EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing by video which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing.

Claimant		**Respondent**
Mr B Nel	**v**	**Pinnacle Housing Ltd**

Heard at: Watford **On**: 6, 7, 8 April 2021

Before: Employment Judge R Lewis
Mr M Bhatti
Mr P English

Appearances

For the Claimant: Mr J Constable, Friend
For the Respondent: Ms A Rokad, Counsel

JUDGMENT

1. The claimant's claims for arrears of pay, notice pay and holiday pay are dismissed on withdrawal.

2. The claimant was at the material time a person with disability in accordance with s.6 Equality Act 2010.

3. The respondent did not fail to make reasonable adjustments, and the claim of disability discrimination fails.

4. The respondent unfairly dismissed the claimant and his claim of unfair dismissal succeeds.

5. By separate order a remedy hearing has been listed and case management directions for that hearing given.

REASONS

Matters of procedure

1. This was the hearing of a claim presented on 20 June 2019. Day A was 13 May and Day B was 12 June. Listing was given at a preliminary hearing on 4 March 2020 before Employment Judge McNeill QC (39).

2. The claimant was represented throughout by Mr Constable. Mr Constable candidly told the Tribunal that this was the first occasion on which he had conducted a case or appeared before an Employment Tribunal (although he plainly has experience in welfare benefits advice). It was necessary on a number of occasions to give Mr Constable and the claimant guidance, while remaining mindful of the boundary between offering guidance in accordance with the overriding objective, while not giving partial advice to a party.

3. We were told that all claims for arrears of pay, including notice and holiday pay, had been compromised before the start of this hearing. Mr Constable had withdrawn them by letter of 21 February 2021. While we sympathise with the claimant's concern about delay in satisfying those claims, they were not matters before us.

4. We therefore had before us two broad issues defined by Judge McNeill. The first was a claim for disability discrimination, in which it was not admitted (but not positively denied) that the claimant met the s.6 definition. The second was a claim for unfair dismissal.

5. This hearing proceeded by CVP. Both the claimant and Mr Constable had unusual difficulties with the CVP system, and as a result the hearing proceeded more slowly than would otherwise have been the case. Mr Constable consented to take part by audio only.

6. The respondent's solicitors had prepared a bundle which was available in pdf format. The pdf included the witness statements and the index to the bundle, as a result of which every numbered page in the paper bundle was out of sync with the pdf by a factor of 18. This was a source of some frustration.

7. The parties had exchanged witness statements. The claimant was the only witness on his own behalf. The respondent had submitted three short witness statements. They were from Mr Marcin Roziak, who had investigated allegations against the claimant; Mr Matthew Walker, who had conducted a disciplinary hearing and dismissed the claimant; and Ms Gemma Sadler, from HR, who had advised throughout, and in the event was not called as a witness. All witnesses adopted their statements on oath and were cross-examined. The parties agreed that in light of time constraints, possible technical difficulty, and the possibility of incomplete remedy evidence being available, this hearing would deal with liability only.

8. The Tribunal proceeded, at the suggestion of the judge, on the first day by hearing the disability discrimination claim in full. In the event, at the end of the first day there still remained Mr Constable's closing submissions on disability discrimination, which we heard the following morning. For the remainder of the second day of the hearing, and at the start of the third day, we heard the claim of unfair dismissal. After an adjournment, the Tribunal gave judgment on both claims, and set a case management timetable and listing for the remedy hearing. Ms Rokad asked for written reasons.

9. After we had given judgment, and in further discussion, it was confirmed that the issues of contribution and of Polkey (both of which the judge explained to Mr Constable) remained live for the remedy hearing.

10. The judge explained Rule 50 to Mr Constable. The claimant and Mr Constable were unsure as to whether to apply for any order in relation to the claimant, and that matter was left to be dealt with in correspondence after the hearing. No application had been received at the date this Judgment was signed.

11. Much of the evidence in this case concerned a named individual. At this hearing, his name was used. All parties knew his identity. The judge invited submissions as to whether he should be referred to by name or anonymously in these reasons. Ms Rokad was neutral in reply, and the claimant applied for anonymity.

12. It seemed to us in the interests of justice that as a matter of caution, the individual should be anonymised in these reasons as Resident A. We were in particular concerned that in light of the evidence about his language and behaviour, the Tribunal should be cautious of placing his name in the public domain in circumstances in which he has not been a party, or witness, or observer to any part of this hearing. The bundle showed that Resident A's identity was placed in the public domain in press reports of a criminal conviction shortly after the events with which we were concerned. That did not affect our decision.

General approach

13. We preface our findings with matters of general approach.

14. In this case, as in many, evidence touched on a wide range of matters. Where we make no finding about something of which we heard, or where we make a finding but not to the depth to which the parties went, our approach does not reflect oversight or omission, but is a reflection of the extent to which the point was of relevance and assistance.

