EMPLOYMENT TRIBUNALS

Claimant: Mr D Jones

Respondent: Costco Retail Limited

Judgment and Reasons

Heard at: Liverpool (by Cloud Video Platform ('CVP'))

On: 19, 20, 21 & 22 April 2021

Before: Employment Judge Johnson

Members: Ms A Berkeley-Hill
Mr T D Wilson

Appearances
For the claimant: in person
For the respondent: Ms R Wedderspoon (counsel)

JUDGMENT

(1) The claimant was fairly dismissed by reason of his conduct. This means that his complaint of unfair dismissal was unsuccessful.

(2) The claimant was disabled at the relevant time by reason of depression and anxiety in accordance with section 6(1) of the Equality Act 2010.

(3) The claimant's complaint of direct discrimination by reason of his disability contrary to section 13 of the Equality Act 2010 is not well founded. This means that this complaint was unsuccessful.

(4) The claimant's complaint of discrimination arising from his disability contrary to section 15 of the Equality Act 2010 is not well founded. This means that this complaint was unsuccessful.

REASONS

Introduction

(5) This claim arises from the claimant's employment with the respondent from 7 August 1995 until 10 January 2020 when he was dismissed from his role of forklift truck driver/merchandiser.

(6) The claimant Mr Jones presented a claim form to the Tribunal on 25 February 2020 following a period of early conciliation from 28 January 2020 to 17 February 2020 when he brought complaints of unfair dismissal and disability discrimination.

(7) The case was heard by Employment Judge Aspinall on 12 May 2020 when she identified the issues, listed the case for a final hearing and made appropriate case management orders.

The issues

(8) The issues between the parties which potentially fall to be determined by the Tribunal can be summarised as follows:

Unfair dismissal

(i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was *a reason relating to the claimant's conduct* and/or some other substantial reason.

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

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

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would [still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8.

b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Disability

(iv) It should be noted that the respondent conceded at the preliminary hearing before Employment Judge Aspinall on 12 May 2020, that the claimant was disabled by reason of his anxiety and depression and that it had knowledge of this disability at all material times in this case. Accordingly, the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of his depression and anxiety.

EQA, section 13: direct discrimination because of disability

(v) Has the respondent subjected the claimant to the following treatment:

a. Deciding to discipline the claimant following the incident on 12 December 2019; and,

b. Finding the claimant responsible for acts amounting to gross misconduct and deciding to dismiss him

(vi) Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

(vii) If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

EQA, section 15: discrimination arising from disability

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

a. Shouting;

b. Swearing; and,

c. Walking away from his supervisor.

(ix) Did the respondent treat the claimant unfavourably as follows:

a. commencing a disciplinary process against the claimant?

b. dismissing him?

(x) Did the respondent treat the claimant unfavourably in any of those ways because of his disability?

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

a. The need to maintain a safe workplace for all of its employees?

Evidence considered by the Tribunal

(9) The Tribunal heard from the claimant, Mr Jones. He did not comply with the order of Employment Judge Aspinall to provide a witness statement in advance of this hearing. However, the Tribunal took into account his disability and his unrepresented status in accordance with the relevant sections of the Equal Treatment Bench Book and the overriding objective at Rule 2 of the Tribunal's Rules of Procedure. An alternative form of evidence that could be used was considered. It was decided (and with no objection being made by Ms Wedderspoon), that Mr Jones could rely upon his disability impact statement and also the background information provided in his claim form. Both of these documents were available in the core hearing bundle used by both parties and the Tribunal.

(10) The respondent called four witnesses who were relevant to the issues which had to be considered. They were Sue Knowles (HR director), Kathryn McInerney (Assistant General Manager – investigating officer), Gerard Rafferty (General Manager – dismissing officer) and Scott Schruber (Vice President & Regional Operations director – appeal hearing officer).Respondent – 4 witnesses SK.

(11) The respondent prepared a core hearing bundle in excess of 200 pages and supplementary hearing bundle in excess of 300 pages. These were made available in digital and hard copy format to the parties and the Tribunal. Mr Jones had limited technology available to him during the hearing and had to rely upon his mobile phone to access the CVP hearing. Accordingly, the respondent helpfully delivered hard copies of the hearing bundle during the first day. This enabled Mr Jones to fully participate during the hearing.

(12) During the cross examination of Ms Knowles on day 2 of the hearing, it became clear that details of Mr Jones' sessions with Dr Chamberlin were not included within the hearing bundle. One supplemental document was provided overnight on made available on day 3. Ms Knowles was able to be recalled to give evidence relating to this document and Mr Jones was given

some additional time in order that he could consider this supplemental document which was added to the bundles as document 'R1'.

(13) Mr Jones very anxious throughout the hearing. Adjustments were made included the listing of this case for a longer than normal hearing, additional breaks when required and additional explanations concerning procedure were given to him at each stage of proceedings. Finally, Employment Judge Johnson made frequent enquiries to see that Mr Jones understood what was required from him.

