CE

EMPLOYMENT TRIBUNALS

Claimant: **Mr S Dodd**

Respondent: **Explore Transport Ltd**

Heard at: **East London Hearing Centre (by CVP)**

On: **9 and 10 March 2022**

Before: **Employment Judge Jones**
Members: **Ms P Alford**
Mr J Webb

Representation
Claimant: Ms L Redman (Counsel)
Respondent: Mr J Wyeth (Counsel)

RESERVED JUDGMENT

The claim of disability discrimination fails. The claim is dismissed.

REASONS

1. This was a complaint of discrimination arising from disability under section 15 of the Equality Act and a failure to make reasonable adjustments under section 20 and 22 of the same Act. The list of issues also contained a complaint under section 19 of indirect discrimination but that complaint was withdrawn at the start of the hearing.

2. The Tribunal will refer to the agreed list of issues in the 'applying law to facts' section of this judgment.

3. The tribunal had the following evidence.

Evidence

4. An agreed bundle of documents. Witness statements from the claimant and from Mr Richard Jenkins, the claimant's line manager and the respondent's Transport Depot Controller. Mr Jenkins made the decision to terminate the claimant's contract of employment.

5. The Tribunal make the following findings of fact from the evidence presented to us in the hearing. The tribunal has not made findings of fact on every piece of evidence but only on those matters which were relevant to the issues in the case.

6. The Tribunal apologises to the parties for the delay in the promulgation of this judgment and reasons. This was due to pressure of work on the judge arising from the pandemic and the changes in the Tribunal work which happened as a result.

Findings of fact

7. The respondent accepted that the claimant has Type II Diabetes and that he is a disabled person for the purposes of the Equality Act 2010. The claimant was diagnosed with Diabetes in 2004. We had copies of his GP medical records and his disability impact statement in the bundle of documents.

8. The claimant is an experienced LGV driver, who was employed by the respondent following his interview on the 23 January 2020, with Mr Jenkins and with Amy Doona, the respondent's Head of HR.

9. It was not put to Mr Jenkins during the hearing that the claimant told him at interview that he was a diabetic. We find that he did not tell Mr Jenkins and Ms Doona about his diabetes at interview. We also find that the claimant did not disclose his diabetes in the medical questionnaire that he completed prior to starting his employment and returned to Optima Health; who at that time were conducting pre-employment health checks for the respondent. The respondent was not sent a copy of the Optima Health form.

10. The respondent was sent a copy of the pre-placement fitness report, conducted by Optima Health. The health assessor checked *'no'* in answer to the question of whether there were any health issues identified that may

impact on certain work activities/workplace exposures. The claimant's diabetes was not recorded anywhere on this assessment form. We find that if he had disclosed his diabetes to Optima Health, it would have been on the form as there would have been no reason for them not to disclose it. It is also highly unlikely that the claimant had a telephone conversation with Optima Health about a week after he began his employment in which they discussed his diabetes and the medication that he was on. We find that Optima Health would have told the respondent about the claimant's diabetes if they had been aware of it.

11. The claimant completed an equal opportunities' monitoring form in which he ticked the box marked '*no'* in response to a question asking whether he had any disabilities.

12. In late January/early February, in general conversation, the claimant informed Mr Jenkins that he had Type II Diabetes. We find it likely that Mr Jenkins' response was to ask the claimant if he was okay. He also asked the claimant if he needed anything from the respondent in terms of help and assistance. The claimant stated that he did not need any assistance.

13. We find that the claimant was one of a few diabetic drivers employed by the respondent at the time. The respondent made provision for its drivers with diabetes to have time off to attend their medical reviews and appointments. We heard about the Cascade system on which copies of their appointment letters and notes were stored. At least 2 of those drivers were under Mr Jenkins' direct line management and he allowed them to have time off to attend appointments.

14. We find that Mr Jenkins had other drivers under his line management who had disabilities or other health conditions, for whom he also made adjustments. We heard about one driver who returned to work after knee replacement surgery and for whom adjustments were made to allow him to have physiotherapy for his knee on his return to work. Mr Jenkins also told us about another driver who suffers from sleep apnoea, who disclosed this to the respondent and for whom Mr Jenkins also made appropriate adjustments.

15. The claimant had another conversation with Mr Jenkins about his diabetes in March 2020, when he asked for time off to attend a medical appointment. The respondent asked to see the appointment letter and once the claimant provided a copy of it, he was given time off to attend the appointment.

16. The claimant's work was called '*tramping'* which meant that he was often driving overnight and frequently over long distances. That was the position

that the claimant applied for. The claimant's cab was kitted out with a bed, fridge and cooking facilities. It also had curtains which could be closed, if he needed to sleep there or otherwise needed privacy. The claimant confirmed in evidence that some drivers have toilet facilities in their cab. He told us that he chose not to get those facilities installed in his cab because he did not want to have to deal with the smell.

