



EMPLOYMENT TRIBUNALS

Claimant: Mr S Rhodes

Respondent:

Royal Mail Group Ltd

Heard at Leeds ET and by CVP On: 18, 19, 20 October 2022

Before

Employment Judge Davies

Ms S Sharma

Mr I Taylor

Appearances

For the Claimant:

In person

For the Respondent:

Mrs J Callan (counsel)

RESERVED JUDGMENT

1. The Claimant's complaints of unfair dismissal and unfavourable treatment because of something arising in consequence of disability are not well-founded and are dismissed.

REASONS

Introduction

1. The Claimant is Mr S Rhodes. The Respondent is his former employer, Royal Mail Group Ltd. In these proceedings, Mr Rhodes is complaining that his dismissal was unfair and that it was disability discrimination. He says that it was disability discrimination because the conduct that led to his dismissal was caused by the disability of ADHD.
2. Mr Rhodes represented himself at the hearing. Mrs J Callan represented Royal Mail Group Ltd. We will call them "Royal Mail."
3. One of the questions the Tribunal had to decide is whether Mr Rhodes has ADHD. During the hearing, we assumed that he did and we made adjustments for that. The Judge explained things regularly and made sure that Mr Rhodes made a note of the key points. The Tribunal took regular breaks. The Judge helped Mr Rhodes to ask his questions of the Royal Mail witnesses. We made allowances for the way Mr Rhodes behaved during the hearing.

4. Mr Rhodes had been to two preliminary hearings, one in February 2022 and one in April 2022. At the first preliminary hearing, Mr Rhodes told EJ Bright that he wanted to bring complaints of disability related harassment. EJ Bright ordered him to provide further details of those complaints. He did so. The further details he provided were about allegations of bullying, harassment and unresolved grievances from 2019 and earlier. At the second preliminary hearing, EJ Knowles struck out all of those complaints. He gave his reasons to Mr Rhodes at the preliminary hearing. EJ Knowle's judgment was sent to Mr Rhodes on 14 April 2022.
5. EJ Knowles also made a case management order. That order said Mr Rhodes now had two complaints: (1) that he was unfairly dismissed and (2) that his dismissal was discrimination arising from disability. EJ Knowles set out the issues that the Tribunal would decide at this hearing.
6. At this hearing, Mr Rhodes was still trying to argue about the events from 2019 and earlier. The Judge repeatedly reminded him that the only claims were about his dismissal.
7. This hearing was meant to be a hybrid hearing. Permission was given for two Royal Mail witnesses to attend by video link (CVP). Everybody else was going to come to Leeds Employment Tribunal. Mr Rhodes misunderstood and joined by CVP on day one of the hearing. We carried on with Mrs Callan and Mr Smith in Leeds with the Tribunal panel, and Mr Rhodes, Mrs Ashley and Ms Thomas on CVP that day. Mr Rhodes said that he would prefer to stay on CVP for the rest of the hearing, so we converted it to a full CVP hearing after that.
8. At the start of the hearing, the Judge ensured that Mr Rhodes had a pen and paper to write some notes. She referred him to the page in the Tribunal file where EJ Knowle's list of issues was set out. She went through them again. She explained that these were the questions the Tribunal would be answering. She ensured that he made a note of the page number and told him to read the list again while the Tribunal was reading the witness statements.
9. The Judge also explained to Mr Rhodes that he would need to ask the Royal Mail witnesses questions. He needed to read their statements and find the things they said that he disagreed with. He also needed to find the things that they had missed out. The Judge made sure that Mr Rhodes made a note that he needed to prepare questions for the witnesses and that these were the things he should focus on. The Tribunal then sent everybody away until 2pm, so that the Tribunal could read the witness statements and the documents. The Judge reminded Mr Rhodes to spend the time preparing questions for the Royal Mail witnesses.
10. There was an agreed file of documents at the hearing. Everybody had a copy. When the hearing re-started at 2pm Mr Rhodes gave evidence on his own behalf. The hearing stopped for the day at 4.15pm. The Judge reminded Mr Rhodes again to prepare his questions for the Royal Mail witnesses.
11. When the hearing re-started on day two, Mr Rhodes finished his evidence. Then Mrs R Ashley (Customer Operations Manager), Mr W Smith (Delivery

Manager and Customer Operations Manager) and Ms C Thomas (Independent Case Manager) gave evidence for Royal Mail.

12. Mr Rhodes said more than once that he had not really prepared many questions. The Tribunal considered that Mr Rhodes had had a reasonable chance to prepare his questions. We understood that if he had ADHD this would make it more difficult for him. But we thought that he had been given a reasonable and proportionate chance.

Issues

13. The issues for the Tribunal to decide were.

Unfair dismissal

- 13.1 What was the reason for dismissal? Royal Mail says the reason was conduct. The Tribunal will need to decide whether Royal Mail genuinely believed that Mr Rhodes had committed misconduct.
- 13.2 If the reason was conduct, did Royal Mail act reasonably in all the circumstances in treating that as a sufficient reason to dismiss Mr Rhodes, in particular:
 - 13.2.1 Were there reasonable grounds for its belief;
 - 13.2.2 Were they based on a reasonable investigation;
 - 13.2.3 Did Royal Mail act in a procedurally fair way; and
 - 13.2.4 Was dismissal within the range of reasonable responses?