Findings of fact

(14) The respondent business operates what is commonly known as a 'cash and carry' retail business. It has 29 UK warehouses and employs approximately 7,500 staff in the UK. The Liverpool warehouse, which is relevant to this case employs over 270 staff.

(15) The respondent has an in-house Human Resources ('HR') staff and accesses external professional advice in relation to matters involving Occupational Health ('OH'). Being a large company, it is understood that the respondent has a number of policies and procedures and these are contained in the 'Employee Agreement'. The Tribunal understood this to effectively be the respondent's company handbook. It was updated from time to time and employees were asked to sign and date the updated versions as they were produced. This document was referred to by the respondent's witnesses in their evidence and in particular by Ms Knowles as HR director.

(16) The Tribunal noted that Mr Jones did sign to confirm that he had received a copy of the Employee Agreement on 24 June 2019, being the most recent update prior to his dismissal. It was also noted that only extracts of the Agreement were provided within the hearing bundle rather than the whole document which presumably would have involved many pages. Instead, the respondent provided the extracts which it considered relevant, namely section 2.3 relating to 'Equal Opportunity', section 11 which was the 'Standards of Conduct and Discipline', and section 14 which was 'Mental Health and Well-being'. Mr Jones did not request that any additional extracts or the entirety of the Agreement be provided, although he argued that the handbook did not have a practical application on the 'shop floor'. However, the Tribunal is satisfied that in broad terms, the respondents followed the principles and guidance contained within the extracts of the agreement provided when disciplining Mr Jones, subject to the findings made below.

(17) While it is not necessary to deal with Mr Jones' employment history in any significant detail for the purposes of determining the issues in this case, the Tribunal makes the following observations.

(18) In terms of his disability, Mr Jones has had depression and anxiety for many years. The severity of this condition fluctuated on a number of occasions and the respondent's HR team following the advice of OH and placed him on a list of employees who had a 'red flag' relating to concerns about severe health issues. The Tribunal heard evidence from Ms Knowles that the red flag would ensure that those employees to whom it applied, had their health reviewed and access to OH support. The red flag label was removed when these health concerns diminished, and Ms Knowles confirmed that Mr Jones was not subject to this designation in late 2019 when the incident on 12 December 2019 took place.

(19) Both Mr Jones and Mr Rafferty had worked for the respondent's Liverpool warehouse since the mid-1990s and it was clear to the Tribunal that they knew each other very well. The Tribunal found that this relationship in a large workplace such as Costco Liverpool was very unusual. Mr Jones appeared to have direct access to Mr Rafferty both at work and outside of work and he would readily contact him about any issues that arose. Mr Jones seemed to feel able to confide in Mr Rafferty, and it is fair to say that as a consequence, Mr Rafferty was fully aware of Mr Jones' mental health issues and the occasions when Mr Jones' condition worsened.

(20) This relationship placed a significant responsibility upon Mr Rafferty and there were a number of emails within the supplemental bundle where he was reporting developments in Mr Jones' mental health in 2018 and 2019. They also revealed Mr Rafferty's frustrations with him. In particular, he described Mr Jones as a 'constant problem' and he noted that if Mr Jones did not get his own way in relation to workplace matters, he would email senior management within the respondent company.

(21) Mr Jones also emailed Ms Knowles on a regular basis and he was offered a number of OH services, including counselling sessions. At the time of his dismissal, he had accessed in excess of 60 counselling sessions in relation to a number of issues. The respondent used an OH service 'Wellbeing Solutions', which was headed by Dr Patrick Chamberlin. Ms Knowles asserted that Dr Chamberlin contacted Mr Jones by telephone on 17 separate occasions and had many meetings with him. This was disputed by Mr Jones. Dr Chamberlin provided a supplemental document which was introduced in evidence by Ms Knowles as document 'R1' when she was recalled on this matter by the Tribunal. R1 dealt with OH intervention concerning Mr Jones from 2014 to 2019. The Tribunal finds that whoever it was in OH who saw Mr Jones between the dates of 2014 and 2019, he was seen on more than 30 occasions. The sessions were not only work-related matters, but also in respect of counselling to support him and his family in personal issues.

(22) In the years prior to the incident which gave rise to his dismissal, Mr Jones experienced significant family issues involving his marriage, children and a subsequent relationship with his then fiancé. Not surprisingly this did have an impact on his mental health, and he would share these issues with colleagues and in particular, Mr Rafferty. Indeed, the Tribunal accepts Mr Jones' evidence that he saw work as a 'refuge' from things which were happening outside of work.

(23) In December 2019, the respondent's Liverpool warehouse was preparing for Christmas and was going through a particularly busy period of the year. Employees were able to work shifts which started as early as midnight. At this time, Mr Jones was volunteering to start work at a very early time. Although a number of reasons were given by Mr Jones and Mr Rafferty for his choice of shift start time, the Tribunal does not consider it relevant to this case and it is not necessary to discuss this matter further.

