EMPLOYMENT TRIBUNALS

Claimant: Mr C Aldred

Respondent: Openreach Limited

Heard at: Manchester (by CVP) **On:** 7, 8, 9 and 10 February 2022
16 February 2022
(In Chambers)

Before: Employment Judge K Ross
Ms C Doyle
Mr I Frame

REPRESENTATION:

Claimant: Mr Moosa, Trade Union Representative
Respondent: Mr Tinnion, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was unfairly dismissed for procedural reasons only but by reason of the principle in **Polkey -v- A E Dayton Services Limited**, we find it was 100% inevitable he would have been dismissed fairly in any event with effect from 8 April 2020, the date he was actually dismissed, if the respondent had followed a fair procedure.

2. We find the claimant was responsible for 100% contributory fault having regard to both the basic and the compensatory award.

3. For these reasons there is a nil award of compensation.

4. The claimant's claim that his dismissal was either an act of direct disability discrimination pursuant to Section 13 Equality Act 2010 and/or an act of harassment pursuant to Section 26 Equality Act 2010 is not well founded and fails.

5. The claimant's claims that he was subjected to direct disability discrimination pursuant to Section 13 Equality Act 2010 and/or disability related harassment, Section 26 Equality Act 2010 as set out in his table of allegations were not well founded and fail.

REASONS

1. The claimant was employed by the respondent from April 2007 until he was dismissed for gross misconduct with an effective date of termination of 8 April 2020.

2. The claimant appealed against his dismissal but was unsuccessful and brought claims for "ordinary" unfair dismissal pursuant to section 95 and 98 Employment Rights Act 1996 and for disability discrimination. He also brought a claim for unlawful deduction from wages pursuant to section 13 Employment Rights Act 1996 but that issue had been resolved by the final hearing.

3. The claimant's disability discrimination claims were pursuant to section 13 Equality Act 2010 (direct discrimination) and section 26 Equality Act 2010 (harassment).

4. The impairment relied upon by the claimant was a psychological impairment of depression and anxiety. At a preliminary hearing on 30 April 2021 Employment Judge Johnson found the claimant was disabled within the meaning of s6 Equality Act 2010.

5. The list of issues were as attached to the case management note of Employment Judge Feeney but with the inclusion of the standard issues in a harassment case.

Facts

6. We find the following facts.

7. The respondent is a functional division of BT plc which maintains the telephone cables, ducts, cabinets and exchanges which connect nearly all the homes and businesses in the UK to the national broadband and telephone network. The claimant was a customer service engineer.

8. Mr Haselum "JH" became the claimant's line manager in 2016.

9. There was an incident in July 2016 involving an altercation between the claimant and another driver. The claimant was assaulted. Page 121. No disciplinary action was taken against the claimant.

10. On 21 February 2017 there was an incident leading to a customer complaint about the claimant-page 123. No disciplinary action was taken against the claimant.

11. In October 2017 there was an incident at Penketh telephone exchange. A complaint was made by a member of staff that the claimant had sworn at her.

The claimant told the Tribunal that he was desperate for the toilet that day and had in fact soiled himself and in frustration had sworn at the member of staff. We find the claimant did not give that information to JH at the time although he did say he was desperate to use the toilet. The complainant, who had refused the claimant access, had done so because the claimant had not provided the correct security pass. The claimant blamed JH in cross examination at the Employment Tribunal for failure to provide him with the appropriate access pass. The Tribunal prefers the evidence of JH that it was the claimant's responsibility to apply for a pass when he was working out of area and if he had done so it would have been authorised. In any event the claimant was not disciplined for the incident.

12. On the 27 October 2018 there was an incident at a fast food restaurant-"the KFC incident". A member of the public who was a medical doctor in the NHS complained to the respondent about the behaviour of the claimant. p127. He gave a detailed account explaining that the claimant was behind the doctor at the drive-through when the claimant beeped the horn of his vehicle and shouted expletives including" I haven't got all fucking day". When the doctor asked the claimant to stop, he alleged the claimant became more aggressive. The doctor got out of his vehicle to take a photograph of the number plate of the claimant's vehicle. He said the claimant then exited his vehicle and aggressively advanced toward the doctor shouting that if he had a problem, he should square up to him face to face. The doctor had a young child in the front seat of the vehicle who was becoming distressed.

13. On 29 October 2018 JH conducted an investigation meeting with the claimant about his account of what had happened at the KFC. The claimant admitted beeping at a member of the public. He admitted shouting "I only have 45 minutes for lunch". He said he could not remember swearing and that he did exit the vehicle although he said that was to apologise. JH suspended the claimant and drove him home.

14. The same day, 29 October 2018, the claimant completed a stress self-assessment showing him at red risk page 131-5, which was sent to his manager JH.

15. We find JH suggested the claimant consult his GP.

16. On 30 October 2018 there is a record of the claimant attending his GP -page 238. The entry notes "Issues with anxiety work" and No current self-harm acts or thoughts, no previous self-harm". "Denied feeling depressed offered medication and other interventions declined for now off sick not fit for work until 13 11 18".

17. On 8 Nov 2018 the claimant sent an email to JH p147. JH says he telephoned in reply. The tribunal accepts JH's evidence that there was a telephone reply.

18. We find the claimant returned to work on 15 November 2018. We find on 13 November 18 his GP noted "stress related problem wishes to return to work tomorrow feeling better overall has spoken to his boss." p237.

19. We note his GP recorded on 15 November 2018 “stress related problem returned to work today BT have their own mental health counselling service and patient taking up this offer. Currently has another person working with him for next two weeks to ease him back to work.” It also states, “Made patient aware to return if he ever has any further concerns with his mental health”. P237.

20. We find the claimant had a discussion with manager JH on his return to work 15.11.18. We find JH gave the claimant a letter to take to his GP see page 148.We find JH referred him to Rehab Works counselling. The claimant said in cross examination that he told JH at this time he was suicidal, but the Tribunal is not satisfied he did so. The Tribunal finds it implausible, given the claimant said said he was unable to share those thoughts about his mental health with his GP or his family and that he told the Tribunal he considered JH an unsympathetic manager.

21. The Tribunal finds that once JH became aware that the claimant was suffering from stress and anxiety he put a number of adjustments in place. He authorised the referral for CBT counselling(Rehab Works) which was paid for by the respondent. He arranged for a “buddy” system so that the claimant worked with another engineer, AT, instead of alone. We find this “buddy” system started on 15 November 18 when the claimant returned to work. It is evidenced by the GP entry and the claimant confirmed it. The arrangement continued into 2019, certainly until March 2019 because it is recorded in the Rehab Works entry on page 163. The claimant appeared to suggest in his statement that the arrangement came to an end around September 2019. In any event the claimant agreed he had the benefit of this arrangement for many months. The Tribunal finds the claimant had the benefit of two-man working at least for the period November 18 to March 19.

22. Another adjustment put in place for the claimant was that he was removed from the respondent’s job allocation system named “Tours”. That meant that instead of being allocated work automatically by an app, he could pick up a single job as and when necessary. We accept the respondent’s evidence that there was no pressure on the claimant to complete each task.

23. We accept the evidence of JH that from time to time the job could be intrinsically stressful. The claimant did not dispute that the respondent introduced patch supervisors for all engineers in the team. They were a first port of call if an engineer found they were struggling with a specific job.

24. We find that the clamant relied on a Patch Engineer named AP in November 2019 who went to the claimant’s assistance and reported back to JH that the claimant had been upset on site but had told AP he was” just having a bad day.”

