Case number: 2601086/2018 Reserved

# EMPLOYMENT TRIBUNALS

**BETWEEN:**

| **Claimant** | **Respondent** |
|---|---|
| And | |
| Mr L Attwal | Legacy Will and Estate Planning Limited |

# AT A FINAL HEARING

**Held at:** Leicester **On**: 30 September and 1 October 2019

**Before**: Employment Judge R Clark
Mrs M Gola
Mr A Wood

**REPRESENTATION**
**For the claimant**: In Person
**For the respondent**: Mr Brotherton

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**JUDGMENT** having been sent to the parties on 5 October 2019 and written reasons having been ordered in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

# REASONS

## 1. Introduction

1.1 This claim relates to the circumstances of Mr Attwal's summary dismissal effective on 15 March 2018. He says that dismissal was both unfair and discriminatory. The respondent says he was guilty of negligent conduct for which dismissal was appropriate. The nature of the negligence is that he telephoned a prospective client and, without realising the call had been picked up by the client's voice mail, he entered into a conversation with a colleague

about getting drunk at a pub offering cheap drink in the course of which various offensive expletives were used. All of this was inadvertently recorded on the client's voicemail. The client then promptly contacted the respondent to complain.

## 2. The issues

2.1 The issues in the claim were identified at an earlier Preliminary Hearing, albeit in outline only. We have confirmed the issues in the claim of unfair dismissal as: -

a) Whether the respondent has established the true reason for dismissal and, if so whether that amounts to a potentially fair reason for dismissal. The respondent says the reason was the claimant's swearing in the call centre environment which was recorded on the client's voicemail. The claimant accepts this was part of the issue, but says that his dismissal was principally because of his response to the initial allegations and because of his disabilities.

b) If the respondent's reason is accepted as the true reason, there is no substantial challenge arising in respect of the reasonableness of the belief or the reasonableness of the investigation on which that belief was based. There is no dispute that the claimant's actions did occur. Similarly, there is no substantial challenge to the fairness of the actual disciplinary procedure adopted but there are challenges to whether the notes of the investigation were accurate and whether Mr Stephenson should have conducted the disciplinary hearing.

c) Perhaps the central thrust of the challenge to fairness is whether summary dismissal was a sanction that fell within the range of reasonable responses of a reasonable employer. The claimant says what he did was a mistake and that he should have been given a final written warning and retraining, but not dismissal. He says others have been treated more leniently.

2.2 The disability claim is less clear. The impairments alleged are dyslexia and diabetes. Neither impairment is conceded as amounting to a disability although we have explained that the threshold was such that it is often not a difficult test to overcome although the necessary evidence in this case is limited. When it comes to discerning the legal basis of what Mr Attwal advances as his disability discrimination claim, the only real possibility seems to be a claim under s.15 of the Equality Act 2010. That is, that he was subjected to unfavourable treatment for something arising in consequence of his disability. The claimant has struggled to identify the legal elements and even, the "something arising". We have allowed this to develop in his evidence ensuring both parties were able to develop their cases and being alert to the risk the respondent might be surprised and put to any evidential disadvantage by new matters. The clearest point advanced was that Mr Attwal's prior disability related sickness absence was instrumental in Mr Stephenson's decision to dismiss. Any alternative legal foundation was hard to see. Mr Attwal was not saying he was dismissed because of any disability itself to give a claim of direct discrimination. Nor has there been any suggestion of what we might have identified as a provision, criterion or practice, disadvantage or

adjustment to be able to construct the potential for a claim of failure to make a reasonable adjustment or, indeed, indirect discrimination.

## 3. Preliminary Matters

3.1 We timetabled the hearing. The time estimate was generous and the main evidence appeared likely to conclude over two days. We indicated at the outset that we would consider liability and leave Wednesday for remedy, if appropriate.

3.2 We also dealt with the claimant's application to amend his disability discrimination claim to add a new disability, that of a visual impairment and an unparticularised claim that the employer should have done more. Mr Attwal described that he was blind in one eye. The application was resisted by the respondent principally due to timing and prejudice. We refused the amendment application for the following reasons.

3.3 The rules of procedure give the tribunal power to permit an amendment to a claim or response at any stage of proceedings. That must always be done with regard to the overriding objective. It is always a question of acting in the interest of justice. Guidance on the approach to adopt in this regard was laid down in Selkent Bus Co Ltd v Moore [1996] ICR 836 EAT and are also found in the Presidential Guidance, General Case Management. The relevant considerations include the nature of the amendment, whether a minor matter or a substantial alteration, pleading a new cause of action; if a new complaint or cause of action, the applicability of relevant time limits; the timing and manner of the application, although an application should not be refused solely because there has been a delay in making it; and, most importantly, the balance of hardship between the parties of granting or refusing the application.

3.4 This new disability was not intimated in the claim or the contemporary documentation nor subsequently. It was an oral application and Mr Attwal was invited to set out the basis of the new claim. In summary, it was that the employer should have done more to understand and look into his disabilities as they could have been relevant to the issue. For example, his vision impairment could have been a factor explaining why he did not notice the call to the customer was live or that he had not properly replaced the handset.

