EMPLOYMENT TRIBUNALS

Claimant: Mr P Dytkowski

Respondent: Brand FB Ltd

Heard at: Manchester Employment Tribunal **On:** 21, 22 and 23 June 2020

Before: Employment Judge Dunlop
Ms J Beards
Mrs J Byrne

Representation

Claimant: In person
Respondent: Mr R Ryan (Counsel)

JUDGMENT having been sent to the parties on 20 January 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant worked for the respondent as a Process Operative at a factory producing biscuits. He was dismissed on 11 January 2019 for alleged gross misconduct, arising from an altercation with a colleague. He brought claims arising out of his dismissal, as set out more fully below.

The Hearing

2. The hearing was conducted over three days in-person at the Manchester Tribunal. The Tribunal heard evidence from Mr Dytkowski on his own behalf and Andrea Kay (HR Manager), Nick Bourne (Production Manager) and Lee McLeod (Manufacturing Manager) and on behalf of the respondent. Mr Dytkowski's first language is Polish and he gave evidence through an interpreter. We had regard to an agreed bundle of documents of just over 400 pages, although we only read those documents which were specifically referred to in the witness statements or by the parties during the hearing.

3. The Tribunal gave its decision orally at the end of the hearing. Before pronouncing the decision, the Tribunal commended both parties on their

presentation of the case. Both sides had shown respect and courtesy to all participants in their presentation of the case. The Tribunal also noted its finding that each of the witnesses had given full and honest evidence to the best of their recollection making genuine efforts to assist the Tribunal.

The Issues

4. A preliminary hearing took place on 28 October 2019 in front of Employment Judge Allen. The following list of issues was agreed, and both parties confirmed at the start of this hearing that these remained the issues to be determined:

Unfair Dismissal

1. What was the principal reason for dismissal and was it a potentially fair reason in accordance with section 98 of the Employment Rights Act 1996 ("ERA")? The respondent asserts that the reason for dismissal was conduct.

2. If so, was the dismissal fair or unfair in accordance with section 98(4) of ERA? Matters to be determined which are relevant to this question will include:

(a) Was a fair process followed?

(b) Was dismissal reasonable in all the circumstances?

(c) Was the claimant treated inconsistently when compared to other employees in the same or similar circumstances?

(d) Was dismissal within the band of reasonable responses open to the respondent?

3. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any award to reflect the possibility that the claimant would still have been dismissed in any event had a fair and reasonable procedure been followed?

4. If the Tribunal finds that the dismissal was unfair, should any compensation awarded be reduced to reflect the claimant's contributory conduct?

Disability Discrimination

5. The respondent accepts that he claimant's diabetes amounts to a disability and that the claimant had this disability at the relevant time.

Discrimination arising from Disability (section 15 Equality Act 2010)

6. Did the respondent treat the claimant unfavourably because of something arising in consequence of his disability? The unfavourable treatment relied on by the claimant is his dismissal on 11 January 2019. The "something arising" is that the claimant's behaviour on 4 December 2018 was caused, or contributed to, by the claimant's disability.

7. If so, can the respondent show that the unfavourable treatment, that is dismissing the claimant, was a proportionate means of achieving a legitimate aim? The respondent relies on the contention that dismissing the claimant, who had behaved aggressively to another employee, was a proportionate means of achieving a legitimate aim. The legitimate aim relied upon is ensuring a safe and appropriate working environment for the respondent's employees. The respondent will also contend that the claimant was fully aware that there was an issue with his blood sugar levels prior to the incident and that he could have and should have taken steps to get support for it.

Duty to make reasonable adjustments (section 20 Equality Act 2010)

8. The provision, criterion or practice ("PCP") relied upon is the respondent's disciplinary procedure and, in particular, the practice of dismissing individuals who conducted themselves in the way that the respondent determined the claimant had on 4 December 2018.

9. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled at the relevant time?

10. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The reasonable adjustment relied upon by the claimant is imposing an alternative sanction other than dismissal, and/or not imposing a sanction at all.

11. If so, would it have been reasonable for the respondent to have taken this step at the relevant time?

Remedy

12. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

Findings of Fact

5. Mr Dytkowski was a long-standing employee of the Respondent, having commenced employment in 2009. As a Process Operative, he worked in a food production environment undertaking various roles in the biscuit-making process.

6. Mr Dytkowski has a hearing impairment. In March 2018 he was also diagnosed with insulin-dependent diabetes. The respondent concedes that the claimant was a disabled person within the meaning of s.6 Equality Act 2010 by reason of his diabetes.