(24) The Tribunal accepts that the work rota at Liverpool Costco was provided to staff at least two or three weeks in advance of the shifts being worked. Certainly, in relation to working days over the Christmas period, staff would have had plenty of notice as to when they were working. The claimant was aware that on 27 December 2019, he was booked to work a shift.

(25) Unfortunately, in early December 2019, Mr Jones was told by Merseyside Police that he was required to attend an interview at a police station on 27 December 2019. During this period, Mr Jones' mental health had deteriorated due to personal issues outside of work and he was extremely anxious about being allowed time off work to attend the interview on that date.

(26) On 12 December 2019, Mr Jones started working his early shift as usual and went to speak with his new supervisor Karen Maher when she started work at 5am. He asked if he could change his designated shift on 27 December 2019 and she told him that in accordance with usual practice, he would need to find a colleague with whom he could swap shifts with.

(27) The Tribunal accepts that Mr Jones then left Ms Maher. However, he then returned 5 minutes later. There was some dispute between Ms Maher and Mr Jones as to how this second meeting went, but Mr Jones was clearly anxious about resolving the shift swap request as a matter of urgency. The Tribunal finds on balance, Ms Maher was asked by Mr Jones to resolve this issue. She said that she needed to look into the matter further and Mr Jones stormed off. She asked him to come back and he shouted loudly at her. Whatever words he used, he told her to leave him alone. Mr Jones explained that while he could not recall precisely what he said, he recalled his feelings at the time and that he felt the walls were closing in around him. He admitted that he shouted, may have sworn and walked away from Ms Maher.

(28) Due to the commotion, which was heard as far as 300 metres away from where the incident occurred, a number of colleagues came to see what was

happening. Ms Maher was found to be shocked by the incident, there was evidence of apples being strewn across the Produce area floor and Mr Jones was found in the work café, sat down with his head in his hands.

(29) Mr Rafferty was informed of the incident as he was driving into work just before 8am. He was told that Mr Jones had *'shouted loudly, sworn at Karen [Ms Maher] and kicked/thrown boxes of merchandise over before walking off from his duties'*. He was also informed that as a consequence of this incident, Ms Maher and another colleague Colin Russell, were concerned for their safety. He was aware that the matter potentially involved serious disciplinary issues and he invited Mr Jones into a meeting and despite being offered, he declined to have a friend or representative with him. Mr Rafferty informed Mr Jones that he was suspended on full pay and this was confirmed by letter. Mr Rafferty said that taking into account the nature of the incident and the fears raised by his colleagues, Mr Jones could not be allowed to remain in work at this time.

(30) A note was taken at this meeting and allegations were presented to Mr Jones, including kicking boxes and throwing merchandise and being very aggressive and intimidating towards Ms Maher. He acknowledged that he 'just flipped' and while accepting that he became 'irate', denied kicking boxes or throwing merchandise.

(31) Mr Rafferty appointed Ms Kathryn McInerney as the investigating officer to conduct the disciplinary investigation. She was told to speak with Ms Knowles if she needed any HR advice concerning the investigation.

(32) Ms McInerney firstly met with Ms Maher and the colleagues who were nearby in the workplace when the incident took place. In addition to Ms Maher, she interviewed six other witnesses. One of the witnesses, Colin Russell, declined to provide a witness statement, but Michal Costain, the Merchandise Manager provided a description of what he said to him separately. He said that Mr Russell suggested that Mr Jones was '*completely out of order and aggressive'* towards Ms Maher, was shouting and swearing, and was kicking and punching boxes. Ms Maher reported that Mr Jones had behaved aggressively. Mr Ladd described Mr Jones as '*being very loud and forceful and aggressive'* and because he knew Ms Maher had just been looking for him, he assumed that this shouting was directed her, even though he heard rather than saw the incident and he went to check that she was ok.

(33) Ms McInerney then had a separate meeting with Ms Maher and produced a note which suggested that while Ms Maher described herself as *'I'm no yellow belly'*, she described herself as being intimidated by Mr Jones, not being sure what he would do next and expressing worry about possible repercussions arising from this incident. Although it is not clear when this interview took place and when the note was prepared, the document was not challenged by Mr Jones and the Tribunal finds that on balance the note reflected the genuine concerns that Ms Maher had and that as Mr Jones' supervisor, it would be difficult to admit to these concerns upon her initial

questioning by Ms McInerney. Indeed, Ms Maher also sent an email to Mr Rafferty and Ms Knowles on 23 December 2019 and described her experience of working with Mr Jones during the previous 4 months and while some of her comments did not relate to the incident under investigation, she made clear that it had left her feeling 'extremely unnerved and felt somewhat concerned even outside of the work environment'.