3.5 We had regard to the fact that this was alleging new facts. That a new claim on that basis would be out of time. The most immediate factor was the timing of the application, it being made on the first day of the final hearing which had been listed 14 months ago, in July 2018. The effect of granting it would be that the respondent would be required to deal with matters that it had not addressed in evidence and it objected to the late amendment and the inevitable further adjournment if it were granted. The explanation for this amendment is said to be that, at some point over recent weeks, the claimant had received some new advice which speculated about possible reasons why might have done what he did. That advice did not prompt any application when it was given, even when the parties attended a preliminary hearing heard as recently as last week. The claimant himself does not come armed with any evidence to advance the new claim.

3.6 We have considered the substance of the proposed new claim. We are, of course, yet to hear evidence and the respondent says it would wish to adduce additional evidence if the vision impairment argument were to proceed, but even on reading into the bundle today we note the following matters which would appear relevant to the proposed new contention: -

a) The claimant's pre-employment health check recorded no difficulties with his eyes or vision.

b) There is documentation which appears to show the respondent dealt with the conditions that were disclosed at start of new employment and explored the effects on his work. Mr Attwal confirmed he was not struggling in his role in any way

c) At the very first disciplinary investigation meeting in this matter, it was the employer that raised diabetes as a potential issue. When this was rejected by the claimant, the employer then enquired if there was anything else that might explain it, which was also rejected.

d) By the time of the appeal, which was lodged apparently with legal advice, the disability argument was advanced in respect of dyslexia but not his diabetes and still less any vision impairment. On the face of the papers this appears to have been considered and in fact was raised by Ms Chaplin as it had not been advanced by the claimant.

3.7 Having regard to all those matters, and the fact that this is now an old claim, that the contemporaneous exchanges may weigh against a just and equitable extension (without deciding any time limit point) and that the parties are here and otherwise ready to have the claim determined, we have decided that the balance of prejudice between the parties of allowing or refusing the application falls in favour of refusing the amendment.

## 4. Evidence

4.1 We heard from Mr Attwal in support of his own case. Mrs Attwal provided a statement going to the narrow issue of her own company and appeared not to be relevant to the substantive issues. She did not give live evidence. Her statement was accepted but carried little weight in the circumstances.

4.2 For the respondent we heard from Daniel Stevenson, dismissing manager and Claire Chaplin who conducted the appeal against dismissal.

4.3 We received a bundle running to 176 and a small supplementary bundle from the claimant. We accepted additional documentation on the second day relating to the claimant's allegation that there were appropriate comparators who had not been dismissed that had been raised by him during the first day of hearing.

## 5. Disability Status

5.1 The claimant has not prepared an impact statement. He has not dealt with his disability in any substance. We have taken the view that it would be unjust to simply dismiss those

claims on that basis, particularly as there is no dispute that the claimant has the impairments described as diabetes and dyslexia. Indeed, we have seen a number of health review meetings in the workplace in which those two impairments have been considered by the respondent in respect of his work and managing any disadvantages. For that reason, we have taken the view that the just approach is to consider the substantive allegations based on the accepted impairments. If they fail, that is an end of the claim. If they succeed, we will then have to consider whether the statutory definition of disability was made out at the relevant time on what evidence has been put before us.

## 6. Facts

6.1 It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. Our purpose is to make such findings of fact as are necessary to answer the issues in the claim before us and to put them in their proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.

6.2 The respondent is a private company providing Will writing, Lasting Powers or Attorney and estate planning services. Part of its business model is its telemarketing section in which Mr Attwal worked.

6.3 Mr Attwal's continuous service goes back to 2014. Indeed, there is a previous separate episode of employment before that. The current configuration of the business arises from a TUPE transfer in or around August 2015. He was originally employed on full time hours but has subsequently requested and was granted a reduction to part time hours; a request arising from his own concerns about his health needs.

6.4 The claimant was readily described by the respondent as one of its top performers in the nature of the work he did. We find his dismissal on 15 March 2018 was a loss to them. The issues behind it first came to light a week earlier, on 7 March, when a client raised a complaint about a voicemail he had picked up earlier that day. The complaint was sent in by text. We can infer there was already some connection between the customer and the respondent and that this was not an entirely cold call. The customer stated: -

> ***"I am not sure why your adviser has left me a voice message of a conversation he was having with another colleague about getting drunk and using swear words. Thinking of putting it on the internet. Very unprofessional!".***

6.5 The documentation in the bundle comes from an internal text handling system which converts incoming texts into an e-mail format. That was sent and retrieved around 3 pm the same day.

6.6 What seems to have happened is this. The call itself was relatively short. The customer was somebody on the claimant's contact list for that day. It is clear from the content that after Mr Attwal had called the client's phone number he had not realised that the call had connected and the customer's voicemail had picked it up. What then happened was that Mr Attwal began a discussion with a colleague, Dean, in the course of which Mr Attwal made reference to a local pub, that there was a "pound-a-pint" night, the cost of alcohol generally

and began reminiscing on various stories about getting drunk. The conversation was punctuated with the words “fuck” or “fucking” and reference to the beer being “crap”.

