EMPLOYMENT TRIBUNALS

Claimant: Mr G Cunningham

Respondent: Royal Mail Group Limited

Heard at: Manchester **On:** 27 and 28 January 2020

Before: Employment Judge Ross
Mrs S A Humphreys
Mr S T Anslow

REPRESENTATION:

Claimant: In person
Respondent: Mr McArdle, Legal Executive

CORRECTED JUDGMENT

The reserved judgment of the Tribunal is that:

1. The claimant's claim for "ordinary" unfair dismissal in accordance with Section 95 and Section 98 Employment Rights Act 1996 is not well founded and fails.

2. The claimant was a disabled person within the meaning of the Equality Act at the relevant time and the respondent had knowledge of disability at the relevant time.

3. The claimant's claims that he was unfavourably treated because of something arising in consequence of disability in accordance with Section 15 Equality Act 2010 with regard to his dismissal and with regard to the failure of the respondent to obtain an up to date health report from occupational health are not well founded and fail.

4. The claimant's claim that the respondent failed to make reasonable adjustments pursuant to section 20 - Section 21 of the Equality Act 2010 before they dismissed him by: -

   (i) not delaying the conduct meeting in October 2018; and

   (ii) not obtaining a further report from Occupational Health

   is not well founded and fail.

REASONS

1. The claimant was employed as an HGV driver for Royal Mail Group Limited based at Warrington. He was a delivery driver. In November 2017 a customer complained about racist tweets which came from a Twitter account subsequently identified as belonging to the claimant. The claimant was suspended. He went absent initially due to stress at work and later was identified as suffering from anxiety and depression. He never returned to work. He was dismissed for gross misconduct with effect from 2 November 2018. He appealed but his appeal was unsuccessful.

2. He brought claims for unfair dismissal and disability discrimination to this Tribunal.

3. The claims and issues were identified at a Case Management Hearing before me on 17 May 2019. The issues are: -

Claim for "ordinary unfair dismissal pursuant to the Employment Rights Act 1996

1. What was the reason for dismissal? The respondent relies on conduct.

2. Did the respondent have a genuine belief based on reasonable grounds following a reasonable investigation of the claimant's conduct at the relevant time, namely displaying pictures and words with racial undertones on social media (Twitter) by tweeting on 2 and 3 November 2017.

3. Was dismissal within the band of reasonable responses of a reasonable employer?

4. Was the dismissal procedurally fair?

Disability Discrimination

5. Was the claimant a disabled person at the relevant time?

6. Did the respondent have knowledge of disability at the relevant time?

Section 15 Claim

7. Was the claimant unfavourably treated because of something arising in consequence of disability? In answering this question, the Tribunal will ask:

   (1) What was the alleged unfavourable treatment?

   (2) What was the "something arising in consequence of disability"?

   (3) Was the "something" arising in "consequence of disability"?

   (4) If so, was the treatment a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments pursuant to sections 20-21 of the Equality Act 2010

8. What was the provision, criterion or practice?

9. Did it put the claimant at a substantial disadvantage in relation to a relevant matter?

10. What were the steps the claimant contends the respondent should have taken?

11. Did the respondent take such steps as were reasonable to avoid the disadvantage?

12. Did the respondent know or could the respondent be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

The Law

4. The relevant law for the unfair dismissal case is the principle set out in **BHS -v- Burchell 1980 ICR 303.**

5. For the discrimination claims the relevant law is found in Section 6, Section 15 and Section 20 to 21 Equality Act 2010. The burden of proof provisions are relevant, Section 136 Equality Act. The Tribunal also had regard to the EHRC Code of Practice. In the Section 15 claim the Tribunal had regard to **Pnaiser -v- NHS England** and **Another 2016 IRLR 170 EAT**. In the reasonable adjustments claim the Tribunal had regard to the principles in **Environment Agency -v- Rowan 2008 ICR 218 EAT**, **Project Management -v- Latif 2007 IRLR 579 and Smith -v- Churchill's Stairlifts PLC 2006 IRLR 41 CA**.