7. We find that this was a difficult diagnosis for Mr Dytkowski to accept and to manage. He received commendable support from the respondent's occupational health nurse, Margaret Hornby. Ms Hornby helped to arranged adjustments to his work including short breaks to check his blood sugar, regular eating times, time off to attend appointments and no overtime. Mr Dytkowski attended reviews with Ms Hornby during April, May, June and July when he kept her informed of the information and treatment he was receiving via the NHS. From as early as April, she was aware that there was an important course for Mr Dytkowski to attend which would help him to manage his condition (the Dose Adjustment for Normal Eating (DAFNE) course). This was booked for January 2019 and, in November, Mr Dytkowski saw Ms Hornby about this, with the result that he was permitted time off to attend the course.

8. There was an incident on 7 August 2018 where Mr Dytkowski was concerned about his blood sugar levels and felt that he needed a break. He asked his supervisor, Egle Vaisutyte, to arrange this. It was difficult to accommodate a break at that time due to the need for Production Operatives to be covering certain areas. It appears there was some

confusion (possibly contributed to by the claimant's hearing difficulties) over whether Ms Vaisutyte had refused the break, or whether she was getting cover, but the claimant ended up shouting at Ms Vaisutyte, who then escalated the matter to management.

9. This was dealt with by Nick Bourne (Production Manager) who spoke toMr Dytkowski about controlling his temper. There was no formal disciplinary action, and Mr Dytkowski retained his clean disciplinary record. The notes of the investigation meeting arising out of that incident record Mr Bourne commenting that "*you are more angry than you used to be. I don't know why*" and "*your temper comes quicker*."

10. An incident occurred on Tuesday 4 December 2018 following a team meeting. Mr Dytkowski had arrived late and Lucas Ulvenmoe, another Process Operative commented that everyone should be on time. Mr Dytkowski took offence at the this comment, which he believed to be directed at him. After the meeting he approached Mr Ulvenmoe, either grabbing his clothes or pushing him, whilst shouting at him. Mr Ulvenmore, like Mr Dytkowski, is Polish, and the words shouted were in Polish, but the parties agreed that they were angry and offensive, approximately translating to "*say that to me again and I will smash your fucking face*" and "*now get out of my fucking face*".

11. The incident was over very quickly and both Operatives went to their work. Mr Ulvenmoe reported the incident to a manager, Ms Vaisutyte, and Mr Dytkowski was suspended. A disciplinary process was then instigated.

12. Mr Dytkowski has admitted all along that he attacked Mr Ulvenmoe in the way described above, and that he was wrong to do so. There are some minor differences in the accounts given by Mr Ulvenmoe and Mr Dytkowski at the time, for example as to the length of time the encounter went on, and whether Mr Dytkowski "grabbed" Mr Ulvenmoe or "pushed" him. We do not consider that this was the result of any party failing to give an honest account to the respondent's investigators – it is almost inevitable in a fracas of this type that exact recollections will differ. We do consider that the claimant's account (that the incident lasted 15-20 seconds) is likely to be a more accurate assessment than Mr Ulvenmoe's contention that it lasted up to two minutes, although we have no doubt that it would have been frightening to Mr Ulvenmoe and would therefore have felt like it lasted much longer than was actually the case.

13. The incident was investigated and statements were taken from Mr Dytkowski, Mr Ulvenmoe and another operative who witnessed part of the incident. In his statement, Mr Dytkowski explained that he had been feeling "horrible" the day before the incident. On the morning of the incident the heater in his car had been broken which made it hard to defrost the car, which meant that he was late and in a bad mood. He felt provoked by Mr Ulvenmoe's comments about lateness and by a "look" that Mr Ulvenmoe gave him when they left the meeting. He also explained earlier difficulties in the relationship between him and Mr Ulvenmoe.

14. During the investigation meeting Mr Dytkowski explained that his blood sugar had been going up since the previous Saturday. He attempted to

explain his own understanding of the effect of his diabetes, which he expanded on in his evidence to the Tribunal. Mr Dytkowski understands, on the basis of what he has been told by his treating clinicians, that there can be a 'honeymoon' period following a diagnosis of insulin-dependent where the commencement of insulin treatment prompts the pancreas to partially resume its function. After some months, however, the pancreas 'dies' and the patient will become entirely dependent on injected insulin. C's theory is that this change was happening during the week of the 4 December, and it accounted for him being unable to control his emotions, feeling horrible and, ultimately, the explosive 'rage' which led to the incident with Mr Ulvenmoe. With help from Ms Vaisutyte to find the right word, he explained in the investigation his belief that his medical situation at that time had made him more "sensitive" to the problems that arose on the day, resulting in his violent reaction to Mr Ulvemore. We record this as Mr Dytkowski's explanation, without making findings on it at this stage, and will return later to the question of the connection between his diabetes and the incident.

15. During the investigation Ms Vaisutyte commented "*We have had problems before, we did talk about you getting some help and helping with your anger*". Mr Dytkowski replied that "*I didn't get help. I feel completely different between me and you. Now I see I can't handle it on my own. It isn't under control*."