25. We find there was another earlier incident in February 2019 at the Etihad stadium where the claimant was struggling with a job and on that occasion called JH who went to help him.

26. There is no dispute that the claimant was offered six sessions of CBT authorised by JH and paid for by the business which took place via telephone. The claimant attended all sessions although found it stressful to attend one session as he was not able to make it home in time and so attended the counselling by parking up and taking the call in his van.

27. After the CBT sessions were concluded the claimant was discharged from Rehab Works. The discharge notes state that the claimant was happy with the support in place at work, that no further work recommendations were necessary and that he had indicated a significant improvement in his mood.

28. The claimant had attended a disciplinary hearing on 4 December 2018 in relation to the KFC incident. Page 155 to 158. He was issued with a written warning that "during your lunchbreak you behaved in an unprofessional and aggressive manner towards a member of the public". The disciplinary officer took into account a number of factors including the claimant had "spoken with his doctor privately about controlling anger and temper" and "I believe Colin was affected by his state of mind at the time and have considered this while making my decision". The penalty issued to the claimant was a written warning. P159.

29. We find after the claimant was discharged from counselling in March 2019, he worked without any issues apart from one occasion in November 2019 when the patch engineer went to help him. We find no evidence that JH was unsupportive.

30. On 10 December 2019 there was another incident leading to a complaint against the claimant by a member of the public, a female motorist. (see page 176). The member of the public alleged the claimant had been travelling at speed and almost "ripped off my door". She admitted she had not seen the van coming around the corner. She put her hand up to apologise to the driver and was rewarded with a "torrent of foul language being shouted at me through the window".

31. She then said that she walked around the corner to where the vehicle was parked, and a middle-aged man got out and began to "square up to me in quite an aggressive manner". She admitted to swearing at him in response to his manner.

32. The claimant had reported a "near miss" incident to his manager JH on the morning this incident occurred but we find that he had not told his manager that he had made an offensive remark to the member of the public.

33. The complaint from the motorist was escalated to the claimant's manager and he called the claimant in for an investigatory meeting on 11 December at 8.30 am, see pages 167 to 171. The claimant admitted calling the member of the public "a stupid cow". He admitted exiting the vehicle but said he did not approach the woman. He said the woman approached him. When asked if his conduct was acceptable, he said "yes I drove away and did not confront her". He accepted that in calling or shouting at her that she was a "stupid cow" his conduct was not acceptable but said it was in reaction to the situation.

Page 171 to 172. At the end of the investigatory meeting it is not disputed that the claimant told his manager JH to "stick my job up your arse".

34. The claimant was suspended on 11 December 2019.

35. We find that the claimant's manager, despite the claimant's offensive language, once the claimant had calmed down, drove him home.

36. We find the following day the claimant attended his GP and was issued with a two-week fit note from 12 to 24 December 2019. His GP recorded that the claimant had been suffering "stress with work in general" but recorded there were no thoughts or acts of self-harm. There was a discussion of medication and the claimant agreed to try antidepressants. The reason for absence on the fit note, according to the GP records, recorded "stress at work".

37. The claimant remained suspended once that fit note expired. His GP did not issue further fit notes. The claimant did return to his GP on 10 January, 6 February, 6 March when his medication was reviewed.

38. On 30 January 2020 the respondent issued an invitation to a disciplinary hearing. The allegation was that the claimant had used unprofessional behaviour in that "on 10 December you used abusive language towards a member of the public which resulted in a customer complaint whilst in your company vehicles and wearing branded clothing".

39. We find and it is not disputed that his manager JH hand delivered the letter to the claimant's home. We find that the claimant invited JH into his home and opened the letter in front of him. We accept JH's evidence that the reason he hand delivered the letter was that he wanted to be sure that the claimant received it and also that the claimant understood what was required of him. The claimant alleges that in front of his wife and daughter JH made a remark that he could not babysit the claimant. We are not satisfied that remark was made.

40. The claimant attended a disciplinary hearing with his trade union representative on 24 February 2020, page 185 to 203. The claimant did not dispute in that hearing that he had used words to the effect of "silly cow" directed at the member of the public. In one part of the hearing he agreed it had been directed at the member of the public. At another point, page 194 he said that he was referring to the car door which the dismissing officer found to be implausible.

41. There was no dispute that the claimant knew that the good name of the company was very important to it and that when he was on company business, wearing uniform and in a liveried vehicle, it was important that he treated members of the public with respect. The claimant agreed that he attended regular training each year to remind him of this.

42. During the course of the disciplinary hearing the claimant raised complaints about his manager JH which are summarised by the dismissing officer Mr Baker on page 204 and 2005.

43. We find that Mr Baker spoke to JH about the claimant's complaints. A transcript of the telephone recording of the meeting was provided to the Tribunal during the course of the Tribunal hearing. Unfortunately, it had not been disclosed any earlier to the claimant. The claimant was made aware at the time he was dismissed, in the rationale letter, that Mr Baker had interviewed his manager JH about the complaints made about him by the claimant. P205

44. Following the claimant's dismissal for his behaviour in calling the member of the public a "silly cow" through an open car window, he appealed. His appeal is at page 210. An appeal hearing took place on 23rd April 2020. The issues raised by the claimant were considered but the decision was upheld.

45. The Tribunal finds that the claimant did not say either at the dismissal hearing or at the appeal hearing or at the Tribunal that the reason he used the offensive words to the member of the public was related to his illness or caused by his illness.

46. At the Case Management Hearing the claimant said at paragraph 12 his manager chose to pursue the incident as since his anxiety/anxiety episode the manager had felt negative towards him. At the Tribunal hearing the claimant's representative said that because the dismissing officer and appeal officer had taken into account the previous warning which had expired where the disciplinary officer ,on that occasion had taken into account the claimant's "state of mind" at page 160 meant that the issue of disability had infected the final decision.

47. We heard from the claimant. For the respondent we heard from his manager JH, the dismissing officer Mr Baker and the appeals officer Mr McGinlay.

48. The Tribunal did not find the claimant to be an impressive witness. Some of his answers were inconsistent and the Tribunal found some evidence implausible.

49. The Tribunal found Mr McGinlay the appeal officer to be a clear, forthright and conscientious witness. The Tribunal found Mr Baker to be an honest, blunt and forthright witness and found JH, the claimant's manager to be a conscientious witness.

Preliminary Matters

50. At the outset of the hearing there was an application by the claimant's representative to amend the claim to include a claim that his dismissal was an act of unfavourable treatment because of something arising in consequence of disability pursuant to Section 15 Equality Act 2010. He also sought to amend the claim to bring a complaint that the dismissal was an act of direct disability discrimination, Section 13 Equality Act 2010 and/or harassment Section 26 Equality Act 2010. The Tribunal permitted the claimant to amend his claim to include the claim for direct discrimination and harassment in relation to dismissal but did not permit the amendment in relation to the Section 15 claim.

51. At the start of the hearing the Panel noted that although the claimant had provided further particulars of his claim as directed, by Judge Feeney page 51 to 53, unfortunately, perhaps because the claimant was a litigant in person at that time, this was not in a clear Schedule of Allegations format. Accordingly, at the outset of the hearing the Tribunal placed the claimant's allegations into a table, with the consent and agreement of the claimant and his representative. The table is of allegations one to ten. By the end of the hearing the claimant with his representative had withdrawn allegation 10 and part of allegation 6.

