THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE TRUSCOTT QC**
Mrs A Williams
Mr N Shanks

BETWEEN:

Mr P Chadwick
Claimant

AND

British Telecommunications plc
Respondent

ON: **11 and 12 September 2019**

Appearances:

For the Claimant: **R Dennis of Counsel**

For the Respondent: **Ms G Hicks of Counsel**

JUDGMENT

The unanimous judgment of the Tribunal is:

(1) that the Claimant's claim of disability discrimination contrary to section 15 of the Equality Act is not well founded and is dismissed, and
(2) that the Claimant's claim of unfair dismissal brought under Part X of the Employment Rights Act 1996 is not well founded and is dismissed.

REASONS

PRELIMINARY

1. The Claimant gave evidence on his own behalf and was represented by Mr R Dennis barrister. The Respondent was represented by Ms G Hicks, barrister, who led the evidence of Mr Jon Harrod, who was, at the time, Area Manager for

the South East, Paul Allen, who was, at the time, General Manager for UK South Engineering Services and Mr Gary Taylor, the claimant's line manager.

2. There were two volume of documents to which reference will be made where necessary.

3. It was agreed that, due to shortage of time, the hearing would address liability only.

4. Following a preliminary hearing before EJ Freer on 11 March 2019, the issues in the case were set out [27-28]. Prior to the start of this hearing, the parties agreed an updated list of issues as follows:

ISSUES

5.

Unfair Dismissal

1. Was the Claimant dismissed for a fair reason under s.98(2) Employment Rights Act ("ERA") 1996? The Respondent avers that the reason for dismissal was conduct.
2. If so, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss him? In particular:
   a. Did the Respondent have reasonable grounds for its belief that the Claimant was guilty of this misconduct?
   b. Had the Respondent carried out as much investigation as was reasonable in the circumstances?
   c. Was the procedure followed by the Respondent within the range of reasonable options open to a reasonable employer? Did the Respondent comply with its procedure and/or the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code")?
   d. Was the decision to dismiss a fair sanction; that is, was it within the range of reasonable responses?

Discrimination Arising from Disability (s.15 EqA 2010)

3. Did the Respondent treat the Claimant unfavourably, by dismissing him, because of something arising in consequence of his disability (s.15(1)(a) EqA 2010)? In particular:
   a. Was the Respondent's decision to dismiss the Claimant influenced to a significant extent by the Claimant's existing written warning of 18 July 2017?
   b. If so, was the Claimant's depression an effective cause of this written warning? The Claimant claims that he was issued with this written warning because he had failed to attend work on 1 June 2017, and that he failed to attend work because he:
      i. Felt a lack of motivation to do the work required;
      ii. Had a low mood; and
      iii. Did not think rationally about the potential consequences of his actions.
   c. Further or alternatively, was the Respondent's decision to dismiss the Claimant influenced to a significant extent by the Claimant's failure to attend work on 3 February 2018?
   d. If so, was the Claimant's depression an effective cause of his failure to attend work on that day? The Claimant claims that he failed to attend work because he was stressed and anxious about doing the work required

at Sanderstead unsupported; and for the reasons in paragraphs (i)-(iii) above.

4. Insofar as the Claimant was dismissed because of something arising in consequence of his disability (within the meaning of s15(1)(a) EqA 2010), was this dismissal a proportionate means of achieving a legitimate aim within the meaning of s.15(1)(b) EqA 2010?

a. Was the Claimant dismissed in pursuit of a legitimate aim? The Respondent says that it was aiming to ensure all employees conduct themselves by promoting a healthy, safe and supportive environment based on integrity, mutual respect and ethical behaviour.

b. If so, was the Claimant's dismissal a proportionate means of achieving that aim? The Respondent avers that it was, particularly in light of the previous warning the Claimant received on 18 July 2017 for unauthorised absence from work.

5. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was disabled within the meaning of s.6 EqA 2010 of fact at the material time (s.15(2) EqA 2010)?

Findings of fact

6. The Claimant commenced his period of continuous employment on 27 September 1982 as a Trainee Technician Apprentice [72-73]. On 21 March 2001, his employment (now as a C3 IXD Engineer) transferred to the Respondent [76-77].

7. Two of the many services provided by the Respondent are fixed line telephony and broadband services. Throughout the country, there are thousands of buildings called 'exchange buildings' which house the infrastructure to link each exchange with each other and with the customer to enable them to access the Respondent's telephone and broadband services. Within the exchange building is the main distribution frame which is normally a large steel structure which can be accessed from either side. One side is known as the exchange side and the other side is known as the distribution or line side. On the distribution side, there are two copper wires for every telephone line and these feed to either a street cabinet or telegraph pole which then feeds into the customer's premises.

8. One large programme of work undertaken by the Respondent is called concentrator compaction whereby it moves all available customers to one concentrator so it can depower the other concentrator. The process of moving the wires from one connection to another is called jumpering and involves disconnecting and re terminating wires on the main distribution frame.

9. An MOT task is one whereby the engineer goes to the exchange and oversees an element of the exchange. This is a proactive task and the engineer is looking to identify any potential problems and fix those problems before they actually cause a customer service issue. MOT work was originally introduced to install a sense of ownership and responsibility within the engineers for their exchanges, it can take a number of hours.

10. Five to six years ago, the Respondent initiated the IXD programme within Engineering Services (ES) which changed the culture from what was a command and control structure. Principles were put in place around autonomy, trust, accountability and ownership, for the engineers which manifested itself in self-

pinning (i.e. allocating jobs to themselves). Trust is paramount with the engineers. The engineers know what's right for their exchanges and are trusted to make the right decision in relation to the tasks they pin to themselves, as well as in how they undertake those tasks.

11. In 2017, there was a drive to improve productivity as the amount of work that ES was doing hadn't improved. An email was sent out and best practice guides were provided [86.26-86.34]. One of the key focuses was ensuring that the time that the engineer spent on a task was not matched to the Standard Task Time (STT) allocated to that job. The STT was an estimate of time that a task should take. Jobs would sometimes take less time to complete, or more time to complete, but what was needed was an accurate record of how long the job actually took [86.28, 86.33]. As a result of this, the MOT tasks were not a priority for electronics engineers, and instead resources were focussed on what would add more financial value (CAPEX or Capital work). The MOT work became the lowest priority work along with CP ceases as these did not bring in revenue, so the priority was given to the income-generating work and the instruction was to stop picking up MOT and CP cease work.

12. Mr Taylor provided this information individually to the three engineers who completed MOT tasks, out of a team of twenty-three, these were the Claimant, Stephen May and Oliver Anstey. All three confirmed they understood.

13. All of the tasks that the engineers are required to do are recorded on a scheduling programme called Field Operation Scheduler (FOS). This is an interface that the engineers access on their laptops. FOS identifies all the tasks whether future dated work, current month work or tail/backlog work. The engineers are required to log in each day and self-pin their own tasks. The engineers go on and select the tasks best suited to them: best fit, most value added, priority tasks. They are autonomous when assigning themselves tasks and the Respondent trusts them to undertake this task in accordance with what is in the best interests of the customers and the business. Some tasks are undertaken by engineers on their own and others can be paired up with other engineers. The tasks for the day are listed and may include urgent reactive tasks, planned maintenance tasks, scheduled routine tasks and MOT work.

14. When the engineer logs in to FOS, the tasks become visible as soon as they are built on FOS and they can pin their first task to themselves at any time prior to when they are expected to be ready for work and sign on. Once they have pinned the task, their next action is to go back into FOS and issue that task. What that means is that they have picked up the job and will be (if necessary) travelling to site. Once the engineer is on site, they then go back into FOS and mark the job as in execute, in other words that they have started to carry out the task. When they have finished the task, they mark the job as complete and pin their next task to themselves. Any urgent work was prioritised to minimise the loss of service.

15. To enable the engineers to get to their jobs, they are supplied with a van. Their vehicles are fitted with ILM (location device/tracker) which is used by control if an urgent job needs to be picked up, so they can identify whose vehicle is nearest and can respond quickest. Also, the ILM is used as a duty of care tool in case it is necessary to see where someone's van is located

16. The work of the Claimant was mainly on the exchange side when dealing with reactive faults but could be on both sides of the frame on tasks such as compactions. Mr Taylor is EES IXD Croydon Patch manager and was in this role at the time of the incident with the Claimant. He was the Claimant's line manager and was responsible for the Croydon area.

