Case: 1804526/2019 (v)

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Ryan**
Respondent: **Burmatex Limited**

AT A HEARING

Heard at: **Leeds** **On: 5th and 6th August 2020**
Before: **Employment Judge Lancaster**
Members: **Ms H Brown**
Mr M Taj

Representation
Claimant: In person
Respondent: Ms L Fenton, HR consultant

This has been a partly remote hearing, with one witness giving evidence by CVP video platform (V), which has been consented to by the parties.

JUDGMENT

1. The claim of harassment related to disability succeeds.
2. All other claims are dismissed.
3. Remedy is adjourned to a date to be fixed, if not agreed, and the parties are no later than 1st October 2020to provide the Tribunal with draft proposed directions and a time estimate and availability for the remedy hearing (to be agreed if possible)

REASONS

The Issues

1. The issues in this case were extensively explored at a preliminary hearing before Employment Judge O'Neill on 17th December 2019. The Claimant was then given leave to amend his sparse grounds of claim in the ET1 in accordance with the expanded details of his case as set out in Judge O' Neill's case management summary. Those amended grounds of claim (in bold italics) and the list of identified issues are reproduced in the endnote to this judgment[i].

2. In her Order Judge O'Neill also required the Claimant to provide addiitonal information about his claim as follows;

the claimant must provide to the respondent the names of the comparators who were engaged in altercations in the factory similar to his own but were not dismissed.

the claimant must provide to the respondent a list giving the dates or approximate dates of the occasions on which Mr Hague harassed the claimant by reference to his disability and what Mr Hague did or said.

the claimant must provide to the respondent a list giving the dates upon which he complained to the respondent about Mr Hague's conduct, briefly setting out who the claimant spoke to, what the claimant said and what the management representative said to him.

By 17 January 2020 the claimant must provide to the respondent a list setting out the dates on which the claimant made a request for reasonable adjustments, briefly setting out to the claimant spoke to, what the claimant said, what the management representative said in response and what adjustment if any was made.

3. This additional information was to be provided no later than 17th January 2020.On 16th January 2020 the Claimant sent an email to the Respondent providing some further details, but by no means answering all of the maters raised by Judge O' Neill. The terms of the Order did not explicitly require that this also be copied to the Tribunal, so it is no criticism of the Claimant that this was not done. This email was not, therefore, brought to our attention until the morning of the second day of the hearing. In the meantime, there had been no application further to amend the particulars of claim. Nor has there been any such application before us.

4. The Claimant did provide the names of three employees who he said had been involved in altercations at work but not dismissed, all in 2018. One of these instances was hearsay, that is merely something he had been told about. One was something he had witnessed between two other people. and the third had involved something being said to him personally. In each case the supervisor who dealt with the incident was Andy Shearon, who was called as the Claimant's witness at this hearing. The Claimant, however, gave no evidence about any of these incidents and nor was Mr Shearon asked about them.

5. The Claimant also identified Marcus Crossland as someone who was not disciplined, but not because he had been involved in any similar sort of altercation in the factory. In April 2018 Mr Crossland had apparently refused to work with the Claimant and had mocked him because of his illness. This is also referred to in the Claimant's witness statement. It has not, though, ever been put forward as a proposed amendment to the harassment claim: as identified before Judge O' Neill that complaint was solely in relation to Mr Matthew Hague. In any event the evidence of Mr Shearon was that any issue between the Claimant and Mr Crossland had been Satisfactorily dealt with at the time by a manager, Susan Pearson, and any complaint from April 2018 would on the face of it now be significantly out of time.

6. The Claimant was unable to provide more specific responses to the request for information about Mr Hague's alleged harassment or his complaints about that behaviour. He simply says that he comments (of which he gave some examples as to the type of thing said) were constant throughout March and April and that he reported it to Mr Shearon many times.

7. Nor did the Claimant identify any specific adjustments he had requested on any particular occasion. He did, however, refer to an email to his then manger Mr Michael Zanetti on 13th April 2016 which he described as "practically begging for help" and to his having approached Mr David Simpson in the week before his dismissal to tell him he could not continue doing 60 hours per week.

8. The issues remain therefore as set out in Judge O'Neill's Case Management Summary sent to the parties on 19th December 2019. These are to be taken as agreed, because no issue was ever taken as to their accuracy, and under the terms of the Order this was to be raised within 14 days.

Conclusions in respect of those issues

9. ***Unfair dismissal***

   a. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct namely being involved in an altercation.

   b. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

The Dismissal Hearing

10. The Claimant was dismissed for misconduct, as was Mr Hague (or possibly Mr Haigh), with whom he had been involved in an altercation at work on 23rd April 2019. Both men had also been suspended following the incident. Conduct is a potentially fair reason for dismissal.