16. Following the investigation meeting, Mr Dytkowski met with Ms Hornby. She emailed a brief report to Ms Affleck explaining that Mr Dytkowski had been struggling to deal with his diabetes and various other medical issues. She stated that she had reviewed his blood sugar records and appears to agree that these had been "spiking high" over a period. The email notes that she had advised that Cognitive Behavioural Therapy (CBT) may be an option to support him in managing anger and also notes that Mr Dytkowski was due to attend the DAFNE course which would be of benefit. She ends bysaying that she has asked Mr Dytkowski to see his diabetic nurse as soon as possible and to update her on the treatment plan and prognosis.

17. C was invited to attend a disciplinary hearing, conducted by Mr Bourne on 18 December 2018.Mr Dytkowski was supported by a union representative. He explained to Mr Bourne that he had simply "exploded". Mr Bourne was prepared to listen to the claimant's argument that his diabetes had affected his behavior and requested evidence of his blood sugar levels. After the meeting, the claimant duly sent copies of his daily blood sugar records, which he keeps for the purpose of monitoring his condition. Mr Bourne informed the claimant that he would discuss the matter with Ms Hornby but that he would not be able to do so until after Christmas.

18. The blood sugar records showed an average reading during the period of 1-18 December of 9.7, compared to an average of 8.2 for the period 1 October to 30 November. Blood sugar will fluctuate throughout the day. We were told that the target reading is between 4 and 7. The claimant's readings showed figures of up to 12, 13 and 14 on several occasions, including on the 4 December. The readings on the 30 November and 1 and 3 December were not particularly high. There was only one reading taken on 2 December. At 11.1, it was relatively high. Overall, the blood sugar records appeared to support Mr Dytkowski's claim that he was experiencing spikes

(as noted by Ms Hornby when she reviewed the records) but they do not demonstrate a clear difference between the 4 December and the preceding weeks.

19. On 10 January 2019 Mr Bourne talked to Ms Hornby, who provided him with details of the dates Mr Dytkowski had seen her and the discussions they had had. This included the fact that the DAFNE course was coming up in January 2019, and that the last two occasions the claimant had seen Ms Hornby were 27 November (to talk about the course) and 6 December (to talk about the incident with Mr Ulvenmoe and how he might access support with anger management and/or CBT).

20. The disciplinary hearing was reconvened on 11 January 2019. Mr Dytkowski informed Mr Bourne that he had started CBT and that he did not want this to happen again and felt he could learn from it. He repeated his argument that his pancreas had stopped working and that his blood sugar had been spiking leading to his explosive reaction. He believed this would now improve and was very hopeful about the upcoming DAFNE course. There followed a lot of discussion about blood sugar readings, how Mr Dytkowski had been feeling in the run up to the incident and whether he could have done something else to avert it, for example by going to see Ms Hornby and explaining that he was feeling bad. Mr Dytkowski had stated that he had tried to see Ms Hornby in the preceding weeks but had been told she was unavailable, there was discussion about whether he could have sought assistance form the union or HR in obtaining an appointment.

21. At the conclusion of the meeting Mr Bourne statted that "*I do think that the diabetes had an influence on the incident but you have not done enough in work as in mentioned to either Margaret [Ms Hornby] or Manager that you were struggling*." He went on to dismiss Mr Dytkowski and this was confirmed by letter dated 15 January 2019. The letter also stated that the claimant's diabetes, and particularly his blood sugar levels "*may have had an influence on the incident*". As Mr Bourne had found Mr Dytkowski's actions to be gross misconduct, this was a summary dismissal and no notice payment was made.

22. Mr Dytkowski appealed his dismissal in line with the company procedures. The appeal letter was detailed and repeated the point that Mr Dytkowski 's behavior was influenced by his diabetes. He emphasised that he deeply regretted the situation and was determined not to let it happen again, providing the information that he was undergoing CBT and that the DAFNE course would help him to better manage his condition.

23. The appeal was heard by Mr McLeod on 11 February 2019. He also adjourned the meeting to speak to Ms Hornby, and gleaned from that discussion that in some circumstances a high blood sugar level could cause symptoms of anxiety and stress. However, Mr McLeod took the view that it was for Mr Dytkowski to control his blood sugar levels and to seek assistance from managers to manage symptoms that might result. By letter dated 13 February 2019 Mr McLeod rejected Mr Dytkowski's points of appeal and upheld the dismissal.

24. During the appeal, Mr Dytkowski drew attention to other disciplinary incidents which he said showed more lenient treatment. Mr McLeod did not assess these in detail, as he took the view that each case was to be judged on its own merit. Mr Dytkowski repeated this argument to the Tribunal, and there was information provided in the bundle about several other disciplinary cases, both those which had resulted in dismissal and those which did not. (As these employees have not been directly involved in this litigation, and given that Tribunal reasons are published and searchable online, we consider it appropriate to refer to these employees by their initials only. This means the cases can be identified by those involved in this litigation, but also offers a degree of protection of their privacy.)

