EMPLOYMENT TRIBUNALS

Claimant Besim Morina

v

Respondent DHL Services Limited

Heard at: Cambridge (via CVP) **On**: 27, 28 & 29 June 2022

Before: Employment Judge Ord
Ms W Smith
Mr D Snashall

Appearances

For the Claimant: Mr G Leigh - Solicitor
For the Respondent: Mr D Patel - Counsel

JUDGMENT

1. It is the unanimous decision of the Employment Tribunal that the claimant's complaints that he was unfairly dismissed, dismissed in breach of contract and because he was a victim of unlawful discrimination on the protected characteristic of disability are not well founded.

2. The claim is dismissed.

REASONS

Background

1. The claimant was employed by the respondent from the 23 December 2002 until the 20 November 2019 as a warehouse colleague. He was dismissed on the 20 November 2019 on the stated ground of gross misconduct. The claimant was dismissed without notice.

2. Following a period of early conciliation which began on the 14 January 2020 and ended on the 3 February 2020 the claimant presented his claim form to the Tribunal on the 20 February 2020 claiming that he was unfairly dismissed, the victim of discrimination on the protected characteristic of disability and dismissed in breach of contract.

3. The respondent denied that the claimant was a disabled person within the meaning of s.6 of the Equality Act 2010 but at a preliminary hearing before Employment Judge Warren (reserved judgment 2 July 2021) it was found that the claimant was disabled by virtue of anxiety and depression.

4. The respondent denied that the claimant was unfairly dismissed and said that he was fairly dismissed for a potentially fair reason (conduct), was dismissed in circumstances where they were entitled to terminate his employment without notice and further, they denied any acts of discrimination.

The Issues

5. The issues in this case had been initially considered by Employment Judge King at a preliminary hearing on the 9 March 2021 but the record of that preliminary hearing did not form part of the bundle prepared by the parties ahead of this hearing.

6. At the commencement of this hearing at document headed "Claimant's List of Issues" and another document headed "Draft List of Issues" were presented to the Tribunal and after discussion the issues for determination by the Tribunal were set out as follows

    6.1 Knowledge of disability (s.15(2) Equality Act 2010)

        6.1.1 Did the respondent have actual or constructive knowledge of the claimant's disability of mixed anxiety and depression and if so, from what date?

    6.2 Discrimination arising from disability (s.15 and s.39 Equality Act 2010)

        6.2.1 Did the respondent subject the claimant to unfavourable treatment by dismissing him and by rejecting his appeal against dismissal?

        6.2.2 What was the something arising from his disability? The claimant relies upon the adverse effect of his mixed anxiety and depression which he says substantially impaired his cognitive functions in relation to his capacity to concentrate and regulate his emotions on a day-to-day basis.

        6.2.3 Was the unfavourable treatment because of the thing or things arising?

        6.2.4 If so, is the respondent able to show that its treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the need to treat breaches of or non-compliance with health and safety policies seriously and treats the provision of a safe working environment as bein paramount importance.

6.3 Indirect discrimination (s.19 Equality Act 2010)

6.3.1 Did the respondent apply a provision criterion or practice ("PCP") requiring employees to undertake "for cause" testing when there was reason to do so?

6.3.2 If so, did this put persons with whom the claimant shares his protected characteristic at a particular disadvantage compared to others without the claimant's disability (the claimant stating that persons with his disability would be less likely to be able to take a test when required to do so).

6.3.3 If so, did the claimant suffer that particular disadvantage?

6.3.4 If so, can the respondent show that the PCP was a proportionate means of achieving a legitimate aim (the respondent relying on the need to ensure health and safety and a safe working environment).

6.4 Unfair dismissal (s.94 Employment Rights Act 1996)

6.4.1 What was the reason, or if more than one principal reason, for the claimant's dismissal?

6.4.2 Is that a potentially fair reason under s.95(1) of the Employment Rights Act 1996 (the respondent relies on conduct as the reason for the dismissal).

6.4.3 Was the dismissal fair in the circumstances of the case, in particular

6.4.3.1 Did the respondent believe that the claimant had committed the misconduct alleged (refusal to take a for cause alcohol and drugs test)?

6.4.3.2 Did it have a reasonable ground on which to sustain that belief?

6.4.3.3 At the stage which that belief was formed had the respondent carried out as much investigation into the matter as was reasonable in the circumstances?

6.4.4 Was the dismissal fair or unfair having regard to the reasons shown in accordance with s.98(4) of the Employment Rights Act 1996?

6.4.5 If the claimant was unfairly dismissed should any compensatory award be reduced on the basis of the principal set out in the case of *Polkey v AE Dayton Services Limited [1988] ICR142.*

6.4.6 If the claimant was unfairly dismissed should there be any deductions from any award of compensation for any relevant unreasonable failure to mitigate and/or for any contributory fault (s.122 and s.123 Employment Rights Act 1996)?

6.5 Breach of contract

6.5.1 Had the claimant committed a repudiatory breach of contract as to justify his summary dismissal?

The Hearing

7. The claimant gave evidence and on behalf of the respondent evidence was heard from Mr Jeffrey Long (dismissing officer and at the relevant time a Shift Manager for the respondent) and Mr Richard Kelly (who heard the claimant's appeal against dismissal and at the relevant time was employed by the respondent as Operations Manager).

