EMPLOYMENT TRIBUNALS

Claimant: Mr C Daley

Respondent: Vodafone Automotive Limited

Heard at: Manchester (remotely, by CVP) **On:** 7 and 8 February 2022

Before: Employment Judge Robinson
(sitting alone)

REPRESENTATION:

Claimant: Mrs C Barton (Daughter of claimant)
Respondent: Miss Peckham (Employment Consultant)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant's claim for unfair dismissal fails and is dismissed with regard to the issues remitted to this Tribunal by the Employment Appeal Tribunal.

2. There is no claim with regard to any disability discrimination matters.

REASONS

Introduction

1. This was a hearing to deal with discrete matters which are set out below after His Honour Judge Shanks at the Employment Appeal Tribunal allowed an appeal by the claimant against the Employment Tribunal's refusal of the claimant's unfair dismissal claim on the grounds that the Employment Tribunal had failed to consider the adequacy of the employer's investigation in relation to whether his misconduct may have been caused by his depression and/or the side effects of the medication he was on for it.

2. The original Judgment was sent out to the parties on 31 January 2020 and the Tribunal consisted of Employment Judge Tom Ryan, Mr Wilson and Mr Gill.

3. Because of Judge Ryan's retirement the matter has been sent to a fresh Tribunal consisting only of Employment Judge Robinson.

4. On the first morning of this hearing the administration had set the matter down before three panel members, but I discharged the two lay members as the matter only consisted of a reconsideration of the unfair dismissal element of the claimant's claim.

5. Consequently, I sat alone and heard evidence from one respondent witness, namely Mrs Harvey, who had rejected the claimant's appeal from his dismissal.

6. The EAT remitted the matter to my Tribunal to consider the three issues set out below. His Honour Judge Shanks confirmed that in general the factual findings made by the Tribunal can stand and the Judgment of Employment Judge Ryan's Tribunal can stay in place subject to the three issues to be decided today.

The issues to be decided

7. In paragraph 12 of the EAT's decision the three issues were set out as follows:

(i) whether the respondent's investigation into the claimant's mental health and medication he was taking and the effect on his behaviour was reasonable and if not whether the dismissal was unfair as a consequence;

(ii) if the reason was unfair whether a **Polkey** reduction should be made to the compensation;

(iii) if dismissal was unfair for that reason whether any reduction in relation to contributory fault should be made.

8. Those were the only issues before the Tribunal. Issues relating to disability discrimination are not to be dealt with today as those matters were dealt with by the first Tribunal, the EAT and subsequently, on an application to amend the claimant's ET1, a refusal of an amendment application by Regional Employment Judge Franey on 25 November 2021 after both parties had submitted submissions regarding the late amendment application by the claimant.

The facts from today's hearing

9. The involvement of Michelle Harvey, who is a senior manager for the respondent company, began after Mr Mark Oldham, the Customer Service Director for Vodafone, dismissed the claimant on 18 October 2018 which was confirmed by letter of the 24 October 2018.

10. The claimant appealed that decision to Ms Harvey and on 28 November 2018 the claimant attended the appeal hearing before Miss Harvey. Miss Harvey was accompanied by Mr Josh Morris, the HR professional at Vodafone who acted as a note taker at that hearing.

11. There are no issues with regard to the process of that appeal as the claimant had been offered the opportunity of having with him either a trade union official or

another work colleague. He had received the full pack of documents that were before Miss Harvey. Miss Harvey, prior to the hearing, had reviewed all the documentation provided to her.

12. The claimant found himself in difficulties with management after an incident which took place on 4 October 2018 when there was an altercation between him and an IT officer at the respondent company, Mr Ainsworth. The details of that incident do not need to be gone into save to say that Mr Oldham decided to dismiss. However it is important to note that the respondent's disciplinary officer found that it was the claimant who was aggressive towards Mr Ainsworth to such an extent that Mr Ainsworth had to leave the workplace on the particular day of the incident as he was so upset about the claimant's attitude towards him.

