THE EMPLOYMENT TRIBUNALS

Claimant Mr G Hardy

Respondent Topps Tiles plc

Heard at Newcastle upon Tyne Hearing Centre

On 10-11 June 2021 & 14 July 2021 (in chambers)

Before Employment Judge Langridge
Members Ms B Kirby
Mr K Smith

Representation:

Claimant Mr Richard Owen, CAB advisor
Respondent Mr Sam Proffitt, counsel

JUDGMENT

1) The claimant was unfairly dismissed by the respondent. He did not contribute to his dismissal, which was both substantively and procedurally unfair.

2) The claimant is a disabled person within the meaning of section 6 Equality Act 2010, and was disabled at all times material to his dismissal.

3) The claimant's dismissal was discriminatory contrary to section 15 Equality Act 2010 in that it arose from his disability. The respondent has not shown that the dismissal was a proportionate means of achieving a legitimate aim.

4) The claimant's claim under section 10 Employment Relations Act 1999 is not well-founded and is dismissed.

5) A remedy hearing shall be listed for one day to determine compensation.

Introduction

1. In his ET1 the claimant alleged unfair dismissal and disability discrimination arising from his dismissal as a store manager on 22 November 2019. He originally joined the respondent on 5 June 2002. He claimed he had suffered from depression for a period of over 20 years and that the respondent was aware of this. The claimant alleged that the respondent had knowledge of his disability following a discussion with an area manager in 2016, though he had been provided with no support. His line manager was also aware of his health problems after he broke down in tears at a meeting with her on 7 October 2019. Not long after this meeting the claimant had an altercation with an abusive customer in the store, which led to his suspension and dismissal.

2. The claimant's complaint was that the respondent disregarded the impact of his disability on the altercation simply on the grounds that he was not taking medication at the time, and dismissed him because he admitted he could have handled the situation better. The claimant also complained that the respondent ignored the points he put forward in mitigation, including provocation from the customer during the incident. Having appealed against his dismissal the claimant said the respondent did not investigate his health issues and declined to wait for his redacted GP records to be produced before deciding the appeal. His final complaint was that the rights of his companion under section 10 Employment Relations Act 1999 were not respected in accordance with the Acas guidance.

3. In its response to the claim the respondent said it did not accept that the claimant was disabled or that the respondent had any such knowledge. In reference to the incident with the customer the respondent said the claimant was alleged to have used profanity and foul language; to have been aggressive; and to have thrown tea over the customer. It asserted that a reasonable investigation was carried out and relied on certain admissions made by the claimant as to his conduct, such as acknowledging that he should have handled the incident differently.

4. This hearing took place in person on 10-11 June 2021 in the Newcastle Tribunal. The claimant gave evidence on his own behalf, agreeing to give evidence first in view of the discrimination claim, even though the case revolved around a dismissal decision. For the respondent, evidence was given by managers Tammie O'Lone (Area Business Manager), Tracy Wearmouth (Regional Director of Sales) and Kevin Nicol (Area Business Manager). An agreed bundle comprising around 200 pages was provided.

5. Before the hearing began the Tribunal took the time to review the issues with the parties and asked the respondent to clarify why disability and knowledge of disability were in issue. The respondent relied on the case of J v DLA Piper UK LLP [2010] ICR 1052 in drawing a distinction between depression as a medical condition and a depressed reaction to adverse life events. Mr Proffitt referred us to paragraphs B1 and B7 of the Equality Act guidance and said there was not much evidence that the claimant's depressive periods met the definition. He accepted that all three witnesses for the respondent were furnished with information from the claimant to the effect that he had depression and considered himself disabled.

6. In reference to Cox v Essex County Fire and Rescue Service UKEAT/0162/13 on the question of an employer's knowledge of disability, Mr Proffitt pointed to the claimant's own case that he hid the effect of his condition from his employer.

7. Part of the claimant's claim included an allegation that misconduct was not the real or only reason for dismissal, as the claimant suspected the respondent wished to make his post redundant, based on what he had heard about subsequent events. However, after hearing from the respondent's witnesses on that issue, Mr Owen agreed during submissions that the redundancy argument was not being pursued.

8. We asked the claimant to clarify the basis on which the section 10 claim was made and whether it was about the claimant's companion being unable to answer questions on his behalf. Mr Owen said that it was not about answering questions, but the fact that the companion was unable to support the claimant in the way allowed by section 10. By the time of submissions this too was all but withdrawn.

Issues & relevant law

9. The issues were summarised following a preliminary hearing on 29 April 2020 as follows:

9.1 Was the claimant a disabled person by reason of depression?

9.1.1 Section 6 Equality Act 2010 provides as follows:

(1) A person (P) has a disability if--

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

9.2 If so, did the respondent have actual or constructive knowledge of that disability?

9.3 Did the conduct for which he was dismissed arise in consequence of his disability?

9.3.1 Section 15 of the Act provides as follows:

(1) A person (A) discriminates against a disabled person (B) if--

> (a) *A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> (b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> (2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

9.4 Was his dismissal a proportionate means of achieving a legitimate aim?

9.5 The Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability ('the Guidance') is relevant to the question whether the claimant was disabled under section 6 of the Act. Paragraphs B1 and B7 of the Guidance state:

Meaning of 'substantial adverse effect'

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at S212(1). This section looks in more detail at what 'substantial' means. It should be read in conjunction with Section D which considers what is meant by 'normal day-to-day activities'

Effects of behaviour

B7. Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.

For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities.

9.5 In any event, was the claimant unfairly dismissed?

9.5.1 Section 98(4) Employment Rights Act 1996 provides that:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

9.6 Did the respondent fail to comply with section 10 Employment Relations Act 1999 regarding his right to be accompanied at his appeal hearing? Section 10 permits an employee to be accompanied at a disciplinary hearing by a recognised trade union official or colleague. The point of dispute in this case revolved around the role of the companion at the hearing, in light of the following subsections of section 10:

(2B) The employer must permit the worker's companion to—

(a) address the hearing in order to do any or all of the following—
(i) put the worker's case;
(ii) sum up that case;
(iii) respond on the worker's behalf to any view expressed at the hearing;
(b) confer with the worker during the hearing.

(2C) Subsection (2B) does not require the employer to permit the worker's companion to—

(a) answer questions on behalf of the worker;
(b) address the hearing if the worker indicates at it that he does not wish his companion to do so; or
(c) use the powers conferred by that subsection in a way that prevents the employer from explaining his case or prevents any other person at the hearing from making his contribution to it.

10. In addition to these key legal questions, it was necessary for us to make detailed findings of fact on the events of 14 November 2019 when the claimant had an altercation with the customer. This was because of its relevance to the section 15 claim. We were mindful of the fact that for the purposes of the unfair dismissal claim under section 98(4) Employment Rights Act 1996, it was not for us to determine whether the claimant had committed misconduct but rather to assess whether the respondent's decision to dismiss for that reason was fair and reasonable in all the circumstances of the case, and having regard to the guidance set out in BHS v Burchell [1978] IRLR 379.

Findings of fact

11. The claimant began his employment with the respondent on 5 June 2002 as a store manager. From July 2017 he was based at the respondent's store in Sunderland where he had overall responsibility for the day to day management of the branch, reporting to an area business manager and a regional director. During his lengthy service the claimant had an unblemished record with the exception of a Record of Concern being issued in May 2016. This was issued by Regional Director of Sales Tracy Wearmouth and arose from a minor incident when the claimant had spoken inappropriately to her.