17. On 15 October 2015, the Claimant was absent from work with stress/anxiety [86.25].

18. On 2 September 2016, the Claimant was put on a coaching and development plan due to issues with signing-on late for work [86.24]. The Claimant said he had "lost some focus" [86.18] and had a number of late starts [86.20]. Mr Taylor wrote that: "I am sympathetic to your recent issues we have talked about in our discussion that there is EAP employee consoling [sic] and assistance available. You let me know that at this time you do not need this. Please remember that these services are available to everybody and can be of enormous benefits in certain situations this is of course a personal decision for you…As a manager I need to ensure that all BAU [Business As Usual] behaviours are followed as detailed in the job description. One of these would be signing on and off at the correct time daily as this is a basic requirement of the role. …" [86.24].

19. In his performance review for 2016/2017, it was recorded that the Claimant was experiencing issues with signing on late [82.10]. This refers to the issues narrated in paragraph 17. The Claimant developed his skills as an AXE10 engineer to the extent that he was sharing his knowledge with colleagues. He was the highest skilled AXE10 engineer on the team. His achievement was recorded in his annual performance review [82.10-82.11] as well as in subsequent meetings [84.1-86].

20. In March-May 2017, the Claimant was placed on a four-week performance monitoring plan which was extended to a six-week monitoring plan following an investigation into the Claimant not completing his tasks properly. The Claimant's performance improved.

21. In April 2017, Mr Taylor asked the Claimant to lead on a project called the SLCT compaction programme. This programme was being carried out in Sydenham. The task involved shifting customers from one part of the frame to another by moving their two-wired connection.

22. On 1 June 2017 at 10.35, Mr Taylor was checking the location of his engineers as was normal. He noticed that the Claimant's task had not been put into execute and so he called him to ask if he had forgotten to do this. The Claimant advised him that he was travelling to Norbury. Mr Taylor checked this with him as the system was showing him travelling to Sydenham (where the pinned task was). He asked him where he was because he didn't sound like he was in a vehicle or near a road. The Claimant then admitted that he was still at home. His start time was 8.30am so he was still at home more than 2 hours later.

23. Mr Taylor printed off a screen print of his sign on which showed that he signed on at 8.00am and signed off at 6.21pm [86.14]. He also checked the ILM data for the Claimant's vehicle which showed that he didn't switch the engine on in his van until 1.45pm [86.15]. He also printed off a screen shot from FOS; this

showed that his first completion of the day was at 1.10pm [86.16]. He produced a precis of events of that day [84].

24. On 2 June 2017 at 4:30pm, the Claimant attended a fact-finding interview with Mr Taylor [86.6]. The questions revolved around his dishonesty as to his whereabouts. The notes also record that Mr Taylor asked him: "Can you provide me a reason or mitigatining [sic] reasons as to fall we have a another drop in standards on lateness and why you decided to sign on and then not start travelling to work immediately?" [86.8, Q4]. The Claimant is noted as answering: "Peter replied to say he has had a long-standing issue with time keeping at the start of day which may be linked to his personal history of depression" [86.8, A4]. Mr Taylor thought that the Claimant's mental health issue was grief because of the death of his mother. Mr Taylor made a recommendation that the case proceed to disciplinary.

25. The Claimant was offered assistance from the Employee Assistance Programme (EAP). He took up the offer and had his first face to face counselling on 15 June 2017. To enable the Claimant to attend these sessions that were due to take place during his scheduled hours, Mr Taylor moved his rest day so he had a stress-free day. The Claimant said he had four sessions. He was offered additional sessions by Mr Taylor but did not take up the offer.

26. Shortly before the disciplinary hearing on 6 July 2017, the Claimant met with Mr Taylor. The bundle contains some notes of the meeting [85]. These include: "We discussed EAP employee counselling, and you have let me know that you have taken the advice and availed yourself of this help. This is good and a positive move forwards. They are the professionals and can assist you in this area. You have taken a step forward in helping yourself. We discussed the hearing on Thursday [6 July 2017] and have confirmed your attendance … You have expressed an adult view and our [sic] not going to contest the evidence and just want to move on, with work BAU following the hearing. I think this is a sensible approach."

27. Mr Harrod met with the Claimant on 6 July 2017 to conduct the disciplinary hearing. He was accompanied by his union representative, Mr Owens. During the hearing, the fact that the Claimant had signed on at 8am, but was still at home at 10.35am when his line manager called him was discussed. The Claimant said little as to why he had been dishonest about his whereabouts. The Claimant said he was undertaking tasks from home, but it was agreed that he did not have approval to do this. Mr Harrod noted that the Claimant had not mentioned that he was working from home during the investigation. The bundle contains a summary of what was discussed, as part of the HR case notes [227-228]. The notes refer to the Claimant as "EMP", and Mr Harrod as "SLM". They include the following:

> "EMP confirmed he didn't set off from home on the 01/06/2017 as he was having a bad day but understands this is not justification.
> SLM asked for clarity on what these problems are and EMP advised he is accessing support and this case was the push to access support …
> EMP advised that he feels his motivation has been an issue and he finds this is impacted when he has a slower start in the morning.
> …
> SLM asked questions surrounding timekeeping. EMP confirmed in the past this was an issue relation to depression. …

> SLM asked EMP to confirm what he feels is impacting his mood/wellbeing and EMP confirmed that depression relapse is linked to bereavement of his mum which happened last year."

28. The result of this disciplinary action was that the Claimant was issued with a 12-month written warning. Mr Harrod wrote to the claimant to confirm the outcome on 18 July 2017 and to provide the rationale for his decision [87-93]. The letter stated that any further misconduct could lead to dismissal depending upon the severity of the case [88]. The rationale recorded: "Peter explained that he has recently had some personal problems. Peter alluded to mental health issues in the past such as Depression. Peter has explained that he is getting support from the Employee Assistance Programme (EAP) Jon explained to Peter that in the event of more sessions being required, Peter should talk to his line manager and more sessions can be arranged…Peter went on to say that he sometimes finds it hard to get motivated particularly when there is a period of reduced workstack. Peter did say that he finds it more motivating when there are faults to deal with." [90] Later, the rationale states that: "Peter discussed some mental health related issues which may have contributed to this situation and perhaps a lack of motivation towards work. Although I sympathise with Peter, BT still expect all employees to abide by the code of conduct and it is the employee's responsivity [sic] to ensure he arrives at work on time. I am pleased to see Peteris [sic] engaged with the Employee Assistance Programme given his mental health issues are longstanding and is following through with the counselling sessions. This is encouraging and I hope the support Peter is receiving helps in his recovery. I would also ask that Peter maintains regular contact with his GP and the EAP to ensure the right levels of support are continually offered and that Peter continues to drive his own recovery with the specialist support available. Continued contact with his line manager is also important to explore any updates surrounding his health especially in instances whereby his wellbeing is negatively impacted and where adjustments could have been explored to avoid the situation which occurred on the 1st June." [91]. In his conclusions, Mr Harrod also noted that: "Peter acknowledged the process which should be utilised for sign on and task progression but advised that he was suffering with reduced wellbeing linked to his mental health. Peter also acknowledged that prior authorisation should be obtained from his line manager to work from home which was not obtained on this occasion" [92]**.**

29. Mr Taylor had no issues with the Claimant from this point through to 3 February 2018. The Claimant continued to develop his knowledge and expertise in AXE10. The Claimant had not taken any time off sick during this period [67]. He was performing his tasks as usual and he had not indicated in any way that he might be struggling with his mental health.

