant at the time, especially given the dramatic change in his personality after mid 2016. And indeed it could not be said that there was no evidence at all to support the claimant's position, there being an adminicle of evidence which would tend at least to question the absolute insistence of all concerned that there had been no "rumours" about him. We heard for example that one colleague, apropos of nothing relevant, proclaimed that he was not "homophobic"; we noted that RM did recall a discussion about DVDs, but said that it was in jest; and we noted that one of those interviewed mentioned the "Jimmy Savile" comment before he had even been asked about it.

125. In the appeal outcome, Ms Fisher said that she did not intend to refer him for any further medical advice as it has been accepted Mr Richardson had some mental health issues, and that had been taken into account by Mr Aitchison. She concluded that this could not provide justification for such serious threats against colleagues or an intent to cause fear to those colleagues.

126. Despite misgivings, ultimately we accepted that in weighing up the factors, the respondent had placed reliance on the fact that the claimant apparently at the time of the disciplinary hearing and the appeal hearing still harboured resentment against his former colleagues, however that might be explained. Indeed, it is clear that his position has not changed even at this hearing, and we were struck by his tone when he said in evidence that he would never speak to them again. Given that conclusion, which we accept was a reasonable conclusion for the respondent to make in the face of the information and evidence they had, taken along with the seriousness of the threats, we accept that the respondent's assessment that there was still some risk was a reasonable one.

127. The claimant also argued that dismissal was not reasonable given his length of service and his clear conduct record. However, we accept that both Mr Aitchison and Ms Fisher were well aware of these facts and took them into account in their assessment. Of Mr Richardson's work ethic, Ms Fisher said "these are very serious conduct notifications and cannot be simply mitigated against on the basis of previous work record".

128. With regard to the claimant's inconsistent treatment argument, although we noted that the disciplinary hearing of JB2 took place after that of the claimant, the claimant's appeal took place after that, so that we did not accept Dr Gibson's submissions to the effect that the claimant could not rely on how JB2 was treated. Further, we thought that Dr Gibson articulated the position too narrowly when he said that the only other circumstance when an inconsistency argument can be made out is where there are truly parallel circumstances arising out of the same incident. We did not accept the reference had to be to "the same incident". Further and in any event, any reliance on an inconsistency argument relates ultimately to the reasonableness question and should not be elevated to any rule or absolute principle.

129. Notwithstanding, we accept that it could not be said that the circumstances of the other individual who was transferred rather than dismissed were parallel, or otherwise supported an argument that dismissal was unreasonable. Although the claimant had clearly heard that his former colleague had assaulted a manager, the evidence we heard confirmed that he had threatened a manager. Although the underlying issue it seems had not been resolved (in regard to workload), the individual was found to have regretted his actions immediately afterward and to have accepted he was "out of order". This was said to be in contrast with the claimant, where the level of threat was of a very different order and also where the respondent had concluded that he had not accepted the outcome of the investigation and did not regret his accusations but still insisted on them and still harboured resentment to the colleagues.

130. The claimant also argued that the respondent had failed to consider redeployment to another office as an alternative to dismissal if there were genuinely held concerns that he may pose a danger to his colleagues. The claimant claimed in his ET1 that this was not considered at the appeal despite the fact that it was raised in the appeal letter.

131. Although the claimant brought up the possibility of a transfer at the disciplinary hearing, Mr Aitchison did not directly address the reasoning in his disciplinary outcome letter or report. However, it was directly addressed by Ms Fisher in the

appeal outcome report. In particular, she concluded that Mr Aitchison had taken account the seriousness of the threats, and that "It was clear Mr Richardson intended his colleagues to be afraid and this is a very serious matter and not one that could be overlooked simply by moving Mr Richardson to another site".

132. The respondent therefore did clearly consider transfer as an alternative sanction and discounted it because of the seriousness of the threats. Although no further rationale was given at the time, we accepted that in all the circumstances, and in particular given the potential seriousness of the threats, that dismissal was in the range of reasonable responses open to the respondent.

Procedural fairness

133. We went on to consider whether the dismissal was nevertheless unfair on procedural grounds. The question was whether in all the circumstances a fair procedure was followed, and the band of reasonable responses test applies not only to the decision to dismiss but also to the procedure relating to dismissal.

134. Dr Gibson conceded that there had been no reference to the meeting on 14 February in the "charge" or notification of the disciplinary hearing, which referred only to the meeting on 27 January. The claimant had made no issue of that and nor did we. We accepted that both dates were in the frame at each stage and that the claimant was fully aware of the charges that he was facing. That minor error could not be said to render the procedure unfair.