25. The Tribunal reviewed all the material and from this concluded that the respondent's practice is to carefully consider each case on its own facts. We noted that a final written warning had been issued in respect of one case (GC/AT) in which there was an altercation which appeared similar to that between Mr Dytkowski and Mr Ulvenmoe, but that that altercation had happened off company premises as the employees were on their way home. There were a number of cases in which abusive and/or violent conduct had resulted in dismissal.

26. The Tribunal considered that the most significant case was that of MR. MR had disclosed mental health problems to the respondent and was receiving support for this. An incident arose where he had become frustrated with a colleague and had thrown a torch at a colleague. The respondent accepted that he had not intended for the torch to hit the colleague, although in fact it had. MR was given a written warning.

Relevant Legal Principles

Section 15 – Discrimination arising from disability

27. Section 15 Equality Act 2010 ("EqA") provides:

> ***(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.**

28. The elements of discrimination arising from disability can be broken down as follows:

    (a) unfavourable treatment causing a detriment;

    (b) because of "something";

    (c) which arises in consequence of the claimant's disability.

29. The respondent will have a defence if it can show:

(a) The unfavourable treatment is a proportionate means of achieving a legitimate aim – "objective justification"; or

(b) It did not know and could not reasonably have been expected to know that the claimant had the disability – the "knowledge defence".

30. In this case there is no dispute that the dismissal was unfavourable treatment and that it arose from the claimant's conduct on 4 December. The first key question is whether the conduct on the 4 December can properly be said to be "something arising" from the claimant's disability. The secondary question, which arises if that connection is established, is whether the dismissal was justified.

31. In determining whether the behavior was "something arising" from the disability, it need not be entirely caused by the disability but must be a significant influence, and there can be more than one link in the chain. (**Pnaiser v NHS England, EAT, [2016] IRLR 170**).

32. It should be noted that the knowledge defence extends only to situations where the employer cannot reasonably be expected to know that the claimant was disabled. It does not extend to situations where the disability is known, but the respondent did not know, or could not be expected to know, that the disability could lead to the conduct for which the claimant is disciplined (see **York City Council v Grosset, CA, [2018] IRLR 1492**). In this case, the respondent accepts that it was aware of C's disability at all material times, and so the knowledge defence does not arise for consideration.

33. The respondent will successfully defend the claim if it can prove that the unfavourable treatment is a proportionate means of achieving a legitimate aim. This is the same test as for indirect discrimination and for direct discrimination on the grounds of age. Although there is limited legal authority on justification in the context of s.15 claims, principles developed from the application of the test in those other jurisdictions will be highly relevant.

34. The burden of proof in establishing both elements of the justification test lies with the respondent. In many cases the aim may be agreed to be legitimate but the argument will be about proportionality. This will involve an objective balancing exercise between the reasonable needs of the respondent and the discriminatory effect on the claimant. In contrast to the test in unfair dismissal, the Tribunal must make its own assessment of proportionality (see **York City Council v Grosset, CA, [2018] IRLR 1492**).

35. We have had regard to the EHRC Code of Practice on Employment (2011) ("the Code") including paragraph 5.12:

"It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations."

36. For the purposes of objective justification there is no rule that justification has to be limited to what was consciously and contemporaneously taken

into account in the decision-making process (see **Cadman v Health and Safety Executive [2004] EWCA Civ 1317**).

37. The relationship between the test of objective justification and the band of reasonable responses test (applied in unfair dismissal claims) has proved to be a problematic issue. It is not necessarily any error of law for a tribunal to find that a claimant succeeds in a section 15 claim but fails in the unfair dismissal that runs alongside it (see **City of York Council v Grossett [2018] IRLR 746 CA**).

38. However, the Court of Appeal in **O'Brien v Bolton St Catherine's Academy [2017] IRLR 547** had this to say about such cases where they arise from long-term sickness absence:

> "53. *However the basic point being made by the tribunal was that its finding that the dismissal of the appellant was disproportionate for the purpose of s.15 meant also that it was not reasonable for the purpose of s.98(4). In the circumstances of this case I regard that as entirely legitimate. I accept that the language in which the two tests is expressed is different and that in the public law context a 'reasonableness review' may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately I see no reason why that should be so. On the one hand, it is well established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat – what is sometimes insufficiently appreciated – that the need to recognise that there may sometimes be circumstances where both dismissal and 'non-dismissal' are reasonable responses does not reduce the task of the tribunal under s.98(4) to one of 'quasi-*Wednesbury*' *review: see the cases referred to in paragraph 11 above[2]. Thus in this context I very much doubt whether the two tests should lead to different results.[3]This part of the Judgment in* ***O'Brien*** *does not appear to have been considered by the first Tribunal hearing this case, which resulted in inconsistent decision with different conclusions reached in respect of the section 15 claim and the unfair dismissal claim. We have paid close regard to the* ***O'Brien*** *Judgment and also to the Judgment of the EAT in this case in our attempt to apply the correct analysis to the facts we have found.*

Unfair dismissal

39. Section 98, so far as relevant, provides as follows:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal and**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this sub-section if it-**
>
> **(b) relates to the conduct of the employee**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (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 reasonable 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**

40. The respondent bears the burden of proving, on the balance of probabilities, that the claimant was dismissed for a potentially fair reason: s. 98 (1) ERA. In this case the potentially fair reason relied on is misconduct.