30. The Claimant had his half-year performance review with Mr Taylor, for the period April to September 2017 [216.3]. The review recorded that: "Peter as you are aware we you had some issues in the first half of this year which involved a monitoring plan for task progression and a lateness issue that resulted in a discipline. That said you took the learning on the chin. And have stepped up your game. This involved you and me talking and you utilising a self-help option." …"Since your meeting with the counsellors and the review with Jon [Harrod] I have started to see a change in your overall interest.
…

All BAU activities sign on sign off, task progression, being as productive as possible using all systems, support for others and the team, FPQ; CI mandatory learning is all standards
Peter I fell [sic] you have now turned a corner and can look forward to a second half year in a different light" [216.4].

31. On 1 February 2018, the Claimant and Mr Taylor had a routine meeting [95]. They discussed the current work and the AXE10 compaction job in the exchange at Sanderstead where he had been working on the jumpering schedule with a colleague, Mark Kane, for at least 2 or 3 weeks. The task involved at Sanderstead was the same as the tasks involved in Sydenham but on a larger scale. The jumpering schedule was an Excel document which Mark Kane and the Claimant kept up to date each day with progress on this project and it contained all the customers' lines that needed re-jumpering and changing from the old position to the new allocation [116-135]. Mark Kane is a transmission engineer, but learnt AXE10 through the Claimant's training. The Claimant did not express any concerns about the jumpering task. The Claimant also did not mention anything about how he was feeling from a mental health point of view. The notes record Mr Taylor saying that:

> "We discussed your recent discipline and that I am mandated to make checks and that these have been made on your start times and locations during the past few months togethor [sic] with task progression and sign on sign off times.
> Period discussed up till the 1st of Feb is at standard when compared to all other engineer. We discussed that this has to maintained throughout the length of the discipline warning period then be considered what is required Business as usual.
> Up till Thursday 1st Feb your
> Sign on
> Sign off
> Task progression
> Mandatory learning
> Are all at a good standard. Please maintain this" [96].

32. On 3 February 2018, Mr Taylor attended Ryland House in Croydon at about 9.30am. He was not working that day but had lost his wedding ring and had gone there to look for it. He decided to see if an engineer was in. He checked FOS and saw that the Claimant had pinned an MOT task to himself for Ryland House which had been moved into issue (i.e. that he was leaving to start the job) and then he had put it into execute (he had arrived at the job). Mr Taylor was surprised that the Claimant had pinned this task to himself as there were no customer faults and he had had the jumpering schedule emailed to him on 2 February [116] which he was expected to carry out. As the Claimant had put the MOT task into execute, Mr Taylor was expecting to see him on site. He wandered around the site but could not locate him. His company vehicle was parked in the car park, but he couldn't see him. Mr Taylor checked to see whether the Claimant had gone to Sanderstead to work on the jumpering instead, but he wasn't there.

33. Mr Taylor checked back again at Ryland House at 10.50am and 12.25pm, but there was still no sign of the Claimant. Each time he attended Ryland House, he was there for about 45 minutes. He put a tannoy request out for him [161-162]. He checked the FOS and saw that the Claimant had marked the job as completed after exactly 4 hours. To find out what the Claimant was doing next, Mr Taylor

rang up Carol Wolstenhome in the control team. She advised that the Claimant had logged that he was on site at Sanderstead at 12.59pm. Mr Taylor went to Sanderstead, but again he could not find the Claimant. He returned on a couple of occasions and still the Claimant was not present. When he later checked the system, the Claimant had recorded 4 hours at Sanderstead, but none of the work had been carried out.

34. The Claimant did not contact Mr Taylor either by telephone call or text. If the Claimant was having difficulties logging on or if he was feeling unwell, he should have contacted Mr Taylor. All his engineers regularly call him even when he is not on duty.

35. The duty of care system at the Respondent operates on the following basis: if an engineer signs on for his scheduled day self-pins work and progresses this in the form of Issue (travel to site) EXE (on site) Com (completed) and signs off at the end of that day, no alert would be generated as the system would assume everything is in order. If an engineer does not sign on then the duty of care system kicks in after 30 minutes and advises the line manager that someone has not signed on. The line manager then tries making contact and if necessary, attends the engineer's home. If Mr Taylor had not attended site to locate his wedding ring, the issue of the Claimant's absence from site would not be known at that time.

36. Every engineer would ring the control telephone number on a regular basis. Control might contact an engineer to move them to a more urgent job. If an urgent job comes up, control will identify an engineer to send to address it, determining who they will send by either looking at their location on a map (using the tracking location on their van), or by looking at their 'task in execute' which will identify where they are located. Likewise, all engineers would speak to control to update them on their status. The reactive engineers, like the Claimant, would contact control very regularly. The Claimant did not contact control that day.

37. On 5th February, Mr Taylor sent himself an email with his initial thoughts on questions he would need to ask during the fact find [152]. As part of his investigation, he produced a precis of what had happened [170-171]. He produced a copy of the Claimant's rostered hours to show that he was due to be working 8.30am-6.30pm on 3 February [172]. He also produced a copy of the MOT task that the Claimant had pinned to himself that morning [173] and the progress notes for that task which showed the Claimant pinning the task at 2.58am, issuing it at 8.48am, being onsite at 8.58am and completing the task at 12.58pm [175]. He gathered similar information in relation to the afternoon task at Sanderstead [176-177]. He asked for the details of whether the Claimant's van had been moved at all and was provided with a report which showed that his van had not been moved since 31 January [174]. He also accessed the PMS live data which shows the relationship with the engineer's vehicle, i.e.: location, engine start, speed and each stop and each of the tasks the engineer has pinned or has that day [178]. Finally, he gathered the jumpering schedules to determine whether or not any work had been carried out by the Claimant that day.

38. Mr Taylor undertook a fact find meeting with the Claimant on 12 February 2018. During this meeting, he asked the Claimant why he wasn't on site at Ryland House in Croydon on the morning of 3 February. The Claimant said that he did not need to be on site and was working remotely at home. When Mr Taylor reminded the Claimant that he needed permission to do this, he said that he forgot.

When Mr Taylor asked about Sanderstead in the afternoon, the Claimant said that there were enough hours on the job and sufficient work had been done previously and so he didn't feel like he needed to come in. Mr Taylor also asked the Claimant about why he had pinned the MOT task to himself. The Claimant responded that it was because it was on red status, meaning that it was at the point of being overdue. The Claimant acknowledged that he recalled Mr Taylor saying that they needed to work on higher priority work.

39. At the end of the fact find, Mr Taylor asked the Claimant if there was anything else he should be aware of, and he responded no. The Claimant, at no stage, said that he was suffering in any way with his mental health, nor did he say he was lacking in motivation. Mr Taylor concluded that there was evidence to show that he was being dishonest by recording himself as being at site on two separate occasions when actually he was at home. He recommended that the case progress to disciplinary because as the Claimant's behaviour was dishonest. Mr Taylor produced the misconduct investigation report [160-169] and incorporated his fact find with the Claimant as part of the investigation.

40. On 13 February 2018, Mr Taylor advised the Claimant that he was being suspended pending an investigation into allegations of gross misconduct. This was confirmed by letter [153-155]. The Claimant and Mr Taylor discussed his state of mind and any possible effects this suspension could have on him. The Claimant assured him that he was in a good state compared to June/July 2017 but Mr Taylor still wanted to be sure that he was OK, so it was agreed that he would contact him by telephone every Tuesday and Thursday to check on his welfare. The Claimant also assured him that if he started to feel depressed or his state of mind was dropping that he would call Mr Taylor [253]. Mr Taylor contacted him throughout the period of suspension [205-207]. He reported each time that he was feeling 8 out of 10.

41. In February 2018, as the claimant's second line manager, Mr Harrod was asked to hear the disciplinary case in relation to the following allegations:

a. Falsification of work records – that on the morning of 3 February 2018 the Claimant had recorded on the work systems that he was attending site for 4 hours when he was not;

b. Falsification of work records – that on the afternoon of 3 February 2018 the Claimant had recorded on the work systems that he was attending site for 4 hours when he was not;

c. Unauthorised absence from work – that on 3 February 2018 from 8.30am to 4.30pm the Claimant was not on site where he claimed to be but was in fact at home; and

d. Failure to follow management request – that he was using his own vehicle for work contrary to an instruction from his line manager.

42. The specific allegations are set out on the first page of the letter to the claimant inviting him to the disciplinary hearing, and enclosing the investigation report dated 23 February 2018 [156-178].