Discrimination arising from disability

- 13.3 At the time of the events the claim is about, did Mr Rhodes have a disability as defined in the Equality Act 2010? He relies on ADHD (Attention Deficit Hyperactivity Disorder)?
 - 13.3.1 Did he have a mental impairment (ADHD)?
 - 13.3.2 Did it have a substantial adverse effect on his ability to do normal day-to-day activities?
 - 13.3.3 Were the effects long-term? Had they lasted 12 months or were they likely to?
- 13.4 Did the Royal Mail treat Mr Rhodes unfavourably by dismissing him?
- 13.5 Did Mr Rhodes's conduct on 11 May 2021 arise in consequence of his disability?
- 13.6 Did Royal Mail dismiss him because of that conduct?
- 13.7 Was the treatment a proportionate means of achieving a legitimate aim? Royal Mail says the aim was maintaining appropriate standards of behaviour in the workplace. The Tribunal will decide, in particular:
 - 13.7.1 Was dismissing Mr Rhodes an appropriate and reasonably necessary way to achieve the aim?
 - 13.7.2 Could something less discriminatory have been done instead?
 - 13.7.3 How should the needs of Royal Mail and Mr Rhodes be balanced?
- 13.8 Did Royal Mail know or could it reasonably have been expected to know that Mr Rhodes had the disability? From what date?

Findings of fact

Disability

14. Mr Rhodes says that he has been discriminated against because of the disability of ADHD. He has not been diagnosed with ADHD. After his dismissal he was referred for ADHD testing by his GP in September 2021. He still has not been assessed. That is not the end of the matter. The Tribunal does not have to have a clinical diagnosis to find that somebody is disabled.
15. The evidence included a copy of Mr Rhodes's GP records. They showed a history of stress/anxiety/depression going back some years, including about a year off work in 2018/2019. That was around the time Mr Rhodes was pursuing a grievance against Royal Mail. He was also having difficulties in his home life at that time, including his children being removed from him. Stress, anxiety or depression are not the disabilities Mr Rhodes relies on in these proceedings.
16. Mr Rhodes's GP records also show a history of anger related issues and losing control. For example, in 2005 he told his GP that he was stressed, had attacked his partner and wanted anger management help. There was reference to an arrest and not being allowed access to his children. He was having issues trying to get custody of his children and problems at work in 2008. There were references to losing his temper at work in June 2016. There were references to arrests for assault in both September 2019 and August 2021. The second occasion led to a conviction. There were references to cannabis use throughout the records.
17. There was no mention of ADHD until June 2021. It was Mr Rhodes who told his doctor he thought he might have ADHD. His doctor referred him for assessment. Mr Rhodes asked for a letter confirming he had ADHD when he was applying for benefits. On 16 September 2021 his GP wrote that he had spoken to Mr Rhodes in clinic and, "I wonder whether he has elements of ADHD." The GP confirmed that he had referred Mr Rhodes for an assessment.
18. A few months later the GP notes record discussions between Mr Rhodes and the doctor. In March 2022 the GP wrote, "diagnosis: ?ADHD ?Personality disorder."
19. The GP records also show an occasion when Mr Rhodes diagnosed himself with a physical health condition. The doctor examined him and reassured him that all was fine.
20. As well as the GP records, the Tribunal had a statement written by Mr Rhodes. It was written after April 2022, when Mr Rhodes was applying for benefits. Mr Rhodes described the situation when he wrote the statement and mentioned some historical matters.
21. Mr Rhodes's statement included the following:
 - 21.1 Mr Rhodes said he has problems concentrating. He finds it difficult to hold two things in his head at the same time. That happens day-to-day. If he does not do something straight away, or something else comes up,

the first thing does not get done. For example, he forgets he is running a bath and it overflows. He refuses to cook because it overwhelms him and he cannot work in a linear way. He burns food. He buys packaged meals and counter food instead. In his house jobs need doing but they do not get completed.

- 21.2 Mr Rhodes said that reading letters overwhelms him. He reads the same sentence repeatedly skips through and forgets the detail. He ends up not paying his bills because of not reading the letters properly.
 - 21.3 Mr Rhodes said that he does not enjoy food. Eating is just a task that he rushes through.
 - 21.4 Mr Rhodes said that he gets frustrated with life and this has a detrimental effect on his mental health.
 - 21.5 Mr Rhodes says that he struggled at school with bullying. This led to a mental breakdown when he was 17. He wonders now whether he has PTSD. He feels out of place at work and always has done. He feels like he is the butt of jokes.
 - 21.6 Mr Rhodes said that he had had periods of clinical depression and suicidal thoughts. Sometimes he was overwhelmed with life. In 2017/2018 he was clinically depressed. He was "dilapidated and fed up with life." He could not pay his bills and was a lone parent. He found himself shouting at the slightest struggle that came his way. His brother phoned the police and Mr Rhodes was accused of physically assaulting his child. His children were taken away. That led to a complete breakdown. For six months he could only get out of bed, cry, stare at the television, eat a little and go back to bed.
 - 21.7 Mr Rhodes then found Gabor Mate online. He read his book and watched him on YouTube. He started to understand ADHD.
22. On the evidence before us the Tribunal accepted that Mr Rhodes has a long history of mental health issues. We also accepted that he experiences a range of difficulties with normal day-to-day activities. The focus of his witness statement and his oral evidence about ADHD was about difficulties with concentration and organisation. The Tribunal accepted that he has those difficulties as described in his witness statement and set out above. We found that they were ongoing. He had them before, during and after 2021. At times he has also had problems with self-care, going out and other matters. His evidence about those was really linked with periods of depression and the Tribunal found that those difficulties were associated with depression.
 23. The Tribunal has to decide whether Mr Rhodes's problems, in particular with concentration and organisation, are caused by a mental impairment. He says that they are and that the impairment is ADHD. The Tribunal is not in a position to diagnose Mr Rhodes with ADHD. That is a matter for expert medical assessment. Mr Rhodes's belief is not enough. We noted that he has misdiagnosed himself in the past.
 24. The evidence provided to the Tribunal revealed a number of possible causes of Mr Rhodes's difficulties. ADHD is one possible cause. Stress, anxiety, depression and personality disorder are possible causes mentioned in the GP notes. There may be a different explanation. The Tribunal noted that these difficulties with organisation and concentration are long-standing and significant

issues for Mr Rhodes. We found it more likely than not that they are caused by a mental impairment, but it was not possible for us to decide what that impairment is.