15. It is the duty of the Tribunal to be accessible to lay people, and to endeavour in accordance with the overriding objective to place parties on equal footing. We were conscious of the particular difficulty faced by Mr Constable, as an inexperienced lay representative; and by the claimant, who was described to us by Mr Constable as "functionally illiterate", which proved in the event to relate to his dyslexia. The usual process of

questioning on documents was not realistic. We noted that when Ms Rokad at one point asked the claimant about one of the employment procedures which applied to him, the claimant's answer was that it was some time since anybody had read it to him.

16. Those practical difficulties were compounded by conducting this hearing by CVP. Mr Constable and the claimant were each remote but in separate locations, and Mr Constable's difficulties with CVP obliged him to take part in much of the hearing by audio only.

17. It is commonplace in the work of the Tribunal for one party (almost always the claimant) to have exercised subject access requests, and to comment on the disparity between SAR documents and disclosed documents. We understand that the approach of SAR is indiscriminate, where that of the Tribunal is focused. It is usual in our experience that SAR documentation is more substantial than disclosed documentation, but that SAR documentation is rarely relevant to the Tribunal.

18. It is also not unusual for one party (usually but not always the claimant) to allege failure by an opponent to give full disclosure. Ms Rokad informed us, and witness evidence confirmed, that the respondent had given disclosure of relevant documents and had answered SAR requests. The Tribunal has no means of gainsaying those assertions. We make findings below about the absence of the documentation which a large organisation would be expected to hold about an employee of six years' service.

19. In these reasons, we follow the structure which we followed at the hearing. We therefore deal first with the s.6 and disability discrimination issue; and then separately with the unfair dismissal claim. We depart from strict chronology where we consider it useful to do so. Although throughout this hearing documents were referred to by double numbering (eg page 39 in the bundle was page 57 in the pdf) all references below are to the numbering of the indexed paper bundle only.

Legal framework: discrimination

20. It was not in dispute that the claimant is blind in one eye and has a lifelong history of epilepsy. The sole focus of this case was the claimant's muscular skeletal impairment which was said to restrict his mobility.

21. The case fell to be considered under section 6 and Schedule 1, paragraph 5, of the Equality Act. The first of those states:

> "A person has a disability if she has a physical or mental impairment and the impairment has a substantial and long term adverse effect on her ability to carry out normal day to day activities."

22. In Schedule 1 at paragraph 5(1), the following is stated:

> "An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if

> (a) Measures are being taken to treat or correct it, and
> (b) But for that, it would be likely to have that effect.
>
> (2) Measures include in particular medical treatment…"

23. The only discrimination claim was a claim for a failure to make reasonable adjustments, within the framework set out in s.20 of the Equality Act. The material section states:

> " The duty comprises … a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantia disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

24. In the list of issues, Judge McNeill had defined the claim for reasonable adjustment very narrowly: it was a failure to make reasonable adjustment in relation to heavy lifting and moving, including the provision of help and special equipment.

The discrimination claim: s.6 status

25. The claimant, who was born in 1968 and is South African, joined the respondent as a cleaner in 2012. He was assigned to work at a social housing development in Sunbury.

26. Judge McNeill's order had directed the claimant to serve relevant medical records and a disability impact statement.

27. The claimant's impact statement (199-201) was a chronology of the claimant's grievances and concerns about mobility, which did not address the statutory issue set out by Judge McNeill. The only specific which it referred to was the meeting of June 2016; it was otherwise expressed in the language of general complaints. Annexed to it were a number of medical letters and reports written between November 2015 and February 2019. They were presented without analysis by or on behalf of the claimant.

28. The claimant had had total left side hip replacement in early 2015 (209). Throughout this hearing, both the claimant and Mr Constable described the procedure as having been "botched". The respondent, like the Tribunal, did not challenge this usage. We make no finding or comment on it.

29. The records indicate that the claimant has since the surgery reported, and repeatedly been seen for, pain, loss of sensation, and loss of effective use of the left leg and foot. We note that he has been seen by specialists in orthopaedics, pain management, and physiotherapy. His symptoms were not stable (ie they came and went and there were better days than others) and they were not constant (ie they might vary in intensity).

30. The claimant gave evidence, and the Tribunal asked him questions about day to day activities, and activities which might take longer than otherwise;

which he might find more difficult than otherwise; and which might be painful to undertake.

31. We find that since about late 2015 (although the precise onset date is not material) the claimant has had limited reliable use of his left leg and foot. He has experienced loss of sensation. Sometimes he has had falls and has had difficulty in standing unaided. He has repeatedly described his left foot as being like "dead meat". He has had a number of consultations to address pain management.

32. The claimant told the Tribunal that he occasionally walks with a stick when he needs it, and that he has difficulty using stairs, particularly coming down stairs. His present accommodation, to which his social landlord relocated him, is a bungalow, furnished with a wet room because he cannot use a bath. He said that he could not, or could not readily, bend down, or lift objects off the floor. He mentioned in particular that one task which is difficult is to plug in an appliance at a low level plug. He agreed that these effects were not experienced all the time or every day and that they varied.

33. We find that the claimant had an impairment of painful and / or reduced use of his left leg and foot and consequent back pain, which had an effect on the day to day activities described above, including all forms of mobility. The effect was substantial and it lasted more than a year. We find that at the material times the claimant met the s.6 definition of disability.