43. On 15 March 2018, Mr Harrod met with the Claimant who was accompanied by his union representative, Mr Owens. The meeting was recorded and a transcript has been produced [178.1-178.20]. Mr Harrod asked the Claimant why he had signed on late. The Claimant explained that the reason for this was that he had an issue with his laptop. The Claimant went through the process he followed in

some detail as to what he had to do to get the laptop working again. This was a process he was familiar with as he said this problem was not uncommon.

44. Mr Harrod asked him about why he was not on site when the MOT task he had pinned to himself was being completed. He explained that it was a keyboard based task. The Claimant booked on the job at 8.58am and marked it as complete at 12.58pm [178]. Mr Harrod asked him if the job had taken him the full 4 hours and he confirmed no. Mr Harrod asked the Claimant what he did with the remaining time on the MOT task. The Claimant advised that he had checked emails, admin and monitoring the queues. When Mr Harrod asked him why he had not checked in to FOS again for another job, he confirmed that he hadn't searched for tasks. Mr Harrod then asked the Claimant about whether he had permission to undertake the MOT from home. The Claimant confirmed that he didn't. He said that with hindsight he was aware that he needed permission but it didn't register at the time.

45. They then discussed the second allegation which was in relation to the afternoon of 3 February 2018 when the Claimant was scheduled to work at the Sanderstead exchange. Mr Harrod asked him to explain why he did not attend site to which the Claimant responded, "I should've gone". He then explained how he was not comfortable changing the circuits on his own and would have preferred to work with a colleague on this. He acknowledged that he should have gone in and run some jumpers and dealt with the changeovers on Monday. The Claimant explained that he spent the time (when he should have been at Sanderstead) monitoring the faults queues and reviewing the excel spreadsheet associated with the concentrator compaction task [116-135]. The Claimant did not pick up any other work that afternoon.

46. They discussed the fourth allegation about the use of his vehicle.

47. Mr Harrod then moved on to talk about the Claimant's well-being. The Claimant stated that in relation to his depression, compared to how he felt before, it was like night and day. He explained night as being when you don't want to do anything, you don't feel like going out the house. Mr Harrod asked him if that was how he was feeling now and he said no that was how he felt before when he went to get further support.

48. The Claimant then went on to say that it had been suggested to him that he could play on his depression in this disciplinary but that he was not comfortable doing that because it was not his current mind-set. Mr Harrod then asked Mr Owens, the Claimant's union representative, if he wanted to add anything. Mr Owens said "It's not rational behaviour and when you've been… well we sat through, it was us 3 who sat through the previous and he was bad then, he was in a much, much darker place then when we sat before and erm how long it takes to get over it, if you ever get over it, I don't know I'm not a, I'm not a doctor a psychologist or anything so I don't know a psychiatrist but you know in yourself when something doesn't feel right and I think that it doesn't feel right that the would've done it again without you know having an element of maybe it was still there in the background and Pete has been [51:88] I couldn't function before, I'm functioning now but I still have the, and that for me Peter's denies he doesn't want to accept that and that's up to him but it's up to me to point out that I think that should be considered. It's not a rational behaviour to disregard especially with a previous discipline but it's also not rational for a Manager to act and not support

someone and I don't feel that Gary supported him at all in this. And I think there's still issues that Peter does as I say, it just doesn't feel right. I don't see anyone all the time but, I think its admiral that he's been honest with you he's not tried to deny anything he's told you exactly what's happened and why he's done it. …" [178.19]. Mr Harrod was surprised by this as the Claimant had just stated that his mental health was in a much better place and was not the reason for his actions. Mr Owens went on to explain that there was a duty of care issue because Gary had not called the Claimant when he realised that the Claimant had not attended for work that morning.

49. In relation to the Croydon task, the Tribunal finds that the Claimant:

a. Accepts that it was a task "*to be carried out onsite at Ryland House*" [C/WS para 50].

b. Accepts that whilst some parts of the task (running the alarms and checking the equipment [178.4] could be done from anywhere, the majority of the MOT check had to be done onsite. The Claimant, in cross-examination, accepted that tasks such as: a visual inspection, checking the filters, checking the fans, checking the hardware all had to be done onsite. He also accepted that there could have been a flood onsite and he would not have known this from home.

c. Accepted (in the disciplinary hearing) that his MOT checks did not take 4 hours to complete but that he marked the task as taking exactly 4 hours on the system [178.6].

d. Accepted (in the disciplinary hearing) that he did not have permission to work from home [178.7].

e. Accepted (in the disciplinary hearing) that with hindsight he should have gone to Croydon to carry out the task [178.8].

50. In relation to the Sanderstead task, the Tribunal finds that the Claimant:

a. Could not explain, in the investigation, why he had not gone to Sanderstead to do the task [164].

b. Could not initially offer any explanation in the disciplinary hearing as to why he did not attend Sanderstead that day: "… *I haven't really got a lot to add to that to be honest, I mean I should have gone*"

c. Accepted, in the disciplinary hearing, that he should have gone to Sanderstead: "*OK I should have gone and done the jumpering Jon that's it and I didn't do it*" [178.10]; and: "*No I should have gone. I'll hold my hand up and say I should have gone. I'm in the wrong*" [178.11].

51. Generally, the Claimant accepted: that his actions put others safety at risk (investigation [165]); that he defrauded the company of valuable work (investigation [165]); that he should have called Mr Taylor or someone to explain that he was working from home or to explain if he was uncomfortable working on the Sanderstead jumpering (disciplinary [178.9]). In cross-examination the Claimant accepted that: (a) he could – and should – have called someone to say he was working from home; and (b) whilst there was no option to select "working from home" on the drop down menu on the system, he could have entered this information in the Progress Notes section or the Closure Notes section of engineer.com, in which he instead wrote, "*Completed OK*" [175].

52. Following the meeting, Mr Harrod carried out further investigations to clarify some of the points. He looked at what work was available on patch and nearby [136-152]. He concluded that there was plenty of work he could pick up. This work

included 8 current month 21cn routines within the Claimant's patch (TNS921) and 3 x 21cn tasks in the neighbouring patch of Kingston (TNS922) [139 & 147]. He also found that there were 49 x 21cn tasks in the Claimant's patch for March and 85 x 21cn tasks in March in the neighbouring patch of Kingston [139] which could have also been completed. There was also plenty of build work across the South East region including work within the Croydon patch

53. Mr Harrod spoke to Mr Taylor in relation to the jumpering task the Claimant had said he was not comfortable to do at Sanderstead. Mr Taylor sent him an email in which he explained how the Claimant had trialled the first SLCT compaction in Sydenham and competed this task on his own, he explained how this involved the same work moving the connections [179]. Mr Taylor also sent him notes of a meeting he had held with the Claimant in which it confirmed that the Claimant had completed the compaction programme which he was leading on [216.3]. Mr Harrod was therefore satisfied that the Claimant did have the necessary skill and knowledge to undertake the jumpering task.

54. Mr Harrod also contacted Adrian Davies in relation to whether or not the MOT can be run from home. He confirmed that MOTs required an on-site presence as visual verification was required [181.1].

55. In order to see what was available to the engineers in terms of the MOT process, Mr Harrod was provided with a link to the Switch MOT Toolkit [181.2]. Within the toolkit, it mentions in several places that the individual is required to be on site for carrying out the Switch MOT [82.1-82.7]. Mr Harrod was therefore satisfied that the Claimant should have been on site to carry out the MOT.

56. Mr Harrod pulled out the productivity guide which he had shared with Mr Taylor to share with his team [86.26-86.32]. This stated that an engineer should not be trying to match the time booked to the STT for the task they are doing [86.28 & 86.33]. He therefore did not accept the Claimant's comment that it was standard practice to book the full STT on an MOT task or any task for that matter.

57. Finally, he reviewed the written warning that he had issued to the Claimant and was satisfied that the Claimant was fully aware that he should not be working from home without prior approval.

58. Mr Harrod considered the charges and produced his rationale which sets out the reasons for his decision. In coming to his decision, he took into account what was discussed during the meeting, what was in the investigation report and the follow-up investigations [199-201].