17. The claimant was an experienced LGV driver. However, the respondent does not allow newly employed drivers to start work until they had been through the internal induction process. The claimant went through this process. The induction was carried out over a period of 5 days. Part of the induction was for the new driver to be mentored by another employed experienced driver who would have accompanied him on his journeys over a couple of days. Mr Jenkins' evidence was that the respondent wanted to ensure that drivers were safe before they were allowed to drive for the company and that during their employment, it was the company's job to keep drivers '*safe, legal and commercial'*. It was stressed to drivers that if there were any issues that came up while they are out on a job, they should telephone their line manager to ask for assistance. If something happened, they were to take a photograph on the phone and send it to their line manager, in addition to having a conversation. Like all of their drivers, the claimant was provided with a mobile phone by the respondent, with credit so that there would be no obstacle to him calling, if necessary.

18. The respondent would frequently arrange 'toolbox talks' for its drivers in which they would provide information about aspects of the work which drivers needed to know, such as safe winter driving. The respondent has a company app called the Drivers Handbook, but it was not clear to the Tribunal whether it covered comfort/toilet breaks.

19. The respondent has a SNAP Account. This is membership of a comprehensive network of Truck Park and Truck Wash locations throughout the UK and Europe. The respondent gives each driver a card, which allows them to access the facilities at the Truck Park, including refreshments and toilet facilities. There is a network of these Truck Parks across the UK and Europe. The respondent did not want its drivers to have to stop in motorway laybys to urinate as this would be dangerous.

20. The claimant evidence was that he had previously stopped in a layby to urinate and on occasion, he had come off the hard shoulder to do so.

21. On 28 April 2020, a few weeks into the national lockdown to protect the public from coronavirus Covid-19, the claimant collected a cabin from Worksop to drive to the yard at Select Plant Hire in Wincham. Select is one

of the respondent's clients. The tachograph readings provided by the respondent for 28 April shows that on the way to Wincham, the claimant stopped at Woodhead. He took a 45-minute break in a layby near Woodhead and then drove for 48 minutes to Wincham.

22. There is a dispute between the parties about what happened when the claimant arrived at the yard at Select in Wincham. This is a depot. It was agreed between the parties that on arrival at the Select Yard, the claimant was in a queue of lorries waiting for their cargo to be unloaded. The cargo the claimant was carrying was in a container/cabin on the back of the lorry. Once it was the claimant's turn to be unloaded, he would drive further into the yard and a crane would pick the container off the back of the truck.

23. We find that when the claimant arrived at the yard, he was, as he described it, '*busting for a wee'*. Nevertheless, he sat in his cab for 20 minutes. There were at least 2 trucks ahead of him waiting to have their containers taken off them. During those 20 minutes, the claimant did not ask another driver if they knew where the toilets were, did not speak to staff at Select to ask them for the location of toilets and did not make use of the toilet facilities at Select. The queue was not moving. The claimant's live evidence was that from where he was parked, he could see that the crane driver was on a break and that other drivers and staff from Select were milling about the yard. This was the second time that the claimant had been to the yard at Select Plant Hire. At the time, Select had installed additional toilet facilities in the yard for the use of drivers as there was increased concern over hygiene and handwashing because of the threat of infection from Covid-19. The claimant also had a bottle of water with him in his cab.

24. We heard evidence that, if they are unable to access any toilet facilities, long-distance LGV drivers would frequently use empty water bottles for urination. The claimant agreed that this was what would happen with other drivers in his profession but stated that he did not feel comfortable doing this as he was worried about spillage into the cab and the smell that might result from such spillage.

25. Having waited 20 minutes, the claimant stepped out of the cab and proceeded to urinate in the open yard, in public. He was seen doing this, either on CCTV or in person by an employee of Select, Steve Griffiths. Mr Griffiths shouted at the claimant and confronted him about what he had just seen him do.

26. After his exchange of words with Mr Griffiths, the claimant telephoned the respondent and spoke to Mr Jenkins and reported that he had been '*caught'* urinating in the yard at Select. He told Mr Jenkins that he was a diabetic

and when he has to go, he has to go. He also told him that a man had come up to him and shouted at him for doing it and that he offered to wash it away with water.

27. On the same day, Mr Griffiths contacted the respondent to complain about what happened. He sent an email to the respondent which was in the hearing bundle. In the email he referred to the *'unacceptable behaviour'* of one of the respondent's drivers at the Wincham depot. He stated that he witnessed the driver urinating in the yard alongside his trailer. He stated that *'I hope you understand that the concern I have about this action not just on a professional level and how it looks but also one of general hygiene as even when confronted the driver didn't wash his hands, let alone deal with the remains of his actions!'* He ended the letter by asking the respondent to inform its drivers that this was unacceptable in that depot and would not be tolerated.

28. The respondent's Head of People Operations, Amy Dood wrote to Mr Jenkins, attaching Mr Griffiths' email. In the accompanying email Ms Dood instructed Mr Jenkins to conduct an investigation into the incident. She also stated that this was *'appalling'* for the respondent's reputation and that she did not '*believe the respondent had any place for a driver with this behaviour in its business*'.

29. On the following day, 29 April, Mr Jenkins began his investigation. He spoke to the claimant. The claimant confirmed that when he arrived at the depot he had been '*busting for a wee'*, that he waited 20 minutes and then urinated in the yard. Mr Jenkins noted that he told him that he was going to wash it down but before he could do so, a man appeared and was shouting and screaming at him. When he was asked why he had not looked for toilet facilities, the claimant is noted as saying that *'it was a spur of the moment thing*.'