6. We heard from the claimant and for the respondent from Mr Jamieson, the Dismissing Officer. We did not hear from the Appeals Officer Miss Wilkinson. The respondent's representative explained that she had now left the business.

Facts

7. We found the following facts.

8. On 27 November 2017 the respondent received a complaint from a customer accusing a Royal Mail employee of posting inappropriate tweets with racial undertones. The offensive tweets are clearly identified at page 104 of the bundle. The customer said she did not know the claimant but "I came across the racist comment and went to report it and saw he was a proud Royal Mail driver as indicated in his bio and picture. Doesn't make Royal Mail look very good". Page 103. The complaint was forwarded by a Social and Media Executive for the respondent to Mr Hunter, page 99, 170, 171. Mr Hunter, the Late Shift Office Manager at the depot where the claimant was based forwarded the complaint to Mr Jamieson, page 99, 161.

9. There is no dispute that Mr Jamieson spoke to the claimant on 28 November 2017 about the tweets. It is not disputed that the claimant had never before met Mr Jamieson. Mr Jamieson showed the claimant the tweets and asked if the Twitter account was his and the claimant confirmed it was. He then advised the claimant to go home.

10. On 2 December 2017 the claimant was sent a formal suspension letter, page 110 and 111. On 4 December 2017 the claimant attended a meeting with Mr Leela Manikonda at which the claimant again confirmed the relevant Twitter account was his account (141).

11. By an undated letter the claimant was invited by Mr Jamieson to a fact-finding meeting on 8 December 2017 for "unacceptable external behaviour affecting the good image of Royal Mail". Meanwhile, on 7 December 2017 the claimant's wife contacted the respondent explaining the claimant had been to visit his GP and that he was unfit for work due to stress brought on at work.

12. The claimant commenced sickness absence on 8 December 2017. On 11 December 2017 Mr Jamieson sent the claimant a letter confirming that his suspension from work had been amended to sick absence due to stress. We find that the conduct case was suspended and the claimant's sickness absence was managed by other individuals, in particular Chris Wong.

13. We find at this point the respondent paused the conduct procedure.

14. In March 2018 the respondent obtained an Occupational Health report from OH Assist, their occupational health advisor. The questions posed by the manager (see page 118 to 119) were:- (1)Would Gareth be able to attend a conduct interview and have the conduct concluded to pave the way for a possible return to work without having a negative effect on his mental health? (2) if the conduct was concluded what sort of timescales would a return to work be able to be considered?

15. The answer to the first question was : "Mr Cunningham is currently feeling that the work-related issue is the main reason for his current absence from work. He is struggling to attend even his counsellor currently, he has been unable to appoint any colleague to support him through any disciplinary process and he

does feel well enough to be able to answer questions coherently, therefore he is unable to consider attending a conduct review currently".

16. We find it is likely that there is a typographical error here and it should say he does not feel well enough to be able to answer questions

17. So far as the current outlook was concerned the report noted that Mr Cunningham does not have an underlying mental health condition. His presently impaired mental health wellbeing is reactive in nature and due to his reported work-related circumstances: "I am hopeful his emotional wellbeing will stabilise with support from the counselling, medication and in the workplace to prevent any further or ongoing symptoms".

18. The report was based on a telephone interview which the claimant said was short. It states, "he is clearly continuing to experience severe anxiety and depression". It also states "he is attending a private counsellor and he attends his GP on a regular basis. He is going to ask for an increase in his medication again tomorrow".

19. The reply to the second question was once Mr Cunningham is able to attend any conduct reviews it is hoped that his mental wellbeing is stabilising enough so that he is able to consider a return to work within four to six weeks of the conduct being concluded

20. We accept the evidence from Mr Jamieson that he was involved in business review meetings of the claimant's sickness absence and during the course of those conversations he was informed that it would be beneficial for the claimant for the conduct case to progress.

21. We find that many weeks after the OH report was recived and many months after the claimant was first suspended, the respondent restarted the disciplinary process.

22. The case was passed to Mr Graham Thubrom to progress fact finding. He sent the claimant an undated invitation to a fact-finding meeting to take place on 23 July 2018. He noted that it had been seven months since the incident occurred and it was necessary to bring the case to a conclusion. He reminded the claimant that being faced with conduct could be a stressful time and reminded him of the 24-hour support service First Class.