59. Mr Harrod concluded that the Claimant had not intended to go to work that day, but he had been caught out by chance, by Mr Taylor going on site on a day when he was not due to be in work. The breakdown in trust was because he had been dishonest. Not only had he not been at work but he had actively stated that he was on site. In the disciplinary hearing in July 2017, the Claimant was comfortable speaking about the mental health issues he had at that time and about the impact it was having on his ability to carry out his role. Mr Harrod did not accept that he been feeling the same way on 3 February 2018 and that he no longer felt able to talk to him about it. He was satisfied that what had happened on 3 February 2018 was of itself sufficient for gross misconduct.

60. On 4 April 2018, Mr Taylor was provided with the outcome of the Claimant's disciplinary and a copy of the rationale to hand over to him [185]. He met the Claimant that afternoon and handed the envelopes over to him [187]. The Claimant appealed.

61. On 6 April 2018, Paul Allen contacted the Claimant to arrange the appeal meeting, which was originally scheduled to take place on 19 April 2018 [203-204]. The meeting was rescheduled to 4 May 2018 in the Claimant's home town of Croydon [211-212].

62. The Claimant attended the appeal meeting with his union representative Mr Owens. During the meeting, Mr Allen let both the Claimant and Mr Owens talk as much as they needed to, to explain the Claimant's grounds of appeal. He also went through Mr Harrod's rationale with them. The crux of the appeal was that the Claimant had been in denial over his mental wellbeing. The Claimant confirmed that he was not disputing what he had done, but felt that the mitigating circumstances had not been considered by Mr Harrod when he came to his decision [212.7-212.43].

63. In the meeting, Mr Allen was handed a letter from the South London and Maudsley NHS Foundation Trust, Croydon IAPT [210], a list of medication and a certificate recording the Claimant's 35 years with BT. The letter set out a summary of a call the Claimant had had with an Assistant Psychologist on 16 April 2018. The Claimant and Mr Owens spoke about the letter and said that it supported the Claimant's problems. They were suggesting that he was not in the right state of mind which caused him to behave in the way that he did. Mr Allen noted that the medical information the Claimant had supplied was all dated from after the Claimant had been advised of his dismissal, none of the information provided related to the day of the incident.

64. Mr Allen spoke to Mr Taylor to make sure that nothing had been missed. Mr Taylor confirmed that at a meeting two days before the date of the incident the Claimant had not given any indication at all that he might be suffering in any way. Mr Taylor forwarded documents that demonstrated that the Claimant had received the support from EAP and was receiving ongoing line management support from Mr Taylor [215-216.4]. He also checked the fact finding document and there was nothing within that document, nor the explanations provided to Mr Harrod that indicated he was struggling with his mental health that day. Mr Taylor also provided evidence to support the fact that the Claimant was competent on the AXE10 compaction when the Claimant led on the SLCT compaction task in Sydenham. Mr Allen was satisfied that the Claimant did have the necessary skills to undertake the jumpering task and agreed with Mr Harrod's conclusions on this.

65. The language used by Mr Harrod in his rationale was also raised during the appeal and it was commented that he was relying on assumptions. Mr Allen agreed that the wording was a bit ambiguous but he was entirely satisfied that it was just terminology and didn't take away from the facts of the case nor Mr Harrod's findings.

66. Mr Allen came to the conclusion that the Claimant's behaviours which he had admitted to were not as the result of him feeling depressed or anxious but were acts of misconduct. He was also mindful of the level of trust expected of the engineers, never more so than at the weekend. The Claimant's behaviour in

progressing these tasks as if he was on site, but not actually attending site resulted, as Mr Harrod had concluded, in a complete breakdown of trust. His rationale sets out his reasons for his decision [218-221]. There was some delay in getting the outcome to the Claimant and so he wrote to the Claimant on 4 June to advise him of this. There were further delays and the Claimant had to chase him on 14 June [221.1-221.2]. He responded to the Claimant immediately and the letter and rationale was sent out to him confirming that his appeal had not been successful and his dismissal still stood [217-221].

SUBMISSIONS

67. The Tribunal received detailed submissions of the highest quality from both barristers both in writing and orally. Without intending any disrespect, these submissions are not repeated here.

RELEVANT LEGAL PRINCIPLES
Unfair Dismissal

68. Dismissal must be for a potentially fair reason within the meaning of section 98 of the Employment Rights Act ("ERA") 1996. Conduct is a potentially fair reason: section 98(2)(b) ERA 1996. At the first stage of assessing fairness, the employer merely has to show that the reason given was the reason it in fact relied on and that it was capable of being fair. Once it has done this this the tribunal will go on to consider whether the dismissal was fair in all the circumstances within the meaning of section 98(4) ERA 1996.

69. The statutory reasonableness test which tribunals must apply when deciding unfair dismissal complaints requires that where the employer has fulfilled the requirements of section 98(1) of the Employment Rights Act 1996, then, subject to sections 99 to 106 of the Employment Rights Act, the determination of the question whether the dismissal was fair or unfair, is established in accordance with section 98(4) of the Employment Rights Act, which states:

> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (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.

70. In the context of misconduct, the test of a fair dismissal is that it is sufficient if the employer honestly believes on reasonable grounds, and after all reasonable investigation, that the employee is committed the misconduct. In considering reasonableness in this context, the judgment in **British Home Stores Ltd v. Burchell** [1980] ICR 303 contained guidelines, cited in most tribunal cases involving dismissal for misconduct and are contained in the following quotation from the Employment Appeal Tribunal's judgment at paragraph 2:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the

> employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. *[It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further.]* It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being sure' as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter beyond reasonable doubt'. The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."

71. In **Scottish Daily Record & Sunday Mail [1986] Ltd v. Laird** [1996] IRLR 665, the Inner House of the Court of Session said, as regards the application of the **Burchell** test, that if the issue between the employer and the employee is a simple one and there is no real dispute on the facts, it is unlikely to be necessary for the employment tribunal to go through all the stages of the **Burchell** test.

72. The Court of Appeal further considered **Burchell** in **Graham v. Secretary of State for Work and Pensions (Jobcentre Plus)** [2012] IRLR 759 by Aikens LJ at paragraphs 35-36:

> 35 '…once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.

36 If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical

reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee.

73. Although not specifically identified in the issues, the Tribunal considered the cases of **Sandwell & West Birmingham Hospitals NHS Trust v. Westwood** 2009 UKEAT/0032/09 and **Eastland Homes Partnership Ltd. v. Cunningham** 2014 UKEAT/027/13 and considered the nature of the misconduct and whether the characterisation by the Respondent that it was gross misconduct was reasonable.

74. It may be that the foregoing issue is contained within consideration of sanction. In relation to sanction, there are, broadly, three circumstances in which dismissal for a first offence may be justified:

a. where the act of misconduct is so serious (gross misconduct) that dismissal is a reasonable sanction to impose notwithstanding the lack of any history of misconduct;

b. where disciplinary rules have made it clear that particular conduct will lead to dismissal; and

c. where the employee has made it clear that he is not prepared to alter his attitudes so that a warning would not lead to any improvement.

75. In considering procedural fairness the Employment Appeal Tribunal in **Clark v Civil Aviation Authority** [1991] IRLR 412 laid out some general guidelines as to what a fair procedure requires. But even if such procedures are not strictly complied with a dismissal may nevertheless be fair – where, for example, the procedural defect is not intrinsically unfair and the procedures overall are fair: **Fuller v Lloyd's Bank plc** [1991] IRLR 336.

76. An employment tribunal must take a broad view as to whether procedural failings have impacted upon the fairness of an investigation and process, rather than limiting its consideration to the impact of the failings on the particular allegation of misconduct, see **Tykocki v. Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust** UKEAT/0081/16 dated 17 October 2016.

