THE EMPLOYMENT TRIBUNALS

Claimant: Mr M Connorton
Respondent: PD Ports Limited

Heard at: Newcastle Hearing Centre **On:** 1 September and 8, 9 and 10 December 2021 with deliberations on 13 January 2022

Before: Employment Judge Morris
Members: Mr P Curtis; Ms J Lancaster

Representation:
Claimant: Mrs C Connorton, the claimant's wife
Respondent: Mr R Powell of counsel

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that the claimant's complaint that, by dismissing him, the respondent discriminated against him in that it treated him unfavourably because of something arising in consequence of his disability as described in section 15 of the Equality Act 2010 is not well-founded and is dismissed.

REASONS

The hearing, representation and evidence

1. This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

2. The claimant was represented by Mrs C Connorton, his wife, who called the claimant to give evidence.

3. The respondent was represented by Mr R Powell of counsel who called two employees of the respondent to give evidence on its behalf: Mr W Draper, General Manager – Unitised; Mr A Oxby, Operations Director.

4. The evidence in chief of or on behalf of the parties was given by way of written witness statements. The Tribunal also had before it a bundle of agreed documents comprising in excess of 275 pages, which by consent was added to during the hearing. The numbers shown in parenthesis below are the page numbers (or the first page number of a large document) in that bundle.

The claimant's complaints

5. Although the claimant had originally presented and considered making additional complaints, by the commencement of the hearing they had been reduced to a single complaint of discrimination arising from disability, as described in section 15 of the Equality Act 2010 ("the 2010 Act"), by dismissing him contrary to section 39(2)(c) of the 2010 Act.

The issues

6. During the course of these proceedings, the respondent has conceded that the claimant was a disabled person at the time material to his claim, being 7 October 2019 until the date of the appeal against his dismissal on 9 April 2020. That concession relates to the claimant's physical impairments but not to the mental health issues to which he has referred during the course of both the respondent's internal disciplinary process and the proceedings before this Tribunal. The respondent has not, however, conceded that it had actual or constructive knowledge of the claimant's disability at that material time.

7. The issues to be determined at this hearing are therefore as follows, the references to "the respondent" being read to include relevant managers acting on its behalf:

> 7.1. Is the respondent able to show that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?
>
> 7.2. Did the respondent treat the claimant unfavourably, by dismissing him, because of something arising in consequence of his disability?
>
> 7.3. If so, is the respondent able to demonstrate that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

Findings of fact

8. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and after the hearing in relation to the issue of knowledge, and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

> 8.1. The respondent's business is in shipping, port operation and logistics. It operates in various locations across the UK. It is a large employer of some

1,320 employees and has significant resources including a dedicated HR Department.

8.2. The claimant was a long-serving employee of the respondent. His employment as a dock yard worker at Teesport commenced on 1 October 1980 and ended when he was summarily dismissed for gross misconduct on 19 March 2020. The functions of the claimant's job involved driving and physical labour.

8.3. During his employment the claimant had some health issues and absences from work including as a result of an injury to his shoulder in 2005, a road traffic accident in 2008 and a neck problem in 2015. In respect of that latter absence, although he became fit to return to work he could not do so as a risk assessment had not been undertaken in respect of his normal job and no other work was available for him (219). These matters apart, until the events leading to his dismissal there had been nothing untoward in the claimant's employment history; indeed he had carried out additional functions such as health and safety representative and received awards, for example in relation to his long service and good attendance.

8.4. Away from work the claimant had participated in martial arts for many years and, with others, set up a class some 25 years ago as a hobby in respect of which they do not receive payment. [*Note: Throughout these proceedings and the related documentation the parties have referred to the claimant participating in a martial arts "class" and a martial arts "club". The Tribunal has continued to use that dual nomenclature but notes that the two terms appear to be synonymous and interchangeable*.]

8.5. On Friday, 4 October 2019, while he was working, the claimant felt a spasm of pain, which became more acute during his shift. On Monday 7 October he did not attend work and made an appointment with his doctor. From that date until his dismissal the claimant was on certified absence from work. The pain from which he was suffering was not alleviated despite a "cocktail" (to use the doctor's term) of painkilling medication and was not helped by him suffering further injuries when he fell down in November 2019. The principal issue appears to be a degenerative disc bulging from his spine.

8.6. During his absence from work the claimant had appointments with the respondent's Occupational Health advisers ("OH"). At one appointment on 27 January 2020 the nurse suggested that the claimant might request ill-health retirement at his next welfare review with the respondent.

8.7. That review took place on 7 February 2020. It was conducted by the respondent's Allocation Manager, MC, who was accompanied by an HR manager, JC. The meeting took place at the claimant's home to accommodate the claimant who had explained that, due to his condition, he was unable to attend a meeting at the respondent's premises, which would have been usual practice. At the meeting the claimant updated the respondent's representatives on his condition and his medication. He explained that he was unable to do anything other than read, which he could do while lying on his bed or sofa. While

not recorded in the notes of the meeting, the claimant's evidence was that his mental health was affected by the pain, the changes in his medication and the periods that he spent alone at home. In connection with the possibility of securing ill-health retirement the claimant had prepared a list of his current illnesses. He asked JC to look into that possibility and whether he would lose any money. He also advised that his next OH appointment was on 11 February. Additionally, the claimant explained that earlier that day his GPs' practice had telephoned to tell him that his medication was to be changed, and said that his son would collect it as he was unable to do so. At the end of the meeting the claimant was asked to keep in touch and was informed that MC would contact him in 3-4 weeks to arrange a further visit.

8.8. The change in medication referred to was from the "cocktail" to Zomorph (a morphine-based painkiller for the relief of severe pain) with Naproxen, albeit that the Naproxen was subsequently discontinued. The first prescription was for a two-week supply of this medication, which the claimant commenced taking that night, 7 February 2020.

8.9. Taking the Zomorph did seem to ease the claimant's pain but he says that for the first few weeks he suffered tiredness and confusion. There is, however, no reference to such side effects of that medication in the contemporaneous documentation. In the claimant's medical records, for example, the doctor recorded on 13 February only shoulder pain (161) and on 25 February it is recorded that the claimant had said that the Zomorph and Naproxen were taking the edge off (163) but there is no reference to any side effects. Also, the decision to increase the prescription of the medication to a one-month's supply as opposed to 2 weeks' does not suggest significant contra-indications. Additionally, in a letter from the Musculoskeletal Clinic dated 24 February 2020 (209) reference is made to the claimant being on Zomorph, Naproxen and Co-codamol but there is no reference to any side effects: indeed, it is recorded that there are not any "red flag signs". Although the OH report of 11 February (262) does record the claimant stating that he has little sleep causing him low mood and fatigue, that is expressly stated to be "due to his symptoms" and not to any side effects of medication, of which there is no mention.

8.10. Furthermore, in the impact statement that the claimant produced in connection with these proceedings (40) he stated, "I do suffer with side effects. Sometimes I feel quite nauseous and dizzy and early on in the first few weeks I felt as though I was on a high and my thoughts and behaviour was affected. I was not able to think clearly or have a normal conversation with people. This has reduced as time has passed and happens only occasionally."

