Case No: 2207810/21

EMPLOYMENT TRIBUNALS

Claimant: **Mr. S. Turnham**
Respondent: **Openreach Limited**

London Central (CVP) Hearing **12-15 September 2022**
Panel Discussion **16 September 2022**

Employment Judge Goodman
Mr D. Clay
Mr P. Secher

Representation:
Claimant: Ghazaleh Rezaie, counsel
Respondent: Ryan Anderson, counsel

JUDGMENT

1. The claimant was not disabled at the material times; the claims of discrimination made under sections 13, 15 and 20 of the Equality Act 2010 fail.
2. The claimant was unfairly dismissed.
3. The claimant contributed to dismissal. A 20% reduction is made to the compensatory award in consequence.
4. The basic award is £13,200. The compensatory award (after reduction) is £31,567. The two awards have been grossed up to allow for tax payable by the claimant on them. The respondent is ordered to pay the claimant unfair dismissal compensation in the total sum of £48,459.
5. The respondent having agreed to pay the claims of accrued holiday pay and unpaid expenses, those claims are stayed for 14 days, after which the claimant may either withdraw the claims, or apply for a hearing.

REASONS

1. The claimant had been employed by the respondent for 32 years when he was summarily dismissed by the respondent for misconduct in September 2020.

2. He has brought claims for unfair dismissal, for direct discrimination because of

disability, for discrimination because of something arising from disability, and for failing to make reasonable adjustments for disability. There are also claims of unpaid expenses, of unauthorised deductions from wages, (3 days overtime), and finally, a claim of accrued holiday pay under the Working Time Regulations. On closing, the respondent agreed to pay the expenses and holiday pay claims, so these reasons do not discuss them.

3. A list of issues was prepared for the case management hearing on 24 January 2022. This did not record the "something arising" from disability in the claim under section 15 of the Equality Act. At the start of this hearing the claimant identified that it was "the claimant's ability to work within the hours that he is set". The list, amended to incorporate changes at the hearing, appears at the end of these reasons.

4. Disability remains in issue. The tribunal decided not to take this as a preliminary issue because even if the claimant was disabled, there was an issue whether the respondent was aware of it, and little would be gained by hearing the relevant witnesses twice.

5. We also decided to hear evidence on remedy at the same time as liability. Lack of a recording facility on CVP meant that a reasoned decision was better reserved.

Evidence

6. The following witnesses gave evidence to the tribunal in accordance with their written witness statements and answered questions from the parties and the tribunal:
Steven Turnham, the claimant
Alexander (Alex) Tyrrell, technical specialist manager in the chief engineer's team, who managed the claimant, and investigated his conduct.
James (Jim) Bloomfield, senior program manager in MDU, who made the decision to dismiss
David (Dave) Lynch who managed the whole team, who decided the appeal

7. There was an indexed bundle of 366 pages. A few more were added at the start of the hearing, together with an updated schedule of loss,.

8. The tribunal read in on the morning of the first day, but due to counsel's difficulties with a keyboard evidence did not start until following day. The witnesses were examined on days two and three. The parties made oral submissions on day four and the tribunal then reserved judgment.

Findings of Fact

9. The respondent is a wholly owned subsidiary of BT plc. It installs and maintains copper and fibre cables to carry the digital telecommunications network. Much of its current work is focused on installing the cable needed to deliver high speed broadband to domestic and commercial users.

10. The claimant began work in 1988 at the age of 18 after completing a two-year City and Guilds qualification. By the date of dismissal in September 2020 he was in the chief engineer team, based at Shoreditch. This team surveys existing installations to check that the actual equipment on and under the ground conformed to existing plans and records, and then amends the record if there are differences. Once the area had been surveyed, the project moved on to ordering materials to install new

networks. Although formally a chief engineer, grade C3, the claimant was called a 'clerk of works'. The existing plan was maintained on a piece of software called "Orion". Engineers would usually print out the plan from Orion, make notes on the paper printout as they walked the area, then update Orion using a laptop, others carried a tablet to do this.

Disability

11. We set out here our findings and conclusions on the disability issue, before turning to events leading to dismissal.

12. The claimant ascribes the onset of his symptoms of stress, depression, anxiety and panic attacks to the days following a road accident on 17 March 2018 in which his Openreach van was damaged, which led to an altercation with his manager, Steve Trim, who came to his house. This episode, plus concerns about the health of his long-term partner, led him on 11 April 2018 to consult his GP, who certified him as unfit for work due to stress. The claimant continued to be certified as unfit for work at 2 weekly intervals, eventually returning on 9 July 2018. He was not prescribed medication during this period, and he declined an offer of talking therapy. The doctor advised cutting down his alcohol consumption. His return to work was prompted by a meeting with managers Dave Lynch and Steve Trim on 2 July 2018. He had been warned that if his absence continued much longer they would have to consider his future with BT, because of the impact on the service. He was also offered counselling through the employee assistance programme. At that meeting the claimant says, he complained about the bullying and intimidating atmosphere, but understood the pressure to return to work, and did.

13. He said from that date he found it difficult to get to work, often having panic attacks as he left the house, but he did not return to the doctor for any reason from 2 July 2018 – when he had told his doctor he was doing better and cutting down - until nearly a year later. Both for this period, and in his account of how his symptoms affected him later on, we treat the claimant's evidence with caution. It is not suggested that he is dishonest or self-serving, but he has been ill from time to time with related conditions for over 2 years now, and it would be understandable if he confused one earlier period with another, and his evidence was not always consistent. We weighed his evidence together with other contemporary evidence – or lack of it. We concluded that between July 2018 and June 2019 he was not substantially impaired by reason of stress, depression anxiety or panic attacks, because there is no evidence of this other than his own, he did not seek treatment, although an offer had been made, and he was able to go to work and do his job to the satisfaction of his employer.