The Issues

52. Accordingly, the list of issues was as set out in the appendix attached to the Case Management Order of Judge Feeney at page 41-43 but in addition there were issues in relation to harassment, these were agreed to be:-

(i) what was the unwanted conduct? Did it occur? If yes, was it related to disability?

(ii) If yes, did it have the disadvantageous purpose or effect set out in Section 26 Equality Act 2010. The claimant's representative with the claimant had clarified the precise disadvantageous effect relied upon in the table document, it was assumed for the harassment claim in relation to dismissal unlawful purpose all disadvantageous effects were relied upon.

53. At a Preliminary Hearing heard by Employment Judge Johnson,(p61-70) it was found that the claimant was a disabled person within the meaning of s6 Equality Act 2010 although knowledge that the claimant was a disabled person within the meaning of s6 Equality Act 2010 at the relevant time remained in dispute.

54. The issue of unlawful deduction from wages was no longer a live issue because that matter had been resolved the parties.

The Law

Unfair Dismissal

55. The relevant law is s95 and s 98 Employment Rights Act 1996. The well-known principles in **BHS v Burchell 1980 ICR 303** were relevant. We had regard to **Airbus -v- Webb 2008 EWCA Civ 49**

Direct Disability Discrimination.

56. The relevant law is found and the Equality Act 2010 Section 13 (Direct Discrimination), The burden of proof provisions are relevant, Section 136.

57. We reminded ourselves of the principles in **Igen Limited & others v Wong [2005] ICR 931 CA**; **Anya v The University of Oxford [2001] IRLR 377**; **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL**; **Barton v Investec Securities [2003] ICR 1205**; **Madarassy v Nomura International PLC [2007] ICR 867**; **Laing v Manchester City Council [2006] ICR 1519**; and **Nagarajan v London Regional Transport [1999] ICR 877 H**L and **Chief Constable of Greater Manchester v Bailey 2017 EWCA Civ 425.**

58. The Tribunal also had regard to the EHRC Code of Practice.

59. The Tribunal had regard to Section 23(1) and 23(2)(a) Equality Act 2010 concerning the comparator and **Shamoon -v- The Chief Constable of RUC 2003 ICR 337**, the principles in **High Quality Life Style Limited -v- Watts 2006 IRLR 850**, **Stockton on Tees Borough Council -v- Aylott 2010 ICR 1278 CA** and **Efobi -v- Royal Mail Group Ltd 2019 2 All ER 917.**

60. The Tribunal reminded itself that a difference in treatment and a difference in protected characteristic are not sufficient to shift the burden of proof. There must be "something more". See **Mummery L J in Madarrassy -v- Nomura International Plc.**

61. We also reminded ourselves that it is necessary to explore the alleged discriminator's mental processes. We took into account Lord Nicholl's guidance in that bias may be unconscious. See **Nagarajan v London Regional Transport 1999 ICR 877.**

Harassment

62. For the harassment claim the relevant law is s26 Equality Act 2010. We reminded ourselves of the principle in **Richmond Pharmacology v Dhaliwal 2009 ICR 724 EAT** which gives guidance as how the "effect" test in s26(4) should be applied

Unfair Dismissal claim

63. We return to the first issue. Was the claimant dismissed for a potentially fair reason pursuant to Section 98(2)(b) Employment Rights Act 1996 namely conduct? There is no dispute that the reason for dismissal was conduct, a potentially fair reason because as set out in our findings, the claimant was dismissed for the inappropriate way he spoke to a member of the public when in uniform and in a liveried vehicle.

64. We turned to the next matter, listed as item 8 on the list of issues compiled by EJ Feeney: did the claimant's behaviour amount to a breakdown of trust and confidence between the claimant and the respondent? There was no need for us to consider this because the respondent relied on conduct as the reason for dismissal and we have found conduct was indeed the reason for dismissal

65. We turned to consider the second issue: did the respondent act reasonably in treating the claimant's conduct as a sufficient reason for dismissing the claimant in that:-

(a) did the respondent form a genuine belief that the claimant was guilty of gross misconduct by engaging in behaviour whilst using the respondent's van and in uniform which breached the respondent's standards of behaviour?

(b) did the respondent have reasonable grounds for that belief?

(c) did the respondent form that belief based on a reasonable investigation in all the circumstances.

66. There was no dispute that the claimant admitted on a number of occasions that he had called a member of the public "a silly cow". He admitted it in the fact-finding investigation and disciplinary hearing and at the appeal hearing (occasionally it was wrongly transcribed as stupid cow). We find the claimant suggested at one point in the disciplinary hearing that the words "silly cow" were directed at the woman's car door rather than the woman herself.

67. The claimant did not dispute at the time that he was well aware of the respondent's standards of behaviour. The claimant did not dispute that the respondent had a non-confrontational policy and that that was covered in Avoiding Violence in the Workplace learning home module, a mandatory computer-based training which he completed annually.

68. Accordingly we are satisfied that the dismissing officer and the appeal officer had a genuine belief based on reasonable grounds of the claimant's behaviour. He had admitted he had used inappropriate language to a member of the public when driving a liveried company vehicle and when in uniform.

69. We turn to whether the respondent conducted a reasonable investigation. We remind ourselves of the case of **Sainsburys Supermarket -v- Hitt.** It is not for us to substitute our own view. It is whether an employer of this size and undertaking could have carried out such an investigation.

70. The critical relevant issue here is the conduct for which the claimant was dismissed namely offensive language used by the claimant to the member of the public. The member of the public had suggested that she had been subject to a "torrent of foul language and shouted at her through the window". She said she didn't recall the exact words, but she was sure there was f……. stupid bitch" was part of the sentence.

71. The respondent found that the claimant had used the words he admitted which was the expression "silly cow" or "stupid cow" through an open window directed at the member of the public. There was therefore no need for any further investigation because the respondent accepted the claimant's version of events that he had used that specific language.

72. We turn to the next issue, was the dismissal of the claimant fair in all the circumstances? In particular was the dismissal fair within the meaning of Section 98(4) Employment Rights Act 1996 and the band of reasonable responses available to the respondent.

73. We reminded ourselves it is not what we would have done which counts. It was whether a reasonable employer of this size and undertaking could have dismissed the claimant for this behaviour. The respondent is a national organisation with a national reputation. It protects its brand very carefully to the extent that all employees, like the claimant, who are in a customer facing role, are given annual training on avoiding confrontation. Some may consider dismissing the claimant for the words he admits he uttered to be harsh, but that is not the test. We must consider whether dismissal was within the band of reasonable responses of a reasonable employer of this size and undertaking.

74. We are satisfied that given the claimant was well aware that he was not to be confrontational with members of the public when he was in uniform and in a liveried vehicle, and given he did not dispute the offensive remark and given how carefully the respondent guards its brand image, we are satisfied that dismissal was within the band of reasonable responses of a reasonable employer in these particular circumstances.

75. It was suggested to us that the dismissal was unfair because the dismissing officer Mr Baker took into account the claimant's previous spent warning for the behaviour he had exhibited in the earlier "road rage" incident at the KFC restaurant.

76. We are satisfied that Mr Baker dismissed the claimant for his conduct in the December 2019 incident. However we accept his evidence that when considering the appropriate sanction he did have regard to the fact that the claimant had been involved in a previous similar incident, only the previous year, when finding dismissal was the appropriate sanction. We rely on his evidence that given that recent previous offensive behaviour to a member of the public, he could not be satisfied the same problem of the claimant behaving offensively to a member of the public, would not reoccur.