8.11. As the claimant's pain had eased, on 9 February 2020 Mrs Connorton suggested that she would take him to the Hapkido class to socialise. She drove him there on the way to visit her father and collected him about one hour later. The claimant's evidence, which on balance the Tribunal accepts, is that this was the first occasion upon which the claimant had visited the class since 4 October 2019. That being so, this was a significant event.

8.12. On 10 February the respondent received a report that the claimant was "actually teaching his martial arts class". That is first referred to in an email from MC timed at 10:36 on 10 February (212). It is likely that the report is in relation to the claimant attending the class the night before, 9 February, but it could have been before that date.

8.13. On 11 February 2020, at 1.00pm, the claimant had a telephone consultation with OH (262). In the adviser's report of that date the claimant's current situation is described as follows:

> "Mr Connorton has stated his discomfort and acute pain radiating from his neck and lower back has not improved. He has been referred to the spinal unit on 24/02/2020 for review. Mr Connorton has now been prescribed strong painkillers for severe pain. He has stated mobility is poor he is not driving and has little sleep due to his symptoms causing low mood and fatigue."

8.14. That account provided by the claimant is in response to OH asking him about his current situation (put simply, how he felt at that time) and did not require the claimant to rely on his memory. Some key points that the Tribunal notes from that report of what the claimant told the OH adviser include the following:

8.14.1. the pain has not improved;

8.14.2. the claimant's mobility is poor;

8.14.3. he is not driving;

8.14.4. his symptoms were causing low mood and fatigue.

8.15. In contrast to these reported issues, the claimant had decided to attend the Hapkido class again that night, 11 February 2020. It was intended that his wife would again transport him but due to an issue at her work she was unable to do so and he therefore decided to drive himself. This was the first occasion on which the claimant had driven since October 2019 and, once more, it ought to have been a significant event. As the claimant put it at the Preliminary Hearing on 24 August 2020, the effect of relief from pain put him "on a high". In re-examination in these proceedings the claimant was asked what was the biggest change when he began to take Zomorph and answered, "I was able to think more clearly – I was in a better mood". He was then asked what had been the biggest physical change and answered, "I was able to get around more", adding that that was because of his medication.

8.16. Given the inconsistencies between, on the one hand, the claimant's account at the welfare meeting on 7 February and the OH report of 11 February and, on the other, the report of 10 February about him teaching at the class, the respondent decided to investigate matters and instructed private investigators to undertake covert surveillance of the claimant. That surveillance established that he drove to and attended the Hapkido class on Sunday 16 February,

Tuesday 18 February and Sunday 23 February 2020. The investigators provided the respondent with a report (126) and photographs (117 to 125) and a video recording, which the Tribunal viewed. Amongst other things, the investigators' report refers to the claimant, without any obvious signs of discomfort or ailment, driving to and from the class, rising from the floor after conducting stretching exercises with a class of approximately 25 people, assisting with student development, lifting a metal barrier and then a five-a-side football goal, carrying a number of training swords and walking approximately 100m carrying a large sports bag holstered over his right shoulder, providing instruction, contributing to martial arts activity/instruction including adopting a fighting stance and shouting to all the class that he was about undertake 'mock tests' for those who wanted to practice. The photographs are supportive of the above in that they show the claimant arriving at the class driving himself in his car, walking without any apparent discomfort, carrying a bag and equipment and moving barriers and a football goal. In the class itself the claimant is shown wearing his Hapkido suit, exercising, conducting exercises, kneeling and demonstrating martial arts moves and techniques. In light of this report, the respondent was concerned at the apparent disparity between what the claimant was reporting and what he was doing, and that the claimant was not being truthful.

8.17. The respondent therefore invited the claimant to attend an investigation meeting on 9 March 2020. The invitation letter (256) informed the claimant of the surveillance report about his attendance at the class on 16, 18 and 23 February 2020 and the apparent inconsistencies in respect of his abilities and activities when compared with his account at the welfare meeting. The respondent's Operations Manager, MK, conducted the investigation meeting; he was accompanied by RC, the respondent's Group HR Manager. The claimant attended the meeting with copies of his medical records, which gave details of his conditions and related treatments from 2008 onwards. In this respect the notes of the meeting record, "MK not disputing health issues as have met to review, appeared not likely to return ….". The claimant was not permitted to have his wife present at the meeting but was offered the opportunity to have a representative, which he declined. Before the meeting commenced the claimant was given the information that the respondent had received from the private investigators and allowed time to review it.

8.18. At the meeting (108), MK and RC sought to understand from the claimant what appeared to have been a significant improvement in his condition in a matter of days. The claimant referred to his change of medication about which he agreed that he had not contacted MC to make him aware. Importantly, the claimant was asked several times whether he had attended the Hapkido class on days other than those identified in the private investigators' report, including since October 2019. He did not answer those questions. Instead, for example, he said that 16 February was probably the first time he had instructed but then that he could not recall and then, several times, that he did not remember or could not recall whether he had been to the classes between October 2019 and February 2020. He explained that he could not remember "due to drugs" (109).

RC found this difficult to accept as, in her opinion, to have attended the class after not being able to leave the house or drive, must have stood out.

8.19. In this connection the Tribunal notes that, in contrast, there were matters other than the claimant's attendance at the class that he did appear to remember with some clarity. He remembered the following, for example: MC had said that he would visit him but he had not done so; he had suffered sleep deprivation; he had started taking Zomorph either on the same day as the welfare meeting or the day afterwards; he had shown MC the prescription for Zomorph; his discussion with OH about ill-health retirement; RC offering to speak to OH about that; the sensation he felt as soon as he took the Zomorph; the text messages he had had with OH.

8.20. The claimant also remembered what he had done at the class in that, in connection with the surveillance photographs, he explained at the investigation meeting that he had just been helping out, he moved the barrier and goal to be safe, the items he was carrying were light, he could instruct as the morphine helped with the pain and the activities at the club were not about being aggressive.

8.21. The claimant was asked why he had not contacted MC to inform him of the improvement in his condition and that, as he could now drive, he would not require future welfare visits at his home. Initially, he answered that he had been told MC was busy and he was waiting for him to make contact, he then said that it was the drugs and when asked the question again did not respond. On a point of detail, on at least three occasions MK referred to the claimant "instructing" at the class, which at this stage in these matters the claimant did not seek to correct.

8.22. After an adjournment MK informed the claimant that he had decided that the matter should be progressed to a disciplinary hearing. MK produced a Disciplinary Investigation Report (113), which summarises aspects of the discussion at the investigation meeting including that the claimant attributed the "major improvement in his physical abilities" to the morphine-based painkiller. MK noted that a major concern was that the claimant had been unwilling to confirm whether during his absence he had instructed at classes other than those at which he had been observed by the private investigators, which led him to believe that the claimant may have been instructing regularly throughout his absence. While MK did not doubt that the claimant "has ongoing medical issues, this throws into doubt the validity of the physical limitations he described during his welfare meeting, and had the Company been aware of his actual limitations restricted duties could have been considered" (115). The Report continued that if the claimant had been dishonest it could be considered as fraud in respect of the company sick pay scheme, which was considered gross misconduct, as well as a breakdown in trust and confidence.