8. Reference was made to an extensive bundle of documents.

9. Each side submitted closing submissions in writing to which the advocates added orally.

<u>The evidence and facts</u>

10. The facts of the case are largely not in dispute.

11. The claimant was employed by the respondent as a Warehouse Operative. His duties and responsibilities included forklift truck driving, moving stock manually or by use with a forklift truck, alternatively by use of lifting gear. He was responsible for loading and occasionally delivering goods at "putting away" (i.e. stacking on pallets) products.

12. As the respondent's employees work with heavy machinery, including lifting gear and vehicles, it is considered for the health and safety of its employees. As part of the health and safety regime the respondent has a substance misuse policy under which it operates a "for cause testing" procedure.

13. The misuse of alcohol drugs or solvents is strictly prohibited during working hours including during breaks, and at official work related meetings on and off the company premises.

14. The "for cause" testing process forms part of the respondent's accident investigation procedure. Under the policy a non-exhaustive list provides examples of situations where they would apply "for cause" testing which includes any accident or incident where there is damage to any company or third party property and that includes "near misses" in line with health and safety reporting for accidents or incidents.

15. The claimant was aware of the for cause process and had previously undertaken tests resulting from workplace incidents in January 2011, June 2013, July 2015 and December 2016.

16. The claimant says that on each of those occasions his test was taken within 5 to 10 minutes of the incident in question. There was no suggestion that the claimant had difficulty taking or was unable to take a test on any of those occasions.

17. In the company's disciplinary policy one of the items categorised as an example of gross misconduct for which an employee may be summarily dismissed is a refusal to take a drugs or alcohol test whether under the random testing procedure which the respondent operates or under the "for cause" procedure.

18. The claimant is a disabled person within the meaning of s.6 of Equality Act 2010 by virtue of anxiety and depression. He had a period of absence in 2015-2016 with mixed anxiety and depression and was seen by the respondent's occupational health provider (Cotswold Medicals Limited) in February 2016.

19. Following that examination, the claimant was reported as having suffered from depression in the past requiring counselling, could not identify any reason why his mental health had deteriorated in the months leading to his examination and did not identify any problems at work. The claimant did report symptoms of poor concentration, poor memory, lack of motivation and problems controlling his mood which had been exacerbated by the stress of his wife recently giving birth.

20. When examined by Cotswold Medical Limited the claimant was not fit to return to work, was seeing his General Practitioner for assessment of appropriate medication and it was recommended that he should have a phased return to work when he was certified as fit to return.

21. In December 2018 to February 2019 the claimant had a further period of absence for the stated reason of stress/depression. He attended a return to work meeting on the 25 February 2019 where he said he was "not 100% but ok to work" without restrictions. A request was made for him to have a further appointment with occupational health, but the claimant said he would rather not see the company doctor. The matter was not pursued further.

22. The claimant worked without incident until November 2019.

23. On 7 November 2019 the claimant was approached by Nader Creamby his direct Line Manager, who advised that he was suspected of being involved in a "near miss" incident concerning an alleged failure to stack a pallet in compliance with appropriate standards. It was said that that increased the prospect of an accident occurring with the pallet "sticking out" rather than being safely secured in place. The claimant's name had appeared as being the driver that had stacked the relevant pallet or pallets.

24. The incident in question was said to have occurred at about 2:15 in the afternoon but the claimant was not approached until shortly after 7:00pm. According to the statement of Nader Creamby, which was taken on the 11 November 2019 as part of the respondent's initial investigation, when the claimant was told that he had to undergo an alcohol test they went to the first aid room. When the details were explained to the claimant, he became upset and asked why he had not been asked to do a test straight after it the incident had happened and not five hours later. For that reason, he refused to take part in the test.

25. Mr Creamby then contacted the Shift Manager (Sharon Rai) who said that the claimant had to take the test otherwise he could be suspended. Mr Creamby returned to the first aid room and reported this possibility to the claimant who still refused to take the test.

26. Mr Creamby then went to see Miss Rai who went to the first aid room with Mr Creamby and explained to the claimant that he must take the test or that he would be suspended. The claimant again refused and asked for a Mr Gary Wishart to come to the first aid room and act as his witness. Miss Rai agreed to this.

27. There were discussions between the four individuals and Mr Wishart then spoke to the claimant alone.

28. When Mr Wishart was interviewed on the 11 November 2019, he said that the claimant was confused about why it had taken six hours or so to ask him to take the test and he would have been happy to do it if it had been requested earlier.

29. The claimant continued thereafter to refuse to take the test and as a result Miss Rai suspended him from work.

30. An investigation took place into the claimant's potential misconduct by his refusal to take the test.

31. The claimant was called to an investigation, initially at 2:00pm, on the 11 November 2019. That was postponed on two occasions and eventually took place on the 15 November 2019. The claimant was advised that he was under investigation because on the 7 November 2019 he refused to carry out an alcohol test after a reasonable belief that he was involved in an incident on site.