11. The decision to dismiss was announced at an adjourned Disciplinary meeting on 2nd May 2019 conducted by Mr Simpson. We accept that the reasons for dismissal were those set out in bullet point form in the notes of that meeting.

12. Mr Simpson concluded that:

    1. The Claimant had been involved in a heated argument with a co-worker.
    2. He had used inappropriate and aggressive language which inflamed the situation.
    3. He had also put his pen to the other employee's face in a threatening manner.
    4. It took more than one attempt by the team leader to separate the two employees.
    5. All the evidence pointed to the likely escalation of the incident.

13. We are satisfied that those were genuinely the conclusions which Mr Simpson had reached in respect of this incident, and that he had reasonable grounds for making those findings after carrying out appropriate investigation in all he circumstances.

14. Mr Simpson investigated this matter from the outset because he was approached shortly after it happened, firstly by the Claimant and then by Mr Hague from both of whom he himself therefore took contemporaneous statements. He then, this time with the assistance of a note-taker, took further short statements from potential witnesses.

15. Although it was therefore the same person, Mr Simpson, who carried out the initial investigation and the disciplinary hearing, and he alone conducted the interviews with the Claimnt and with Mr Hague that does not in any way affect the overall fairness of the procedure. Mr Simpson was initially involved at the instigation of the two protagonists, but he was still the most appropriate person then to consider any appropriate disciplinary action. In reality this was single process of investigation and disciplinary hearing, and in the circumstances, that was not unreasonable.

16. At the first disciplinary hearing on 29th April 2019 the Claimant was given the opportunity to correct any error in the notes from the first investigative meeting and to put forward his account a second time. The hearing was then adjourned overnight to 30th April 2019, to allow the Claimant to show text messages from colleagues which he said confirmed that he was not the aggressor. The hearing was then adjourned further to 2nd May 2019 for Mr Simpson to consider his decision.

17. We are satisfied, after hearing Mr Simson give evidence, that the initial impression to be formed from this sequence of event, namely that it was a careful and considered investigation of all the available evidence, is indeed the correct one.

18. Although the statements are not entirely consistent all of the conclusions reached by Mr Simpson are supported within the documentation collated during the investigation. Mr Simpson was therefore, we find, perfectly entitled to choose to accept those pieces of evidence.

19. In particular, on the most contentious point, we find that it was reasonable, notwithstanding the Claimant's protestations to the contrary, for Mr Simpson to have concluded that "he had also put his pen to the other employee's face in a threatening manner". In the first interview on the day itself we are satisfied that the note is accurate and that the Claimant did indeed say "I raised my arm which happened to have a pen in it. MH said don't put that pen in my face then pushed me backwards". This was the first that Mr Simpson had heard about the incident so he would have had no preconceived ideas about what did or not happen with a pen, and there is no reason to find that he did not accurately record the information which the Claimant then volunteered. Whilst the Claimant then sought to correct the impression that his initial account had given, and on reflection denied ever having pointed a pen in Mr Hague's face, he did accept that he may have lifted his hands when speaking. Mr Hague had said that the pen was lifted towards his face and his perception is supported by his well-attested immediate reaction which was to accuse the Claimant of having a pen "in his face". Mr Simon Harrison also said that he saw the Claimant point a pen at Mr Hague's face. Although Mr Danny Tomlinson at the appeal stage retracted his original statement that he too had actually seen the pen being pointed he confirmed that he had heard Mr Hague's clear accusation that this is what had taken place. Although other witnesses did not see any incident involving a pen, they do not say categorically that it did not happen.

20. In the light of the specific findings made by Mr Simpson dismissal was clearly a sanction which fell within the range of reasonable responses open to a reasonable employer. It may be that others would not have reached the same conclusion, in particular it appears that had the matter been dealt with solely by Mr Shearon he personally would have taken no further action once he had managed, eventually, to diffuse the situation. However, when the matter had been escalated to a more senior

level of management it was certainly open to Mr Simpson to take a more serious view of such an altercation within a small and mutually dependant team of employees working with machinery. We cannot substitute our view for that of the Respondent's Manufacturing Manager, who, of course, has an intimate knowledge of the business and was, we conclude, acting reasonably in these circumstances.

