EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111815/2019 (V)

Held via Cloud Video Platform (CVP) on 7 & 8 October 2020

Employment Judge M Sangster
Tribunal Member Taylor
Tribunal Member Coyle

Mr B Fitzsimmons — **Claimant**
In Person

Tesco Stores Limited — **Respondent**
Represented by:
Mr Bradley
Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that

- The claimant was unfairly dismissed and his dismissal amounted to discrimination arising from disability. The respondent is ordered to pay to the claimant the sum of **£15,613.72** by way of compensation.

- The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award. The prescribed element is **£14,993.64** and relates to the period from 23 June2019 to 12 October 2020 The monetary award exceeds the prescribed element by **£620.08**.

- The claimant's dismissal amounted to discrimination arising from disability. The respondent is ordered to pay the claimant the further sum of **£2,020.92** by way of compensation for injury to feelings.

- The remaining claims for discrimination arising from disability, failure to make reasonable adjustments and wrongful dismissal do not succeed and are dismissed.

REASONS

Introduction

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.

2. The claimant presented a complaint of unfair dismissal, wrongful dismissal, discrimination arising from disability and failure to make reasonable adjustments.

3. The respondent admitted the claimant was dismissed, but stated that the reason for dismissal was conduct, which is a potentially fair reason. The respondent maintained that they acted fairly and reasonably in treating misconduct as sufficient reason for dismissal. They denied wrongfully dismissing the claimant and that he had been subjected to disability discrimination.

4. The claimant gave evidence on his own behalf.

5. The respondent led evidence from three witnesses: Stacey Millar (**SM**), Dotcom Group Fulfilment Coach, Barry Duncan (**BD**), Store Manager, Renfrew and Paul McCarter (**PM**), Store Director for Glasgow, Ayrshire & Inverclyde.

6. Evidence in chief was taken by reference to witness statements, which had been exchanged in advance and were taken as read.

7. A joint set of productions was lodged, extending to 368 pages.

Issues to be determined

8. An agreed list of issues was included in the joint set of productions. It was clarified at the outset of the hearing that the claim of wrongful dismissal should be added to that list and, in relation to remedy, the claimant was no longer seeking reinstatement or re-engagement. The issues to be determined, were accordingly as follows:

Unfair dismissal

Fairness

a. Did the Respondent conduct a reasonable investigation?

b. Did the Respondent have reasonable grounds to believe that the Claimant was guilty of the misconduct?

c. Did the Respondent believe that he was guilty?

d. Was dismissal within the range of reasonable responses open to the Respondent?

e. Did the Respondent and the Claimant comply with the ACAS Code of Practice?

Remedy

f. What financial compensation is appropriate in all of the circumstances?

g. Should any compensation awarded be reduced in terms of ***Polkey v AE Dayton Services Ltd*** [1987] ICR 142 and, if so, what reduction is appropriate?

h. Should any compensation awarded be reduced on the grounds that the Claimant's actions caused or contributed to their dismissal and, if so, what reduction is appropriate?

i. Has the Claimant mitigated their loss?

j. Was the claimant wrongfully dismissed?

k. Discrimination - Disability

Discrimination arising from disability

l. Did the Respondent know/could the Respondent reasonably have been expected to know that the Claimant had a disability? If not, when ought the Respondent to have been aware of the Claimant's disability?

m. Was the Claimant treated unfavourably because of something arising as a consequence of their disability by ;

i. during an investigation meeting on 23 January 2019 the Respondent not having regard to the Claimant's well-being and failing to refer him to occupational health;

ii. continuing with an investigation on 23 May 2019 even though the Claimant had a sick line, not making allowance for toilet breaks, duties being changed by not being allowed to drive and instead placed on click and collect; and

iii. dismissing the Claimant for using his own toilet facilities?

n. If so, what was the reason for that treatment?

o. In treating the Claimant in that way what aim was the Respondent seeking to achieve?

p. Was that aim legitimate?

q. Was the treatment a proportionate means of achieving that aim or was there a less discriminatory way of achieving it?

Reasonable adjustments

r. Did the Respondent know/could the Respondent reasonably have been expected to know that the Claimant had a disability? If not, when ought the Respondent to have been aware of the Claimant's disability?

s. Did the Respondent apply a provision, condition or practice ("PCP"), namely a policy to not allow employees to take home the company vans or allow employees to use their own facilities?

t. If so, did that PCP place the Claimant at a substantial disadvantage in comparison with employees who were not disabled?

u. Did the Respondent make reasonable adjustments such as :

i. Making adjustments to ensure the Claimant was close to a toilet?

ii. Adjusting the Claimant's duties?

iii. Altering the Claimant's hours?

Findings in Fact

9. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

10. The claimant has COPD. This was diagnosed in 2009. This causes him to have persistent wheezing and coughing fits and periods of breathlessness. He is susceptible to chest infections as a result of his condition.