34. The respondent did not concede having actual or constructive knowledge of disability. The bundle included an occupational health report on Ms Sadler's referral of September 2015 (181). It set out as the relevant history the consequences of hip replacement on 10 March 2015 and described a range of symptoms consistent with what we have found above. The adviser wrote that notwithstanding other health issues "All symptoms are due to his operation" and advised that the condition was likely to be considered a disability. There was then advice about restricted and light duties.

35. While we appreciate that the occupational health adviser offers no more than an opinion on the application of s.6, there was no indication that the respondent at the time challenged or disagreed with this advice, or sought another opinion. It was difficult to see the basis on which the respondent maintained its non-admission of knowledge. It was also difficult to avoid the inference that the non-admission was no more than litigation reflex, contrary to the respondent's practice in managing the claimant. We find that the respondent had actual and/or constructive knowledge of disability.

36. Ms Rokad was also instructed to raise a limitation defence. We accept the forensic logic which states that the last day on which a failure to make reasonable adjustment constituted discrimination against the claimant was the last day on which he functionally did work. As that was in November 2018, the claim was on its face out of time. We accept that the claimant had the advice in early 2019 both of Mr Constable and of a non-practising solicitor without employment law experience. Although we accept also that

the claimant was well able to articulate grievances, we find it just and equitable to extend time on the basis that the claimant chose not to test these issues (even if he understood that he could bring a discrimination claim while still employed) until his dismissal in April 2019 left that course unavoidable. In other words, it seems to us just and equitable to extend time so that the claimant is able to claim for disability discrimination at the same time as unfair dismissal.

Legal framework: unfair dismissal

37. When we come to the claim for unfair dismissal, the legal framework was largely agreed. It was common ground that the claimant was an employee of the respondent with over two years' service; that the respondent had dismissed him; and that he had completed early conciliation and presented his claim in time.

38. The first task of the Tribunal is to find as fact what was the reason for dismissal, namely the material factual basis for the decision to dismiss, irrespective of the label applied to it at the time. It must then consider whether that is a potentially fair reason within the framework set by s.98 of the Employment Rights Act, the reason relied upon in this case being "some other substantial reason" which is something of a catch-all provision set with the other specific reasons.

39. The Tribunal must then consider whether the requirements of fairness have been met having regard to equity and the substantial merits and the size and administrative resources of the respondent. While the breadth of the "SOSR" approach will lead to some diversity in what fairness requires, the basic framework is, it seems to us, reasoned analysis of the factual basis; investigation in light of that analysis; presentation to the employee of the basis upon which dismissal is proposed, along with the material evidence, and the opportunity to present evidence, be accompanied and heard; open-minded discussion at a disciplinary hearing; leading to a decision within the range of reasonable responses, and a right of appeal. These are generalities, to be fine-tuned in the light of each individual substantial reason.

The discrimination claim

40. The discrimination claim formulated by Judge McNeill was narrowly stated. The PCP was a requirement to undertake heavy lifting and cleaning and the reasonable adjustment requested was "providing the claimant with either a person or equipment to assist him with heavy work". (41)

41. The paucity of documentation about the claimant's management was a recurrent feature of this case. As noted, the claimant had surgery in March 2015. He was then effectively signed off until September 2015. We note that an occupational health referral took place at the time of his return. If a return to work meeting took place, as would be usual, no record was available of it. If there was any monitoring of the claimant's well-being, returning to work with (at least) an impairment, after six months absence,

and in light of the OH report, no record was available of it, and no evidence was given about it. The first documented, evidenced record of consideration by the respondent of the claimant's well-being was a sickness review meeting on 14 June 2016. That was not a welfare meeting. The first line records Ms Sadler as stating that the purpose of the meeting "is to recap on absence record over the last 12 months and to discuss the reasons for his absence" (85).

42. We accept the accuracy of the note of the meeting, which the claimant did not challenge in evidence (85-86). It was not clear to us that, as is often the practice, a copy was sent to the claimant at the time, so that he could have the opportunity to go through it with a friend with reading skills. That is, in our experience, the good practice of many employers, regardless of an employee's reading ability.

43. It is nevertheless clear from the note, and the claimant accepted at this hearing, that there was discussion of a range of mechanisms and support provided by the respondent to the claimant. These included equipment, working boots, the use of a trolley to move heavy items, and assistance of a helper. In evidence to this hearing, the claimant was dismissive to the point of contempt of each of these. He said that the boots were wrong, the trolley was no use, and the helpers were unreliable, and indeed suffered from addiction problems (an allegation which the claimant scattered wider than just the helpers). We are sceptical of all of this evidence, given years after the event in the context of litigation, and we prefer the evidence of the claimant's contemporaneous replies.

44. We find that the respondent provided the claimant with an extra person as helper. When the primary helper (D) was not available, support was provided by agency staff or by a short term cover (A). The claimant was specifically asked on 14 June 2016 about the helpers. He accepted that the helper undertook the work, but that there was negotiation involved in achieving that outcome.