14. Nearly a year later, on 11 June 2019, he told the doctor he had been off work for a week with stress, and that probably underlying it were "issues at work with a manager who is….. no good with people". A few days later he went to an accident and emergency department with chest pains, but left before a diagnosis could be made. On 17 June 2019 he emailed his managers Steve Trim and Dave Lynch saying that he would be off work sick that week as a result of "my mental health issue", would send in the certificate next day, and that "I will be receiving cognitive behaviour therapy as recommended". However, in evidence to the tribunal he conceded that he did not receive cognitive behaviour therapy then, but he might have googled for some YouTube videos. He gave no account of what videos he had followed or what he had learned from them. The GP's telephone consultation on 25

June 2019 showed him awaiting an assessment call with the Well-being team, and the doctor warned him that would not be the start of treatment. We concluded he jumped from being told he would be assessed by a well-being team to saying he would be receiving CBT. There are no further GP records about stress-related symptoms, although there were consultations about other matters in August and December 2019, until July 2020.

15. He returned to work on 9 July 2019, and on 1 August 2019 met a member of the NHS well-being team. The recorded outcome of the meeting: "is that you feel your needs will be better met through a workshop on anger".He was told that Mind in mid-Herts would contact him shortly. The claimant says he did not *decline* cognitive behaviour therapy, and that an anger management workshop was the assessor's advice. The record shows he was invited to re-refer to the Well-being team for cognitive behaviour therapy, or to self-refer at any time by visiting a website, or asking his GP. He never heard from Mind. The claimant did not follow up the Mind referral, or self-refer, or go back to his GP.

16. He continued at work. He says his symptoms worsened at the time of lockdown in March 2020. This was not mentioned to anyone at work until the first meeting to investigate his conduct in relation to working time on 16 July 2020, the conduct which led to his dismissal. At that meeting, asked why he had not completed surveys, he said he suffered from stress, anxiety and panic attacks, sometimes struggling to leave the house, and that he had had 9 months off sick because of the problem. (We are not sure where this comes from; he was away 3 months in 2018 and just over a month in 2019). Challenged by his then manager Alex Tyrrell, who had taken over in July 2019, that although he knew the claimant had had time off work with stress, when he had met him the claimant always said he was fine. The claimant replied in general terms that mental health was all over the news. He then explained that although he walked the routes, his lack of confidence stopped him clicking the complete button (to insert changes on Orion). He could not speak to his current project manager. He had been absent from work the previous Friday (when his absence from a planned meeting had been noted) because he was having "a dark day". Alex Tyrrell recognised a problem, said he needed more help, and asked if he would accept a referral to Rehab Works, a health service. The claimant said he would like to get the surveys completed, then take a week off work, and then speak to them.

17. The tribunal notes that the behaviour the claimant described in the last few weeks - whether in this meeting, the second investigation meeting or the disciplinary hearing - was very odd, and may well have been features of depression or anxiety: he left the house in the evening or the in small hours, he made out of hours visits to exchanges, because he said he could not work at home when his partner returned from work, but did little or no work there; he once visited an exchange in north London where he had worked some time earlier to check his locker there. We conclude that this is evidence of substantial impairment of normal activities during those weeks.

18. The claimant had an assessment by Rehab Works on 15 August 2020 and two sessions of counselling, before they were cancelled because of his dismissal. Rehab Works wrote to his GP at the end of September, asking the doctor to arrange an appointment to see the claimant for assessment and intervention as appropriate. On 15 August his condition had been assessed as: "moderately severe depression".

19. His symptoms worsened following dismissal. His evidence was that they were so

serious that he was unable to apply for work. Eventually, on 25 November 2020, he went to see his doctor, and was prescribed sertraline, an antidepressant. The doctor recorded that he had felt low for years, but was worse in the last 6 months (that is, since soon after lockdown began), that it got worse during the pandemic, and also after he had lost his job. He was invited to return, but did not do so until 8 April 2021, when he asked for an increased dose, having had an episode of shaking 3 weeks into a new job. The last entry available to the tribunal is on 9 July 2021, when he reported that sertraline did not seem to have helped. From July 2021 he has also been prescribed Propranolol, a beta-blocker, for panic attacks, to be taken as needed. He is currently off sick from his present job as a delivery driver, and during the tribunal hearing was on occasions upset and angry, which we attributed to his illness.

Relevant Law

20. Disability is defined in section 6 of the Equality Act 2010. A person is disabled if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on (his) ability to carry out normal day-to-day activities. Employment tribunals should assess the evidence to make findings on: (1) whether the claimant has an impairment (2) whether the impairment has an adverse effect on his ability to carry out normal day-to-day activities and (3) whether it is substantial, meaning more than trivial - **Aderemi v London and South Eastern Railway Ltd (2013) ICR 591**. These questions are to be decided by the employment tribunal based on all the evidence – **Adeh v British Telecommunications plc (2001) I IRLR 23**, and "it is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant is a physical or mental impairment with the stated effects." – **McNicol v Balfour Beatty Rail Maintenance Ltd (2002) ICR 1498.** Except for very specialised work, work activity can be a normal day-to-day activity –**Banaszczyk v Booker Ltd. (2016) IRLR 273.**

21. The statutory guidance on the meaning of disability says that the term mental or physical impairment must be given its ordinary meaning. The cause does not have to be established, nor must it be the result of an illness. "The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of the physical nature may stem from an underlying mental impairment, and vice versa".

