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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104614/2020

Final Hearing Held by Cloud Video Platform (CVP) on 21-23 June 2021

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Employment Judge Sangster

Tribunal Member McColl

Tribunal Member Taylor

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Mr C Devlin

**Claimant
Represented by:
Mr Smith
Solicitor**

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BAE Systems Surface Ships Limited

**Respondent
Represented by:
Ms Wood
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

- The claimant was unfairly dismissed by the respondent.
- The respondent is ordered to:

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(a) reinstate the claimant on or before 1 September 2021, treating the claimant in all respects as if he had not been dismissed. This is to include:

- i. employing the claimant on the same terms, rights and privileges as applied before his dismissal;
- ii. maintaining his continuity of employment; and

iii. annual leave accrual between 12 May 2020 and the date of reinstatement.

(b) pay to the claimant on reinstatement back pay calculated as all sums he would have received (including in relation to any annual pay increases, bonuses, pension and any other benefits), but for the dismissal, between
5 the date of dismissal (21 May 2020) and the date of reinstatement, less:

i. any payment received from the respondent in that period in respect of annual leave entitlement accrued up to the date of dismissal;

10 ii. any income received from any third party; and

iii. any relevant state benefit.

• The claims of direct discrimination because of disability and discrimination arising from disability do not succeed and are dismissed.

15 • The claims of indirect disability discrimination and failure to make reasonable adjustments are dismissed, following withdrawal by the claimant.

REASONS

Introduction

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

25 2. The claimant presented claims of unfair dismissal and disability discrimination (direct discrimination, discrimination arising from disability, indirect discrimination and failure to make reasonable adjustments). The claimant

asserted that he was a disabled person at the material time, for the purposes of the Equality Act 2010 (**EqA**), as a result of depression.

3. The respondent denied that the claimant was unfairly dismissed and that he had been subjected to disability discrimination. They conceded that the claimant was a disabled person at the material time, for the purposes of EqA, as a result of depression. They denied however that that they had knowledge of this.

4. The claimant gave evidence on his own behalf and led evidence from two witnesses:

- a) David Adger (**DA**), an electrician employed by the respondent; and
- b) Andrew Gay (**AG**), an electrician employed by the respondent.

5. The respondent led evidence from:

- a) John Shearer (**JS**), Fabrication Facility Manager for the respondent; and
- b) David Skinner (**DS**), Pipe and Mechanical Discipline Manager for the respondent.

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

7. The parties agreed a joint bundle of documents extending to 408 pages, in advance of the hearing. Parties also provided an agreed statement of facts.

Issues to be Determined

8. The issues to be determined were agreed at the outset of the hearing. During submissions, the claims of indirect discrimination and failure to make reasonable adjustments were formally withdrawn by the claimant. The remaining issues to be determined were as follows:

Direct discrimination because of disability - s13 EqA

9. Did the respondent subject the claimant to the following treatment?

- a) undue haste in the disciplinary process and the decision to dismiss;
- b) not undertaking further enquiries regarding the claimant's health; and
- 5 c) not speaking to further witnesses nominated by the claimant.

10. If so, was that treatment '*less favourable treatment*', i.e. did the respondent treat the claimant less favourably than they treated, or would have treated others ("comparators") in not materially different circumstances? The claimant relied on a hypothetical comparator.

10 11. If so, was this because of the claimant's disability?

Discrimination arising from disability – s15 EqA

12. Did the claimant's dismissal amount to unfavourable treatment? In particular, did the respondent dismiss him:

- 15 a) in part because he had failed to confide in others or take steps earlier to alert others that he was in need of help; and
- b) in part because he had failed to demonstrate...that he had taken responsibility for the incident or shown remorse.

13. If so, was this due to something arising in consequence the claimant's disability? Namely:

- 20 a) his unwillingness to confide in others or alert them that he was in need of help, even when they had asked him;
- b) he isolated himself from others;
- c) he had no memory of the incident;
- d) he had failed to obtain help with his mental health; and

- e) he had failed to demonstrate to the respondents that he had taken responsibility for the incident.

14. If so, was the treatment a proportionate means of achieving a legitimate aim?

5 *Unfair Dismissal*

15. Was the reason for the claimant's dismissal a potentially fair reason, within the meaning of s98(1) or (2) of the Employment Rights Act 1996 (the **ERA**)?

16. Was the claimant's dismissal for that reason fair in all the circumstances, in terms of s98(4) ERA?

10 **Findings in Fact**

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

18. The respondent operates a Disciplinary Procedure, which provides that 'Physical aggression, assault or fighting at work' are normally regarded as gross misconduct.
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19. The claimant commenced employment with the respondent on 10 September 2006 as an electrician. He had a history of depressive episodes but did not inform the respondent of this on the commencement of his employment.