32. When asked to explain what had happened on the day the claimant said that he was told by Mr Creamby why he had to take a test and his reply was that he would not do an alcohol test as he knew "100%" that he had not done it [failed to stack the pallet properly].

33. The claimant said he also asked Mr Creamby why, if the incident took place at about 2:25 he was not called until 7:30 but Mr Creamby said he was only told about the matter five minutes earlier. In his investigation interview the claimant said that that was how he knew this was "basically rubbish".

34. It was explained to the claimant that the purpose of the investigation was not to investigate the pallet incident but to investigate the claimant's refusal to take the alcohol test. The claimant was referred to the company test policy but the claimant suggested that asking him to take an alcohol test was pre-judging the issue of whether he was at fault in relation to the pallet incident.

35. The claimant agreed that Mr Creamby had explained the consequences of refusing to undertake a test as had Miss Rai and Mr Wishart. The claimant said that he told Mr Wishart that he had not been responsible for the pallet incident, denied drinking alcohol or taking any substance before being asked to undergo the test and when he was asked why he would not perform the test he did not answer. On his behalf his union representative told the investigating officer that the claimant did not do the test because he felt victimised and discriminated against in the past (but no details were given).

36. The investigating officer, Mr Kaluda, confirmed that the test was part of an investigation under the "for cause" process and reiterated that he was only investigating the refusal to perform the test.

37. The claimant's representative said that the claimant had felt intimidated and referred to his stress and anxiety over this issue and that he refused to take the test because he felt intimidated.

38. It was pointed out to the claimant that Mr Wishart had attended at his own request and spoke to the claimant separately, but it was said on the claimant's behalf that he still felt intimidated.

39. When the claimant was asked why he refused the test his reply was, "because I'm sure I didn't do it" and when he was asked again why he refused what the respondent considered a reasonable request to take a test his reply was, "because it was not me".

40. There was further discussion about the delay which the claimant and his representative suggested amount to a breach of the duty of care owed to other employees and further discussion about the claimant suffering with anxiety and depression over the incident. It was put to the claimant that it was his refusal to do an alcohol test that was causing his anxiety and on the claimant's behalf it was said that he wanted to come back to work.

41. At the end of the meeting Mr Kaluda advised the decision to refuse an alcohol test was a breach of the substance misuse policy which was potential gross misconduct so the case would be forwarded to a disciplinary hearing.

42. The disciplinary hearing was conducted on the 20 November 2019 by Mr Long.

43. Prior to the hearing Mr Long considered the substance misuse policy, the disciplinary policy, the witness statements from Mr Creamby, Mis Rai and

Mr Wishart and the notes from the claimant's investigation meeting. The claimant had access to all of these documents.

44. The claimant was accompanied by a Mr Bassinder at the disciplinary meeting.

45. The claimant accepted that he had refused to take an alcohol test despite knowing that this was potentially an act of gross misconduct. His justification for not completing the test was that he had not done anything wrong and the length of time it had taken to ask him to take a test.

46. The claimant also said that he had previously been discriminated against and when he was asked to explain this, he said he had been shouted at Miss Rai on a number of occasions in the past.

47. The claimant, however, gave no further information about that other than to say that he had been shouted out on occasion. The claimant did not suggest that his anxiety was the reason why he had not taken the test, he said he should not have been asked to take the test.

48. Mr Long concluded that the claimant's refusal to submit to an alcohol breathe test in accordance with the for cause process, his declining to provide a breath sample, would be treated as gross misconduct under the disciplinary policy. The claimant did refuse to undertake the test despite being requested to do so on several occasions and despite having been warned that failure to provide a sample could lead to suspension and that refusing to submit to a test could amount to gross misconduct under the company's disciplinary policy.

49. Mr Long accepted that ideally the test should have taken place shortly after the incident in question but did not consider that the delay gave the claimant any reasonable ground to refuse to take the test.

50. Further, whether or not the claimant believed he was responsible for any incident was not relevant. Mr Long was satisfied that Miss Rai had acted in accordance with the company policy and so there was no evidence of any discriminatory basis for the steps she had taken. Mr Long further noted that the claimant had already refused to take the test before Miss Rai became involved.

51. Mr Long did not consider that the claimant refused to take the test because he was suffering from depression or anxiety. Mr Long concluded that it was unlikely that this was the reason for his actions. He considered that the claimant had acted in full knowledge that his actions were in breach of company policy and that he might be suspended and dismissed as a result.

52. Mr Long concluded that summary dismissal was the appropriate outcome. He said that he had not taken the decision likely bearing in the mind the claimant's length of service and the impact which the dismissal could have on him, but Mr Long considered that the claimant had demonstrated disregard to the substance misuse policy which is in place to ensure the health and safety and well-being of everyone in the warehouse. Mr Long

considered it important that the policy was applied consistently to ensure that everyone knew the standards expected to avoid allegations of unfairness.

53. Mr Long gave his decision orally and confirmed the decision in writing on the 21 November 2019.

54. The claimant appealed the decision to dismiss, and his appeal hearing was heard by Mr Kelly.

55. Prior to the appeal Mr Kelly considered the statements and meeting notes from the investigation, the disciplinary hearing notes and the outcome letter as well as the claimant's letter of appeal.