22. The test of disability is a functional one – **Ministry of Defence v Hay (2008) ICR 1247**. It must be assessed as at the time of the discriminatory acts alleged - **All Answers Ltd v W (2021) EWCA Civ 606.** If the tribunal has to assess the likelihood that a condition will last at least 12 months, or recover in that period, the assessment must be made for the time at which the treatment complained of occurred, – **Parnaby v Leicester City Council UKEAT/0025/19.** . If an illness is being treated, the tribunal must look at the deduced effect, without treatment.

Discussion and Conclusion

23. Although in evidence the claimant said his symptoms have lasted all his life, there was no evidence of mental health difficulty before April 2018. Although he was off work for 3 months then, there was no evidence of continued symptoms after his return to work. We note the claimant did not follow up the reference to Mind, or go back to his GP for a referral for treatment, or mention stress-related symptoms when he saw the GP on other matters, for nearly a year. Given the symptoms were a

reaction to a difficulty at work, we concluded that this was an isolated episode of ill health, and not an illness likely to recur.

24. The episode in June 2019 also appears to be a reaction to relationships with the manager and probably to a particular incident. It was relatively short. We concluded that while some people prefer a stoic approach to their illness, the claimant had accepted an offer of assessment for therapy, and told his managers he was going to have CBT.The fact that he did not follow up the opportunity for treatment suggests that his symptoms had resolved, he did not consider he needed therapy, and he was not substantially impaired. If he recalls now that he was, that may be a feature of depression, when life seems always to have been difficult. In our finding, this was not an underlying condition, likely to recur.

25. We concluded there was no evidence of impairment between August 2019 and a period which began a few weeks into national lockdown, probably from April 2020. This fits with what we know of his symptoms and ability at the time, and also fits with his account to the GP at the end of 2020, when he may have had a better grasp of the detail of that year.

26. From about April 2020 the impairment was substantial, as shown by the erratic behaviour which emerged from the conduct investigation. We asked ourselves whether as at the disciplinary investigation which began in mid-July, this was an impairment likely to last more than 12 months (that is, past April 2021). But soon after, he had had the major shock of being dismissed without notice. Had he not been dismissed, we very much doubt that the illness would have continued. Lockdown eased up at the beginning of July 2021, many restrictions eased further from September 2021, with some return to normality, although locked down again just before Christmas 2021. Had he not been dismissed, an informal discussion, or even a formal warning, perhaps accompanied by a transfer to another team, would have seen the episode resolve illness as before, and he would have returned to normal functioning.

27. We conclude that although the claimant was substantially impaired for a period in 2020 and in particular in the weeks leading to his dismissal, it was not a long-term impairment. He was ill, but not disabled.

The Dismissal – Findings of Fact

28. Within the Chief engineers team, it was the custom to leave the more senior team members to keep their own timesheets and claim overtime when worked, and there was no requirement to obtain authority before undertaking overtime. The nature of the work meant that they were often out on site, might have to travel to a particular exchange, and could sometimes work from home, for example inputting changes. Alex Tyrrell, team manager from July 2019, signed off timesheets without checking. Only more junior staff (the jointers and cable layers) had close supervision of their timekeeping. The claimant was contracted to work 36 hours per week over 4 days. He said he “filled out a timesheet as required every day”, but it became clear that during the weeks or months leading up to the start of the investigation in July 2020, this was not the case. Sometimes he “copied over” a timesheet, overtime and all, to the next week, and sometimes he claimed for a day’s overtime when, as he explained, he was adding up odd hours worked on standard working days. It was plain from evidence that in this period at least his timesheets were unreliable, and in fact he had no clear idea of the days or hours he was working.

29. This contrasted with the picture shown in emails from earlier years. In 2018 engineers had been told that the first 45 minutes of travel within the day was their own time and could not be booked to the company. In January 2019 the claimant is shown contacting Steve Trim about moving his day off on his weekly timesheet. In March 2019 he asked about carrying over leave. In May 2019 he reported that he would be spending 4 hours swapping his vehicle at the workshop. In July 2019 he queried whether he should still be getting an inner London weighting allowance when most of the time he was in outer London. In other words, he was in general alive to the detail, and knew that when he worked was important.

30. When Alex Tyrrell learned from the claimant in the first investigation meeting on 16 July that the timesheets bore little resemblance to reality, he emailed the team on 22 July: “from now on I’m going to have to ask you email me before working any schedule days off all weekend days overtime, they will only be authorised if there is a business need for you to come in. If working on at the end of the day to get tasks finished can you please send me a text to confirm. If there is a need to come in on an out of hours job this will also need to be sent to me via email for authorisation”.

31. When giving evidence to the tribunal, Alex Tyrrell said that around March 2020 he had called each member of his team to warn them that Openreach was taking a strict approach to overtime claims – someone in another team had recently been disciplined for this. As this did not feature in his witness statement, or his conduct investigation notes, and not been put to the claimant, we take little heed of this as regards the respondent’s decision making. There was enough circumstantial detail to suggest that it was something that could have happened, and that is all.