8.23. By letter of 10 March 2020 (258) the claimant was invited to a disciplinary hearing. He was informed of the reasons for that hearing, was provided with the investigation pack, including the Investigation Report, and warned that the allegation of gross misconduct, if proved, could result in dismissal. He was

advised of his right to be accompanied. In preparation for the hearing Mr Draper read through the investigation pack, viewed the investigators' video and considered a list of questions prepared for him by HR (127). Within that list the Tribunal notes that HR advised Mr Draper, "We are not refuting that Mick has a medical condition and understand that he has provided us with documents from the NHS regarding his problems."

8.24. The meeting took place on 19 March 2020 (133). It was conducted by Mr Draper who was accompanied by HR, an HR adviser. The claimant was accompanied by DG his trade union representative. The claimant had taken two statements with him to the meeting: one prepared by his wife on his behalf (129) the other a witness statement from Mrs Connorton herself (132). The two statements were principally directed at answering the points identified by MK in the Investigation Report. Details of the common side effects of Zomorph are given in the claimant's statement, which are said to include tiredness and confusion, but the claimant does not state that he actually suffered from any of those common side effects although he does refer to having repeatedly told MK that "he could not remember due to the medication and state of his mind at that time".

8.25. The notes of the disciplinary meeting open by recording that Mr Draper "has no questions around medical condition, he isn't disputing this as provided reviews from DR and [*Mr Draper*] is aware of his condition over the years conducting welfares with Mick". As set out below, the respondent's position in this regard was restated by Mr Draper at the point at which he reconvened the meeting to give his decision.

8.26. The disciplinary hearing first considered the claimant's medical history and his condition from October 2019 to February 2020; in particular the impact of the change in his medication to Zomorph, which the claimant described as "like flicking a switch". The principal matters discussed related to the claimant's attendance at the Hapkido class and what he had done while there. The claimant initially did not answer a question relating to him instructing at the class but then said that he was not instructing but was showing and guiding others, which the Tribunal considers to be little more than semantics. He explained that the items he had been observed carrying were light and that he went to the class to improve his mental health but he was still in pain. He said that he had not done anything strenuous and getting out accorded with medical advice. When asked about contacting the respondent in relation to the improvement in his condition the claimant initially avoided the question then referred to MC having said that he would contact the claimant. As had been the case at the investigation meeting, at the disciplinary hearing the claimant again did not say that he had attended the class on either 9 or 11 February and there is no reference to either of those attendances in the two statements the claimant presented to the disciplinary hearing; in particular, although the statement from Mrs Connorton does state, "I encouraged him to return to his fitness class", she does not say when that was. In cross examination the claimant initially said that at the disciplinary hearing he had admitted those attendances but, when pressed, did not pursue that. Importantly, at the disciplinary hearing, the

claimant did not suggest that the reason why he was unable to give clear answers to the questions asked of him either at the investigation meeting or the disciplinary hearing was due to the effect of Zomorph on his ability to recall events clearly or at all, and the claimant does not state in his witness statement that he did suggest this to Mr Draper.

8.27. Following a short adjournment Mr Draper gave his decision that the claimant's employment was terminated for gross misconduct and the reasons for that decision (136). In particular, Mr Draper said that he had "no issues with medical information, not disputing in any shape or form" but his concerns lay with the events from 10 February and the subsequent footage from the classes. He was, "not disputing medication may have had profound effects" but queried such an improvement after a period of eight days and had problems rationalising what the claimant had presented to the business with the footage, which led him to question if they trusted the claimant and should believe him.

8.28. Mr Draper confirmed his decision in his letter to the claimant of 20 March 2020 (237). Key points contained in that letter include the following:

8.28.1. "The company does not dispute your current and previous medical conditions and has supported you over a number of years in line with your ailments." The issue, however, was whether the claimant's "account of such condition had been honest and ultimately, whether the business could therefore have trust and confidence in the employment relationship".

8.28.2. He recorded, "as I am not a medical expert, I am unsure as to whether the morphine tablets you have been taking could provide such relief over a short period of time, which also draws attention to whether this has genuinely been the case of such improvement. Or, whether the information you have provided regarding the improvement is genuine at all and whether there is a potential that you have consistently been attending the martial arts classes throughout your whole period of sickness."

8.28.3. Regardless of that, "there are significant doubts with regard to your honesty and integrity and thus, I am confident in my decision that the relationship cannot be amended".

8.28.4. The offence was considered to be gross misconduct and, as such, the respondent had "no alternative but to summarily dismiss you with immediate effect" (240).

8.29. In cross examination, Mr Draper stressed several times that the key point in his decision to dismiss the claimant was the "disconnect" between what the claimant had said to OH on 11 February and the information from the surveillance team; and the claimant had shown a lack of candour in his explanations despite numerous attempts by Mr Draper to get to the truth of these matters. Thus, he did not believe the claimant; he had not been truthful regarding the position he was in.

8.30. The Tribunal has some understanding of Mr Draper's position in this respect as it noted that often in cross examination, when the claimant was pressed on key events in his case he claimed that he was unable to remember, which was unconvincing and did impact on the credibility of his evidence.

8.31. The claimant was offered a right of appeal, which he exercised. In his appeal statement (138) it is stated that the claimant had "tried to explain" the side effects of the medication he had taken from October 2019 to February 2020 including "memory loss and confusion". The Tribunal does not find that to be entirely accurate given that, as noted above, this was not an issue that was actively pursued by the claimant at the disciplinary hearing. That said, the Tribunal accepts that the claimant said at the investigation meeting that he could not remember and had not contacted MK "due to morphine" and in the statement he presented to the disciplinary hearing he did refer to how he had told MK that he could not remember due to the medication. Much of the claimant's appeal statement repeats the longer statement that he presented to the disciplinary hearing. On a particular point it is said, "Michael's side effects and his mental health have not been taken into account and no account was made of the effect they had on him thinking clearly or making decisions or indeed confusion over events during this period". The statement also raises a new issue in its reference to section 15 of the Equality Act 2010 but there is no explanation of why that reference is made or in what way the claimant might consider that it applies to his circumstances: for example, as he now asserts, that the dishonesty etc for which Mr Draper had dismissed the claimant arose from the side effects of the new medication.

8.32. The appeal meeting (141) was conducted by Mr Oxby who was accompanied by DW, an HR adviser. The claimant was accompanied by a different trade union representative. At the meeting Mr Oxby worked through the claimant's grounds of appeal in which he suggested that the investigation was unfair and biased including that he had been asked to remember things from months previously. According to the notes of the meeting, the claimant expanded upon this in the following terms:

> "…. no consideration had been given to the medication he had been prescribed and its effects. MC said that the medication causes you not to remember things clearly. His doctor had said that the medication he had been taking was not working – so he had been moved to a morphine-based drug. MC said that the new medication feels like an electric buzz in your body – but it causes you to not think straight – he believed he had lost some of his memory – it was strong stuff. He had been honest and open with the company – when he said that he didn't remember things but this had been seen as him not being honest and truthful".