21. At no stage in the disciplinary process did the Claimant refer to others in allegedly comparable situations who had not been dismissed. His complaint is rather that he was the innocent party and should not have been sanctioned at all. There is no inconsistency of approach on the part of Mr Simpson: he simply made findings in the particular instance and determined that the conduct of both men in fact warranted dismissal.

The Appeal Hearing

22. The Claimant appealed against the decision to dismiss. Mr Darren Longden, the Respondent's Commercial Director heard the appeal. Although Mr Longden identifies this as being by way of review, the transcript of the meeting shows that it was treated as a re-hearing and the Claimant was afforded the opportunity to give again his factual account of the day). Because the Claimant's letter of appeal also contained complaints which wear more properly considered as separate grievance (though not referred to as such by the Claimnt himself). Mr Longden therefore firstly held a grievance investigation meeting on 20th May 2019, gave the outcome in a letter dated 28th May 2019, and then convened the appeal hearing on 31st May 2019. It was clearly reasonable conduct on the part of Mr Longden to have adjourned the appeal pending determination of a grievance which may have had a bearing on the matter.

23. The outcome of the grievance was that Mr Longden did not uphold the complaints that Mr Hague had victimised the Claimnt prior to the 23rd May incident or that the company had victimised him in that he had received no support in respect to his medical condition.

24. In considering the alleged lack of support offered it is clear that Mr Longden did review the history of welfare meetings throughout the course of employment and that in relation to two specific incidents cited as "victimisation" he also made inquiries and gave a brief but reasoned explanation for his conclusion that the grievance should not be upheld

25. The conclusion in respect to Mr Hague is far from satisfactory as it simply records that there is "no evidence to support this allegation" without addressing the fact that the Claimant himself had provided evidence of comments made, and there is no documented record of any evidence taken from any other potential witness. These deficiencies do not, however, materially affect the fairness of the subsequent appeal hearing.

26. At the appeal hearing itself the Claimant did for the first time specifically recount the words referencing his illness that were allegedly used by Mr Hague at the time of the incident on 23rd April 2019. These comments had not previously been mentioned in the initial investigative interview nor at the disciplinary hearings before Mr Simpson. All that had been alleged earlier was a general remark about the Claimant having been accused of faking his illness. The now specifically alleged comment was "why don't you fuck off and have a nose bleed you little cunt".

27. Mr Longden did not make any specific finding as to whether this comment had indeed been made, but he did establish that this was not the first thing that had been said and that the Claimant had said something to Mr Hague first.

28. Mr Longden, also in the course of the appeal caused a clarifying statement to be taken from Mr Tomlinson, and this change in his evidence (see paragraph 19 above) is duly recorded in the appeal outcome letter.

29. Having considered the case again, including the new evidence as to the more precise content of the conversation and the amendment to Mr Tomlinson's account, Mr Longden still concluded that:

  "there are reasonable grounds to support the view that you weir an active participant in this incident..also,,that you exhibited abusive and threatening behaviour towards a work colleague."

30. Looking at the totality of the disciplinary process this was therefore a fair dismissal for a reason related to conduct.

31. ***EQA, section 13: direct discrimination because of HHT (Hereditary Haemorrhagic Telangielasia and COPD.***

(i) ***It is not in dispute that the respondent subjected the claimant to the following treatment: dismissal.***

(ii) ***Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?***
The claimant relies on the following comparators- (names of people not dismissed for a similar offence to be provided) and/or hypothetical comparators.

(iii) ***If so, was this because of the claimant's disability***

32. As we have found the Claimant was fairly dismissed for a reason relating to conduct. There is simply no basis whatsoever upon which we could conclude that a non-disabled person found to have committed that same misconduct would not similarly have been dismissed.

33. To put it another way, we are quite satisfied that had the roles ben reversed and had it been Mr Hague who had been found to have acted as the Claimant did both men would still have been dismissed.

34. There is also not sufficient point of similalrity between the briefly-outlined-circumstances of individuals named in the Claimant's letter of 16th January 2020 and the findings made by Mr Simpson in his own case to make them material comparators for the purposes of section 23 of the Equality Act 2010.

35. The Claimant was not dismissed because he was disabled, but because he had been found to have committed misconduct.

36. **EQA, section 15: discrimination arising from disability**

    a. **Did the following thing(s) arise in consequence of the claimant's disability: -**
    b. **Was the Claimant's conduct in the altercation caused by the disability - the claimant says that he had had a serious nosebleed in the night before the altercation which had left him very tired and the condition made him moody**

    c. **Did the respondent seize on the opportunity to dismiss the claimant and ignore the mitigation because of the claimant's past request for reasonable adjustments and the respondent's fear of further requests**

    d. **If so, has the respondent shown that dismissing the claimant was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):**

37. The Claimant's case is, of course, that he had in fact done nothing wrong. Even though the Respondent disagreed and concluded that this was misconduct, the Claimant cannot assert that that conclusion alters the character of what he says that he did. His primary case is that irrespective of the fact that had suffered a bad nose bleed the previous night he would have behaved in the same way.