6.7 The claimant’s supervisor was Mr Bhav Patel. He was involved in the initial response. He spoke to the Client and attempted to smooth the feathers but the potential business with this customer was lost. The matter was referred to Mr Stephenson, the Director with responsibility for the area of the business that the claimant worked in. There was immediately a meeting that afternoon with Mr Attwal. The recording of the customer’s voicemail was played and he was asked for his comments.

6.8 We find it was reasonable for Mr Stephenson to interpret the claimant’s response overall as minimising the situation. The file note of that meeting refers to references of the claimant having “done nothing wrong”. An explanation that the phone must have “dialled itself” or, alternatively, that he had not put the handset down properly. There is an issue arising as to whether an apology was due and it seems Mr Attwal misunderstood that to mean whether there should be an apology to Mr Stephenson, as opposed to the customer himself. We find in the course of illustrating the seriousness of the matter, Mr Stephenson explained the potential for this sort of error to give rise to other issues of compliance and even that customers may call the Police or Trading Standards or any other body that might have implications for the reputation to the respondent’s business. We find that was said in the context of explaining the seriousness of the issue as the respondent saw it and not, as Mr Attwal misunderstood at the time, that the customer himself had threatened to take that course. We find Mr Stephenson was frustrated and disappointed that this had happened.

6.9 We find that the claimant used what we would describe as a traditional telephone handset, that is as opposed to a headset or headphones.

6.10 In deciding what steps to take with this matter, we find that the quality of the recording which we have heard in the course of the proceedings was such that it was reasonable for Mr Stephenson to make a number of instinctive assessments based on his experience and knowledge of the systems and environment used by his staff. The first of these was that it was reasonable for him to conclude that the handset had remained close to the claimant’s mouth during the conversation. The quality of the recording was sufficient for a reasonable conclusion to be drawn that it was unlikely that the phone handset had been misplaced back on the body of the telephone so as not to have ended the call. Secondly, that the phones do not automatically dial customers themselves. Thirdly, that whilst waiting for the phone to be answered after first dialling the number, the claimant must have begun his conversation with his colleague. Fourthly, that he was not concentrating during the sixty seconds or so that the conversation was conducted and had not noticed that the call had been picked up by the voicemail. Fifthly, he obviously said what he is recorded as having said. Finally, when the claimant’s concentration returned to the call he was making, if he had then attempted to listen in it would have simply been silence and the call was, thereafter, ended.

6.11 We then had to look at what we have before us to explain why this is such an issue for this respondent. We accept the telemarketing industry has a poor reputation, particularly in some quarters and certainly where cold calling is involved. It is common to see press reports

of rogue elements in the industry and we accept as a fact that Mr Stephenson was at pains to build a business in this sector which acted appropriately, ethically and professionally. We accept that his stated aims to do so were more than him paying lip service for our purposes. This was a genuine desire on his part to improve the reputation of his business in this sector.

6.12 A number of the employees in this business had previously worked in earlier incarnations of either associated employers or had been transferred into this employer under TUPE. Most of them had worked in other markets including product sales, insurance and PPI etc whereas this employer focussed on the Will writing business and associated products. We find there is some relevance to the case in the fact that the potential client group for this business may, on average, be older. They may also be considering Will writing at pressured times in their life, either through experiencing family bereavement or their own health issues causing them to reflect on their arrangements. All of those factors are relevant to how the respondent wants to project a professional image through its telemarketing staff. We do not accept these are the only client group, but it is nonetheless a client group that this business is entitled to expect its staff to be alert to and to conduct themselves accordingly perhaps with some additional obligations by way of empathy towards the clients. The broader objective of creating a business that demonstrates professionalism and a positive public reputation seems to us to be a forceful objective for setting in place the measures that we find Mr Stephenson did put in place. We are satisfied that a number of tangible measures have happened to achieve this objective.

6.13 First, the introduction of the public review system on “Trust Pilot” which on the evidence we have currently shows a positive review score of 9.4 out of 10 in over 1400 reviews. A measure which we find is likely to give public confidence in the quality of the service. Secondly, and more specific to Mr Attwal’s work, we accept there was extensive work on scripting and the support to telemarketers with a view to helping them stay compliant in the role they perform. Thirdly, we find that a detailed training programme has been introduced and improved over the years. This has evolved from the programme inherited from a previous associated company and has been developed substantially under Mr Stephenson’s direction. We have been taken to module 2 of that training which is particularly important because it is the module which sets out the attitude and behavioural aspects of the role, as opposed to the technical or product related aspects. We find it is directly relevant to what is expected of the claimant and those in his role. In particular, it sets out examples of how not to act on a client call. More importantly, it notes how these scenarios are based on real situations and we find it is those real situations, occurring around a decade ago, that have since led to the focus on improving the standards of conduct. One of those real situations described is that of a telemarketing consultant leaving a message for a client containing swearing. There are a number of other examples of inappropriate conduct given. Significantly, it makes clear that behaviour such as this will not be tolerated in any form. It reinforces the notion of the company’s reputation and that if there is no business there will be no jobs. There coveys is a clear expectation to staff that they do not act unprofessionally or use foul language at work.