11. The claimant's employment with the respondent commenced on 4 November 2016. When the claimant commenced employment with the respondent, he was a Customer Delivery Assistant. His role involved making deliveries of shopping to customers. His job title was later changed to Customer Delivery Driver, but his duties remained unchanged.

12. All of the respondents delivery vans were fitted with tracking systems. These recorded the location of the van and the speed at which the vehicle was travelling every five minutes, or every mile, to ensure the vans were being driven safely and efficiently. Reports were generated from the tracking system by the management team on a weekly basis. The performance report was used to measure performance and support with coaching and covered issues such as harsh braking or cornering and speeding. Drivers were aware that this was done as the performance reports were placed on a wall in the respondent's premises, referencing the driver number rather than name, so that the drivers could see how they were doing. If issues/problems were identified, the reports were used for 1:1 coaching. Line mangers also used the tracking system to check, on a weekly basis, whether any unscheduled stops were made by drivers. If this demonstrated that unscheduled stops had been made, this would be raised with the driver.

13. On 7 & 9 November 2016 the claimant received training relevant to his role. This involved training on 26 separate modules. Modules 1-16 were covered on 7 November 2016 and modules 17-26 on 9 November 2016. The modules were conducted by the trainer reading from a pack of training documents. In modules 8 and 18 the claimant was informed, among other things, that he should not take his van home during or at the end of his shift. No reference materials were provided to the claimant to take away from the training.

14. Due to a delay in receipt of the claimant's criminal record check, he did not commence driving duties until the end of December 2016.

15. The respondent's disciplinary policy provides examples of gross misconduct, which includes issues such as theft, fraud, assault. It also provides as an example *'deliberate disregard/abuse of Tesco procedures e.g. misuse of your Colleague Clubcard'*. Three further examples were provided which were stated to be solely applicable to drivers, namely '*Driving at more than 20 miles per hour over the speed limit; Smoking in a Dotcom van; and Refusal to take part in an alcohol or drugs test.*'

16. In April 2018 consulted his doctor about urinary issues. He was finding urgency and frequency of needing to urinate increasing to the point of having incontinence issues at home and work. He was diagnosed with a urinary tract infection and enlarged prostate. Whilst two different courses of medication have been tried since that point, the claimant continues to experience these symptoms. He manages these as best he can, but continues to experience episodes of incontinence.

17. The respondent was aware that the claimant was suffering from prostate issues, but was not aware that he experienced episodes of incontinence. The claimant did not feel comfortable discussing this with his line manager, who he did not get on well with and had little confidence in.

18. In around April 2018, the claimant required the use of a toilet and went to the nearest Tesco Store in Kilmarnock. He went instore and made his way to the staff toilet, as the public toilets were closed. On his way he was stopped by the duty manager who asked him what he was doing. The duty manager told the

claimant that, as it was not his store, he should sign in at the customer service desk and be escorted to the staff toilet. Given the claimant's medical condition, waiting at the customer service desk to then be escorted to a toilet was not viable. He accordingly did not use facilities in other stores from that point onwards, where this could be avoided.

19. Instead, in periods between deliveries, when he was in an area local to his home, he would return to his home and use the toilet facilities there, to try to avoid the requirement to use public facilities. Once he had done so, he would sit in the van until it was time to travel to the next customer. The reason he sat in the van was that the engine needed to be kept on to keep the temperature at an acceptable level for food safety reasons. If he had had an episode of incontinence he would also return home to wash and change his clothes and, if required, clean his van. He would then wait in the van until it was time to go to the next customer. He did not inform his employer that he was doing so as he understood that this was accepted practice and that other drivers did this also. Indeed, he had been doing so since he started in the role. The times when he returned home were times in between deliveries when he would otherwise be 'parked up' at the side of the road in any event, waiting for the allocated delivery time slot in which to deliver goods to the next customer. The claimant always delivered to customers within the appropriate delivery time slots.

20. At no point did the claimant's line manager raise any concerns with the claimant about him taking his vehicle home. It would have been clear to the claimant's line manager that he was doing so from the tracking reports, which were reviewed on a weekly basis. The claimant's line manager should have raised this with the claimant, but failed to do so.

21. In February 2019 the claimant started to take champix, medication to help him stop smoking. He required to stop smoking due to his COPD. This caused the claimant to have bouts of diarrhoea and, on occasion, episodes of bowel incontinence.

22. On 27 March 2019, at 8am, the claimant was provided with a Driver Handbook by the respondent. He was not given any information about what was contained in this. He was asked to sign for this, which he did. The declaration which he

signed confirmed that he had read the Handbook, which he had not. He was due to leave at 8.15am and had van checks to complete prior to doing so. He took the Handbook and placed it in his van, in case he needed to refer to it at any point. He did not read it.

23. On page 20 of the Driver Handbook, it was stated that *'As the Tesco.com van belongs to the company, you are not authorised to take it home at any time.'* The Driver Handbook did not state that it was gross misconduct to take the van home. In relation to a positive alcohol tests greater than 22mg for Scottish colleagues, it was expressly stated that this would be treated as gross misconduct and individuals may be suspended while this was investigated. Similarly, in relation to positive drugs tests, it was expressly stated that this would be treated as gross misconduct and individuals may be suspended while this was investigated.

