EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112713/2018

Held on 8, 9, 10 and 11 December 2020

Employment Judge P O'Donnell
Members Mr W Muir
Ms J Lindsay

Mr S Donohoe **Claimant**

Chivas Brothers Limited **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:-

1) The claimant was not unfairly dismissed.

2) The Claimant's dismissal did amount to a *prima facie* case of discrimination arising from disability but that the Respondent had established that the Claimant's dismissal was objectively justified. The claim for discrimination arising from disability, is, therefore, dismissed.

3) The claims of indirect disability discrimination and breach of the duty to make reasonable adjustments being withdrawn at the hearing are hereby dismissed.

REASONS

Introduction

1. The Claimant has brought complaints of unfair dismissal and disability discrimination against the Respondent in relation to his dismissal.

2. In a judgment dated 23 June 2020 and sent to the parties on 25 June 2020, another Employment Tribunal found that the Claimant was disabled as defined in s6 of the Equality Act 2010.

Preliminary and case management issues

3. At the outset of the hearing, Mr Hay informed the Tribunal that the Claimant no longer insisted on the claims of indirect disability discrimination under s19 of the 2010 Act and the breach of the duty to make reasonable adjustments under ss20 & 21 of the Act. Those claims were withdrawn and the Tribunal dismissed them under Rule 52.

4. Ms Wright, also at the outset of the hearing, advised the Tribunal that one of the Respondent's witnesses, Mr Reilly, had a friend who was a lay member. It was confirmed that neither of the lay members of the Tribunal had any connection to Mr Reilly.

5. Towards the end of his evidence, the Claimant mentioned that his brother was a trade union official. The Judge asked for clarification of the name of the Claimant's brother and, on this being provided, the Judge disclosed that he knew the Claimant's brother in a professional capacity from when he had been in private practice. He explained that the Claimant's brother was an official with one of the trade unions to which his former firm had provided legal services; he had never been instructed by the Claimant's brother nor had the brother been involved in any case in which the Judge had acted. The principal contact between the Judge and the Claimant's brother was through training or conferences; the last instance in which the Judge could recall meeting the Claimant's brother was approximately a year previously when the Judge had been speaking at a conference and the Claimant's brother was the next speaker.

6. After taking instructions, both parties confirmed that no objection was made to the Judge continuing to sit in the case.

7. A schedule of loss was produced by the Claimant's agents; the computations in the schedule were a matter of agreement but there was not agreement as to certain of the underlying assumptions such as the amount of injury to feelings or the period of loss.

Evidence

8. The Tribunal heard evidence from the following witnesses:-

    a. The Claimant

    b. James Moffat, warehouse manager, who was a member of the panel who heard the disciplinary hearing.

    c. Robert Muir, head of HR, who was a member of the appeal panel.

    d. James Reilly, safety, health & environment specialist with the Respondent.

9. There was an agreed bundle of documents prepared by the parties. References to page numbers below are references to pages in the agreed bundle.

10. One document was added to the bundle during the course of the hearing, that is, a collective agreement between the Respondent and the GMB trade union. The reason for this is that reference was made during evidence from the Respondent's witnesses to the Claimant's contract of employment which incorporated the collective agreement. Parties were agreed that this document was needed to provide the Tribunal with a complete picture of the contractual terms.

11. The Respondent sought to add further documents relating to health and safety issues ahead of the evidence of Mr Reilly under explanation from Ms Wright that Mr Reilly had only recently come across these and they had been provided to her that day.

12. Mr Hay objected to these documents being added given the timing of their production and the prejudice to the Claimant. He drew attention to the fact that the proceedings had been going on for some time and that case management had been done very early in the process which included the exchange of documents. There had been ongoing discussion regarding the joint bundle up to the week before the final hearing which included documents relating to health and safety. There was, therefore, an awareness for all involved of the need for documents to be produced. There was no foreshadowing of Mr Reilly's evidence

in the ET3, especially in relation to these documents, which placed greater emphasis on the need for documents to be exchanged well in advance to allow instructions to be taken. In this instance, the Claimant does not recognise these documents. Mr Hay questioned the relevance of the documents given that they do not relate to the site where the Claimant worked, are not mentioned in any correspondence or minutes in the bundle and had not been referred to by either of the Respondent's witnesses who had given evidence by that stage. It was submitted that there was a prejudice to the Claimant in admitting these documents as they were being produced at the end of the Respondent's case and had not been foreshadowed in the pleadings or other evidence.

13. In response, Ms Wright accepted that the documents were late having only being provided to her that day. She submitted that they related to how safety matters were produced to staff and were relevant to the issue of smoking on site being a disciplinary matter; the Claimant's case had developed as suggesting that smoking was not a disciplinary matter and that this had itself not been foreshadowed in the ET1. If there was an issue with these documents then the Claimant still had the opportunity to respond in his evidence.

14. After consideration, the Tribunal decided that it would not allow these additional documents to be admitted. In reaching that conclusion, the Tribunal took account of the overriding objective and the following factors:-

    a. The late lodging of the documents in circumstances where there had been case management regarding the exchange of documents and preparation of a joint bundle.

    b. The prejudice to the Claimant in these documents being produced towards the end of the Respondent's case when they had not been foreshadowed in the ET3.

    c. The relevance of the documents to the disciplinary and appeal process where they were not raised.

    d. The Claimant's case as had been developed in cross examination.

15. Taking all of these matters into consideration, the Tribunal found that the balance of prejudice fell in the Claimant's favour for refusing the documents.

16. There were a number of documents in the bundle which fell under the broad heading of "medical evidence". No medical experts were called to speak to these and, rather, parties produced an agreed statement of fact that this documentation is an accurate record of facts and opinion to the extent that they relate to facts and opinions about the Claimant's health and prognosis.

17. The Tribunal was also shown a video taken on a mobile phone which was used as part of the disciplinary process. It was accepted by the Claimant that this showed him on the Dalmuir site operated by the Respondent.

18. This was not a case where there was a significant dispute of fact in relation to the core facts. The Tribunal was not, therefore, having to decide whether to accept the evidence of one side against the other.

19. The Tribunal would say that it found all the witnesses to be credible in the sense that it was considered that they gave their evidence truthfully. The Tribunal found the Claimant, in particular, to be a credible witness who gave his evidence in an open and honest manner on matters which were detrimental to his case and, at times, very personal issues.

20. On the Respondent side, the Tribunal found Mr Moffat to be an honest witness who would accept matters put to him in cross examination even where they were detrimental to the Respondent's case. Similarly, the Tribunal considered Mr Muir was honest in his answers although he would, at times, fall into the trap of seeking to anticipate the line of cross-examination and try to pre-empt the question he believed was coming next. Mr Reilly was also an honest witness but the Tribunal found that his evidence did not really add anything to the evidence from the other witnesses from the Respondent in relation to health and safety issues for the Dalmuir site.

21. In relation to those witnesses who spoke directly to the events leading up to the Claimant's dismissal, the Tribunal considered that their reliability was affected by the passage of time since the events of the case occurred and there were matters which they could not recall or could not recall in detail. All of these witnesses

were honest in confirming when their recollection was lacking rather than seeking to fill in the gaps in their memory with what they believed had happened.

22. There were also other issues with the reliability of evidence from the Respondent where the witnesses in question could not speak to particular matters. For example, Mr Moffat could not say what documents were sent with the invitation to the Claimant to attend the disciplinary meeting because he did not prepare that correspondence. However, none of these issues were fundamental to the matters which the Tribunal had to determined and there was evidence on these points from which findings in fact could be made.