12. In his capacity as a store manager the claimant occasionally had to deal with difficult or aggressive customers and did so without incident over a number of years. The respondent operated a written policy on dealing with angry customers and aggression, the aims of which were primarily to prevent a customer complaint escalating to aggressive behaviour, and containing any aggression. The guidance on the latter was set out in the policy in the following terms:

> “Containing aggression
>
> Even if someone is trying to provoke you, do not respond in kind. Meeting aggression with aggression leads to confrontation and someone could get hurt.
>
> - Stay calm and speak gently, slowly and clearly. Do not argue or try to outsmart the person verbally. Breathe slowly to control your own tension.
> - Avoid body language which could be misinterpreted, such as looking down on the aggressor, hands on hips/folded arms; raised arms; any physical contact.
> - Keep your distance by remaining behind the counter or a few feet away from a customer if you are both standing away from the counter area.
> - Compromise: offer the aggressor a way out of the situation.
> - Suggest consulting a third party, eg Store Manager, Area Business Manager, supplier etc to avoid the conflict becoming a personal issue.”

13. The respondent’s disciplinary procedure set out the expected guidance and procedural steps applicable in a case involving alleged misconduct. One of the provisions was that any disciplinary investigation would be carried out by an employee’s manager or another individual at the same level, and an employee would usually be invited to attend a separate investigatory interview prior to a disciplinary hearing. The procedure went on to say that:

> “The relevant facts will be established by a thorough and reasonable investigation and the whole proceedings will be concluded with the minimum of delay according to the circumstances.”

14. The procedure spells out that in considering what disciplinary action is appropriate, “the following will always be taken into account:

- Mitigating factors
- The gravity of the breach of discipline
- The employee's work record
- Any other relevant factors

15. One of the disciplinary sanctions that the company identified as an alternative to dismissal was demotion with consequent changes to salary.

16. A list of examples of misconduct included:

    - Fighting, physical violence, assault or threatening or intimidating behaviour
    - Bringing the company into disrepute

17. No separate offences of gross misconduct were identified but rather the respondent's policy stated that other offences which it believed to be "of such serious nature that they have reasonable belief for it to be classed as a gross misconduct offence."

18. In July 1999 the claimant was diagnosed with depression. This was triggered by a traumatic family event which had a devastating impact upon the claimant both at home and in his then job. He experienced symptoms of depression in the period after that diagnosis and these were continuing in November 2019. The claimant was also experiencing occasional anxiety and heightened anger. He found it difficult to deal with anger or abusive behaviour directed by customers towards himself or his colleagues, though in practice had managed to do so successfully on the occasions when this arose during his long employment with the respondent.

19. Over this prolonged 20 year period the claimant experienced significant symptoms from his depression, including mood swings, shame, low self-esteem, loss of concentration and irritability. He tried to manage his condition with the help of different medications but found that none had much benefit and they often caused him to experience side effects. He had a personal preference to avoid taking medication on a long-term basis if possible and as a result worked with his GP and counsellors at times to develop coping strategies to deal with day to day life. On occasions the claimant's depression became debilitating. He suffers from broken sleep and tries to manage this by having a set routine both at night and in the morning. He manages anxiety about being on time for work, allowing extra time for travel which may mean arriving at work an hour early.

20. The claimant also managed his condition by ensuring that his days off were spread over the week so that he only ever worked three consecutive days, and similarly spreading annual leave throughout the year where possible. Given the respondent's peak trading time in November and December each year, when annual leave was not permitted, the claimant found that period particularly stressful.

21. Another feature of the claimant's condition is that he found it difficult to talk to colleagues about his depression, though they were aware of his coping strategies including taking short breaks as needed to control anxiety while at work. During his

employment with the respondent the claimant had some spells of sickness absence with depression and anxiety. His first sickness absence for depression was for two weeks in November–December 2003. The second absence in May 2006 was identified as relating to stress and this lasted one month. In a return to work interview with his then manager at the Durham store, the manager recorded an intention to compile an action plan with the aim of dispersing the claimant's stress and allow him to perform well. The further absence for stress lasting 17 days occurred in 2014, some years later. This was linked both to work and family problems at the time which had exacerbated the claimant's condition.

22. The claimant's medical records show that in July 1999 he was seen by a clinical psychologist about his depression following a referral by his GP. The resulting report noted that his low moods had lasted “quite a few months” and the spells were lasting longer. The claimant reported having problems at home over the previous two years, including anger and verbal aggression on his part. The psychologist noted that the claimant “thinks he has always had a variable mood but this has got worse with the upsets [at home] over the last 18 months”. In February 2000 a psychotherapist wrote to his GP to confirm that he had been assessed as suitable for psychotherapy, noting that “at present he seems to be quite depressed” and would benefit from a review of his medication.

23. In November 2003 the claimant saw his GP about his ongoing low mood and the doctor notes that he had been losing his temper at work. In December 2008 he consulted his doctor about depression and related irritability, poor sleep and weepiness. His anger management problems had caused confrontations with his manager in that previous employment. The doctor noted that the claimant had been on medication for depression for two years until around 2005, and medication was prescribed again on this occasion. In December 2019 the claimant was placed on a waiting list for counselling.

24. It was on 18 May 2016 that the respondent issued the Record of Concern regarding the claimant’s conduct. This was prepared by Ms Wearmouth following a telephone conversation with the claimant that day. She recorded that during a discussion about bonus payments the claimant became “loud and aggressive in his tone and language”, and she described his attitude as argumentative and unconstructive. The note went on to record the claimant’s response to the concern, in which he accepted that his conduct had been unacceptable and said it was not intended to be aggressive. The note said:

> “He recognised that such behaviour cannot be tolerated by our business. Garry and TW talked at length about Garry temper, the triggers which can set it off. It was agreed that Garry recognised that sometimes during times of depression Garry can fly off the handle and react in an unprofessional manner. He talked about how he can see this actually happening but struggles to control it.”

25. Ms Wearmouth recorded the agreed outcomes and support as follows:

- the claimant would seek support from his GP
- Ms Wearmouth would “support with feedback”

- There were to be "no further outbursts"
- The claimant was to try and recognise triggers and remove himself from situations if an outburst was approaching

26. Her note recorded that the claimant had Ms Wearmouth's "full support in changing his behaviour" and this would continue for the future. An offer of access to the company helpline was made though not taken up by the claimant. Following this discussion, the respondent took no practical steps to follow up the issue, and indeed there was no recurrence of any such concern in the following years until late 2019.

27. Five weeks before the incident which led to the claimant's dismissal, on 7 October 2019, the claimant attended a routine meeting with his line manager Ms Tammie O'Lone (Area Business Manager). When asked how he was, the claimant broke down in tears. He talked about his poor mental state at that time and disclosed that he had a history of depression. He did not go into details, partly from embarrassment as being perceived as weak, and partly from a wish to maintain his privacy. Ms O'Lone was sympathetic and sent him home with some information about the respondent's counselling service. She followed this up with an email on 9 October regarding the Employee Assistance Programme, leaving it with him to take up the offer of accessing support. She did not follow up with any particular action herself, other than to speak to the claimant at a managers' meeting a few days later to ask how the claimant was. Given the fleeting nature of this conversation and the fact that others were in the vicinity, the claimant said he was fine. He was masking his symptoms of depression and hoping that being back at work and around colleagues would help him feel better.

28. First thing in the morning of 14 November 2019 a customer came into the Sunderland store where the claimant was on duty alongside two colleagues, Stephen Stubbs and Stephanie Thompson. The customer complained about a short delay to his order and asked for a discount to reflect this. Having reviewed carefully the accounts of the incident provided by the customer, the claimant and his two colleagues who were witnesses, we make the following findings of fact as to what happened during the incident. In doing so, we have taken account of the contemporaneous written evidence provided to the respondent at the time, as well as making an assessment of the claimant's written and oral evidence to this Tribunal, which we found credible in all respects.