38. There is no medical evidence to support a finding that the Claimant's conduct - which he denies – was something arising in consequence of his disability.

39. Most significantly from the evidence of Mr Shearon the Claimant was generally not noticeably more moody than anybody else but when he had suffered a particularly bad episode in the night he had very occasionally requested and been afforded a dispensation to come in to work late. The Claimant has sought no such dispensation on this occasion and had come into work as normal.

40. The Claimant has not therefore established that his dismissal for misconduct was in fact because of behaviour arising in consequence of his disability.

41. The issue in respect of 36 (c) is more appropriately dealt with in the context of the victimisation claim.

42. ***Equality Act, section 27: victimisation***

    a. ***Did the claimant do a protected act and did the respondent believe that the claimant had done or might do a protected act. The claimant relies upon the following:***

        i. ***Having made a request for a reasonable adjustment under the EQA in the week preceding 23 April 2019***
        ii. ***having made such requests in the past (to be particularised).***

iii. The respondent anticipated that the claimant would insist on exercising his right to a reasonable adjustments in the future

b. The respondent summarily dismissed the claimant

c. Was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

43. The only particularised past request for adjustments is identified as the email to Mr Zanetti of 13th November 2016:
"I feel the need to email you rather than try to talk to you as i don't feel like you listen to me when i mention my disability. when i agreed to you taking the hours back that i had worked i never thought i would be put on 12s most of the time and to be honest I think it's rather sad that i only had the operation because you and nick said I needed to get it sorted! my disability affects me from day to day and you don't see the half of what i have to go through just to get to work..no one has asked me how anyone could help after i nearly died at work and if it was not for lidden i probably wouldnt be here now..i also feel im going to be pushed out and forced to leave having to work with nick…thee is a lot i could say but i won't bother..i have nothing but respect for you because you gave me the chance and in return i think i am a good honest worker but i can't help being ill."

44. The context of this email is that the Claimant had had time off for an operation and that Mr Zanetti had agreed that under the annualised hours contract he should work back addiitonal hours after his return so that, averaged across the period including his absence, he might be paid at full rate rather than only receiving reduced sick pay for the time he was off. The Claimant's expressed concern was that, although intended to be of benefit to him financially, this had therefore led to a higher proportion of the longer shifts being worked consecutively rather than their being spread over a period and balanced with the shorter ones.

45. This is not a request for a reasonable adjustment, it is a statement that the Claimant had misunderstood the implications of agreeing to a varied shift pattern on one particular occasion. This particular working pattern did not continue and the Claimant's suitability to work various shift patterns, including where applicable 12-hour shifts, were subsequently discussed on repeated occasions.

46. This is not therefore, although it does register the Claimant's general concerns about accommodating his disability, the doing of a specific protected act within the meaning of section 27.

47. In any event this single exchange 2 ½ years earlier with a manager who no longer worked for the Respondent clearly will have n had no bearing whatsoever upon Mr Simpson's decision at the disciplinary hearing.

48. The history of welfare meetings throughout 2017 and 2018 shows the accommodations that were in fact clearly made for the Claimant. In particular there were temporary reductions in his lengths of shifts, he did not work nights at all after July 2017 and his move to the dryer department in February 2018 was with his expressed consent and after a series of meetings to explore the most suitable palace for him to be assigned.

49. Having been moved to that department under the supervision of Mr Shearon we are satisfied, having heard his evidence, that he then sought to make appropriate allowances for the Claimant as necessary on occasions and cultivated an environment where other employees were encouraged to report any concerns about the Claimant's health to him so that he might take action if appropriate. Although Mr Shearon acknowledges that the 12-hour shift pattern is hard work for anyone he confirmed that the Claimant did not ever tell him that he could not work 12-hour shifts and that in particular he never made any request to move to an 8-hour shift pattern.