45. When asked whether he had "everything that you need from Pinnacle to assist you" the claimant said that he did. When asked why he preferred to use a Tesco trolley rather than the trolley provided to him by the respondent he said that the respondent's trolley was "fine" and the claimant understood that he was responsible for asking for any further help if need be.

46. The claimant did not put to the Tribunal any specific event or task in relation to which he alleged a failure to make reasonable adjustment. He put a very general case, and in finding that the respondent made the reasonable adjustment of providing the claimant with a helper, we add the perhaps obvious comment that by helper we do not necessarily mean a companion at his side every moment. We accept that the respondent provided such additional equipment as was requested from time to time. We find that the respondent made adjustments to support the claimant such that they were available when required. As the claimant noted at the June 2016 meeting, he did a lot of light duties, and therefore did not always need assistance.

We add, in fairness to the respondent, that that was not the only adjustment which it made; and that we accept that the claimant could ask for further assistance if a need arose in practice.

47. We find therefore that the respondent discharged its duty of reasonable adjustment, and that the claim fails.

Unfair dismissal

48. When we come to the claim of unfair dismissal, the matter is more complex. We open with an executive summary, which we hope will make these reasons easier to follow.

Summary of the claim

49. The claimant was employed as a cleaner at a social housing site in Sunbury managed by the respondent on behalf of Metropolitan Housing, a housing association. The site had about 130 units, and Mr Walker agreed a rough figure of about 350 residents. The claimant had been employed there as a cleaner since 2012.

50. The claimant reported that over the years he had been the subject of unprovoked hostility, expressed verbally but sometimes physically, by Resident A. Some of the language used by Resident A was unashamedly racist. There was evidence that the claimant had reported these events, naming Resident A, to a number of line managers. There was no evidence that the respondent had taken any steps in response, either by offering support to the claimant, or by addressing A or Metropolitan.

51. The trigger event in the case before us was an interaction with Resident A on the afternoon of 24 October 2018, which the claimant reported, leading to a response from management. The claimant was suspended from the Sunbury site on grounds of health and safety. Health and safety guidance remained that the claimant should never return to site. The claimant was offered a relocation to another site, which he declined even to trial, on grounds of travelling difficulty and cost. He was in due course invited to a disciplinary hearing, the outcome of which was that he was issued with a final written warning for a remark which he admitted he had used to Resident A; and told that he could not return to Sunbury because of health and safety advice, and in the absence of accepting relocation, was dismissed. The claimant did not appeal. The respondent took up the issue with Metropolitan Housing, which reported that it had sent a warning letter to Resident A, but appeared otherwise unhelpful, and unconcerned by the impact of its tenant's behaviour. We now give a more detailed fact find.

Findings of fact

52. We set the scene. The claimant, who was born in 1968, took up employment with the respondent as a cleaner in late 2012 (49). His starting salary was £13,500 and he was full time.

53. The respondent is a company which provides facilities management under contract to social landlords. Metropolitan Housing is the social landlord of a site at Sunbury. The respondent was responsible for facilities management of the site. The respondent is a substantial enterprise, employing about 2,400 people, with a professional HR function, and a central London base. We regard it as an employer of significant size and administrative resources.

54. The boundaries in these relationships seemed clearer to us than to Mr Constable. Although he questioned on the commercial relationship between the respondent and Metropolitan, and appeared frustrated (understandably) about the interface between the respondent, Metropolitan and Resident A, we can, on paper at least, understand the existence of the chain of relationships before us. The claimant was an employee of the respondent, which owed him the duties of a good employer. The respondent was in a commercial contractual relationship with Metropolitan. Metropolitan was in the relationship of social landlord with residents, including Resident A. We assume that that relationship was set out in a tenancy agreement. We There was no contractual relationship between Resident A and either party to this claim.

55. The claimant's health issues include epilepsy and blindness in one eye. He moves with a limp. He is dyslexic. He is South African and speaks with a recognisable South African accent.

56. The claimant reported to line managers (we heard three main names, Mr Evans, Mr Modeste, then Mr Flynn). He clearly had accessible relationships with all of them (as shown in email trails). He said in evidence that each visited the site about twice a month and spoke to him in the course of the visit. That would make about one hundred interactions during the claimant's employment. The bundle contained a record of risk assessment by Mr Modeste in July 2015 and January 2017. Other than that, there was no record or evidence of a single instance of routine management supervision, appraisal, or feedback throughout the six years of the claimant's employment.

57. There was no record or evidence of any relationship difficulty between the claimant and any colleague, resident or other party apart from Resident A. The only evidence about the quality of the claimant's work was that Mr Walker said that, 'you have done a good job' (160). Minutes later, he dismissed him.

58. On 16 October 2013 there was a report from Mr Lapsley that Resident A had used 'foul and abusive' language towards the claimant and himself, including the phrase (about the claimant) "fucking cleaner" (74).