20. The claimant was promoted to the role of Supervisor in 2008. In his role as a Supervisor, the claimant was responsible for overseeing the shift and managing a team. In 2018 he became the weekend shift supervisor at the respondent's site in Govan. In that role he worked from 7:00am to 7:30pm on Friday, Saturday and Sunday each week. He earned £808 per week gross, £577 net, and was a member of the respondent's pension scheme. He was very capable in his role and respected in the workplace. The claimant's direct line manager at that time was Stephen Munro (**SM**), Integrated Work Team Manager. The claimant and SM shared an office space.
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21. Around 2018, the respondent developed an initiative in the workplace to have mental health recognised as much as physical health. Certain employees received training to become mental health first aiders. The initiative was called 'the elephant in the room', and the mental health first aiders wore badges with an elephant on them, so they could be readily identified in the workplace. Two of the claimant's team members were involved in the project, with one becoming a trained mental health first aider. The respondent remains committed to this initiative.
22. In December 2019 the claimant developed a head cold/bug. He recovered from this relatively quickly, but his mood remained very low and he was quieter and more withdrawn than usual. He took two weeks off work in January 2020, as he felt unable to attend work. He did not however visit his GP and ultimately, therefore, ended up taking the days as holidays, as he could not produce a fit note covering his absence.
23. On 20 February 2020 the claimant's partner of 12 years left him, taking his two daughters aged 11 and 10. This was, from the claimant's perspective, entirely without warning. He was not able to see his daughters thereafter. The claimant was extremely shocked, and this had a very significant impact on his mental well-being. He was unable to sleep at night and unable to focus on anything, other than his personal situation. He recommenced smoking, smoking up to 40 cigarettes a day. At work, he was acting out of character: arriving late and being distant and withdrawn when present. This was noticed by colleagues including DA & AG. He was found, on a number of occasions by colleagues, sitting alone in the dark, in rooms where the lights had motion sensors. DA and AG both observed the claimant doing so. This was not however reported to management.
24. In the period from 20 February to 14 March 2020, SM asked the claimant twice if he was okay. The claimant explained that his partner had left him, taking the children, but the conversation did not develop further.
25. On Saturday 14 March 2020, at approximately 8:30am, an operator reported to SM that the claimant had just 'cracked him on the jaw', without provocation.

SM called the claimant to the office. The claimant attended but would not sit down when asked to do so, instead he paced the floor for around 5 minutes during the discussion. SM asked the claimant if the report made to him was correct. The claimant indicated that it was and stated that he had also assaulted another employee. SM asked the claimant what was wrong and whether it was personal or work related. The claimant indicated that it was personal, but did not expand further. SM indicated to the claimant that he could not, and would not, accept that type of behaviour and asked him to leave the premises immediately. SM asked the claimant to contact him by phone when he arrived home to confirm he was okay, as he was concerned for his wellbeing. The claimant left the premises at approximately 8:45am. SM received a text from the claimant at 9:05am, stating that he had arrived home.

26. On his return home, and for the next 3-4 weeks, the claimant remained at home. He did not go out at all and barely left his couch. He didn't eat and lost a lot of weight as a result. He ran out of cigarettes and didn't go for more. He had no contact with anyone. He did not charge his phone, so the battery died. He developed scabs on his face. He has very limited recollection of that period.

27. On 14 and 15 March 2020, SM conducted an initial investigation into the alleged conduct of the claimant. He interviewed both the operatives who were assaulted. The first, who had reported the incident, reiterated his previous statement. The second operative stated that he had been struck in some way by the claimant but he was not entirely sure what happened, as it happened so fast. He indicated that he thought he might have been struck by the claimant with his body. When asked if the claimant had approached him in an aggressive, threatening manner, he stated that this was not the case. Both operatives indicated that they were fine, notwithstanding the assaults, and did not need to go home. SM prepared notes of the discussions with the operatives. SM also documented his own account of the events of 14 March 2020, and obtained statements from the two supervisors who were present with him when the operator originally reported the assault. DA and AG were not interviewed, nor were any of the claimant's colleagues.

28. One of the operatives subsequently texted the claimant to say that there were no hard feelings.
29. SM wrote to the claimant on 17 March 2020, to confirm that he was suspended on full pay pending investigation into the alleged incidents.
- 5 30. Eamon Burke (**EB**), Production Manager, was appointed as the investigating officer. He principally relied upon the statements compiled by SM and the terms of an occupational health (**OH**) report, which was subsequently instructed. The only additional action undertaken by him was to interview the claimant. A further letter was sent to the claimant on 17 March 2020 inviting
10 him to attend an investigation meeting on 20 March 2020 with EB. The claimant did not attend this meeting.
31. When the claimant failed to attend the investigation meeting, the respondent contacted the community police, to raise concerns in relation to the claimant's welfare. They visited the claimant's home. He did not answer the door on their
15 first visit. They returned with a camera which they put through the letterbox. This prompted the claimant to answer the door. He informed the police constables that he was self-isolating, with Covid-19 symptoms, so that they would leave him alone. This was not in fact the case. The police then reported back to the respondent that the claimant was at home.
- 20 32. On or around 23 March 2020, Paul Connolly (**PC**), Integrated Work Team Manager, raised concerns with the respondent's Head of Occupation Health and Wellbeing that he had been unable to contact the claimant, despite repeated attempts. He asked them to contact the claimant, which they did by sending him a text.
- 25 33. On 23 March 2020, SM wrote to the claimant to advise that they had been informed by the police that he was at home. They stated that, given the lack of contact from the claimant, he was considered to be absent without leave and would be placed on unpaid leave with effect from 20 March 2020.
34. On 25 March 2020 the claimant contacted the respondent for the first time
30 since 14 March 2020. He informed the respondent that he was self-isolating.

Given that he had contacted the respondent, he was not placed on unpaid leave with effect from 20 March 2020, as proposed. Instead, he continued to be suspended on full pay. In light of the nationwide lockdown at that time, and the fact that the claimant had informed the respondent that he was self-isolating, the investigation was temporarily put on hold.