24. In May 2019, SM became the Dotcom Driving Manager and the claimant's line manager. The individual who had previously been the claimant's line manager moved to a driver role.

25. SM conducted a stress risk assessment with the claimant on 16 May 2019, as he had described feeling stressed. During the risk assessment he queried whether his recent selection for a drugs test had been random or whether it was triggered by his driving performance. SM decided to look at his driving record given the concerns he had raised. On doing so, she noticed that there were a number of unscheduled stops recorded at two particular addresses. On checking, she discovered that one of these was the claimant's home address. SM ran a report for the previous three months and found that the claimant had stopped at his home address 34 times for a total of 795 minutes and that he stopped at the other address 6 times for a total of 142 minutes. She decided to conduct a formal investigation to fact find what happened as a result.

26. SM wrote to the claimant inviting him to an investigation meeting on 23 May 2019. She indicated that the purpose of the meeting was to discuss allegations of *'deliberate disregard and abuse of Tesco procedures through the unauthorised use of tesco.com vans. Namely, unscheduled stops made during your paid working hours at your home address…(34 occasions amounting to*

795 minutes between 24 February 2019 and the 20th of May 2019) and a further address of Milton View, Kilmarnock (6 separate occasions amounting to 142 minutes between 24 February 2019 and 20 May 2019)'. The claimant was advised he could be accompanied by a colleague or authorised trade union representative.

27. The claimant attended the investigation meeting on 23 May 2019. He was not accompanied by a trade union representative but indicated that he would prefer to be. The meeting was adjourned until the trade union representative could attend later that day. The claimant also advised that he had a medical certificate satisfying him as unfit to work. Notwithstanding this, the claimant indicated that he wished to continue with the meeting. The claimant was asked about the unscheduled stops at his home address from February 2019 to date. He explained the impact his medication and prostate issues were having on him, particularly urinary and bowel incontinence and that he was going home to use the toilet and, on occasion when required to wash and change his clothes, as well as clean the van. He indicated he hadn't told anybody about doing this as it was embarrassing. He stated that the other address he had unscheduled stops at was a church with toilet facilities which he could use and it was a quiet area, so he could park up there. He explained the difficulties he had experienced using toilet facilities in one of the local Tesco stores and that, given his medical condition, he didn't have time to wait at the customer service desk and then be escorted to a toilet. He indicated that he had asked his previous manager for a referral to occupational health, but this had never been actioned. SM explained that further investigation would be undertaken and then a further meeting would be held. The claimant indicated that he was anxious to get back to work. Given the details which the claimant had disclosed during the investigation meeting in relation to his health, SM indicated that, if the claimant did return to work, it would need to be on amended duties to accommodate his condition. She discussed with the claimant the possibility of him working in the store for a temporary period. The claimant was adamant that he did not wish to work in the store. He agreed however to work in the click and collect pod which was located in the store car park.

28. SM then conducted interviews with four other drivers and two individuals employed as Dotcom Team Support to ascertain their understanding of the respondent's policy in relation to park ups and toilet breaks. Most were able to articulate that park up should not be in a customer's street but should be in a suitable place in the local area and that drivers should use toilet facilities in other Tesco stores, or other supermarkets. The drivers were also asked if they ever took their vans home. Three drivers indicated that they didn't. One indicated that he had, on occasion, gone home to use the toilet when in the local area, but didn't do so regularly. One of the individuals employed Dotcom Team Support indicated that drivers did phone him, on occasion, to say they were close to their house and ask if they could pop in to use the toilet. He indicated however that drivers would always phone in and let them know prior to doing so. SM also interviewed the claimant's former line manager. Notes, reflecting what was discussed at each meeting, were taken during each discussion and, at the conclusion of each meeting, the individuals were asked to review the notes and sign them to confirm they were accurate.

29. SM then reviewed the tracking data for the claimant for a longer period and ascertained that the claimant had been making unscheduled stops at both addresses throughout his employment with the respondent.

30. On 30 May 2019, SM held a further investigation meeting with the claimant. He was accompanied again by his trade union representative. His medical conditions were discussed in further detail and it was put to him that he had been going home since he started employment, not just since April 2018, when his prostate issues started. He accepted that he had, but indicated that this was in times when he was required to 'park up' and he was in the local area. SM advised the claimant at the conclusion of the meeting that she felt there was a disciplinary case to answer and that she was recommending that a disciplinary hearing be held.

31. The claimant attended an appointment with occupational health on 31 May 2019. They provided a report that day. The occupational health report confirmed the claimant's medical conditions and the urinary and bowel incontinence issues he was experiencing. The report confirmed that the

claimant was not currently fit to undertake a driving role and that he should remain on his current adjusted duties, with ease of access to toilet facilities, whilst he experiences side-effects of medication and undergoes treatment for his prostate over the next six months. It was reported that the claimant had found the fact that he was not currently driving more helpful in managing his symptoms.