6.14 There is also a company code of conduct. Whilst that may be focussed as much on the behaviour between colleagues as it is towards customers, we find it is nonetheless still a very relevant standard as it requires all employees to conduct themselves in a professional and mature manner at all times. Staff are particularly reminded that the use of inappropriate language is not acceptable. We accept as a fact that swearing is not tolerated in the workplace. We also accept, however, that some will no doubt use it on occasion and will not be found out. In that regard, it is not the mere use of foul language that we look for in the evidence, but whether the employer overlooks or otherwise condones or tolerates it in the workplace so as to undermine the force of its stated policies and standards. We find there is no such evidence of that for us to reach that conclusion. We are satisfied this is something the employer takes seriously.

6.15 We also note the opportunity for social conversations seems in any event to be limited and short term. Firstly, each telemarking consultant has the pressure of their own work to make their calls and, secondly, even between calls there needs to be a coincidence of timing when another consultant is also “off call” so as to be able to engage in conversation. It seems to be a fair assessment that any opportunity to have social conversations with one’s colleagues would be limited to very short periods of time. This analysis also illustrates a significant justification for the rules this employer puts in place. Just because you may have ended your call at the same time as one of your colleagues ends their call, a third colleague sitting within earshot may still be talking to a customer. We find it is all but a universal rule in professional call centre environments that there are never any inappropriate conversations as there is always the potential for them to be overheard.

6.16 We turn to the impairments and the knowledge of the impairments and we accept Mr Stephenson was aware of the claimant’s impairments. The claimant had been subject to two health reviews, once when he started in 2014 and one again in 2016 following a period of sickness absence relating to his diabetes. The fact that Mr Stephenson was aware of this is abundantly clear as it was him who raised the issue in the first informal investigation meeting on 7 March. He asked the claimant whether he had taken his diabetes medication that day and whether that might have had anything to do with the error. We find this possible connection was rejected by the claimant as not being relevant.

6.17 Returning to the chronology, the informal investigation concluded and based on what was before him, Mr Stephenson told the claimant he would be suspended. That happened formally through another manager, Chatan Mackan, and a letter was sent to the claimant dated 8 March 2018 confirming the suspension. On 9 March 2018 Mr Attwal was sent a letter inviting him to an investigation meeting. That letter gave notice that the investigation had been delegated to another manager, Lee Buckby, who was Head of Operations, and that the investigation meeting would be held on 13 March 2018.

6.18 That meeting took place as planned. The key points fall into two categories. The first is that, in a number of respects, the claimant appears to either criticise the respondent or minimise the effect of his conduct. For example, there are a number of points when it is asserted it was not such a big issue. There is a dispute about the apology we have referred to. already There is a suggestion that Mr Stephenson acted inappropriately on 7 March by

banging the desk. There is also some sense in which Mr Attwal seemed to deflect the fact that his actions might be the cause of any damage to the respondent's reputation by accusing the respondent itself of having brought about that result through its pricing policies and other matters. On the other hand, the secondary category of matters discussed show the claimant did accept he went wrong. He accepted it was his fault. He did not realise the call was recording. He described it as a genuine mistake and he was devastated with the circumstances. He confirmed he recalled the training sessions he had previously attended, albeit he would later on suggest that was many years earlier but, nonetheless, he was able to recall that the training focussed on the need for staff to be careful with language when on the phone. He confirmed he dialled the number himself and that, on this occasion, his mind had gone as he had started a conversation with a colleague.

6.19 Following the investigation, the matter was referred to a disciplinary hearing. A letter dated 13 March was sent inviting Mr Attwal to a hearing on 15 March to be chaired by Mr Stephenson. There is an issue before us about the accuracy of the notes of that investigation meeting. We accept that there were some handwritten notes taken at the time but find that they were destroyed. We find that what was typed up is an accurate reflection of the issues discussed in that meeting and that those were before Mr Stephenson when it came to the disciplinary hearing. To the extent that there was anything said to be missed from those notes, we do not accept that the claimant was denied or deprived the opportunity to raise those issues at the disciplinary hearing or that he was instructed to leave things until an appeal stage.

6.20 The disciplinary hearing went ahead as planned. The claimant attended alone which prompted the first point of discussion which was to confirm the claimant was content to continue alone. He said he was. Again, there is no reason to doubt the accuracy of the notes taken, albeit they must be seen within the limitations of a notetaking exercise as opposed to a verbatim record. We are satisfied the notes show a fair summary of the main points of discussion. At the end of the hearing Mr Stephenson adjourned for 20 minutes or so before coming back to give his decision. His decision was that the swearing was deliberate and the claimant was negligent in it being recorded. The culmination of those two matters amounted to gross misconduct and the claimant was summarily dismissed. That decision was communicated in writing on 20 March 2018 and confirmed that the claimant had a right of appeal against the decision.

6.21 The claimant did appeal. His grounds of appeal identify 6 points. They are that the investigation meeting notes were not accurate; the reference to Mr Stephenson's behaviour when he was suspended; the issue over the reputation of the business deriving from pricing policy; that the training he received was some time ago and inadequate; that whilst the swearing was admitted, it was not directed at the client and, for the first time, raising his dyslexia.