(34) Mr Jones was interviewed on 18 December 2019 and he accepted that he 'lost it' and explained the personal circumstances outside of work which had impacted upon him. He said *'I just lost it, I was shouting just fucking leave me alone, I walked away and I pushed a trolley into the boxes as very distressed and unhappy she [Maher] said we would go to Gerald [Rafferty] that she had enough of me that's its something every week with me.'* He denied kicking the boxes, but said *'its all a blur'.* During this interview Mr Jones made a number of apologies.

(35) Ms McInerney completed her investigation on 24 December 2019 and although she did not produce a formal investigation report, she invited him to a formal disciplinary hearing on 28 December 2019, which would be chaired by Mr Rafferty, she informed him that he could be accompanied and warned that he could be dismissed. Having considered the evidence of Ms McInerney and the relevant papers in the core hearing bundle, the Tribunal finds that she had carried out a proper investigation where she had interviewed all key witnesses and obtained as much evidence as she realistically could in relation to the incident.

(36) It was Ms Knowles who chose Mr Rafferty as the disciplinary hearing officer. It was explained that usually, a more junior Assistant General Manager (known as an 'AGM'), would be selected for a disciplinary of this nature. However, Ms Rafferty said that given Mr Rafferty's close relationship with Mr Jones, she felt that it he would be best placed to be the disciplinary hearing officer and that Mr Jones would not accept a disciplinary decision from anyone other than Mr Rafferty. The Tribunal acknowledged that this was a well-intentioned, but problematic decision for HR to take. Mr Rafferty's impartiality could be questioned, especially given the long running close relationship which at times could be sympathetic but at other times frustrated. The selection of an AGM would have made more sense under these circumstances. However, the Tribunal having heard Mr Rafferty's evidence, found him to be a reliable and credible witness. Indeed, he clearly sought to balance his concerns for Mr Jones during the disciplinary hearing against his concerns for the wider workforce. He also did not make a decision concerning the outcome immediately, but instead adjourned the matter so that he could consider his decision carefully.

(37) Mr Rafferty decided to adjourn in order that he could reflect upon the case and the Tribunal. He decided to do this because Mr Jones was a long serving employee of some 24 years' service and he did not think it was fair to rush his decision. Indeed, the Tribunal accepts that he 'agonised' over the decision and it was not something that he took lightly.

(38) During the adjournment, he received an email from Mr Chamberlin dated 26 December 2019 which referred to a consultant psychiatrist's report prepared in relation to family law case during October 2019. Although this related to the question of what contact Mr Jones should have with his children following his divorce, reference was made to comments made to the psychiatrist which suggested that he was *'…playing the system, exaggerating his symptoms to get some leverage with his employers and was manipulative'*. Although Mr Jones denies that he made any such comments and that he had been misinterpreted, the Tribunal accepts that it was reasonable for Mr Rafferty to rely upon Mr Chamberlin's report, given that it related to Mr Jones' credibility when it came to his health issues. Mr Jones spoke on a number of occasions about his relationship with Mr Rafferty, with on one occasion, describing him as a father figure and on another occasion, finding him intimidating. The Tribunal finds that Mr Jones knowing that Mr Rafferty had some control over his career with Costco, had tried to develop a relationship where he tried to anticipate how he handled this manager. The Tribunal preferred Mr Rafferty's evidence and accepts that he did treat Mr Jones' mental health as a paramount concern, but that he also had to balance these concerns against his duty to ensure that the workplace was safe.

(39) The disciplinary hearing reconvened on 10 January 2020. It commenced at 11 am and ran until 12pm, following a resumption at 12.30pm to 12.45pm. No witnesses were called and the hearing appeared to mainly discuss Mr Chamberlin's email and the suggestion that Mr Jones was manipulative. Once the hearing resumed, Mr Rafferty gave his decision, which was to summarily dismiss Mr Jones for gross misconduct. Mr Rafferty explained that Mr Jones's behaviour was serious conduct issues and that dismissal was necessary because Costco cannot tolerate aggressive and intimidating behaviour. Mr Jones verbally confirmed he would appeal and that he would *'go to the top'* and *'to the press'*.

(40) Mr Rafferty explained his decision to Mr Jones in a very detailed letter which he sent on 10 January 2020. The Tribunal noted that although he found that Mr Jones had been aggressive and intimidating and made other employees scared at work, the damage to the property was not really considered in his decision. Mr Rafferty provided lengthy details of the support which had been provided to Mr Jones over the years, but expressed concern that although Costco wants to support him, it was also necessary to consider the impact of his behaviour on colleagues. He mentioned Mr Chamberlin's report about fabrication of symptoms and that he felt that this was relevant in that Mr Jones appeared to have exaggerated his symptoms since the incident on 12 December 2019, in an attempt to avoid consequence of actions.

(41) Mr Rafferty mentioned Mr Jones' previous disciplinary record. The Tribunal accepts Mr Rafferty's evidence that this record did not include warnings which could be formally used when considering the sanction which he could impose.