25. The Tribunal therefore finds that Mr Rhodes has a mental impairment that has a substantial and long-term effect on his ability to do day-to-day activities such as cooking, reading and running a bath. That means he meets the definition of disability in the Equality Act 2010. He met that definition in 2021. However, the Tribunal was not satisfied on the evidence before us that the mental impairment is ADHD. That does not mean Mr Rhodes does not have ADHD. That must be assessed by a properly qualified professional. It means that the evidence provided to the Tribunal did not justify such a conclusion.
26. To succeed in his disability discrimination claim, Mr Rhodes must show not only that he had the disability but also that his behaviour on 11 May 2021 arose in consequence of it. Before we consider that question, we must make findings about what actually happened.

Background

27. Mr Rhodes started work for Royal Mail in June 2000. He was an Operational Postal Grade (OPG).
28. Royal Mail have a National Conduct Procedure Agreement with the recognised trade unions. They also have a Conduct Policy. Abusive behaviour to colleagues is an example of gross misconduct included in those documents. Summary dismissal is the normal penalty for gross misconduct.
29. Mr Rhodes has a long history of issues at work. There are references in his GP notes to problems at work as far back as 2009/2010. In 2015 he was absent from work and complained about a manager coming to his house. That was not resolved to his satisfaction. In September 2017 he injured himself at work and was unhappy with the way the manager dealt with it. Among other things he says that he was prevented from filling in the accident book. That led to a grievance. Again, matters were not resolved to his satisfaction. He was experiencing problems in his personal life at this time. He blames Royal Mail for the fact that he lost custody of his children. Mrs Ashley was a witness in one of the meetings involved in these events. That is the context for the events the Tribunal considered.

Events leading to dismissal

30. Mr Rhodes's employment seems to have gone relatively smoothly after 2019 until the events in these proceedings.
31. There was an incident at work on 11 May 2021. There is no dispute that Mr Rhodes returned from his duty about an hour and a half before his shift ended. His manager Ms Carnie asked him to deliver surplus parcels before the end of his shift. That led to a heated exchange. Mrs Ashley was in the vicinity. When Mr Rhodes saw her, he raised his voice and behaved inappropriately towards her. He referred to his historic grievances and her presence as a witness at one of the meetings. He was sent home.

32. Mr Wright, Delivery Line Manager, investigated. He obtained written statements from the people present.
33. In her statement, Ms Carnie said that she saw Mr Rhodes at about 13:40hrs. She asked him to go back out with a couple of parcels. He was immediately defensive and raised his voice. He asked why he was the only one and referred to "other lazy bastards sat on their arses." Ms Carnie reminded him that he had been caught waiting at home to finish his duty on previous occasions. She told him the names of other people who had already been sent back out with parcels. Then he became extremely angry and aggressive. He swore at Ms Carnie and told her to do some work instead of looking at PDA actuals. Then he started to shout at Mrs Ashley. Mrs Ashley was not involved and had not said a word. He screamed, was very aggressive and repeatedly swore at her. Ms Carnie went to Mr Whitford's office to get him to step in. Mr Rhodes was screaming at Mrs Ashley, moving quickly towards her and pointing aggressively. He was extremely threatening. He mentioned that he had not seen his children for several months and that it was all Royal Mail's fault. Ms Carnie thought that Mr Rhodes was going to hit Mrs Ashley. Mr Whitford put himself in front of Mr Rhodes and herded him down the corridor. Ms Carnie told Mr Rhodes that if he did not leave she would call the police. Mr Whitford managed to get him out.
34. In her statement, Mrs Ashley said that she heard the conversation between Ms Carnie and Mr Rhodes. Mr Rhodes was arguing about having to go back out. Mrs Ashley did not get involved. She walked through the double doors into the corridor. Then Mr Rhodes opened the double doors and started shouting after her. He referred to her sitting in a corner stirring her spoon and egging him on. She had no idea what he was talking about. They walked into the training room. Mr Rhodes was still shouting at her talking about stirring a spoon. She thought he was referring to a meeting three or four years ago that she had sat in on. Mr Rhodes screamed at her. Ms Carnie stepped between them. When Mr Rhodes carried on, Ms Carnie went to open Mr Whitford's door and he came out. Mr Whitford asked Mr Rhodes to calm down. Mr Rhodes was screaming, saying things had been brushed under the carpet and saying that he had not seen his children for two years. He was raising his fist and pointing at her. He lunged towards her. Mr Whitford stepped between them. He asked Mr Rhodes to leave. He was still screaming and shouting. Ms Carnie said that if he did not leave they would call the police. Mr Whitford walked Mr Rhodes down the corridor. He was still shouting on his way out. Mrs Ashley believed he would have physically attacked her if Mr Whitford had not stepped in his way.
35. In his statement, Mr Whitford said that Ms Carnie came to his office and asked him to have a word with Mr Rhodes who was "having a moment." As he started to reply he heard very loud shouting and screaming. He set off out of the office. Just outside the door to the training room were Mr Rhodes and Mrs Ashley. Mr Rhodes was advancing towards her, shouting and screaming. He had a clenched fist and was pointing his finger towards her face, backwards and forwards. He was very aggressive, red in the face and snarling. Mr Whitford got himself in front of Mrs Ashley before Mr Rhodes could get to her. Mr Whitford told Mr Rhodes to stop and managed to usher him out. He left the building still

shouting. He was out of control. Mr Whitford said that he would not like to think what would have happened if he had not stepped in.