23. The claimant responded by sending a letter dated 18 July 2018 at page 125 to 126. The letter explained that the claimant was not well enough to attend a meeting, that he was absent due to depression and anxiety. We find he included a copy of a report from his counsellor, page 190 which identifies the claimant has made some progress but the claimant continued to struggle with low moods and episodes of anxiety and did not believe he was well enough to return to work or engage with the investigation process that he was facing.

24. Mr Thubrom sent the claimant a further undated letter inviting him to a meeting on 30 August 2018. The Tribunal finds the letter was unhelpful because it did not engage with the claimant's letter of 18 July 2018.

25. The claimant wrote in response a letter dated 28 August 2018 complaining that Mr Thubrom had not engaged with his earlier letter explaining why he was unable to attend.

26. The claimant suggested in evidence he had provided a letter from his GP to the respondent. He was unclear when he had done this. The Tribunal was not presented with a letter from the GP from either party.

27. The Tribunal finds that certainly by the appeal stage the claimant had provided the respondent with some information from his GP, see page 181.

28. We find the case was passed to Mr Jamieson. We find on 17 September 2018 Mr Jamieson wrote to the claimant inviting him to attend to a formal conduct meeting on Friday 21 September 2018. Unfortunately, he included in the standard letter a standard paragraph which was irrelevant to the case which was:

> "I enclose a summary of the findings of the investigation and copies of relevant witness statements and other documents …" see page 131

29. When giving evidence Mr Jamieson admitted this paragraph was not relevant to the claimant's claim and was included by mistake.

30. The letter did offer the claimant the opportunity to meet at an alternative suitable location if he felt he was not able to attend a meeting at the Distribution Manager's office. It also suggested the claimant could forward any mitigation in writing and included questions (see page 149) for the claimant to answer should he wish to engage with the process in writing rather than in person. Again, he was reminded the claimant of "Feeling First Class" support service.

31. Mr Jamieson also acknowledged the claimant's earlier letter of 18 July 2018 and noted "I appreciate you are still suffering with your mental health and that this case is adding to the strain. I will do my best to conclude it as swiftly as possible in order to alleviate this". He went on to state "the business has to take a decision to progress this case due to the length of time it has been ongoing. I am happy to take on board any suggestions from your GP or counsellor should they have any advice that will allow you to participate in the investigation".

32. The claimant responded to say that he would not be able to attend a fact-finding meeting on 21 July 2018.

33. The Tribunal finds that the pre printed reply slip created by the respondent for the claimant to complete, attached to the letter of 17 September 2018, wrongly referred to the fact-finding meeting when it should have referred to the formal conduct meeting. This had confused the claimant who was suffering from a mental health condition. He stated, "it is unclear from the paperwork that you sent me whether you want me to attend a formal conduct meeting or a fact-finding meeting". He also referred to some other paperwork which had referred inaccurately to a different job holder. He referred to suicidal thoughts and people recommending that he get himself sectioned.

He referred to the Equality Act and then said, "I also want to stress I am willing to attend any meeting but not on 21/9/18 and it needs to be at a neutral base as stated in December".

34. We find there was a telephone conversation (referred to by the claimant) at page 134 between himself and Mr Jamieson on or around 18 September 2018 where Mr Jamieson agreed to hold the meeting at a neutral venue, Prescott Delivery Office.

35. We find the claimant attended the meeting.We rely on the notes at page 138 to 139 as they include the annotations completed by the claimant when the notes were sent to him in September 2018.

36. We find there was no detailed discussion of the claimant's conduct at that meeting because the claimant repeatedly stated he was not well enough to answer questions and felt his mental health condition had been ignored.

37. Mr Jamieson sent the claimant a letter of dismissal which is undated but which informed him his last day of service would be Friday 2 November 2018. The reason for dismissal was: -

    (i) Breach of the code of business standards in that he displayed pictures and words with racial undertones on social media (Twitter) by tweeting/re-tweeting tweets on 2 and 3 November 2017.