Findings in fact

23. The Tribunal made the following relevant findings in fact.

24. The Claimant was employed by the Respondent as a warehouse operator. He originally worked for the Respondent through an agency, Brightworks, and became directly employed by the Respondent from 2014. The Claimant worked at the Respondent's Dalmuir site.

25. The Claimant's job involved the manual handling of casks in and out of the warehouse at the Dalmuir site. This would entail moving casks full of spirits which would then be emptied into vats.

26. The Dalmuir site is a blending site operated by the Respondent where alcoholic spirits are stored and blended. It has a vatting capacity to hold 5 million litres of spirits and there are approximately 80-100 employees on site in normal circumstances although this can be increased when it is busy. There can also be contractors on site as well.

27. The site is located on a small island and has 27 warehouses, each holding 25,000 casks of spirits.

28. The site is governed by the Control of Major Accident and Hazards Regulations (COMAH) which regulate the storage of hazardous materials. Any site which contains more than 50000 tons of such material is classed as a top tier site and subject to more stringent rules. The Dalmuir site is a top tier COMAH site. The Respondent is required to put in place a plan for minimising risks arising from the

material stored on site which is audited by bodies such as the Health & Safety Executive. There are exercises carried out with the emergency services every three years which help devise the plan. COMAH also requires the Respondent to provide information to their neighbours (either other businesses or private homes) about the operations being carried out on the site and what steps are being taken to avoid risks to these neighbours.

29. The two main risks at the Dalmuir site are spillage of spirits (particularly if this was into nearby bodies of water) and fire resulting from the very high volume of flammable spirits stored on the site. For the purposes of this case, it was the risk of fire which was the relevant risk.

30. In order to comply with the COMAH regulations, and other health and safety legislation such as the Dangerous & Explosive Atmosphere Regulations, the Respondent has put into place a number of controls to reduce and minimise the risk of fire. These include ensuring that machinery is rated to meet the relevant safety standards and protections being in place where "hot work" (that is, work which involves using an ignition source) is being carried out.

31. The control put in place by the Respondent which is most relevant to this case was the ban on bringing potential ignition sources on to the site. This included lit cigarettes, lighters, matches and even mobile phones. Staff, contractors and visitors were prohibited from bringing such items on to the site. Smoking in prohibited areas where there is a safety risk is listed as an example of gross misconduct in the Respondent's disciplinary policy (p103).

32. Smoking was allowed on site in a designated, outdoor area up to January 2017. However, it was not allowed anywhere else on the site, either indoors or outdoors. The shelter where smoking was allowed was removed in January 2017 and, from that point onwards, there was no smoking allowed anywhere on the site. If staff wanted to smoke then they had to leave the site by passing through the gates and going into the car park where there was a smoking shelter available.

33. At the time of his dismissal, the Claimant had depression. This condition started in 2010 after the death of the Claimant's father and worsened over time.

34. The Claimant's depression affected his memory and concentration. He would often find that he would forget his car keys, mobile phone and other items, having to return to his house or workplace to get these. Similarly, he would forget items such as keys for doors and vans in the workplace. He would have to take several attempts to carry out tasks or instructions at home or in the workplace as he would lose concentration.

35. The Claimant also became withdrawn from others and would not want to interact with his family, colleagues and friends. He would eat his lunch in his car at work rather than in the canteen.

36. The Claimant had not raised his depression with the Respondent, either formally to management or through the Respondent's occupation health department which can be accessed directly by staff. Further, the Claimant had completed two health questionnaires during his employment, one in December 2014 (p236-238) and in December 2015 (p241-243). On both occasions, the Claimant answered questions regarding mental health issue and being on medication in the negative.

37. The Claimant had had no absences relating to his depression.

38. The Claimant had taken up smoking in recent years. He would smoke in his car rather than with others in the smoking shelter outside the gates of the Dalmuir site. The Claimant was aware that smoking was prohibited on the site and that ignition sources should not be brought on to the site. He was also aware that breaching these prohibitions could be considered to be gross misconduct.

39. On 7 March 2018, the Claimant went to his car to eat his lunch. He had gone to the canteen to get a cup of tea and a roll. On his way to his car, he realised that he had forgotten his keys. He returned to the canteen to look for these which had been found by one of the canteen workers. He recovered his car keys and went to his car where he ate his lunch and smoked a cigarette.

40. He left his car and returned to the site, passing through the security gates. He continued on into the site when he realised that he still had his cigarette in his hand. The Claimant described himself thinking "*Oh Christ, I still have* this" when

he became aware that he still had the cigarette. He stubbed this out with his fingers and discarded the butt in a pile of snow. He then went back to work.

41. The Claimant had been observed with the cigarette by an unnamed colleague who had filmed the Claimant on his mobile phone. Photographs of the discarded cigarette butt were also taken. The colleague reported the matter to management.

42. Later that same day, the Claimant was informed that Jimmy Brown, operations manager, wanted to see him. He was not told why. The Claimant went to Mr Brown's office and was told that it had been brought to Mr Brown's attention that the Claimant had been seen walking on site with a cigarette. The Claimant describes that he felt his heart sink at hearing this. He was informed by Mr Brown that this was a breach of health and safety and that Mr Brown had no choice but to suspend the Claimant on full pay pending further inquiry.

43. The Claimant was given a piece of paper to sign by Mr Brown. This is produced at p191 and is a handwritten note which states "*As he has been back into work he was just finishing a cigarette*" and is then signed by Mr Brown and the Claimant. The Claimant could not recall if this was prepared when he was in the office or if it was already been drafted. He described his mind as racing as he knew how potentially serious this was and that he could lose his job and livelihood. He did not read the paper and just signed it.

44. On his way out, he was met by Tony McIvor (TM), a trade union representative, who had become aware of the Claimant being called into the office to speak to Mr Brown. He asked the Claimant what he had signed.

45. The Respondent appointed James Moffat (JM), warehouse manager, to hear the disciplinary meeting. He was informed that the allegation was that the Claimant was smoking in a prohibited area. Diane Whitefield (DW), HR adviser, was also appointed and the two of them formed the disciplinary panel.

46. By letter dated 8 March 2018 (p202), the Claimant was invited to attend a disciplinary hearing on 13 March 2018. The letter set out the disciplinary charge as being one of gross misconduct arising from him smoking in a prohibited area which could result in dismissal. A copy of the statement (p191) signed by the

Claimant was provided. The letter makes reference to other documents being included but neither the Claimant nor JM could recall what these were although it is common ground that they did not include the witness statement from the person who reported the Claimant.

47. JM did have certain documents before him for the purposes of the disciplinary hearing; photographs of the entrance to the site, the pile of snow where the Claimant discarded the cigarette butt and the cigarette butt in the snow (pp186-189); an email from John Devine, operations manager, dated 11 January 2017 confirmed that smoking was no longer allowed anywhere on site (p190); the handwritten statement signed by the Claimant (p191); an incident report prepared by Mr Brown (p192); the witness statement from the person who reported the Claimant (p193) and the video taken by this person.