36. Some of the other eyewitnesses confirmed that they had heard parts of what happened. They confirmed that other people had been asked to go back out with parcels. One of those people was Ms Dalingwater. She described Mrs Ashley asking her politely to take some parcels out. Ms Dalingwater said that this was not a problem and she did so. She said that Mr Rhodes was reluctant to do the same.
37. Mr Wright suspended Mr Rhodes on 5 June 2021. He invited Mr Rhodes to a fact-finding meeting. The date was moved so that Mr Rhodes's trade union representative could attend.
38. The fact-finding meeting took place on 15 June 2021. The notes were agreed by Mr Rhodes with some amendments. They show that during the meeting:
 - 38.1 Mr Rhodes said that he had been feeling under pressure for six months. He thought there was a "them and us" culture. He felt like people were trying to get him out again. He said that he had had bouts of depression.
 - 38.2 Mr Rhodes said that he believed he suffered with ADHD. That appears to have been the first mention of such a condition. Mr Rhodes told Mr Wright that he had not yet been diagnosed by his GP. He was due to be tested. This was why he struggled to learn new duties and remember things.
 - 38.3 Mr Rhodes said that on 11 May 2021 he had been moved to a different duty at the start of the day. He was not happy because he was more senior than the person put on his duty. He said that Ms Carnie did not say hello to him. He got back an hour and a half early at the end of his shift. He did not want to do what others did and hide out on delivery to avoid being given extra work. He heard Ms Carnie shout from the office, "take some parcels out" and then do the same to Ms Dalingwater. He did not like the way Ms Carnie spoke to Ms Dalingwater who was older and hard-working. It angered him and he lost it. He had to say something. Ms Carnie raised her voice, bringing up his previous early finish times, so he raised his voice too. Mrs Ashley then "piped up" in the corner. She knew the issues Mr Rhodes had had with not being able to see his children, so he accused her of stirring things in the corner. They sent him to the back room. Ms Carnie said that she was going to call the police. He did not know why. As they got down the corridor, Mr Whitford came out of his office and said that Mr Rhodes had to go home and come back tomorrow. That was about it.
 - 38.4 Mr Rhodes agreed that it was reasonable to ask him to take parcels out. He said that the way they went about it was wrong. He agreed that he did not behave in a professional manner, but he said that it was because he had been given a lack of dignity and respect himself.
 - 38.5 Mr Rhodes said that he was "vocal but not shouting."
 - 38.6 When Mr Wright asked Mr Rhodes if his behaviour was acceptable he answered, "Yes... for sure. How come I can be treated like that... without respect and when I lose it I end up being sent home and then here answering to this?"

- 38.7 When Mr Wright asked Mr Rhodes how he could have dealt with the situation better, Mr Rhodes said that he was dealing with ADHD and learning about himself, but “you lot” need to learn how to deal with mental health better and be more supportive.
- 38.8 Mr Rhodes said that he did not swear or threaten anyone, did not raise his fists and did not gesture in a threatening way.
- 38.9 Mr Rhodes said that he had not been advised to cool off.
39. Mr Wright referred the case to a second line manager, Mr Smith, because the potential penalty was outside his authority. Mr Smith invited Mr Rhodes to a formal conduct meeting on 27 July 2021. He was to face a charge of threatening behaviour towards a colleague. He was provided with copies of all the written statements and other documents in advance. Mr Rhodes was accompanied to the meeting by his trade union representative. The notes of the meeting were agreed. They show that during the meeting:
- 39.1 Mr Smith asked Mr Rhodes if he had had a diagnosis of ADHD yet. Mr Rhodes told him he had not.
- 39.2 Mr Rhodes accepted that he had not acted in a rational way on 11 May 2021. He said that he did try to.
- 39.3 Mr Smith took Mr Rhodes carefully through each witness statement and gave him the chance to comment on them. Mr Rhodes denied being aggressive. He said that he had been pointing by making a spoon gesture like stirring a cup of tea. He had raised his voice at times.
- 39.4 When Mr Smith asked him if he had shouted “bastards” as he left, he said that he could not recall. He was struggling with understanding reality. The witness accounts were a way of tripping him up and making him doubt himself. A little later Mr Rhodes said that he was struggling to identify what was reality because of his ADHD. He said that he could not recall if he swore because of his ADHD.
- 39.5 Mr Smith identified some of the important differences between Mr Rhodes’s version of events and what the other witnesses said. He asked Mr Rhodes about those differences.
- 39.6 Mr Rhodes’s trade union representative said that Mr Rhodes was sorry. Mr Rhodes did not say so. His trade union representative also said that managers had failed to follow the “cooling off” policy.
40. On 17 August 2021 Mr Smith wrote to Mr Rhodes to ask him some questions about ADHD. He asked him how ADHD affected him at work and how it caused him to act in a volatile situation like 11 May 2021. He also asked if there was any way Royal Mail could support him further with the condition and whether there were any workplace adjustments he would like to see if he were to return to work.
41. Mr Rhodes sent a reply. He said that his ADHD had never affected him until high periods of stress. He said that in volatile situations he became “hyper-reactive” because his mind was too busy. He did not suggest any way in which Royal Mail could support him with ADHD. In fact, he said that he was pursuing all channels to help. He did not suggest any adjustments if he were to return to work. Instead, he said that he would just like it to go back to how it was.