41. If a potentially fair reason is shown, then consideration must then be given to the general reasonableness of that dismissal under s.98(4) ERA.

42. In considering the question of reasonableness, the we have had regard to the decisions in **British Home Stores v. Burchell [1980] ICR 303**; **Iceland Frozen Foods Limited v. Jones [1993] ICR 17**; **Foley v. Post Office and Midland Bank plc v. Madden [2000] IRLR 82**.

43. In summary, these decisions require that we focus on whether the respondent held an honest belief that Mr Dytkowski had carried out the acts of misconduct alleged, and whether it had a reasonable basis for that belief. The panel must not, however, put itself in the position of the respondent and decide the fairness of the dismissal based on what we might have done in that situation. It is not for the panel to weigh up the evidence as if we were conducting the process afresh. Instead, the Tribunal's function is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to an employer.

44. In conduct cases, when considering the question of reasonableness, we are required to have regard to the test outlined in the '**Burchell**' case. The three elements of the test are:

    1.1 Did the employer have a genuine belief that the employee was guilty of misconduct?

    1.2 Did the employer have reasonable grounds for that belief?

1.3 Did the employer carry out a reasonable investigation in all the circumstances?

45. It was confirmed in **Sainsbury's Supermarket v Hitt 2003 ICR 111** that the 'band of reasonable responses' test applies equally to the employer's conduct of an investigation as it does to the employer's decision on sanction. Whilst an employer's investigation need not be as full or complete as, for example, a police investigation would be, it must nonetheless be even-handed, and should focus just as much on evidence which exculpates the employee as on that which tends to suggest he is guilty of the misconduct in question.

46. Where an employee asserts that oter employees have been treated more leniently in respect of similar misconduct, that may be a matter which can make the dismissal unfair. However, the authorities are clear that there must be true parity between the comparison cases (**Paul v East Surrey District Health Authority, CA, [1995] IRLR 305**).

47. Sections 122(2) and 123(6) ERA respectively provide that the tribunal may reduce the amount of the basic and/or compensatory awards payable following a successful unfair dismissal claim where it is just and equitable to do so on the grounds of the claimant's conduct. In the case of the compensatory award, the Tribunal can only take into account conduct which caused or contributed to this dismissal.

48. Under the principle in **Polkey v A E Dayton Services Ltd 1988 AC 344** the Tribunal may reduce the amount of compensation payable to the claimant if it is established that a fair dismissal could have taken place in any event – either in the absence of any procedural faults identified or, looking at the broader circumstances, on some other related or unrelated basis.

Submissions

49. Mr Ryan, for the respondent, produced a helpful and detailed written argument which highlighted key passages of the evidence as well as addressing the law. Both parties addressed us with oral submissions. Arguments raised by the parties in relation to specific issues are discussed below.

Discussion and conclusions

50. We found it helpful to consider C's case as it was put under the discrimination claims, specifically the claim of discrimination arising from disability under s.15 Equality Act 2010, as a starting point. The first issue we considered was therefore:

Did the respondent treat the claimant unfavourably because of something arising in consequence of his disability? The unfavourable treatment relied on by the claimant is his dismissal on 11 January 2019. The "something arising" is that the claimant's behaviour on 4 December 2018 was caused, or contributed to, by the claimant's disability.

51. It is not in dispute that Mr Dytkowski was dismissed and that the dismissal was unfavourable treatment. Nor is the immediate reason for the dismissal in doubt – it was because of an aggressive outburst against Mr Ulvenmoe.

Mr Dytkowski has freely admitted from the outset that this incident took place, that it was unacceptable and that it should not have happened.

52. We are therefore required to examine the connection between the claimant's disability (his diabetes) and his behavior towards Mr Ulvenmoe on 4 December 2018.

53. Mr Dytkowski was very frank that he had sought, but failed to obtain, evidence from his treating clinicians to support his own view that there was a connection between his condition and his "explosion" (to use his word) on that day. He told us that the doctors had commented that they could not say for sure that the behavior on a particular day and the condition were linked. Although this is indirect, heresay, evidence, it is readily believable that this is the sort of response that may have been given. Indeed, during his own submissions Mr Ryan appeared himself to place some reliance on this being the clinicians' response.