48. The disciplinary meeting was held on 13 March 2018 with the Claimant in attendance along with Mr McIvor as his representative. JM and DW held the meeting. A note of the meeting is produced at pp205-208 although it was not a verbatim record:-

    a. The hearing opened with DW setting out the terms of the hearing and confirming with the Claimant that he understood the seriousness of the issue. He confirmed that he had received the correspondence and understood that this was serious.

    b. The Claimant then set out his version of events explaining that he entered the site with the cigarette and only realised that he still had it after entering the site. He stubbed it out and put it in a pile of snow. He explained that he would normally smoke in his car and that this had been a lapse in concentration. He had just bought a new house and a new car and had a lot on his mind.

    c. The Claimant was asked if he understood the risk involved in bringing a lit cigarette on site and he confirmed that he did so. On replying to a question from JM, the Claimant confirmed that the biggest risk on the site were flames.

d. After a short adjournment, JM asked the Claimant to go through the incident again. The Claimant explained that he could not recall the precise details but that he had been smoking in his car, had walked through the gate and then realised he still had the cigarette butt. He put it out with his finger and threw it in the snow.

e. The Claimant was asked where he discarded the cigarette butt and JM drew a sketch of the gatehouse and loading area which the Claimant marked with a star. JM then stated that the company had information that the cigarette was discarded further into the site than indicated by the Claimant and that he was seen throwing the cigarette away further into the site and a butt was found at that location.

f. TM stated that it could have been anyone's butt and not the one discarded by the Claimant. In response, DW disclosed that there was a witness who stated that they saw the Claimant discard his cigarette but that this person wished to remain anonymous and that their statement was not included as the Claimant had admitted smoking.

g. JM and DW confirmed that they would ask the witness if the statement could be released but that the witness would remain anonymous.

h. The hearing was then adjourned until 19 March 2018 to allow the witness statement to be provided.

49. By letter dated 14 March 2018 (p204), the Claimant was provided with a copy of the anonymised witness statement (p193) and photographs (pp186-189). It was also confirmed that the witness statement was supported by video evidence which would be made available to the Claimant if he wished to see it.

50. The disciplinary hearing resumed on 19 March 2018 with the same people in attendance. A note of the hearing was prepared (pp209-210), again this was not a verbatim record.

a. JM asked the Claimant if he wished to change his statement in light of the further information provided and the Claimant confirmed that he did not.

b. The video was shown to the Claimant and TM. The Claimant confirmed that it was him in the video and that he could not remember smoking the cigarette on site before discarding it but that the video suggested that he had.

c. The Claimant was asked about the video showing him in the "empty wood" area and not the gatehouse as he had said previously. He replied that he was sure it was the gatehouse.

d. The Claimant confirmed his position that he had forgot that he still had the cigarette when he went back on site.

e. TM raised the fact that smoking had previously been allowed on site until a year ago.

51. A decision was not made at the hearing. JM and DW adjourned to consider the case. A decision to dismiss was reached and this was confirmed to the Claimant by letter dated 22 March 2018 (pp213-215). The Claimant was dismissed without notice from the date of the letter. The letter sets out the following reasons for the decision:-

a. The Claimant was found to have brought a lit cigarette on to the Dalmuir site which he smoked and discarded on a pile of snow. Smoking is prohibited anywhere on the site which is a top tier COMAH site. The Claimant was, therefore, found to be guilty of smoking in a prohibited area which was a breach of safety rules. This was considered to be gross misconduct.

b. The Claimant's version of events was set out; he had forgotten that he still had the lit cigarette and did not realise that he was on the site. When he did realise, he nipped the end of the cigarette and discarded it in a pile of snow. It was said by him that this was a lapse in concentration.

c. It had been concluded that the Claimant knew the risks in bringing an ignition source on site and had committed a serious and wilful breach of safety rules.

d. It had been noted that the Claimant had presented mitigating factors; he claimed that there was a lapse in concentration and that he extinguished the cigarette as soon as he realised that he still had it.

e. The letter noted that the Claimant had to perform a number of actions in bringing the cigarette on to the site; he had to walk past the "no smoking" signs on the gates and then walk further into the site. It was not considered that this was a simply lapse of concentration. Further, the panel had considered that the Claimant could not forget he had the cigarette whilst also being aware of the safety risks involved.

f. He had accepted that the video showed him smoking on site and he did not deny doing so. The video evidence also contradicted the Claimant's version of events that he had discarded the cigarette in the gatehouse area and showed that he was further into the site.

g. The panel did not believe his account of events in light of what the video evidence showed.

h. Given what the panel considered to be the seriousness of the situation, they did not consider that action short of dismissal was appropriate.

52. JM, in particular, did not consider that he could trust that this incident would not be repeated if the Claimant was given a lesser sanction. The risk of fire was a major hazard for the Respondent, its employees and neighbours. He considered that it would send out the wrong message and it would be taken as a precedent that smoking on site would be tolerated. This could lead to a further incident which may have more serious consequences.

53. The Claimant appealed the decision to dismiss him by way of a letter dated 28 March 2018 (pp216-217). The letter was prepared and sent by TM. It was accompanied by a "supporting statement". The grounds of appeal were:-

a. The decision take was excessively punitive and unfair.

b. No consideration was taken of the view or contribution by the Claimant and his representative.

c. Covert video evidence should not have been used as it was taken without authorisation in breach of the Data Protection Act.

d. The taking of the video was in breach of company policy as mobile phones are to be kept in lockers.

e. It was questioned why the anonymous witness (who was described as "hostile") had not challenged the Claimant about smoking when it was said that the witness had seen the Claimant smoking previously.

f. The Claimant had an underlying health condition, depression and anxiety, "*which is within the scope of Equality Act 2010*".

g. The Claimant had 18 years' service with a clean disciplinary record.

h. The decision to dismiss had had a devastating effect on the Claimant and his family.

i. The Claimant reiterated his full and sincere apology for the incident.

j. He enjoyed working for the company.

k. The dismissal is having a serious effect on his mental health.

l. He has suffered from depression and anxiety for a few years and has been taking antidepressants.

54. The appeal was acknowledged by letter wrongly dated 8 March 2018 (p218) and an appeal hearing to be heard by Robert Muir (RM), HR Manager, and Brian McAulay (BM), Senior Bulk Operations Manager, was arranged for 23 April 2018.

55. The appeal was heard on 23 April 2018 by RM and BM. The Claimant was present along with TM and a further trade union officer, Keir Greenaway (KG).

56. A note of the appeal hearing was produced at pp220-222. The appeal proceeded by way of addressing each of the points raised in the appeal letter:-

a. TM raised an issue at the outset that JM had made reference during the disciplinary hearing to legal advice being taken but that this was not

included in the note of the hearing. It was agreed that this would be addressed at the end of the appeal hearing.

b. The first issue discussed was the use of the video evidence and the fact that the identity of the witness was not known so could not be questioned. RM outlined that this was not set up as CCTV or covert surveillance but, rather, an employee recording what they believe to be an unsafe act. He went on to indicate that there was a level of protection given to whistle blowing.

c. In relation to the issue of the witness using a mobile phone in an area where this is prohibited, RM indicated that there is a difference between a mobile phone and a lit cigarette.

d. Turning to the issue of the Claimant's health, RM asked the Claimant is he was happy for this to be discussed and the Claimant indicated that he was.

e. RM asked why this issue had not been raised during the investigation or in any occupational health reports. The Claimant explained that he was under stress and only recently started smoking again. He had moved flat and had a lot on his mind. He lost his father 8 years previously and his doctor had put him on mild anti-depressants for the last three years.

f. He was asked by BM if he had reported this to the company or been under occupational health review. The Claimant replied no to both queries.

g. BM asked what point was being made in relation to this issue and KG replied that the Claimant was trying to explain that he was dealing with things now. He was having bereavement counselling and stopping smoking.

h. TM then raised the issue that smoking was allowed on site until last year and the appeal moved on to a discussion about this change and whether or not the Claimant knew that smoking was prohibited in the area where he had been.

i. KG confirmed that this was a case where the Claimant had absent-mindedly brought a cigarette on site rather than having a "*crafty fag*" where he should not be smoking.

j. BM raised an issue about what message would be sent out to other staff if the Claimant's dismissal was overturned.