32. By letter dated 4 June 2019, the claimant was invited to a disciplinary hearing on 19 June 2019. He was informed that the purpose of the disciplinary hearing was to discuss an allegation of *'Deliberate disregard and abuse of Tesco procedures through the unauthorised use of Tesco.com vans. Namely, unscheduled stops made during your paid working hours at your home address… and a further address of Milton View, Kilmarnock.*'

33. He was informed of his right to be accompanied and that the hearing may result in disciplinary action being taken against him, up to and including his dismissal from the company.

34. Appended to the letter were the investigation report, the witness statements and the unscheduled stops report.

35. The disciplinary hearing ultimately took place on 23 June 2019, as the claimant's trade union representative was unavailable on 19 June 2019. It was conducted by BD.

36. At the disciplinary hearing, the claimant explained his medical conditions and the urinary and bowel incontinence episodes he was experiencing as a result. Reference was made to the occupational health report, which the respondent now had, providing confirmation of this. The claimant highlighted that the time that he went home was time when he would otherwise have been parked up, doing nothing, and that he was never late for any deliveries. The claimant questioned why it had not been picked up by his manager if he was not in fact allowed to return home during times he would otherwise have been parked up. The claimant stated that, whilst he had been doing this since his employment started, more recently it was so that he could use the toilet and, on occasion to clean himself and the van if he had had an episode of incontinence. He

explained that he would use his toilet facilities and then sit in the van until it was time to travel to the next customer. The reason he sat in the van was that the engine needed to be kept on to keep the temperature at an acceptable level for food safety reasons.

37. BD adjourned the hearing to deliberate. He reconvened the meeting 55 minutes later and informed the claimant that he had found the evidence/process threshold had been met in relation to the allegation and it was his belief that this was an act of gross misconduct, that the trust and confidence between the claimant and his employer had been irreparably damaged and he would be summarily dismissed.

38. A letter was sent to the claimant on 23 June 2019, confirming his summary dismissal for gross misconduct. The letter stated that the reasons for this were

'1. Unable to provide a satisfactory explanation for the abuse and disregard of Tesco procedures, namely the unauthorised misuse of tesco.com vans over an extended period as described in the dot com driving handbook (page 20).

2. Considering the mitigation of Billy's recent health problems since February, I acknowledge that there would have been an increase in the amount of times Billy required to go to the toilet but it is my belief that after being made aware the store took supportive actions. When I compare the number of unscheduled stops prior and after Billy's new medication, it is my belief that there has still been a complete disregard and abuse of Tesco policies at a level I have not seen in my career.'

The letter also informed the claimant of his right to appeal.

39. On 1 July 2019, the claimant confirmed that he wished to appeal against the decision to terminate his employment. He indicated as follows

a. That the driver handbook, referred to in the letter of dismissal, had not been given to him until March 2019.

b. That he was not aware that taking his van home, so he could use the toilet, could amount to gross misconduct or that he was doing anything

wrong. Other drivers did so also and there were admissions of this in the witness statements provided. He was being treated differently to his colleagues by his actions being treated as gross misconduct.

c. That he was not given any allowance for his medical problems and there was insufficient consideration of his explanation of the circumstances.

d. All of the times of the unscheduled stops to use his home toilet were during park up times, where his delivery schedule had him sitting idle close to his home address. There was nowhere else he was meant to be and there was no impact on customer delivery times.

40. The appeal hearing took place on 2 August 2019. It was chaired by PM. PM was accompanied by another member of staff who took handwritten notes during the meeting. The claimant was accompanied by his trade union representative.

41. At the conclusion of the meeting, the claimant reviewed the handwritten notes and signed them, confirming they were accurate.

42. PM did not uphold the claimant's appeal and confirmed in a letter to the claimant dated 5 August 2019. The letter stated:

'Having reviewed all of the disciplinary notes and completed the appeal hearing, I believe that the decision to dismiss you was fair and reasonable based on the following reasons:

1. You were fully trained on the Bronze for Customer Delivery Assistants/Drivers on 07/11/16 and 09/11/16. Bronze Module 18 clearly states 'you should never take a Tesco.com van home, either during or at the end of shift'

2. Barry Duncan, dismissing manager took your health issues into consideration.

3. I don't believe it is common practice in the department to take tesco.com vans home.

There is no further right of appeal from my decision.'

43. The claimant was paid every 4 weeks. In the last 12 weeks prior to the termination of his employment (pay dates 4 May and 1 & 29 June 2019) he earned, on average, £275.59 per week, gross. The respondents contributed 4% of his basic pay to his pension, averaging £11.05 per week. The claimant was aged 44 at the time his employment with the respondent terminated.

44. The claimant has not secured alternative employment since the termination of his employment with the respondent. He has received universal credit since April 2020, but has received no other benefits.