    (ii) Breach of the acceptable use policy in that he used Royal Mail Group name and logo on his Twitter profile which uploading images and words that could damage Royal Mail Group's brand.

    (iii) Breach of the social media guide in that he used Royal Mail Group name and logo on his Twitter profile while uploading images and words that could damage Royal Mail Group's brand, tweeting attached tweets on 2 and 3 November 2017.

38. There was no dispute that a customer complained about the offensive tweets and the customer sent a screenshot which showed that the claimant was wearing Royal Mail uniform in his picture and his biographical details "bio" referred to him "living the dream lorry, driving for Royal Mail".

39. The claimant appealed against his dismissal. He stated he had never seen the tweet before, that Mr Jamieson had not applied principles of fairness or reasonableness and had failed to carry out a full or effective investigation of the alleged offence and raised concerns about a breach of confidentiality, he said he was unaware that posting a picture on social media with Royal Mail uniform visibly identifiable was in breach of the code of business standards and did not recall receiving a copy of the business standards.

40. We find the appeal was conducted by Erica Wilkinson. We find she conducted a thorough and detailed appeal.

41. We find that the claimant confirmed he would be able to attend a meeting on 22 November 2018 at page 158 and that when Miss Wilkinson asked him if he was well enough to proceed at the hearing on 22 November 2018 he confirmed that he was, page 163. We rely on the notes in the bundle at page 159 to 205. We find that the claimant apart from some minor corrections was satisfied with the notes of the appeal hearing and signed to confirm the accuracy of the notes, see page 189.

42. We find that Miss Wilkinson considered the concerns raised by the claimant and explored if he did not post the offensive tweets whether he could have been framed and if so, how. We also find she conducted further investigation by contacting Sarah Bowers, see page 170 to 171, Paul Jamieson and Graham Thurbrom and shared the replies with the claimant, see page 199. She took his further comments into account.

43. Miss Wilkinson found that the claimant had been fairly and reasonably treated and that the original decision of dismissal was appropriate, see her letter of 17/12/2018 at page 206. She also provided a detailed decision document, page 207 to 227 which she sent to the claimant which clearly gives reasons for her decision. We also find that her appeal was conducted as a re-hearing. She also said going through an appeal could be stressful and she reminded the claimant of the ATOS help advice line, page 157.

Applying the law to the facts

44. **We turn to the claim for "ordinary" unfair dismissal pursuant to s95 and s98 Employment Rights Act 1996**. We turn to the first question what was the reason for dismissal? The respondent relied on conduct, the claimant disputed that was the reason. He said in cross examination that he thought the reason for his dismissal was his lengthy absence from work.

45. The Tribunal is satisfied that the respondent has shown the real reason for dismissal was conduct. The respondent had received a complaint from a customer about the conduct of a Royal Mail employee, which is clearly identified at page 99 and 171. It found the complaint had come from the claimant's account and the claimant admitted it was his account.

46. The claimant's suggested that the real reason he was dismissed was because of his lengthy absence from work. This is not consistent with the fact that he was first suspended before he became ill. His present absence from work started 8 December 2017.

47. The Tribunal turns to the next question. We must consider whether the respondent acted fairly or unfairly in treating conduct as the reason for dismissal .We are guided by the principles set out in **British Home Stores -v- Burchell** namely did the respondent have a genuine belief based on reasonable grounds following a reasonable investigation of the claimant's conduct at the relevant time, namely displaying pictures and words with racial undertones on social media (Twitter) by tweeting on 2 and 3 November 2017 when the claimant showed a photograph of himself in Royal Mail uniform on his twitter page and identified himself as a Royal Mail driver.

48. The Tribunal is satisfied that both the Dismissing Officer and the Appeal Officer had a genuine belief based on reasonable grounds of the claimant's conduct. They had sight of the offensive remark and the offensive picture, both clearly identified at page 104. The claimant himself says the conduct is "vile". The claimant agreed that the comment and picture were posted on his Twitter account. The claimant had no explanation for how the comment and picture came to be there if he had not posted them himself. The claimant closed his Twitter account (on the advice of his union he says) soon after the offensive tweets were discovered. The claimant did not inform the respondent of any efforts he had made to contact Twitter or to establish who could have hacked his account and why.