42. Mr Smith decided that Mr Rhodes had committed gross misconduct and should be dismissed without notice. He wrote to him with his decision on 27 August 2021. Mr Smith found that Mr Rhodes knew what was expected of him and acknowledged that he had not behaved correctly. He said that Mr Rhodes did not show any remorse or apology. Mr Smith found that a reasonable request was made for Mr Rhodes to deliver surplus parcels. He noted what Mr Rhodes said about ADHD. He did not think and Occupational Health referral should be made because Mr Rhodes was going through the NHS. Mr Smith had looked into the history of events involving Mrs Ashley. He had been told that Mr Rhodes's grievance was not upheld. He concluded that Mr Rhodes still felt resentment towards the managers involved. Mr Rhodes noted that there had not been a cooling off period, but he concluded that that was not appropriate. He thought there was a serious threat to Mrs Ashley. Ms Carnie had to threaten to call the police and Mr Whitford had to physically get between Mr Rhodes and Mrs Ashley. That clearly demonstrated a threat of physical violence. The main objective at the time was to remove Mr Rhodes from the site, and with him that threat. Mr Smith had no doubt that Mr Rhodes displayed verbal abuse to Mrs Ashley with excessive anger. He thought it "all but" led to physical contact, apart from Mr Whitford's intervention. Mr Smith said that he had a responsibility to protect people. An employee should never be on the receiving end of an attack like this. It amounted to gross misconduct. He realised it was an isolated incident for Mr Rhodes but he thought that once was enough. This warranted dismissal on its own merit. Mr Smith said that he had considered all penalties but decided Mr Rhodes should be summarily dismissed. He took into account his clean disciplinary record, length of service and alleged diagnosis of ADHD. However, he decided that the case was too serious to consider a lesser penalty.
43. The Tribunal accepted Mr Smith's evidence that these were his reasons for dismissing Mr Rhodes. In his oral evidence, Mr Smith said that it was not for him to decide whether or not Mr Rhodes had ADHD. He kept an open mind. When he was reaching his decision he knew it was possible that Mr Rhodes had ADHD. He also knew it was possible that ADHD was a cause of Mr Rhodes's behaviour. He said that he looked at all the options and what they could do differently. He noted that Mr Rhodes did not identify any other support that Royal Mail could provide, when he asked him. Even though he knew that ADHD might be a cause of Mr Rhodes's behaviour he decided that the seriousness of that behaviour justified summary dismissal. It was because of the risk going forward. This was a small, reasonable request and triggered this reaction from Mr Rhodes. Mr Smith was worried about the safety and security of his colleagues.
44. On 28 August 2021 Mr Rhodes appealed against his dismissal. He said that mitigating factors had not been fully considered.
45. Ms Thomas was appointed as appeal manager. She invited Mr Rhodes to an appeal hearing on 17 September 2021. That took place by Microsoft Teams. Mr Rhodes was accompanied by a trade union representative. The appeal was a full rehearing. There were agreed notes of the appeal hearing. The notes showed:
- 45.1 Mr Rhodes's trade union representative again made the point that there had been no cooling off period. He pointed out that Mr Rhodes had 21

- years' service with no disciplinary action. He said that no Occupational Health referral had been made about ADHD.
- 45.2 Mr Rhodes again referred to a build-up of events and a bullying and harassment culture. He said that someone on lower seniority had taken his duty on 11 May 2021. Because of ADHD that got him "in a tizz." He got around his duty quickly and then had more parcels "put on me." So did Ms Dalingwater. She was close to retirement and worked hard. She was digging into the bottom of the parcel cage and that triggered him. He called the managers "aliens" as they were always scribbling on computer screens. They brought up a previous issue with him taking a van home and started having a go at him. Mrs Ashley "piped up" and because of previous harassment and not seeing his children for two years he "lost it." He told Mrs Ashley that she was in that meeting with her tea and her spoon.
- 45.3 Mr Rhodes accepted that it was a reasonable request for him to go back out with parcels. He said that he was happy to go and do it. He just wanted to go to the toilet and have a drink. He was "fizzed up." There was no chance to calm down and take a breath. His anxiety and stress kicked in. He said that Mr Whitford got up and charged out of the office and he left.
- 45.4 At one point, Ms Thomas asked him why Ms Carnie said she was going to call the police. He said that he did not know, "Is she applying for a job as a copper?" He agreed that they raised voices but said it was not aggressive. He said that he was "ashamed" of himself.
- 45.5 At one stage Ms Thomas pointed out that Ms Dalingwater had no issue with being asked to take out more parcels. She asked why that triggered Mr Rhodes. He said that it was because of ADHD.
- 45.6 He agreed that his behaviour was not acceptable. He said that he had been "turned into the bully." He said that he had found out he had ADHD and this was why he reacted like this.
- 45.7 Ms Thomas took Mr Rhodes through the different accounts of events.
- 45.8 Mr Rhodes said that he was stressed, frustrated and angry but not violent. He said that the witness statements were not true. He did not shout, "bastards." They were embellishing. They were lying because they thought he was useless and unmanageable and they wanted rid of him.
- 45.9 Mr Rhodes's trade union representative told Ms Thomas that Mr Rhodes was going to get help and ensure it did not happen again.
46. After the appeal hearing Mr Rhodes sent Ms Thomas more information. It was about his previous complaints of harassment and bullying.
47. Ms Thomas re-interviewed all the witnesses. She sent copies of the interview notes to Mr Rhodes. The witnesses gave accounts that were consistent with their previous interviews. Ms Carnie and Mrs Ashley both mentioned and occasion in the past year when Mr Rhodes had had an exchange with another OPG. They had ended up squaring up to each other. Mrs Ashley said she would have serious concerns for her own safety if Mr Rhodes came back.