77. Whilst there was some suggestion that the 'range of reasonable responses' test applies only to the decision to dismiss, not to the procedure adopted, this was rejected by the Court of Appeal in **Sainsbury's Supermarkets Ltd v. Hitt** [2003] ICR 111 CA. The Court of Appeal held in this case (at paragraph 30) that the 'range of reasonable responses' – or the need to apply the objective standards of the reasonable employer – applies:

> "…as much to the question of whether the investigation into the suspected misconduct was reasonable in the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

78. Procedure is part of the overall fairness to be considered by the tribunal and not a separate act of fairness – see Langstaff J in **Sharkey v Lloyds Bank plc** UKEAT/0005//15 (4 August 2015, unreported):

> …procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.

79. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness: **Taylor v OCS Group Ltd** [2006] IRLR 613.

Discrimination Arising from a Disability

80. Section 15 EqA 2010 provides, relevantly, as follows:

'(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.'

81. There are two questions of causation, as the Employment Appeal Tribunal held in **Basildon & Thurrock NHS Foundation Trust v. Weerasinghe** [2016] ICR 305 EAT explained:

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

82. **Sheikholeslami v. University of Edinburgh** [2018] IRLR 1090 EAT confirmed that there are two distinct causative issues:

> "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. (See *City of York Council v Grosset* [2018] EWCA Civ 1105 [2018] IRLR 746)."

83. **Pnaiser v. NHS England** [2016] IRLR 170 EAT set out the following guidance as to the correct approach to a claim under section 15 EqA 2010 (at [31]), including, relevantly, the following (emphasis added):

> '(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. 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.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…
>
> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
>
> (e) … However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
>
> (f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
>
> …
>
> (h) Moreover, the statutory language of s.15(2) makes clear… that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so…

84. Whilst the test is objective and could arise from a series of links, there still has to be some causal connection between the "something" and the Claimant's

disability: per HHJ Eady QC (as she then was) in **iForce v. Wood** UKEAT/0167/18 (2 January 2019, unreported).

85. It is also sufficient if the disability is an "effective cause" of the "something" that causes the unfavourable treatment: it does not have to be the sole (or even main) cause. In **Risby v. London Borough of Waltham Forest** (UKEAT/0318/15, 18 March 2016, unreported) the Employment Appeal Tribunal held that:

> "17. … In the passage cited from the Employment Tribunal's decision, it is plain that it believed that it was necessary for it to be shown that there was a "direct linkage" between the Claimant's disability and his conduct on 19 June 2013. There was no such requirement. All that had to be established was that the Claimant's conduct arose in consequence of his disability or, to put it in Laing J's words, that was an effective cause or more than one of his conduct. …
> 18. If he had not been disabled by paraplegia, he would not have been angered by the Respondent's decision to hold the first workshop in a venue to which he could not gain access. His misconduct was the product of indignation caused by that decision. His disability was an effective cause of that indignation and so of his conduct, as was, of course, his personality trait or characteristic of shortness of temper, which did not arise out of his disability. On the Employment Tribunal's own analysis of the facts, this was a case in which there were two causes of conduct that gave rise to his dismissal, one of which arose out of his disability."

86. The test of justification is an objective one to be applied by the Tribunal, against the backdrop of evidence before it. The Tribunal may, therefore, reach a different conclusion to that advanced by the employer: **York City Council v Grosset** [2018] ICR 1492 CA. held that:

> "54. … the test in relation to unfair dismissal proceeds by reference to whether dismissal was within the range of reasonable responses available to an employer, thereby allowing a significant latitude of judgment for the employer itself. By contrast, the test under section 15(1)(b) of the EqA is an objective one, according to which the employment tribunal must make its own assessment …"

87. The EHRC Code further states that:

> "5.20. Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments …
> 5.21. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."

88. Para 4.31 states that:

> "EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."

89. In other words, the justification defence will not be made out where the same aim could be achieved by less discriminatory means.

90. Albeit in the context of indirect discrimination, Lady Hale addressed the justification defence (which is the same in section 15) in **Essop v Home Office; Naeem v Secretary of State for Justice** [2017] ICR 640 SC and stated at [29]:

> "A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question - fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in Essop, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result."

91. In **Homer v Chief Constable of West Yorkshire** [2012] ICR 704 SC the Supreme Court considered the justification defence (again in the context of indirect discrimination) and Lady Hale stated:

> "19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim…
>
> …
>
> 20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:
>
> ". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."
>
> He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:
>
> "First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"
>
> As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

> …
> 22. The ET (perhaps in reliance on the IDS handbook on age discrimination) regarded the terms "appropriate", "necessary" and "proportionate" as "equally interchangeable" [29, 31]. It is clear from the European and domestic jurisprudence cited above that this is not correct. Although the regulation refers only to a "proportionate means of achieving a legitimate aim", this has to be read in the light of the Directive which it implements. 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.
> …
> 23. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate. The EAT suggested that "what has to be justified is the discriminatory effect of the unacceptable criterion" [44]. Mr Lewis points out that this is incorrect: both the Directive and the Regulations require that the criterion itself be justified rather than that its discriminatory effect be justified (there may well be a difference here between justification under the anti-discrimination law derived from the European Union and the justification of discrimination in the enjoyment of convention rights under the European Convention of Human Rights)."

92. Proportionality was considered by the Supreme Court in **Bank Mellat v HM Treasury (No 2)** [2014] AC 700 where Lord Reed JSC stated at page 791:

> "74 The judgment of Dickson CJ in Oakes provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in Oakes can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measures effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in de Freitas, and the fourth reflects the additional observation made in Huang. I have formulated the fourth criterion in greater detail than Lord Sumption JSC, but there is no divergence of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

DISCUSSION and DECISION

93. There was said to be no dispute about the applicable law but the Tribunal recognises that the amount of investigation required to satisfy the legal test will depend on the circumstances and where the offence is admitted very little investigation is required. In this case, the investigation which was undertaken by the Respondent went well beyond what was necessary to satisfy the legal test.

94. If there were any disputes between Mr Harrod and Mr Allen and the Claimant in evidence, the Tribunal preferred the evidence of the Respondent's witnesses. As disability has now been admitted by the Respondent, it is not necessary to comment on the evidence given by the Claimant in this regard. However, there were points in the evidence of the Claimant where he sought to introduce matters relating to his mental health with Mr Taylor with which Mr Taylor did not agree. Examples are as follows: at paragraph 7 of the Claimant's witness statement he says "Mr Taylor suggested I had been signing on late because of my depression", at paragraph 17, the Claimant says he told Mr Taylor he was not able to carry out tasks, at paragraph 55, the Claimant said Mr Taylor said "I really can't understand how your mind works"£ and at paragraph 56 where he says Mr Taylor asked: "How is it you are doing something wrong and have no reaction?" In any evidential dispute between the Claimant and Mr Taylor, the Tribunal accepted the evidence of Mr Taylor.

95. On 18 July 2017, the Claimant was issued with a written warning on 18 July 2017 [87-93]. This was not relied on in relation to the events of 3 February 2018.

96. On 3 February 2018, the Claimant failed to attend sites at Croydon and Sanderstead despite indicating on the internal systems that he had taken work at those locations. The Claimant's manager, Gary Taylor carried out an investigation. The Claimant was suspended [153-154] and ultimately invited to a disciplinary hearing [156-159]. The hearing was recorded and a transcript is available at [178.1-178.20].

97. Following the hearing and further investigation the disciplinary chair, Jon Harrod made the decision to dismiss the Claimant with notice [188].

98. On 5 April 2018, the Claimant appealed against his dismissal [248]. Following an appeal hearing on 4 May 2018 (for which see the transcript at [212.7-212.43]) and consideration of medical evidence submitted by the Claimant, the appeal chair, Paul Allen came to the view that the appeal should be dismissed [217-221]. The Claimant's effective date of termination was 3 July 2018.

99. Turning to the issues:

Unfair dismissal

Conduct was the reason for the dismissal and it is a potentially fair reason. It was appropriate for the Respondent to characterise the conduct as gross misconduct.