Submissions

Respondent's submissions

45. Mr Bradley, for the respondent, provided a written submission which was supplemented by an oral submission. He referred to s98 ERA and the Burchell tests, which he stated were satisfied. The claimant admitted his conduct. His conduct amounted to gross misconduct. It was within the range of reasonable responses for the respondent to dismiss the claimant in the circumstances and a fair procedure was followed.

46. The claimant was not treated unfavourably because of episodes of incontinence. He was taking the van home before these issues arose. If dismissal of the claimant amounted to discrimination arising from a disability this was objectively justified. There is no evidence to support the remaining assertions of discrimination arising from disability.

47. The duty to make reasonable adjustments did not arise until 23 May 2019, as the respondent did not know that the claimant was likely to be placed at a substantial disadvantage prior to then. At the point the duty arose, adjustments were made to temporarily change the claimant's duties.

48. The claimant was not wrongfully dismissed.

Claimant's submissions

49. The claimant gave a very brief submission, summarising the evidence he had given.

Relevant Law

Unfair Dismissal

50. S94 ERA provides that an employee has the right not to be unfairly dismissed.

51. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that it is a potentially fair reason falling within s98(1) or (2) ERA.

52. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (having regard to the reason shown by the employer):-

> *"(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

53. Where an employee has been dismissed for misconduct, ***British Home Stores v Burchell*** [1978] IRLR 379, sets out the questions to be addressed by the Tribunal when considering reasonableness as follows:

i. whether the respondent genuinely believed the individual to be guilty of misconduct;

ii. whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and

iii. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

54. The Tribunal will then require to consider whether the decision to dismiss fell within the range of reasonable responses available to a reasonable employer in the circumstances. In determining this, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law as the Tribunal would have 'substituted its own view' for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (***Iceland Frozen Foods Limited v Jones*** [1982] IRLR 439).

55. Equity means that similar cases should be dealt with in a similar manner. Valid arguments in relation to inconsistency of treatment however only arise in limited circumstances, such as where employers have previously treated similar matters less seriously, leading employees to believe that such behaviour is condoned or to an inference that the asserted reason for dismissal is not the real reason, or where employees, in truly parallel circumstances arising from the same incident, are treated differently (***Hadjioannou v Coral Casinos Limited*** [1981] IRLR 32, approved by the Court of Appeal in ***Paul v East District Health Authority*** [1995] IRLR 305).

Wrongful Dismissal

56. Wrongful dismissal is a claim for breach of contract – specifically for failure to provide the proper notice provided for by statute or the contract (if more). An employer does not however have to give notice if the employee is in fundamental breach of contract. This is a breach of contract that goes to the heart of the contract so that the employer should not be bound by its obligations under the contract (including the requirement for notice).

Discrimination arising from disability

57. Section 15 EqA states:

> *"(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."

Guidance on how this section should be applied was given by the EAT in ***Pnaiser v NHS England*** [2016] IRLR 170, EAT, paragraph 31. In that case it is pointed out that 'arising in consequence of' could describe a range of causal links and there may be more than one link. It is a question of fact whether something can properly be said to arise in consequence of disability. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

58. There is no need for the alleged discriminator to know that the 'something' that causes the treatment arises in consequence of disability. The requirement for knowledge is of the disability only ***(City of York Council v Grosset*** [2018] ICR 1492, CA).

59. The EAT held in ***Sheikholeslami v University of Edinburgh*** [2018] IRLR 1090 that:

'the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.'

60. The burden is on the respondent to prove objective justification. To be proportionate, a measure has to be both an appropriate means of achieving the

legitimate aim and reasonably necessary in order to do so (***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601).

Failure to make reasonable adjustments

61. Section 20 EqA states:

"Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A."

62. The duty comprises three requirements (of which the first is relevant to this case.) The first requirement is a *"requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

63. Section 21 provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments and that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

64. Further provisions in Schedule 8 Part 3 provide that the duty is not triggered if the employer did not know, or could not reasonably be expected to know that the claimant had a disability and that the provision, criteria or practice ("PCP") is likely to place the claimant at the identified substantial disadvantage.

65. The guidance given in ***Environment Agency v Rowan*** [2008] IRLR 20 remains valid, being that in order to make a finding of failure to make reasonable adjustments there must be identification of:

(a) the provision, criteria or practice applied by or on behalf of an employer or the physical feature of premises occupied by the employer;

(b) the identity of non-disabled comparators (where appropriate); and

(c) the nature and extent of the substantial disadvantage suffered by the claimant.

Burden of Proof

66. Section 136 EqA provides:

'If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.'

67. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Plc*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish prima facie case of discrimination by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

68. In ***Madarassy***, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal "could conclude" that on a balance of probabilities the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748***,*** an EAT authority approved by the Court of Appeal in ***Madarassy***.

Discussion & Decision

Unfair Dismissal

69. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s98(2). At this stage the Tribunal was not considering the question of reasonableness. The Tribunal had to consider whether the respondent had established a potentially fair reason for dismissal. The Tribunal accepted that the reason for dismissal was the claimant's conduct – a potentially fair reason under s98(2)(b). No other reason has been asserted.

70. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason as shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources the employer is undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

71. The Tribunal referred to the case of ***British Home Stores v Burchell***. The Tribunal was mindful that it should not consider whether the claimant had in fact committed the conduct in question, as alleged, but rather whether the respondent genuinely believed he had and whether the respondent had reasonable grounds for that belief, having carried out a reasonable investigation.

Did BD have a genuine belief that the claimant was guilty of misconduct?

72. The Tribunal concluded that BD did have a genuine belief that the claimant had committed the misconduct detailed in the dismissal letter.

Did BD have reasonable grounds for his belief?

73. The Tribunal noted that the claimant admitted that he had taken the van home. The tracker information also showed that he had done so. BD accordingly had reasonable grounds for his belief.

Was there a reasonable investigation?

74. The respondent conducted a balanced investigation. SM interviewed the claimant and other drivers to ascertain their position. She also reviewed the vehicle tracker information. Whilst SM made a decision to proceed to a disciplinary hearing prior to the occupational health report being obtained, the Tribunal noted that that report was available by the time of the disciplinary hearing, so any error in that regard was rectified. There were no further steps which should, reasonably, have been undertaken during the investigation.

Procedure

75. The respondent investigated the allegations against the claimant. They informed him of the allegations and the potential consequences and provided copies of the evidence compiled. The claimant was given the opportunity to respond to the allegations at the disciplinary hearing and was provided with the opportunity to appeal. He was afforded of his right to be accompanied at all stages. The respondent followed their internal procedures. The procedure adopted by the respondent was fair and reasonable in the circumstances.

Did the decision to dismiss fall within the band of reasonable responses?

76. The Tribunal then moved on to consider whether the decision to dismiss the claimant as a result of the identified misconduct, fell within the range of reasonable responses available to a reasonable employer in the circumstances.

77. The Tribunal did not accept that there was an unjustified disparity in the treatment of the claimant in comparison with other drivers who, the claimant

asserted, also took their vans home. The evidence demonstrated that some of the other drivers had taken their van home, but this had only been done on a rare occasion, not on a regular basis. The Tribunal did not accept therefore that it had been established that the circumstances of any other drivers were truly parallel with those of the claimant. The argument in relation to consistency was accordingly not relevant.

78. The Tribunal did however find that the conclusion that the claimant's conduct amounted to gross misconduct, and the decision to summarily dismiss him as a result, fell outside the range of reasonable responses available to a reasonable employer in the circumstances, for the following reasons:

a. No reasonable employer would have categorised the conduct of the claimant as gross misconduct in circumstances were this was not stated to be gross misconduct in:

i. any training given to drivers generally and, in particular the claimant;

ii. the Driver Handbook; or

iii. the respondent's disciplinary procedure.

b. No reasonable employer would have relied on the number of occasions on which the conduct occurred as a basis for concluding that, as a result, the conduct amounted to gross misconduct in circumstances where:

i. the location of all drivers is continuously tracked;

ii. drivers are informed, and it is demonstrated to them, that this data is examined on a weekly basis;

iii. the claimant's actions are not identified by his line manager as being inappropriate in any way;

iv. the respondent's witnesses acknowledge that the claimant's line manager ought to have noticed and highlighted to the claimant that his actions were inappropriate;

v. any inappropriate behaviour on the claimant's part was not highlighted due to a consistent and continued failure on the part of the claimant's former line manager to review the appropriate weekly tracking reports.

c. By the time of the disciplinary hearing, the respondent had been informed of the full detail of the claimant's medical condition, supported by an occupational health report. It was accordingly clear that the claimant had genuine health issues which required ease of access to toilet facilities. That ease of access could be guaranteed at the claimant's home, but not elsewhere and was accordingly, latterly, the reason for the claimant returning home to use his own bathroom facilities, in periods when he would otherwise have been parked up in the local area. It was also clear that the claimant suffered episodes of urinary and bowel incontinence, so some trips home were necessitated by the requirement to wash and clean himself and his vehicle. No reasonable employer would have dismissed the claimant for returning home to use his own facilities in these circumstances.

79. The Tribunal accordingly found that BD's conclusion to dismiss the claimant fell outside the band of reasonable responses open to the respondent in the circumstances.

Conclusions re s98(4)

80. For the reasons stated above the Tribunal conclude that the respondent acted unreasonably in treating the claimant's conduct as a sufficient reason for dismissal. No reasonable employer would have dismissed the claimant in these circumstances. The claimant's dismissal was accordingly unfair.

Wrongful Dismissal

81. Having found the claimant was unfairly dismissed, there is no requirement to determine the wrongful dismissal claim.

Discrimination Arising from Disability

82. In relation to the claims of discrimination arising from disability the Tribunal started by referring to section 15 of the EqA.