(42) As a consequence, despite his long service, Mr Rafferty was of the view that he did not have confidence that Mr Jones could return to work and behave in an acceptable manner and in a way which would not intimidate his colleagues.

(43) Mr Jones' appeal was heard by Mr Schruber and he confirmed that he was given an opportunity to advance his case at this hearing on 15 January 2020. He disputed that he had been aggressive and referred to having a mental breakdown. He accepted that he swore and apologised for shouting during the incident. While he acknowledged that he pushed his trolley into some produce, he said that it was waste. He made reference to the availability of CCTV evidence of the incident location, questioned whether the rota for Christmas had been posted and that when the incident occurred he had worked 7 days continuously.

(44) Mr Schruber adjourned the appeal to consider these issues further. He was provided with information of the CCTV provision in the Liverpool Costco warehouse and a copy of the CCTV layout was included within the bundle and explained to the Tribunal by Mr Rafferty. The Tribunal accepted his evidence that the incident took place in a low value, low theft 'produce' area and that the incident would not have been covered by surveillance cameras.

(45) Mr Schruber sent his appeal decision letter to Mr Jones on 24 January 2020. He confirmed that the appeal had reviewed all of the available evidence. He confirmed that it was correct to conclude that Mr Jones had been aggressive towards Ms Maher. He considered the appeal points raised by Mr Jones in detail, but ultimately concluded that, '*As an employee with 24 years' service, you were an experienced member of staff. You were therefore more than aware of the standards of behaviour expected from any employee including yourself'.* The decision of Mr Rafferty was therefore upheld and the Mr Jones remained dismissed.

(46) The Tribunal noted that Mr Jones persistently sent emails during the disciplinary process of a repetitive nature seeking to explain to Mr Rafferty and Mr Schruber of the present position concerning his mental health and his personal difficulties. While he was clearly concerned that his health issues and their relationship with the incident which led to the disciplinary hearing, the Tribunal is satisfied that he was given every opportunity to explain himself at both the disciplinary and appeal hearings and that his health was taken into account by Mr Rafferty and Mr Schruber.

(47) Mr Jones did suggest that the dismissal was prompted by his 24 years' service and that when he reached 25 years' service, he was entitled to a bonus, which he believed the respondent was keen to avoid paying. The Tribunal does not believe these circumstances were in any way connected with the decision to dismiss and accepts Ms Knowle's' evidence that many other of its employees in the UK, including at the Liverpool warehouse have achieved 25 years employment and the bonus that goes with it. It appears to the Tribunal that this argument amounted to little more than a conspiracy

theory on the part of Mr Jones and that there was no unwillingness by the respondent to allow employees to reach this length of service.

(48) It was clear to the Tribunal that while Mr Jones was suffering from mental health issues, throughout the disciplinary process, he appeared to be unable to show sufficient insight into how his behaviour impacted upon others and that he could be intimidating, frightening and unpredictable. He appeared unable to provide his managers with any encouragement which would convince them that he could manage his behaviour in a much better way in future.

The law

Unfair dismissal – section 98 Employment Rights Act 1996 ('ERA')

(49) Section 98(1) ERA provides that it is for the employer to show that the dismissal of the employee was fair by relying upon one or more of the reasons or principle reason described in sections 98(2) ERA or some other substantial reason (section 98(1)(b) ERA). The respondent in this case relies upon conduct and/or some other substantial reason.

(50) In unfair dismissal cases where the respondent relies upon conduct, the Tribunal should consider:

(a) whether the employer genuinely believed the employee committed the misconduct in question;
(b) whether the employer held that belief on reasonable grounds; and,
(c) whether the employer carried out a proper and reasonable investigation.

(51) (Ms Wedderspoon referred to the long established and well known case of ***British Homes Stores v Burchell 1978 IRLR 379***) which confirmed this approach in determining with cases involving conduct.

(52) Ms Wedderspoon also referred the Tribunal to the case of ***Sainsbury's Supermarkets Limited v Hill (2003) ICR 111*** which establishes that the band of reasonable responses applies to all 3 stages above and in considering sanction the Tribunal should focus on whether the sanction of dismissal fell within the band of reasonable responses.

(53) The role of the Tribunal is not to substitute its own view for that of the employer and the Tribunal has reminded itself of this duty.

(54) The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will

be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

(55) The Tribunal has a discretion to make a deduction to the compensatory award where it finds that the claimant has caused or contributed to the dismissal pursuant to section 123 (6) of the Employment Rights Act 1996. Ms Wedderspoon referred to the case of ***Nelson v BBC No2 1980 ICR 110*** and its guidance that when considering contributory fault on the part of a claimant, the Tribunal should consider whether the claimant's conduct must be culpable or blameworthy.

(56) Finally, the Tribunal should consider its discretion to make a reduction to the compensatory award to reflect the percentage chance that the claimant would have been dismissed fairly in any event (as explained in **Polkey v AE Dayton Services Limited 1987 IRLR 50**). The deduction can take the form of a finding that the individual would have been dismissed fairly after a further period of employment, during which a fair procedure would have been completed.