<u>Did the Respondent have reasonable grounds for its belief that the Claimant was guilty of this misconduct?</u>

100. The Tribunal concluded that it did. Mr Taylor happened to attend the Ryland House site at Croydon on 3 February 2018, having lost his wedding ring there [GT/WS para 25]. When on site he checked the FOS system, saw that the Claimant

had pinned an MOT task to himself for Ryland House, "*which had been moved it into issue (i.e. he was leaving to start the job) and then he had put it into execute (he had arrived at the job*)"

101. Mr Taylor could not see the Claimant on site, despite his van being there [GT/WS para 26]. Nor could Mr Taylor see the Claimant at Sanderstead (the location of the jumpering work that had been assigned to him) [GTWS para 27]. Mr Taylor checked back at Ryland House at 10.50 and 12.25. He checked for 45 minutes at a time and put out a tannoy announcement [GT/WS para 28], [161-162]. Having checked the FOS system, Mr Taylor saw that the Claimant had marked the job as complete at 12.48, after exactly four hours [GTWS para 28].

102. Mr Taylor went to Sanderstead as this was where the Claimant was next due to be, according to the FOS. The Claimant was not to be found either then or on Mr Taylor's subsequent checks [GTWS para 28]. Given the Claimant had indicated on the system that he was onsite at Croydon and Sanderstead, this is where he ought to have been. Signing on in this way without appearing onsite was potentially a misconduct offence.

<u>Had the Respondent carried out as much investigation as was reasonable in the circumstances?</u>

103. The Tribunal concluded that it did much more than was necessary in the circumstances. Mr Taylor wrote himself a time line of what happened on 3 February 2018 and emailed this to himself on 5 February 2018 [152]. He wrote a list of questions to ask the Claimant [152]. This was in accordance with the Respondent's policy [46.18]. He then proceeded to conduct the following further investigation:

a. He produced his own account of what happened on the day [170];

b. He obtained a copy of the Claimant's rostered hours which showed he was due to be working 08.30-18.00 on the day in question [172], [GTWS para 34];

c. He obtained a screen print of the engineer.com system, which showed the steps the Claimant had taken in: pinning the Croydon MOT task to himself; progressing the task; indicating that he had moved onsite; and indicating that the task was complete [175], as well as the equivalent screen print for the Sanderstead task [176-177];

d. He obtained the log of the two tasks [178]; and

e. He sourced the jumpering schedules, which showed the work at Sanderstead that the Claimant was supposed to be doing that day [116-135], [GT§34].

104. Mr Taylor then conducted an investigation interview (or "fact find") with the Claimant on 12 February 2018 [GT/WS para 35], [163-166]. During the meeting the Claimant claimed that he did not need to be working onsite for the Croydon MOT [164]. When Mr Taylor reminded him that no work was to be done without having been "*explicitly cleared*" by him, the Claimant said he forgot [164]. In relation to the Sanderstead work the Claimant could offer no explanation as to why he did not attend Sanderstead, despite indicate on the system that the task was in "execute" [164]. The Claimant admitted that his actions: (a) put colleagues' safety at risk; and (b) by recording that he was doing meaningful work whilst remaining at home he was "*defrauding the company*" [165].

105. The Claimant was suspended on 13 February 2018 in accordance with the procedure set out in the Manager's Guide to Handling Misconduct Fairly document [46.6-46.7].

106. Following the disciplinary hearing, further investigation was conducted by Mr Harrod. The appeal hearing conducted by Mr Allen considered the medical evidence submitted by the Claimant.

Was the procedure followed by the Respondent within the range of reasonable options open to a reasonable employer? Did the Respondent comply with its procedure and/or the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code")?

107. The Tribunal considered that it did. The Respondent invited the Claimant to the disciplinary hearing on 23 February 2018 [156-159]. The appropriate amount of notice, as prescribed in the Manager's Guide to Handling Misconduct Fairly document, was given [46.8]. The Claimant was advised of his right to be accompanied and was represent by a trade union representative, Mr Owens. The Claimant was provided with copies of all documentation relied on at the hearing, including: the disciplinary policy; the investigation report [160-169]; line Manager's summary document (03.02.2018) [170-171]; the 'Chadwick MOT JP' document [172-173]; the 'Compaction 3rd compaction job 1' document; the MOT task sheet [82.1-82.7]; the rostered hours [172]; the vehicle detail sheet [174]; and the Sanderstead jumpering schedule [116-135].

108. The Respondent put the allegations to the Claimant. He was given a chance to respond and put his case with regards to each of them. The Claimant raised little by way of mitigation. At the end of the hearing both the Claimant and Mr Owens were content that a fair process had been followed [178.20].

109. Following the hearing, Mr Harrod conducted further investigation. In particular, he: (a) checked the Claimant's April to September action plan [180-181]; (b) reviewed the Claimant's "1-2-1" with Mr Taylor in which it was clear the Claimant had trialled previous compaction work (the task at Sydenham) [196]; (c) checked with an appropriate colleague the extent to which the Croydon NGS MOT could have been carried out from home [181.2]; (d) reviewed the IXD Exchange MOT Toolkit (Switch) [181.2, 82.1-82.7]; and (e) reviewed the 'Productivity Best Practice Guide' [94.1].

110. The Tribunal find that, in accordance with the Respondent's policy, the Claimant should have had the opportunity to comment on this further evidence but that this failure made no difference to the overall outcome because:

a. The April to September action plan and the "1-2-1" document were not documents the Claimant had never seen before – they were notes used in his own review meetings with Mr Taylor. And they were used by Mr Harrod to confirm that which he already knew – that the Claimant should have done the jumpering / compaction task onsite at Sanderstead and that he was more than capable of doing it. Contrary to the Claimant's assertion Mr Harrod did not "*rely heavily*" on this evidence [C/WS98] – they were for clarification only [JH/WS31].

b. The research surrounding the NGS MOT (the email and the Toolkit document) were means by which Mr Harrod familiarised himself with the MOT process – something which was known to the Claimant.

c. The 'Productivity Best Practice Guide' was a document emailed to the Claimant along with all of the ES team [94.1]. The finding that it was not "standard practice" from an engineer to book all of the standard time to a job was Mr Harrod's own experience and was not a discovery from further research [JH/WS36]. Whether it was standard practice or not, the Claimant admitted in the disciplinary hearing that he was aware of the productivity drive [178.14] and admitted in cross-examination that he was aware of management's requests that the recorded times reflect the actual times it took to do tasks [94.1].

d. The Claimant did not deny any of these points, either in the dismissal process or at the hearing. The Claimant admitted the misconduct charges. Therefore, seeing the above documents would have made no difference to the result.

111. Before making his decision, Mr Harrod reviewed the allegations; considered all the evidence; took into account the Claimant's mitigation [188]; and presented his reasoning based on the explanations offered by the Claimant [191-197]. He found that the charge relating to the use of a personal vehicle had not been made out and so this was dropped [197]. He noted that the Claimant's representative had raised the issue of his mental health but that the Claimant had explicitly said in the disciplinary hearing that he did not want to "*use his mental health as an excuse*" [198]. Ultimately, Mr Harrod found that the Claimant's conduct had been dishonest [199], that it had fallen below the standard expected of the Respondent's employees [200-201] and that there had been a fundamental breach of trust [199]. He found that dismissal for gross misconduct was the appropriate sanction – but nevertheless gave the Claimant three months' notice [188].

112. The Claimant appealed. He had a fair hearing before Mr Allen [212.7-.212.43]. The Claimant submitted medical evidence, which was considered by Mr Allen. However, having reviewed the decision he was of the view that it was reasonable and the evidence did not change the decision as it post-dated the offence in question [PA/WS para 18], [220]. The appeal was dismissed [217-221].

113. When considering the fairness of the dismissal as a matter of both substance and procedure it is important to bear in mind that the Claimant admitted the misconduct and was not able to explain his actions.

<u>Was the decision to dismiss a fair sanction; that is, was it within the range of reasonable responses?</u>

114. In light of the level of dishonesty and the fundamental breach of trust, the dismissal of the Claimant fell within the range of reasonable responses open to a reasonable employer.