59. On 20 November 2014 Ms Halfhide, a manager employed by the respondent, interviewed the claimant with a notetaker about a resident's complaint. It appears that the complainant was not Resident A but a friend

of his. Reading the note in isolation, the circumstances are not clear. We were struck by the following exchanges (81-83). In quoting these exchanges we remind ourselves that this is management's note (emphasis added):

> "VH In general your safety at work how do you feel?
>
> BN My only concern is Resident A. He sneaks around. He might say oh my staircase never gets cleaned, and I'll admit I don't clean his staircase, because I don't want to go near him. He punched me in the face.. He snuck up on my right hand side and he just punched me.. He abuses me, spitting at me, following me round.. taking photos of me..
>
> VH Who did you report it to?
>
> BN Met, the police, you guys
> .. He is a bully.. he bullies other residents. He'll shout and bully them. Not just me
>
> VH We've dealt with him before and X is aware of him.. You need to keep the reporting of incidents like this going, report everything.. we need to know as it is abuse we need to build a log.. "

60. There was no further evidence of the factual basis of the emphasised parts of this note.

61. On 25 May 2017 the claimant reported, referencing Resident A (87).

> "Abusive language towards [me]. He also threatened physical abuse"

62. On 21 June 2018 the claimant emailed Mr Modeste (89):

> "I would like to inform you that I have had an incident with Resident A today. He came at me with a crowbar from the boot of his car while I was closing the bins.. I brought this to your attention as I now think this seriously needs to be dealt with."

63. There was no evidence that the respondent initiated any response to being told that its employee had been assaulted at work. There was no document or evidence of any management response by anyone at the respondent to any one of these events, or the accumulation of them.

64. We turn now to the index incident. In the early afternoon of 24 October 2018 the claimant emailed Mr Flynn, copy to Mr Flynn's line manager Ms McAuliffe (95). The report should be read in full. We summarise. The claimant was helping a delivery driver, whose lorry had caused an obstruction as it was parked to deliver. Resident A drove past.

65. The report continues:

> "A proceeded to drive past and rolled down his window, he then started to swear and abuse me. I said to him it takes a man on a horse not a boy on a bicycle. He drove down the road and I said to the driver he will come and cause shit now. He parked his car and came across and got up in my face, he started to push me in the chest and was

> spitting in my face. Telling me I stink and that I must fuck off back to my home country. I told him to move back and I told him this multiple times. He pushed me several times. I turned and walked away. Then rang the police as well as my managers."

66. The claimant reported the matter to the police, which logged a report having been made at 16:07, classified by the police as "racially aggravated assault" (104).

67. Within the respondent the claimant's email report was forwarded to the health and safety function. If any comment was made in the forward, it was not disclosed. At 15:58 the same afternoon Mr Fenn, who we understand to be a member of the health and safety team, wrote as follows in full to Mr Flynn, emphasis added:

> "I understand there has been an incident involving [the claimant] and a resident. While we await your investigation and statements etc our immediate advice is that the claimant must not return to site at least for this week and preferably not at all. Let us have the reports as soon as you can please."

68. Ms Rokad advised in submission, and we accept, that the precise chronology of the claimant's attendance at work after the index incident was as follows:

- Between 26 October and 1 November he was suspended pending investigation;
- 2 November annual leave;
- 5 to 16 November cover at another site;
- 19 November to 29 December off sick;
- 30 December to 10 April 2019 suspended on full pay pending disciplinary outcome.

69. On 25 October Mr Flynn interviewed the claimant (106). The purpose was to investigate the event of the previous day. It was not clear how this meeting was convened, or whether the claimant was provided at the time with a copy of the meeting note to check with a friend. Mr Flynn asked the claimant to describe the incident, and the claimant repeated the account already quoted.

70. The claimant added that the "horse / bicycle" phrase was "a South African saying." He later clarified that the sting of the phrase is to the effect that whatever A was saying or threatening would take a real man a carry out.

71. The notes show Mr Flynn asking: "Have you had problems with the resident before?" The claimant's recorded answer is (107):

> "Yes, when I first started working there some years back, he came up to me and punched me in the face.. I don't know why he just came up to me out of the blue and hit me for no reason at all.. Back in 2014 he did the same thing, shouting abuse at me and pushing me."

72. There was no evidence that Mr Flynn investigated this any further. We comment that if Mr Flynn were to conduct a thorough investigation, he would have had access to the reports of 2013, 2014, 2017 and June 2018 quoted above. Assuming the accuracy of Mr Flynn's note, we accept that the claimant did not give him a complete account of Resident A's behaviour.

73. On the same day, the incident was recorded on the respondent's "Cascade" system. (105) That is a log accessible to employees and managers for incident recording. Ms Rokad explained that it has been in place since 2017 and has been searched for the purposes of disclosure in this case. She explained that it replaced an earlier system of the same type. Ms Rokad said that there is no Cascade record of the June 2018 incident, when the claimant informed his manager that a resident had threatened him with a crowbar.

74. Mr Flynn continued to investigate. He contacted the contractor who had been undertaking delivery at the time of the incident. The contractor was unable to reply until 8 November (109), when he wrote:

> "There was an incident whilst we were around the site, but myself and the driver were concentrating on unloading our wagon as it was parked on the tight side road. A resident and the caretaker did exchange a few words. The resident was aggressive, even with us to start with. I didn't witness any physical violence just threats to do this and that. The two then parted. The resident then came and had a pop at us about our wagon being parked on the corner. We just told him to calm down which he did pretty much straightaway. We didn't then see him for the rest of our visit."