29. The customer, a large and loud man, came into the store to collect an order which he incorrectly claimed was delayed. He asked aggressively for a discount to which he was not entitled, raising his voice. He had dealt with the claimant's colleague Mr Stubbs earlier in the week when he had tried to get some free product. The claimant stepped into this exchange in an effort to protect Mr Stubbs from the customer's behaviour. The customer said they "couldn't organise a piss up in a brewery" and his behaviour started to become increasingly aggressive.

30. The claimant told the customer his delivery was not late, to which the customer said "Fuck this, I'll just get a fucking refund". The claimant agreed to process the refund. The customer said it was "fucking ridiculous" and that he had "never known this much trouble". He then realised he needed to purchase some additional tiles

and said he would just pay for them, to which the claimant said no, he would be getting a refund. The claimant decided to “play him at his own game”.

31. At some point during this exchange the customer asked the claimant to go out to the car park, intending to escalate the situation into a physical altercation. He was angry. The claimant went outside with him expecting to be able to diffuse the situation and was successful in doing so. Both men then returned to the store where discussion about the transaction continued. The customer queried the price of some tiles. When the claimant explained the price the customer called him “a fucking arsehole”. The claimant responded “I'm not trying to be an arsehole”. This was the only time Ms Thompson heard the claimant swear, though she did believe that heated words were exchanged.

32. At the counter the customer asked for his tiles and said “apparently I'm the world's worst customer”. The claimant said he was being a “nightmare”, to which the customer reacted with a laugh. He turned to Ms Thompson and asked if he had been a nightmare, and she agreed he had. The customer also said “Fucking hell, this is the worst customer service I've received, I'm shocked”.

33. The claimant had gone behind the counter where he had a cup of tea which was cooling. He picked it up to take a drink. At this point the customer aggressively called the claimant a “fucking prick”. The claimant was angry at this. He reacted by gesturing for the customer to leave the store, using the words “fucking” or “fuck off” at this point. This was the first time the claimant used foul language. He had not previously been aggressive with the customer during the encounter, “only a little bit, towards the the end” in the words of Mr Stubbs. In gesturing with his hand the claimant's cup of tea splashed some of its contents over the counter, with a little landing on the customer’s face. The customer wiped his face. He started shouting “fucking bastard” and said “I can't believe you have done it”. The claimant came out from behind the counter and Mr Stubbs stepped in front of him because he was worried about how the customer, who was being very aggressive, might behave.

34. The customer then left to go to the car park where the claimant's colleagues helped him load his van. He told them that he had intended to hit the claimant outside the store, saying “If he wasn't such an old man I would have decked him” . He wanted to know whether the claimant lived in Sunderland.

35. A number of times during the incident the customer asked if the respondent had CCTV at the store and was told it did not. He did not make a recording of the incident himself, though he claimed to have done so.

36. The claimant did not report the incident, seeing it as a “storm in a teacup”. Ms Thompson also felt the incident was not a reportable one. To her, it had been diffused initially by the claimant and then “lit again” by the customer.

37. Contrary to what was alleged, the claimant did not threaten the customer or swear at him other than at the end of the incident when telling him to leave. He did so under provocation from the customer, whose behaviour was abusive and aggressive. Both Mr Stubbs and Ms Thompson were clear that the customer was

the aggressor in the incident and both made Ms O'Lone aware of this. Neither of them corroborated the customer's allegations of the claimant using abusive language towards him, nor did they support the notion that the tea was deliberately thrown.

38. Returning to the narrative of the respondent's handling of the allegations, the following summaries of the evidence available to the respondent at the time demonstrate some of the variations between the accounts provided.

39. After leaving the store the customer telephoned the respondent's customer services line to report that there had been an incident. A record of the incident was created through a customer services contact form. This was emailed to Ms O'Lone that day at 09:51 under the subject line "Serious issue at Sunderland". The attached contact form stated:

> "Customer visited the Sunderland store this morning to collect his order which had been slightly delayed. When in store he asked for a possible discount of a few trims due to the delay in his order. After asking, Garry apparently kicked off and started calling the customer a nightmare, a Pr##k and an Ar##hole. He then started to threaten the customer. During this time the customer was trying to calm the situation but was shaken by what happening. During this situation it escalated to the point where Garry through a cup of tea over the customer. This shuck the customer up more and when he asked about CCTV Garry replied with "we don't have CCTV in our store". The customer after this left the store to which Garry followed him out. The customer has since phoned the Police and is awaiting further details from them; he also apparently has video footage of the incident.
>
> He is worried that the store will stick together and not be fully truthful to the police on this situation. This is why he is keeping hold of the footage."

40. Ms O'Lone phoned the customer back at 12:03pm that same day and in a later email to her HR colleague on 18 November she wrote an account of their conversation. She noted the customer's various allegations about the claimant's behaviour, including that he had:

    - Called the customer "a nightmare" and said he had been a "nightmare from the beginning"
    - Subjected the customer to a "torrent of abuse"
    - Told the customer he could "speak to him any f**k**g way I want"
    - Followed the customer out to the car park where he said they could "sort it out man to man"
    - Said to the customer "come in, pay for your goods, and f**k off"
    - Once back in the store, thrown a cup of tea over the customer, such that he was blinded for a minute as the liquid was on his face and in his eyes
    - Come out from behind the counter and had to be restrained by his colleague Mr Stubbs

41. The customer made some admissions about his own conduct, telling Ms O'Lone that due to the delay in his materials being delivered he had said the store "couldn't organise a p**s up in a brewery". He claimed that he was trying to diffuse the situation in the car park, but admitted that before the cup of tea was thrown over him he called the claimant a "p***k" which led to tea being thrown.

42. Ms O'Lone recorded that the customer claimed to have video footage of the incident on his phone and that he had logged a police complaint due to the fact that hot tea had been thrown into his face. The customer said he had "contacted his solicitor dependant on how the police pursue the matter". Ms O'Lone took no steps to find out whether the customer did in fact have video footage of the incident, nor did she make any request for it to be provided. Although the police were notified of an incident by the customer, they took no action to investigate.

43. Ms O'Lone suspended the claimant on the day of the incident, when she also began her investigation into what had happened. The suspension form recorded as the reason for suspension:

> "Allegations following a transaction with a customer on 14.11.19 and claimant allegations of profanity and foul language used by claimant towards customer. Allegations of aggressive behaviour towards customer. Allegations of cup of tea being thrown over customer."

44. At 1:25pm the same day the claimant attended an investigation meeting with Ms O'Lone. This was paused at 2:10pm to enable her to speak to the claimant's colleagues who were present during the incident. Mr Stubbs was interviewed at 2:15pm until 3:10pm, following which Ms Thompson was interviewed between 3.:5pm and 4:25pm. Ms O'Lone took handwritten notes of their evidence during the meetings which both she and the interviewees signed as accurate. At 5:25pm she then resumed the investigation interview with the claimant briefly, but without following up any of the questions raised by the interviews with his colleagues. The meeting concluded ten minutes later.

45. In the first part of his interview the claimant gave an account in line with our findings of fact above. He said the customer had asked aggressively for a discount, having tried earlier in the week to get some free product. He admitted telling the customer he had been a "nightmare", which Ms Thompson agreed with. The claimant said he agreed to process the requested refund, because he thought he would "play him at his own game". It was the customer who asked the claimant to go outside, not the other way around, where they had a heated exchange about the discount. After calming the situation and returning to the store, the customer called the claimant a "fucking prick". When the claimant gestured for the customer to get out, some tea spilled accidentally. He accepted that some "words of profanity" were exchanged and that he was angry at being called a "fucking prick".

46. In the second part of his his interview, with the benefit of the accounts of the claimant's colleagues, he was asked whether he had called the customer a "nightmare" and he admitted he had. When he gestured with the teacup, he was telling the customer he needed to get out. There was a heated exchange. He did not know what was said or if he used profanity at that stage.