57. The appeal was not decided on the day of the hearing and was communicated to the Claimant by letter dated 1 May 2018 (pp223-225). The appeal was not upheld for the following reasons:-

a. The panel had not agreed that the decision to dismiss was excessively punitive. It was noted that the Claimant brought a lit cigarette on site in circumstances where this was prohibited. The panel considered that the COMAH policy was the most seriously regarded policy. Such action was considered to be gross misconduct and the normal sanction was dismissal. The panel considered that there were no mitigating circumstances which would have led to something other than dismissal.

b. It was not considered that there was anything unfair in the use of the video evidence provided to the Respondent or the witness being anonymous.

c. The letter expressed sympathy for the Claimant's health conditions but it was considered the company could not have provided the Claimant with occupation health or other support because they were not aware of his condition at the time of the offence or his dismissal.

d. The Claimant's service had been taken into account but his actions were considered to be gross misconduct for which dismissal is the normal course of action even on a first offence.

e. Health and safety was of utmost importance to the panel and this was the first breach of this nature that had occurred. There was a concern by RM and BM that they could set a precedent that it was considered okay to do what the Claimant had done and that staff could get away

with it. They considered that it would need exceptional mitigating circumstances.

Respondent's submissions

58. The Respondent's agent produced written submissions and supplemented these orally.

59. Ms Wright set out the findings in fact from the decision issued previously on the issue of disability status which the Respondent intended to rely on and the findings in fact which she invited the Tribunal to make from the evidence heard at the present hearing.

60. It was submitted that there was not any dispute that the Claimant had been dismissed because he was smoking and had a lit cigarette on an upper tier COMAH site. This is listed as an example of gross misconduct in the Respondent's disciplinary policy. It was not alleged or put to the Respondent's witnesses that the Claimant was dismissed for any reason other than conduct.

61. In terms of procedural fairness, Ms Wright submitted that the Respondent had carried out a fair process in terms of its own disciplinary policy and the ACAS Code of Practice. In particular, she made reference to the following:-

    a. The investigation was proportionate to the allegation.

    b. The Claimant and his trade union representatives did not make any complaint about the process followed at his appeal.

    c. The Claimant was warned that dismissal could be the result of the disciplinary.

    d. Every opportunity had been given to the Claimant to give his version of events.

    e. There was no indication that the Claimant did not understand the seriousness of the issue.

    f. The Claimant had the right of appeal.

62. Ms Wright made reference to the well-known case of *British Home Stores v Burchell* and made the following submissions in relation to the test set out in that case:-

    a. There was clear evidence from Mr Moffat that he did believe that the Claimant had brought a lit cigarette on to the Dalmuir site and that he believed this to amount to gross misconduct.

    b. Mr Moffat had reasonable grounds to believe this given the evidence which he had before him when making his decision. In particular he had video footage of the Claimant's actions and the Claimant's own admission that he had brought a lit cigarette on to the site.

    c. There had been a reasonable investigation. Reference was made to the case of *Ilea v Gravett* [1988] IRLR 497. Ms Wright also relied on *Royal Society for the Protection of Birds v Croucher* [1984] IRLR 425 for the proposition that an employer will not have to conduct an investigation where the employee admits the misconduct.

    d. Ms Wright drew attention to the steps taken by the Respondent to investigate the allegation and noted that no issue was taken with the sufficiency of the investigation by the Claimant or his trade union representatives at the disciplinary or appeal hearings.

    e. In light of all of this, it was submitted that the *Burchell* test was satisfied.

63. Turning to the question of whether dismissal was fair and reasonable in all the circumstances, Ms Wright drew attention to the case of *Iceland Frozen Foods v Jones* and the need for the Tribunal to avoid substituting its own decision.

64. It was submitted that, taking account of the following factors, the decision to dismiss was within the band of reasonable responses:-

    a. Smoking in a prohibited area is given as an example of gross misconduct in the Respondent's own disciplinary policy where it is also said that such misconduct will normally result in dismissal.

b. The Respondent's witnesses had all explained the significance of the Claimant's actions.

c. In particular, this was a serious breach of health and safety and had to be taken seriously by the Respondent.

d. The Respondent's witnesses also explained that they did not take such decisions lightly but had to take account of the severity of the risk created by the Claimant.

e. The Claimant had understood the severity of the allegations and the potential consequences.

65. Turning to the disability discrimination claim, Ms Wright addressed the issue of the Respondent's knowledge first. She referred to the cases of *A Ltd v Z and Sullivan v Bury Street Capital Ltd*.

66. It was submitted that the following matters established that the Respondent did not know and could not reasonably be expected to know that the Claimant was disabled:-

a. The first mention of the Claimant's depression was his appeal letter.

b. The Claimant had not made any previous disclosure to the employer regarding his depression; there was nothing mentioned in his health questionnaires and he had not referred himself to occupational health,

c. He had no absence due to his depression.

d. Very little had been said about his depression at the appeal hearing. He had been asked about it and explained that he had been put on mild anti-depressants and was dealing with things.

e. The Claimant had not said that his actions had been in consequence of his disability and there was no attempt to link these made during the appeal.

f. Mr Muir had given evidence that there were no “red flags” which would have prompted him to investigate further and also gave evidence as to what he considered would be a red flag.

67. In relation to the issue of whether the Claimant was treated unfavourably due to something arising from his disability, it was understood that the “something” was his lapse in concentration on the day causing him to bring the lit cigarette on site. It was submitted that there was very limited evidence of this.

68. Reference was made to the report of Dr Wylie at pp297-298 and it was submitted that Dr Wylie was being asked a very narrow question at this part of his report which does not take account of the fact that the Claimant had to go through a turnstile and walk a distance on the site. Further, he was saying that it was “*reasonably possible*” that the Claimant’s lapse was caused by his depression and this did not afford a significant degree of certainty as to the connection between the disability and the misconduct.

69. If the Tribunal did find that there was knowledge and sufficient causation then it was submitted that there was objective justification.

70. The Respondent had a legitimate aim in complying with COMAH and showing compliance with those Regulations.

71. Reference was made to *Homer v Chief Constable of West Yorkshire Police* [2015] UKSC 15.

72. It was submitted that the Respondent’s actions were in pursuit of a legitimate aim:-

a. There was evidence of the application of COMAH and the risks it sought to avoid to employees, the wider community and the environment. Specifically, the catastrophic consequences of a fire at the site were explained in evidence and the risk of this which arose from having an ignition source on site.

b. Smoking had never been permissible at the area of the site where the Claimant had been even when there had been designated smoking areas on site.

c. The Respondent is answerable to a number of regulatory authorities in relation to compliance with COMAH. The implications for the Respondent if they were found not to be in compliances are severe.

d. There were also financial implications.

73. Ms Wright went on to submit that dismissal was a proportionate means of achieving its aims. The Respondent could not afford to take a relaxed approach to breaches of this nature given the potential consequences to a range of people, not just the Respondent but also its employees and the public. There was a real concern that a lesser sanction would be considered as precedent given the trade union presence at the site. Although no damage had occurred this time, it could not be said that this would not recur if employees felt that such a breach would not be punished at the highest level.

74. In rebuttal, Ms Wright submitted that she was not inviting the Tribunal to make a quantum leap in relation to the "luck" involved in there being no consequences of the Claimant's actions given the evidence heard about the risks involved.