35. The claimant attended an OH appointment, by telephone, on 1 May 2020. The assessment was conducted by an OH nurse. The assessment was requested by the respondent in order that they could receive advice from OH in relation to the following six questions:

a) Is the employee fit for work?

b) Is there an underlying medical condition (and is it temporary or permanent)?

c) What is the nature and effect of it (i.e. chronic, long-term, recurrent symptoms)?

d) Further medical referrals or treatment outstanding/required (e.g. GP, specialist)?

e) What action is required to support the employee during their absence?

f) Is the employee fit to attend a formal meeting if required?

36. The report from OH, dated 6 May 2020, stated that the claimant had been *'experiencing low mood, lack of motivation and fatigue and...a poor sleep pattern leading up to his suspension from work'*. The report stated that the claimant *'experienced acute and reactive stress following a significant personal issue. His reaction and emotional state following this had a further decline following an incident at work, rendering him emotionally broken and unable to function properly he tells me for almost 4 weeks. Since this time, although extremely isolated and emotionally vulnerable, he is being proactive in turning things round, and has contacted his GP as instructed to discuss his ongoing issues.'* The report confirmed that the claimant was not fit for work but was fit to attend a formal meeting.

37. The claimant contacted his GP on 6 May 2020, as had been recommended by the occupational health nurse. He was able to open up to his GP, in a way he had not been able to do with the OH nurse, and explained matters in detail to them. He was diagnosed as having anxiety with depression. The possibility of medication and counselling were discussed, but discounted at that time as a result of the positive steps which the claimant was himself taking by that point to aid his recovery. It was however agreed that both would be kept under review. The claimant remained under the care of his GP thereafter.
38. The rescheduled investigation meeting with EB took place on 14 May 2020. The claimant attended in person and his companion, PC, attended by telephone. At the investigation meeting the claimant explained *'that he now knows he is suffering from depression but does not know how long that has been going on...that he now knows that between 20th February and 14th of March he was really struggling and that he does not remember much of that time at all. It is all a blur which he guesses how depression works...[he] has recently spoken to occupational health and that he tried to open up to Aileen (OH nurse) but it was very difficult as in the past he could not even tell his GP... Aileen at occupational health encouraged him to speak to his GP and he has done that now... It was only this week he realised that he had been unwell at Christmas and suspects he could have been unwell all this time, but he has been living somewhere else in his head and did not know. His GP advised him that he has suffered from depression in the past and [he] now accepts that he has probably had depression a long time... He finds it easy to help others with their problems but cannot deal with his own and has now found it a relief to finally accept that he is not well... he does not think the depression has just been this year that it has been going on much longer.'*
39. He explained that, prior to the incident he should have asked for help from a mental health first aider but he couldn't express himself. He stated that *'he has for years just sat in the chair at home with the curtains drawn, they (the family) didn't go anywhere not even out for a walk, that he just gave up and didn't even take his kids to school...That the depression visits and he just goes into himself'*. He stated that *'it was a relief for him today to talk about*

things as for years he has been unable to express himself... He would go to his GP but would end up saying that he had other ailments but really he was screaming inside and couldn't tell them what was really going on inside.'

5 40. After his partner left on 20 February 2020, he stated *'he was just lost and didn't know it at the time, that he would sit all week doing nothing and go to work on a Friday and just try and get through.'*

10 41. When asked about the alleged incident he stated that *'he had thought long and hard, but that it is all a bit of a blur... He does not remember going to work that day, he did remember being in the amenities with [one of the operatives assaulted] and he knows what happened in there but not in between.'*

15 42. He explained that, following the incident, *'that when he was put out of the yard he went home but it was all a blur. That after that he stopped eating for 25 days. He didn't open any letters that his phone was in bits in the kitchen. HR sent the police to his door and there were battering and he didn't do anything or attempt to answer and they went away. It was only when they came back later with a camera and put it through the door that he thought he should open it...even then he told them lies, he told the police that he was self isolating which was not true he just wanted to be alone...it is all a blur that time he can only really remember the big events and he has tried to reflect on it in the past*
20 *three weeks...he did not even remember being ill at Christmas, he remembers telling his partner that he didn't feel well and never went back to work and didn't go to his GP. So when he went back to work and Stevie asked him for a fit note he didn't have one. He tried to get one from his GP but*
25 *couldn't as he didn't see them at the time so just covered it all with holidays.'*

30 43. EB provided the claimant with the findings of the investigation orally following an adjournment of the investigation meeting. He stated that *'there is a case to answer in relation to the assault, that it took place and it is something business cannot ignore...that another production manager will take the disciplinary that he will pass on all the mitigation information provided today.'*

44. By letter dated 18 May 2020, the claimant was invited to attend a disciplinary hearing on 21 May 2020, to be chaired by JS. He was provided with the documentation collated in the course of the investigation.

5 45. The claimant attended the disciplinary hearing on 21 May 2020, accompanied by PC. JS was accompanied by an HR Advisor. JS explained at the outset that he had read all the notes from the investigation and understood the mitigation presented at investigation. He explained that he required to make a decision that day and that this type of incident was very serious. He stated that he would need to feel assured by the claimant on his conduct in the future
10 and establish if there was any failing by the company.

46. JS approached the disciplinary hearing as a straightforward assault case. His view was that, unless any additional factors were brought out in the disciplinary hearing, then the matter was clear cut: the conduct in question was established and the appropriate sanction, given the seriousness of the
15 actions, would be summary dismissal. He did not consider that the claimant's medical condition was relevant, given that there was no indication prior to the incidents that the claimant had any medical conditions. He was clear at the time of the disciplinary hearing (as repeatedly stated in his evidence to the Tribunal) that his role at the disciplinary hearing was not to investigate the
20 claimant's medical conditions. He was simply there to ascertain whether an assault had happened or not.