47. The account of the incident set out in the claimant's witness statement for this hearing was consistent with the information he provided to the respondent during the internal proceedings. He further explained, which we accepted, that in the weeks leading up to the incident, he had been suffering frequent low moods, feelings of guilt and shame and some anger at himself. He felt emotionally drained and was also feeling the pressure of a phone call from Ms O'Lone saying that his performance on trade sales was not good enough. She expressed disappointment at the claimant's attitude given that she had allowed time for him to adjust after suffering his breakdown. This call annoyed and upset the claimant as he felt he had not really had any support at all. Having revealed his vulnerability to his line manager, he felt she was now using it against him.

48. In his interview with Ms O'Lone, Mr Stubb gave an account which corroborated the claimant's and contradicted the customer's in a number of respects. He said the customer said it was "fucking ridiculous", in response to the claimant agreeing to process the refund. Mr Stubbs felt that this was when things started to escalate. After asking about CCTV in the store, the customer "offered Garry to go outside". Mr Stubbs could not hear their conversation outside. In the following conversation inside the store, the customer was insisting he was entitled to a discount. The claimant told the customer he had been a nightmare, to which the customer responded by laughing and asking Ms Thompson "have I been a nightmare?" to which she said he had. She also said he had lied about when he had been told the order would come in. Mr Stubbs referred to the customer's ongoing use of foul and abusive language, quoting him as saying, "Fucking hell this is the worst customer service I've received, I'm shocked".

49. Mr Stubbs told Ms O'Lone that the customer was being aggressive from when he asked for a discount. When asked whether this was also true of the claimant, he replied "towards the end a little bit, yes". He acknowledged the situation could have been handled differently but said he understood why it went the way it went. Mr Stubbs said the claimant had used profanity but only "towards the end". He could not remember precisely what words were used but thought "fucking" had been said.

50. Mr Stubbs did not see how the tea ended up on the customer, but said most of it landed on the counter. He did not believe the tea was thrown deliberately, pointing out that it was mostly on the counter and if it had been thrown at the customer, it would have landed behind him. He heard the customer shouting "fucking prick" at the claimant, but disputed that the claimant had called the customer a "prick" or an "arsehole" as alleged. After the tea was spilled, the customer started shouting further obscenities and the claimant told him to get out. Mr Stubbs said he had not restrained the claimant as claimed, but had stood in front of him because of the customer's aggression.

51. When Mr Stubbs was helping the customer to load up outside, he reported his comments about wanting to hit the claimant and asking whether he lived locally.

52. In her interview Ms Thompson confirmed that the incident began with the customer asking for a discount. When the claimant said it was not late, the customer began swearing and said, “Fuck this, I'll just get a fucking refund”. The claimant agreed to do that. When the customer remembered he needed to purchase other tiles the claimant asked whether he wanted the refund or to go ahead with the purchase. The customer, who was being aggressive, asked the claimant to go outside. She reported that whatever had been said outside had “diffused the situation”. It was then “lit again” by the customer, who resumed his aggressive behaviour by calling the claimant “a fucking arsehole”. The claimant responded “I'm not trying to be an arsehole”.

53. Ms Thompson did not see how the tea was spilled but she was splashed by a few drops. She felt this happened simultaneously with the customer making the above comment. She saw the customer wiping his face. When the claimant came round from behind the counter, Mr Stubbs stood in the middle between the two men, but this was not a case of the claimant “stepping in”.

54. The only example of the claimant swearing that Ms Thompson could recall was “just in reference to Garry saying that he wasn't an arsehole”. She was asked whether the customer had been aggressive towards the claimant and said “yes definitely”. When asked whether the claimant was aggressive towards the customer she said, “Yeah, heated words were exchanged”.

55. The two accounts from the claimant's colleagues therefore broadly supported his version of events and in a number of ways directly contradicted the allegations made by the customer.

56. The next day, 15 November, Ms O’Lone contacted the customer to check on his wellbeing. He maintained the allegation of the claimant’s “violent manner” towards him. No other details were recorded in her notes. No welfare contact was made then or at any later time with the claimant, nor were any sources of support identified in the standard suspension form.

57. Ms O’Lone compiled a handwritten investigation report on 15 November, comprising two pages. In her summary she identified three particular issues:

    57.1 The customer alleged that profanity and foul language had been used towards him by the claimant. The claimant confirmed that he had called the customer a nightmare and that “words of profanity” were exchanged between the two men. She recorded that the claimant’s two colleagues confirmed that the claimant “used profanity in exchange”.

    57.2 An allegation of aggressive behaviour towards the customer by the claimant. She noted that the claimant confirmed going outside to the car park with the customer where there was a “heated exchange”. She recorded Mr Stubbs’ belief that the claimant was being aggressive and noted that the claimant had admitted that Mr Stubbs had “kept us apart”. He had also admitted being angry at the customer for the alleged profanity directed towards the claimant. Ms O’Lone noted that Ms Thompson confirmed that the claimant was aggressive during a “heated exchange”.

57.3 An allegation of a cup of tea being thrown over the customer. Ms O'Lone recorded that the claimant confirmed tea from his cup "went on customer". At the time he was positioned on the opposite side of the counter. Mr Stubbs had confirmed that tea had ended up on the counter and the customer. Ms Thompson had confirmed the same information.

58 In her report Ms O'Lone recorded that the customer had reported the incident to customer services and the police, and noted that neither she nor any other senior managers had been contacted to report the incident. She made a recommendation based on what she said had been confirmed by the claimant himself, namely that he had used profanity and foul language and demonstrated aggressive behaviour, and also that tea from his cup had ended up on the customer. She noted that there had been no diffusion of the situation demonstrated on the claimant's part and recommended that a disciplinary hearing be convened in respect of the alleged breach of the Dignity at Work policy (a document neither produced nor referred to during this hearing).

59 The claimant was invited to a disciplinary hearing by letter dated 19 November 2019 which stated:

> "At the hearing we will be discussing the allegation of your serious inappropriate conduct whereby you have displayed aggressive and unacceptable behaviour and used foul and offensive language towards a customer."

60 This was the only description of the conduct to be discussed. It was identified as potential gross misconduct. The claimant was provided with the investigation report and records of interviews and other records of the customer complaint.

61 The disciplinary hearing took place on 22 November with Mr Nicol (Area Business Manager), when the claimant was accompanied by a colleague. When asked at the outset about the incident with the customer, the claimant first referred to breaking down at his meeting with Ms O'Lone on 7 October and his longstanding depression which he had had for 20 years. Mr Nicol asked if he had been off work in the last 12 months or on medication. The claimant said he had not, but was taking medication now. He said his condition was the background to the case and that he was disabled under the law.

62 The claimant apologised for the incident and explained that it was the customer who had been aggressive and he felt he had to protect himself and his team. He explained how the customer had called him a "fucking prick" at a time when he was holding a cup of tea which was spilt when he gestured for the customer to leave. The claimant thought he did say "fuck off" a couple of times and that he had raised his voice, but this was in response to the way he was treated by the customer. He admitted that he had not dealt with the customer properly, but he had been provoked. He reiterated towards the end of the meeting that he had been "going through some things" since the 7 October review meeting. Since then he had had a call from Ms O'Lone, but no other specific follow up.

63 The meeting was then adjourned for fifteen minutes, during which Mr Nicol spoke to Ms O'Lone. Mr Nicol asked whether the claimant had told her he had depression to which she replied, "No, I don't think so". She was asked whether she had taken any follow up action and said she had, through conversations in which the claimant had said he was a lot better. She claimed there had been three or four such conversations. When asked whether she had any ongoing concerns, Ms O'Lone said not, that the claimant had "seemed his normal self".