48. On 26 October 2021 Ms Thomas wrote to Mr Rhodes with the outcome of his appeal. She upheld the decision that he should be summarily dismissed for gross misconduct. Her reasons included the following:
- 48.1 Ms Thomas noted that Mr Rhodes only went to the doctor about ADHD after he had been dismissed. She did not think that Occupational Health were there to substitute for an employee's own doctor. She thought that there was no indication that an Occupational Health referral was needed before Mr Rhodes's dismissal. Anyway, she concluded that whilst Mr Rhodes might have ADHD, they could not lower standards or condone such behaviour towards a colleague to compensate for such a condition. She did not believe that ADHD would sufficiently mitigate clearly inappropriate behaviour. Mr Rhodes had been threatening and abusive. She believed he would have physically attacked Mrs Ashley if Mr Whitford had not stood between them.
- 48.2 Ms Thomas concluded that Mr Rhodes behaved the way he did because he did not want to go out with extra parcels. Ms Dalingwater had confirmed that there was no issue at all with her going out, or with the way she was asked. She said that Mr Rhodes was reluctant to deliver his parcels. Ms Thomas thought that Mr Rhodes had tried to justify his behaviour by saying it was because of how Ms Dalingwater was spoken to when there was nothing untoward in that. It was just because he did not want to go back out. Ms Thomas noted that Mr Rhodes said he was in a "tizz" because his duty was swapped that morning, he had a lot more to do and was behind everyone else. But she said that it turned out he returned with plenty of time. Just because Mr Rhodes was able to complete his duty quicker than his colleagues did not excuse him from doing more work in duty time.
- 48.3 Ms Thomas said that it was clear Mr Rhodes was not able to accept previous decisions about past issues. He continued to mention them when they were of no relevance to the events of 11 May 2021.
- 48.4 Ms Thomas concluded that there was no opportunity to allow Mr Rhodes the 10 minute cooling off period because he continued to shout and scream. The onus was on getting him out of the building to protect him and others.
- 48.5 Ms Thomas found that Mr Rhodes had clearly shown threatening behaviour towards his colleagues. Even at the appeal hearing he had failed to acknowledge the impact or take ownership.
- 48.6 Mr Thomas had no confidence that applying a lower penalty would have the desired result or encourage Mr Rhodes to change his behaviours. If given further instructions he did not want to carry out she believed he would show further aggression.
- 48.7 Ms Thomas concluded that Mr Rhodes had committed gross misconduct. She considered a lesser penalty but decided that summary dismissal was appropriate.
49. The Tribunal accepted Ms Thomas's evidence that these were her reasons for dismissing Mr Rhodes's appeal against dismissal.

Additional findings of fact relevant to disability discrimination

50. For the disability discrimination complaint only, the Tribunal has to decide what actually happened on 11 May 2021. We found that Mr Rhodes behaved as described in the statements written by the various witnesses at the time and in Mrs Ashley's evidence to the Tribunal.
51. We found that Mr Rhodes started by raising his voice to Ms Carnie because he had been asked to go out and deliver more parcels. It was nothing to do with how Ms Dalingwater had been treated. His account of what was said to her changed and her own account was that there was no issue. Mr Rhodes was using this as an excuse. He was unhappy because he felt he had arrived back "too soon" which meant that he ended up having to do more work. He had an argument with Ms Carnie about it. When he spotted Mrs Ashley he lost control completely and started shouting at her about past issues. She had walked through the double doors into the corridor and he opened them to start shouting after her. She turned back and Mr Rhodes and Ms Carnie followed her down the corridor. They went into the training room. Once in the training room Mr Rhodes shouted and swore at Mrs Ashley. He was angry, out of control and pointing at her. Mr Whitford came out when Ms Carnie went to get him. Mr Rhodes was screaming by this point. Mr Whitford had to get between Mr Rhodes and Mrs Ashley for fear that Mr Rhodes would physically attack her. Mr Whitford herded Mr Rhodes out of the building. Ms Carnie told him that she would call the police if he didn't leave. He left, still shouting and swearing.
52. The Tribunal found that this happened based on the broadly consistent accounts of all the witnesses written at the time and Mrs Ashley's evidence to the Tribunal. By contrast, Mr Rhodes's accounts at the time were differing and contradictory. Perhaps more importantly, when he was cross-examined at the Tribunal, Mr Rhodes made a number of admissions. He accepted that he "had a go" at Ms Carnie. He said that he "genuinely regretted" what he did to Mrs Ashley. He admitted that he "lost it", "was angry", and "was shouting." He said more than once, "I scare myself when I'm angry and my words are terrible." He agreed that it was a "verbal attack" on Mrs Ashley. In those circumstances, although he denied being threatening or swearing, the Tribunal found that he did behave that way. We found that he was pointing his finger aggressively towards Mrs Ashley, not just making a spoon stirring gesture.
53. That brings us to the question whether Mr Rhodes's behaviour arose in consequence of his disability. We have explained above our conclusion that he did have a mental impairment causing a disability, but that we could not be satisfied that the impairment was ADHD. We concluded that he had a mental impairment that affected his concentration and organisation, not one that caused him to lose control, shout or act aggressively. We therefore had to decide at this stage whether such behaviour did arise in consequence of his disability.
54. On the evidence before the Tribunal there were a number of possible causes of Mr Rhodes's behaviour. There was no medical evidence supporting the suggestion that a mental impairment caused him to lose control, shout and act in an aggressive way. The only evidence about that was Mr Rhodes's own