50. The only reference in the welfare meetings to any concerns about the shift pattern is on 7th September 2018. On that occasion the Claimant said:
"It's hard at the minute, with the long shifts I get tired and then find it hard to do anything when I get home, the 12 hours are hard for me."
Mr Simpson's recorded response is an entirely appropriate expression of concern and a clear statement that the Claimant needed to let them know if he had a problem, in which case the situation would be reviewed as it had been before. At that point the Claimant was about to receive fork-lift-truck training and the position was to be reviewed after that when the options for suitable work could be more fully assessed. That review was overtaken by the Claimant being taken ill the following week and his being admitted to hospital for an emergency blood transfusion. there was then a brief review on 2nd November 2018, where the Claimant did not express any immediate concern about continuing to work on the dryer: he said it was "good, I'm enjoying it".

51. Once again, this history throughout 2017 and 2018 does not therefore disclose any actual and unmet request for reasonable adjustments, nor any identifiable protected act. Nor is there any basis for concluding that this reference to finding 12 hour shifts hard in September 2018 had any impact upon Mr Simpson's decision to dismiss in May 2019.

52. The Claimant stated in his appeal letter that on 16th April he had had a conversation with Mr Simpson where he had asked "why do I still have to move half dozen rolls of carpet and pallets in order to reach the rolls that ned working on first?" to which the reply was "sometimes this is how we have to do things." This was addressed as one of the specific allegations of "victimisation" by the company in the course of the grievance hearing.

53. Form the evidence of Mr Simpson and Mr Shearon we are satisfied that any such passing comment was interpreted by Mr Shearon as a reference to a change in working arrangements where stock had had to be moved above floor level to avoid possible flood damage and this had led to les convenient working practices for everybody.

54. there is no obvious reason to construe this as a complaint that the Claimant was being required to move carpets manually – he had, after all been recently trained as a fork-lift-truck driver – let alone that it was a request for a reasonable adjustment of the doing of a protected act.

55. On 18th April 2019 Mr Simpson had a further conversation with the Claimnt which he made a file note of. That records the Claimant raising again the earlier discussion from the 16th April and Mr Simpson's response having indeed been on the lines we have set out in paragraph 53. This is, we accept, potentially an intimation that the Claimant may

in the future formulate ongoing concerns about his work in terms of a request for reasonable adjustments.

56. There is, however, no reference in the minutes to the Claimnt ever having said “I am not working 12-hour shifts, end of”. On balance we prefer Mr Simpson’s evidence that this subject was not in fact mentioned. That is because the Claimant’s evidence throughout has been hopelessly confused as to whether his concern was the working of 60-hour weeks or 12-hour shifts and we do not find his account reliable. In the witness statement he categorically asserts that he told Mr Simpson on this occasion that he was not working 60 hours a week anymore. That would in fact make sense because the clocking-in records show conclusively that the Claimant was not working 60 hours a week at this stage. He had worked 57 hours in the week commencing 8th January 2019 and only one other week that calendar year of more than 50 hours. He had worked 8 weeks of more than 50 hours throughout the whole of 2018. The last shift which was actually a full 60 hours had been in December 2017; in that year he had worked three 60-hour weeks, two of which had been in what was obviously a busty period of four consecutive weeks prior to Christmas. So, although on an annualised hours contract, averaging 40 hours per week, a 60-hour shift was occasionally worked it was clearly not the norm. The Claimant’s repeated assertions throughout the course of these proceedings that he was regularly required to work a 60-hour week is therefore not credible.

57. Whatever was discussed at the short and informal meeting on 18th April 2019 it is quarte clear that Mr Simpson was fully prepared and intending to follow it up with a further meeting which he arranged for 24th April 2019 where any concerns that the Claimant had about his work would be addressed. As the Claimant had seen his consultant just the day before (17th April) it was anticipated that the meeting a week late would be informed by an up-to-date letter from his doctor. The Claimant confirmed that he felt safe at work until that next meeting could be convened.

58. The reason that the anticipated meeting did not go ahead was, of course, because of the supervening incident on 23rd April and the Claimant’s resulting suspension.

59. There is absolutely no good reason to suppose that Mr Simpson in fact took advantage of the incident on 23rd to go back upon his stated intention to discuss matters on the 24th. We accept Mr Simpson’s evidence that he did not consider that all options for the Claimant had been exhausted and that he would have been fully prepared to consider appropriate adjustments if necessary.

60. ***EQA, section 26: harassment related to disability***

   a. ***Did Mr Hague engage in conduct as follows:***

      i. ***On 23 April during the altercation Mr Hague said ‘fuck off - go and have a nosebleed you little cunt’***
      ii. ***on previous occasions Mr Hague made similar remarks which are were reported to Mr Sheeran the supervisor (to be particularised)***

   b. ***If so was that conduct unwanted?***

   c. ***If so, did it relate to the protected characteristic of disability?***

d. ***Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?***

61. We have already set out the discrepancies in the account given by the Claimant as to what was actually said to him on 23rd April. Whether or not these precise words were used on that occasion we accept hover that Mr Hague had indeed said to him at some point "why don't you fuck off and have a nose bleed you little cunt".