49. So far as the investigation is concerned there was very little investigation required of the respondent when confronted with offensive tweets with a racial undertone, a complaint from the customer and the claimant's acknowledgment that they came from his Twitter account. The test for the Tribunal is not whether the respondent believed beyond reasonable doubt that the claimant had posted those tweets but whether they had a genuine belief based on reasonable grounds, following a reasonable investigation.

50. We remind ourselves it is not for us to substitute our own view of the investigation.

51. The claimant had a number of concerns about the investigation. We find it was understandable he found it frustrating that the respondent sent him standard template letters which had inaccuracies in them sometimes, for example referring to a fact-finding meeting when they meant a conduct meeting or including a paragraph that was irrelevant. He was also concerned about the fact Mr Jamieson had suspended him in the first place and then dealt with the dismissal.

52. We are not satisfied in a case like this where there was very limited investigation required that it was a significant procedural failing for Mr Jamieson to suspend the claimant at the initial stage and then to conduct the disciplinary hearing. However, even if there where are concerns they were put right by Miss Wilkinson at the appeal stage. She conducted a thorough appeal which was a rehearing and which when the claimant said he was well enough to be present.

53. Likewise, the claimant's concern that the hearing in September before Mr Jamieson should not have proceeded because the claimant told him he was not well enough. The respondent had waited for a period of approximately ten months and had delayed the conduct and disciplinary hearing during that period. There came a time when a reasonable respondent had to proceed.

54. However, even if there was a procedural error in Mr Jamieson's going ahead to conclude the dismissal when the claimant had attended a meeting saying he was not well enough to engage, the situation was put right by Miss Wilkinson. She expressly asked the claimant if he was well enough to attend the appeal hearing, on the day he was there. Although the claimant told the

Tribunal he wasn't well enough to attend, he told Miss Wilkinson at the relevant time that he was.

55. Furthermore, the respondent had offered many alternatives to the claimant to reduce stress during the investigatory period. Almost every letter referred him to the respondent's helpline service. They had offered to conduct the hearing at a neutral venue, which occurred, and finally, he was offered the opportunity to respond by answering written questions rather than appearing in person. The claimant chose not to take that option.

56. We turn to the third question, was dismissal within the band of reasonable responses of a reasonable employer. We remind ourselves it is not for us to substitute our own view. The claimant admitted the tweets were "vile and unacceptable", page 163. The respondent's conduct policy states that an example of gross misconduct is "abusive behaviour to customers or colleagues", page 58. The respondent's code of business standards at page 81 states "we must not discriminate for any reason" and must not "use inappropriate behaviour". It identifies examples of inappropriate and unacceptable behaviour "displaying pictures with sexual or racial undertones" and "using social media to display any of the above behaviours". The respondent's social media guidance identifies Twitter as a social media, page 90. It also identifies a risk of using social media as "serious damage to Royal Mail's reputation brand and business and potential claims for defamation, discrimination or harassment", page 90. It states employees must ensure they "avoid saying anything that might seriously damage Royal Mail's reputation and brand". It says, "the following principles apply to employees using social media in both their work and personal capacity- employees must not use social media to make defamatory or discriminatory comments". Employees are informed "if an employee's behaviour is seen to either potentially harm their relationship with Royal Mail Group or the reputation of the business their actions may be addressed under the conduct policy. Breaches could lead to disciplinary action and in cases where the behaviour is serious enough to be considered gross misconduct this could lead to dismissal". Page 93.

57. Given that the respondent had concluded the claimant had posted racist content in a context where he was identifiable as a Royal Mail employee both in how he described himself "living the dream driving for Royal Mail" and by identifying himself with a picture where he was wearing Royal Mail uniform, dismissal was within the band of reasonable responses of a reasonable employer.