47. During the course of the disciplinary hearing the claimant explained that he felt it would have been evident to anyone working with him that he was struggling in the run-up to the incident. When asked why he did not ask for
25 help from his manager or a mental health first aider, or contact the employee assistance programme, the claimant stated that for a long time he had not been able to express how he felt and found it difficult to open up. He stated that he has been suffering from depression and that you are the last one to know when you have depression. JS advised that he had spoken to the
30 claimant's manager in advance of the disciplinary hearing and that he had

been advised by him that the claimant had not been himself, in that he was subdued and quiet.

48. In relation to the incidents themselves, the claimant reiterated that he could not recall much of what happened, that he could only describe it as a blur and that he does not know what he was thinking at the time.

49. When asked whether he could give assurances on his future conduct, the claimant indicated that he doesn't think it is part of his character or personality and that he is now in the hands of his GP, to build himself back up. PC added that the claimant could not give any assurances, but stated that no one could. JS stated that without any assurance from the claimant he was left with only one option. He then adjourned the hearing 32 minutes to consider the outcome.

50. When the hearing resumed JS indicated to the claimant that he had taken some time to consider all the facts presented and review the circumstances. He stated that the claimant was a role model in the business and as a supervisor had a duty of care for others, that he had the toolset at his disposal including occupational health, employee assistance programme and mental health first aiders. That he had taken on board the fact that the claimant has now opened up to his GP, but that in the weeks leading up to the incident he was functioning, coming to work and following regular pattern of timekeeping. He went on to say that he had received no assurance that the claimant would not do something like this again and had taken the decision to summarily dismiss him with immediate effect. The claimant asked JS what kind of roadmap he wanted him to display. JS responded that GPs are general practitioners and that counsellors have more expertise in this area and the claimant could have used this option as well as attending his GP. JS stated that all of the claimant's actions were after the incident. The claimant was informed of his right of appeal.

51. In reaching his decision that the claimant should be dismissed for gross misconduct as a result of his actions, JS relied upon the following:

- 5 a) The fact that he felt that, if the claimant had genuinely been suffering from mental health issues prior to the incidents, he would have raised these issues, with his line manager or mental health first aiders etc, prior to the incidents occurring. This is notwithstanding the fact that the respondent did not ask the claimant's GP, or OH, to comment on this.
- 10 b) The fact that the claimant had not been prescribed medication or referred for counselling, from which he concluded that the claimant's GP did not consider that the claimant's condition was serious. This was notwithstanding the fact that the respondent had not asked the claimant's GP any questions about the claimant's condition, or asked OH to obtain further detail in relation to the claimant's condition, once he made it clear that, subsequent to his telephone consultation with the OH nurse, he had spoken to his GP (as recommended by OH), opened up to them and been formally diagnosed as having depression.
- 15 c) The fact that the claimant could not provide an absolute assurance to him as to his future conduct. (The claimant stated instead that he didn't feel it was part of his character or personality and that he was now in the hands of his GP). Despite the significance he placed on this, he did not contact the claimant's GP, or OH, to obtain their views on this. They would have been best placed to provide an informed view on the claimant's likely future conduct.
- 20 d) His conclusion that claimant was not taking his condition seriously, and that he had taken no steps whatsoever by the time of the disciplinary hearing to aid his recovery. In his opinion, the claimant ought to have sought counselling, rather than being satisfied with simply remaining under the care of his GP. JS felt strongly that a GP, being a *general* practitioner (his emphasis), is not an expert and the claimant would only be taking sufficient steps to address the situation if he participated in counselling, as they were experts in the field.
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- e) The fact that he didn't believe that the claimant had no memory of the incidents, notwithstanding the fact that he was not medically qualified and the respondent had not asked the claimant's GP, or OH, whether this was a possibility.
- 5 f) His conclusion that there was no evidence to indicate that the claimant's depression would tend to cause him to be violent. A conclusion reached by him despite the fact that no report was sought from the claimant's GP and neither the claimant's GP, nor OH, were asked this question.
- 10 52. JS wrote to the claimant on 25 May 2020, confirming the decision to dismiss him and informing him of his right of appeal. The dismissal took effect on 21 May 2020. In the outcome letter JS stated the reasons for his findings were as follows:
- a) The claimant had not disputed the allegations.
- 15 b) As a Supervisor the claimant had a duty of care towards his team and the employees he assaulted.
- c) Prior to the incident, the claimant was functioning, coming to work and following his regular pattern.
- d) The claimant was aware of the support the respondent offered, including the Employee Assistance Programme, Occupational Health and Mental Health First Aiders and he did not take advantage of this support.
- 20 e) The claimant was unable to give any reassurances regarding his future conduct and did not demonstrate that he had taken any responsibility for his actions.
- 25 53. The claimant appealed against his dismissal by email dated 2 June 2020. In that email he stated that he had recently been diagnosed by OH and his GP as having been suffering from depression and anxiety at the time the incident took place on 14 March 2020. He stated that he now had a doctors letter to

support that which he could produce as evidence, on request. He stated that the advice he received from OH, EAP and mental health first aiders was to follow his GP's instruction, which he had done and that he was now also participating in sessions with a therapist from Lifelink. He raised that he felt he had not been supported by his line manager, who was aware of his personal situation and that he was struggling prior to the incidents. He stated that had his colleagues been interviewed as part of the disciplinary process, they would have confirmed this.

54. The appeal was heard by DS on 11 June 2020. He was accompanied by an HR Manager. The claimant attended the hearing and was again accompanied by PC. The claimant produced medical evidence to the respondent at the outset of the appeal hearing, confirming that he was suffering from depression at the time of the incidents. (This was not however produced to the Tribunal).