64 On resuming the hearing with the claimant, he was provided with the notes of the above conversation and given time to review them. He challenged the amount of contact he had had from his line manager, and explained that when he seemed "normal" to her, this reflected one of the ways he managed his depression. He said he did not understand how Ms O'Lone could go from him being "so uptight" to "normal" in that period of time. He said this behaviour was not normal for him; he disputed the customer's version of events; and said it had got to the point where it got too much for him. The claimant did not defend his handling of the incident as appropriate.

65 Following a further brief adjournment Mr Nicol notified the claimant verbally that he was being dismissed with immediate effect for gross misconduct. On 25 November Mr Nicol wrote to the claimant confirming the dismissal decision, recording that the claimant admitted raising his voice and swearing at the customer in retaliation to the latter's aggression towards him. He recorded also the claimant's admission that he had not dealt with the situation "in the correct way" and had acknowledged that his actions were inappropriate. Mr Nicol added: "However, your mitigation was that you have been suffering from depression for a number of years". No other mitigating circumstances were referred to and no reference was made to the customer's own behaviour. Mr Nicol recorded that the aggressive and unacceptable behaviour and the use of foul and offensive language towards a customer was the reason for the summary dismissal.

66 The claimant was offered a right of appeal and wrote to the respondent on 27 November to exercise this. His grounds for appeal were that:

- Mitigation was not fully considered
- His disability was not fully considered
- Some of the evidence from his manager was factually inaccurate
- The sanction was too harsh and unreasonable
- Some sections of the disciplinary policy and the ACAS code for handling disciplinaries was not followed

67 The claimant requested two adjustments to accommodate his disability, namely being given time to obtain medical evidence from his GP about the extent of his condition and the medication he had recommenced taking; and the ability to bring a personal friend as a companion to the appeal hearing. Both requests were agreed to and arrangements were made to delay the appeal until 3 January 2020. The claimant did not receive the medical records from his GP until 2 January, which gave him insufficient time to review them carefully and arrange for redacted copies to be prepared for handing in at the appeal hearing. The claimant did not

wish the entirety of his medical history to be made available to the respondent, but only the parts relevant to the issues.

68 The appeal hearing was dealt with by Ms Wearmouth (Regional Director of Sales), and the claimant was accompanied by his friend, Ms Smith. The claimant handed in a written statement for the appeal expanding on his grounds of appeal and providing further detail about his depressive condition. He sought to make a direct connection between that and his response to the customer's behaviour. He pointed out that no attempt had been made to determine the impact of his disability. The claimant addressed these points also in his verbal presentation to Ms Wearmouth.

69 Ms Wearmouth was made aware that the medical records had been obtained but were not yet in a redacted format that could be handed over. The claimant offered to provide redacted copies if it would affect the outcome of the appeal. Ms Wearmouth did not consider adjourning the appeal to allow this to be done nor did she take any steps to consider what the relevance of those records might have to her decision.

70 Ms Wearmouth gave her decision to turn down the appeal by a letter dated 9 January 2020. On the question of the claimant's depression, she noted that this was first raised as an "alleged disability" during the disciplinary hearing on 22 November and that Mr Nicol had given full consideration to this in reaching his decision. She went on to say:

> "However, in accordance with our disciplinary procedure, all matters relating to aggressive and/or inappropriate conduct are considered as potential gross misconduct therefore your conduct was not deemed acceptable under any circumstances. I therefore conclude that you have not been treated any differently or less favourably than any other colleague across the company facing similar allegations and full consideration was given to your explanations."

71 Ms Wearmouth rejected all the other reasons for the claimant's appeal, and that concluded the matter.

Claimant's submissions

72 On the question whether the claimant is a disabled person, Mr Owen referred us to the claimant's impact statement, his fit notes and the medical evidence. He asked us to take account of the claimant's behaviour at the meeting with Ms O'Lone on 7 October 2019 shortly before the incident with the customer. He also referred us to the 2016 Record of Concern. Mr Owen submitted that, contrary to the suggestions made during cross-examination, the claimant's depression was not caused by his son, but it was exacerbated by events, particularly when he was reminded of the original trauma. Arguments could also be a trigger. It is more than a personal trait but rather a specific something which arises from depression. The trigger here was the aggressive and abusive customer. It was a one-off outburst and not

unprovoked. The claimant's account was corroborated by his two colleagues who witnessed it.

73 He submitted that the respondent had knowledge of the issue through the fit notes and the conversations with line managers in May 2016 and October 2019, but nothing was done to provide support. The claimant's mask is part of his coping strategy. He takes medication occasionally and follows strict routines without which he becomes agitated. He did not specifically ask for support, but the duty is on the employer to take the initiative. The respondent did not even check on the claimant's welfare after the incident with the customer.

74 The respondent did not pick up on what the claimant said at the disciplinary hearing or appeal and look into it. The outcome letters barely refer to the mitigation relating to the customer. Initially the claimant was acting professionally not inflaming the situation. Going outside may not have been the wisest decision but things diffused when he returned. It was the customer who then kicked off again and became more abusive.

75 The "something arising" for the purposes of section 15 Equality Act was the tendency to act angrily especially in response to certain triggers, here an argumentative customer. The treatment was because of that and was unfavourable. The claimant accepted that he did not handle it well, but the respondent could have referred him to occupational health to explore supportive measures. They should have got more medical information.

76 On the unfair dismissal claim , Mr Owen referred to the Burchell guidelines in relation to the investigation. He said the respondent's focus was on what the claimant did in isolation from the customer's behaviour. Mitigation was not properly taken into account. Alternatives were given only cursory consideration and instead the respondent made up its mind that dismissal was the only option. There was virtually no consideration of mental health on the situation.

77 On the question of contribution, the claimant accepts that he did something he should not have done and would not normally have done, but it was only because of the high level of provocation. The level of culpability is not 100% but 50% might be apt if it is a case of six of one and half a dozen of the other. The maximum would be a 25% discount.

Respondent's submissions

Section 6 disability

78 For the respondent, Mr Proffitt contended that the claimant was not a disabled person, or that the conduct for which he was dismissed arose in consequence of any disability. Furthermore, the respondent did not have knowledge of disability. In the alternative, the claimant's dismissal was proportionate having regard to the gravity of his gross misconduct, which the respondent said was admitted.

79 The respondent reminded us that the burden for proving disability lies with the claimant. A person may not be disabled if reasonable modifications of behaviour, coping and/or avoidance strategies might render the effects of an impairment no longer substantial – paragraph B7 Equality Act 2010 Guidance. Mr Proffitt relied on the distinction between clinical depression or anxiety as opposed to normal reactions to adverse life events, which do not amount to impairments – J v DLA Piper UK LLP [2010] ICR 1052.

80 The fact that a claimant tells their employer of a particular named impairment does not necessarily mean the employer has actual or constructive knowledge of disability, following Cox v Essex County Fire and Rescue Service UKEAT/0162/13.

Section 15 claim

81 Mr Proffitt submitted that disability must be the effective cause of the unfavourable treatment, rather than just relevant to the background circumstances, relying on Kelso v Department for Work & Pensions [2015] 10 WLUK 782.

82 He suggested that there should be no real distinction between a fair dismissal under section 98(4) and a proportionate dismissal under section 15, suggesting that it would be odd if the two tests should lead to different results, per O'Brien v Bolton St. Catherine's Academy [2017] EWCA Civ 145.

Unfair dismissal

83 The respondent relied on the well known principles set out in BHS v Burchell, and the range of reasonable responses open to a reasonable employer, citing also Sainsbury's v Hitt [2003] ICR 111, CA.

84 Having outlined some key legal principles, Mr Proffitt made submissions on the facts of this case. On the question of disability he contended that the medical evidence was sparse, but at best the times when the claimant was suffering from depression were inextricably linked to adverse life events. He referred to the GP records of the claimant's sickness absence history. The total absences for mental health reasons fell far short of the requirement for any impairment to be long-term and to have a substantially adverse effect.