83. Section 15(2) states that section 15(1) will not apply if the employer did not know, and could not reasonably have been expected to know the claimant had the disability. The respondent conceded that the claimant was disabled person and that, at all relevant times, the respondent knew that the claimant had prostate issues, which amounted to a disability.

84. The Tribunal considered the guidance ***Pnaiser***. The first question is whether the claimant was treated unfavourably. In determining this, no question of comparison arises. The EHRC Employment Code indicates that unfavourable treatment is treated synonymously with disadvantage. It is something about which a reasonable person would complain. The Tribunal considered each allegation of discrimination arising from disability, to ascertain whether unfavourable treatment was established, and found as follows in relation to each:

a. **Not having regard to the claimant's well-being and failing to refer the claimant to occupational health on 23 January 2019.** The Tribunal found that this did occur and amounted to unfavourable treatment.

b. **Continuing with the investigation on 23 May 2019 even though the claimant had a sick line.** The Tribunal found that this did not amount to unfavourable treatment. There was no disadvantage to the claimant. It was his preference that the respondent proceed. He requested that they do so.

c. **Not making allowances for toilet breaks.** There was no evidence before the Tribunal in relation to allowances not being made for the claimant to take toilet breaks. He was free to do so whenever he wished. The Tribunal accordingly do not find that the claimant was unfavourably treated by the respondent by them not making allowances for toilet breaks.

d. **Duties being changed by not being allowed to drive and instead being placed on click and collect.** The Tribunal found that this did not amount to unfavourable treatment. This temporary change was

implemented as a reasonable adjustment, when the respondent was informed of the impact the claimant's medical condition was having on him, pending receipt of the occupational health report. The occupational health report subsequently received confirmed that the claimant was unfit to undertake driving duties and that adjustments should be made to allow him to work in an alternative role.

e. **Dismissing the claimant.** The Tribunal found that this did amount to unfavourable treatment.

85. The next question concerns the reason for the alleged treatment. In order to establish the reason, the focus is on the respondent's conscious or unconscious thought process. If there is more than one reason, then the reason allegedly arising from disability need only be a significant (in the sense of more than trivial) influence on the unfavourable treatment, it need not be the main or sole reason. Applying that test, to unfavourable treatment established, the Tribunal found as follows:

a. **Not having regard to the claimant's well-being and failing to refer the claimant to occupational health on 23 January 2019.**The Tribunal found that the reason for the unfavourable treatment was solely due to the ineptitude of the claimant's manager at the time.

b. **Dismissing the claimant.** The Tribunal found that the reason for the unfavourable treatment was that the claimant had taken the company van home, contrary to the respondent's policy.

86. The next question is whether the reason for any unfavourable treatment established was something 'arising in consequence of' the claimant's disability. It was held in ***Pnaiser*** that the expression 'arising in consequence of' could describe a range of causal links. More than one relevant consequence of the disability may require consideration and whether something can properly be said to arise in consequence of disability is a question of fact in each case. It is an objective question, unrelated to the subjective thought processes of the respondent, and there is no requirement that the respondent should be aware

that the reason for treatment arose in consequence of disability. The Tribunal found as follows:

a. **Not having regard to the claimant's well-being and failing to refer the claimant to occupational health on 23 January 2019.**The reason for the unfavourable treatment, being the ineptitude of the claimant's manager, was not something arising in consequence of the claimant's disability. It was entirely unrelated.

b. Dismissing the claimant. The claimant had, from 2018 onwards, taken the company van home, contrary to the respondent's policy, as he was having episodes of urinary incontinence due to his prostate issues and/or bowel incontinence due to the medication he had been prescribed to stop smoking, which he required to do given his COPD. On some occasions, as a result of those episodes of incontinence, he required to clean himself and change his clothes, and also clean the van. On other occasions, he simply used his own toilet facilities to avoid potential episodes of incontinence. He knew he would have ready access to the toilets in his own home, and was not comfortable using public toilets given that they may not be free when he had an urgent requirement to use the facilities. Similarly, he felt that he may not have sufficient time to sign into a local Tesco store to use the staff facilities there. The Tribunal found that the reason for the unfavourable treatment of dismissal was therefore something 'arising in consequence of' the claimant's disability.

87. The Tribunal then considered justification, and the question whether the unfavourable treatment complained of was a proportionate means of achieving a legitimate aim, for the purposes of section 15(1)(b) EqA.

88. The legitimate aim relied upon was that colleagues follow the respondent's policies and procedures and are prohibited from misusing company property. The Tribunal accepted that the respondent genuinely had that aim and that it was legitimate.

89. The Tribunal then considered whether dismissing the claimant was a proportionate means of achieving that aim. In order to be proportionate the

measure has to be both an appropriate means of achieving the legitimate aim and also reasonably necessary in order to do so (***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601). The Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant (***Land Registry v Houghton and others*** UKEAT/0149/14). There is, in this context, no 'margin of discretion' or 'band of reasonable responses' afforded to respondents (***Hardys & Hansons v Lax*** [2005] IRLR 726, CA).