62. We also accept that in the course of the heated altercation on 23rd April Mr Hague did make some reference to his belief that the Claimant was feigning his illness. That is confirmed by Mr Shearon.

63. Mr Shearon's evidence, which we accept, was that everyone had banter, joking with the Claimant about his condition but that although the Claimant had told him that Mr Hague had said "stuff" that went beyond that mere banter, he, Mr Shearon, had never heard that himself.

64. We also accept the Claimant's account that reason why he had objected to Mr Shearon about some of the "stuff" that Mr Hague in particular was saying was that the tone of those comments relating to his illness being "put on" was indeed transgressing beyond that which was generally considered acceptable. That is therefore unwanted conduct which, having regard to the Claimnt's perception, has the prohibited effect. Clearly the specific words used are offensive and constitute harassment related to the Claimant's disability. We do not however accept that this was "constant" behaviour on the part of Mr Hague.

65. To the extent that Mr Hague did make a number of harassing comments within the time frame March and April 2019, including on at least one occasion the offensive phrase "why don't you fuck off and have a nose bleed you little cunt", the complaint of harassment succeeds.

66. ***Reasonable adjustments: EQA, sections 20 & 21***

a. ***The respondent knew that the claimant had a disability***
b. ***A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):***

    i. ***The requirement to undertake long hours, heavy lifting and bending in the course of the claimant's employment.***

c. ***Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time.***

d. ***If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?***

e. ***If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant; however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:***

A reduction in hours, more assistance from other workers and the avoidance of jobs which require bending e.g. tiling

f. ***If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?***

67. The history of the Claimant's alleged requests for reasonable adjustments is already largely set out in respect to the victimisation claim.

68. When moved to the dryer in February 2018 the Claimant had expressly said "I can do 12 hours ok".

69. The only specific complaint about bending was in relation to the Claimnt's return to work after his operation in January/ February 209 when he was temporarily allocated to work on tiling. This matter was addressed in the grievance hearing where it was established that the Claimant had not actually raised any concern at the time. Throughout the course of the numerous welfare meetings the Claimant was repeatedly assured that he should raise any concerns.

70. This matter is not addressed in the Claimnt's witness statement and there is no evidence that he in fact suffered any disadvantage, rather his complaint in the appeal letter/grievance is that it did not demonstrate what he expected to be the duty of care towards him.

71. This was, in any event a single instance where work was allocated which the Claimant now says was inappropriate and it occurred more than three months before the commencement of early conciliation so that the claim presented on 22nd August 2019 would on the face of it be out of time. there is no actual complaint made about the type of work undertaken in the dryer department. As we have said there was then, on 18th April 2019, an intimation of a possible need to review his role but this was in the process of being addressed if necessary, and in the meantime the Claimant confirmed that he felt safe at work.

72. There is therefore no identifiable PCP as alleged which actually placed the Claimant at a particular disadvantage, or which the Respondent ought reasonably to have known placed him at such a disadvantage, and no duty to make further adjustments had yet arisen.

73. ***Breach of contract (notice pay)***

a. ***To how much notice was the claimant entitled?***

b. ***Did the claimant fundamentally breach the contract of employment by [an act of so-called gross misconduct]? [N.B. This requires the respondent to prove, on the balance of probabilities, that the claimant***

actually committed the gross misconduct]; if so, did the respondent affirm the contract of employment prior to dismissal?

74. The question whether the dismissal was fair or not is not necessarily determinative of whether it was a wrongful dismissal, without notice.

75. The Respondent's disciplinary procedure defines gross misconduct as including "fighting, physical assault or abusive/threatening behaviour."

76. The only actual physical contact was by Mr Hague when he pushed the Claimant. This was not serious violence and was in response to a perceived threat from the Claimant "putting a pen in his face. That was no doubt an overreaction on the part of Mr Hague but it cannot be said to have been a wholly unprovoked assault by him.

77. We accept the Claimant's evidence that he did not actually intend any actual physical threat with a pen. However, there is clear evidence that in the middle of an admittedly heated argument that is how it was interpreted, in that moment, by those who saw it.

78. We find, doing the best we can on the evidence, that Mr Hague initially approached Mr Shearon and not the Claimant. However, because the issue that was troubling Mr Hague was a trial conducted the previous week and involving the Claimant he, the Claimant, remonstrated with him and that that was therefore what triggered the personal altercation.