assertion that it was because of ADHD. As the findings of fact above show, he attributed all sorts of things to “ADHD” at different times. Those included not only problems with organisation and concentration, but getting “in a tizz” because his duty was changed, not being able to remember whether or not he swore, and struggling to identify what was reality. As we have mentioned, the medical evidence shows a long history of anger management type issues and allegations of physical violence. The explanation for such behaviour might be a mental health issue – ADHD or some other impairment. But it might be a different explanation such as cannabis use or simply Mr Rhodes’s personality. The state of the evidence did not enable the Tribunal to find that Mr Rhodes’s behaviour on 11 May 2021 arose in consequence of his disability.

Legal principles

Disability discrimination

55. Claims of disability discrimination are governed by the Equality Act 2010. The Equality and Human Rights Commission’s Code of Practice on Employment is relevant to discrimination claims and the Tribunal considered its provisions.
56. Disability is defined in s 6 and schedule 1 of the Equality Act 2010.
57. Under s 6, a person has a disability if he has a mental impairment that has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. Section 6 is supplemented by Guidance made by the Secretary of State called “Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)”. The Tribunal is obliged to take the Guidance into account.
58. The EAT also gave guidance about how to approach the definition of disability in a case called *Goodwin v Patent Office* [1999] ICR 302. The Tribunal considered that case. We also noted that it is not always essential to identify a specific ‘impairment’ if the existence of one can be established from the evidence of an adverse effect on the claimant’s abilities: see *J v DLA Piper UK LLP* [2010] ICR 1052. However, if the claimant is relying more than one condition and it is not clear which one caused the symptoms or effects, the Tribunal must make clear findings about the nature of the disability and which symptoms were attributable to it: *Morgan Stanley International v Posavec* EAT 0209/13.
59. Discrimination arising from disability is governed by s 15 Equality Act 2010. An employer must not treat an employee unfavourably because of something arising in consequence of their disability. There are two elements. First, there must be something arising in consequence of the disability; secondly, the unfavourable treatment must be because of that something. The EHRC Code gives examples of things that may arise in consequence of disability. Losing one’s temper because of pain caused by cancer is one example. It is clear that “misconduct” might be something that arises in consequence of a disability. The Tribunal has to decide about that on the evidence in each particular case: see *Pnaiser v NHS England* [2016] IRLR 170.

60. The unfavourable treatment will be “because of” the something, if the something is a significant influence on the unfavourable treatment.
61. It is a defence for the employer to show that the treatment is a proportionate means of achieving a legitimate aim. The employer must show that it has a legitimate aim, and that the means of achieving it are both appropriate and reasonably necessary. Consideration should be given to whether there is non-discriminatory alternative. A balance must be struck between the discriminatory effect and the need for the treatment. The EHRC Code advises that a legitimate aim is one that is legal, not itself discriminatory, and one that represents a real, objective consideration.

Unfair dismissal

62. So far as unfair dismissal is concerned, the right not to be unfairly dismissed is set out in s 94 of the Employment Rights Act 1996. Under s 98 the employer must show the reason for dismissal and that it is a potentially fair one, which includes a reason relating to the employee’s conduct.
63. If the employer shows that the dismissal is for a potentially fair reason, the Tribunal must then decide whether in the circumstances the employer acted reasonably in treating it as a sufficient reason to dismiss. Reasonableness is assessed by reference to the range of reasonable responses: the Tribunal must not substitute its own view, it must decide whether a reasonable employer might have acted as this employer did.
64. It is well-established that in a misconduct dismissal the Tribunal must decide: did the employer have a genuine belief in misconduct; was that belief based on reasonable grounds; and when the belief was formed had the employer carried out a reasonable investigation: see *British Home Stores Ltd v Burchell* [1980] ICR 303.
65. The question for the Tribunal is always whether dismissal was within the range of reasonable responses open to the employer. That applies to all aspects of the decision to dismiss including the procedure followed: see *Sainsbury’s Supermarkets v Hitt* [2003] IRLR 23.
66. The ACAS Code of Practice on Disciplinary and Grievance Procedures is also relevant.

Application of the law to the facts

67. The Tribunal’s detailed findings of fact are set out above. We can deal with the issues much more briefly, because many of them turn on the findings of fact.

Unfair dismissal

68. We start with the unfair dismissal complaint. We found that the reason Mr Rhodes was dismissed was conduct. Mr Smith genuinely believed that he had committed misconduct in the way he behaved on 11 May 2021. Ms Thomas agreed when she dealt with the appeal. At times Mr Rhodes seemed to suggest that Royal Mail were out to get him because they thought he was “useless” or

“unmanageable.” There was absolutely no evidence to support that. The Tribunal had no doubt that Mr Smith and Ms Thomas believed Mr Rhodes’s behaviour on 11 May 2021 was very serious and that that was why he was dismissed.