54. Given the lack of any direct medical evidence attesting to a connection between 's condition and his behavior, the respondent submitted that that was the end of the matter. There was nothing on which the Tribunal could base a finding that the behavior (and therefore the dismissal) had arisen as a result of the disability.

55. Although the Tribunal could see force in that argument, the panel decided that it was satisfied that the claimant had, on the balance of probabilities, demonstrated the requisite connection. The key points, as far as the panel were concerned, were as follows:

    55.1 We take judicial notice of the fact that variation in blood sugar and, in particular, unmanaged highs and lows in blood sugar, can have an impact on a person's emotions. This general principle was acknowledged Ms Hornby, who told Mr McLeod that in some circumstances high blood sugar levels can cause anxiety and stress, as noted in the appeal outcome letter.

    55.2 Following on from this, we paid some regard to articles produced by the claimant relating to the phenomena of 'diabetic rage'. Essentially, the articles support the proposition that uncontrolled blood sugar levels in diabetes sufferers can leave sufferers more susceptible to strong emotions, including anger.

    55.3 We note that the blood sugar levels recorded show that the claimant was taking readings outside a normal range frequently in the period leading into the incident. We take the respondent's point that particularly high levels had been recorded on early dates which did not result in incidents of 'rage' but we do not consider that is of much assistance in determining whether there was a connection between what happened on 4 December and the condition. On 4 December Mr Dytkowski was dealing with a stressful situation regarding his car and his late arrival at work, which was then compounded by some provocation (in his eyes, at least) from Mr Ulvenmoe. There is no suggestion that similar stressors were present during other episodes of high blood sugar levels.

55.4 Against this background, we then have to consider the claimant's own belief that his actions were influenced by his condition. This was raised by him from an early point in the investigation and has been elaborated on in this Tribunal, during which he has drawn on further information made available to him during the DAFNE course. The claimant is not a medical expert but, at least to some extent, we are entitled to treat him as an expert on his own condition and how he experiences the effects of it. We have found that he was an entirely honest witness and this is not a case of an employee putting forward such an explanation opportunistically – whether right or wrong we are sure his view is genuinely held. Given those findings, C's evidence that his reaction on the 4 December was different to what it would have been on another occasion, and that difference is due to his unmanaged diabetes, is not something which can be lightly disregarded.

55.5 Finally, we placed significant weight on the respondent's own contemporaneous observations that in the nine months or so since Mr Dytkowski had been diagnosed with diabetes his character had changed. (See the findings of fact at paragraph 9 above.) Given Mr Dytkowski's long service, and the generally high regard in which he was held, we consider that this is important evidence. We consider that it is unlikely to be a coincidence that the C's personality is observed to have become more aggressive in the weeks and months following this serious diagnosis. We consider the probability is that his increased aggression is an effect caused or contributed to by his condition.

55.6 Added to this, Mr Bourne in both the disciplinary meeting and dismissal letter accepted that there was likely some link between the outburst and the condition. Of course, Mr Bourne is not a medical expert, anymore than Mr Dytkowski is. He did, however, know Mr Dytkowski relatively well over a period of time and his recognition of that link is, again, not something that can be easily disregarded.

55.7 To satisfy the test, we do not have to be satisfied that diabetes was the sole cause of Mr Dytkowski's behavior on that day. Taking account all of the factors above, we concluded that his condition had a significant influence on, or, to put it another way, played a material part in, his behavior on the day. For those reasons, we are satisfied that the claimant's actions on the 4 December were, for the purposes of the statute, "something arising" from his disability.

If so, can the respondent show that the unfavourable treatment, that is dismissing the claimant, was a proportionate means of achieving a legitimate aim? The respondent relies on the contention that dismissing the claimant, who had behaved aggressively to another employee, was a proportionate means of achieving a legitimate aim. The legitimate aim relied upon is ensuring a safe and appropriate working environment for the respondent's employees. The respondent will also contend that the claimant was fully aware that there was an issue with his blood sugar levels prior to the incident and that he could have and should have taken steps to get support for it.

56. This issue deals with the justification defence that is available to the respondent under s.15. We accept the respondent's contention that it had a legitimate aim of ensuring a safe and appropriate working environment for its employees and that C's dismissal was in furtherance of this aim. The only question is whether dismissal was a proportionate response.

57. In the respondent's favour we had regard to the following factors:

    57.1 This is a particularly important and serious legitimate aim, and respect is to be paid to Mr Bourne's own balancing exercise. We accept that this was a difficult decision for him and that he approached it in good faith.

    57.2 This was a serious incident. Although no physical injury was caused to Mr Ulvenmoe, there was physical contact as well as forceful verbal abuse. We have no doubt it would have been a shocking and frightening experience.

    57.3 The circumstances which gave rise to the incident – a bad morning and some perceived provocation which was mild at best and may even have been inadvertent – were not extreme or unusual. Although that exact set of circumstances might be unlikely to happen again it is very possible that Mr Dytkowski could again have faced similar frustrations. The respondent was therefore right to be concerned that there might be a similar incident in the future, and that another episode could easily be even more serious.