(57) Ms Wedderspoon in her submissions, referred to the case of **Andrews v Software 2000 Limited 2007 IRLR 568** which set out principles to be applied conducting this assessment. Having considered the evidence the Tribunal may determine that:

(i) if fair procedures had been complied with the employer has satisfied it, the onus being firmly on the employer, that on the balance of probabilities the dismissal would have occurred when it did in any event;
(ii) that there was a chance of dismissal but less than 50% in which case compensation should be reduced accordingly;
(iii) the employment would have continued but only for a limited fixed period; or,
(iv) employment would have continued indefinitely.

Disability – section 6 Equality Act 2010 ('EQA')

(58) Under section 6(1) of the Equality Act 2010 ('EQA'), a person has a disability if they have a physical or mental impairment and that impairment has a substantial and long-term adverse effect on their ability to carry out normal day to day activities.

(59) Reference is made to Schedule 1 of the EQA which provides supplemental information concerning the determination of a disability. In particular, it explains in paragraph 2(1) that the effect of an impairment is long-term if –

(a) It has lasted for at least 12 months,
(b) It is likely to last for at least 12 months, or
(c) It is likely to last for the rest of the life of the person affected.

(60) Paragraph 2(2) goes on to say that *'[I]f an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to occur.'*

Direct Discrimination – section 13 EQA

(61) Section 13 of the Equality Act 2010 provides that "*a person A discriminates against another B if because of a protected characteristic, A treats B less favourably than A treats or would treat others*".

(62) In terms of comparators, "there must be no material difference between the circumstances relating to each case" (section 23 of the Equality Act 2010.

(63) Section 136 (2) and (3) of the Equality Act 2010, a "reverse" burden of proof is provided so that 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. Mr Ms Wedderspoon referred the Tribunal to guidance on the application of this burden was provided in the Employment Appeal Tribunal case of ***Barton v Investec Henderson Crosthwaite Securities Limited*** ***(2003) IRLR 332*** and the Court of Appeal case of ***Wong v Igen Limited*** ***(2005) EWCA Civ 142***.

(64) Ms Wedderspoon also referred to the Court of Appeal decision of ***Madarassy v Nomura International plc*** ***(2007) EWCA Civ 33,*** which confirmed that a claimant must establish more than a difference in status and a difference in treatment before a tribunal will be in a position where it could conclude that an act of discrimination had been committed.

Discrimination arising from disability – section 15 EQA

(65) Section 15 EQA provides that '*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.'

(66) Ms Wedderspoon was correct in stating that the Tribunal should consider why the employer treated the worker as the respondent did. It should also consider whether that reason was something arising in consequence of the worker's disability.

(67) If there are several reasons for the treatment in question, it is sufficient if only one of them was something arising from his disability provided that

reason was a "significant influence" (that is more than trivial), and Ms Wedderspoon referred to ***Pnaiser v NHS England (2016) IRLR 170***, concerning this particular issue.

(68) An employer can of course argue under section 15, that the discrimination was justified if it can show that it is a proportionate means of achieving a legitimate aim. The Tribunal should make its own judgment as to whether the acts are justified and should balance the aim with the proportionality of achieving the same.

(69) Section 15(2) EQA, provides that it is not unlawful if the employer can prove it did not know and could not reasonably have been expected to know that the worker had the disability.

Discussion

Unfair dismissal

(70) The Tribunal accepts that the principal reason for the dismissal of Mr Jones was the potentially fair reason of conduct. He was dismissed by Mr Rafferty following a disciplinary process where he decided Mr Jones should be summarily dismissed for gross misconduct. This decision was upheld at the appeal heard by Mr Schruber. The respondent through its relevant officers relied upon conduct in their decision to dismiss and that this was a potentially fair reason in accordance with section 98(1) of the ERA.

(71) As to the question of whether this decision was reasonably held by Mr Rafferty, we noted that he balanced Mr Jones' mental health issues, while nonetheless behaved in a way which had the effect of being intimidating and which left employees feeling frightened. He had all of the available evidence from the witnesses and most significantly, the evidence given by Ms Maher which described the impact of Mr Jones's behaviour and how it affected her. The available evidence from the disciplinary investigation was also very clear as to how loud Mr Jones' shouting was and the reaction of other employees located up to 300 metres away from the incident location in the produce area. Taking into account the way that the witnesses reacted when they heard Mr Jones shouting, it was clearly something that was out of the ordinary and not typically heard in this workplace. Additionally, the available witness evidence did not involve just one third party witness, but several co-workers. While they gave differing accounts as to what happened, this reflected their different locations when the incident occurred. But all of them expressed shock at this incident and there was a concern expressed as to Ms Maher's well-being.