8.33. This was the first occasion upon which this explanation had been advanced so clearly. Although the claimant had answered certain questions at the investigation meeting to the effect that he could not remember and in his statement for the disciplinary hearing had said that he could not remember due to the medication, he had not previously explained his position with such clarity.

As to the claimant's attendance at the club, as before, he explained that this was due to the morphine masking the pain; it "put him on cloud 9" (146).

8.34. The notes of the meeting refer to the ground of appeal that the respondent had failed in its obligations under the Equality Act but the reference is to treating the claimant "less favourably" which, as Mrs Connorton said at this Tribunal hearing, is the issue in direct discrimination and not discrimination arising from disability.

8.35. Mr Oxby concluded the appeal saying that he would consider matters and investigate further and respond in due course. He did that by letter of 24 April 2020 (241). Mr Oxby first set out the history and the reasons for the claimant's dismissal, making it clear that it was "important to note that at no point during the disciplinary process has your current and previous medical conditions been disputed by the company". He then addressed each of the claimant's points of appeal. Mr Oxby considered that the investigation had been conducted appropriately. He noted that the claimant could recall certain times and dates but had said that he could not recall whether he had attended the Hapkido classes prior to 16 February giving the impression that he did not wish to answer the question. As to the side effects of the medication, Mr Oxby accepted that it might have been reasonable for the claimant to attend his club as an observer but his level of participation was more than he would have expected given the medical issues the claimant had described. Additionally, regarding the effects of the medication on the claimant's memory, Mr Oxby again noted that the claimant's memory appeared to be clear in some respects but not others and he found it difficult to understand why the claimant would have struggled to remember whether he attended the club before 16 February when he had said that the Zomorph had allowed him to drive there. As to the claimant having questioned why no investigation had taken place into the medical benefits of taking Zomorph in that it provided fast acting pain relief, Mr Oxby explained that most people were familiar with morphine and its pain relieving properties and, therefore, an investigation was not necessary. Mr Oxby thus acknowledged the potential effect of Zomorph as fast acting pain relief but, given that it only masked the condition, he considered that it was putting the claimant in a position of unnecessary risk participating in the activities at the club. Mr Oxby answered the claimant's criticism of the use of the word "housebound" but explained that it reflected the OH review that the claimant was not in a position to leave the house. The phrase therefore had validity.

8.36. As to the claimant's reference in his appeal letter to section 15 of the 2010 Act, Mr Oxby found that there was no evidence that the respondent had discriminated against him, "From the moment you started your period of sickness absence the company has recognised that you are suffering from chronic neck, back and shoulder issues. The company has adopted its welfare and OH processes in order to support you and accommodate your physical condition. At no point has the company questioned the legitimacy of your medical condition which is why it was so surprising when the feedback was received from the PI". Mr Oxby was satisfied that the claimant but not been treated any less favourably than others, that his medical condition had been

taken into account and he had not been discriminated against resulting in a breach of the 2010 Act.

8.37. The Tribunal is satisfied that it is clear from both those references in Mr Oxby's appeal outcome letter and his dogged answers in cross examination that in respect of the claimant having referred in his appeal letter to section 15 of the 2010 Act he had given only what he repeatedly described as "a generic response" (which the Tribunal considers really focused on the question of direct discrimination under section 13) that Mr Oxby did not understand the implications of that section 15. While that might be understandable for someone employed as Operations Director, he appears to have sought neither more information nor legal advice in this respect; that being compounded by the fact that he was accompanied at the appeal hearing by an HR adviser.

8.38. Thus, Mr Oxby dismissed the claimant's appeal. In oral evidence he explained several times that the "core" issue or "crux" of the matter was the disparity between the report that the respondent had received of the claimant teaching at the class on 9 February and what he reported to the contrary to OH on 11 February, and that he could only remember attending the class from 16 February, which was the first date of the surveillance.

Knowledge

9. After the evidence had been concluded, the parties' representatives made submissions, which addressed the issues in this case. At the conclusion of those submissions the Tribunal remarked that it had been unable to identify any record that the respondent had accepted that the claimant was a disabled person as defined in section 6 of the 2010 Act. The respondent's representatives were unable to identify that concession but confirmed that such concession had previously made and Mr Powell stated that, for the avoidance of doubt, he would concede there and then that the respondent accepted that the claimant was a disabled person in respect of his physical impairments but not by reason of mental health, which had lasted less than 12 months in any event.

10. The Tribunal then commenced deliberations but was not ready to announce its decision orally when the parties joined the hearing the following day. In relation to the above concession in respect of disability, however, it enquired whether the respondent also conceded that it knew that the claimant had the disability. Mr Powell replied that he did not know the answer to that question would have to take instructions. In the circumstances the following order was made:

During the course of these proceedings the respondent has conceded that the claimant was a disabled person (with reference to his physical impairments but not in relation to the mental health issues to which he has referred during the course of the internal disciplinary process and the proceedings before this Tribunal) at the time material to his claim, which the Tribunal takes to be from October 2019 until the date of the appeal against the claimant's dismissal: 9 April 2020. It is unclear, however, whether the respondent also concedes that it had knowledge of that disability during all or part of that same period.

The respondent is required to write to the Tribunal and the claimant by Thursday, 16 January 2022 to state whether,

a. *it accepts that it had knowledge of the claimant's disability throughout that period;*
b. *it accepts that it had knowledge of the claimant's disability for only part of that period, and if so the start and end dates of when it had that knowledge;*
c. *it does not accept that it had knowledge of the claimant's disability at any time during that period.*

If the respondent denies such knowledge during all or any part of that period, it must set out in its response the essential basis upon which it denies that knowledge.

11. The respondent submitted an initial response on 16 December and a more detailed response the following day. Although not having been required to do so, Mrs Connorton also made submissions in an email dated 16 December and further submissions under cover of an email dated 21 December. The written submissions of the parties in respect of this issue of knowledge are addressed in the following section of these Reasons.

Submissions

12. It is not necessary for the Tribunal to set out the parties' submissions in detail here because they are a matter of record and the salient points will be obvious from the findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account in coming to our decisions. That said, the key points in the representatives' submissions are set out below.

13. On behalf of the respondent, Mr Powell made oral submissions at the hearing by reference to an outline of relevant statutory provisions and a number of leading authorities in this area of the law. His submissions included the following:

13.1. The reason for the claimant's dismissal was his dishonesty. In accordance with the decision in Cummins Ltd v W Mohammed UKEAT/0039/20/OO the Tribunal needed to grapple with the reasoning processes of Mr Draper and Mr Oxby so as to determine the facts they took into account and precisely which (if any) of those factors was something that arose in consequence of the claimant's disability.

13.2. The respondent relies upon four essential points:

13.2.1. The claimant did not have the "something" he asserts of memory loss or confusion.

13.2.2. He no longer had memory loss or confusion in the relevant period which was between the investigation meeting and the appeal hearing.