75. There was a flurry of emails around 13 November. Ms Sadler from HR asked for an update. She raised the question of where the claimant (who was then covering at another site) was to work. She also wrote:

> "Brett has also advised that he has bought a bodycam which he will be wearing to work. I think that this could have the potential to do more harm than good and I'm not sure where we would stand on allowing him to wear the bodycam. Surely, there are other risk assessments which we could put in place for a lone worker... what is it that we currently have in place for lone workers?"

76. A matter of minutes later Mr Butcher, who we understand to be the senior health and safety manager, replied:

> "I'm not happy with wearing bodycams.. I've only seen the statement from Brett. There was nothing further about what future actions had been taken. I am concerned that he made quite a sarcastic comment to the aggressor.. If Brett genuinely feels concerned about attending this patch, he should be kept away and moved elsewhere. My reading is that there is a little bit of history between the two people.."

77. There was no evidence of the risk assessment requested by Mr Fenn ever happening. There was no evidence of any response to Ms Sadler's request for information about risk assessment for lone workers. Later the same day Mr Roziak confirmed that the claimant was temporarily covering another site and that the respondent was "working with the client [ie Metropolitan] to

investigate issue with resident but have not had too much support so far." (115)

78. A little later Ms Sadler's comment was:

> "My thoughts are if we collate the information and look to see if there is enough to proceed to a hearing for gross misconduct."

79. At that stage, the claimant had been suspended on Mr Fenn's advice and had covered another location. The only other live witness had provided his statement, which part corroborated the claimant's report. Metropolitan was being less than co-operative. It is not at all clear how the horse/bicycle phrase was taken by Ms Sadler to constitute potential gross misconduct, such as to warrant summary dismissal. There was no evidence available to this Tribunal of any further contribution to the discussion of the claimant's future by the health and safety team. Its contribution was in full Mr Fenn's email of 24 October, in which he asked to be sent further reports; and Mr Butcher's email of 13 November, from which it is clear that he had seen nothing else, and expressed a negative view about bodycams.

80. Mr Roziak looked at possible alternative locations for the claimant (119). He identified the Chalk Hill site as most appropriate and closest to the claimant's home but wrote, presciently and accurately, "I know he will object" in light of extra travelling time and cost (115). As predicted, the claimant declined Chalk Hill (123) in light of his disabilities and travel difficulties. The claimant raised a number of points. He is not permitted to drive and does not have a driving licence; train travel would absorb a large proportion of his modest income; bus travel would add significantly to the length of his day. Those were the claimant's initial objections to working at Chalk Hill (16 November, 123), and he never departed from them.

81. It appears that Mr Roziak had been tasked with investigating in accordance with the respondent's disciplinary procedure. The bundle did not contain any formal request or instruction. It did contain an incomplete draft of his report (101). Mr Roziak in evidence confirmed that he never completed the report because it was overtaken by time, delay and events. The draft contained no reference to the history with Resident A, did not indicate what evidence had been gathered, or give a conclusion or recommendations.

82. In late November and into December the claimant was signed off sick. The advice of health and safety remained that the claimant was not to return to Sunbury. No efforts on Mr Roziak's part would persuade the claimant even to try a period at Chalk Hill and the claimant was absent in the circumstances set out above.

83. In mid-November further correspondence took place between Mr Roziak, Ms Sadler and Mr Walker about forcing the issue (143-146). Although it turned out not to be material the correspondence suggests that Mr Roziak was uncertain and sympathetic to the claimant and Ms Sadler markedly less so. On 30 November Ms Sadler emailed Mr Walker to suggest dismissal for

some other substantial reason; and Mr Walker replied stating: "Thanks Gemma, on that basis let's crack on and get him out." (132) That language seems to us only explicable on the basis that their joint view at that stage was that the claimant was to be dismissed. On 3 December Mr Allie-Lamptey of Metropolitan wrote to Mr Roziak (129):

> "I will be sending a warning letter to the resident. Unfortunately I am not in position to provide a more sterner response as the independent [witness?] is not able to corroborate the assault that the caretaker is alleging."

84. After the change of year the claimant's certificated sick leave came to an end. On 2 January 2019 he confirmed his refusal to work at Chalk Hill (150) and was suspended.

85. On 15 January Ms Sadler invited the claimant to a disciplinary hearing. The allegation was, "you were involved in a verbal altercation with a resident" (153). Six of the seven paragraphs in her letter were in template wording. We note that the phrase "I have attached a copy of the investigation documents" was not accompanied by an index or explanation of what documents were provided, which was unhelpful in the case of an employee with serious reading difficulty. The fifth paragraph of the letter stated as follows:

> "If you are found to have committed an act of misconduct, disciplinary sanctions may result. I am obliged to inform you that if it is not considered possible for you to return to your role, then we will need to consider whether there are any suitable alternative roles available for you within the Company."