(72) It is acknowledged that Mr Russell would not give a meaningful formal statement to Ms McInerney. However, whether this was because of fear or unwillingness to get Mr Jones into trouble, he did confide in Mr Costain who was a trusted manager and who had no reason to mispresent what was said to him. Additionally, the way Ms Maher opened up over several meetings and in her final email to Mr Rafferty before the disciplinary hearing, led him

to reasonably conclude that an apparently strong manger being reduced to a state of some anxiety over the incident.

(73) The Tribunal was satisfied that in reaching his decision, Mr Rafferty had done so following a reasonable investigation by Ms McInerney. There should have been investigation report produced, but all relevant witnesses were interviewed, all this evidence was provided to the disciplinary hearing for Mr Rafferty consider.

(74) As has already been mentioned above, the Tribunal should not determine what it would have done in Mr Rafferty's position. Instead, it must consider whether Mr Rafferty's decision to dismiss fell within the range of reasonable responses available to him as the disciplinary hearing officer. It was certainly not a decision which he took lightly and his adjournment to consider the matter, was indicative of that. But while he acknowledged that Mr Jones was not a well man, he concluded that his behaviour was unacceptable and he had to balance the problems facing a long serving employee whom he had been supported on many occasions, with the overarching need to ensure his colleagues could attend work without being frightened or intimidated. Unfortunately, Mr Jones had not provided any reassurance that this incident would not be repeated and although harsh, the decision to dismiss fell within the range of reasonable responses available to Mr Rafferty.

(75) While the Tribunal did express concerns about Ms Knowles' decision that Mr Rafferty was best suited to act a dismissing officer because of his close relationship with Mr Jones, instead of the usual Assistant General Manager, this decision did not materially affect the fairness of the hearing. Mr Rafferty clearly addressed any biases that he might have whether for or against Mr Jones and his decision was not tainted with any reasonable perception of procedural unfairness.

(76) With the benefit of hindsight and considering the lengthy history of interventions from Mr Rafferty, the appointment of a General Manager from outside of the Merseyside area might have been a better choice. But nonetheless, the decision to use Mr Rafferty was a well intentioned one and even following his dismissal and during this hearing, the Tribunal was aware of a respect given by Mr Jones towards Mr Rafferty.

(77) In terms of other procedural matters, the decision to suspend was reasonable, a separate investigation officer was appointed. Mr Jones was asked whether he wished to have a colleague to support him at disciplinary meetings and was informed of the matters which he was being investigated under the respondent's Employee Agreement disciplinary policy. He was also afforded the right of appeal and Mr Shruber reheard the disciplinary hearing and considered all the evidence again. This was a procedurally fair disciplinary process, and the dismissal was fair by reason of gross misconduct on the part of Mr Jones.

(78) Consequently, there is no need to consider any reduction for contributory fault, although had the dismissal been unfair, this would have been relevant given the nature of Mr Jones' behaviour and the effect it had upon his colleagues. This is a case where significant contributory fault would have been imposed had Mr Jones been unfairly dismissed.

(79) Additionally, as the dismissal arose from the adoption and application of a fair process, there was no reason to apply Polkey. However, even if the dismissal was procedurally unfair, it was likely that a fair dismissal would have taken place within no more than three months.

(80) The Tribunal did consider the alternative potentially fair reason pleaded of some other substantial reason. Although given the conclusion already made concerning conduct, this is a case where a dismissal for some other substantial reason could have been a fair alternative reason for dismissal. the respondent had carried out an investigation which identified an employee who had been provided with a great deal of support, but whose behaviour was problematic, showed no signs of improving in the longer term and where there was evidence of mental health issues being used in a manipulative way. Had this been the primary reason for the dismissal, it would have been fair given the information available to the dismissing officer Mr Rafferty, although an additional 3 months' notice would have been required because the dismissal could not have been made summarily.

Disability

(81) As was mentioned above, the respondent conceded at the preliminary hearing before Employment Judge Aspinall on 12 May 2020, that the claimant was disabled by reason of his anxiety and depression and that it had knowledge of this disability at all material times in this case. Accordingly, the claimant was a disabled person in accordance with the EQA at all relevant times because of his depression and anxiety.

Direct discrimination

(82) There is no dispute that Mr Jones was subjected to the treatment of a disciplinary process following the incident on 12 December 2019 and that this resulted in his dismissal.

(83) Mr Jones did not identify a named comparator, whom he felt had been treated less favourably by him in similar circumstances. Indeed, he made no real attempt to argue that somenone hypothetical who did not share his disability would not have been dismissed in materially same circumstances. Accordingly, he failed to assert a prima facie case that his disciplinary action and/or dismissal was because of his disability.

(84) Nonetheless, even if he did assert this prima facie case, the Tribunal did not hear anything and in particular from the evidence or Mr Rafferty or Mr Schruber which suggested that another employee in a similar situation who did not have Mr Jones' disability would have been treated any less

unfavourably than Mr Jones. Accordingly, if the Tribunal adopts an approach which used a hypothetical comparator, it cannot conclude that Mr Jones was treated differently than any other employee would have been who did not share his protected characteristic.