55. Akin to the position adopted during the disciplinary process by JS, DS approached matters from the perspective of a straightforward assault case. He was clear at the time of the appeal hearing that his role at the appeal hearing was not to investigate the claimant's medical conditions. He was simply there to ascertain whether an assault had happened or not.

56. During an adjournment of the hearing, DS contacted SM and the two supervisors who had already provided statements to the SM in the initial investigation. He confirmed, having done so, that he would not be upholding the claimant's appeal.

57. Following the appeal hearing, DS wrote to the claimant on 29 June 2020 to confirm that the decision to dismiss the claimant had been upheld.

58. The claimant was unable to take any steps to seek alternative employment, due to ill health, until September 2020. Since then he has been taking steps to try to secure alternative employment, but has been unsuccessful in doing so.

59. On 10 April 2021, the claimant was assessed by Dr Alison Harper, registered Clinical Psychologist. She concluded that, from the start of March 2020 to the

date of assessment, the claimant met diagnostic criteria for Major Depressive Disorder (MDD). Criteria for MDD includes depressed mood most of the day, diminished interest or pleasure in activities, significant weight loss, insomnia, fatigue and diminished ability to think or concentrate. The symptoms cause clinically significant distress or impairment in social or occupational areas of life.

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60. Dr Alison Harper also concluded that the claimant meets diagnostic criteria for Autistic Spectrum Disorder (ASD). This causes the claimant to have difficulties in labelling and understanding his own emotions, to the extent that he appears unaware of his symptoms of depression and has little insight into them.

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61. Dr Alison Harper noted that in her opinion, the claimant was suffering from severe symptoms of depression at the time of him assaulting two colleagues in March 2020. In her report she stated that in her clinical experience, physical outbursts are not uncommon in individuals with ASD when under significant stress, as they are unable to verbally articulate their emotions to others and are thereby unable to seek help.

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Claimant's submissions

62. At the outset of submissions Mr Smith confirmed that, having heard all the evidence, the claimant was no longer insisting on claims of indirect discrimination and failure to make reasonable adjustments and that these claims were therefore formally withdrawn.

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63. In summary, Mr Smith submitted for the claimant that:

a) There was insufficient investigation: the respondent failed to interview the claimant's colleagues, who would have been in a position to provide insight into the claimant's behaviours prior to the incident; and the respondent failed to obtain appropriate medical evidence. It was not reasonable to dismiss the claimant in light of the mitigation put forward. The case of *Brito-Babapulle v Ealing Hospital NHS Trust* UAEAT/0358/12/BA was referred to and relied upon.

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- b) The respondent had knowledge of the claimant's medical condition, or ought to have had this, at the relevant times.
- c) The claims of direct discrimination and discrimination arising from disability have been established and should be upheld.

5 **Respondents' submissions**

64. Ms Wood for the respondent lodged a written submission, extending to 21 pages. This was supplemented by a brief oral submission, responding to the claimant's submission.

65. In summary, she submitted that:

- 10 a) The respondent was not aware that the claimant was a disabled person, as a result of depression, at the material times.
- b) Any acts of discrimination established are time-barred.
- 15 c) The claimant was not directly discriminated against because of his disability. The principal submission was that the decision makers did not have knowledge of the claimant's disability at the material time. In the alternative, the alleged acts of less favourable treatment either did not occur or, where accepted, the reason for the treatment was not because of the claimant's depression.
- 20 d) The respondent did not discriminate against the claimant because of something arising in consequence of his accepted disability. The principal submission was that the decision makers did not have knowledge of the claimant's disability at the material time. In the alternative, the alleged acts of unfavourable treatment either did not occur or, where accepted, the reason for the treatment was not because of something arising in consequence of the claimant's depression.
- 25 e) The **Burchell** tests were satisfied, a fair procedure was followed and the claimant's dismissal fell within the range of reasonable responses open to the respondent in the circumstances.

f) Reinstatement is not practicable, as there has been a clear breakdown in trust and confidence. It is not appropriate to make such an order given the claimant's contributory conduct.

5 g) In relation to any financial award, any award should be reduced as a result of **Polkey**, contribution and failure to mitigate. Any award for injury to feelings should be in the lower Vento band.

Relevant Law

Direct Discrimination

66. Section 13(1) EqA states:

10 *'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.'*

67. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In **Amnesty International v Ahmed** [2009] IRLR 884 the EAT recognised two different approaches from two House of Lords authorities - (i) in **James v Eastleigh Borough Council** [1990] IRLR 288 and (ii) in **Nagaragan v London Regional Transport** [1999] IRLR 572. In some cases, such as **James**, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as **Nagaragan**, the act complained of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in **R (on the application of E) v Governing Body of the Jewish Free School and another** [2009] UKSC 15.

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68. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions), as

explained in the Court of Appeal case of *Anya v University of Oxford* [2001] IRLR 377.

69. In *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, they may wish to concentrate initially on why the claimant was treated as they were, leaving the less favourable treatment issue until after they have decided on the reason why the claimant was treated as they were. What was the employer's conscious or subconscious reason for the treatment? Was it because of a protected characteristic, or was it for some other reason?

70. The *EHRC: Code of Practice on Employment (2011)* states, at paragraph 3.5 that *'The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to have be treated differently from the way the employer treated – or would have treated – another person.'*

71. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment *'but does not need to be the only or even the main cause'* (paragraph 3.11, *EHRC: Code of Practice on Employment (2011)*). The protected characteristic does however require to have a *'significant influence on the outcome'* (*Nagarajan v London Regional Transport* 1999 ICR 877).