58. Finally, the Tribunal turns to consider whether the dismissal was procedurally fair. We remind ourselves of the guidance of Sainsbury Supermarkets -v- Hitt. It is not for us to substitute our own view of the procedure we may have adopted. It is whether a reasonable employer of this size and undertaking could have reasonably conducted such an investigation.

59. We find there are some errors in the way the respondent communicated with the claimant in terms of some of the standard letters were confusing, undated and appeared to be poorly edited template letters. On occasion the

respondent did not directly engage with the claimant, for example Mr Thurbrom's letter. However, we find that these were relatively minor and having regard to the ACAS code of practice did not render the dismissal unfair.

60. We find that the errors in the procedure conducted by Mr Jamieson, the Dismissing Officer in proceeding to dismiss the claimant when he had told him he was not well enough to be at the meeting in September 2018 were corrected by the Appeals Manager who conducted a re-hearing and to whom the claimant confirmed he was well enough to attend and participate in the appeal hearing.

61. The claimant suggested there was a procedural error in not obtaining a further report from Occupational Health. The Tribunal reminds itself that this was a conduct hearing. The respondent had delayed the hearing for a period of many months whilst the claimant was absent from work on sick leave but his condition on the claimant's own evidence had not improved. There came a point where the respondent had to deal with the conduct issue. In these circumstances it was not procedurally unfair for the respondent to proceed without an up to date occupational health report when it dismissed the claimant.

62. If the Tribunal is wrong about that, by the time of the appeal, the claimant told the Appeals Officer at the time that he was well enough to attend and participate in the appeal and so this issue does not have any direct relevance.

63. For these reasons we find the dismissal was fair.

64. **We turn to the next claim: disability discrimination**. The first question was whether the claimant was a disabled person at the relevant time. Section 6 of the Equality Act states the claimant has a mental impairment if "the impairment has a substantial and long term adverse effect on the claimant's ability to carry out normal day to day activities".

65. At the relevant time, namely when the claimant was dismissed and when his appeal was dismissed we find he was a disabled person. We find that by September 2018 the claimant had been absent from work for a period of ten months. We find that being unable to work, also being unable to drive are day to day activities. The claimant's inability to carry out these activities we find had a substantial and long term adverse effect on a claimant's ability to carry out normal day to day activities. We also rely on the information in the claimant's counsellor report which confirms the claimant was suffering from anxiety and depression, was seeking counselling and requiring medication, which is listed in the report. We accept the claimant's evidence in his Disability Impact Statement.

66. The respondent sought to persuade us that in accordance with **Herry -v- Dudley Metropolitan Council UK EAT/0100/16** that the claimant's reaction to his adverse circumstances may be intertwined with his refusal to work. It was suggested that the claimant in this case failed to evidence anything more than adverse reaction.

67. We accept the evidence of the claimant that he was unable to work during the relevant period and was unable to drive a heavy goods vehicler by reason of the medication he was taking and was unable to drive the family car. We find the claimant was and is suffering from depression and anxiety. We find that in July 2018 he was taking the medication described by his counsellor at page 190 of the bundle. We rely on our findings above that the claimant's anxiety and depression had a substantial adverse effect on his normal day to day activities meaning he was unable to drive and unable to work.

68. We find by September 2018 the condition had lasted ten months and was likely to last at least twelve months.

69. We were also referred to **Day -v- DLA Piper UK 2010 ICR 1052** where Underhill P dealt at paragraph 42 with the distinction between a mental illness "clinical reaction to adverse circumstances" and adverse life events.

70. We are satisfied that the evidence from the claimant and his counsellor in this case suggests that the claimant was suffering from clinical depression given the medication identified by his counsellor which includes an anti-depressant.

71. The Tribunal turns to the next issue which is whether the respondent knew or had constructive knowledge of the impairment.

72. The Tribunal finds that by the time of the dismissal and the time the appeal was heard the respondent had either actual or constructive knowledge that the claimant was a disabled person. There was an occupational health report from March 2018 where the occupational health advisor stated that it was her belief that the claimant was suffering "severe anxiety and depression" and yet "did not have an underlying mental health condition".