56. The appeal letter set out five grounds of appeal namely

    56.1 The incident happened at around 2:25pm and the claimant was not made aware of it until 7:30.

    56.2 The incident was rectified before he was advised.

    56.3 The reason why he refused to take the test was because he was told it was not a random test but instead it was because of an incident he was told about and shown photographic evidence which in his words was, "not proof that it was my incident".

    56.4 He also refused the test is because he felt victimised and discriminated against and

    56.5 Errors (unspecified) were committed by DHL Managers during the investigation.

57. The disciplinary appeal hearing took place on the 10 December 2019.

58. Mr Kelly took each of the appeal points in turn but said that the claimant was not engaging with the specific reason of his dismissal (refusal to submit to an alcohol test) but was focused on his belief that he should not have been asked to take a test in the first place as he was sure he was not responsible for the near miss which had led to the test being requested.

59. Mr Kelly said that during the hearing the claimant appeared to place emphasis on his anxiety as being a contributing factor to his decision not to take the test and it was said on his behalf that he was in "shock" because there had been such delay between the incident and being asked to take the test so that the claimant "probably wasn't thinking straight".

60. However, when the claimant was asked why he had not taken the test by Mr Kelly the claimant said it was because he had not caused the initial incident and that he did not want to be "stitched up".

61. Mr Kelly formed the view on the basis of what the claimant said that the claimant stood by his decision not to take the test.

62. Based on what was said in the hearing Mr Kelly understood the claimant's grounds of appeal to be that

    62.1 He should not have been asked to take the test because he was not responsible for the near miss and because there had been a five hour delay between it and his being asked to take the test.

    62.2 His decision had been affected by depression and anxiety.

    62.3 He claimed to have been victimised and discriminated against.

    62.4 There were allegedly errors made during the investigation and

    62.5 He had not been involved in blameworthy accidents before.

63. Mr Kelly concluded that the for cause procedure did not provide details of the amount of time that has passed between an incident and a test nor whom may be asked to complete a test.

64. Whilst a delay of five hours could have reduced the value of the test in trying to establish the cause of any incident Mr Kelly considered this to be "entirely besides the point" as a refusal to cooperate with a testing process was the offence under consideration.

65. Mr Kelly considered that there was nothing in the policy regarding the reasonableness of the decision to ask an employee to give a test.

66. During an adjournment Mr Kelly had investigated why there had been a delay between the incident and the request of the claimant to take the test and was told that the team that had started working at 2:00pm took the view the relevant pallets (found at 2:13pm) must have been involved in an incident occurring during the previous shift which would have been reported separately. Subsequently, when it became clear that that was not the case and that the claimant was the last person to move/stack the pallet it was only then that he was asked to undertake a test, hence the delay.

67. Mr Long considered whether the claimant's anxiety had affected his decision making process. He accepted that such a condition could cause difficulty in making decisions which would normally be taken easily but concluded that the claimant had taken the decision not to submit to the test without any such difficulty. The claimant had been clear that he would not take the test on several occasions, he had had ample opportunity to change his mind and implications of refusing to take the test were made clear to him. Further, the reason given in the appeal before Mr Kelly for not taking the test was because the claimant felt the respondent had not followed the substance misuse policy correctly. Mr Kelly concluded that the claimant still agreed with his decision not to take the test and that the reason why he had refused was as set out by him orally i.e. because of a combination of delay and his firm belief that he had not been involved in the original incident.

68. Mr Kelly did not consider asking the claimant to take the test was in any way discriminatory. He took into account the claimant's length of service and clean disciplinary record but (as he confirmed under cross-examination before us) he did not consider these to be of sufficient weight in themselves when considered against the offence that the claimant had committed. The claimant had been asked to take a test of several occasions and had refused. The reasons he gave at the time were related to delay and his not being involved in the original incident, grounds that the claimant repeated in the appeal hearing.

69. Mr Kelly did not consider that there had been any flaws in the process in asking the claimant to take a test at the investigation process. He did not accept that the investigation should have been completed before making a request for a "for cause" test.

70. For those reasons the claimant's appeal was rejected and the decision to dismiss was upheld.

71. It is against that factual background that the claimant brings his complaints.

The Law

72. Under s.94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his employer.

73. Under s.98(1) it is for the employer to show a reason (or if more than one the principal reason) for a dismissal and that it is a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

74. Under s.98(2)(b) conduct is a potentially fair reason for dismissal.

75. Under s.98(4) where an employer has fulfilled the requirements to show the reason for the dismissal and that it is a potentially fair reason, the question of whether or not the dismissal is fair or unfair – having regard to the reason shown – depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employer, and (b) shall be determined in accordance with equity and the substantial merits of the case.

76. Under the well known case of *British Home Stores v Burchell [1980] ICR303* the employer when justifying a dismissal for misconduct must show

    76.1 That it held a genuine belief that the employee was guilty of misconduct.

    76.2 It had in mind reasonable grounds on which to sustain that belief, and

    76.3 At the stage at which the belief was formed on those grounds it carried out as much investigation into the matter as was reasonable in the circumstances.