58. Overall, however, we found that the response was not proportionate. We found that the following factors outweighed those set out above:

    58.1 Mr Dytkowski had a long record of previous good service before his diagnosis.

    58.2 Although both Mr Bourne and Mr McLeod appear to have accepted a link between the diabetes and the behavior, there was no evidence of how that link went on to inform their decision-making. Specifically, we consider there was a failure to seek more detailed advice about the extent of the connection and what it meant for the possibility of similar occurrences in the future.

    58.3 We reject the respondent's submission that Mr Dytkowski had not managed his condition appropriately and that that failure should weigh against him in any balancing exercise. Mr Dytkowski had sought advice from Ms Hornby as well as from his NHS clinicians. He had made arrangements to attend the DAFNE course. We find that that, along with the CBT which he sought access to after the incident, would make a significant difference to the risk of a similar incident happening in the future. It is evident that this event had severely shaken Mr Dytkowski and that he was determined to ensure that he did not react in this way again. Mr Bourne and Mr McLeod failed to explain why a final written warning, combined with the steps Mr Dytkowski was taking, did not provide a sufficient safeguard against repetition.

    58.4 In the case of MR, who had declared mental health issues during his disciplinary, a written warning had been considered appropriate and proved to be effective in presenting other incidents. This, along with the cases of GC and AT demonstrates that the respondent had felt able to take a more lenient approach to violent incidents where there was good reason to do so. Given the link between Mr Dytkowski's condition and his loss of temper, we accept that a final written warning

would not have been appropriate without some reason to believe that a similar situation would not result in a similar "explosion". However, Mr Dytkowski's conduct after the event gave good indication that he was likely to be responsive to a final written warning. That included seeking help from Ms Hornby, engaging with CBT and the fact that the up-coming DAFNE course should lead to better overall management of his blood-sugar levels and condition.

59. For those reasons we find that a final written warning would have been a more proportionate response and that the dismissal was not justified. The claim under s.15 EqA therefore succeeds.

60. However, we also find that, notwithstanding the link between his diabetes and the outburst, there is an element of contributory fault on Mr Dytkowski's part. Mr Dytkowski's medical condition may have made him more susceptible to experiencing "rage", but he still let that emotion get the better of him and dictate his actions. He accepts, and the Tribunal has found, that even if he had not been dismissed a serious disciplinary sanction such as a final written warning would have been appropriate. It is right that that is reflected in a reduction to his compensation. The amount of reduction is necessarily a somewhat arbitrary exercise, but we have determined that it is just and equitable to apply a reduction of 30% to the compensation that Mr Dytkowski would otherwise be awarded in respect of his s.15 claim.

Duty to make reasonable adjustments (section 20 Equality Act 2010)

The provision, criterion or practice ("PCP") relied upon is the respondent's disciplinary procedure and, in particular, the practice of dismissing individuals who conducted themselves in the way that the respondent determined the claimant had on 4 December 2018.

Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled at the relevant time?

61. The Tribunal is not satisfied that the respondent can properly be said to have applied any PCP in the decision to dismiss Mr Dytkowski. As we have stated above, we accept that the respondent considered each disciplinary sanction individually. Although we have found Mr Bourne's decision on this occasion not to be justified in the terms of s.15, we accept that it was a one-off decision made in good faith on the particular facts and circumstances of this particular case.

62. Our doubt as to the PCP more broadly reflects the fact that the claim under s.20 and s.21 (the failure to make reasonable adjustments claim) is simply a much less apt way of putting forward the same argument as we have already considered under s.15. It adds nothing to the matters already considered above and, even it were successful, would not change the compensation which would fall to be awarded.

63. In those circumstances, we consider this claim to be not well-founded, and we dismiss it.

64. The subsequent issues from the list of issues related to failure to make reasonable adjustments therefore fall away.

Unfair Dismissal

What was the principal reason for dismissal and was it a potentially fair reason in accordance with section 98 of the Employment Rights Act 1996 ("ERA")? The respondent asserts that the reason for dismissal was conduct.

65. We accept (and it was not disputed) that the reason for dismissal was C's conduct and that this is a potentially fair reason within s.98 ERA.

If so, was the dismissal fair or unfair in accordance with section 98(4) of ERA? Matters to be determined which are relevant to this question will include:

(e) Was a fair process followed?

(f) Was dismissal reasonable in all the circumstances?

(g) Was the claimant treated inconsistently when compared to other employees in the same or similar circumstances?

(h) Was dismissal within the band of reasonable responses open to the respondent?

66. We find that the respondent had a genuine and reasonable belief that Mr Dytkowski had committed the misconduct in question.