6.22 The arrangements were put in place for an appeal and communicated to the claimant by letter dated 29 March 2018. The appeal was set for 6 April but eventually took place on 10 April. It was heard by Claire Chaplin. Ms Chaplin is another Director of the business and someone who did not have any line management relationship with either the claimant or Mr

Stephenson. She was assisted by Kim Day. HR officer. Again, we have seen the notes of the meeting which we accept are a fair reflection of the points discussed.

6.23 The issue with dyslexia was put in terms that this was overlooked and not considered. He alleged that during his employment he was not given any support or assistance with his disability as a matter unrelated to the circumstances of his dismissal. Indeed, when Mrs Chaplin raised the point about dyslexia in his letter of appeal he confirmed that it was not the problem and his main concern about that was that he had not received a pay rise when his other colleagues had. It seems at that stage the issue was being raised more in the context of a wider grievance than it was in respect of the dismissal itself.

6.24 Although not identified as such in his appeal, the central discussion was in relation to an apparent comparator. This arose from Ms Chaplain exploring why it was that Mr Attwal felt he should not have been dismissed. In the response he gave, we find Mr Attwal was alleging disparity of treatment. He sought to compare himself with someone thought to be Kritesh Patel who he says did what he had done but was given only a warning. When it came to deal with this part of the appeal, we find the respondent took steps to investigate it. It checked through its records but was unable to find any record of this. Pausing there, we interpose the chronology to deal with how that matter unfolded before us. In the early part of this hearing, the process of exploring the disparity issue threw up the fact that there was in fact another employee called Patel, a Dhruv Patel, who had used inappropriate language on a call with a client and had been disciplined. We ordered the respondent to do what it could by way of a further disclosure search to look into this issue overnight. On the second day, the respondent was able to disclose some relevant documents. We make no criticism of the original disclosure search. This matter dated back to 2009. This respondent was not the employer at that time. In fact, it was only discovered because the respondent's HR officer had documents on her computer from when she herself had worked in the predecessor organisation. The bottom line was that the claimant was correct about the nature of the conduct, but that this employee had also been dismissed. As we observed at the time, this was not only not a persuasive example of disparity of treatment, but it potentially established a basis of consistency of the employer's response to this sort of unprofessional language being used in the earshot of customers. We also find, as we discovered in the course of this matter unfolding before us, that the Kritesh Patel matter was, on the claimant's case, itself before the actions of Dhruv Patel.

6.25 Perhaps of particular significance, however, is that the examples of inappropriate conduct we have already referred to set out in module 2 of the training course for telemarketing consultants are drawn from real life experience. In fact, we find one in particular, leaving answerphone messages with swearing on them is in fact drawn from the example given in the case of Dhruv Patel. These exist in this training module because this employer, under Mr Stephenson's direction, has wanted to stamp out this sort of behaviour. It made clear that it would no longer be tolerated, it put in place the training and guidance, scripts and codes to support the expected standards of conduct. As far as we have in evidence before us, even if there was any previous variance in the sanctions imposed by predecessor organisations, it has since been consistent in enforcing its policy. Indeed, there

are fewer stronger examples of an employer's genuine desire to enforce a standard than when a particularly valuable worker such as Mr Attwal falls foul of the rules, but the rules stand and have to be enforced, albeit with regret.

6.26 The other matters of the appeal were explored, considered and the conclusion set out in the outcome letter dated 17 April 2018. It deals with each of the 6 points it seems to us that each of those six points was dealt with as fully as might reasonably be expected. The appeal itself was in the form of a review of Mr Stephenson's decision as opposed to a rehearing of the allegation itself.

6.27 The only other matter to record is the claimant's own disciplinary record at the material time. Unfortunately, Mr Attwal did not have a clean disciplinary record. On 8 August 2017, about seven months or so before he was dismissed, Mr Attwal was made subject to a written warning in respect of an incident where he went "off script" with his engagement with a customer. The effect of what was said gave rise to concern that his comments exposed the respondent to a complaint of mis-selling its products. We accept that this was a potentially serious matter for the respondent but its response was to invest in the claimant with time and effort to support him. The written warning was a first written warning remaining live for 9 months but, more to the point, it was supplemented by a programme of support through Mr Bhav Patel to ensure the claimant was working to his duties in a compliant manner and as a result of this, that a series of FAQ's were developed. We have no reason to doubt that the claimant played some part in the development of those FAQ's but the principle purpose of which they existed was as a response to his own risk of mis-selling. In any event, the current matter was treated as gross-misconduct warranting dismissal in itself but this provides further confidence that this employer does enforce the expectations placed on staff through its internal policies and standards.

## 7. DISABILITY DISCRIMINATION

7.1 We turn then to our determination of the issues. We start with disability discrimination. We do so simply because if disability discrimination is made out, that may influence the outcome of the unfair dismissal claim in a way that unfair dismissal does not necessarily have on the outcome to a discrimination claim.