77. The claimant himself raised the issue of the previous KFC incident during the disciplinary process. We find it was not raised by the respondent and we find the dismissing officer was unaware of it until the claimant raised it.

78. We rely on **Airbus -v- Webb 2008 EWCA Civ 49** as authority for the fact that the particular circumstances must be taken into account when dismissing an employee for misconduct. There is no ubiquitous rule that an employer must for all purposes and in all circumstances ignore an employee's previous expired written warning.

79. We note that the expired warning here was not a final written warning, it was a written warning. We are satisfied that in this case the reason for dismissal has clearly been shown by the respondent to be the claimant's unacceptable conduct to a member of the public in December 2019. The only relevance of the expired warning was that it showed that dismissal was an appropriate sanction because the dismissing officer considered it was a real risk, given his previous behaviour, that the claimant may reoffend.

80. The claimant's representative also suggested that part of the reason the claimant was dismissed was because he had told his manager to "stick his job

up his arse" at the fact-finding stage. We find that is not true. The reason the claimant was dismissed was because of his behaviour towards a member of the public.

81. The offensive remarks he made to his manager which he did not deny, did not assist the claimant. It suggested from an evidential point of view that the claimant did indeed have difficulty exhibiting courtesy to those around him.

82. We turn to the next issue which is did the respondent follow a fair procedure when dismissing the claimant, in particular did the respondent follow its own disciplinary policy and procedure? Did the respondent follow the ACAS code when dismissing the claimant?

83. We find the claimant was invited to an investigatory meeting with his manager which was conducted properly. We find he had the benefit of a disciplinary hearing and an appeal, at both of which he was represented by his trade union representative. We find no breach of the ACAS Code.

84. We find no breach of the respondent's disciplinary procedure.

85. The claimant's representative sought to suggest that the dismissal was procedurally unfair because there was no referral back to occupational health during the disciplinary process. Firstly, there was no specific request from the claimant's side that he be referred to occupational health. Secondly, the dismissing officer and the appeal officer carefully clarified with the claimant that although he attended his GP after he had been suspended and was then signed unfit for work, it was for two weeks only. They noted the claimant was prescribed anti-depressants only at that stage, after the incident and after his suspension.

86. The claimant did not say that his mental state had caused him to say the offensive words to the member of the public. The anti-depressants could not have caused that effect because the claimant did not take them until after the incident. We are not satisfied there was any requirement to refer the claimant to OH and accordingly there is no procedural irregularity.

87. The only procedural irregularity the Tribunal finds is in relation to the further evidence the dismissing officer obtained when he spoke to JH which was not shared with the claimant before he was dismissed. We rely on our finding that when the claimant complained in his disciplinary hearing about the behaviour of his manager, JH, Mr Baker arranged to speak to JH about those complaints and recorded the meeting. The meeting took place on 19 March 2020. However he did not prepare a statement of JH's comments or make a transcript of his meeting with JH. Thus he did not send a transcript or a statement of JH's comments to the claimant and so did not give the claimant an opportunity to comment on such a transcript or statement before making his decision to dismiss.

88. It was only at the Tribunal hearing when asked about the paragraph in his statement where he said he had spoken to JH that Mr Baker, to his credit, admitted he had drafted notes for his meeting with JH and recorded the meeting. A transcript of the recording was then made and provided to the

Tribunal and the claimant. We find a reasonable employer of this size and undertaking who chose to interview a further witness and recorded the meeting should have provided the recording or a transcript of it to the claimant and his representative for their comments before reaching a final decision on dismissal.

89. We therefore find the claimant's dismissal was unfair because of that procedural irregularity.

90. We turned to consider the next issue: "if the claimant's dismissal is found to be unfair did the claimant's conduct cause a substantially and contribute to his dismissal? If so, by what proportion would it be just and equitable to reduce the compensatory award."

91. We have considered whether the claimant was responsible for culpable, blameworthy conduct, both with regard to the basic award and the compensatory award. s122(2) and s123(6) ERA 1996.

92. We find the relevant conduct was the claimant's use of offensive language directed at a female motorist when he was in uniform and a liveried vehicle. We find that is culpable and blameworthy conduct. Even if he felt frustrated, the claimant should not have used offensive language in those circumstances. There is absolutely no excuse for it. We find the claimant was a 100% to blame. We have had regard to the evidence which shows that the claimant had been involved in a serious of incidents during the course of his employment where he had behaved offensively towards members of the public, another employee and his manager. A disinterested observer might consider that the claimant had been fortunate to keep his job for so long. The claimant did not say to the Tribunal at any time that his inability to keep his temper under pressure was caused by his mental health.

93. The claimant was well aware that he must behave well and courteously to members of the public. He received a written warning for how he had behaved at the KFC restaurant the previous year and he agreed he had attended annual training on the importance of non-confrontation. The respondent on a previous occasion, concerned that perhaps his state of mind had affected his behaviour had paid for six sessions of CBT and put a package of support in place for the claimant. His manager had encouraged him to attend his GP.

94. Despite this, the claimant behaved offensively to a member of the public in December 2019.

95. In these circumstances we find he was 100% to blame and it was therefore just and equitable to make a nil basic and compensatory award for the reasons set out above.

96. We turn to the next issue, if the respondent failed to follow a fair procedure can the respondent show that following a fair procedure would have made no difference to the decision to dismiss? if so, by what proportion would it be just and equitable to reduce the compensatory award?

97. We find that if Mr Baker had disclosed the transcript of his conversation with JH to the claimant and his trade union representative it would not have changed or delayed the final outcome. The disciplinary hearing took place on 24 February 2020. The meeting between Mr Baker and JH took place on 19 March 2020. The final outcome letter was dated 7 April 2020. We find it would have made absolutely no difference to the outcome of a dismissal because JH disputed what the claimant said about him. Any comment of the claimant would have simply re iterated that he believed JH was unsupportive.

98. We find if Mr Baker had transcribed the recording and sent it to the claimant for his information, it is likely the claimant would not have commented further(he never requested the notes of any meeting despite being informed in the rationale for dismissal that Mr Baker had spoken to JH) or if he had responded with any comment, would have responded promptly.

99. In any event, the information from JH made no difference whatsoever to the allegation which caused the claimant to be dismissed namely that the claimant had behaved offensively towards a member of the public and admitted he had done so.

100. We find it is 100% inevitable that the claimant would have been dismissed in any event, by letter of 7 April to take effect on 8 April 2020, as actually occurred.For this reason too, any award of compensation is nil.

101. We have dealt with the issues in the order set out in the case management note of Employment Judge Feeney although we remind ourselves that the order of deductions when considering a Polkey deduction under s123(1) ERA 1996 and deductions for contributory fault s 123(6) and s122(2) ERA 1996 is that that the Polkey deduction should be considered first. In this case, because we found it 100% inevitable the claimant would have been dismissed in any event, on the date he was actually dismissed and because we have found contributory fault of 100% there is a nil award in any event and the order of deductions makes no difference.

Disability Discrimination-knowledge of disability.

102. Did the respondent know or could the respondent reasonably have been expected to know that the claimant was disabled for the purposes of Section 6 of the Equality Act 2010.