86. It was not in dispute that the claimant is dyslexic. Mr Constable used the phrase 'functionally illiterate.' Consistently with the absence of management records, it is not clear when the respondent knew of this. Items written in 2013 and 2015 by the claimant, or on his behalf, recorded a reading issue, which must have been known to his line manager. When Mr Modeste in 2015 and 2017 gave him recorded forms of training or induction, the issue must have arisen again. We find that in meetings, as at this hearing, the claimant was voluble but not articulate. We mean by this that he could express himself, with vigour and at length, but often not with focus, or to the point. He seemed to us not good at doing justice to what he wanted to say. We record these matters as the basis for a finding which seems to us critical. In managing the claimant, the respondent, through HR, was under a particular duty to use clear, plain, unambiguous language, and to explain itself fully. We find that the above, crucial paragraph of Ms Sadler's letter of 15 January failed to achieve that objective.

87. The disciplinary meeting took place on 14 February. It was chaired by Mr Walker and Mr Roziak presented, with Ms Sadler as adviser. The claimant was accompanied by a non-practising non employment solicitor, who was a friend from mutual church attendance.

88. The first four pages of notes (156-159) record the conversation about the horse/bicycle exchange. The claimant explained the phrase and was

questioned as to its prudence, and whether it was provocative or sarcastic. In the middle of the meeting Mr Walker is recorded as stating:

> "You are not going to be sacked for saying something like that. All I'm saying is that the response could be seen as provocative – the sarcastic nature.. that is how it could have been perceived – but it doesn't justify it.. It could have inflamed that situation.. we have escalated this to Metropolitan.."

89. Up to that point, the discussion had been about the horse/bicycle incident and remark. At this hearing. and implicit in the notes, weight was attached to the claimant's reported remark to the contractor that 'shit would happen' in reaction. It was put to the claimant that that phrase suggested that he must have known that his horse / bicycle remark would provoke Resident A. However, having heard that part of the case Mr Walker clearly formed the view that the horse / bicycle remark was not a dismissal matter.

90. The note records Mr Walker's next remark as follows:

> "We have escalated this to Metropolitan. Is there anything that has happened with this? Given the history of the incidents we do have a duty of care to you. You may disagree, but it is not reasonable for you to return to that place.. H&S have stated that it is not reasonable for you to go back.. so the position we find ourselves in now – as much as you might say it is unfair that you can't go back.. the fact of the matter is, you can't continue to work at that location. You have information there that has been said that you have done a good job."

91. There was then further discussion about where the claimant could relocate, and after an adjournment Mr Walker repeated and confirmed,

> "The bottom line, it is not an option for you to return."

92. Mr Walker reserved his decision. Although his evidence was that there was a great deal to think about, there was no evidence of further enquiry or activity by the respondent until the outcome letter was sent on 11 April 2019 (168). In the letter Mr Walker issued the claimant with a final written warning for the horse/bicycle remark. He then wrote that as the claimant could not return to work at the Sunbury site, and had declined to attend Chalk Hill as an alternative, he was dismissed. He was advised of his right of appeal. Understandably, Mr Constable made a great deal of the fact that a senior manager, with HR advice, failed to give proper notice (six weeks, not one month) to an employee of six years' standing. The claim which arose from that failure was one of those compromised before the start of this hearing.

93. The claimant did not appeal. On 24 April the press reported Resident A's conviction and sentencing (177).

Discussion of unfair dismissal

94. This was a troubling case. Ms Rokad was right to caution the Tribunal to approach the matter objectively and to take particular care not to substitute

our own view of the matter. She rightly corrected the judge in particular for a loose phrase, adopting one used on the claimant's side, by reminding us that this was not a claim akin to victimisation or whistle blowing, and that it could not be said that the claimant was dismissed for making an allegation of discrimination.

95. The first question for the Tribunal is to find what was the reason for dismissal, namely the operative material consideration in the mind of the dismissing officer. Mr Constable submitted that there was some form of hidden agenda against the claimant. There was scant evidence of that and we do not agree. We accept that the reason for dismissal was that set out in the dismissal letter, namely that the respondent acted on advice of its health and safety specialists to exclude the claimant from his workplace and an alternative workplace could not be agreed.

96. We agree that that is potentially some other substantial reason for dismissal. Exclusion from a work place on health and safety grounds is not unusual – this case was, we note, heard in the fifteenth month of the pandemic. We accept that the reason was a potentially fair reason.

97. We then must consider the question of fairness through the spectrum of s.98(4) bearing in mind that the burden of proof is neutral.

98. In submission, Ms Rokad twice said that the respondent was 'between a rock and a hard place.' That phrase seemed well used in theory. It captures something of the burden of management decision making, where a manager must weigh up competing considerations, all of which have their strengths and weaknesses; and must then make a decision which may be the least bad available. At the point of decision making, there may be many possible answers, all of them in part right -- in the familiar phrase, a range of reasonable responses. But where Ms Rokad's phrase was ill used was that it implies a careful balancing exercise. We find that nothing approaching that ever took place. There was never a point at which a reasonably informed decision maker, presented with all relevant information, weighed up the relevant factors, balanced the competing interests, possibly then inquired further, discussed the balancing exercise with the claimant, and reached a fully informed decision, with reasons which the claimant could understand and challenge by appeal.