7.2 Section 15 of the Equality Act 2010 provides: -

> ***(1) A person (A) discriminates against a disabled person (B) if—***
>
> > ***(a) treats B unfavourably because of something arising in consequence of B's disability, and***
> >
> > ***(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.***
>
> ***(2)Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.***

7.3 To succeed in this form of discrimination, Mr Attwal must establish that the something relied on arises in consequence of his disability. He must then establish facts from which the tribunal could conclude that the unfavourable treatment arose because of that something, in

the sense that it played some material part in the reasoning. The respondent may then seek to defend the claim either by showing the unfavourable treatment was in no way whatsoever because of the something arising or that it did not have the necessary knowledge or that the treatment was itself justified, being a proportionate means of achieving a legitimate aim.

7.4 This is the only form of prohibited discrimination that we have been able to identify could arise from Mr Attwal's generalised disability complaint. They key to any such claim is in identifying the something arising and, as we have alluded to, the claimant has found it difficult at times to identify the something arising in consequence of dyslexia or diabetes that might be relevant to the events in question. This difficulty has meant the claim has been expressed in two ways. The first was that the respondent should have done more to explore his disabilities as it could be that they had something to do with the circumstances of the conduct leading to dismissal. That, by its very nature, has a speculative feel to it. The second which was developed during giving evidence before the Tribunal was that the decision to dismiss was influenced by his previous disability related sickness absence.

7.5 When we consider the first of those arguments, that the respondent should have done more to explore disability, it is immediately apparent it does not establish the necessary elements of a "something arising" claim. The claimant has an initial burden to establish the prima facie case and, in this respect, it is simply not made out. In any event, and notwithstanding the gaps in the claimant being able to set out the elements, it is difficult to where the gaps are in the employer's response. We note that Mr Stephenson explored diabetes with the claimant at the time of the first exchange over this incident and was told it was not relevant. Indeed, that is a position maintained by the claimant thereafter. Dyslexia was not raised until the appeal but, even then, when it was raised in the appeal the opportunity to explore it was couched in terms of a wider long standing grievance, and not the dismissal, which is the unfavourable treatment we are concerned with. Recognising that Mr Attwal is a litigant in person, we have considered whether he is really trying to articulate a failure to make reasonable adjustments but, even then, we cannot see the evidence which would identify any aspect of the process as a PCP for which he might be placed at a substantial disadvantage compared to non-disabled employees. We also have to ask ourselves what the reasonable adjustment would be because, as a matter of fact, the respondent was alert to his dyslexia and diabetes and had demonstrated a reasonable approach to its management, both were in fact considered at various stages of the disciplinary process and were met with a response that it was unrelated to the facts of the dismissal. We are at a loss to identify what it is that the employer has failed to do.

7.6 The second contention does at least fit with the necessary elements of a claim under section 15. Very often, the sickness absence record of a disabled employee will form the basis of a section 15 claim as the something arising. There certainly is a history of sickness absence during this employment relationship some of which does appear to have had some link to his conditions relied on as disabilities. However, the very fact that it existed for so long over a number of years is itself a factor pointing away from any inference that the respondent was looking to rely on it as a reason to take action against the claimant. That is especially so when it is seen in the wider context of the other efforts of the respondent into supporting him,

to varying his contracted hours all arising from his potential disabilities. We have recorded the disappointment on the part of Mr Stephenson which we accept both in terms of the effort that over the recent months had been put into supporting the claimant to ensure he met the compliance requirements and also because the employer recognised he was one of its telemarketing consultants who was otherwise operating at the top of his game. It is a contention which goes against the run of logic that an employer that was likely to act on disability related absences mounting up is less likely to be one that waits for an event such as this which it simply could not have anticipated coming. If it was going to respond negatively it would, on balance, have done so long before the events of 7 March.

7.7 Breaking the claim down, we are satisfied that the claimant did have a history over a number of earlier years where his sickness absence arose as a consequence of his alleged disabilities. He was subject to unfavourable treatment in the form of dismissal. He has not persuaded us those absences were the reason for his dismissal or played any part at all. There is no basis for drawing adverse inferences to shift the burden. Whilst that means the burden has not sifted to the respondent, we are nevertheless entirely satisfied that the respondent can show a reason which is no way whatsoever related to either alleged disability, namely the claimant's actions of 7 March.

7.8 It follows from those conclusions that we dismiss the disability discrimination claims on their merits without needing to determine, one way or the other, whether the claimant was or was not a disabled person at the material time.

## 8. Unfair dismissal

8.1 The law of unfair dismissal is well settled. Neither party has taken us to any particular authorities or seeks to advance any novel argument. We are concerned with section 98 of the Employment Rights Act 1996 which provides: -

> ***(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> > ***(a)the reason (or, if more than one, the principal reason) for the dismissal, and***
> >
> > ***(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) A reason falls within this subsection if it—***
>
> > ***…***
> >
> > ***(b)relates to the conduct of the employee,***
>
> ***(3)..***
>
> ***(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer)—***
>
> > ***(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and***

***(b)shall be determined in accordance with equity and the substantial merits of the case."***

8.2 The legal burden of proving a fair reason for dismissal in fact and law rests with the employer. The true reason for dismissal is a question of fact for us to determine on the evidence. The "reason" referred to in s.98(1) is the set of facts or beliefs operating on the mind of the employer at the time it takes the decision, and causing him, to dismiss. Abernethy v Mott Hay and Anderson [1974] ICR 323. To discharge the legal burden, that factual reason must itself fall into one of the categories of potentially fair legal reasons defined in s.98(1)(b) of the 1996 Act. In this case, the legal label advanced is that of conduct.