135. The claimant did raise other concerns about procedure, set out in his ET1. He complained about the failure of Mr Aitchison to ask him whether his "stance" had changed, and failure to take account of earlier interview notes which he said showed that he had, and he complained that Mr Aitchison had predetermined dismissal as the appropriate sanction and had failed to take into account all the evidence before him.

136. We did not accept that these were matters which undermined the fairness of the procedure, if they were even relevant to the question. These were matters which we took to relate to the substantive question whether dismissal was reasonable

in all the circumstances. These were matters which in any event were dealt with by Ms Fisher at the appeal stage, so could not be said to render dismissal procedurally or substantively unfair.

137. In all the circumstances, we consider that the procedure followed by the respondent fell within the band of reasonable responses and therefore that the procedure followed could not be said to render the dismissal unfair.

138. We therefore concluded that dismissal was within the band of reasonable responses and not unfair.

Disability discrimination

139. We then turned to the question of disability discrimination. The test to establish whether a dismissal such as this could amount to disability discrimination is different from the test for establishing unfair dismissal. The fact that dismissal was fair (falling within the band of reasonable responses) does not necessarily mean that it was not discriminatory (a breach of section 15). In other words, an employee can lose their unfair dismissal claim, but succeed in a claim under the Equality Act. Counter-intuitive though that may seem (that an employer in breach of the Equality Act might still act reasonably), this is clear for example from recent decisions of the Court of Appeal in *City of York Council v Grossett* 2018 ICR 1492. We were aware therefore that it was important for us to consider these different tests separately.

140. The respondent accepts, not unsurprisingly, that the claimant's dismissal was unfavourable treatment. However, Dr Gibson said that after some thought he was not able to concede that he was dismissed because of something arising in consequence of his disability. He relied on "adminicles of evidence which point away from that and towards the making of the threats in a premeditated and vindictive way". While accepting his disability was a significant factor in his dismissal, his dismissal arose from other factors which go beyond his disability. Ultimately, Dr Gibson said that it was a matter for the Tribunal, and indeed we do not agree.

141. On the one hand Dr Gibson argued that it was just "common sense" to conclude that the claimant's continued refusal to accept the outcome of the bullying and harassment investigation comes down to the claimant's paranoia; and on the other he argues that dismissal, which was largely explained by the fact that the claimant had failed to accept it and shown no remorse, did not arise in consequence of his disability.

142. There is a clear interplay between the bullying and harassment allegations and the threats, because he said that it was the bullying and harassment which led him to make the threats and it was because he still believed in the veracity of those allegations that he still harbours resentment. The claimant said in evidence that if it had not been for bullying and harassment his mental health would not have suffered so badly. Dr Gibson argued that the continuing hostility was related to his delusional beliefs, but it was because of that hostility that he made the threats.

143. Dr Gibson argued that not everyone who suffers from anxiety depression and paranoia would have been minded to make such extreme and alarming threats with a clear motivation to cause fear. We readily agreed with that, but that is nothing to the point. The point here is whether the claimant's refusal to accept the outcome of the bullying and harassment investigation and to fail to apologise or see that he was in the wrong and therefore to continue to harbour resentment against his colleagues, which was submitted as the true rationale for dismissal, was attributable to his disability or not. As discussed above, we do not know that as we did not have up to date psychiatric reports on this point, but on Dr Gibson's own argument it would therefore require to be attributed to his disability.

144. We concluded therefore that the claimant was treated unfavourably because of something arising in consequence of his disability.

145. Dr Gibson submitted that the respondent has shown that the treatment was a proportionate means of achieving a legitimate aim, that being to ensure the ongoing health and safety of staff, to ensure that incidences of gross misconduct are dealt with appropriately and to protect the reputation of the organisation.

146. Again we readily accepted that. As is often the case at this stage of the test, the focus of course is on the proportionality question and the means chosen to achieve the stated aim. Dr Gibson did not elaborate in his written submissions beyond submitting that dismissal was proportionate. However in oral submissions he confirmed that he relied on his submissions in regard to the band of reasonable responses and the respondent's position regarding the transfer.