99. The respondent had been given information about Resident A's behaviour on at least five occasions since 2013. That may well be an underestimate, as Ms Halfhide's note in 2014 plainly refers to other concerns from other sources. We understand that Mr Walker was not aware of that history. His ignorance of the full background is troubling in itself. One reason was the respondent's failure to inquire. In considering the future employment of an employee of six years' service with no relevant disciplinary history, the respondent failed to conduct a reasonable inquiry into its own records of dealings with Resident A, and failed to consider the absence of managerial records to which we have referred above.

100. Mr Fenn gave what he called an immediate response (obvious from the timing) and called for further reports. There were no further reports. By the time Mr Butcher provided the second and final contribution from H&S, he did so on the basis that there had not been any other report. The totality therefore of health and safety advice was the two emails of 24 October and 13 November. No adviser from the health and safety function had considered any document beyond the claimant's email of 24 October; they must have been wholly unaware of the history; they had not visited or inspected the site; they had undertaken nothing in the nature of an enquiry or investigation or analysis, let alone what might be understood to constitute a balanced risk assessment. If the respondent had any generic lone worker risk assessment, there was no evidence of it.

101. None of the managers involved challenged this, or invited dialogue with Mr Fenn or Mr Butcher for further consideration. Mr Butcher was dismissive of the proposal for bodycam. His response was just as immediate as Mr Fenn's: it was written minutes after he was told of the proposal. There was no consideration or analysis of how, in this situation, it might be weighed up in the balance as a proposal which might help save the employment of an individual.

102. The claimant was verbose but not articulate. He had no effective reading skills. There was a heavy obligation on the respondent to make its paperwork clear. Ms Sadler's invitation letter was seriously at fault. The fifth paragraph, which we have quoted above, implies that the question of the claimant's return to work is contingent on the outcome of the disciplinary allegation. That is of course the conventional model of a disciplinary hearing. In this case, it was badly misleading.

103. The letter fails to say that whatever the outcome of the disciplinary investigation, the claimant's exclusion from the Sunbury site is an accomplished fact, not open for discussion, and that therefore the only means of saving the claimant's employment is for him to agree terms for relocation. If we are in any doubt about that proposition, we ask what would have happened if Mr Walker's decision about the horse/bicycle incident had been that the charges were rejected and the claimant was cleared of the allegation. If that had been Mr Walker's decision, the outcome would have been exactly the same. The same discussion about exclusion would have taken place, and the claimant would have been dismissed.

104. Accordingly, we find that the decision to dismiss was not made on reasonable evidence, or after reasonable inquiry, and therefore could not itself be a decision within the range of reasonable responses, for the following reasons, which are not set out in order of priority, and which apply cumulatively.

    - the health and safety advice was ultimately determinative of the claimant's exclusion. It was a snap judgment, which was not the product of any or any reasonable or adequate inquiry, including but

not limited to the failure to conduct any risk assessment and / or to consult the claimant;

- the exclusion of the claimant from site was not the product of any or any adequate or reasonable inquiry or decision making process or analysis, including but not limited to the failure to conduct any risk assessment and / or to consult the claimant;
- the issue of the claimant's exclusion was never the subject of open minded consultation with the claimant, including at the dismissal meeting;
- Mr Walker and Ms Sadler had on 30 November recorded unqualified views that the claimant was to be dismissed;
- Although an investigator was appointed, his report was never completed, so that there was no document setting out formally the allegation, course of investigation, evidence gathered, analysis and recommendation;
- the invitation letter of 15 January 2019 did not fairly or clearly alert the claimant to the nature of the two discussions that were to take place;
- in particular the letter failed to make clear that the outcome of the horse / bicycle investigation might have no bearing whatsoever on his future employment (as in the event turned out to be the case);
- It was not clear to this Tribunal that any paperwork about exclusion and relocation was included in the papers sent to the claimant in January 2019.
- There was no record of any or any adequate or reasonable bilateral consideration of relocation at a point when the claimant had been told in terms that that was the sole alternative to dismissal;
- There was no evidence of any balancing consideration given to the factors in the claimant's favour: his quality of work and length of service, his working relationships with all residents and colleagues except A, his disciplinary record (which we understand to have been clean, apart from a minor episode about smoking on site in August 2018), and the health issues which rendered him vulnerable in the job market;
- Every manager who saw the claimant's report of the index incident, (our fact find names seven, but there may well have been more) knew that he had written that A had said that, 'I stink and that I must fuck off back to my home country.' There was no evidence that any consideration was ever given by anyone to the issues of principle and fairness which would arise if the outcome of the index incident were to be the dismissal of the person to whom this ugly language was directed.

105. The issues of contributory conduct and Polkey reduction are to be considered at the remedy hearing, if pursued by the respondent.

_____ _____
Employment Judge R Lewis

Date: ……5/5/21……

Sent to the parties on: .....
.....
For the Tribunal Office