32. Early in 2020 the claimant was transferred to a rural build project overseen by Gareth Hazel. The claimant was given an area to survey which covered 6 sub-areas (called PONs). An email from Gareth Hazel to the claimant and his assistant Kenny shows that he wanted the surveying to be completed in time to start a new area and gave the claimant a deadline of 8 May to conclude 3 PONs and 15 May to complete the other three. A further email of 11 May shows 031 uncompleted, and later 04 uncompleted.

33. At a site visit on 7 July a customer asked team members why his broadband upgrade was so delayed, and Dave Lynch followed this up with him on 13 July. He asked Aaron Winter about the detail, and was told that to get the customer onto broadband he would have to be moved to PON 03 but on that and 037 the survey was outstanding, had been for months, and they would have to do it themselves. The surveys were those allocated to the claimant. At this point Dave Lynch emailed Alex Tyrrell:

> “Following on from discussions yesterday this is another issue raised by the team about Steve Turnham. He should have surveyed PONs 3 and 37 but as Aaron has said they have been waiting ”months”. In my last 2 visits to Nazeing Steve Turnham has not been onsite, what has he been doing ?
>
> The team are not happy with him as he is (from their perspective) not pulling his weight.
>
> He has not completed surveys in reasonable timescales that will now have a material impact on the build and customers in Nazeing.
>
> None of this is proved but I am no longer willing to get this feedback without a proper fact finding investigation.

Can you open an HR case and complete the FF as appropriate following the process"

34. Steve Lynch said he had been hearing complaints "for months" about the claimant not pulling his weight, but wanted it to be dealt with "properly", not on the basis of tittle tattle.

35. Alex Tyrrell recorded as the reasons for investigation that it had come to his attention on 13 July that the claimant had not completed any Orion service survey since 11 May, despite being asked to complete by then. This put the whole Nazeing scheme behind schedule, which had a negative commercial impact, and customers were not able to connect in those areas. "It is also incurred additional costs because Steve has not been booking his time to the Nazeing project for the whole of his this." It was also alleged that he had not turned up for work on "several days including 13th 7th 3rd July and 2nd of June 2020", and had recorded overtime on 10 separate days (between 29th of May and 25th of June, with an itemised list totalling 67 hours) and would have to be asked what he was doing on those days.

36. The claimant was asked to meet Alex Tyrrell on 16 July, when he was told that he was being investigated under the company disciplinary policy for not completing set work (Orion surveys) 11 May and 13 July, and that he had not turned up for work on a listed 6 days, and claimed overtime on 10 other days. The claimant replied immediately that he was in poor mental health. He said he had walked some of the PONS several times but for lack of self-confidence had not completed the entries on Orion "even when I know I should". He complained of lack of help, and of Kenny Stone, who "understood complications" being taken away from him. Asked about his absence from a meeting arranged for 13t July, the claimant replied it was a dark day and he did not want to see Katie Milligan (the VIP attending Nazeing) and had instead gone to Hoddesdon exchange to complete some notes on a survey. The claimant was asked why Alex Tyrrell, Dave Lynch and Steve Trim had not seen the claimant at Nazeing, either in the exchange or on the patch, on 7 July. They moved on to a great deal of detail. The claimant said: "I just struggle to get things completed even when I know I should just submit it"- this was, in effect, the answer to several challenges- that he was walking surveys and making notes, but not importing them to Orion. He said he turned up for work every day, but found it hard to focus. There was a discussion about his mental health: the claimant said that he had not always suffered and used to be a confident person until a friend died. Asked directly, he said he usually started work at 8 am, and then stayed until 8 pm. He could not work from home when his partner was there, and so sometimes he went to Hoddesdon rather than Nazeing. He was then challenged about absence from Nazeing when Alex Tyrrell was there on 3 July and 2 June, with regard to 25 June (a day off for which he had claimed 13 hours overtime), he said he always came in on his rostered days off, and "I am not a fool, I would not falsify my timesheets". On the 67 hours overtime, he said "I haven't been as efficient as I could be, nor is hard-working as I normally (am)". He had done ad hoc tasks, such as ordering and picking up stores. Members of the team were excluding him. He could do cabling splicing and exchange work, but he was not being given a chance: "maybe I need a kick up the backside. I don't want to lose my job".

37. Alex Tyrrell decided he wanted to check some of these answers and asked for permission to access the claimant's vehicle tracker records so that he could compare the vehicle location against where the claimant said he was on a particular

day. Once he had them, he fixed another meeting to see the claimant on 31 July. He had made a list of times that the claimant left the house and returned, and some dates when he had not left at all, between 30 May and 15 July. These showed that the claimant was often not leaving the house until late morning, sometimes not until the evening. To take one example, on 2 June, the claimant had booked on his timesheet that he was working from 7:30 am to 5 pm, but the vehicle records show that he left home at 5:19 pm, did not go to the site, and returned home at 11:20 pm. Numerous other entries, matched against the timesheet, show that if the claimant was working when he was out in the van, the hours on the timesheet bore no relation to working time.

38. The claimant was shown the details at the meeting. He was questioned about 14, 13, 5, 4 and 1 July, and 24, 21, 10, 9, June. He said that on 21 June, when he left the house at 4:26 am, returning 4:52 am, that he might have gone to the garage to fill up or to buy teabags. In relation to other dates he agreed that "evidence of what I have done doesn't always match up with what I've actually done", and on others, the days all blurred into one. He got "sidetracked" often. He knew he had not delivered the Orion surveys, but "I was just going around in circles with these".

39. The meeting was cut short when the claimant became upset and went outside. The claimant was expecting a further meeting to conclude. Alex Tyrrell says he saw no point, because the claimant could not be specific about so much of his time.