77. As set out in many cases including _Post Office v Foley [2000] ICR1283_ a Tribunal, when considering any claim based upon alleged misconduct, must not substitute their own view for that of the employer. The question is whether what the employer did, and how they did it, fell within the range of reasonable responses open to an employer.

78. Under s.15 of the Equality Act 2010 a person discriminates against a disabled person if that treat that person unfavourably because of something arising in consequence of their disability and it cannot be shown that the treatment is a proportionate means of achieving a legitimate aim.

79. Under s.19 of the Equality Act 2010 a person discriminates against another if they apply to that person a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of that person.

    79.1 A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of that person if the policy applies, or would apply, it to persons whom does not share the characteristic, it puts, or would put, persons with whom that person shares a characteristic at a particular disadvantage when compared with persons who do not share it, it puts, or would put, the individual at that disadvantage, and it cannot show that the PCP was a proportionate means of achieving a legitimate aim.

80. On behalf of the claimant, we have been referred to a number of additional authorities which we set out below.

    80.1 What constitutes gross misconduct is a mixed question of fact and law (_Sandwell West Birmingham NHS Trust v Westwood UK EAT/0032/09_) stating that gross misconduct involves either deliberate wrongdoing or gross negligence.

    80.2 Deliberate wrongdoing must amount to wilful repudiation of the expressed and applied terms of the contract (_Wilson v Racher [1974] ICR428_) impartiality is essential to the basis of a reasonable investigation (_Sovereign Business Integration Limited v Trybus EAT/01/07_) emphasising that an investigator should look for evidence which weakens as well as strengthens a case against an employee.

    80.3 _AVB [2003] IRL405_ the EAT held that the gravity of the charges and the potential affect on the employee are relevant to the question of what is a reasonable investigation.

    80.4 _Salford Royal Foundation Trust v Roldan [2010] IRL721_ stating that if a dismissal is likely to blight a claimant’s career the Employment Tribunal would be required to scrutinise the respondent’s conduct of the matter all the more carefully.

80.5 *Governing Body of Hastingsbury School v Clarke UKEAT/0373/07* where in that case the Employment Appeal Tribunal held that a Tribunal had been correct to hold that an employee had been unfairly dismissed when his employer had failed to investigate his apparent ill-health before dismissing him for gross misconduct.

80.6 *Martin v Home Office UK EAT 0046/19* where an employee was in breach of a zero tolerance policy. In those circumstances, an employer must still take mitigating factors into account when considering whether to dismiss. In the absence of such consideration, it was said that the decision to dismiss may arise to a claim of unfair dismissal xxxx discrimination.

80.7 *Brito-Babapulle v Ealing Hospital NHS Trust [2014] EWCA Civ 1626* when the claimant relied upon to state that the dismissal was not always fall within the range of reasonable response in the case of gross misconduct and mitigation and other relevant circumstances should be taken into account when deciding on an appropriate sanction.

80.8 *Basildon and Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14* the EAT stated that the two xxx steps to be applied by a Tribunal in determining whether the discrimination arising from disability has occurred were

80.8.1 Did the disability cause, have the consequence of, or result in "something".

80.8.2 Did the employer treat the claimant unfavourably because of that something?

80.9 *Pnaisen v NHS England and another [2016] IRLR170* the EAT summarised the approach to claims for discrimination arising from disability as

80.9.1 The Tribunal must identify whether the claimant was treated unfavourably and by whom.

80.9.2 What cause that treatment (focusing on the reason in the mind of the alleged discriminator) which may include examination of conscious or unconscious thought processes whilst keeping in mind the motive is irrelevant.

80.9.3 The Tribunal must then determine whether that reason was something arising in consequence of the claimant's disability.

80.9.4 The knowledge required is of the disability, not that the something leading to the unfavourable treatment was a consequence of the disability.

80.10 *Baldeh v Churches Housing Association Dudley and District Limited [2019] UKEAT/029/18* where an employer did not know about an employees disability at the time of dismissal but was told about it at the appeal hearing, the dismissal could still be discriminatory under s.15 of the Equality Act 2010.

80.11 *City of York Council v Grosset [2018] Civ 1105* restating that it is not necessary for an employer to be aware that the "something" arises in consequence of the employee's disability to be liable under s.15 if it treats the employee unfavourably because of that something.

80.12 *Asda Stores Limited v Raymond EAT0268/17* a failure to conduct a reasonable investigation into a claimant's disability, which it became aware of during an appeal hearing, rendered the dismissal unfair in that case.

80.13 *Correras v United First Partners Research UKEAT/0266/15* where an expectation for an employee to work long hours, though not a strict requirement, was a PCP.

80.14 *Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UK SC65* where it was held that the words "disadvantage", detriment and unfavourably in the Equality Act were of similar affect.

80.15 *Essop v Home Office (UK Abroad or Agency*), *Naeem v Secretary of State for Justice [2017] UK SC27* where the Supreme Court stated that there was a group of disadvantage was established there is no need to prove a reason why the PCP puts or would put the effective group at a disadvantage.