90. The Tribunal was not satisfied that dismissal of the claimant was reasonably necessary to achieve the aim. Lesser measures, such as a warning, would have also done so.

91. The claimant's dismissal accordingly amounted to discrimination arising from disability.

Reasonable Adjustments

92. The duty to make reasonable adjustments arises when an employer knows that the employee had a disability *and* that the provision, criteria or practice ("PCP") is likely to place the employee at the identified substantial disadvantage.

93. While the respondent knew that the claimant had COPD and, from the start of 2018, that he had prostate issues, it only became aware of the fact that the claimant was suffering from incontinence as a result of these conditions when the claimant disclosed that to them on 23 May 2019. Prior to that, despite attending numerous discussions with his employer in relation to his health, and being asked at each about his conditions and the impact of them, he did not disclose this.

94. The Tribunal's first step was to identify the relevant PCPs. The PCP relied upon is the respondent's policy not to allow employees to take home company vans or allow employees to use their own facilities. The respondent admitted having such a PCP.

95. The Tribunal then considered the whether the claimant was placed at a substantial disadvantage by the PCP. The Tribunal found that, from the point the duty to make reasonable adjustments was triggered, on 23 May 2019, the

claimant was not placed at a substantial disadvantage by the PCP relied upon. On 23 May 2019, the claimant was removed from driving duties and given temporary duties, working in the click and collect pod instead. Given that he was not driving from that point onwards, the PCP of not allowing employees to take company vans home or allowing employees to use their own facilities did not apply to the claimant, as he was not driving. For this reason, the claim of failure to make reasonable adjustments fails.

Remedy

96. Having found that the claimant was unfairly dismissed, and that his dismissal amounted to discrimination arising from disability, the Tribunal moved on to consider remedy.

97. The Tribunal firstly considered whether it was appropriate to make any adjustments to the basic or compensatory award, and reached the following conclusions:

Polkey

98. Given that the Tribunal's finding that the dismissal was unfair is not restricted to procedural irregularities, a reduction in any compensation awarded on the basis of ***Polkey*** is not appropriate.

Acas Code

99. The Tribunal do not make any finding that the respondent unreasonably failed to comply with the Acas Code. No uplift in compensation is accordingly appropriate.

Contribution

100. The Tribunal required to consider whether the claimant's dismissal was to any extent caused or contributed to by the actions of the claimant. If so, the Tribunal requires to reduce the amount of the basis and/or compensatory award by such proportion as it considers just and equitable having regard to that finding. In reaching a conclusion on this point the Tribunal must consider whether the claimant's actions were culpable or blameworthy. This requires the Tribunal to

make findings in relation to what actually happened, rather than whether the respondent reasonably believed that the claimant was guilty of misconduct.

101. From the evidence before the Tribunal, the Tribunal determined that the claimant was taking his van home and ought to have known that this was contrary to the respondent's policy, as a result of the training received when he commenced employment and the terms of the Driver Handbook provided to him in March 2019. If he required adjustments to the respondent's policy, he ought to have informed the respondent of the impact of his medical condition and discussed with them the adjustments required as a result. He did not do so.

102. The Tribunal find that this is culpable or blameworthy conduct and that it contributed slightly to the claimant's dismissal. The Tribunal do not accept that the claimant contributed to his dismissal in any other way. The Tribunal find that it would be just and equitable to reduce the compensatory and basic awards by 25% as a result.

Basic Award

103. Given the claimant's age (44), service (2 years) and weekly gross wage (£275.59), the basic award is £826.77. A reduction for contribution at 25% reduces this to **£620.08**.

Compensatory Award

104. The claimant's employment terminated on 23 June 2019. He had not secured alternative employment by the date of the hearing, a period of 68 complete weeks. The respondent confirmed in submissions that they did not seek to assert that the claimant had acted unreasonably in his attempts to mitigate loss. Given the time which has passed since the termination of the claimant's employment, the Tribunal did not consider that an award of future loss was appropriate. The Tribunal accordingly calculated the compensatory award as follows:

Loss of earnings to hearing – 68 weeks at £275.59	£18,740.12
Pension contributions – 68 weeks at £11.05	£ 751.40

Loss of statutory rights	£ 500.00
Sub-total before adjustments	£19,991.52
Reduction for contributory fault – 25%	£4,997.88
Total Compensatory Award	**£14,993.64**

Injury to Feelings

105. The claimant did not include anything in his witness statement regarding injury to feelings. In response to questions from the Tribunal, he stated that he had been very upset and stressed as a result of his dismissal. There was however no evidence presented to the Tribunal that he contacted his doctor in relation to this, following the termination of his employment. Given the very limited evidence, the Tribunal determined that it was appropriate to make an award for injury to feelings of **£2,000**. Interest is payable on this sum, from the date of dismissal to date. Given the period of 68 weeks from date of dismissal to date of this Judgment, interest is calculated to be **£20.92**.

Employment Judge: Mel Sangster
Date of Judgment: 12 October 2020
Entered in register: 30 October 2020
and copied to parties