13.2.3. Alternatively it might be that that did not apply at the time of the appeal hearing.

13.2.4. The "something" had no material effect on the decisions of Mr Draper or Mr Oxby.

13.3. Credibility is at the core: see Royal Mail Group Ltd v Efobi [2021] UKSC 33. The account the claimant gave at the welfare meeting, at the OH appointment on 11 February, at the disciplinary hearing and at the appeal hearing all lacked credibility and there was no confirmation in the medical records, the letters from the claimant's GP or from the musculoskeletal clinic that the claimant had problems with his memory. In the claimant's impact statement he makes no reference to problems with his memory and refers to feeling nauseous and dizzy in the first few weeks. Thus, the identified side effects had ceased at the time of the disciplinary investigation. Given the fundamental differences in the accounts the claimant gave to OH, the musculoskeletal clinic and the GP records, one account cannot be true. All three are consistent with, first, there being no noteworthy side effects and, secondly, his having misled the three 'medics'; all three are relevant to the claimant's ill-health retirement application. In that respect, the claimant had a substantial financial incentive to ensure that what he said, and as a result the medical opinion, was supportive of his application.

13.4. During the investigation and disciplinary the claimant and Mrs Connorton had not been candid. They had admitted only what he could not hope to deny i.e. as shown in the video footage. Mrs Connorton has a quicksilver mind but her evidence is mercurial – it changes. The claimant's assertion that a side effect of the medication led to him having poor judgment in deciding to attend the class does not make sense: first, it was not only his poor judgment as it was his wife who suggested that he should go and took him; secondly, the claimant suggested that attending the class was in accordance with his doctor's advice which would therefore not be poor judgment, is contradictory, and reflects on the reliability of the claimant and Mrs Connorton.

13.5. Most of the documents that the claimant produced to the investigation meeting to demonstrate a possible side effect of Zomorph do not suggest that memory problems are a side effect and if confusion is a side effect, it normally wears off in a few days. There was no evidence that it had not worn off or ceased to be a side effect by 9 March – apart from**,** first**,** the claimant's assertion, which is inconsistent with the medical records and, secondly, the evidence of Mrs Connorton, which is not impartial. So whether at the investigation, disciplinary or appeal stages, any side-effects had worn off and ceased to apply.

13.6. Other credibility points are that it is not credible that the claimant could not identify people at the class who would know of his attendance and it was intrinsically unlikely that there was no record of who had attended, and medical notes record that the claimant told the doctor that he had not taken part "apart from signing people in" (174).

13.7. The crux is the claimant's memory at meetings. He says that it is partial memory because of the medication but it is more partisan than partial. At the investigation meeting the claimant could remember much that assisted him but not the most memorable event of his first return to the class. It is more than likely that in the discussion between the claimant and Mrs Connorton in advance of the investigation meeting they would have reminded themselves of the dates that the claimant went to the class before 16 February, but they withheld that and not for a medical cause. By the disciplinary hearing Mrs Connorton had produced two statements but neither refers to attendance before 16 February. By that stage it was inconceivable that they had not discussed attendances but did not disclose 9, 11, or 13 February; similarly at the appeal.

13.8. It was sad because if the claimant had been honest with OH on 11 February and called MC updating him there would probably have been no reason to doubt why he was going to the class. If he had been candid with MK and at the disciplinary and appeal meetings it might well have saved him from a finding of dishonesty; and in respect of neither the OH appointment nor the welfare meeting had the claimant asserted that memory is the issue.

13.9. The claimant's evidence is so inconsistent that he does not provide sufficient evidence that he had side-effects or, if so, they lasted more than a few weeks and, if so, they had a material effect on his memory from 9 March onwards.

13.10. Mr Oxby gave many reasons that added up to dishonesty. He particularly evidenced the OH matter where there is a stark difference between what the claimant had reported and his actions. The degree to which his decision was tainted by something arising from disability is immaterial and does not fall foul of section 15.

13.11. As to justification, the respondent's aim was to maintain relationships between it and its employees and not breach the implied term; and thus it was proportionate. The claimant suggests that his long service and the availability of other sanctions meant that dismissal was not proportionate but the claimant was dishonest with OH, withheld information from MC, did not disclose information in the disciplinary hearing holding back what he knew to be untrue and similarly at the appeal hearing. There was a pattern of a lack of candour with increasing severity amounting to a repudiatory breach of the contract. If it was sufficient to warrant dismissal it is sufficient to establish a proportionate response to a genuine belief in dishonesty.

14. The written submissions on behalf of the respondent in relation to the issue of knowledge included the following:

14.1. The issue of the respondent's knowledge of the claimant's disability is not relevant. This is because the evidence of the parties was consistent that the side effects of the claimant's medication had ceased to affect him by no later than 7 February 2020 and, therefore, the "something" relied upon by the

claimant had ceased to affect him before the earliest date of the alleged unfavourable treatment.

14.2. Alternatively, the respondent did not have knowledge of the claimant's disability and should not be fixed with constructive knowledge. This is essentially because none the respondent's managers believed the claimant's account of his physical limitations:

14.2.1. MK noted that the claimant now appeared to be able to carry out usual day-to-day activities and did not have knowledge of his disability.

14.2.2. Mr Draper had problems rationalising the claimant's attendance at the class (with no restrictions of movements after eight days of medication) with what the claimant was presenting to the business and found him to have been dishonest regarding his physical limitations.

14.2.3. Mr Oxby did not accept the claimant's narrative about the impact of his medical condition on his ability to carry out activities as the surveillance report had shown the claimant undertaking various activities with no sign of discomfort. Mr Oxby "did not agree that the Claimant was disabled". [*The Tribunal notes that this final submission is not accurate*.]

15. On behalf of the claimant, Mrs Connorton made oral submissions at the hearing by reference to two documents: a written summary and her observations upon applicable case law all of which the Tribunal brought into account. In the summary document and in Mrs Connorton's oral submissions, the "something" arising in consequence of disability is variously described but essentially it is said to be the fast acting pain relief of the Zomorph and Naproxen that was prescribed on 7 February 2020, which had two effects: first, it made the claimant virtually pain-free and elevated his previous low mental health enabling him to return to his class within a very short time; secondly, it had side effects of confusion, memory problems, sleep problems during day and night and on his mental health, clouding his judgment at this time such that he was not thinking straight and was unable to process things clearly or make decisions as he normally would. This, coupled with his low mood led to the claimant returning to the class. Additionally, Mrs Connorton made submissions including the following:

15.1. The decision-maker in dismissing the claimant thought he was being dishonest. Mr Draper accepted the medical evidence and that he was not saying that the claimant was fit but dismissed him for two reasons: the main reason was that the claimant attended the club and took an active part, which amounted to dishonesty; the secondary reason was that the claimant had problems remembering dates.

15.2. If the respondent had taken time both at the investigation/disciplinary and appeal stages and investigated fully the claimant's mitigation that the Zomorph had enabled him to attend the class due to the pain relief but clouded his judgment/thinking it could have avoided dismissing him and repaired the employee/employer relationship. At the appeal stage no request for further

medical evidence was sought regarding the claimant's mitigation concerning the pain relief and side effects of the medication.