103. We reminded ourselves that in a direct discrimination **Gallop -v- Newport City Council 2014 IRLR 211** the Court of Appeal approved the summary of the legal principle that before an employer can be answerable for direct disability discrimination against an employee the employer needs to have actual or constructive knowledge of the facts that make the employee disabled person. For the purposes of the required knowledge, whether actual or constructive, it is of the facts constituting the employee's disability as identified in the relevant law, namely Section 6 Equality Act 2010. We reminded ourselves that we must consider whether the employer has actual or constructive knowledge of the facts constituting the claimant's disability.

104. The claimant told us in evidence that he had shared concerns of suicidal thoughts with his manager JH. The Tribunal finds this to be untrue. The Tribunal finds it wholly implausible that a person suffering from mental health issues who would not share information about thoughts of self harm and suicidal thoughts with either his family or his GP, see page 236, would share those thoughts with a manager who the claimant tells us now he regarded as being unsympathetic.

105. We find that JH knew the claimant had completed a stress questionnaire on 29 October 2018 which indicated that he was under high levels of stress and actions should be taken quickly to address and manage his issues. We find it was that document which triggered JH approving the claimant being referred for the sessions of Cognitive Behavioural Therapy (CBT).

106. We find that JH was aware the claimant was absent from work from 30 October to 15 November 2018. We find that he received the Rehab Works Discharge Document in March 2019 and understood from that document that the claimant had been discharged and that there were significant improvements to his mood, indicative of recovery. He understood from the report that the claimant was happy with the support in place at work.

107. We rely on JH's evidence that once the CBT sessions had been completed, although some support was left in place for the claimant, he considered the claimant essentially recovered. We find that there were no incidents brought to JH's attention by the claimant or anyone else after March 2019 apart from the incident in November 2019 when the claimant asked for the help from the Patch Leader. We find that the Patch Leader told JH that it had simply been a "bad day" for the claimant.

108. We find that the claimant had asked JH after March 2019 to go back to working overtime. We rely on JH's evidence that two man working was not available at the weekend and that the claimant carried out a good deal of overtime between March 2019 and the incident in December 2019 which led to his dismissal.

109. We find that JH was aware that the claimant was absent from work sick for two weeks after he was suspended in relation to the "silly cow" incident but that beyond that, although the claimant remained absent from work it was because he was suspended. He was not in receipt of any further fit notes

110. We are satisfied that the claimant never told JH that he had been suicidal or was thinking of self harm. We rely on our earlier findings that the claimant is unreliable on his evidence on this point.

111. Accordingly, although we find that JH was aware of the facts that the claimant had suffered from stress and had two short periods of absence and had undergone six CBT sessions we are not satisfied that he knew this was a long-term condition or likely to be a long-term condition. We are satisfied that he did not have any information to suggest that the claimant had a psychological problem which was causing substantial and long-term adverse effect on the claimant's ability to carry out day to day activities. The claimant

had remained at work and after March 2019 had worked regular overtime and seemed to be coping well.

112. We therefore find he did not know the claimant was disabled within the meaning of s6 Equality Act 2010.

113. We turn to the dismissing officer and the appeal officer. We are not satisfied they had knowledge of disability either. We find they were both aware that the claimant had had a short absence after his suspension in December 2019. Both officers clarified the situation with regard to antidepressants and discovered the claimant had been prescribed antidepressants after the incident for which he was suspended in December 2019 and which ultimately led to his dismissal. We find there was no indication that this was a long-term condition that had lasted, was likely to last at least twelve months. We are satisfied that there was not any evidence that showed to these two officers that a psychological problem was causing substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities.

114. However, in case we are wrong about that and the claimant is able to show that the respondent had knowledge of his disability we turn to the next matter, which is the claimant's claims for direct disability discrimination, Section 13 Equality Act 2010. We turn to consider this in relation to the claimant's dismissal.

115. The list of issues reminds us we must firstly consider who is the comparator for the purposes of the claimant's claim of direct discrimination? The claimant did not rely on a real comparator and accordingly we construct a hypothetical comparator. We remind ourselves that in constructing a comparator there must be no material difference between the circumstances of the case, Section 23(1) Equality Act 2010, and where the protected characteristic is disability, the circumstances include a person's abilities Section 23 (2)(a). We therefore considered that an appropriate hypothetical comparator is an employee also dismissed for calling a member of the public a "silly cow" when in uniform and in a liveried vehicle who was not disabled by reason of a psychological impairment.

116. We turn to the next issue. Did the respondent treat the claimant less favourably than it would have treated a hypothetical comparator, in dismissing the claimant?

117. We remind ourselves at this point of burden of proof. It is not sufficient to have a protected characteristic, in this case disability, and for unfavourable treatment to occur, in this case dismissal. The claimant must adduce some facts which could suggest that the reason for his dismissal was his disability.

118. The claimant has never said that his mental health impairment caused him or was a factor in him in using the offensive language towards the female member of the public.

119. At the case management stage he suggested that his manager JH was unsympathetic towards his mental health and that was why he placed him in the disciplinary process. At the Tribunal hearing it was suggested that both

the dismissing officer and appeal officer had regard to the claimant's previous spent warning for an incident where the claimant had lost his temper. When the claimant was issued with a warning for the KFC incident, the disciplinary officer stated "I believe Colin was affected by his state of mind at the time and have considered this while making my decision". The disciplinary officer at that stage noted that the claimant had accepted telephone counselling sessions and had "spoken with his doctor privately about controlling anger and temper".

120. The Tribunal therefore finds there is sufficient evidence which might suggest that the claimant's dismissal was because of disability. The evidence relied upon by the Tribunal is the evidence in relation to the expired warning that the claimant's "state of mind" affected his behaviour.

121. The Tribunal finds no evidence that his manager JH was unsupportive or commenced the disciplinary process because he was unsympathetic to the claimant. In fact the Tribunal finds the contrary. The Tribunal heard evidence of previous incidents in particular where the claimant had behaved offensively towards another employee at Penketh Exchange and no action was taken by JH. The Tribunal finds JH was fully supportive in terms of authorising the claimant's treatment with Rehab Works and putting in place supportive working practices such as the two-man working. In addition he took no action in relation to the very offensive "stick your job up your arse" comment made to him and even drove the claimant home later.

122. The Tribunal turns to consider the next issue which is: was the less favourable treatment because of/on the grounds of the claimant's disability contrary to Equality Act 2010? The answer to this question is no. The Tribunal is absolutely satisfied that the reason the claimant was dismissed was because he spoke offensively to a member of the public. The Tribunal finds that a non-disabled comparator would have been treated in exactly the same way. The Tribunal finds the respondent was satisfied the claimant was well aware his behaviour was offensive, and the dismissing officer and appeal officer checked that the claimant was not undergoing medication at the time of the incident and the claimant never suggested to them or at the Tribunal that the reason he lost his temper with the female motorist was because of his mental health impairment.

123. In having regard to the decision to dismiss, the Tribunal reminds itself of Nagarajan that decision to discriminate can be unconscious. The Tribunal noted that both managers had received training in mental health issues and the Tribunal finds there was no evidence to suggest an unconscious bias.

124. Accordingly, his claim for direct disability discrimination fails

Harassment/Dismissal

125. In the alternative the claimant relied on his dismissal as an act of disability related harassment. Knowledge of disability is not required for this claim.

126. The first question is: was the claimant's dismissal unwanted conduct. We find that it was. The next issue is: was it related to disability. We find for the

reasons we have given above that it was not. We find the only reason the claimant was dismissed was because he spoke offensively to a female motorist, a member of the public, in a situation where he was well aware that such behaviour when he was in company uniform and in a liveried vehicle was unacceptable. Accordingly, the claim fails at this stage.