75. She also pointed out that there was evidence of the quantification of risk involved in the area where the Claimant had been smoking.

76. In regard to the failure to provide the witness statement and video ahead of the first disciplinary hearing, she submitted that this had not been taken as an issue at the appeal and it was accepted by the Claimant that he had all the documents by the time the decision was made.

Claimant's submissions

77. The Claimant's agent also produced written submissions and supplemented these orally.

78. Mr Hay set out a revised list of issues and then went on to set out what he considered was the relevant law both in relation to the unfair dismissal and disability discrimination claim. He set out a number of propositions relating to both the unfair dismissal and disability discrimination claims and the authority for those.

79. The Claimant did not dispute that the evidence in the case established a potentially fair reason for dismissal, namely conduct. It was accepted that this conduct was bringing a lit cigarette on site. It was also accepted that the Respondent had a genuine belief in this and that such belief was reasonable in so far as it related to the Claimant bringing the lit cigarette on site.

80. However, it was submitted that there was no reasonable grounds for any belief that the Claimant had actually been smoking the cigarette. This was a matter of the credibility and reliability of the video and witness statement which were tainted by the failure to disclose this before the disciplinary hearing.

81. As regards the reasonableness of the investigation, it was said that this fell short as it amounted to no more than a one sentence “statement” from the Claimant, a one-page report, the witness statement, two photographs and the video.

82. It was submitted by Mr Hay that the Respondent did not act reasonably in treating the Claimant’s conduct as sufficient to dismiss. He made reference to what he described as substantial procedural unfairness arising from the failure to disclose the information that the Respondent had in their possession (that is, the witness statement and video footage) before the first disciplinary hearing. It was submitted that this material was then used to “ambush” the Claimant at the hearing. Further, that this material was then used to undermine the Claimant’s credibility and challenge his account.

83. He went on to submit that there was further unfairness in the handling of the appeal in that potentially relevant and significant new evidence as to the Claimant’s mental health was not pursued.

84. It was accepted that ethanol is a highly flammable substance and so danger can arise. However, it was submitted that the Tribunal was not assisted by the Respondent’s labouring of catastrophic scenarios. It was submitted that the incident itself was not considered to be reportable and that the actual risk (that is, a cigarette snubbed out in snow, outdoors in cold weather) had not been quantified by the disciplinary panel.

85. It was submitted that the Respondent’s position on what warnings had been given was far from clear; there was no reference to a high tier COMAH site in the

list of gross misconduct and, at the date of that policy, smoking was allowed at Dalmuir. The email at p190 was not sent to all staff but relied on managers cascading it and, even then, did not state that smoking on site would be considered gross misconduct. The Claimant's contract did not describe smoking as amounting to gross misconduct in the same way as it did for other matters such as the Search Policy.

86. It was submitted that the Claimant did not understand the position to be clear although he did understand that smoking was prohibited due to the risk of fire.

87. Turning to the disability discrimination claim, it was accepted that the Respondent did not have actual knowledge as required by *Gallop* but that, by the appeal stage, they were put on enquiry. The appeal letter and statement both make reference to depression and anxiety, that the Claimant is being medicated and reference is made to the Equality Act 2010.

88. It had been the Claimant's case that bringing the cigarette on to site was a lapse in concentration, that he had been under stress, that he had a lot on his mind and that he had been put on anti-depressants three years ago.

89. It was submitted that this was more than enough to raise the issue of disability under the Equality Act that required more investigation and may be relevant to issues of culpability and mitigation. If the Respondent had investigated then there was no reason to suppose that this would not have disclosed the symptomology that is described in the report from Doctor Wylie produced to the Tribunal.

90. Mr Hay went on to submit that the Respondent had treated the Claimant unfavourably because of something arising from his disability. The unfavourable treatment was the Claimant's dismissal and the "something" was what the Respondent considered to be the wilful conduct of bringing a lit cigarette on site.

91. This was sufficiently connected to the Claimant's disability; the causal connection can involve several links in the chain and can be looser than in other areas of law. Mr Hay pointed to the descriptions of the symptomology of depression in Doctor Wylie's report and to the Claimant's own evidence about the effects on

his memory and concentration as supporting the connection between the Claimant's disability and his conduct.

92. It was accepted that the maintenance of site safety was capable of amounting to a legitimate aim. However, it was submitted that the Claimant's dismissal was disproportionate; there was no basis on which it could be argued that this aim could not have been achieved by a lesser sanction such as a warning. This would have shown that smoking was not tolerated and, in any event, a warning posted at the site could make it abundantly clear that smoking would not be allowed. It would not have created any binding precedent in future disciplinary cases.

Relevant Law

93. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

94. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of this claim, the relevant reason is conduct.

95. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

96. The test for whether a dismissal on the grounds of conduct (or misconduct) is set out in the well-known case of ***British Home Stores Ltd v Burchell*** [1978] IRLR 379.

97. The test effectively comprises 3 elements:-

    a. A genuine belief by the employer in the fact of the misconduct

    b. Reasonable grounds for that belief

    c. A reasonable investigation

98. It is important to note that, due to changes in the burden of proof since *Burchell*, the employer only has the burden of proving the first element as this falls within the scope of s98(1) with the second and third elements falling within the scope of s98(4).

99. In order for there to be a reasonable belief, especially where there is a dispute as to whether or not the employee committed the misconduct in question, the employer must have some form of objective evidence on which to base their conclusion.

100. Delay in carrying out an investigation is capable of rendering the dismissal unfair (on the basis that the investigation is then not reasonable) even with no evidence of actual prejudice cause by the delay (***RSPCA v Cruden*** [1986] IRLR 83 and ***A v B*** [2003] IRLR 405*, EAT*).

101. On the question of whether the investigation was reasonable, the case of ***Sainsbury's Supermarket v Hitt*** [2003] IRLR 30 is authority for the proposition that the band of reasonable responses test applies to conduct of the investigation.

102. If the Tribunal is satisfied that the requirements of *Burchell* are met then they still need to consider whether dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

103. Disability is one of the protected characteristics covered by the Equality Act 2010 and section 6 of the Act defines disability as a physical or mental condition which has long-term, substantial adverse effects on a person's day-to-day living activities.

104. The definition of discrimination arising from disability in the 2010 Act is as follows:-

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

105. These provisions do not stand on their own and any discrimination must be in the context of the provisions of the Act which makes it unlawful to discriminate in particular circumstances. The relevant provision in this case is:-

39 Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

(c) by dismissing B

106. The burden of proof in claims under the 2010 Act is set out in s136:-

136 Burden of proof

1) This section applies to any proceedings relating to a contravention of this Act.

2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

3) But subsection (2) does not apply if A shows that A did not contravene the provision.

107. The burden of proving the facts referred to in s136(2) lies with the claimant. If this subsection is satisfied, however, then the burden shifts to the respondent to satisfy subsection 3.

108. Guidance as to how to apply the test under s15 was given in *Pnaiser v NHS England [2016]* IRLR 170, EAT:-

a. *Was there unfavourable treatment and by whom?*

b. *What caused the treatment, or what was the reason for it?*

c. *Was the cause/reason 'something' arising in consequence of the claimant's disability?*

d. *This stage of the test involves an objective question and does not depend on the thought processes of the alleged discriminator.*

e. *The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.*

109. The case of *A Ltd v X* [2020] ICR 199 sets out guidance for Tribunals in assessing the employer's knowledge of disability:-

"In determining whether the employer had requisite knowledge for section 15(2)purposes, the following principles are uncontroversial between the parties in this appeal:

(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see York City Council v Grosset [2018] ICR 1492 CA at paragraph 39.