15.3. The something arising need not be the only reason for the dismissal provided it is significant or more than trivial. There can be discrimination at either the disciplinary or appeal stages. When Mr Oxby was questioned about section 15 he was not forthcoming. No effort was made to consider at the appeal meeting or later the new issue of section 15 of the 2010 Act that had been raised in the claimant's appeal letter. It is clear in the outcome letter from Mr Oxby that he did not understand the claimant's claim under section 15 and instead assumed it was a reference to section 13, and he did not take the time to seek clarification from the claimant, his union representative or the respondent's HR/legal team.

15.4. By reference to the decision in Grosset v City of York Council [2018] EWCA Civ 1105, the employer does not have to know of the link between the disability and the reason for the unfavourable treatment, it is sufficient that it knew or could reasonably be expected to know of the disability. In this connection the claimant had provided records and explained at meetings his mental health problems and that the pain relief had clouded his judgment.

15.5. As the claimant had shown, on balance of probability, that there was "something" that arose from, first, the pain relief and, secondly, confusion and him focusing on things other than contacting work, the burden of proof shifts to the respondent to consider justification. The decision was not proportionate to achieve a legitimate end. The respondent is a large substantial business and could have taken into account the claimant's mental health, reasoning that his actions were a result of his medication and mental well-being. Mr Draper said he had no option other than to sack the claimant but other options were available: see Department of Work and Pensions v Boyers UKEAT/0282/19/AT. The claimant had been employed for 30 years, he was only a few weeks away from going onto half pay reducing the financial cost to the respondent (which highlighted the genuine medical need to remain on the sick even at a loss of wages) and he had applied for ill-health retirement. Something less severe could have been looked into. Mr Draper dismissed in breach of section 15 and Mr Oxby did not consider section 15.

15.6. At no time did the respondent request medical evidence to establish if the claimant was actually able to return to his very physically demanding role or to assess his mental health. No offer of any adjustments at work was made yet each decision-maker said he did not doubt claimant's physical problems.

15.7. It is stated that the claimant fraudulently claimed company sick pay but the evidence shows that he would not be able to perform his job at this time, which shows he was legitimate in claiming sick pay. All three managers had no intention of investigating the claimant's mitigation. None more clearly than at the disciplinary meeting where the summary of prepared questions lay primarily in the area of employee/employer trust and even quoted the case law of Metroline West Ltd v Ajaj UKEAT/0185/15/RN. They ignored the claimant's reasons for going to the class and substituted them with their own, confident in

the law protecting them with regards to unfair dismissal but without any knowledge or understanding of section 15 of the 2010 Act.

16. Mrs Connorton's written submissions on behalf of the claimant in relation to the issue of knowledge included the following:

16.1. By the time of the welfare meeting on 7 February 2020 he had already provided medical evidence and provided copies of his medical records and hospital letters at the investigative meeting.

16.2. At that meeting and during the disciplinary process each decision-maker stated that he accepted and was not questioning the claimant's medical condition.

16.3. As was indicated in excerpts from several documents set out in the written submission, both Mr Draper and Mr Oxby were aware of the claimant's disability from years earlier due to carrying out previous reviews and the medical evidence provided from 7 October 2019 onwards.

16.4. In answer to a question from the Tribunal, Mr Draper had confirmed that the claimant's fit notes were valid.

16.5. Mrs Connorton's reference to the effects of the medication lasting 3 to 4 months was only an estimate.

16.6. As the Employment Judge said at the Preliminary Hearing on 24 August 2020, referring to the decision in Grossett, the respondent does not have to know the "something" arose in consequence of the disability.

The Law

17. The principal statutory provision that is relevant to these proceedings is section 15 of the 2010 Act, which is as follows:

"15 Discrimination arising from disability

(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."

Application of the facts and the law to determine the issues

18. The above are the salient facts and submissions relevant to and upon which the Tribunal based its judgment. It considered those facts and submissions in the light

of the relevant law being primarily the statutory law set out below and relevant case precedents in this area of law many of which were relied on by either or both of the representatives. The Tribunal also brought into account relevant aspects of the Equality and Human Rights Commission Code of Practice on Employment (2011) ("the Equality Code").

Knowledge of disability

19. A preliminary point is whether, with reference to section 15(2) of the 2010 Act, the respondent is able to show that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

20. In this connection the Tribunal first reminds itself of the guidance given by the Court of Appeal in its decision in Gallop v Newport City Council [2014] IRLR 211 CA, which can be summarised as follows:

> 20.1. Before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person.
>
> 20.2. For that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 6 of the 2010 Act.
>
> 20.3. Those facts can be regarded as having three elements, namely:
>
> 20.3.1. a physical or mental impairment, which has
>
> 20.3.2. a substantial and long-term adverse effect on
>
> 20.3.3. his ability to carry out normal day-to-day activities;
>
> and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1 to the 2010 Act.
>
> 20.4. Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequences of such facts is that the employee is a "disabled person" as defined.

21. Against the above background, the Tribunal is not satisfied that the respondent's written submissions regarding knowledge actually addressed that issue.

> 21.1. As set out above, the respondent first contended, in its written submissions dated 16 December 2021, that the issue of knowledge was not relevant. The Tribunal rejects that submission given that section 15(2) of the 2010 Act contains what might be termed a 'statutory defence'. More particularly, even if it were right that the side effects of the Zomorph wore off after 3 to 4 weeks, that might result in the claimant then no longer being confused and his memory no longer being affected but no evidence has been put before the Tribunal that the side effects wearing off would restore the memory that the

claimant had previously lost and clarify his previous thoughts. Although the claimant did not advance such an argument, it is something that the Tribunal has had in mind and, therefore, it is repeated that it considers that the issue of knowledge is relevant.

21.2. The principal basis of the respondent's second submissions dated 17 December was that none of the respondent's managers believed the claimant's account of his physical limitations affecting his ability to carry out normal day-to-day activities and, therefore, absent such belief, the respondent did not have knowledge and should not be fixed with constructive knowledge. Although those submissions purport to deny knowledge, whether actual or constructive, the Tribunal is satisfied that as the focus is upon day-to-day activities, they actually challenge the issue of whether the claimant was a disabled person; but that has been conceded by the respondent. Furthermore, in connection with the issue of knowledge (and indeed generally throughout the evidence given and submissions made on behalf on the respondent) no regard appears to have been had to the effect of medical treatment that is provided for in paragraph 5 of Schedule 1 to the 2010 Act:

> "(1) 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) that for that, it would be likely to have that effect.
>
> (2) "Measures" includes, in particular, medical treatment …."

22. Mrs Connorton's submissions strayed beyond the issue of knowledge and also addressed issues such as the "something". Those of her submissions that did relate to knowledge focused upon the fact that at every stage of the disciplinary process the three respondent's managers made clear that it was not challenging the claimant's physical impairments. That alone is insufficient, however, as that again addresses the question of disability rather than knowledge.