127. In case we are wrong about that we have gone on to consider the next issue which is did the dismissal have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

128. We turn to consider whether it was the purpose of any of the respondent's witnesses: namely the claimant's manager, the dismissing officer or the appeal officer to violate his dignity or create an intimidating, hostile, degrading, humiliating or environment for the claimant. We find it was not. We find commencing the disciplinary process by conducting a fact-finding meeting and putting the case through to a disciplinary procedure JH was acting properly as a fair manager on a complaint received from a member of the public.

129. We find it was not the purpose of Mr Baker or Mr McGinley to create the disadvantageous effect for the claimant either. Their purpose was to uphold the respondent's standards and brand image to follow reasonable process relying on admitted evidence provided to them by the claimant.

130. We turn to consider whether the conduct had the disadvantageous effect as described in Section 26(1)(b) Equality Act 2010. At this stage we reminded ourselves that deciding whether the dismissal violated the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, we must have regard to the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect. We heard evidence from the claimant that unsurprisingly he found it upsetting to be dismissed. However we must consider the other circumstances of the case. The claimant had used inappropriate language to a member of the public when he was in his uniform and in a liveried vehicle. He was well aware of the high standards required by the respondent in relation to how he behaved to members of the public, not least because there had been a similar incident in the past. In this case the respondent was entitled to follow the disciplinary procedure and to dismiss the claimant when he behaved offensively towards a member of the public. Accordingly, his claim for disability related harassment in connection with his dismissal fails.

131. **Complaints 1 to 10 in the Schedule of Allegations document, direct disability, Section 13 Equality Act 2010 and/or harassment Section 26 Equality Act 2010**.

Allegation 1 "the majority of jobs pinned to the claimant were difficult two-man areas whilst working alone and underground".

132. The claimant said that the name of the discriminator in relation to this allegation was JH and the period of time was 2018 to 2019. He relied on a hypothetical comparator.

133. We considered whether the respondent treated the claimant less favourably than a hypothetical comparator. To answer this question had to decide if the allegation was factually correct. We find it is not.

134. We entirely accept the evidence of the claimant's manager that he had no involvement in "pinning" jobs on the claimant. We accept his evidence that the claimant had been removed from "Tours", the respondent's system which automatically allocated work to particular engineers, certainly from December 2018 until the point of his dismissal.

135. We also accept his evidence that when the claimant was working in a two-man team with a respected and senior colleague AT, it was AT who picked up the work and the claimant simply assisted him. We find that two man working commenced in December 2018 and continued at least until March 2019. We find there is some evidence to suggest it continued intermittently after that date until September 2019.

136. We also rely on the claimant's evidence that he found it helpful working as a two-man team and on the CBT Counselling report: "the move to a workplace buddy is supporting him in the workplace". Page 163

137. We rely on the evidence of JH that the jobs the engineers did were allocated by the respondent's control department and not by him.

138. We also rely on JH's evidence that some jobs were automatically two-man jobs because of the postcode or other factors relating to risk. We rely on his evidence, with which the claimant agreed, that every job should be risk assessed by the engineer doing the job and if an engineer considered a second person was necessary, the engineer could contact JH or another manager to request a second person.

139. So far as underground work is concerned, the Tribunal finds that any job could potentially be an underground job but these were not the majority of the work.

140. Accordingly we find the factual allegation "the majority of jobs pinned to the claimant were difficult two-man areas whilst working alone and underground" to be factually incorrect. Accordingly, the claim fails at that stage.

141. We considered the same allegation as an allegation of harassment. The first issue is: what is the unwanted conduct and did it occur? We rely on our reasoning above that there is no factual basis for the allegation that "the majority of jobs pinned to the claimant were difficult two-man areas whilst working alone and underground" and accordingly the claimant has failed at the first hurdle to show there was any unwanted conduct.

Allegation 2 "when the claimant brought this up in conversation,JH shut him down saying this is the job he is paid to do and get on with them. When the claimant asked if rather than 80% plus of the jobs

being underground work if he could have a more varied pattern to support him JH shut that down with a no". The claimant initially said this occurred between 2018 to 2019 but later in evidence clarified it was a conversation in August 2018. The comparator relied upon is a real comparator, R.H.

142. We turn to considered this as an allegation of direct disability discrimination. This issue is: did the respondent treat the claimant less favourably than it treated the comparator RH? To answer this question we must consider the facts of the allegation. There was a dispute in the evidence here. JH was clear that there had never been any such conversation.

143. The claimant was contradictory. Although this allegation suggests a specific conversation where the claimant asked if rather than 80% plus of the jobs being underground work he could have a more varied pattern to support him, in cross examination the claimant said that he did not mind underground work but felt pressure from his manager to complete it.

144. Accordingly the Tribunal prefers the recollection of JH to the recollection of the claimant and finds these words were not said.

145. If we are wrong about that, and there was a conversation, we are not satisfied that the claimant was treated less favourably than the comparator. We find RH is not a true comparator because although he was another engineer in the team, we find he had a different skillset to the claimant and it was for that reason he was allocated different work.

146. Further, there is no evidence whatsoever to suggest that any conversation in relation to the claimant's work allocation even if it did occur, had anything to do with the claimant's disability. The date of the alleged conversation in August 2018 was before the claimant had ever attended his GP about stress or anxiety, before the KFC "road rage" incident and before the claimant had attended CBT. There is nothing whatsoever to suggest there was any connection with disability at all.

147. Accordingly, this allegation fails.

148. We turn to consider this allegation as an act of harassment. Because we have found that the conversation did not occur it cannot amount to unwanted conduct. Even if we are wrong and the conversation did occur, we find there is no evidence whatsoever to suggest it was related to disability for the reasons set out above. Accordingly, this allegation fails.

Allegation 3. "When the claimant underwent six sessions of counselling there were specific times when the claimant had to be unavailable to receive a call. JH made it difficult for the claimant to ensure he had his work done and had time for the counsellor."

149. We find that the claimant attended six sessions of CBT paid for by the respondent and authorised by JH between December 2018 and March 2019. We find the claimant was able to attend every session. We find that the claimant liaised direct with the therapist to arrange a suitable time for a

telephone appointment for the counselling which was at 4pm. We find the claimant normally finished work at 15.40 and had sufficient time to travel home for the appointment. We find on one occasion there was a problem. On that occasion we find that the business had moved to "summer-time working" and the claimant had a later finish time. We find the claimant did not liaise with his manager about appointment times for his CBT and JH was unaware of them.

150. We rely on JH's evidence that on that particular day the claimant contacted him to say he was struggling to make the appointment because his job was running on. We find JH advised the claimant to attend the appointment and complete the task the following day, which the claimant did. We find it was the claimant's own choice to schedule his CBT appointments at 4pm.

151. We turn to the first issue in the direct discrimination claim which is whether the claimant was treated less favourably than a hypothetical comparator. We find he was not. We find it is factually incorrect to say that JH made it difficult for the claimant to ensure he had his work done and had time for the counsellor. We find the claimant managed to attend all his appointments and the only occasion where there was an issue and the claimant had to take the call by parking up and taking the call in his car, was because the business had moved to summertime working which involved later hours and the claimant had not re arranged his appointment or requested an early finish

152. We find when the claimant informed JH of the problem, on the afternoon the appointment was due when he had already started the job, JH offered a practical solution which worked. We find there is no evidence to suggest that a hypothetical comparator in the same set of circumstances as the claimant i.e. an engineer undergoing counselling which he arranged himself out of hours and did not have a disability, would have been treated any differently. Accordingly, the claimant fails.