(85) The Tribunal accepts the respondent's evidence that the decision to commence disciplinary action and to dismiss took place not because of Mr Jones' disability, but because of his behaviour and how that behaviour affected the ability of his colleagues to feel safe in the workplace.

(86) Accordingly, Mr Jones' claim of direct discrimination by reason of his disability contrary to section 13 EQA, must fail.

Discrimination arising from a disability

(87) The claimant did provide evidence which suggested that not only was he disabled with depression at the time of the incident in December 2019 but suffering from a deterioration in his health more generally. The Tribunal accepted because of he did not get an immediate solution to his leave request that he raised with Ms Maher, because of his underlying anxiety, he exploded. He simply could not control himself sufficiently, when Ms Maher would not give him what he wanted, immediately. Consequently, the shouting, swearing and walking away from his supervisor as identified in the list of issues above, were more likely than not to arise from the disability of depression and anxiety.

(88) The respondent did subject claimant to a disciplinary process for gross misconduct relating to the manifestation of behaviour which was objectively aggressive and intimidating not only to Ms Maher, but to other colleagues. This process of course ultimately led to his dismissal.

(89) The Tribunal did consider whether there could be a separation between the behaviour which was arose from Mr Jones' disability and the behaviour under investigation, especially taking into account the way in which Ms Maher was left feeling intimidated by the incident. Additionally, Ms Wedderspoon argued that the conduct in question did not arise from Mr Jones' disability and the Tribunal should take account of the evidence of his manipulative behaviour. However, while the Tribunal accepts that Mr Jones had been identified by Mr Chamberlin as being manipulative, it did not consider that in relation to the 'explosive' behaviour which resulted in the disciplinary process, there was evidence available to suggest that it was controlled act of drama designed to get a reaction. The manipulative behaviour, insofar as it could be identified, appeared to relate to seeking justification for unreasonable actions, so as to explain away what had happened and to lessen any sanction or penalty that might arise. On this basis, the Tribunal must conclude that the incident which led to the disciplinary action and dismissal arose from things which in turn arose from Mr Jones' disability.

(90) That finding however, does not end matters in relation to this particular complaint. The respondent did rely upon the defence allowed under section 15 EQA and advanced the legitimate aim behind Mr Jones' treatment, of the need to keep workplace safe and employees safe. This is an acceptable legitimate aim when it comes to managing the behaviour of employees and conduct is something which can result in an employee being fairly subjected to a disciplinary procedure and potentially a dismissal. The Tribunal accepts that because of his disability, Mr Jones found it harder to regulate his emotions in stressful situations. But while this might be the case, it is unreasonable for an employer to simply acquiesce and tolerate this behaviour when it has an adverse impact upon the wellbeing of the workforce more generally.

(91) What was particularly striking in this case was the way in which the incident affected Ms Maher and the way in which, over time, she acknowledged how she was left feeling following the incident.

(92) It may have been possible for the respondent to explore other options to deal with Mr Jones, but there had been many occasions previously where they had tried to support him and yet his behaviour remained unpredictable. The incident on 12 December 2019, was particularly shocking and left colleagues anxious and in the case of Ms Maher, feeling intimidated and frightened. There was nothing available to the respondent at the time of dismissal, to suggest it would not happen again and yet while this was the case, the respondent nonetheless managed the disciplinary process in a considered way and with a clear reluctance to dismiss. What was noticeable was how Mr Rafferty during the disciplinary hearing began to realise that dismissal was a necessary option but even so, he allowed himself additional time in order that he could be satisfied that it was the right decision.

(93) Both Mr Rafferty and Mr Schruber gave convincing evidence to the Tribunal that had they decided not to dismiss, they could not have any confidence that Mr Jones would not repeat his behaviour. Accordingly, not only was the disciplinary process a proportionate means of achieving the legitimate aim, but the decision to dismiss was also a proportionate means as well.

Outcome

(94) Having discussed this case and having applied the findings of fact to the list of issues, while taking into account the relevant law, the Tribunal must conclude as follows:

(i) The claimant was fairly dismissed by reason of his conduct. This means that his complaint of unfair dismissal was unsuccessful.

(ii) The claimant was disabled at the relevant time by reason of depression and anxiety in accordance with section 6(1) of the Equality Act 2010.

(iii) The claimant's complaint of direct discrimination by reason of his disability contrary to section 13 of the Equality Act 2010 is not well founded. This means that this complaint was unsuccessful.

(iv) The claimant's complaint of discrimination arising from his disability contrary to section 15 of the Equality Act 2010 is not well founded. This means that this complaint was unsuccessful.

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Employment Judge Johnson

Date: 14 May 2021

Sent to the parties on: 14 May 2021

For the Tribunal Office