23. Nevertheless, those concessions by the three managers do have a bearing on whether, as referred to in the decision in Gallop, they had knowledge of the facts constituting the claimant's disability. The Tribunal has set out those concessions in some detail in its findings of fact above. They include the following:

23.1. MK at the investigation meeting "not disputing health issues as have met to review, appeared not likely to return" and in his Investigation Report not doubting that the claimant "has ongoing medical issues".

23.2. In the list of questions prepared for Mr Draper by HR it being recorded, "We are not refuting that Mick has a medical condition and understand that he has provided us with documents from the NHS regarding his problems".

23.3. At the disciplinary hearing, Mr Draper having "no issues with medical information" and not questioning or "disputing in any shape or form" the

claimant's medical condition of which he said he was "aware over the years conducting welfares" with the claimant; and "not disputing medication may have had profound effects".

23.4. In Mr Draper's disciplinary outcome letter, "The company does not dispute your current and previous medical conditions ….".

23.5. Mr Oxby noting that "at no point during the disciplinary process has your current and previous medical conditions been disputed by the company" and "From the moment you started your period of sickness absence the company has recognised that you are suffering from chronic neck, back and shoulder issues. ….. At no point has the company questioned the legitimacy of your medical condition.

24. Those observations fall to be considered in the context of the length of time that at least MK and Mr Draper had been involved with the claimant (including MK having "met to review" and Mr Draper "conducting welfares") and the wealth of medical evidence referred to above that was available to those managers and Mr Oxby at the time the decision to dismiss the claimant was taken.

25. In these circumstances, the Tribunal is satisfied that those relevant managers (and therefore the respondent) had knowledge of the facts constituting that disability and, therefore, did know or at the very least could reasonably have been expected to know of the claimant's disability.

26. That is the decision of the Tribunal on this issue, which it has reached on the basis of the evidence before it. The Tribunal finds support that that is the correct decision on this issue by the fact that when the concession as to disability was made on behalf on the respondent prior to the commencement of this Hearing and repeated at this Hearing, (the respondent being represented throughout by competent lawyers) it was not qualified by any clarification that although disability was conceded knowledge was not conceded. Those two issues could be described as being 'opposite sides of the same coin'. Denial of knowledge is not something that might arise only from argument and submissions but is expressly provided for in section 15(2) of the 2010 Act. In the circumstances, the Tribunal considers that it is at least surprising that if the respondent did not accept that it knew, and could not reasonably have been expected to know the claimant had the disability, that point was not made at the appropriate time when disability was conceded and, indeed, was not made until after the conclusion of the Hearing in response to the orders of the Tribunal set out above, which stemmed from the issue having been raised by the Tribunal.

Something arising in consequence of his disability

27. In this connection the Tribunal adopted the approach as set out in Pnaiser v NHS England and another [2016] IRLR 170 which, so far as is relevant to this case, is as follows:

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

> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, …. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
>
> (c) Motives are irrelevant. …..
>
> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. …..
>
> (f) This stage of causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
>
> (i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

28. In this regard the Tribunal also reminds itself that "unfavourable" does not equate to a detriment or less favourable treatment but to an objective sense of that which is adverse as compared to that which is a benefit: Trustees of Swansea University Pension and Assurance Scheme v Williams [2018] ICR 233. Thus, the 'test' is an objective one requiring the Tribunal to make its own assessment. In addition, the concept of "something arising in consequence of" disability entails a looser connection than strict causation and may involve more than one link in a chain of consequences: Sheikholeslami v University of Edinburgh [2018] UKEATS/014/17.

29. Further, that the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. It is for an employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases unfair dismissal: Hardys & Hansons plc v Lax [2005] IRLR 726.

30. In this case the claimant relies on only one incident of unfavourable treatment, being his dismissal.

31. As set out above, the "something" relied upon by the claimant is somewhat a mixture. At risk of some repetition it is said to be that the fast acting pain relief of the Zomorph had two effects: first, it made the claimant virtually pain-free and elevated his

previous low mental health enabling him to return to his class within a very short time; secondly, it had side effects of confusion, memory problems, sleep problems during day and night and on his mental health, clouding his judgment at this time such that he was not thinking straight and was unable to process things clearly or make decisions as he normally would.

32. In this respect, the initial burden of proof is on the claimant to show that it is more likely than not that his dismissal was because of something arising in consequence of his disability. It there is evidence of that, the burden will shift to the respondent to prove that the treatment was in no sense whatsoever because of the "something" arising in consequence of disability.

33. In this case, the claimant relies upon having experienced either or both of the above effects and that that was a consequence of his disability or the new medication that he had been prescribed in relation to his disability; that being a looser connection than strict causation and maybe involving more than one link in a chain of consequences as is referred to in the decisions in Pnaiser and Sheikhholeslami. As is provided in the Equality Code it is sufficient that there is a connection between whatever led to the unfavourable treatment and the disability. In response, the evidence of each of the respondent's witness was that the reason for the claimant's dismissal was simply his apparent dishonesty which did not arise in consequence of his disability. When asked very simple questions he was evasive and was unable to offer any reasonable explanation in reply: for example, he could not remember driving to the club on the first occasion on which he had driven anywhere in some five months, which it was considered should have been memorable.

34. The issue for the Tribunal is whether that apparent dishonesty, which led to the unfavourable treatment of dismissal, arose from the side effects of the change in the medication the claimant was taking in relation to his impairment and, therefore, did arise in consequence of his disability. As is stated in Cummins, "the fundamental matter for the tribunal to determine is the reason for the impugned treatment".

35. A preliminary point is that, as intimated in our findings of fact above, the Tribunal did not find the claimant to a credible witness. On almost every occasion when he was asked a question, even going back to events in October or November 2019, the answer to which was of significance and might have caused him difficulty in relation to his contentions he avoided giving a meaningful answer by stating that he could not remember, could not recall, etc.

36. The claimant's medication was changed on 7 February 2020 and on 9 February he went to the Hapkido class. According to the claimant that was the first occasion that he had attended the class since he had suffered his injury on 4 October 2019 and, as he said, he was "euphoric". The Tribunal is satisfied that such an event would have had a searing impact on the claimant that would have struck through any confusion that he might have been experiencing as a side effect of the new medication and would have had such an impact that it would not have left his memory yet, two days later on 11 February the claimant reported to OH the matters set out in our findings of fact including that his condition had "not improved" and his mobility was poor. The information provided to OH by the claimant appears to be very specific and does not reflect any confusion or memory loss and in oral evidence the claimant did not suggest

that at that appointment he was confused or suffering from memory loss yet he withheld from OH that he had attended the class (according to the report received by the respondent, "teaching") on 9 February. In this connection, the Tribunal found Mrs Connorton's explanation for this discrepancy (as recorded in the notes of the Preliminary Hearing held on 7 December 2020) to be unconvincing, "He answered the questions knowing his physical problems were still present and that he was still possibly going to have further treatment on his back or shoulder/neck. He was not trying to mislead the OHS nurse but was confirming that he was still unfit to return to his normal duties."