79. Although the Claimant's own conduct was not properly construed as fighting or physical assault and although we are prepared to give him the benefit of the doubt and find that it was not actually intended to be threatening, it was nonetheless abusive, and it certainly contributed to an incident which taken as a whole was properly regarded as threatening.

80. The key evidence in this respect is that of Mr Shearon, who was of course called as the Claimnt's witness – albeit under a witness order, so that the Claimant had no forewarning of what he would actually say. Although Mr Shearon confirmed that some degree of confrontation in the workplace was fairly commonplace he was clear that the intensity of this argument was extraordinary and well outside the normal range.

81. On the balance of probabilities, therefore, we are persuaded that the Respondent s have proved that what was done by the Claimnt on this occasion amounts to gross misconduct of a type entitling them to dismiss without the customary period of notice.

EMPLOYMENT JU DGE LANCASTER

DATE 20th august 2020

[i] **The claim**

(1) ***Claims:The remaining claims are for***
- ***notice pay***
- ***unfair dismissal***
- ***disability discrimination under the Equality Act 2010 (EQA) section 13 EQA 2010 (direct); section 15 (discrimination arising); section 26 (harassment); section 27 (victimisation); (Reasonable adjustments) S 20/21***

(2) ***Background:The respondent is a carpet maker. The claimant was employed by the respondent as a production operative from 19 August 2014 until his dismissal on 2 May 2019. The claimant was involved in an altercation with another member of staff Matthew Haigh on the 23rd April 2019. As a consequence of which both employees were suspended and taken through a disciplinary procedure and dismissed. The claimant was suspended on 23 April 2019, he was summarily dismissed on 2 May 2019, he lodged an appeal against dismissal which was heard on 20 May 2019 and was unsuccessful.***

(3) ***Disability: The claimant claims to have two conditions namely HHT (Hereditary Haemorrhagic Telangielasia (excessive and spontaneous nosebleeding) and COPD.***
The respondent accepts that the claimant has the above conditions and that they constitute a disability within the meaning of the Equality Act 2010.

(4) ***Unfair dismissal:The claimant makes a claim of unfair dismissal on the basis that he was the innocent victim of an assault by Mr Hague in the presence of the supervisor Mr Sheerin who was working only for 5 feet away. Mr Hague who had been working at the other end of the carpet machine advanced towards the claimant who had said and done nothing to provoke him, when he was about 10 feet away Mr Hague swore at the claimant and told him to 'go and have a nosebleed'. Mr Hague then advanced right up to the claimant and put his face directly into the face of the claimant who said he was a hard man and told Mr Hague to leave him alone. The claimant called out to Mr Sheerin two or three times for assistance. Mr Sheerin then came over and in factory language told Mr Hague to go over to the other side. No blows were exchanged and there was no physical contact other than a push by Mr Hague.***
The dismissal was unfair because
- ***the claimant was the innocent party and the respondent failed to take that into account***
- ***the respondent seized on this as an opportunity to be rid of the claimant for having made requests for reasonable adjustments as recently as the week before***
- ***altercations such as this are not uncommon in the factory but other people have not been dismissed***

(5) ***Harassment - disability: at the time of the altercation Mr Hague said to the claimant 'go and have a nosebleed' which was a clear and insulting reference to the claimant's disability which upset the claimant. Mr Hague has made such remarks in the past and the claimant has reported that to Mr Sheerin. The claimant does not wish to join Mr Hague as a second respondent. He brings his claim against the respondent who has failed to take steps to protect him from this harassment by Mr Hague.***

(6) ***Direct Discrimination S13/ Discrimination arisingS15/ S27 Victimisation: There is an overlap between these claims and the unfair dismissal claim.***
The victimisation claim is brought on the basis that the respondent seized on opportunity to be rid of the claimant and ignored his mitigation because of the past requests he had made for reasonable adjustments and because the respondent did not wish to have to deal with future requests. The claimant will say that previous requests for reasonable adjustments have been met by veiled threats of dismissal.
The claims for direct discrimination and discrimination arising also relate to the factual matrix set out by the claimant in respect of the unfair dismissal above.