73. By the time of the disciplinary hearing the claimant had been absent from work for almost ten months and there was a report from the claimant's counsellor which identified he was continuing to suffer from anxiety and depression and listed the medication he was taking. It was unclear what the information was before the Dismissing Officer in terms of the GP. However, the respondent as an organisation had the claimant's fit notes. They were supplied to the manager dealing with the claimant's sickness absence. The claimant said the sick notes had originally said stress at work but later stated depression. Mr Jamieson was on notice that the claimant remained mentally very unwell because his note at page 133 referred to suicidal thoughts and a suggestion from other people that the claimant should be sectioned under the Mental Health Act. By the time of the appeal the Appeals Officer had a copy of page 181 which appears to be an extract from the claimant's GP notes and refers to an episode of depression in February 2005.

74. The Tribunal is therefore satisfied that the Dismissing Officer and Appeal Officer had actual or constructive knowledge of the claimant's impairment of anxiety and depression.

75. The Tribunal turns to the next issue, the claim under Section 15 of the Equality Act 2010.

76. The Tribunal must ask itself was the claimant unfavourably treated because of something arising in consequence of disability? To answer this question the Tribunal must first identify the alleged unfavourable treatment. The claimant relies on his dismissal and the respondent's failure to obtain an up to date occupational health report.

77. The Tribunal turns first of all to consider the dismissal. The respondent accepts the dismissal was unfavourable treatment. The Tribunal must then consider was this because of "something? And was the "something" arising in consequence of disability. To answer this we must find out what the "something" was. At the Preliminary Case Management Hearing the claimant identified the "something" as difficulty in attending the conduct meeting in October 2018. The Tribunal is not satisfied the claimant has shown that the reason for his dismissal was his difficulty in attending the hearing in October 2018. The Tribunal relies on its findings above that the reason for the claimant's dismissal was conduct. The claimant has never suggested that his conduct was because of his illness. It was expressly considered by the Appeals Officer where she confirmed "at no time has Gareth Cunningham attributed his comments to any medical condition" see page 211.

78. Accordingly, the claim fails at this stage and there is no requirement for us to consider the further issues.

79. We turn to the second allegation of unfavourable treatment :the failure to obtain an up to date Occupational Heath Report. The respondent disputed that this could amount to unfavourable treatment. The Tribunal reminds itself that this term is not defined in the Equality Act although the Equality and Human Rights Commission Code of Practice on Employment states that it means a disabled person "must have been put at a disadvantage" see paragraph 5.7.

80. We remind ourselves that there is a relatively low threshold with disadvantage required to engage Section 15. We find that the claimant perceived that failing to refer him to occupational health for a second time at the time of his dismissal was unfavourable treatment.

81. We turn to the next question which is was the unfavourable treatment because of the "something". "Something" relied upon the claimant was his difficulty in attending the conduct meeting in October 2018.

82. The Tribunal finds that the reason Mr Jamieson did not obtain a second occupational health report was entirely unrelated to the claimant's difficulty in attending the conduct meeting in October 2018. He did not obtain an up to date Occupational Health Report because he was not dealing with a capability dismissal where a claimant had been long term absent from work, he was dealing with a conduct dismissal.

83. Following advice from occupational health a decision had been taken to put the conduct case on hold to allow for Mr Cunningham to receive treatment to try and improve his mental health to a point where he would be fit to participate. Mr Jamieson noted by July 2018 following his conversations with

Mr Chris Wong who was managing the attendance management process that the claimant was not improving and the outstanding conduct case was prolonging his absence. Therefore, the business took the view that it would be beneficial to Mr Cunningham for the conduct case to be concluded to alleviate the stress it was causing him. The Tribunal finds that the decision not to refer the claimant back to HR was not related to the claimant's difficulty in attending the meeting in October 2018 and accordingly the claim fails at this point.

84. Accordingly, the claim fails at this stage.

85. Failure to make reasonable adjustments pursuant to Section 20 to 21 of the Equality Act 2010.

86. The Tribunal turns to the first issue, what was the provision, criteria or practice? The Tribunal finds that the PCP was the respondent applied its disciplinary conduct procedure to the claimant.