85 Mr Proffitt referred to the absence of evidence suggesting that the claimant's impairment was such as to require medication in order to cope. The coping mechanisms which the claimant referred to in his evidence were, he submitted, nothing more than the reasonable coping strategies that exist amongst people generally. Disrupted sleep, anxiety about lateness, using annual leave and breaks for effective rests from work, and using humour as a defence mechanism are all normal behaviours.

86 The fact that the claimant make no real attempt to obtain support at work indicated that his health was not materially affecting him on a day to day basis, and furthermore it showed that the respondent could not reasonably have known of such an effect. The respondent had no medical evidence available to it indicating

that the claimant had a long-term substantial depressive condition, with the word "depression" being referred to only once in a fit note in 2003.

87 Given the claimant's evidence that he consciously presented himself as coping, the respondent cannot be criticised for not realising that there was any more serious problem. The meeting on 7 October 2019 was no more than "a wobble". Therefore the respondent cannot be said to have had knowledge, nor even at the time of the appeal when its decision was being made on the basis of the claimant's vague assertion of long-standing depression without evidence. The respondent reasonably concluded that the claimant was simply reluctant to hand over his medical documents.

88 In order to succeed with his section 15 claim, the claimant had to prove that the unfavourable treatment of dismissal was because of something arising in consequence of disability, in other words that his aggressive reaction to the customer was causally linked to his depression. The respondent contended that there was no evidence, and importantly not a shred of medical evidence, that depression caused the claimant to react as he did.

89 Mr Proffitt submitted that the claimant's own account of the events of 14 November 2019 made clear that he had not behaved badly, and so there was nothing arising from disability on which to rely. He submitted that the claimant's evidence was unreliable and that his behaviour on the day in question was grossly different to that portrayed in his witness statement.

90 Applying the test in Kelso, we were invited to draw a distinction between the background circumstances of the incident and the "something arising" from disability. He contended that the aggression demonstrated by the claimant on that day was a personality trait and not caused by depression.

91 Although the tests under section 98 Employment Rights Act 1996 and section 15 Equality Act 2010 need to be applied separately in accordance with the respective statutes, following O'Brien it would be a rare case where they led to different results. The respondent relied on the dismissal as being both fair and proportionate. There was no way for the respondent to mitigate the risk of a repetition of the incident with the customer, in circumstances where the claimant had to have the trust of his employers to be left to manage the store. No other location or role would have protected the respondent from the claimant repeating such behaviour. He invited the tribunal to take account of the incident in previous employment in 1999 as evidence of the claimant having behaved that way in the past, for the purposes of the section 15 claim and also in support of any Polkey outcome, albeit this could not be taken into account under section 98(4) because the decision-makers at the time of dismissal did not have evidence of that.

92 Mr Profitt submitted that the requirements of Burchell were met and we should not seek perfection in relation to the investigation but ask whether that fell within the band of reasonable responses. He relied on the fact that the claimant had advance notice of the allegations against him; the facts were largely not in dispute; the claimant was able to participate in the procedural hearings; which were conducted independently; the claimant was provided with all relevant documents and had an

opportunity to provide his own evidence; he was given the right to be accompanied; and he was given clear reasons for the respondent's conclusions.

93 This being a clear case of gross misconduct, which the respondent submitted was largely admitted, the decision to dismiss was fair and reasonable. The respondent was effectively left with no choice. Although the claimant's health might have played a part, his mitigation placed the entire blame with the customer. In relation to the incident the claimant's attitude was contemptuous and belligerent, as he described it as a "storm in a teacup". There were no appropriate or effective alternatives to dismissal.

94 The aims pursued by the respondent were legitimate. These were identified in submissions as the fact that a retail business must be permitted to ensure a positive customer experience through the management of employees who face those customers. It was submitted that no option other than the claimant's dismissal would achieve that aim.

95 Mr Proffitt said that if we were to find any procedural unfairness in the decision to dismiss, we should make a finding that any compensation be reduced by 100% on the grounds that any such defect would have made no difference to the outcome. He also submitted that there should be a percentage reduction in respect of contributory conduct, relying on <u>Nelson v BBC (No. 2)</u> [1979] IRLR 346, where the test for contributory conduct is the claimant engaging in culpable or blameworthy behaviour.

96 Finally, on the claim under section 10 Employment Relations Act 1999, the respondent relied on the fact that the claimant was allowed to bring his chosen companion to the appeal hearing on terms that were more generous than section 10, in that she was a personal friend. He submitted that section 10 was therefore not engaged, but in any event the companion was given an opportunity to speak and did so on the claimant's behalf such that there was no breach of the claimant's statutory rights.

<u>Conclusions</u>

Disability – section 6 Equality Act 2010

97 We are satisfied that the evidence available to us was sufficient to conclude that the claimant is and was at the relevant times a disabled person within the meaning of section 6 of the Act. The mental impairment is depression and it is undoubtedly long term. It goes back to a traumatic incident in the claimant's personal life in 1974, which the medical records show was triggered in 1999. Since then the claimant has sought the advice and support of his GP on several occasions. He has also taken medication for periods of time (for example in 1999, 2008, 2009, and from December 2019), though mostly he preferred not to take medication on a long-term basis. He has adopted coping strategies and has masked his condition at work in an effort to manage the job and protect his confidentiality.

98 The claimant's GP records demonstrate that this is a long-term condition which flares up more seriously from time to time. The consultant psychologist's report dated July 1999 makes clear that the claimant's "low moods had lasted 'quite a few months' and were lasting longer". The problems the claimant had been having at home included anger and verbal aggression, which the psychologist noted had "got worse with the upsets [at home] over the last 18 months".

99 In his oral evidence at this hearing the claimant was very clear that the difficult life events he has experienced were not a cause for his low mood, but rather triggers for his pre-existing condition of long-term depression. We accept that evidence without reservation and reject the respondent's submission that this case falls into the circumstances dealt with in J v DLA Piper. The claimant's conduct in late 2019 was significantly more than a reaction to adverse life events. We are satisfied that it was the culmination of an acute period of difficulty managing his depression. We also reject the submission that the behaviour that led to the claimant dismissal was a personality trait, a notion based on no evidence. On the contrary, the claimant's handling of difficult customers over a period of many years had never been called into question, and the respondent's witnesses saw the behaviour on 14 November 2019 as being out of character.

100 We have taken into account the claimant's sickness record. This did not present a picture of someone unable to cope with the demands of work, as he had only a few episodes of absence from work linked to mental health. There were three such absences over a period of years. The first was a two week period of sick leave explicitly for "depression" in November 2003. The second absence was more significant in duration, amounting to a little over four weeks in May 2006 for "work-related stress". Some years later, in November 2014, he was signed off work for two weeks with a "stress-related problem".

101 Nevertheless, we accepted the claimant's evidence about coping strategies, and accepted the contents of his impact statement as providing evidence of a substantial adverse effect on his day to day activities caused by his condition. The effects are summarised in our findings of fact above and not repeated here, but we note examples such as disturbed sleep, and arriving at work up to an hour early in order the manage his anxiety about being late. This goes well beyond the everyday steps a person without his impairment would take to ensure they arrive at work on time. The claimant took other steps to avoid stressful situations or anxiety that might trigger his condition through the way he managed his working pattern. For example, he arranged to work no more than three consecutive days each week, took short breaks during the day as needed, and used annual leave to help manage the effects of work on his mental health and wellbeing. Those coping strategies reduced but did not eliminate the substantial adverse effects on his daily activities. For the purposes of section 6 of the Act, and in keeping with paragraphs B1 and B7 of the Guidance, we conclude that the effects on the claimant of living with his condition were more than minor or trivial, and furthermore that he could not reasonably have been expected to do more to remove those effects.