(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2) ; it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long- term effect, see Donelien v Liberata UK LtdUKEAT/0297/14 at paragraph 5, per Langstaff P, and also see Pnaiser v NHS England & Anor [2016] IRLR 170 EAT at paragraph 69 per Simler J.

(3) The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take

into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council [2017] ICR 610 , per His Honour Judge Richardson, citing J v DLA Piper UK LLP [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, " it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so] ", per Langstaff P in Donelien EAT at paragraph 31.

*(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the **Code** , which (relevantly) provides as follows:*

> *"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.*
>
> *5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."*

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628 ; SoS for Work and Pensions v Alam [2010] ICR 665).

(7) Reasonableness, for the purposes of section 15(2) , must entail a balance between the strictures of making enquiries, the likelihood of such enquiries

*yielding results and the dignity and privacy of the employee, as recognised by the **Code**."*

110. In terms of justification, the EAT in *MacCulloch v ICI* [2008] IRLR 846 set out four principles to be applied by the Tribunal. These have since been approved by the Court of Appeal in *Lockwood v DWP* [2013] IRLR 941:-

"(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].

(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."

Decision – Unfair Dismissal

111. The Tribunal will address each of the issues that arise for consideration in the context of the unfair dismissal claim in turn.

Was there a potentially fair reason for dismissal?

112. The Tribunal held that the Respondent had shown that they had dismissed the Claimant for reasons which would fall within "conduct" for the purposes of s98(1) ERA and that there was, therefore, a potentially fair reason for dismissal.

113. The Claimant had not sought to argue that the reason for his dismissal could not fall within the description of "conduct" and, indeed, Mr Hay on behalf of the Claimant accepted that there was a potentially fair reason. In any event, the Tribunal was of the view that the reason given by the employer clearly fell within that category of potentially fair reason.

114. The Tribunal considered that the conduct in question (and, therefore, the factual reason for dismissal) was bringing a lit cigarette on to the site. There was some debate in the disciplinary process as to whether or not the Claimant had actually smoked on site but the Tribunal considered this to be something of a red herring; it was clear from the evidence that simply having a lit cigarette was enough because of the risks which were involved in this.

115. In the Tribunal's view, it was important to be clear as to the actual reason as this was relevant to the other issues to be determined in the unfair dismissal as well as in the discrimination claim.

Did the respondent have a genuine belief in that the claimant had committed the misconduct in question?

116. Again, the Claimant did not seek to advance an argument that there was not a genuine belief by the Respondent or that there was some other reason for his dismissal with Mr Hay accepting that there was a genuine belief.

117. The Tribunal heard evidence from the decision-makers, Mr Moffat and Mr Muir, as to the reason why they decided to dismiss the Claimant and the Tribunal had no reason to doubt the reliability or credibility of their evidence on this point.

118. In these circumstances, there being no evidence to suggest some other reason for the Claimant's dismissal and, in fact, this being a case where the Claimant admitted that he had committed the conduct in question the Tribunal concluded that there was a genuine belief by the Respondent.

Had there been a reasonable investigation?

119. In assessing this issue, the Tribunal bore in mind that, as confirmed in the case of *Hitt r*eferred to above in the Respondent's submissions, the question is not whether the Tribunal would have carried out the investigation in another way but whether what was done by the Respondent was within the band of reasonable responses.

120. The Tribunal also bore in mind that this was a case where the Claimant admitted the conduct in question and so there was a relatively low hurdle for the Respondent to overcome in terms of investigating whether the Claimant did what he was alleged to have done. Once that admission was made then, in terms of this case, the only other matters that required investigation was the extent of the Claimant's knowledge of whether his actions were wrong and any issues of mitigation.

121. The Tribunal did consider that the "statement" taken by Mr Brown did not meet good industrial practice given that it was undated and was not the product of a discussion with the Claimant recording what he had said when questioned. However, the Tribunal did not consider that this was sufficient to render the investigation unreasonable given the other steps taken and the Claimant's admission.

122. It was quite clear to the Tribunal that the Respondent took steps to fully investigate the matter; the Respondent had obtained a witness statement and video in support of the allegation and the Claimant was given the opportunity to put forward any explanation or mitigation at the disciplinary and appeal hearings.

123. There was no evidence led by the Claimant or submissions made as to what further steps should and could have been taken by the Respondent. The Tribunal itself, while conscious of the need to avoid substitution of what it would have done, could identify no further steps that it would have been reasonable for

the Respondent to take. This was not a case, for example, where there were conflicting versions of events to which further witnesses could speak and provide evidence which supported one version or the other.

124. In these circumstances, the Tribunal considers that there had been a full and reasonable investigation into the alleged conduct by the Claimant.

Did the respondent have a reasonable belief?

125. In considering whether the Respondent held a reasonable belief that the Claimant had committed the misconduct in question, the Tribunal bore in mind that it was not a question of whether or not the Tribunal believed that he had done so.

126. The question for the Tribunal was whether there was objective evidence from which the Respondent could come to the view which they had. In this regard, the Tribunal noted that the facts of the case as they relate to the Claimant's actions were not significantly in dispute; there was no question (and the Claimant accepted) that he brought a lit cigarette on to the site. In these circumstances, the Tribunal has little difficulty in finding that the Respondent held a reasonable belief that the Claimant had done what he admitted to doing.

Was the dismissal procedurally fair?

127. The Tribunal has already addressed the conduct of the investigation above and, for the reasons set out previously as to why the investigation was reasonable, we have concluded that there was no procedural unfairness in that element of the process.

128. In relation to the broader process, the Tribunal notes that the Claimant was given the opportunity to put his case including any mitigation at both the disciplinary hearing and the appeal hearing. He was given the right to be accompanied on both occasions and took this opportunity, bringing trade union representatives to both hearings.

129. The Tribunal did consider that there was a procedural flaw at the point of the first date of the disciplinary hearing in that the Claimant had clearly not been provided with a copy of the witness statement and video in advance of the hearing.

Rather, this was sprung on him during the course of the hearing when there was a potential dispute of fact.

130. If Mr Moffat had proceeded to dismiss the Claimant at that point in time then the Tribunal would have considered that the dismissal was procedurally unfair. However, the defect in the procedure was cured by the disciplinary hearing being adjourned, the statement and video being provided and the hearing reconvened at a later date once the Claimant and his representatives had reviewed that evidence.

131. The fact of the witness statement being anonymised was not something which the Tribunal considered lead to any procedural flaw. The Claimant was provided with sufficient information to know what the statement said and this must be viewed in the context of the Claimant admitting the conduct.

132. The Tribunal did give significant thought to whether there was any procedural error at the appeal stage arising from the fact that the Respondent did not refer the Claimant to occupational health or take other steps to investigate the health condition which was raised in the appeal.

133. It is noted that the Respondent did ask the Claimant to explain the relevance of his health condition in the course of the appeal. The issue was raised in the appeal letter apropos of nothing in the sense that it was not being said to be the cause of the Claimant's conduct. The opportunity is given to raise this at the appeal hearing when the Claimant is expressly asked the relevance of this issue to the appeal. Nothing is said by the Claimant or on his behalf that suggests that this is the underlying cause of his actions or that this is some form of mitigation.

134. In these circumstances, there was nothing which alerted the Respondent to the need for further investigation. The Tribunal was surprised that such a large employer who had a significant occupational health department would not have taken steps to investigate further as a matter of good practice but it is also conscious that it is not for the Tribunal to substitute its own decision as to what it may have done. The question is whether the process followed by the Respondent is within the band of reasonable responses.