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Discrimination arising from disability

72. Section 15 EqA states:

"(1) A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's

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

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

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

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

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

20 *‘the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B’s disability? The first issue involves an examination of the putative discriminator’s state of mind to determine what consciously or unconsciously
25 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.’*

76. The burden is on the respondent to prove objective justification. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (**Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601).

5 *Burden of proof*

77. Section 136 EqA provides:

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

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

25 79. In **Madarassy**, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not, of themselves, sufficient material on which the tribunal 'could conclude' that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful

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act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in *Laing v Manchester City Council* [2006] IRLR 748, an EAT authority approved by the Court of Appeal in *Madarassy*.

5 *Unfair Dismissal*

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

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

82. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (having regard to the reason shown by the
15 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

20 *(b) shall be determined in accordance with equity and the substantial merits of the case.”*

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

25 a) whether the respondent genuinely believed the individual to be guilty of misconduct;

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

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

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

15 Discussion & Decision

Knowledge of disability

85. The respondent conceded that the claimant was a disabled person, as a result of depression, at all material times. They denied however that they had actual or constructive knowledge of this.

20 86. The Tribunal firstly considered whether the respondent had actual or constructive knowledge that the claimant was a disabled person as a result of depression, at the time of the alleged discrimination.

87. The Tribunal found that the respondent knew that the claimant had a disability, or ought to have known of this, from 14 May 2020 onwards. They accordingly knew, or ought to have known, that the claimant was a disabled person at the material times. In reaching this conclusion, the Tribunal took into account the following:

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- a. The events of 14 March 2020, which ought to have acted as a ‘red flag’ for the respondent. The claimant had worked for them for 13.5 years and his actions on that day were entirely out of character;
- b. The information provided by the claimant to the respondent at the Investigation Interview, when he informed the respondent that he had had depression, that he realised he had been suffering from this for some time, and described his symptoms;
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- c. The fact that the claimant informed the respondent on 14 May 2020 that he had spoken to his GP, on the advice of OH, and had opened up to them, which he stated he had found it difficult to do with the OH nurse in the telephone consultation he had had with her, and that his GP had, as a result, diagnosed depression.

Direct Discrimination

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88. The Tribunal considered each allegation of direct discrimination, considering whether the alleged treatment occurred, whether it amounted to less favourable treatment and if so, what the reason for that treatment was: was it because of disability? The Tribunal reached the following findings in relation to each alleged act of direct discrimination.

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a) **Undue haste in the disciplinary process and the decision to dismiss.** This allegation has two elements, which were considered separately. The Tribunal found, in relation to the first element, that there was not undue haste in the process. The incident happened on 14 March 2020 and the investigation meeting did not take place until

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14 May 2020, some two months later and once advice had been obtained from occupational health. The disciplinary hearing took place on 21 May 2020, with the claimant being invited to the hearing by letter dated 18 May 2020. The claimant appealed on 2 June 2020 and an appeal hearing took place nine days later on 11 June 2020. All of these

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timescales were entirely reasonable. The Tribunal was accordingly not

satisfied that undue haste in the process was established. As the alleged treatment was not established, it was not necessary to determine whether the treatment amounted to less favourable treatment because of disability.

5 In relation to the second element the Tribunal was satisfied that the alleged treatment occurred: the claimant was indeed dismissed. The Tribunal was not however satisfied that this amounted to less favourable treatment. The Tribunal concluded that a hypothetical comparator, namely a supervisor employed by the respondent who had assaulted two colleagues in the workplace, but who did not have depression, would have been treated in exactly the same way. They would also have been dismissed by the respondent.

10 b) **Not undertaking further enquiries regarding the claimant's health.** The Tribunal was satisfied that this treatment occurred: No further enquiries were undertaken in relation to the claimant's health. The Tribunal was not however satisfied that this amounted to less favourable treatment. The Tribunal concluded that a hypothetical comparator, namely a supervisor employed by the respondent who had assaulted two colleagues in the workplace, but who did not have depression, would have been treated in exactly the same way. The respondent would have dismissed them without undertaking further enquiries in relation to their health.

20 c) **Not speaking to further witnesses nominated by the claimant.** The Tribunal was satisfied that this treatment occurred: the respondent did not speak to further witnesses nominated by the claimant. The Tribunal was not however satisfied that this amounted to less favourable treatment. The Tribunal concluded that a hypothetical comparator, namely a supervisor employed by the respondent who had assaulted two colleagues in the workplace, but who did not have depression, would have been treated in exactly the same way. The respondent

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would have dismissed them without speaking to further witnesses nominated by the claimant.

89. For these reasons, the Tribunal concluded that the claimant's claims of direct discrimination because of disability do not succeed.

5 *Discrimination Arising from Disability*

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

91. Section 15(2) states that section 15(1) will not apply if the employer did not know, and could not reasonably have been expected to know, that the claimant had the disability. As indicated above, the respondent conceded that the claimant was a disabled person at the material time, as a result of depression, and the Tribunal found that the respondent knew, or ought to have known, that the claimant had that condition at the material time.

92. The Tribunal considered section 15(1) EqA and the guidance *Pnaiser*. The Tribunal noted that the first question to consider is whether the claimant was treated unfavourably. In determining this, no question of comparison arises. The EHRC Employment Code indicates that unfavourable treatment is treated synonymously with disadvantage. It is something about which a reasonable person would complain. Taking those into account, the Tribunal found that the claimant was dismissed and that this amounted to unfavourable treatment.