80.16 Barry v Midland Bank [1999] ICR859 determining that a respondent does not need to show that it had no alternative cause of action when showing that its actions were proportionate, rather it must demonstrate that the measures taken were "reasonably necessary" in order to achieve the legitimate aim or aims.

80.17 But actions will not be considered reasonably necessary if the respondent could have used less discriminatory means to achieve the same objective – *Kutz-Bauer v Freie und Hansestadt Hamburg [2003] IRL 368.*

80.18 *Allonby v Accrington and Rossingdale College and Others [2001] IRL 364* confirming that Courts and Tribunals must carry out a balancing exercise to evaluate whether the business needs relied upon were sufficient to outweigh the impact of the measures in question or the protected generally and on the claimant in particular.

80.19 _Bradley v London School of English and Foreign Language UKEAT/001/18_ stating that a Tribunal would be wrong to focus only on the business needs of the respondent.

80.20 The impact of the PCP on the claimant may be taken into account but proper attention must be paid to whether this is typical of the impact on other people as well (_University of Manchester v Jones [1993] ICR484_).

Conclusions

81. Applying the facts found to the relevant law we have reached the following conclusions.

82. The reason for the claimant’s dismissal was misconduct.

83. On the 7 November 2019 the claimant was approached and advised that he was required to take a “for cause” alcohol test as a result of a “near miss” incident earlier in the day.

84. There had been a delay between the incident and the request to take a test. The incident (a mis-stacked pallet) had occurred at about 2:15 that day but the claimant was not approached until approximately 7:30 as a result of an explained delay in the respondent’s initial inestigation.

85. In its substance abuse misuse policy, the respondent is entitled to test “for cause” in the event of an accident or a near miss and the policy does not set any timescale for so doing.

86. Under the respondent’s disciplinary policy, the refusal to take a test when required to do so is an act of gross misconduct which may result in summary dismissal.

87. The claimant refused to take a test when asked to do so first by Mr Creamby, his Line Manager; then by Miss Rai, the Shift Manager, then when discussing the matter privately with his representative Mr Wishart and then again when they were in further conversation with both Mr Creamby and Miss Rai.

88. The claimant’s reasons for not taking the test were that he was not involved in the near miss and that there had been too long a delay after the alleged incident.

89. The matter was investigated with statements taken from Mr Creamby, Miss Rai and Mr Wishart and thereafter the claimant was interviewed. The claimant confirmed that he refused to take the test despite being warned of the seriousness of his refusal.

90. The investigating officer, Mr Kaluda, considered that the matter should proceed to a disciplinary hearing with the claimant facing a charge of refusing to undertake an alcohol test which was an act of potential gross misconduct.

91. At the disciplinary hearing before Mr Long the claimant accepted that he refused to take the test because in his words, he had not done anything wrong and because of the length of time it had taken to ask him to take the test after the alleged incident.

92. The claimant did not state or imply in any way that his refusal to take the test was because of his anxiety or any other disabling feature.

93. Neither the delay nor the question of whether or not the claimant had been at fault in relation to the alleged incident were reasons, in Mr Long's mind, for refusing to take the test. The claimant and others operate heavy machinery and lifting equipment including forklift trucks and the respondent has the "for cause" testing policy in place as part of a process to ensure the health and safety of colleagues and to maintain a safe working environment.

94. Mr Long concluded that the claimant was guilty of the alleged act of gross misconduct, indeed he admitted so. Mr Long concluded that the claimant did so in full knowledge of the potential consequences of his actions. The reasons why the claimant refused the test, Mr Long concluded, were those which he maintained at the investigation and before him, namely delay and his belief that he had not been involved in the incident.

95. Mr Long considered that the claimant's length of service and previous "clean" disciplinary record were mitigating factors but did not consider them to be sufficient to reduce the appropriate sanction which he deemed to be summary dismissal.

96. In his appeal letter the claimant did not rely on his condition of depression or anxiety as being a reason why he refused the test. Rather he again referred to delay and his not being responsible for the incident in question.

97. The claimant added that he felt "victimised and discriminated against" and so that there were "errors" during the investigation. No details of any alleged acts of discrimination or victimisation were given, and no details of the alleged errors were given.

98. On appeal before Mr Kelly the claimant representative alleged that the claimant was "in shock" because of the delay between the incident and the request and "may not have been thinking straight" but Mr Kelly, based on the fact that the claimant repeated before him the reasons why he did not take the test ("he had not caused the initial incident, did not want to be "stitched up"") did not accept the reason why the claimant was refusing the test was due to shock or "not thinking straight".

99. Mr Kelly again considered the claimant's long service and clean disciplinary record but considered these insufficient reasons to overturn the original decision, particularly as he formed the view based on what the claimant said that even at the appeal stage, he stood by his decision not to take the test for the reasons of non-involvement in the incident and delay.

100. The claimant was dismissed for gross misconduct. He was dismissed following a sufficient investigation (the investigating officer interviewed all people concerned with the matter) particularly so in circumstances where the fact of the claimant's refusal to take the test was not in dispute.