69. The Tribunal found that Royal Mail acted reasonably in all the circumstances in dismissing Mr Rhodes for misconduct. Dismissal was within the range of reasonable responses.
70. As the findings of fact above show, Royal Mail followed a fair process, with an investigation, disciplinary hearing and appeal. Mr Rhodes saw all the evidence and had the chance to comment on it. He was assisted by his trade union throughout. Mr Smith took Mr Rhodes through all the evidence and asked him about it. He had every chance to give his own side of the story and point out any flaws or inconsistencies in what the witnesses said. His appeal was dealt with as a full re-hearing, giving him a second chance to put his version of events and explain why he should not be dismissed.
71. There were reasonable grounds for Mr Smith and Ms Thomas to conclude that Mr Rhodes had committed misconduct. There were minor differences of detail in some of the witnesses’ accounts, but they were essentially similar and consistent. Mr Rhodes gave a different version of events from everyone else, and his accounts changed sometimes too. For example, he began by saying that he was annoyed because Ms Carnie shouted at Ms Dalingwater to take some parcels out, then changed that to say that he was annoyed to find Ms Dalingwater bending into the crate to get parcels out. It was reasonable for Mr Smith and Ms Thomas to prefer the account given by Ms Carnie, Mrs Ashley, Mr Whitford and others, to Mr Rhodes’s account.
72. The Tribunal found that dismissing Mr Rhodes was within the range of reasonable responses. He did have long service with a clean disciplinary record, but it was reasonable for them to conclude that he should be dismissed in any event because his conduct was so serious and there was a risk that he might do the same again. Mr Smith reasonably concluded that this was a serious incident with a real risk of physical violence, and that Mr Rhodes had not shown remorse or accountability to reassure him that it would not happen again. He expressly considered Mr Rhodes’s long service, but decided that it did not outweigh the risk to Royal Mail colleagues.
73. Mr Smith expressly considered what Mr Rhodes said about ADHD. He asked Mr Rhodes the right questions about that: how did ADHD make him behave in situations like this, and was there anything that could be done differently if he came back to work. Mr Rhodes told him that he became “hyper reactive” and that there was not anything by way of adjustments. Mr Smith gave Mr Rhodes the benefit of the doubt. He realised that he might have ADHD and that ADHD might have been behind his behaviour. However, he decided that it was still necessary to dismiss him anyway. That was because of the seriousness of the conduct and the risk that it would happen again, especially if there were no other steps that could be taken. Ms Thomas took the same approach. The Tribunal found that their approach to this was reasonable. It was also reasonable not to refer Mr Rhodes to Occupational Health first. Mr Smith

reasonably decided that assessing and diagnosing Mr Rhodes was a matter for the NHS. Mr Rhodes himself had said that he was pursuing all channels for help.

74. Mr Smith and Ms Thomas also expressly considered what Mr Rhodes said about not being offered a cooling off period. Mr Smith concluded that it was not appropriate because there was a threat of physical violence and the focus was on getting Mr Rhodes off site to remove that threat. Ms Thomas agreed. The Tribunal found that their approach was reasonable.
75. Mr Smith and Ms Thomas looked into what Mr Rhodes was saying about his historic grievances, but concluded that it was not relevant and did not justify his behaviour on 11 May 2021. The Tribunal found that their approach was reasonable. The disciplinary process was not about what had happened between Mr Rhodes and his managers in the past. It was about what they found to be serious gross misconduct by Mr Rhodes on 11 May 2021. It was reasonable for them to conclude that whatever had happened at least 18 months ago did not explain or justify Mr Rhodes shouting, screaming and swearing at Mrs Ashley and putting her in fear of physical violence.
76. Therefore, Mr Rhodes was not unfairly dismissed.

Disability discrimination

77. The Tribunal has dealt above with the question whether Mr Rhodes was disabled. We have explained why we were satisfied from his evidence about his problems with organisation and concentration that he had a mental impairment that had a substantial adverse effect on his ability to carry out normal day-to-day activities. We also explained that we could not be satisfied that the mental impairment was ADHD. ADHD was the specific disability Mr Rhodes relied on in these proceedings. However, the Tribunal gave him the benefit of the doubt by approaching his disability discrimination complaint on the basis that he was disabled because of an undetermined mental impairment, that might or might not be ADHD.
78. We have also explained above why we were not satisfied on the evidence that Mr Rhodes's behaviour on 11 May 2021 arose in consequence of that disability. If his behaviour did not arise in consequence of his disability, this part of his claim cannot succeed.
79. However, the Tribunal went on to consider whether his dismissal would have been justified in any event, if his behaviour had arisen in consequence of his disability. We concluded that if Mr Rhodes did have ADHD and if his behaviour on 11 May 2021 arose in consequence of that, dismissing him would still have been a proportionate means of achieving a legitimate aim.
80. Maintaining appropriate standards of behaviour in the workplace is a legitimate aim, particularly where the behaviour in question is abusive and there is a fear of physical violence. The question is therefore whether dismissing Mr Rhodes was an appropriate and reasonably necessary way of maintaining appropriate standards of behaviour in the workplace. The Tribunal found that it was. No less discriminatory step short of dismissal was identified. Any step short of dismissal

would have kept Mr Rhodes in the workplace with a risk that he would behave the same way again if faced with a reasonable request that he disagreed with. He had a clean disciplinary record, but there was evidence of him having an altercation and squaring up to another OPG within the previous twelve months. No adjustments or actions to prevent such behaviour were identified. Dismissal of course had a serious impact on Mr Rhodes, but that was outweighed by the risk that he would subject another colleague to such abusive behaviour, or actual physical violence, in the future.

81. Therefore, the complaint of disability discrimination does not succeed.

**Employment Judge Davies
20 October 2022**