153. We turn to consider the same allegation as an allegation of harassment.

154. We find JH did not make it difficult for the claimant to ensure that he had his work done and had time for the counsellor. Accordingly, we are not satisfied there was any unwanted conduct. However, if we are wrong about that and there was we find there was no evidence to suggest that it was related to disability. We find JH was supportive of the claimant by authorising the counselling.

155. For the sake of completeness we have gone on to consider whether JH had any unlawful purpose. We find there is no evidence of unlawful purpose. We turn to consider unlawful effect. The claimant said that his dignity was violated and it was a humiliating environment for him. We have had regard to the perception of the claimant in the circumstances of the case and whether it was reasonable for the conduct to have that effect.

156. We find the claimant chose to arrange his appointments direct with the counsellor and not to inform his manager of the specific times of the counselling sessions. We find there was a change in working hours of the respondent moving onto summertime longer hours which led to the claimant

having insufficient time to travel home because he was working on a task which was overunning. Taking all the circumstances into account we are not satisfied the claimant can show in the circumstances of the case that it was reasonable for him to consider there was a violation of his dignity or a humiliating environment. Accordingly, that claim also fails.

Allegation four. "JH knowing the claimant was in a fragile state paired him on a two-man team with AT, who had recently lost his brother to suicide". The period relied upon by the claimant is 5 December 2018 to July 2019 and he relies on a hypothetical comparator.

157. There is no dispute that the claimant was paired with an experienced senior colleague AT as a supportive mechanism after the claimant had gone absent from work with stress in the Autumn of 2018. The claimant agreed that AT was a well-liked experienced engineer and that he got on well with him. He did not dispute that he was therefore an excellent "buddy" for him. It was clear the "buddy" system started on 5 December 2018. In this allegation the claimant appears to suggest that it continued until July 2019. It certainly continued at least until March 2019.

158. The Tribunal found the reason for the "buddy" system was to support the claimant in a practical way. It meant that instead of the claimant picking up a job, it was the other experienced engineer who did and the claimant simply assisted him. We find the purpose of the "buddy" system was not to allocate a colleague to the claimant so that he could speak to him about any mental health issues he had.

159. The Tribunal entirely accepts the evidence of JH that he had no knowledge that the other engineer had suffered a bereavement during November 2018 JH said he was aware that the following year ,November 2019, the engineer's brother had died.

160. Distressingly, the claimant contacted the engineer during the course of the Tribunal hearing to confirm from him that unfortunately he been bereaved when a brother died in November 18, shortly before the claimant started working alongside him, as well as in November 2019.

161. We find that fact was not known to the respondent at the relevant time. We find the engineer had not shared that private information with the respondent. We find the claimant never suggested to JH at the time that he did not wish to be paired with AT.

162. The contemporaneous evidence suggests the claimant was positive about being allocated AT as a "buddy"-see entry in GP notes for 15 November 2017 page 236 and therapist's entry page 163 in 2019 "the move to a workplace buddy is supporting him in the workplace". The Tribunal finds that the claimant cannot show that pairing him with AT amounts to less favourable treatment. In fact it was a supportive step.

163. The claimant's rationale for complaining about being paired with AT as stated at the the Tribunal was that he could not discuss his own suicidal thoughts with AT given AT's personal experience of his brother's suicide.

164. The Tribunal finds this wholly implausible. The claimant had not at this time confided in his GP or his wife or his family about thoughts of suicide or self-harm. We find it wholly implausible that the claimant would be considering discussing such thoughts with a workplace colleague.

165. We also find that it was not the reason for the "buddy system".

166. Accordingly, we find for the reasons above there was no less favourable treatment and the claim fails at this stage.

167. We turn to consider the allegation as unwanted conduct for the purposes of a harassment claim.

168. For the reasons we have relied upon above we find there was no unwanted conduct and accordingly the claim fails at this stage.

Allegation 5 "when starting to work alone after this, the claimant found jobs were being pinned to himself and not issued through the system."

169. Once again we find this allegation is factually incorrect. We find that the claimant started to do some jobs alone after March 2019. We find certainly by the late summer (the claimant suggests September 2019) the claimant was working alone again. However, we find he was never put back on to the "Tours" system so he could still pick up jobs as he chose. These tasks were sent to him via the control department not by the named discriminator JH. In fact when giving evidence the claimant said it was the nature of the job that he was unhappy about not the system of how the work was allocated.

170. Accordingly, once again the Tribunal is not satisfied there was any less favourable treatment. If the Tribunal is wrong about that the Tribunal is not satisfied that the claimant can show that he was less favourably treated than a real or hypothetical comparator. The claimant relies on a hypothetical comparator. The Tribunal finds that work available to the claimant was issued to the claimant via the control department based on their systems having regard to the claimant's skillset. A non-disabled comparator with the same skillset as the claimant would have been treated in exactly the same way. Accordingly, the claim fails at that stage.

171. The Tribunal considered the allegation in the alternative as an allegation of harassment. The Tribunal is not satisfied the claimant can show there was any unwanted conduct for the reasons relied upon above.

172. **Allegation six. "The process for investigation for the disciplinary matter was tainted from the beginning. JH did not ask if the claimant would like his union representative present. In the interview JH brought up another matter which had nothing to do with the incident."**

173. This allegation was clarified at the submissions stage and the sentence "JH did not ask if the claimant would like his union representative present in the interview" was withdrawn.

174. We considered the remaining allegation.

175. The claimant alleged that when JH conducted the investigatory meeting, see notes commencing page 170, he referred on page 171 "after a previous incident of verbal abuse we agreed a two way deal between us that involved full support through a CBT programme where I gave you time to have regular sessions to get over this condition- afterwards you advised me you felt happier and supported". The Tribunal finds that the reference to the previous incident does not suggest the investigation was tainted from the beginning.

176. The Tribunal finds it is inaccurate to say JH brought up another matter which had nothing to do with the incident. The incident which led to the claimant's dismissal was effectively a "road rage" incident where the claimant behaved inappropriately towards a female motorist, a member of the public, whilst in his uniform and in a liveried vehicle. The previous incident at KFC had also involved inappropriate behaviour towards a member of the public whilst in uniform and in a liveried vehicle. There was therefore a pattern of behaviour and it was not inappropriate for JH to refer to it. Accordingly, the Tribunal is not satisfied the claimant can show there was less favourable treatment.

177. However, if we are wrong about that and the claimant can say that the remark amounted to less favourable treatment we must consider whether he was treated less favourably than a hypothetical comparator in the same set of circumstances but who was not disabled. We find JH would have treated a hypothetical comparator in exactly the same way. He would have looked at the previous pattern of behaviour and the support the business had put in place following the last incident. Accordingly, the claimant cannot show he was less favourably treated than a hypothetical comparator. Therefore this allegation fails.

178. We turn to consider the allegation in the alternative as an allegation of harassment. Firstly we find there was no unwanted conduct for our reasons above and if we are wrong about that we find there is no evidence that the remark related to disability. If we are wrong about that we find there was no unlawful purpose in JH making the remark. For the sake of completeness we considered unlawful effect. Taking all the circumstances into account including the perception of the claimant and whether it was reasonable for the conduct to have that effect, even if the claimant felt upset about the reference being made (of which there was no clear evidence) we are satisfied in all the circumstances of the case that it was not reasonable for the conduct to have that effect. The respondent was entitled to investigate the road rage incident and was entitled to raise with the claimant that there was previous similar behaviour in the past. Accordingly the allegation fails.