102 It is not in dispute that the respondent had knowledge of the claimant's depressive condition at the time of making the decision to dismiss and when turning down the

appeal. It was therefore on notice of the possibility that the claimant was a disabled person under the Equality Act 2010. Whether the respondent had actual or constructive knowledge before the dismissal is less clear. The reference to "depression" in the 2003 fit note is unambiguous, but the respondent may not have appreciated that this was long-term in nature. More recently, in May 2016, Ms Wearmouth was aware of an issue in the context of the Record of Concern she prepared. This referred explicitly to depression and made a direct link between that and the claimant's difficulties with anger management. Ms Wearmouth's own words stated (emphasis added):

> "[the claimant] recognised that sometimes **during times of depression** [he] can fly off the handle and react in an unprofessional manner. He talked about how he can see this actually happening but struggles to control it."

103 This was recent enough to the events of late 2019 for the respondent to be fixed with knowledge of a medical issue which sometimes had an impact on the claimant's conduct at work, or his ability to manage certain situations at work.

104 Similarly, Ms O'Lone was alerted on 7 October 2019 to the fact that the claimant was not in good mental health. Uncharacteristically, he broke down in tears at a routine review meeting. While she reacted sympathetically at the time, she did not have any awareness of what ongoing support may be needed, and quickly assumed that the claimant was better because he presented as his "normal self" and masked his feelings in the fleeting conversations they had. As in 2016, line management did not arrange for any support to be provided to the claimant beyond directing him to the employee assistance scheme. When the claimant's conduct was under examination during the disciplinary process, no manager thought to consider the possibility that depression was a relevant factor.

Section 15 claim

105 Having found that the claimant is protected under the 2010 Act by virtue of disability, we considered the claim under section 15. It is a prerequisite of such a claim that the employer have knowledge of the disability – section 15(2). As stated above, there is no doubt that the respondent had sufficient knowledge at the latest by the time Mr Nicol considered the issues at the disciplinary hearing.

106 It was also not in doubt that the claimant's dismissal amounted to unfavourable treatment. The key question for us to determine was whether that treatment was "because of something arising in consequence of" the claimant's disability. We accept that in principle there needs to be a causative element linking the disability to the conduct which in turn led to dismissal. We conclude that the evidence in this case shows that the claimant's depression was more than a trivial contributing factor, and that is enough to support a connection.

107 The evidence in the medical records explicitly identifies a connection between the claimant's depression and his difficulties in managing his irritability and anger. For example, the July 1999 report from the consultant psychologist referred to the claimant experiencing anger and verbal aggression over the previous two years. The GP record from November 2003 referred to the claimant losing his temper at

work. The December 2008 record of a consultation with his GP reported irritability linked to his depression, as well as other symptoms. The claimant also reported to his doctor that anger management problems had caused confrontations with his manager in a previous job.

108 Added to the above is the evidence from the claimant himself, who recognised the connection between his depression and his anger management issues. This is also clear from the 2016 Record of Concern. Moving forward to the incident of 14 November 2019, we conclude that the evidence as a whole shows a causal connection between the longstanding medical history and the claimant's response to the customer's highly provocative behaviour.

109 For these reasons, we conclude that the claimant was treated unfavourably because of something arising in consequence of his disability, namely his difficulties in managing his anger in response to a trigger such as an argument with a customer.

110 The next question is whether the respondent can show that its decision to dismiss was a proportionate means of achieving its stated aim of 'a retail business being permitted to ensure a positive customer experience through the management of employees who face those customers'. We take no issue with the legitimacy of that aim, but we reject the submission that it could be achieved by no other option than the claimant's dismissal. Throughout the respondent's case, both during the internal proceedings and before this Tribunal, it was clear that it gave no thought at all to the possibility of a sanction other than dismissal. The option of a written warning was not addressed by any of the respondent's witnesses nor by Mr Proffitt in his summing up.

111 In his dismissal letter Mr Nicol stated:

> "In hindsight, you admit that you did not deal with this situation in the correct way and acknowledge that your actions were inappropriate; however, your mitigation was that you have been suffering from depression for a number of years".

112 The way this was expressed was such as to minimise or even discount the possible connection between the claimant's disability and his conduct on the day of the incident. No steps were taken to explore this mitigation further and no weight was attached to its relevance to the conduct. In Ms Wearmouth's appeal decision letter she expressed a similarly narrow view of the available options, stating (emphasis added):

> "[…] all matters relating to aggressive and/or inappropriate conduct are considered as potential gross misconduct therefore your conduct was not deemed acceptable **under any circumstances**."

113 Her conclusion that the claimant had "not been treated any differently or less favourably than any other colleague across the company facing similar allegations" displayed a lack of awareness of the principles which underpin the protection afforded by section 15 of the Act. In fact, it was apparent to the Tribunal that the

respondent's witnesses had no real understanding of how a person's disability might impact upon their conduct or performance at work. Even without medical or legal knowledge, it is to be expected that a large employer will ensure their managers have some awareness of how to manage poor mental health, what support to provide, and what their own responsibilities are for exploring such issues carefully. That was not done in this case. Had a warning been considered, with the benefit also of a referral to Occupational Health, plus support from management, there was every reason to believe that this out of character handling of the incident would not have recurred. However, the respondent's did not even address its mind to that option.

114 Another feature of the proportionality argument is that the respondent took no care in evaluating the specific nature of the allegations and the obvious contradictions in the evidence it had gathered. The invitation to the disciplinary hearing, and the decision letters themselves, both used generic terms in referring to the claimant's "inappropriate" behaviour. They said he had not handled the situation "correctly". That falls far short of identifying the particular act(s) of gross misconduct which warranted the dismissal outcome. The specific conduct which the customer complained of amounted to the claimant:

- calling the customer a "nightmare", a "prick" and an "arsehole"
- threatening the customer
- throwing a cup of tea over the customer

115 On any analysis of the evidence, it should have been obvious to the respondent that:

- the claimant did call the customer a nightmare, which prompted him to laugh and ask Ms Thompson whether that was true, to which she agreed
- the other insults (and worse) were in fact directed to the claimant by the customer and not the other way around
- there was no threat to the customer, but rather it was he who had an intention to "deck" the claimant
- the cup of tea was not thrown but spilled accidentally, mostly on the counter

116 It should also have been obvious that the customer was the aggressor, that his behaviour was a completely unacceptable way for a member of staff to be treated, and that he had either lied or exaggerated his complaint.

117 For these reasons we do not find that the decision to dismiss was proportionate at all. The claimant had had a successful 17 year career with the respondent, and to dismiss him for gross misconduct at the age of 60 had, as the respondent knew, the effect of ending his career.

Unfair dismissal – section 98(4) Employment Rights Act 1996

118 For the purpose of the unfair dismissal claim it is not for us to substitute our own view of what the respondent should have done, but to evaluate the reason for dismissal and determine whether that was a fair and reasonable decision in all the

circumstances of the case. The circumstances include the size and administrative resources of the respondent.

119 The respondent relied on conduct as a potentially fair reason for dismissing the claimant, arguing that the claimant was not only guilty of gross misconduct, but also that he had admitted to this. In fact, the claimant did not admit to committing *gross* misconduct; only that he did not handle the incident as well as he should have. The limited admissions made by the claimant were certainly relevant to the respondent's handling of the case, but it erroneously interpreted them as admissions of misconduct warranting summary dismissal.

120 Applying the Burchell guidelines to this claim, along with Sainsbury's v Hitt, we considered whether:

- The respondent had a genuine belief in the claimant's guilt;
- That belief was supported by evidence; and
- The investigation was carried out to the reasonable standard.

121 Provided the respondent met the standards of a reasonable employer, its decision would not be one in which we could interfere. The decision should also be assessed in light of the information which the respondent had – or should have had – available to it at the time. We accept that the respondent's decision-makers did genuinely believe that the claimant committed serious or gross misconduct, but we disagree that this was supported by the evidence or by a reasonable investigation.