- ***the claimant was the innocent party and the respondent failed to take that into account as a mitigating factor***
- ***the respondent seized on this as an opportunity to be rid of the claimant for having made requests for reasonable adjustments as recently as the week before and for fear of future requests because the claimant had 'stood up to him'.***
- ***altercations such as this are not uncommon in the factory but other people have not been dismissed, did not have disabilities and were not dismissed, the claimant was dismissed because of his disability.***

(7) ***Reasonable adjustments S 20/21: the claimant's condition is said to be made worse by bending, heavy lifting and long hours. The claimant says that although his contractual hours are 40 per week he is required to work 60 hours on a regular basis. In order to reach the materials, he needs he has to move heavy crates and racks of other materials. In the past the employer has been unsympathetic for example on his return to work after an operation he was required to lay tiles which involved constant bending over. About a week before the altercation the claimant raised the matter with the manager Mr Simpson made it plain that he could not continue working in these conditions and required a cut in hours and more assistance from other staff (he was too frequently requirement to work on his own). Mr Simpson indicated that they would need to discuss it but no discussion took place and no arrangements were made by way of reasonable adjustment.***

(8) **Respondent's position**: The paragraphs above set out the claimant's claim as he sees it. The respondent does not accept the claimant's version of events. The Respondent contends that the dismissal was fair for gross misconduct both the claimant and Mr Hague were acting in an aggressive way which was unsafe; the respondents disability had no bearing on the dismissal; the respondent accepts that the claimant has a disability and has had regular meetings and made arrangements to assist the claimant and has done all they can reasonably be expected to do by way of reasonable adjustments in the past and were open to making further adjustments if required; until the tribunal preliminary hearing the respondent had no knowledge of the allegation that Mr Hague had told the claimant to go and have a nosebleed ; the claimant was paid all sums that he was entitled to at the date of dismissal, as this was gross misconduct he was not entitled to notice or pay in lieu of notice
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The issues

(9) *Unfair dismissal*

(i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct namely being involved in an altercation.

(ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

(10) Remedy for unfair dismissal

(i) If the claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would [still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway]? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];
b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?
d. Should any award be adjusted by reason of the claimant's failure to mitigate his loss or for failure of either party to observe the ACAS code of practice.

(11) *EQA, section 13: direct discrimination because of* HHT (Hereditary Haemorrhagic Telangielasia and COPD.

(i) It is not in dispute that the respondent subjected the claimant to the following treatment: dismissal.

(ii) Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?
The claimant relies on the following comparators- (names of people not dismissed for a similar offence to be provided) and/or hypothetical comparators.

(iii) If so, was this because of the claimant's disability

(12) *EQA, section 15: discrimination arising from disability*

(i) Did the following thing(s) arise in consequence of the claimant's disability: -

(ii) Was the Claimant's conduct in the altercation caused by the disability - the claimant says that he had had a serious nosebleed in the night before the altercation which had left him very tired and the condition made him moody

(iii) Did the respondent seize on the opportunity to dismiss the claimant and ignore the mitigation because of the claimant's past request for reasonable adjustments and the respondent's fear of further requests

(iv) If so, has the respondent shown that dismissing the claimant was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):

(13) *Equality Act, section 27: victimisation*

(i) Did the claimant do a protected act *and* did the respondent believe that the claimant had done or might do a protected act. The claimant relies upon the following:

a. Having made a request for a reasonable adjustment under the EQA in the week preceding 23 April 2019
b. having made such requests in the past (to be particularised).
c. The respondent anticipated that the claimant would insist on exercising his right to a reasonable adjustments in the future

(ii) The respondent summarily dismissed the claimant

(iii) Was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

(14) *EQA, section 26: harassment related to* disability

(i) Did Mr Hague engage in conduct as follows:

a. On 23 April during the altercation Mr Hague said 'fuck off - go and have a nosebleed you little cunt'
b. on previous occasions Mr Hague made similar remarks which are were reported to Mr Sheeran the supervisor (to be particularised)

(ii) If so was that conduct unwanted?

(iii) If so, did it relate to the protected characteristic of disability?

(iv) Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

(15) *Reasonable adjustments: EQA, sections 20 & 21*

(i) The respondent knew that the claimant had a disability
(ii) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

a. The requirement to undertake long hours, heavy lifting and bending in the course of the claimant's employment.

(iii) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time.

(iv) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

(v) If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

A reduction in hours, more assistance from other workers and the avoidance of jobs which require bending e.g. tiling

(vi) If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

(16) Breach of contract (notice pay)

(i) To how much notice was the claimant entitled?
(ii) Did the claimant fundamentally breach the contract of employment by [an act of so-called gross misconduct]? [N.B. This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct]; if so, did the respondent affirm the contract of employment prior to dismissal?

(17) Remedy

(i) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

[Specific remedy issues that may arise and that have not already been mentioned include:

a. *if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?*
b. *did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any [compensatory] award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?*
c. *did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any [compensatory] award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?]*