Discrimination Arising from Disability

<u>Was the Respondent's decision to dismiss the Claimant influenced to a significant extent by the Claimant's existing written warning of 18 July 2017?</u>

115. The Tribunal concluded that the Respondent has established that the written warning in 2017 did not influence the decision to dismiss to any significant extent in that:

a. The investigation report does not conclude that the matter to proceed to a disciplinary in light of the 18 July 2017 warning [156].
b. The dismissal letter does not state that the written warning of 18 July 2017 was taken into account.
c. Mr Harrod is clear in his evidence that "*what had happened on 3 February 2018 was of itself sufficient for gross misconduct and [the Claimant] would have been dismissed regardless of the previous warning*" [JH/WS44].
d. The dismissal for the offence in 2018 does not need to be based on the warning in 2017 although it was referred to only to confirm that the Claimant needed permission to work from home.

<u>If so, was the Claimant's depression an effective cause of this written warning?</u>

116. It is not necessary for the Tribunal to determine this issue in the light of its finding, but for the avoidance of doubt, the 2017 warning was issued because the Claimant was dishonest.

<u>Was the Respondent's decision to dismiss the Claimant influenced to a significant extent by the Claimant's failure to attend work on 3 February 2018?</u>

117. The Tribunal concluded that it did not. The Claimant was not dismissed because he was unable to attend work on 3 February 2018 but because he was actively dishonest about his whereabouts and actions: "*The breakdown in trust was because he had been dishonest and was therefore untrustworthy. Not only had he not been at work but he had actively stated that he was onsite*" [JH/WS para 43].

118. In respect of the MOT task, the Claimant:
a. Had given the impression, via engineer.com, that he was onsite at Croydon – not least by selecting the drop down option: "*engineer moved onsite*" at 08.58 [175].
b. Closed the MOT exactly 4 hours later – the time allocated for the onsite task – despite admitting that the checks he was able to do from home did not take 4 hours [178.6].
c. Typed, in the Closure Notes, "*Completed OK*" [175].
d. At no point did he give the impression he was working from home.
e. He did not have permission to work from home.

119. In respect of Sanderstead, he had progressed the task at 08.48 and then selected the drop down option: "*engineer moved onsite*" at 12.59 [176]. The Claimant accepted that he did not do any of this work from home. He also accepted that he did not call anyone to explain that he was felt unable to do the task at Sanderstead [178.9] – neither did he accept another task to complete in the meantime.

120. It was for these reasons that the Respondent found that he had: (i) falsified records in relation to the morning of 3 February 2018; (ii) falsified records in relation to the afternoon of 3 February 2018; and (iii) been absent from site without authorisation [191].

<u>Was the Claimant's depression an effective cause of his failure to attend work on that day?</u>

121. The Tribunal does not accept the Claimant's evidence that he failed to attend work because he: (i) felt a lack of motivation to do the work required; (ii) had a low mood; (iii) did not think rationally about the potential consequences of his actions; and (iv) was stressed and anxious about doing the work at Sanderstead.

122. First, there is no evidence (other than the Claimant's evidence in the appeal and before this Tribunal) that he was suffering from these symptoms on the day in question. All of the medical evidence relied upon post-dates the decision to dismiss, as follows:

a. The sick note (1 month – low mood) is dated 10 April 2018 [209]. This does not show that he suffered from the above symptoms.
b. The letter at [210] is dated 18 April 2018. It says he is "experiencing depression and anxiety" but does not list any symptoms.
c. The letter at [210.1] is also dated 18 April 2018. Significantly, this letter notes that the "trigger" of his depressive episode was his "suspension from work".
d. The sick note at [214] (1 month – low mood) is dated 9 May 2018
e. The Claimant was prescribed anti-depressant medication after the dismissal – see: (i) the HR Notes [245]; (ii) Dr Bashir's report (para 12.2) [355]; (iii) the Claimant's witness statement [CWS para 66].

f. The sick note at [268] is dated 3 July 2018. This is the first one to mention depression.
g. The GP records [316 ff] contain no entries over the material time; there is nothing in lead up or immediate aftermath of the 3 February 2018 incident [319.3].
h. Dr Bashir's report is based on: (a) the Claimant's account given at interview; and (b) the medical evidence given above.

123. Second, the Claimant did not show that any low mood; lack of motivation; failure to think rationally; or stress and anxiety caused him to behave in the way he did on the 3 February 2018. The Tribunal finds that:

(1) the steps he took to reboot his computer and system on the morning of 3 February 2018, as described in the disciplinary hearing [178.4]; and
(2) the steps taken on engineer.com as described above and shown at [175-176]

are not those of someone displaying symptoms of low mood, lack of motivation and/or a failure to think rationally. On the contrary, his actions were highly rational, careful, and motivated.

124. The Claimant accepted in cross examination that had he been feeling low, lacking in motivation or stressed and anxious, he could have called a manager, someone in the "contact" team, or HR. Alternatively, he could have indicated in the system he was working from home. He did not do so. The Claimant now claims that one of his symptoms was a failure to think "rationally about the potential consequences of his actions". But there is no evidence that his is a symptom of depression.

<u>Was this dismissal a proportionate means of achieving a legitimate aim within the meaning of s.15(1)(b) EqA 2010?</u>

125. It is not necessary for the Tribunal to address this issue, but in case it should, it found that the Respondent established that it aims to promote a healthy,

safe and supportive environment at work. Through his actions on 3 February 2018, the Claimant put the safety of colleagues at risk through his misuse of the system [165].

126. Dismissal was a proportionate means of achieving that aim. It was proportionate because: (a) the Claimant's dishonesty had been discovered by chance [JH /WS para 43]; and (b) this was not a first offence.

Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was disabled within the meaning of s.6 EqA 2010 at the material time (s.15(2) EqA 2010)?

127. The Tribunal find that the Respondent did not know, and could not reasonably be expected to know, that the Claimant was disabled at the material time (on or around 3 February 2019) because:

a. First, the Claimant had not hesitated in raising mental health concerns previously. He took days off for stress/anxiety on 15-16 October 2015 and 16 June 2017 [67]. He raised and/or discussed mental health on: 13 March 2017 [224]; in his April to September 2017 review [216.3]; in his Annual Performance Review with Mr Taylor [82.11]; and by way of mitigation in his June 2017 disciplinary [228], following which he had made contact with EAP and undergone counselling sessions. It is therefore not symptomatic of condition that he was: (a) slow to get help; or (b) in denial about his condition – at least previously.
b. Second, since the last incident of poor mental health in 2017, the Claimant had shown a distinct improvement in mood and performance. At the meeting with Mr Taylor on 1 February 2018 [95-96], the review notes comment on his: "*increased drive*" and "*commitment*" [99], his "*good work*", and his "*good job standard*" [99].
c. Third, the Claimant did not mention his mental health at any point during the investigation or suspension. Mr Taylor conducted check-up calls with the Claimant throughout the period of suspension but the Claimant maintained that he never had any low mood, lack of motivation or other symptoms [205-207].
d. Fourth, the Claimant did not raise his mental health at any point during the disciplinary hearing. He was given a number of opportunities to raise it by way of mitigation but did not – see [178.1], [178.8], [178.10]. It was Mr Harrod who first raised mental health towards the end of the meeting: "*I just want to make sure that you're aware that EAP are available to support you*" [178.14]. In response, the Claimant explained that how he was feeling, compared with 2017, was "*like night and day*" [178.14]. He said that when he felt depressed, he "*just [didn't] want to do anything*" [178.15] but that was not how he was feeling at the time. The Claimant pointed out that it had been suggested to him that he could rely on his mental health in the disciplinary proceedings [178.15]:

> "*Now it has been suggested that had, what I could do now is if you like play on that in this but I'm not going to do that because that's not my mind set currently.*"

Before the end of the hearing the Claimant reiterates that he has raised everything and that he feels "OK" in himself [178.18]. Mr Harrod considered his mental health in the hearing but, in light of his unequivocal answers at the

hearing, was confident that the Claimant "*didn't want to use his mental health as an excuse*" [198].

CONCLUSION

128. The Claimant's dismissal was not contrary to section 15 of the Equality Act for the reasons given. Even if the Respondent had the requisite knowledge required by the section, the deliberate acts of dishonesty for which he was dismissed cannot be said to be something arising from the disability.

129. The Claimant's dismissal fell within the band of reasonable responses open to an employer and was not unfair. The claims are dismissed.

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Employment Judge Truscott QC

Date 18 October 2019