135. The Tribunal notes that the Respondent's own disciplinary procedure says that the appeal panel "may" conduct further investigations so it is not a requirement of the internal process.

136. In these circumstances, the Tribunal does not consider that, in light of what was said about the Claimant's medical condition at the appeal, it was unreasonable for the Respondent to not investigate the matter further.

137. Overall, the Respondent conducted what the Tribunal found to be a fair procedure, giving the Claimant every opportunity to answer the allegations and there was nothing in what had happened which the Tribunal considered to be unfair.

Was dismissal in the band of reasonable responses?

138. The Tribunal considered that this issue was the real crux of the unfair dismissal claim.

139. The Tribunal reminded itself that it was not a question of whether the Tribunal would have reached a different decision on the sanction to be applied but, rather, whether what the Respondent decided was something which fell within the band of reasonable responses to the misconduct that was established. No matter how much sympathy the Tribunal may have with the Claimant, it was not for the Tribunal to substitute its own decision.

140. It was quite clear from the evidence before the Tribunal that the Respondent takes issues around the COMAH Regulations and the safety issues at its sites very seriously.

141. Indeed, there was acceptance from the Claimant that this was a serious matter and that it did warrant some form of disciplinary action; it was his case that the sanction of dismissal was too harsh, not that no sanction should have been applied at all.

142. The Tribunal took the view that the Claimant clearly knew that bringing a lit cigarette on site was prohibited and that it could have serious consequences for him. There were signs at the entrance through which he had to pass which warned everyone that smoking was not allowed past that point. Further, the

Claimant's evidence of his reactions when he realised that he had the cigarette and when Mr Brown suspended him both indicate that he knew that the consequences could be severe; he described a sinking feeling when Mr Brown spoke to him and that he thought he would lose his job and livelihood.

143. The sanction has to be viewed in the context of the significance placed on the prohibition against bringing ignition sources on site given the potentially catastrophic consequences if these are breached. In this regard, the Tribunal does not consider that the fact that the Claimant's actions did not result in any actual damage to have any bearing on the sanction; it was pure luck that something serious did not take place. Similarly, the issue of the quantification of risk (that is, that the area where the incident took place is not as dangerous as other areas of the site) is not something which the Tribunal considered relevant given that there was still a risk in the area in question. Finally, the fact that, at one point in time, there had been a designated smoking area on site was not something which the Tribunal considered relevant as this had been removed some years ago when the risk it posed was re-evaluated and the Claimant knew the rules that applied at the time of the incident.

144. However, the fact of the rules and that they had been breached are not the end of the Tribunal's consideration and the Respondent has to apply its mind to the question of sanction. It was quite clear from the evidence that Mr Moffat had applied his mind to other sanctions but took the view that dismissal was the only option open to him.

145. The Tribunal did have a concern that, in relation to the appeal, the fact that this related to health and safety had weighed heavily on the Respondent; the evidence about Mr McAulay asking questions about what message it would send out if the decision was overturned and the evidence given by Mr Muir regarding his worry about setting what might be viewed as a precedent could both suggest that there was a reluctance to overturn the decision.

146. However, the Tribunal did not consider that a decision to dismiss in the circumstances of this case was one which was not within the band of reasonable responses. The Tribunal could not see any basis on which it could be said that a breach of such a fundamental rule of the business put in place to protect the

Respondent, its employees and members of the public from potentially catastrophic events was something for which dismissal was not within the band of reasonable responses taking account of all the factors addressed above.

Conclusion

147. In these circumstances, the Tribunal has determined that the Claimant's dismissal was not unfair, there being a potentially fair reason for dismissal which the Respondent was entitled to rely on having come to a genuine and reasonable belief, after a reasonable investigation, as to the claimant having committed the misconduct in question. Dismissal was clearly within the band of reasonable responses in all the circumstances of the case and there was no procedural unfairness.

Decision – Discrimination arising from disability

148. Again, the Tribunal will consider each of the issues for determination in turn.

Respondent's knowledge

149. The question for the Tribunal in terms of s15(2) of the 2010 Act is whether the Respondent has established that they either did not actually know or could not reasonably be expected to know that the Claimant was disabled. In approaching this question, the Tribunal took account of the guidance set out in *A Ltd v X* and the Code of Practice on Disability.

150. In particular, the Tribunal noted that it was not a question of whether the Respondent knew that there was any causal connection between the Claimant's disability and his conduct. Further, the Tribunal had to be satisfied that the Respondent did not have the necessary knowledge in relation to the three elements of the definition of disability.

151. The Tribunal considered that the Respondent had neither express nor constructive knowledge of the Claimant's disability at the point at which the decision to dismiss was made by Mr Moffat. The evidence heard by the Tribunal clearly demonstrated that no issue regarding the Claimant's health had been raised at all, either expressly or in a way in which it could be said that Mr Moffat could be reasonably expected to know that the Claimant was disabled.

152. However, that position had changed by the time of appeal. At that point, the Tribunal considered that the Respondent had actual knowledge of two of the three elements of the definition of disability; they knew that he had suffered an impediment to his mental health as his appeal letter and what was said at the appeal hearing expressly and unambiguously set out that he had depression; they also knew that the effects of this were long-term given that the Claimant had said that his doctor had been treating him for three years.

153. The Tribunal did not consider that the Respondent had actual knowledge of the third element, that is, that the Claimant's depression had a substantial adverse effect on his day-to-day activities. There was nothing said, either in the appeal letter or at the appeal, which expressly and unambiguously set out the effects of his depression on the Claimant.

154. It was, therefore, necessary for the Tribunal to consider whether the Respondent could be said to have constructive knowledge of the third element. In doing so, the Tribunal took account of the following factors:-

    a. The Claimant had had no absences related to his depression which would have indicated to the Respondent that it was affecting his ability to carry out tasks. This is not surprising given the symptoms which the Claimant had suffered.

    b. There was no information at all about his depression in the health questionnaires that the Claimant had completed during his employment.

    c. There was no detailed information provided in the appeal letter or at the appeal hearing about the effect of his depression on the Claimant.

    d. However, the appeal letter did assert that the Claimant was "*within the scope of the Equality Act 2010*". Implicit in that assertion is an assertion that the depression had a substantial effect on his living activities.

    e. Mr Muir did ask Occupational Health if there was anything he should be aware of regarding the Claimant in case he had self-referred.

    f. In the course of the appeal, the Claimant says he had been on "*mild*" anti-depressants.

g. The Claimant also explained that he was now receiving counselling including bereavement counselling.

155. The Tribunal also took into account the fact that the Respondent did not take steps to investigate further. The Tribunal has commented above that they were surprised that an employer with the size and resources of the Respondent did not do so and it would be in keeping with the Code of Practice. The Tribunal accepted the Claimant's evidence that he would have cooperated with any such investigations.

156. However, the Tribunal also notes that there is no duty on the Respondent to investigate and, in this case, the appeal hearing did not develop in a way which would have led the Respondent to consider that the issue of disability was fundamental to the case. At no point was an argument presented to the appeal panel, in clear terms, that the underlying cause of the Claimant's actions was his depression.

157. It is for the Respondent to discharge the burden of proof in relation to s15(2) of the 2010 Act and, in relation to whether there was constructive knowledge of the third element, the Tribunal is not persuaded that the Respondent has done so.

158. Although there was no express reference to the effects of the Claimant's depression during the disciplinary process which would mean there was no actual knowledge, there was information from which the Respondent could reasonably be expected to know the Claimant was disabled. In particular, the assertion that the Claimant was within the scope of the Equality Act must be read as saying that there were substantial effects. Further, the Respondent had information that the Claimant was receiving treatment for his depression which suggests that its effects were serious enough to require this.