40. About to go on holiday, Alex Tyrrell prepared a summary of his facts, and recommended that the case was progressed as gross misconduct under the disciplinary procedure. (He wrote this up on 5th of August in preparation to tell him in person, on his return, but the HR Department proceeded to issue disciplinary hearing invitations). In his summary, on the overtime claim between 29 May and 15 July, he believed "some of this time is questionable, and referred to 9 and 25 June in particular. The claimant had said he made up the hours on other days which were not claimed, but had agreed he ought to tell someone if he was on site or working from home "particularly if you are in on overtime". It was not acceptable to copy timesheet over for a week before. He should only be doing overtime if there was a real business need. It looked like he had falsified his timesheet on a number of occasions for his own financial gain, as nothing showed work done in those hours. There also seemed times when the van was being used on unauthorised journeys, which the claimant could not explain. Finally, on 10, 24 and 30 June he did not come to work at all, nor had he told anyone he was working from home, and was unable to supply any evidence of what he was doing.

41. The Respondent had a policy about use of the Openreach vehicle supplied to engineers. It was not for any personal use, because if so it became a taxable benefit. Buying food on the way to work or between jobs was agreed by witnesses to be acceptable if incidental to work use.

42. The claimant was sent an invitation to a disciplinary hearing with Jim Bloomfield. He pointed out that the investigation process was incomplete, and so was asked to meet Alex Tyrrell at the Hoddesdon exchange. As the exchange was unexpectedly busy, the meeting was adjourned to Costa coffee, where Mr Tyrrell told him his decision.

43. On 1 September the claimant was sent an invitation to a disciplinary meeting on 10 September, the charges were falsification of records claiming 67 hours overtime

between 29 May and 15 July, mentioning two dates in particular, unauthorised use of the vehicle on numerous occasions, but in particular 21 June, and unauthorised absence from work on 10, 24, and 30 June.

44. The disciplinary hearing was conducted by Jim Bloomfield, who had no connection with the team, but was of the appropriate management grade. The claimant had been sent the disciplinary policy and procedure, tracker data, timesheets, Gareth Hazel's emails, the two investigation reports. He was not sent a three-page document about expected standards of behaviour, which probably should have been. He was accompanied to the meeting by a CWU trade union representative. The claimant said he had no notice of Alex Tyrrell's investigation and so was unable to remember what he did on particular days. Jim Bloomfield suggested looking at Orion "for something" to say what you did. The claimant was asked how many of his 67 hours were at home or at Nazeing (the area to be surveyed). The claimant suggested he might visit an exchange to write up on the laptop, or dump rubbish. Mr Bloomfield returned to the point that even if Orion surveys took longer than other tasks he was "struggling to see the evidence" of completed surveys. The claimant produced a WhatsApp chat with a colleague on a technical issue one evening. The claimant added that he might enter up odd hours overtime on a rest day he had not in fact worked. Mr Bloomfield said this was the "definite no-no", telling the tribunal that if it was not clear whether or when he was working on a particular day, there would be insurance difficulty if anything happened. He recorded that he needed to check Orion output, and the overtime process. Next they discussed the vehicle – the claimant said he went out in the small hours to avoid crowds during lockdown. He and his partner had their own vehicle for private use. On the unauthorised absence, the claimant pointed out it not been challenged on any of these days. He had not left the house, but he was still working. "I was getting colleagues like Kenny asking what I was doing and even Adam (Northfield) said they have asked me what you are doing. No one rang me. Why haven't they wrongly?… I have had some issues with anxiety and my workload has dropped off but no not one person has rung me". The claimant was asked about the evidence of working on the 3 missing days, and if there was anything else to take into account. The claimant pointed to his long record of good service.

45. Mr Bloomfield followed up on some of the points. He found that an occupational health referral could not be made while the claimant was with rehab works, that the Orion team held some past data but not all, and that the overtime process had not been formalised until 22 July, when they had investigated the high cost per premises at Nazeing. On the further evidence from the claimant, he had sent a WhatsApp on 10 June, he had replied to an email on one of the days, but did not reply to another email on 30 June. The claimant and his representative were sent the meeting notes for comment.

46. Mr Bloomfield upheld the charge of falsification of records relying on the absence of evidence to show the claimant had been working on the 3 missing days, or when he claimed the overtime, and that use of the vehicle outside working hours was considerable. He concluded that the organisation relied heavily on trust, expected employees to carry out the duties with integrity and honesty, and that in his case trust has been broken and working relationship was untenable. The claimant was dismissed by letter of 24 September to which the reasons were attached. His last day of employment was 29 September.

47. He was offered an appeal and he took up the offer. His appeal dated 4 October said on falsification of records, that the total claims reflected the relative work done over the period, and discrepancies were not falsification. In light of his career and current personal circumstances his behaviour would only have warranted an informal warning. On vehicle use, he suffered insomnia and got up at night to buy food for the working day. On the unauthorised absence, he reiterated his practice of walking the areas and then updating Orion, sometimes more than once. On the days in question he had been working from home. No one had challenged him at the time. Lastly he referred to his 32 years of working for the company and having suffered from stress and anxiety "for over 2 years now". He had not been dishonest and "if the real issue is my output… My health issues have had an impact, but as working to try to recover".