87. We turn to the next issue. Did the application of the disciplinary procedure put the claimant at a substantial disadvantage in relation to a relevant matter? The claimant who was suffering from a mental impairment of depression and anxiety said that the requirement under the respondent's disciplinary procedure to attend a disciplinary hearing put him at a substantial disadvantage compared to a non-disabled person because he found his anxiety caused by the thought of facing questions over his conduct could induce panic attacks, or uncomfortable feelings that he was unable to tolerate. See his counsellor's statement, page 190.

88. The Tribunal is therefore satisfied that the PCP put the claimant at a substantial disadvantage in relation to a relevant matter.

89. The Tribunal turns to the third question, did the respondent take such steps as was reasonable to avoid the disadvantage? In answering this question, the Tribunal considers the steps the claimant contends the respondent should have taken. The claimant contends the respondent should have delayed the conduct meeting in October 2018 and obtained a further report from occupational health before it considered dismissing him.

90. The Tribunal turns to the first suggestion that the respondent should have delayed the October conduct meeting.

91. The Tribunal reminds itself that it must consider the effectiveness of the proposed adjustment. The first factor listed at paragraph 6.28 of the EHRC Code of Practice states that the employer should consider "whether taking any particular steps would be effective in preventing the substantial disadvantage". The claimant has identified the substantial disadvantage as his difficulty in attending a disciplinary hearing.Although delaying the hearing would prevent the substantial disadvantage we must also take into account other factors which include the practicability of the step and the circumstances of the case. Ultimately the test of reasonableness is an objective one.

92. The respondent had already paused the disciplinary conduct procedure for a period of many months but the claimant's condition was not improving. Indeed, the claimant's evidence to this Tribunal was that his condition deteriorated. Accordingly, the Tribunal is not satisfied it was a reasonable step to further delay the hearing in October 2018, particularly in the context where the claimant agreed to attend that meeting and where the claimant had declined to answer written questions.

93. The issue of this adjustment is not relevant to the appeal hearing because by that stage the claimant had informed the Appeals Officer he was well enough to attend the hearing and so there was no substantial disadvantage. (The claimant sought to present a different picture at the Employment Tribunal where he said that he was not well when he attended the appeal hearing. The Tribunal prefers his evidence to the Appeal Hearing Officer as noted at the relevant time).

94. The Tribunals turns to the other suggested adjustment which is a referral back to occupational health. The Tribunal is not satisfied that this step would be effective in preventing the substantial disadvantage, namely the claimant's discomfort at attending an in-person hearing. No guarantee can be made about what an occupational health report would have said. It may have suggested that the meeting should go ahead.

95. The Tribunal finds that it is relevant that the respondent had suggested other practical steps to avoid the substantial disadvantage to the claimant in particular the opportunity to respond by way of written questions so he did not need to attend a meeting but the claimant did not choose that option.

96. Finally, the Tribunal finds it is relevant in terms of whether the step of obtaining occupational health report would have been effective in preventing the substantial disadvantage, in considering the claimant's evidence to the Tribunal. He told the Tribunal that even today which is over two years since the tweets were first posted and the disciplinary proceedings first begun, the claimant considers he is still too unwell to attend a conduct hearing.

97. The Tribunal has taken into account that where a racist tweet has been posted and a complaint made by a member of the public a respondent cannot delay a conduct proceeding indefinitely due to the mental health of a claimant being adversely affected by attending a disciplinary hearing.

98. Accordingly, the Tribunal finds that the respondent took such steps as was reasonable to take to avoid the substantial disadvantage and so the claimant's claim fails.

99. For the sake of completeness, we have dealt with the final question which is whether the respondent could be reasonably be expected to know that the claimant had the disability or was likely to be placed at the substantial disadvantage. The respondent knew the claimant had the disability (see above). We find the respondent knew that the claimant was likely to be placed at a substantial disadvantage by attending the meeting in October as the claimant informed Mr Jamieson of that fact. However, this issue is no

longer relevant given that we have determined that the respondent took such steps as is reasonable to take.

Employment Judge Ross

11 February 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
20 February 2020

FOR THE TRIBUNAL OFFICE

[JE]