93. The next questions concern the reason for the alleged treatment. The Tribunal firstly require to determine what caused the treatment, focussing on the respondent's conscious or unconscious thought process. If there is more than one reason, then the reason allegedly arising from disability need only be a significant (in the sense of more than trivial) influence on the unfavourable treatment, it need not be the main or sole reason. The Tribunal must then determine whether the reason for any unfavourable treatment established was something 'arising in consequence of' the claimant's disability. It was held in *Pnaiser* that the expression 'arising in consequence

of' could describe a range of causal links. More than one relevant consequence of the disability may require consideration and whether something can properly be said to arise in consequence of disability is a question of fact in each case. It is an objective question, unrelated to the subjective thought processes of the respondent, and there is no requirement that the respondent should be aware that the reason for treatment arose in consequence of disability.

94. The claimant asserted that his dismissal was due to a number of factors which arose in consequence of his disability. The Tribunal considered each in turn, to determine whether they did indeed arise in consequence of the claimant's depression and, if so, whether the 'something' identified had a significant (or more than trivial) influence on the respondent's decision to dismiss the claimant. The Tribunal's findings in relation to each are as follows:

a) **His unwillingness to confide in others or alert them that he was in need of help, even when they had asked him.** The Tribunal accepted that the claimant did not confide in others or alert them that he needed help, even when they asked him. The Tribunal found however that this did not arise in consequence of the claimant's depression. Rather, as confirmed by Dr Alison Harper, the claimant was unable to verbally articulate his emotions to others, and thereby unable to seek help, as a result of ASD.

b) **He isolated himself from others.** The Tribunal accepted that the claimant isolated himself from others and that this arose as a consequence of the claimant's depression. The Tribunal found however that this had no influence on the respondent's decision to dismiss the claimant.

c) **He had no memory of the incident.** The Tribunal accepted that the claimant had no, or no clear, memory of the incidents on 14 March 2020. There was however no evidence before the Tribunal that indicated that this arose as a consequence of the claimant's depression.

5 d) **He had failed to obtain help with his mental health.** The Tribunal accepted that the claimant failed to obtain help with his mental health prior to the incident and, indeed, prior to 6 May 2020. The Tribunal found however that this did not arise in consequence of the claimant's depression. Rather, as confirmed by Dr Alison Harper, the claimant was unable to verbally articulate his emotions to others, and thereby unable to seek help, as a result of ASD.

10 e) **He had failed to demonstrate to the respondent that he had taken responsibility for the incident or show remorse.** The Tribunal did not accept that the claimant had not taken responsibility for the incident. The claimant took full responsibility, admitting the assaults from the outset, notwithstanding the fact that he had no clear recollection of the incidents. The Tribunal accepted that the claimant did not appear to the respondent to show remorse. The Tribunal found
15 this did not arise in consequence of the claimant's depression. Rather, as confirmed by Dr Alison Harper, the claimant was unable to verbally articulate his emotions to others as a result of ASD.

95. For these reasons, the Tribunal concluded that the claims of discrimination arising from disability do not succeed.

20 *Unfair Dismissal*

96. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s98(2). At this stage the Tribunal was not considering the question of reasonableness. The
25 Tribunal had to consider whether the respondent had established a potentially fair reason for dismissal. The Tribunal accepted that the reason for dismissal was the claimant's conduct – a potentially fair reason under s98(2)(b).

97. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason as shown
30 by the respondent. The answer to that question depends on whether, in the

circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case.

5 The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited v Jones*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite
10 reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

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

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

20 99. The Tribunal concluded that both JS & DS had a genuine belief that the claimant was guilty of misconduct.

Did the respondent have reasonable grounds for this belief?

100. The Tribunal found that the respondent did have reasonable grounds for this belief. The individuals who had been assaulted by the claimant reported this
25 to the respondent and the claimant accepted that he had done so.

Was there a reasonable investigation?

101. The Tribunal noted that, despite the claimant putting forward his mental health as a mitigating factor in relation to the allegations, this was not investigated in any way. JS was quite clear that his role at the disciplinary hearing was not

to investigate the claimant's medical condition: it was simply to ascertain whether an assault had happened or not. If so, the outcome would be summary dismissal. The same position was adopted on appeal. Given this, the claimant's mitigation was simply discounted, without investigation and without any proper basis for doing so. In the Tribunal's view, no reasonable employer, faced with these circumstances would have failed to investigate these points. In the Tribunal's view, a reasonable employer, faced with these circumstances, would have taken the following steps:

- 5 a) Requested a report from the claimant's GP after the claimant informed the respondent that he had recently opened up to them, having been unable to discuss matters with the OH nurse on the telephone and that his GP had, as a result, diagnosed the claimant as having depression.
- 10 b) Requested a report from the claimant's GP, or referred the claimant back to OH, after the claimant described his symptoms at the investigation meeting.
- 15 c) Obtained medical input to ascertain whether his medical condition could be a mitigating factor, or have contributed to his actions on 14 March 2020, rather than simply requesting confirmation of whether the claimant was fit to be at work or to attend a hearing
- 20 d) Interviewed the claimant's colleagues to ascertain whether he was indeed acting out of character prior to the incident, as he asserted.

102. The Tribunal concluded this fundamentally undermined the fairness of the respondent's investigation. When the respondent formed the belief that the claimant was guilty of misconduct, it had not carried out as much investigation as was reasonable in the circumstances. The third element of the Burchell test was accordingly not established.