147. Dr Gibson did, in written submissions, rely on the case of *Hensman v MOD*, both in relation to the question of the band of reasonable responses and the proportionality question. He submitted that this required this Tribunal, when conducting the appropriate balancing exercise, to include the particular considerations weighing on the respondent's mind. Here, these were the very serious nature of the threats, the fear and alarm they had caused their employees, his intention to cause fear and alarm, the thought out nature of the threats, that he knew where to get a gun, the continuing delusional beliefs and resultant hostility being displayed by the claimant in his unwillingness to accept the outcome of the bullying and harassment outcome.

148. While bearing in mind the respondent's rationale, we were of the view that the proportionality assessment would require in particular scrutiny of the option of dismissal, and what might be the alternative to dismissal, and whether the respondent had given sufficient thought to that option. This is an objective question, and not the "band of reasonable responses".

149. Dr Gibson argued that a sanction short of dismissal would undermine the seriousness of the misconduct and the impact on those staff involved. That is to justify dismissal relative to the impact on other staff and the message that action short of dismissal would send out. However, in a discrimination claim, there is a question to consider whether the impact of the dismissal on the claimant should outweigh those considerations.

150. Clearly the option of a transfer was one which should have been carefully considered, not least because the claimant himself had raised this as an alternative to dismissal. This was something which Ms Fisher considered,

although she reached that conclusion largely based on the seriousness of the initial threats. On the question in particular of the transfer to another office, it did not appear that any further serious consideration was given to that option. In submissions, Dr Gibson argued that simply removing him to another office would not remove the threat, give proper expression to the conduct code or protect the reputation of the business.

151. We gave careful consideration to the question whether a transfer would have been a more proportionate response. We accepted that the claimant harboured particular resentment towards colleagues in the Falkirk delivery office, whom he believed, and still believes, were maligning him. Dr Gibson stressed in submissions that those colleagues were gravely impacted by the threats, such that any return could not be countenanced.

152. When it came to the proportionality question, we considered whether a transfer (for example to the Grangemouth delivery office, as the claimant proposed) would achieve the aim identified (that is to ensure the safety of colleagues). We did not accept that it was as clear cut as suggested by Dr Gibson or as the respondent assumed that a transfer would not achieve that aim. If the respondent was concerned about the risks to those he was harbouring resentment towards in particular, then as Mr Richardson himself pointed out, dismissal was likely to exacerbate resentment against the respondent rather than diminish it.

153. We gave careful consideration to whether the respondent ought to have sought a further medical report in order to properly carry out this balancing exercise. As discussed above, it may have been helpful for the respondent to seek a medical report to address the situation regarding the continuing resentment which the claimant harboured for his colleagues and whether any risk might be diminished by transferring him to work in another delivery office.

154. Ultimately however we were of the view that whatever information was contained in the medical report, that would not have alleviated their concerns about the possibility of risk, because they made their decision on the basis that, given the

seriousness of the threats, even a very small threat was sufficient to conclude that dismissal was appropriate and necessary.

155. We were alert to the difficulties which the respondent faced in ensuring fairness to the claimant (and respecting his rights as a disabled person) and their duty of care to other employees. After careful consideration, we have concluded that dismissal in the particular circumstances of this case was a proportionate response. That is not least because of the seriousness of the threat, but also because there was evidence, even at this Tribunal, that the claimant does continue to harbour resentment against his colleagues. We accepted that, even if the risk were small, it was not a risk which the respondent could afford to take. Dismissal in the circumstances was a proportionate response.

Summary and conclusion

156. The claimant explained that he did not understand the respondent's written submissions, and we consider it likely that he may not fully understand the logic of the conclusion which we have reached. That is because there are certain legal questions which the Tribunal must answer, but we accept that the approach to be taken is not necessarily straightforward or self evident for unrepresented parties.

157. In summary then, we have found that dismissal was fair, because an employer has scope or discretion to dismiss so long as other reasonable employers in similar circumstances would have done the same thing. We accepted that the respondent did take the claimant's mental health into account, but they decided that any unfairness to him was outweighed by concerns they had about the safety of their other staff. Even though it was a small risk, the respondent could not take that risk because of the potential seriousness of the outcome. Although the claimant said that he had been dismissed because of his mental health, where he had special protection under the Equality Act, the fact that there was still a risk, even if that risk was small and even when he said he was getting better, because of his attitude to his colleagues. This meant that dismissal was justified.

158. The claimant's claims for unfair dismissal and disability discrimination are therefore dismissed.

Employment Judge: M Robison

Date of Judgement: 06 August 2019

Entered in Register,

Copied to Parties: 06 August 2019