122 We conclude that the investigation carried out in this case was not a reasonable or balanced one, as it was based on an acceptance that everything the customer said was true. The customer's version of events was neither challenged nor subjected to even the most basic scrutiny. The gathering of the evidence did not include any evaluation of the contradictions between what the customer said and the accounts given by the claimant and his two colleagues, all of which were consistent with each other. Neither Mr Stubbs nor Ms Thompson supported the customer's version of events and in a number of respects they contradicted it.

123 No weight was attached to the possibility that the customer was making a false or exaggerated pre-emptive complaint, nor to his own admissions of serious verbal abuse. A reasonable investigator would have seen that the customer's assertions of having his own video footage were lacking in credibility. Not one witness reported seeing the customer using a mobile phone or other device to record the incident; something which must have been obvious if true. More importantly, Ms O'Lone took no steps to obtain any such evidence from the customer, who did not offer it. Had she asked, it would have become immediately apparent that the customer was probably not telling the truth about having that footage. The fact that he made a report to the police who did not then investigate it should also have alerted an objective investigator to the weaknesses in the customer's credibility. At the very least, a reasonable investigator would have paid attention to the customer's numerous admissions as to his own part in the incident, and seen the way he directed verbal abuse at the claimant and exaggerated the allegations of threatening behaviour, a "torrent of abuse" and the claimant needing to be

"restrained". The way these admissions were ignored demonstrated a lack of impartiality in the way the evidence was gathered and presented in the resulting report.

124 This bias revealed itself most notably in the fact that the claimant's two colleagues corroborated his version of events and did not support the allegations. A reasonable employer would not have discounted the unambiguous statements from the two colleagues saying that the customer had been abusive and aggressive, and that the claimant had only responded to the provocation towards the end of the incident. For reasons which were not at all apparent to us, these contradictions were put to one side from the moment Ms O'Lone compiled her report and throughout the subsequent internal hearings. From that moment on the respondent adopted tunnel vision in relation to its interpretation of events. We found Ms O'Lone's responses during cross-examination to be evasive. She said she was "only looking at the claimant's conduct", which betrayed the lack of open-mindedness in the investigation.

125 This emphasis then carried its way through all of the subsequent stages in the disciplinary hearing and at the appeal, and went hand in hand with a lack of any meaningful consideration being given to the mitigating circumstances. We note that there was a complete lack of any welfare contact with the claimant during the process, unlike the customer. If it was felt that the handling of this incident was out of character for the claimant, as the respondent's witnesses acknowledged, then this seems not to have factored into their assessment nor led to any concerns being investigated as to his state of mind. This was especially surprising in light of his recent tearful breakdown in front of Ms O'Lone.

126 The invitation to the disciplinary hearing did not identify precisely what conduct was the cause of concern. It is one thing for the claimant not to have handled the situation as well as he could have – as he conceded – but quite another to classify this as gross misconduct. The former is an issue about performance in the role, whereas the latter places the conduct at the most serious end of the scale of wrongdoing. During the internal hearings, there was still no effort to reconcile the differences in the accounts of the incident, nor any scrutiny of the evidence supporting the claimant's version of events. The respondent focussed on the fact that the claimant did not calm the situation down quickly, yet ignored Ms Thompson's evidence that the claimant did in fact diffuse the situation.

127 The respondent approached the decision-making with a narrow view of the meaning of mitigating circumstances, instead taking the view that nothing could have saved the claimant's job; neither the serious provocation from the customer nor the possible health reasons which might explain the claimant's conduct on the day after 17 years of successful service. This is illustrated by the fact that Mr Nicol placed weight on the claimant's failure to apologise to the customer for spilling the tea accidentally. No consideration appears to have been given to explore why he had acted out of character and against his experience. Despite regularly having to deal with difficult customers, there had been no previous episodes.

128 The claimant complained that the penalty of dismissal was too harsh. This is an area where tribunals should be slow to interfere, but in this case we agree that no

employer acting reasonably, with knowledge of all the circumstances of the case, could have reached the decision to dismiss for gross misconduct. It was of particular concern to us that the respondent's witnesses felt so strongly that such conduct could never be excused. Both Mr Nicol and Ms Wearmouth seemed to be under the misapprehension that mitigating factors can never avoid dismissal, and they unreasonably failed to give proper consideration to the considerable mitigation in this case. Firstly, the customer's unacceptable behaviour barely warranted a mention by any of the respondent's managers in their handling of the case. That in itself is a mitigating circumstance that a reasonable employer should have taken into account. Secondly, the health issues raised by the claimant in explanation for his handling of the incident were clearly given no weight by the respondent. In his dismissal letter Mr Nicol was somewhat dismissive of the impact of depression, merely referring to it in passing as part of the claimant's mitigation and noting that he had "only recently" started taking medication for it. Although Mr Nicol said in his evidence that he would also consider health as a factor, it did not appear to us that he did so here.

129 By the time of both the internal hearings the respondent was aware that the claimant believed his depression had affected his behaviour, yet it took no steps whatsoever to investigate the point. Both managers were told that the claimant considered himself disabled, and knew he had a longstanding problem with depression, yet they unreasonably brushed this information aside. A reasonable employer would at least have made some enquiries, perhaps through a referral to Occupational Health, to ascertain the relevance and weight to be attached to that aspect of the case.

130 By the time of the appeal, Ms Wearmouth was in no doubt that the claimant considered his medical records relevant to her decision, and she had allowed extra time for them to be obtained. Her decision to proceed without any attempt to obtain redacted copies of the GP records which the claimant had just received fell well outside the range of responses of a reasonable employer. Instead, there was an over-reliance on the claimant to identify the relevance of the medical records, though the responsibility for that lay with the respondent. A reasonable manager would have allowed time for the redacted records to be produced, having already waited a month before fixing the appeal hearing. In his submissions Mr Proffitt suggested that the respondent reasonably concluded that the claimant was simply reluctant to hand over his medical documents, which we do not accept. The evidence pointed clearly to the respondent showing no interest in exploring the point further.

131 We conclude that the appeal decision was substantively flawed in the same ways as Mr Nicol's decision. No consideration was given to the contradictions in the evidence, to the ways in which the claimant's version was corroborated, or to the significant mitigating factors.

132 Overall, this appears to be a case where the respondent took the view that the customer is always right, with little or no regard for the need for a store manager to stand up to a customer in order to protect himself or his colleagues from unwarranted abuse. The fact that the claimant did not, by his own admission,

handle the situation as well as he could have, in no way reduces the responsibility of the employer to carry out a balanced and fair assessment of what happened.

133 In summary, we find that the dismissal was based on a series of decisions which were seriously flawed and which took the respondent's decisions outside the range of reasonable responses. This began with a failure to approach the investigation with an impartial mind, and an acceptance without challenge that the customer's account was accurate and truthful. The respondent consistently failed to address its mind to the obvious inconsistencies in the evidence. The failure of managers to address their minds to the health factors was a significant flaw, as was the failure to consider mitigation generally. Even on the respondent's own evidence it did not occur to them to issue a written warning as an alternative to dismissal. It drew the conclusion that it could not guarantee there would be no repetition, but did so without the benefit of any medical input into the causes and likely risks for the future.

134 On the question of contribution we find that there was no contribution because we do not agree that a reasonable employer could treat the claimant's handling of the episode, faulty though it was, as an act of gross misconduct in the overall circumstances of the case.

135 Finally, the claim under section 10 of the 1999 Act was all but abandoned during the course of the hearing, there being no evidence to support the argument that the claimant's companion was unable to participate at the appeal in accordance with the statutory right. We agree that this claim has no merit and it therefore fails.

SE Langridge
Employment Judge Langridge

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

8 November 2021

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