8.3 If the employer discharges this burden, we must then go on to consider the test within s.98(4) of the 1996 Act on the evidence before me, the burden then being neutral. In applying that test we have had regard to the guidance in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 and also Post Office v Foley [2000] IRLR 827. Where an employee is dismissed relying on [mis]conduct, the substantial test remains that identified in British Home Stores Ltd v Burchell [1978] IRLR 314. The reality of this case, however, is that the central issues of the investigation of the facts and the reasonableness of the belief that that investigation led to do not really engage and they are not challenged. Nor is there any challenge to the underlying procedure adopted. The fairness is attacked at three specific points. One is whether Mr Stephenson should have been the decision maker, another is in respect of the accuracy of the investigation notes. The central challenge to fairness arises in respect of the employer's response. Was the sanction of dismissal a response that was reasonably open to the hypothetical reasonable employer or not? If it was, this employer's decision to dismiss will be fair, whatever we might think of the sanction.

8.4 We start with the first question. What was the reason for the employer dismissing the claimant. For reasons we have already touched on, we are entirely satisfied that the reason was the error of what was said on 7 March coupled with the fact that it happened to be recorded on a potential customer's voicemail. We have considered whether the claimant's challenge to reason for dismissal gives rise to any concerns. The challenge was that it went beyond those facts and included Mr Stephenson "taking it personally" due to the claimant's response during the initial meeting on 7 March. We reject that that was a material factor on Mr Stephenson's decision making. But we do think it appropriate to say that what happened in the immediate response to the complaint is of course inextricably linked to the substance of the complaint itself and it arose in the context of Mr Stephenson's understandable disappointment that one of his top performers had done something he could not simply ignore. This was exacerbated further by the impression that Mr Stephenson quite reasonably formed that Mr Attwal's response did not appreciate the significance of his error. In any event, if we are wrong and there is some separate reason at play in respect of these matters, we remain nonetheless satisfied that it was not the principle reason for dismissal which remains that of the claimant's misconduct as we have described it.

8.5 That misconduct is a potentially fair reason for dismissal and the employer has therefore discharged its burden at the first stage of the test.

8.6 We then move to the second stage, that is the question of fairness under s.98(4). At this stage it is for us to consider whether the employer acted reasonably in relying on that reason as a sufficient reason to dismiss. We have analysed this in each of the 3 elements where there is some material basis of challenge.

8.7 The first was, again, that of Mr Stephenson making the dismissal decision himself when he had taken it personally, as the claimant put it. We did not view Mr Stephenson's role as the disciplinary decision maker as immediately standing out as being obviously inappropriate. This is a medium sized employer. Mr Stephenson was the director in charge of the area that the claimant worked in. We can see an obvious and logical reason why he would be involved. However, we can see that others were involved which suggests that there clearly could have been others involved in other stages of the formal process. Mr Bhav Patel was a supervisor. Some employers may have delegated potential gross misconduct dismissal decisions to that level, many would not. Mr Buckby is another senior member of staff but he was separated from the decision making process and tasked with the investigation, a step which was clearly quite proper and reasonably open to any reasonable employer. We have seen reference to Chatan Macken who was the manager involved in the suspension and there are others whom, it might be said, could have played other roles. Despite all of that, the issue for us is not whether others could have made the decision instead of Mr Stephenson, the only issue is whether Mr Stephenson's involvement fell outside the range of reasonable responses. In this context, the thrust of the challenge to fairness is that there was some degree of contamination because of his earlier involvement on 7 March in the informal investigation into the immediate aftermath. We do not accept that. What happened on 7 March is clearly an urgent and important operational issue. It might immediately become obvious it is a disciplinary issue but there was absolutely no reason why Mr Stephenson should not have been involved in something that Mr Bhav Patel, clearly and instinctively, thought was serious enough to report to him. The extent of the exchange was a first enquiry about what had happened, questioning how serious it was and whether the claimant had to be suspended. Although he undoubtedly formed an initial impression of both the conduct, and Mr Attwal's response to it, ultimately he delegated the issues of the suspension and the further investigation and, for those reasons, we are not satisfied it was outside the range of reasonable responses for him, in the circumstances of this employer, to participate in the process and make the decision.

8.8 The second matter relates to the accuracy of the notes of the investigation meeting. We have found they were a fair reflection of the points discussed. The issue of fairness or unfairness does not arise in a vacuum. There has to be something which creates some substantive unfairness on which we can bite when it comes to applying the statutory test of whether the employer acted within the range of a reasonable employer or not. In this case, even if there was something missed out of the notes in the circumstances in which they were drawn up we can discern no unfairness in the procedures then adopted. Importantly, this includes the opportunities to raise any perceived inaccuracies at the disciplinary hearing. If, which we do not find, there had been anything wrongly recorded, not recorded, or anything else that ought to have been explored arising from the notes, there was reasonable opportunity to do so in the remaining stages of the procedure. There is nothing in this

challenge which takes the process or decisions reached outside the range of reasonable responses.