48. David Lynch conducted the appeal meeting on 28 October, chosen because he was a manager of appropriate grade. He told the claimant at the meeting that it was in effect a rehearing, at the same time as saying that it was to check a full investigation had been made and to consider new evidence. They went over the reasons to dismiss, and the appeal email. The claimant said he was updating Orion on his laptop when working from home, but that would not show up. The claimant said he suffered stress and anxiety and struggled to complete tasks, he had not sought help. There were no records – the overtime hours were "in my head". If had put hours on this timesheet then they were worked. He had not used his vehicle for unauthorised purposes like going to the airport or a DIY store. There was discussion of the tasks he may have been carrying out on the 3 unauthorised days. The claimant's CWU representative summed up that he relied on 32 years of service, that discipline procedures should be corrective, not punitive, he had done the work and he was "clearly not well, he has made wrong choices that they will not benefit himself".

49. On 11 November Mr Lynch wrote to the claimant to say that he upheld the decision to dismiss. The claimant provided no further evidence of falsification of records. He had been trained on Orion and had Kenny Stone to support him. He knew the rules on use of the vehicle, and there was no further evidence about where he was on the unauthorised absence days. He not completed the surveys in time and his colleagues had to step in to turn it round. He told the tribunal he would not have considered the vehicle use a reason to dismiss, but the evidence on the other charges sufficed.

Unfair Dismissal – Relevant Law

50. Section 98 (1)) of the **Employment Rights Act 1996** provides that in a claim for unfair dismissal it is for the employer to show the reason for dismissal, and that it fell within the categories of potentially fair reasons. In this case the reason for dismissal was conduct, a potentially fair reason. Once the reason shown, by section 98 (4) the tribunal must decide:
"…whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case."

51. In determining the question of fairness for these purposes, it is not for the employment tribunal to substitute its own view; it must consider whether the Respondent's decision fell within a band of reasonable responses open to a reasonable employer in those circumstances - **Iceland Frozen Food v Jones** (**1982) IRLR 439 EAT**, and **Post Office v Foley** and **HSBC v Madden (2000) IRLR 827 CA.** That is so not only in relation to the substantive decision to dismiss but also in respect of the question of procedural failures. Decisions taken in this regard must not be considered not in isolation but as part of the overall process, as was explained by the Smith LJ in the case of **Taylor v OCS Group (2006) ICR 1602 CA:**

> "47 … employment tribunals … should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.
> "48. In saying this, it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) of the Employment Rights Act 1996 requires the employment tribunal to approach its task broadly as an industrial jury. That means that it should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So, for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the employment tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. The dicta of Donaldson LJ in Union of Construction, Allied Trades and Technicians v Brain [1981] ICR 542,550 are worth repetition:
> ""Whether someone acted reasonably is always a pure question of fact… Where parliament has directed a tribunal to have regard to equity -and that, of course, means common fairness and not a particular branch of the law -and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane.""

52. There is particular guidance to employment tribunals on how to assess fairness in a dismissal for conduct. The tribunal must consider whether the employer **"**entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time". As broken down, the tribunal must consider **"**whether there was a genuine belief on the part of the employer that the employee was guilty of the alleged misconduct, whether that belief was reasonably founded as a result of the employer carrying out a reasonable investigation, and whether a reasonable employer would have dismissed the employee for that misconduct. **British Home Stores v Burchell (1978) ICR 303.**

Unfair dismissal – discussion and conclusion

53. The respondent's suspicion arose from the failure to complete the outstanding surveys from early May (when Gareth Hazel set a deadline for completion), which remained outstanding in mid-July, when his colleagues' murmurings about the fact that he was never seen on site reached the attention of Steve Lynch. The respondent's managers have been attacked for incompetence. The split responsibility between Gareth Hazel overseeing the project, and Alex Tyrrell, managing the claimant, could account for that, but the tribunal has to consider what the respondent did about it when they did address the question, even if they might have picked it up earlier. Their suspicion was that the claimant was not at work when he said he was, and was claiming overtime for work he had not done.

54. Looked at overall, we thought the investigation was reasonable. Mr Tyrrell should ideally have taken statements or at any rate consulted by email with Aaron Winter and Gareth Hazel, but taken overall, it was clear from the claimant's own answers to Mr Tyrrell that his timesheets were to say the least unreliable, and his explanations unconvincing. He both said he had done the work, but felt unable to press the complete button on Orion, and that he had not done it, because of support, and because his mental health was poor. They did go to look for the vehicle records the work claimed. If the claimant had been asked for other documentary evidence, it is unlikely he would have produced anything, as he did not produce it to Mr Bloomfield or Mr Lynch, bar one WhatsApp text and one sent email. He told the tribunal he had pages of annotated printouts showing he had walked the route, and did not produce them because they were not time stamped, but it seems to us that producing notes would demonstrate that he had walked the ground. As it was, the respondent was entitled to conclude that the claimant may not even have done this. It was suggested this should have been the 3rd meeting, but the difficulty of getting coherent and straightforward answers from the claimant, who swerved and sidetracked any question, is apparent from the meeting transcript; further questions on other dates are likely to have met with the same blanks.

55. We considered whether it was fair to treat this as a conduct issue at all, given what the claimant said about his mental health. The respondent's witnesses said that they had discussed this with HR, who pointed out that the claimant had said nothing about poor mental health until challenged at the investigation meeting. The tribunal accepts that HR departments are often sceptical, from long experience, of employees who suffer stress only when a grievance is presented against them or they are subject to disciplinary investigation. In our finding, the claimant was ill at the time, but he was well enough to answer the questions he was being asked. It was not suggested that he was capable of making Orion surveys, but that he was claiming for hours and days when there was no work to show for it.