13. The criticisms of Miss Harvey in Employment Judge Ryan's written Judgment stand, as does the Tribunal's conclusion that the claimant's claim under section 15 of the Equality Act 2010 fails. Employment Judge Ryan's Tribunal however found that the decision of Miss Harvey was tainted by the fact that there was no reasonable investigation of a single issue and therefore the dismissal was unfair. That single point concerned Miss Harvey recording in her letter of 10 December 2018 telling the claimant that his appeal had failed, in part, because of an off the record comment the claimant is alleged to have said to both Mick Evans and Steve Watkinson, officers of the respondent, that "if I had known it would have come to this I would have hit him". That referred to his altercation with Mr Ainsworth.

14. In all other respects the decisions of the previous Employment Tribunal stand.

15. I heard from Miss Harvey today on the discrete issue as to whether there should have been more investigation of the claimant's mental health and the medication he was taking.

16. It was accepted by Miss Harvey that the claimant had been suffering from severe depression since April 2017. She was aware at the appeal hearing of that situation and that the claimant was taking sertraline. She also knew that the claimant had arthritis and suffered from a vitamin D deficiency. Taking his medical situation as a whole the claimant suffered from low mood.

17. Miss Harvey had also seen medical reports, in particular one in March 2018 from Dr Taggart, relating to the claimant's osteoarthritis and knew that the claimant, because of his arthritis, had had his working week shortened in order to take into account that disability. Miss Harvey therefore knew that the claimant was taking morphine sulphate for the arthritis.

18. From those reports Miss Harvey also knew that the claimant had a history of depression as well as his physical impairments and since her decision she has also seen more up to date medical evidence with regard to both his arthritis and his ongoing issues with depression.

19. At the appeal hearing, Miss Harvey did not seek additional medical information. The reason for that was that she was aware that the claimant had had absences from work and had had full dialogue with his manager. Miss Harvey knew he had suffered from depression which had been diagnosed for some 18 months whilst in the employment of the respondent.

20. Miss Harvey understood that the manager had not seen any change in the claimant's behaviour over that period of time but the respondent had reacted to the claimant's physical impairment by altering his working week but had deemed it

unnecessary to make any reasonable adjustments with regard to his depression. Firstly, because there was no requirement to do so and secondly because the claimant had never asked the respondent company to make any reasonable adjustments. The reasonable adjustments that were made were all in response to the claimant's arthritis and vitamin D deficiency.

21. It was put to Miss Harvey that the side effect of medication with regard to his arthritis could be angry outbursts and that the claimant had been provoked by Mr Ainsworth, and that the claimant's reaction to that provocation was wholly or in part because he was taking that medication. Miss Harvey considered that matter at the appeal hearing but was content to note that there had been no reason to be concerned about the claimant's role, his job or his behaviour and there had been no trigger points or incidents which raised concerns for the respondent's managers. In short, the respondent's managers had not seen any outbursts from the claimant over the previous 18 months and the incident with Mr Ainsworth was a one-off incident.

22. Miss Harvey took the view that the behaviour of the claimant towards Mr Ainsworth was unacceptable and could not be condoned whether it was a one-off incident or not.

23. In any event Miss Harvey found that the claimant's reaction was so aggressive towards Mr Ainsworth that it would have made no difference to her decision to confirm the dismissal and reject the appeal even if she had had further medical evidence. Her view was that she had not only a duty of care to the claimant but also a duty of care to the whole staff of Vodafone and that from a purely health and safety issue another employee should not be placed in the position that Mr Ainsworth was placed by the claimant's attitude towards him on 4 October 2018.

24. Miss Harvey considered whether the claimant's mental health condition and the medication he was taking was a contributory factor or not. During the appeal hearing the claimant did not express the view that a medical report was required with regard to his mental health. Miss Harvey would have expected the claimant to have told her that he had experienced symptoms so that she could have had a dialogue with him about his mental health issues and the medication he was taking.