8.9 The final challenge relates is whether the sanction of dismissal fell within the range or reasonable responses of a reasonable employer. Frankly, it is this challenge which stands front and centre of the claimant's complaint in this case. We have looked carefully at the conduct in question and, in particular, its nature as a mistake during a loss of concentration. As a tribunal, we share a nagging concern that if Mr Attwal's actions were taken in isolation the measure of misconduct may not instinctively satisfy us that it would fall within the ambit of a dismissal decision, although it clearly is misconduct and it clearly would lead to some disciplinary sanction. Similarly, if the decision was found to be unfair, it would clearly give rise to a substantial assessment of contributory conduct. If we considered only that, we think could reach a conclusion of unfair dismissal.

8.10 However, it is not to be viewed in such isolation. We have to look at all the circumstances of the case and consider whether there is anything about this case which renders a mistake, such as this, conduct for which dismissal is a reasonable response. We have considered what steps were taken in this particular employer and in this particular setting to spell out to its employees that if they do use this sort of language, and particularly if it comes to the ears of their customers, what the consequences will be. It is only because we have found as a fact the various steps that this employer has taken over recent years to set those foundations amongst its workforce that we have come to the conclusion that the response of dismissal does fall within the range of reasonable responses. There are a number of key points that persuade us this is correct. The training module undertaken by all staff is key, in particular the explicit and relevant examples in module 2. We are also persuaded by the fact that this working environment is one in which employees are not expected to swear. The fact that others might swear, and not get caught, does not alter our view that these are policies and standards that the respondent does genuinely seek to apply and enforce in practice. Of course, we also have what came to light in respect of the attempts to uncover Kritesh Patel's comparison case when, in fact, Dhruv Patel was discovered instead notwithstanding both of these cases were about 9 years ago. In fact, as we have fond the Dhruv Patel example is now an explicit example included in the training that Mr Attwal undertook.

8.11 As to the specific disparity point, Mr Attwal did go into his appeal hearing believing that there was a comparator, albeit mistakenly thought to be Kritesh Patel, who he believed had been guilty of committing something similar. Whoever that actually was, Mr Atwal believed the person he had in mind had not been dismissed or suffered any disciplinary sanction. We understand Kritesh Patel was still in the employment of this employer or an associated employer at the time of the appeal hearing and it might have been that more that could have been done to establish from Mr Patel himself the circumstances behind what it was that Mr Attwal was alleging. That might or might not have shed any light on the situation and it seems to us is something of a red herring for one fundamental reason. That is that these comparisons date from about 10 years ago. Whoever Mr Attwal had in mind, it seemed to be before the time of the incident with Dhruv Patel who did do something broadly comparable,

albeit potentially more serious, and was dismissed. His conduct, and indeed other similar acts of misconduct, in part were the reason for the development of the training module we have referred to and the clear expression of the standards expected of employees.

8.12 For that reason, and it may or may not be any consolation to Mr Attwal to hear this, even if we accepted the comparisons as Mr Attwal has put it, it would not have led us to a conclusion that he was a victim of disparity of treatment. That is because of what subsequently happened in this workplace. From sometime after around 2010, and certainly since this respondent was the employer, the employer has sought to spell out to its workforce what was expected by way of standards of conduct and, perhaps more importantly, what was not expected and would not be tolerated. The relevance of disparity of treatment to unfairness under s.98(4) is set out in the case of Hadjioannou v Coral Casinos Ltd [1981] IRLR 352. It can arise in different forms but where an employer has previously represented by its conduct that certain misconduct will be met with a certain sanction, it may then be unfair to impose a harsher sanction. However, that does not prevent an employer from giving notice that it is resetting its rules and the consequences of any future breach. Thereafter, an employee that commits the misconduct on notice of the new expectations cannot expect to be able to point to earlier examples under the previous regime to set aside the decision to dismiss. That process of resetting the rules is what has happened here with Mr Stephenson's measures to formalise the training of staff and the codes of conduct they work to. It is entirely legitimate and reasonable that an employer should be able to attempt to improve the organisation's reputation in this way, or at least reduce the risk of reputation damage.

8.13 We therefore conclude that there was a reasonable basis for treating this error as a matter of misconduct. So far as this incident was accidental, that is limited to the conversation being recorded without the claimant realising. Conversely, the swearing in contravention of what is expected of staff in the claimant's position was not accidental. The employer had put in place measures to spell out to staff what was expected and what would not be tolerated, irrespective of what might have happened in the past and under a different employer.

8.14 We also want to make clear, as we have set out repeatedly during the course of the hearing, that our task is not to import a view about what we would have done nor is it correct to ask whether a lesser sanction was reasonable. It clearly would have been reasonable to have imposed a lesser sanction. The only question for us, however, is whether the sanction of dismissal that was imposed was unreasonable. Did it fall outside the range of reasonable responses of a reasonable employer? We cannot say that was the case. The decision to dismiss was therefore a fair one and for those reasons we dismiss the claim.

EMPLOYMENT JUDGE R Clark

DATE 14 August 2020

REASONS SENT TO THE PARTIES ON

24 August 2020

……...……

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AND ENTERED IN THE REGISTER

……...……

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FOR SECRETARY OF THE TRIBUNALS