56. On the disciplinary hearing we concluded it was conducted fairly. The claimant was encouraged more than once to produce anything he had to show what he had been doing on particular dates. It was clear that the claimant at times agreed that his overtime record was wholly unreliable, that he had no other record, and could give no clear account of how time was spent.

57. So far, we consider that the respondent had carried out an adequate investigation, and were entitled to conclude that there was misconduct in completing wholly inadequate and misleading timesheets, against the background of surveys that should have been completed weeks earlier, and no convincing explanation of what the claimant had been doing in those weeks.

58. The respondent may not have had a document to say that timesheets should be accurate, and the claimant may not have been required to get a authority to work

overtime, but we consider that any employee understands that if asked to fill in a sheet to declare the hours that they have been working, it should correspond to reality. The early material on travel time indicated to all that the respondent cared that time records were accurate. The claimant's own correspondence with his managers indicates that he kept track of working time. Had the timesheets accurately stated the number of hours worked, but say, on the wrong days, that would be less serious. The respondents were entitled to conclude from the absence of output, and the claimant's lack of convincing explanation, that he had not worked the hours he was contracted to do, let alone the overtime claimed.

59. We were concerned whether any reasonable employer would have dismissed an employee of 32 years good service, when misconduct shown related to a narrow and very recent band of weeks. They had no reason to conclude that false overtime records or unauthorised absence went back any further. If they had a suspicion (and Alex Tyrrell in his evidence said that in late 2019 he thought the claimant was taking a long time to complete surveys) they did not investigate it. It caused us concern that when questioned about the decision to dismiss against this long unblemished record, Mr Bloomfield referred the tribunal to the damaged vehicle in 2018, and said that although it was "unproven" as the claimant had gone sick, and while it "may be a technically clear record", "there may be other things".

60. This brings us to the appeal. On the face of it, David Lynch conducted it fairly. He covered the ground, he encouraged the claimant once again to produce what evidence he could that he had been working. He discussed, he said, the effect of the claimant's ill-health on decision-making. He conceded that he was not "a liar on everything". But it was David Lynch who had initiated an investigation into the claimant's conduct, and he should not have heard the appeal. It cannot confidently be said that he will have had an open mind. It could well be that he knew too much about the gossip of his managers about the claimant. This is of particular concern, not just because a procedural unfairness, but given the decision to dismiss because of aberrant behaviour over a few weeks, weighed against such a long service. We doubted an independent appeal manager, looking just at the facts found, would have let the dismissal stand.

61. We discussed carefully whether a reasonable employer could have dismissed for this misconduct against this record, when others (and ourselves) would not. None of us thought that dismissal was a conclusion a reasonable employer could have reached. The dismissal was unfair.

62. We considered a fair and reasonable employer could have dealt with it by informal discussion, retraining, transfer to another team if there were conflicts with managers, or a cause for therapy. Other reasonable employers would have issued some kind of warning – not least as a signal to other field-based employees not to abuse the system. Dismissal was unfair.

Contribution

63. We were urged to find the claimant contributed to the dismissal by his misconduct even to 100%. We consider there should be some reduction. The claimant may have been behaving erratically at the time, but he knew that what he was doing was wrong. He did not have to claim overtime when he must have known that he was not doing the work. We have reduced the compensatory award by 20% for this. We have not reduced the basic award because of the unfair process.

Remedy

64. Following dismissal, the claimant's health took a turn for the worse and for 2 months or so he was barely able to leave the house. In March he found work for Sitec Infrastructure Services Ltd at £33,725 per annum (compared to his Openreach salary of £43,908). He had difficulty working for a company that built networks for clients rather than having their own, and with methods that he considered not in line with best engineering practice. He suffered anxiety, leading to absence such that his probation period had to be extended from 3 months and he left the job at the end of the extended probation period, on 19 August 2021. He did not look for further work until 30 September 2021, and then applied for jobseekers allowance. He decided to find less demanding work to improve his health and confidence, hoping to return to skilled engineering work eventually. From 27 October 2021 he has worked for Ocado as a customer delivery driver at £17,940 per annum, though currently on sick leave and in receipt of statutory sick pay. He continues to look for work in telecommunications and has had 3 interviews.

Reinstatement

65. He seeks reinstatement by way of remedy for unfair dismissal. When exercising its discretion under section 113 to order reinstatement (or re-engagement):

" the tribunal shall …take into account—

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) the where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement."

66. Looking at the practicability of reinstatement, we noted first of all that the respondent said they could no longer trust him, given his behaviour from May to July 2020, but we considered that this was not a bar. In our finding, it was unfair to dismiss a man with 32 years unblemished service, hitherto trustworthy, on the basis of his behaviour over a few weeks, without exploring whether a change in management, additional training on Orion, and some work on his mental health, would enable him to continue. On the availability of a suitable post, Openreach is a large, national employer, and for the present at any rate there is a substantial amount of work on the high-speed broadband network. We anticipated a suitable senior engineer job could be found for him in his travel to work area- he lives in Hertfordshire. What causes more concern was whether the claimant was going to be able to do the work. Clearly he is still unwell, and requires some time to be fully fit. Although success in his claim may help on the road to recovery, it may take more than a month or two to become fit for full duties. Even if fit, his behaviour in the past suggests that he will find it hard to work with the respondent's managers. In the past he has had difficulty working with Steve Trim, then Alex Tyrrell, he has complained of lack of help from Gareth Hazel and Aaron Winter, blamed his managers for not taking the initiative to contact him, blamed other for not supporting him; there was a real risk, in the light of his past history, that he sooner or later he would again experience resentment and anger working with other Openreach managers, and relapse into depression. Taken overall, we did not think reinstatement was practicable. Had we thought it practicable, we would not have considered it unjust to reinstate him, balancing many years of blameless service against his shortcomings in the lockdown period.