101. The process itself was reasonable throughout. The claimant was represented by a colleague of his own choosing at the time of the incident in question, further represented at both the disciplinary and appeal hearings which were reasonably conducted. Indeed, a further suggestion that dismissal is a foregone conclusion before the hearings, advanced cross-examination and denied – or denial we accept – no criticism was made of the process by the claimant beyond the delay in him being asked to take the test.

102. The decision to dismiss fell within the range of responses open to a reasonable employer.

103. The working environment is a warehouse with heavy lifting machinery and vehicles including forklift trucks. The respondent has a policy in place to ensure, as far as it is able, that employees are not under the influence of alcohol or other substances such as drugs or solvents.

104. This is a safety critical policy. As part of that the respondent, as well as being able to randomly test employees, tests "for cause" for alcohol and/or drugs when there has been an accident or near miss.

105. To refuse to undergo such a test is considered an act of gross misconduct.

106. Mr Long and Mr Kelly each concluded that the claimant was refusing to take the test because of the two repeated grounds (delay and non-involvement in the near miss incident) and for no other reason. They concluded that he did so in full knowledge of the consequences of his actions and further that he continued to do so after a private conversation with a witness he requested to assist him at the time.

107. Each of Mr Long and Mr Kelly considered the claimant's long service and previously clean disciplinary record but considered that these were insufficient to warrant a lower penalty than summary dismissal in the circumstances of the case.

108. We must not substitute our view for the respondents. The question is whether the respondent has acted reasonably in the treating the claimant's conduct as sufficient to amount to a fundamental breach of contract. We conclude that they did.

109. Dismissal fell within the range of reasonable responses open to the employer. The for cause testing for alcohol and other substances is an important part of the respondent's health and safety policies and the claimant, in this case, refused to undertake the test for reasons which the employer did not consider acceptable. Absent a reasonable excuse for not taking the test the sanction of dismissal fell within the range of reasonable responses open to the employer.

110. The claimant's complaints before us included allegations of discrimination.

111. The first allegation was that the claimant was disciplined and dismissed because of something arising from his disability.

112. He said that the thing arising was a substantial impairment of his cognitive functions in relation to his capacity to concentrate and regulate his emotions on a day-to-day basis.

113. This was advanced in the hearing as meaning that the claimant was not capable of making rational decisions on the day when he was asked to take the test.

114. The second allegation was of indirect discrimination. It was said that the PCP (accepted by the respondent as being applied) of requiring people to take a "for cause" test put people that shared the claimant's disability or condition (and the claimant) at a disadvantage as they would be less likely to take a test when required to do so.

115. We deal with the indirect discrimination claim first.

116. The PCP is admitted.

117. No evidence at all was put before us to indicate that persons who shared the claimant's condition would be disadvantaged by the for cause testing policy because they would be less likely to be able to take a test when required to do so.

118. Further, the claimant did not at any time say he was unable to take the test. He chose, deliberately and consciously, to refuse to take the test for two specific reasons – namely, his belief that he was not involved in the incident in question and secondly, because of the delay in asking him to take the test.

119. Those were, we find, the sole reasons for the claimant's refusal. There was no evidence before us and nor did the claimant allege either at the time, in his investigatory hearing, in his disciplinary hearing or in his appeal hearing that he was unable to take the test.

120. In relation to the complaint that the claimant was subjected to unfavourable treatment (dismissed then refusing his appeal) because of something arising from his disability we have concluded as follows.

121. First, the unfavourable treatment is admitted. The claimant was dismissed and his appeal against dismissal was rejected.

122. Second, the thing arising relied upon by the claimant was an impairment of his cognitive functions relating to his capacity to concentrate and regulate his emotions on a day-to-day basis.

123. During the course of the hearing the “thing arising” was expanded to include an inability to make rational decisions when placed under pressure. In particular, him being asked to undertake a test for cause on the 7 November 2019.

124. We have to ask ourselves two questions.

  124.1 Did the disability cause, have the consequence of, or resul in the thing relied upon, and

  124.2 Was there unfavourable treatment because of that thing?

125. The respondent cannot be held liable unless it knew or ought reasonably to have known that the claimant had the disability.

126. We have concluded that the respondent did not know nor ought it reasonably to have known the claimant had a disability.

127. The claimant had suffered sickness absence in 2016/17 because of anxiety and depression during which period the respondent obtained a report from occupational health which set out the claimant’s condition.

128. Whilst the contents of that report indicated triggers for the claimant’s condition there was nothing in it which suggested that his condition was likely to be long-term (i.e. likely to last 12 months or more) or likely to recur.

129. It was in early 2019, two years later, that the claimant suffered another period of absence for the same stated reasons. If this was a “recurrence” is not clear; there was no evidence before the respondent that the episodes were linked nor that further recurrence was likely (in the sense that it could “well happen”). Had the claimant been willing to undertake a further occupational health assessment at the time this might well have been clarified.

130. However, the respondent’s knowledge was hampered because whilst it requested a further report from occupational health the claimant did not wish to attend. The matter was not pursued but if the claimant had cooperated with the respondent the results of that further occupational health report might have resulted in the respondent gaining knowledge of the claimant’s disability.