25. Miss Harvey was also aware, and she set this out in her letter of 10 December 2018 giving her decision with regard to the appeal, that the claimant had not raised the question of his medical condition both in relation to his arthritis or depression either at the investigation hearing or during the disciplinary process before Mr Oldham. At bullet point nine of that letter she wrote this to the claimant:

> "You felt that the company should have taken into account your ongoing medical conditions and had made no inquiries as to your current health. On further investigation this was not initially raised by you during the investigation or the disciplinary hearing. We discussed this during your appeal and again on the balance of probability I felt that there have been no trigger points during the past 18 months that had raised concerns to the company that would have required a medical assessment to be undertaken. The company has been extremely supportive towards you particularly around the issue of arthritis."

26. In view of that position Miss Harvey did not believe that a further medical report was required but she did have in front of her, because the claimant brought this to the hearing, a leaflet which gave the details of the side effects a patient might

suffer if they took the particular medication that the claimant was taking. Miss Harvey read that leaflet and understood what the side effects were.

27. Because of this this Miss Harvey felt that she had sufficient information to balance the interest and fairness towards the claimant and the safety of all employees. She also feels now that looking back at the situation, her decision would not have been different even if she had taken some more medical evidence for two reasons which are as follows:

(1) that whatever medication the claimant was on she would still have been concerned about future incidents; and

(2) that the claimant was still saying to her at the appeal that he had not acted in an aggressive way towards Mr Ainsworth and was denying any impropriety with regard to his actions on 4 October 2018.

28. Consequently, Miss Harvey's decision overall was predicated on the behaviour the claimant displayed which she felt was wholly unacceptable whether he was disabled or not and whether he was taking medication or not. She was aware that throughout the whole disciplinary process the claimant denied his behaviour had been unacceptable. At no stage did he agree that it was unacceptable, nor did he apologise for his behaviour. Miss Harvey felt that she had an obligation to make sure that all her employees had a safe place to work.

29. Miss Harvey had consulted with the claimant's line manager as part of her preparation for the hearing. Miss Harvey had learned from that line manager that the claimant was carrying out his role appropriately and had had conversations with the claimant about his health and wellbeing.

30. Miss Harvey also confirmed that if the claimant had sought further medical evidence and had been provided to her she would have considered it but in the end even if further medical evidence had been provided it would have made no difference to her decision.

31. Miss Harvey confirmed that she did not research the claimant's mental health issues at a "micro level" but denied that she treated every case exactly the same without taking into consideration specific issues relating to a particular employee. Miss Harvey formed the view that the claimant was guilty of the misdemeanour of which he was accused. She confirmed that she dealt with every individual who came before her with regard to disciplinary matters individually.

32. Miss Harvey therefore treated the claimant's mental health issues and took them into account. If the claimant had marital problems or financial difficulties, she would also have taken those issues into account before making her decision. If the claimant had said that the medication had affected his behaviour then again she would have taken that into account. The claimant's position was that he denied he had been aggressive and the fault lay wholly with Mr Ainsworth with regard to the 4 October 2018 incident.

33. The notes of the hearing on 28 November 2018 show that Miss Harvey understood that the claimant had had depression since April 2017 and that the claimant had raised the issue of health generally in his appeal letter. The notes show that Miss Harvey discussed the claimant's performance in work since April 2017 and that to her knowledge there had been no changes in the claimant's behaviour that would have triggered a concern by anyone within the company and confirmed to the claimant that she felt his depression was not an issue throughout this time. The

claimant did not challenge that comment by Miss Harvey and the notes do not record that he did so. Miss Harvey confirmed that despite reading the medical evidence before her and the leaflet that she had received she could find no evidence that the claimant had suffered any side effects.