Basic Award

67. The claimant was 51 years old when dismissed, and had been employed for 32 years. He is entitled to one and half weeks pay for 10 years, and a weeks pay for another 10 years, a total of 25 weeks pay, at the then statutory maximum of £528 per week. The basic award is £13,200.

Compensatory Award

68. By section 123 of the Employment Rights Act:

> "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

This is subject to the common law duty to mitigate loss:

> In addition, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

69. We have to consider what loss was sustained in consequence of the dismissal, is attributable to the action taken by the employer. We accept that the claimant was unwell in the weeks following dismissal; everyone finds dismissal difficult and the claimant was vulnerable at the time. He eventually sought treatment, and sought and found work. The respondent suggests that their responsibility for his loss ended when he left Sitec in August 2019, because he did not accept their engineering practices. In our finding, the reason for leaving (or not passing probation, if that is what happened) was his continuing intermittent sickness absence attributable to depression exacerbated by dismissal, or to difficulty adapting to different ways of working after 32 years with one employer and the reference to their engineering practices was but a figleaf for this. Taking less well-paid but regular work as a path to recovery is reasonable.

70. It is difficult to assess how long the loss will extend into the future, as we have only a brief GP report summarising his health to date, and no prognosis. A finding of unfair dismissal and the financial award may improve the claimant's mood. Continuing to work steadily may build his confidence. Telecommunications infrastructure is an industry where continuing work opportunities are likely. These factors give reasons to hold he will be able to resume more demanding work. We assess a further 18 months' salary level commensurate with the respondent's.

71. In assessing loss consequent on dismissal we have to take account of what would have happened had he not been dismissed. The facts we have mentioned in the context of reinstatement may equally well have applied had the employer decided not to dismiss but to issue some kind of warning, or additional training on Orion, or a change to a new team, or extended counselling by rehab works (especially as we note that the claimant has not sought counselling since). The history of anger and resentment at the way managers treated him even before July 2020 suggests that even with some informal advice then, let alone a disciplinary warning, his condition would have been slow to resolve, and he would have continued to find difficulty getting work done, adapting to work with colleagues, and may well have suffered ongoing bouts of depression with sickness absence, and ended up in a performance management or attendance management procedure leading to termination of employment, either by now, the date of assessment, or within 18 months' time, our assessment of ongoing loss consequent on dismissal. Taking that period as a whole, we considered was only 25% chance that he would have continued in Openreach employment at the end of the future loss, and so conclude that we should make a 75% reduction in the overall compensatory award to reflect this.

72. Turning to the figures, the claimant's net weekly pay, including overtime and intermittent allowances was £750.54 per week. In addition the respondent made pension contributions of 3,464 76 per annum. These total £42,909 per annum. From dismissal on 29th of September 2020 to the date of assessment, 15 September 2022, is 102 weeks, £84,167.65.

73. From this we subtract amounts earned working for Sitec, £14,260.32, and Ocado, £15,553 36, plus a further £842.18 pension contributions, totalling 19,797 32. That makes a loss to date of £64,370.33.

74. For the future, a further 18 months loss amounts to £64,363.50, less ongoing mitigation at £343.63 net per week, 78 weeks, totalling £26,959. The net future loss is £37,404.34.

75. Adding past and future loss, plus £400 for loss of statutory rights the total is £121,972.

76. We extract from that 12 weeks' notice pay, £9,102.48, as an award for breach pf contract and reduce the balance (£112,321.52) by 75%, to £28,080.38, which, adding back the notice period leads to a compensatory award of £37,182.86.

77. The schedule of loss includes a claim of £2,400 for loss of preferential rates on a mobile phone and broadband, but we could find no evidence in either of the claimant's two witness statements, or in the bundle, about this, and so do not include it in the compensatory award.

78. We then considered whether that award should be reduced for conduct contributing to the dismissal. We took account of the fact that the claimant knew that timesheets should accurately reflect hours worked, that he sought to blame others for things going wrong, was evasive when challenged, and equivocated on whether he had done the work. Taken overall, the award (again excluding the notice pay) is reduced by 20% for contribution to the outcome. That results in a compensatory award of £22,464.30, plus £9,102.48, a total of £31,567.

Grossing up

79. The amounts awarded will be liable to income tax. Therefore they must be grossed up to ensure that after tax the claimant receives the sums awarded The basic and compensatory awards total £44,767. The amount exceeding £30,000 is liable to tax in the current year under section 62 of the ITEPA 2003. The excess liable to tax is therefore £14,767.

80. The claimant's current net income from working for Ocado is £17,972.77, equivalent to around £21,000 gross. That absorbs the £12,570 personal allowance for the year; all the excess of the unfair dismissal award over £30,000 is taxable at 20%, but does not reach the threshold for 40% tax.

81. Grossing up £14,767 yields a figure of 18,458 75, and adding back the £30,000 not liable to tax means the proper compensation award, taxable in the hands of the claimant, is £48,459.

82. For the avoidance of doubt, the award payable to the claimant does not include the employer national insurance payable in respect of the award at 13.8% under section 401 ITEPA 2003.

Employment Judge Goodman
17/09/2022

JUDGMENT AND REASONS SENT to the PARTIES ON

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. 20/09/2022