Procedure

103. The Tribunal's findings in relation to the investigation conducted are set out above. The Tribunal concluded that the investigation conducted fell outwith

the band of reasonable responses open to the respondent in the circumstances.

104. The Tribunal found that, other than in relation to the investigation, the procedure adopted by the respondent, while not perfect, was reasonable in the circumstances. The claimant was informed of the allegations and that these were being considered by the respondent as potentially amounting to gross misconduct. The claimant was provided with a copy of the evidence compiled. Whilst a statement was taken from SM, but not documented, the claimant was informed at the disciplinary hearing that this discussion had taken place and the terms of that discussion. The claimant was given the opportunity to respond to the allegations at the disciplinary hearing and was provided with the opportunity to appeal. He was afforded of his right to be accompanied at all stages. The respondent followed their internal procedures.

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

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

20 106. The Tribunal found that the decision to summarily dismiss the claimant as a result of the identified misconduct, without investigating the mitigation put forward by the claimant in relation to the incident, fell outside the range of reasonable responses available to a reasonable employer in the circumstances. No reasonable employer would have dismissed in these circumstances, for the reasons set out above.

25 *Conclusions re s98(4)*

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

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Remedy

108. The claimant indicated in his claim form that he sought reinstatement as a remedy. He confirmed at the outset of the hearing that this remained the case.

109. S113 ERA states that

5 *'An order under this section may be-*

 (a) *An order for reinstatement (in accordance with section 114), or*

 (b) *An order for re-engagement (in accordance with section 115),*

as the tribunal may decide.'

110. Section 116 ERA states

10 (1) *'In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in doing so shall take into account-*

 a. *whether the complainant wishes to be reinstated,*

 b. *whether it is practicable for the employer to comply with an order
15 for reinstatement, and*

 c. *where the complainant caused or contributed to some extent to the dismissal, whether it would be just and equitable to order his reinstatement.'*

111. In ***PGA European Tour v Kelly*** [2021] IRLR 575, the Court of Appeal,
20 (approving the position set out in ***United Lincolnshire Hospitals NHS Foundation Trust v Farren*** [2017] ICR 513) confirmed, at paragraph 44 that:

*'that approach is the one that employment tribunals should adopt in considering whether it is practicable to order re-engagement in cases where an employer asserts that the conduct of an employee was such as to have
25 led to a breakdown in trust and confidence between the employer and employee. The question is whether the employer had a genuine, and*

rational, belief that the employee had engaged in conduct which had broken the relationship of trust and confidence between the employer and the employee.'

- 5 112. The claimant confirmed that he wished to be reinstated, the first relevant factor is accordingly satisfied.
- 10 113. The second factor is practicability. The issue is one for the Tribunal to consider in the light of the circumstances of the case as a whole. The Tribunal noted, as stated in *Timex Corporation v Thomson* [1981] IRLR 522 that, at the point of making the order section 116 ERA only requires the Tribunal to have regard to matters of practicability. It further noted that the Tribunal must consider the question of practicability as at the date when reinstatement or re-engagement would take effect (which in most cases will mean judging the position as at the date of the hearing) and not limit its consideration to the time of the dismissal.
- 15 114. In submissions the respondent's position was that reinstatement is not practicable, as there has been a clear breakdown in trust and confidence. This was based on the evidence the respondent's witnesses gave that they felt that dismissal of the claimant was appropriate, as they felt, at the time of dismissal, that there was no mitigation for the claimant's actions and they had no confidence that he would not assault other employees in the workplace. They were not asked whether, in light of the medical evidence which they have now seen, that view would change or whether they felt that reinstatement/re-engagement would be practicable. There was no evidence before the Tribunal to suggest that, having seen the medical evidence obtained by the claimant since the termination of his employment with the respondent, they genuinely believed that trust and confidence remained broken, such that reinstatement would not be practicable.
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- 30 115. The Tribunal considered whether any such view could be rationally held in the circumstances. The Tribunal concluded that it could not. Medical evidence obtained since the termination of the claimant's dismissal demonstrates that the claimant's medical conditions: MDD combined with

ASD, were very likely the operative cause of the claimant's actions on 14 March 2020, which ultimately led to his dismissal. In light of this new information, and taking into account the other circumstances of the case, the respondent could not rationally hold the view that trust and confidence remains broken. The claimant had over 13 years of service with the respondent. He was a highly regarded and competent employee. His actions on 14 March 2020 were entirely out of character and no evidence was presented that any of the employees involved had any concerns about continuing to work with the claimant going forward (one in fact texted him to say there were no hard feelings). The respondent has developed initiatives to support employees with mental health conditions and actively promotes this within the workplace. There should accordingly be no concerns internally about supporting the claimant in the workplace, in an appropriate manner, now his medical conditions have been properly diagnosed.

116. The final factor to consider is whether the claimant caused or contributed to some extent to the dismissal and, if so, whether it would be just and equitable to order his reinstatement. In light of the medical evidence produced, the Tribunal find that the claimant's conduct was not culpable or blameworthy. Rather, taking into account the terms of the report from Dr Alison Harper and all the surrounding circumstances, the Tribunal concluded that the claimant's actions were caused by his medical conditions: MDD and ASD combined. He did not, accordingly, contribute to his dismissal.

117. Having considered all of the above points, the Tribunal concluded that, in all the circumstances, it was appropriate to exercise its discretion under section 113 ERA and make an order for reinstatement of the claimant to his previous role.

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Employment Judge: Mel Sangster
Date of Judgment: 19 July 2021
Entered in register: 26 July 2021
and copied to parties

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