159. In these circumstances, the Tribunal considers that the Respondent has not established that it could not be reasonably expected to know that the effects of the Claimant's depression were substantial.

160. The Tribunal, therefore, finds that the Respondent has not established the defence under s15(2) of the 2010 Act that they did not have the necessary knowledge that the Claimant was disabled.

Unfavourable treatment

161. The Tribunal finds that the Claimant's dismissal amounted to unfavourable treatment for the purposes of s15 of the 2010 Act. This was not an issue which was in dispute between the parties.

162. In this regard, the Tribunal held that "dismissal" included the whole decision-making process which culminated in the decision of the appeal panel.

"Something"

163. The next question for the Tribunal is to decide what was the "something" which caused the unfavourable treatment. In other words, what was the reason for the Claimant's dismissal?

164. The Tribunal has already addressed this question in the context of the unfair dismissal claim and held that the reason for dismissal was bringing a lit cigarette on to the site. The Tribunal sees no reason to come to any different conclusion in the context of the discrimination claim.

Arising from disability

165. The Tribunal then has to determine whether this "something" (that is, bringing a lit cigarette on to the site) arose from the Claimant's disability. In this regard, the Claimant's disability does not need to be the immediately proximate cause of his actions and there may be more than one link in the chain of causation so long as the actions and the disability are not too remote.

166. The question for the Tribunal is whether there is any evidence from which it can draw the inference that, on the balance of probabilities, the Claimant's actions arose from his disability.

167. The Tribunal took account of the medical evidence which was the subject of the agreed statement of facts. There were three matters which the Tribunal noted from the medical evidence. First, Mr Mitchell's report which begins at p264 states, at p265, that lapses of concentration are "*part of the presenting symptomology of depression and anxiety*". Second, the report from Dr Wylie which begins at p274 states, at p297, that depression can result in an impairment

in concentration and that this was a symptom which the Claimant recounts as experiencing. He goes on to opine, at p298, that it was "*reasonably possible*" that the Claimant could have forgotten that he was holding a cigarette when he came back on site. Third, nowhere in the medical evidence is it definitively said that the Claimant's disability did or did not cause him to forget he had the lit cigarette in his hand.

168. The Tribunal also heard evidence from the Claimant about the effects of his depression. As stated above, the Tribunal found the Claimant to be a credible and honest witness, it had no reason to question the reliability of his evidence about the effects of his depression and so accepted his evidence on this issue (which was not disputed by the Respondent) in full.

169. The Claimant described an adverse effect on his concentration and memory which had deteriorated over time. He would frequently find himself forgetting items such as his car keys and mobile phone. Indeed, on the day of the incident itself, the Claimant had had to return to the canteen to look for his car keys which he had left behind and which had been found by one of the canteen staff. He also described himself as losing concentration during tasks at work and having to make multiple attempts at these. For example, he would lose keys to vans which he had to empty or for doors which were kept locked.

170. The Tribunal also noted the findings made at the preliminary hearing on disability status as to the effects of the Claimant's disability.

171. From all of this evidence, the Tribunal drew the following inferences.

172. First, it found that the Claimant's actions were not wilful or deliberate and were caused by a lapse in concentration. The Respondent had not sought to argue that the Claimant's actions were deliberate but, even if they had, the Tribunal found it simply implausible to suggest that the Claimant would have done something which would have put his and his colleagues' lives at risk. There was certainly no evidence to suggest that the Claimant acted deliberately.

173. Second, based on the available medical evidence, it was possible for someone with the Claimant's condition to have lapses in concentration or memory of the types described by the Claimant. This, in effect, "opens the door" for a finding

that the Claimant's lapse of concentration on the day in question was caused by the effects of his disability. The question, then, is whether, on the facts of this case, the Claimant can walk through that door.

174. Third, based on the Claimant's evidence describing the effects of his disability, the Tribunal considered that it is more likely than not that his lapse of concentration on the day in question arose from his disability. The Claimant describes an increasingly deteriorating effect on his concentration and his memory with the time around the incident being when he was at his lowest ebb. On the day in question, he had already mislaid his car keys in the canteen. The Claimant's conduct on the day was out of character given that he had been smoking for several years at a time when smoking had to take place off site and there was no evidence that he had previously breached that rule (other than the very brief mention in the anonymous witness statement which had not been investigated further and on which the Tribunal placed no weight).

175. Fourth, the Tribunal did take account of the fact that the Claimant had to do more than simply walk on to the site with the lit cigarette and, rather, he had to go through a turnstile and then walked a distance on the site. However, the Tribunal did not consider that this took anything away from the fact that the Claimant had a lapse of concentration arising from his depression. As stated above, it has not been suggested that his actions were deliberate and lapses of concentration can last for varying periods.

176. In these circumstances, the Tribunal considers that, on the balance of probabilities, the Claimant's lapse of concentration on the day in question arose from his disability and given that this lapse led to him bringing a lit cigarette on to the site resulting in his dismissal, the Tribunal finds that there is a sufficient chain of causation to hold that the Claimant's dismissal was as a result of something arising from his disability.

177. The Tribunal, therefore, finds that the Claimant's dismissal, on the face of it, amounts to discrimination arising from disability contrary to ss15 and 39(2)(c) of the Equality Act 2010.

Objective Justification

178. Having found a *prima facie* case of discrimination, the Tribunal turns to the question of whether the Respondent has established that the Claimant's dismissal was objectively justified.

179. The first matter to consider is whether the Respondent has a legitimate aim. It was accepted by the Claimant that there was a legitimate aim which they expressed as maintaining site safety. The Respondent framed the legitimate aim as complying, and showing compliance, with the COMAH Regulations. The Tribunal did not consider that much turned on this as maintaining site safety was an inherent in complying with COMAH.

180. The Tribunal, therefore, has little difficulty in finding that the Respondent had the legitimate aim of complying, and showing compliance, with COMAH and thereby maintaining site safety.

181. Turning to the issue of whether the Claimant's dismissal was a proportionate means of achieving this aim, the Tribunal considered that it was beyond question that an alternative sanction such as a final written warning would have avoided the discriminatory effect on the Claimant.

182. However, it is not enough for the Tribunal just to say that an alternative sanction would have avoided the discrimination to the Claimant and it must consider whether it this would have also achieved the Respondent's aim.

183. In considering this, the Tribunal took account of the following matters:-

    a. There was a significant risk of damage to property and life in failing to comply with COMAH.

    b. The risk of fire is, along with spillage, the top risk at the Respondent's Dalmuir site.

    c. Taking action less than dismissal had the potential to create the impression among staff that breaches of COMAH would be tolerated or excused.

d. Any action less than dismissal could not give the Respondent the level of assurance that a similar event would **not** recur with the potential for more serious consequences.

184. Balancing these matters against the avoidance of the discriminatory effect to the Claimant, the Tribunal did not consider that the avoidance outweighed the other matters. In particular, the Tribunal considered that a lesser sanction would not have achieved the Respondent's aim as there was a real risk that it could undermine the efforts made to ensure compliance with COMAH.

185. In these circumstances, the Tribunal held that dismissal was a proportionate means of achieving the Respondent's aim in light of the risks that complying with COMAH sought to avoid. The claim for discrimination arising from disability was, therefore, dismissed.

P O'Donnell
Employment Judge

20 January 2021
Date of Judgment

Date sent to parties **29 January 2021**