Allegation seven, during the investigation JH made a house call and told the claimant "he didn't have time to babysit him". The incident is alleged to have occurred on 30 January 2020 and the claimant relies on the hypothetical comparator.

179. Once again there is a factual dispute between the parties.

180. We find that JH attended the claimant's home on 30 January 2020 to deliver to him the letter inviting him to a disciplinary hearing. At this stage the claimant was suspended so was not attending work.

181. We rely on JH's evidence that he did that to ensure that the letter was delivered and also to ensure that the claimant opened it. The claimant first suggested this remark was made when attending the disciplinary hearing with Mr Baker:"he's now got 40 to 50 lads underneath him, he can't babysit me". The claimant said the remark was made in the presence of his wife and daughter.Tribunal did not hear from the claimant's wife or daughter.

182. JH was adamant he did not make the remark. JH was asked by Mr Baker if he had made the remark (although was erroneously asked if it had occurred on site)-See transcript of recording of meeting Mr Baker and JH on 19 March. JH denied it. He told the Tribunal he had not made the remark.

183. The Tribunal found that the claimant was not a reliable witness. His evidence was contradictory and sometimes not consistent. The Tribunal found JH to be a more reliable witness and prefers his recollection of the conversation to the recollection of the claimant.

184. In any event even if the Tribunal is wrong about that and the remark was made the Tribunal is not satisfied that there are facts which could suggest that the remark was related to disability or that a hypothetical comparator in the same set of circumstances as the claimant who was not disabled would have been treated any differently and accordingly the direct discrimination claim fails.

185. The Tribunal turned to consider the allegation in the alternative as an allegation of harassment. Again, the Tribunal is not satisfied there was any unwanted conduct because it prefers JH's recollection to that of the claimant. However, if we are wrong about that we are not satisfied there is anything to suggest that the comment is related to disability. If we are wrong about that we are satisfied because we find JH was a fair manager who tried to support the claimant even to the extent he gave him a lift home after the claimant had insulted him by telling him to "stick his job up his arse", we are not satisfied there was any unlawful purpose in the remark.

186. So far as unlawful effect is concerned once we take into account all the circumstances of the case and whether it was reasonable for the conduct to have that effect, we are not satisfied that the claimant's dignity was violated or that JH created an intimidating, hostile or humiliating environment for the claimant. We take into account JH had taken it upon himself to deliver the letter by hand to the claimant and the claimant had invited him into his home and that the past actions of JH suggest that he was motivated to help the claimant. Accordingly, the allegation fails.

187. **Allegation eight. "In the disciplinary hearing the claimant made Mark Baker aware how JH had treated him when he mentioned he didn't have time to babysit him but Mark Baker did not investigate".** The allegation occurred on 24 February 2020 at the disciplinary hearing and the claimant relied on a hypothetical comparator.

188. We considered this as an allegation of direct discrimination. We find the allegation is factually incorrect. We find Mr Baker did investigate that allegation because he set up a meeting which was recorded with JH on 19

March 2020. The claimant was not given a witness statement or a transcript of Mr Baker's conversation with JH at the time. However Mr Baker made the claimant aware of this conversation because the rationale for dismissal at page 204 states "Colin said that John said that he has 40 to 50 lads underneath him and he can't be babysitting Colin (interviewed John and John denies this -I cannot prove either way)."

189. The Tribunal found Mr Baker to be a direct and honest witness. The Tribunal has the benefit of the transcript which was produced for the Tribunal and Mr Baker's notes. It is clear that Mr Baker did speak to JH about the remark. The Tribunal is not satisfied that Mr Baker should have interviewed the claimant's wife and daughter. The claimant never suggested to Mr Baker that he should do this. In any event, where a remark is made between the claimant and a manager a reasonable employer is likely to speak to the two individuals concerned rather than involving others who are not employees.

190. The Tribunal turns back to the factual basis of the allegation and finds that it is factually incorrect. The Tribunal finds that Mr Baker did investigate whether the remark was made and accordingly the allegation fails at that stage.

191. Even if we are wrong about that and if it can be said that Mr Baker did not investigate because he said he was unable to decide which version of events as correct, we find there is no evidence to suggest that this was less favourable treatment related to the claimant's disability. The claimant did not adduce any facts to suggest that it was. So far as a hypothetical comparator is concerned the Tribunal is satisfied that a person in the same circumstances as the claimant making the same allegation against his manager as the claimant did, Mr Baker would have dealt with the matter in exactly the same way. Accordingly, the claim fails at that stage.

192. The Tribunal turns to consider the matter as an allegation of harassment. For the reasons outlined above the Tribunal is not satisfied there is any unwanted conduct.

193. If we are wrong about that, we are not satisfied that there is any evidence to suggest that if Mr Baker did not investigate properly it was in any way connected or related to the claimant's disability. Accordingly this allegation also fails.

194. **Allegation nine. "At the appeal with Paul McGinley the claimant raised how he had been treated and what had been said, there was no investigation just JH's opinion".**

195. The Tribunal found Mr McGinley to be a clear and decisive witness. He told the claimant at the appeal hearing he would investigate the points of appeal the claimant made. The claimant's appeal letter is very brief. He states "I feel all relative facts and information have not been taken into consideration. By her own admission it was the complainant who was the aggressor, she followed me and admitted swearing at me. I admit that in the reaction to swerving to miss an opening car door I shouted but this was a reaction to a near miss and not aimed at anyone".

196. We find that during the appeal hearing Mr McGinley carefully clarified with the claimant and his representative the points they wished to raise- page 216 and 217. In the appeal outcome rationale Mr McGinley went through points raised at the appeal meeting carefully but he remained of the opinion that the claimant had spoken inappropriately to a member of the public and dismissal was the appropriate sanction.

197. The Tribunal finds that the claimant's union representative seemed at one point to suggest during the appeal stage hearing that the claimant was suffering from depression at the time of the incident although he did not have medication until afterwards but he did not suggest that the reason that the claimant spoke in the offensive way he did to the female motorist was because of his depression.

198. The Tribunal finds there was no less favourable treatment because Mr McGinley conducted an appropriate appeal.

199. However if the Tribunal is wrong about this and Mr McGinley failed to investigate properly how the claimant had been treated, the Tribunal is not satisfied the claimant has adduced facts to suggest that this was because of disability or that the claimant was treated less favourably than a hypothetical comparator. It was not suggested to Mr McGinley that the reason for the way he conducted the appeal was the claimant's disability.

200. Mr McGinley explained that he had received training as did the other managers in mental health awareness. We are satisfied there was no evidence which could suggest unconscious bias.

201. Accordingly, the claim fails.

202. The Tribunal turns to consider this allegation as an allegation of harassment. For the reasons described above the Tribunal is not satisfied there was any unwanted conduct. If the Tribunal is wrong about that the Tribunal is not satisfied there is any evidence that any unwanted conduct was related to disability. Accordingly the allegation also fails at this stage.

203. Allegation 10. This allegation was withdrawn at the submissions stage at the final hearing so we did not consider it.

Employment Judge Ross
10 March 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
14 March 2022

FOR THE TRIBUNAL OFFICE

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