37. Also on 11 February, the claimant again visited the Hapkido class. On this occasion he drove himself. Similar to what the claimant says was his first visit to the class on 9 February, he states that this was the first occasion since 4 October 2019 upon which he had driven himself. If that is right, the Tribunal is satisfied that this was another event that would have had a searing impact on the claimant that would strike through any confusion that he might have experienced as a side effect of the new medication and would have had such an impact that it would not have left his memory; that point being made by RC at the investigation meeting.

38. It is also telling that when the claimant was asked by Mrs Connorton in re-examination what had been the effect on him of taking the Zomorph, his first answer was not that he became confused or suffered any loss of memory but, directly to the contrary, "I was able to think more clearly – I was in a better mood". The Tribunal accepts that "more clearly" involves a comparison but, nevertheless, that answer plainly indicated greater clarity of thought after taking the Zomorph than the claimant now maintains was the case.

39. Similarly, as set out more fully above there is no reference to the claimant suffering side effects of the new medication in the contemporaneous documentation such as the claimant's medical records, the letter from the Musculoskeletal Clinic or in the OH report. Furthermore, in his impact statement the claimant refers mainly to feeling quite nauseous and dizzy and makes no reference to any memory loss although the Tribunal accepts that he does state, more generally, that early on in the first few weeks he felt as though he was on a high, his thoughts and behaviour were affected and he was not able to think clearly or have a normal conversation with people; albeit that had reduced as time passed and happens only occasionally.

40. The above two events of the claimant attending the classes on 9 and 11 February notwithstanding, when the claimant was asked several times at the investigation meeting whether he had attended the Hapkido class on days other than those identified in the private investigators' report, including since October 2019 he did not answer those questions and said that 16 February was probably the first time he had instructed but then that he could not recall and then, several times, that he did not remember or could not recall whether he had been to the classes between October 2019 and February 2020. In contrast, however, the Tribunal has recorded above examples of matters that the claimant did appear to remember with some clarity, such as his discussion with OH about ill-health retirement and what he had done at the classes as witnessed by the investigators. All in all a much clearer recollection of matters of less significance than the question he was asked repeatedly throughout the disciplinary process of whether he had attended the class before 16 February. It is

also relevant that at the investigation meeting the claimant did not challenge MK when on several occasions he referred to the claimant "instructing" at the class.

41. The claimant having failed to explain candidly to the investigation meeting his attendance at the class before he was observed there by the investigators on 16 February is compounded by the fact that in neither of the statements that the claimant presented to the disciplinary hearing is any reference made to his attendance at classes before 16 February; and that despite the fact that a key purpose of the statements was to address points identified by MK in the Investigation Report and in the claimant's statement, reference is made to MK repeatedly asking "why he did not remember going to the class any earlier than 16.2.20". This omission is given greater significance by Mrs Connorton's explanation at the Tribunal Hearing that it was in fact she who had prepared both statements and there is no suggestion whatsoever that when she did so she was suffering any confusion or memory loss; to the contrary, she knew full well that she had herself taken the claimant to the class on 9 February and that he had driven himself to the class on 11 February.

42. For the above reasons and others referred to in the Tribunal's findings of fact it does not find the claimant's evidence to be credible and is satisfied that the new medication did not affect the claimant's ability to provide satisfactory answers and explanations to the questions asked of him during the disciplinary process. The Tribunal is satisfied that in large part the claimant simply did not want to provide answers because he did not wish to cause himself even greater problems: in a phrase, he did not want to be 'caught out'. Nowhere is there a clearer example of this than the claimant being prepared to explain himself to MK and Mr Draper in relation to the classes at which he knew he had been observed by the investigators but not offering the information that he had actually attended classes before those investigators had observed him there.

43. Thus the Tribunal is satisfied that the reason for the claimant's dismissal was his lack of candour and frankness throughout the disciplinary process and his failure to provide a satisfactory explanation for his attendance at the Hapkido classes. As was said in Kelso v Department for Work and Pensions UKEATS/009/15/SM, "That dishonesty is not something arising from disability". That is the finding of this Tribunal in this case too. The Tribunal is therefore satisfied that the respondent's managers were entitled to form the view that the claimant was dishonest with the result that the essential trust and confidence between him and the respondent was irreparably damaged such that his employment should be terminated. As set out above, the key point for Mr Draper was the "disconnect" between what the claimant had said to OH on 11 February and the information from the surveillance team while Mr Oxby explained that the core issue or crux of the matter was the disparity between the report that the respondent had received of the claimant teaching at the class on 9 February and what he reported to the contrary to OH on 11 February, and that he could only remember attending the class from 16 February, which was the first date of the surveillance.

44. In asking questions in cross examination and in her submissions, Mrs Connorton stressed many times that the respondent ought to have sought medical opinion on the claimant's condition and, particularly, the effect of the change in his medication. In that she relied upon the decision in Grosset that if the employer knows

there is a disability, “he would be wise to look into the matter more carefully before taking unfavourable action.” While the Tribunal understands and accepts that point it is repeated that none of the contemporaneous GP notes and medical reports that were available to the respondent made any mention of the claimant suffering from any side effects and it also accepts the explanation given by the respondent’s witnesses, particularly Mr Oxby in oral evidence, that given that the issue was the stark contrast between the claimant attending the classes and the information he provided to OH on 11 February for which he was unwilling to provide any explanation, an investigation into the effects of morphine was not necessary.

45. It thus follows that the Tribunal does not accept that the effect of the claimant’s medication (in short, causing confusion and impacting on his memory) had any impact on the respondent’s decision to dismiss the claimant. If the Tribunal’s decision on that point had been to the contrary, it considers that any impact was so minor as not to meet the threshold of more than trivial.

46. In light of the above findings and conclusions, addressing the above points in the approach in Pnaiser and using the notation used in that approach above:

> (a) The Tribunal is first satisfied that the claimant was treated unfavourably by the respondent having, first, dismissed him and, secondly, not upheld his appeal.
>
> (b) The reason for that treatment was the claimant’s lack of candour and frankness throughout the disciplinary process, which entitled the respondent’s managers to form the view that he was dishonest and that the essential trust and confidence between him and the respondent was therefore irreparably damaged.
>
> (d) The Tribunal is therefore not satisfied that the reason for the unfavourable treatment was something arising in consequence of the claimant’s disability: see Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN.

Summary

47. In summary, referring to the issues in this case as set out above, the Tribunal is satisfied as follows:

> 47.1. the respondent did know that the claimant had the disability

and

> 47.2. the respondent did not treat the claimant unfavourably, by dismissing him, because of something arising in consequence of his disability.

Conclusion

48. In conclusion, the judgment of the Tribunal is that the claimant’s complaint that, by dismissing him, the respondent discriminated against him in that it treated him

unfavourably because of something arising in consequence of his disability as described in section 15 of the Equality Act 2010 is not well-founded and is dismissed.

EMPLOYMENT JUDGE MORRIS
JUDGMENT SIGNED BY EMPLOYMENTJUDGE
ON 28 January 2022

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