67. During the hearing, Mr Dytkowski drew attention to some procedural concerns about the dismissal. In particular, there was a suggestion that Ms Vaisutyte's initial investigation had enabled Mr Ulvenmoe to influence the account of Mr Gillet, the only witness to the incident (aside from Mr Dytkowski and Mr Ulvenmoe). Whilst this might have been an important issue in another case, we do not consider it affected the fairness of this dismissal in circumstances where Mr Dytkowski had admitted the misconduct and the differences between his account and that of Mr Ulvenmoe were minor.

68. Similarly, there was a complaint about a failure to inform Mr Dytkowski that he was entitled to ask for the investigation meeting to be postponed until a union representative was available to accompany him (in line with the respondent's policies). We accept that Mr Dytkowski believed he had no choice but to go ahead, and that the confusion over this possibly stemmed in part from language differences. Although it would have been better practice for the respondent to clearly give an employee the opportunity to delay the meeting, we find that it would have made no difference in this case given that Mr Dytkowski had frankly admitted his conduct from the outset.

69. We also considered the comparator cases that Mr Dytkowski and the respondent put forward. In line with **Paul** we do not consider that any of the circumstances of the comparators were sufficiently similar to make Mr Dytkowski's dismissal unfair. The closest comparison with someone who was not dismissed is with MR, and we did consider his position to have some relevance to our assessment of the s.15 claim, as outlined above. However, we accept that respondent's arguments that for the purposes of the unfair dismissal claim there were relevant differences, in particular the finding that MR had not intended the torch to hit the colleague with whom he was arguing, so physical contact had been inadvertent.

70. Turning back to **Burchell** the respondent is required to show a genuine and reasonable belief that the claimant had committed the misconduct in question, supported by a reasonable investigation. Although the respondent's investigation was adequate in establishing what had happened, and that the claimant was responsible, we consider that it was also necessary in this case to investigate the link between the diabetes and the incident on the 4 December. Even in a straightforward unfair dismissal claim, the employer must investigate matters likely to exculpate the claimant, as well as those likely to implicate him.

71. This link had been suggested by Mr Dytkowski from the outset, and it was important both in terms of his culpability for what had happened *and* in order for the respondent to assess the likelihood of a similar (or more serious) incident happening again. The culpability question falls within the **Burchell** test, whilst the question of likelihood of recurrence goes to whether the sanction of dismissal was within the band of reasonable responses.

72. Although both Mr Bourne and Mr McLeod asked for input from Ms Hornby, this was focused on what Mr Dytkowski had done to manage his condition in the run up to the 4 December. There was no focus on whether any risk of recurrence could be reduced or managed, and what the effect would be of Mr Dytkowski undergoing CBT and receiving assistance to better manage his condition. We consider that by not taking further steps to investigate these matters, the respondent's investigation falls below the standard required by **Hitt**. In terms of the sanction of dismissal, we remind ourselves that we cannot step into the shoes of the employer and substitute our own view for Mr Bourne's or Mr McLeod's. However, we also consider that we cannot artificially exclude from consideration the fact that Mr Dytkowski was a disabled employee and that the conduct he was dismissed for was conduct (as we have found) which arises from his disability. Mr Ryan urged on us the consistent approach extolled in **O'Brien**, but we consider that that argument runs both ways.

73. **O'Brien** was a capability dismissal for long-term sickness absence, and it may be that there is less difficulty in a conduct case with having a finding of a fair dismissal that is nonetheless discriminatory under s.15 (as was the case in **Grossett**). However, having regard to the fact that this employer did know of the link between the medical condition and relying on the factors set out at paragraphs 57 and 58 above (but without repeating them) we find that the sanction of dismissal was also outside the band of reasonable responses and that the dismissal was unfair.

If the dismissal was procedurally unfair, what adjustment, if any, should be made to any award to reflect the possibility that the claimant would still have been dismissed in any event had a fair and reasonable procedure been followed?

74. In view of our comments at paragraphs 67 and 68 above, we do not consider that it is appropriate in this case to make any **Polkey** reduction as we have not relied on procedural factors in reaching the conclusion that the dismissal was unfair.

If the Tribunal finds that the dismissal was unfair, should any compensation awarded be reduced to reflect the claimant's contributory conduct?

75. We make a 30% reduction to compensation in respect of both the basic award (under s.122(2) ERA) and the compensatory award (under s.123(6) ERA) for the same reasons as we have reduced the compensation payable for C's successful s.15 claim, as set out in paragraph x above.

Remedy

76. At the end of the hearing a date for a remedy hearing was agreed with the parties. At that hearing the tribunal will hear evidence and arguments as to the claimant's losses (including any argument that he has failed to mitigate his loss) and will give judgment on the exact amount of compensation payable as a result of the findings made in this judgment.

Employment Judge Dunlop

Date: 20 September 2021

WRITTEN REASONS SENT TO THE PARTIES ON

22 September 2021

FOR EMPLOYMENT TRIBUNALS