The Law

34. With regard to any unfair dismissal claim the Tribunal is concerned with section 98 of the Employment Rights Act 1996 and the principles contained in the well established cases of **British Home Stores v Burchell [1978] IRLR 379, Iceland Frozen Foods v Jones [1982] IRLR 439** and **Sainsbury's Supermarkets Limited v Hitt [2002] EWCA Civ 1588**.

35. The principles contained in those three cases are whether the dismissing officer and those involved in the disciplinary process had a genuine belief upon reasonable grounds after reasonable investigation that the employee is guilty of the misdemeanour of which he or she is charged and that dismissal must be within the range of reasonable responses of a reasonable employer and the reasonable range test extends also to the investigation element of any disciplinary process.

36. I must not substitute my view for the views of the dismissing officer or appeals officer where there has been a full rehearing and I must consider the principles set out in **Polkey v A E Dayton Services Limited [1097] IRLR 503** House of Lords in relation to remedy. That is known as a "**Polkey**" deduction and such a deduction is described as the reduction in any award for future loss to reflect the chance that the individual would have been dismissed fairly in any event and that reduction may take the form of a percentage reduction or it may take the form of a Tribunal making a finding that the individual would have been dismissed fairly after a period of employment for example a period in which a fair procedure would have been completed.

37. With regard to contributory conduct a Tribunal may reduce an award due to the contributory fault of an employee and the size of such reduction will be that which the Tribunal considers to be just and equitable. The test differs between a reduction of basic award and other awards in particular the compensatory award.

38. The basic award may be reduced where the Tribunal considers that any conduct of the complainant before the dismissal was such as it would be just and equitable to reduce or reduce further the amount of the award to any extent. In respect of other awards wherever Tribunal finds that the act was to an extent caused or contributed to by any action of the complainant the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

Decision

39. Applying that law to the facts of this case and the three issues that I have had to deal with I came to the following conclusion.

40. Was it reasonable for the respondent appeals officer, Miss Harvey, to not investigate the claimant's mental health and medication that he was taking with regard to the effect that may have had on his behaviour? There was no evidence in the medical reports of side effects and the claimant did not raise the issue of side effects that the medication had upon him when speaking to Miss Harvey.

41. Miss Harvey was aware of the claimant's condition. The notes that were taken at the appeal hearing I found were accurate and there is no evidence at that time that the side effects of taking such medication and the claimant's mental health itself were mitigating factors.

42. In any event, it was reasonable for the respondent appeals officer to weigh in the balance the question of whether the claimant's actions were acceptable. Miss Harvey made it clear that she had a duty of care to other employees within her business. The particular employee who was involved in the altercation with the claimant was frightened by the claimant's behaviour so much so that he had to leave work on that day There was no evidence presented from the claimant that if he had kept his job that it would not happen again. Indeed, the claimant upheld his position throughout that he had done nothing wrong, that he was the victim and there was no apology forthcoming. Miss Harvey took the view nothing would be gained by obtaining further medical evidence and, in any event, she had the information from the leaflet and the claimant's brief comments about his health made at the appeal hearing itself. To obtain further medical evidence would have simply delayed the inevitable decision by Miss Harvey.

43. Even if I am wrong in coming to that conclusion, the fact is that if a medical report had been obtained applying the principles in **Polkey** the chance that the claimant would be dismissed fairly in any event was extremely high and certainly any reduction in compensation would be at least 75%.

44. Furthermore, having considered the order of adjustments to compensation and having made a percentage reduction under **Polkey,** the percentage reduction for the employee's contributory fault under section 123(6) of the Employment Rights Act 1996 would have been 100%. Miss Harvey felt she could not allow an aggressive employee in the circumstances set out by Mr Oldham, and confirmed by her at the appeal hearing, to continue in employment with the respondent company.

45. Consequently, I find the claimant's claim relating to unfair dismissal should fail and is consequently dismissed

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Employment Judge Robinson

Date: 19 April 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
DATE: 26 April 2022

FOR THE TRIBUNAL OFFICE