131. Absent the claimant’s cooperation, however, they were, we find, unable to do so and were not in a position where they ought to have known that the claimant’s condition amounted to a disability within the meaning of the Equality Act.

132. If we are wrong about that, however, and the respondent ought to have known that the claimant was disabled at the relevant time, we do not find that that assists the claimant in his complaint of unfavourable treatment because of something arising from his disability.

133. That is because the claimant did not advance and the respondent – based on the evidence it had could not reasonably have known – the argument that he was dismissed or that his appeal was refused because of any disability.

134. The claimant's case on the thing arising expanded during the hearing before us. As well as the pleaded matters set out in the list of issues (concentration and regulation of emotions on a day-to-day basis) his ability to "process information" and to make "rational decisions" were advanced, the implication being that it was as a result of the claimant's disability that he was acting as he did on the 7 November 2019 when he refused to take the for cause test.

135. There are a number of reasons why we reject this contention.

136. First, the claimant's reasons for not taking the test were repeated several times on the day, then in the investigation meeting, also at the disciplinary hearing and then again at the appeal hearing. They were his belief that he was not involved in any near miss and that there was a delay in asking him to take the test.

137. These were his stated reasons at the time and the reasons he advanced before us. They were the reasons Mr Long and Mr Kelly considered when reaching their decisions.

138. There is no evidence before us that the claimant's condition caused him to be unable to process information on the day. Even if it did, he maintained those reasons set out above for not taking the test throughout the entire process including in his letter of appeal.

139. Those were the reasons which were in the mind of Mr Kelly and before him Mr Long when reaching their decisions. The alleged things arising, and the claimant's disability played no part in their decision making and were not an effective cause of or reason for the treatment in question.

Summary

140. Accordingly, we answer the questions posed in the list of issues as follows

    140.1 The respondent did not know nor was it reasonably to have known of the claimant's disability.

    140.2 The respondent subjected the claimant to unfavourable treatment when he was dismissed and when his appeal against dismissal was refused.

    140.3 The relevant things arising from the claimant's condition were, as found by Employment Judge Warren in the hearing to determine the question of disability, an adverse effect on concentration, memory, motivation and mood; being agitated, irritable or short-tempered and becoming shy and withdrawn. We note that at no time did the claimant allege in his impact statement or before either Mr Long or Mr

Kelly that he was unable to process information or make rational decisions.

140.4 The unfavourable treatment was not because of the things arising. They were because the claimant refused to take the for cause test as a result from his belief that he was not responsible for the near miss incident and because the respondent had in his view delayed, presumably in the claimant's view too long, before requiring him to take the test. If those decisions were made irrationally the claimant did not resile from them when he had time for reflection and he maintained them at all times including before us.

140.5 We need not therefore answer the question of whether such treatment was a proportionate means of achieving a legitimate aim but had we been required to do so we would have found that the aim of treating breaches of and requiring compliance with health and safety and providing a safe working environment to be a legitimate aim and that the treatment was a proportionate means of achieving that given the claimant's refusal to take the test which he continued to seek to justify throughout the process.

140.6 The respondent applied a provision, criteria or practice requiring the for cause testing when then was just cause to do so.

140.7 This did not put persons who shared the claimant's disability at a particular disadvantage (being unable to take a test when asked to do so) and there was no evidence at all before us of such group disadvantage.

140.8 In any event, the claimant did not suffer the disadvantage. He was able to take the test and said he would have done so if he had been asked earlier. His refusal was a conscious decision made on the grounds that he was not involved in the near miss and because of the delay.

140.9 We need not answer the question whether or not the PCP was a proportionate means of achieving a legitimate aim but if we had been required to do so we would have found that the PCP was clearly a proportionate means of achieving the respondent's legitimate aim providing a safe working environment. It was not suggested before us on the claimant's behalf that this was not the case.

141. The claimant's dismissal was for the reason of conduct.

142. The dismissal was fair in particular

142.1 The respondent believed (indeed the claimant admitted) that he was guilty of the conduct alleged (the refusal to take a test).

142.2 The respondent had reasonable grounds to sustain that belief, in particular given the undisputed facts of the matter and the claimant's continued admissions.

142.3 The respondent carried out a sufficient investigation. All persons involved on the day were interviewed and the facts of the matter are not in dispute.

143. The decision to dismiss fail within the range of reasonable responses and was fair within the meaning of s.98(4) of the Employment Rights Act 1996.

144. The issue of an adjustment under the ruling *Polkey* does not apply.

145. The question of mitigation and/or contributory fault do not arise.

146. The claimant committed a fundamental breach of his contract of employment by refusing to take a for cause test without any proper justification. This was deliberate wrongdoing, from which he did not resile at the disciplinary or appeal hearing and indeed not even before us. The claimant's conduct was in flagrant breach of the terms of the substance abuse policy, as he knew, and it was entirely reasonable for the employer to regard that as gross misconduct justifying summary dismissal, indeed it is categorised as such in the respondent's disciplinary policy.

147. For those reasons the claimant's complaints are not well founded and his claim is dismissed.

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Employment Judge Ord

10 August 2022
Sent to the parties on: ………………..

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For the Tribunal Office