30. Mr Jenkins informed the claimant that this was gross misconduct and that people have been dismissed for gross misconduct. He told the claimant that he needed to speak to a few more people but once he had done that, he would consider his decision and let the claimant know.

31. As part of his investigation Mr Jenkins also spoke to Mr Griffiths of Select Plant Hire. This was also on 29 April. Mr Griffiths confirmed that he had witnessed the driver urinating in the yard at Wincham. He was clear that it was the claimant.

32. From those statements Mr Jenkins completed an investigation report which he submitted to the respondent. In his report, Mr Jenkins stated that he had

come to the conclusion that the claimant had committed gross misconduct by urinating in the yard at a customer's premises. It was noted that the claimant was still in his probationary period with the respondent at the time of the incident.

33. He considered the claimant's mitigation, which the claimant spoke to him about when interviewed, which was noted as *'Perhaps the increased frequency of urinating that diabetics suffer from'*. There was no further investigation into this issue.

34. In considering what would be an appropriate sanction to impose on the claimant, Mr Jenkins considered that prior to the incident, the claimant had not disclosed to the respondent any issues with his diabetes that might have caused his to do this. When asked if there were any issues or if he needed any help from the respondent, he had not told his manager that he had any problems controlling his bladder. If this was something he experienced, it is something he should have told him before this incident since the nature of the job is that the driver would spend hours in their cab as the standard shift could require them to drive long distances without a break. Mr Jenkins also considered that the claimant's claim that he had problems controlling his bladder and needed to urinate frequently against the fact that although he stated that he had been in need of the toilet when he arrived at the yard as he described himself as '*busting for a wee'* on arrival; he waited 20 minutes before deciding to urinate in the yard. He clearly had been able to wait. He was able to control his bladder for all that time.

35. Mr Jenkins considered that the claimant had the opportunity to use the toilet facilities at Worksop before he left, at Woodhead whilst on route and at Wincham, if he had asked. There were toilet facilities available for drivers at all those places. They were not inaccessible, he only needed to ask. He considered the claimant's claim that he had a need to urinate more frequently as a diabetic but he did not believe that the evidence supported that claim as the claimant's tachograph readings showed that he frequently drove over long distances, sometimes over two hours, without stopping. The claimant's evidence to us was the he would stop on the hard shoulder of the motorway, get out, urinate and get back into the cab and that those types of stops were so short that they did not register on the tachograph.

36. Mr Jenkins' decision was that the claimant's actions amounted to gross misconduct and that he could not risk the claimant making such a poor decision in the future. He considered whether it was appropriate to impose on the claimant a sanction that would see him remain in employment such as a written warning or extending his probationary period. He was conscious of the fact that the claimant's actions had risked jeopardising the

respondent's business relationship with Select Hire as it had prompted a complaint from Steve Griffiths. Select was an important customer for the respondent and if the respondent lost that customer, it would affect the jobs of many of the claimant's colleagues.

37. Mr Jenkins concluded that the claimant had made a poor choice during his probationary period to urinate in public, on a client's premises, when there were toilet facilities provided for his use and available. The claimant's actions had been both unprofessional and unhygienic. The claimant agreed in the hearing that he had done a disgusting act. Mr Jenkins concluded that the claimant's actions meant that he had failed his probationary period. When it was put to the claimant in the hearing that he demonstrated poor judgment when he decided to urinate in public in a client's premises, he refused to answer respondent's Counsel. He also refused to answer the question of whether it was acceptable for him to urinate whenever and wherever he chose if he needed to, even if he was a diabetic.

38. Once he made the decision, Mr Jenkins had a conversation with Ms Doona about it. Ms Doona concurred with his decision. As the claimant was still in his probation period the respondent decided that it was appropriate to terminate his contract of employment.

39. We did not have the respondent's disciplinary policy in the hearing bundle. The claimant's contract stated as follows: -

'the first three months of your employment will be a probationary period, during which your suitability for your employment will be assessed by the Company. The Company withholds the right to extend your probationary period if, in its opinion, circumstances so require. If during or at the end of your probationary period it is decided that you are not suitable for continued employment, your employment will be terminated on due notice or payment in lieu thereof. The Company's disciplinary and grievance procedures shall not apply in such circumstances'.

40. On 30 April 2020, the respondent wrote to the claimant to notify him that his employment had been terminated. He was informed that the respondent had taken the decision to terminate his employment due to a failed probation because of his behaviour. The behaviour referred to here is the decision to urinate in the open yard. He was also told that the respondent's policies and processes which would usually be used to deal with conduct issues were not available to him as he was still in his probation period.

41. Although the respondent was terminating the claimant's employment summarily, he was paid a week's notice and his holiday entitlement. The

claimant was advised that he had a right of appeal. He was to send his appeal letter to Ms Doona.

42. The claimant submitted his appeal letter within the stipulated time. His appeal was on the basis that Mr Jenkins had not given consideration to his mitigation which was that because of his diabetes he needed to urinate more frequently. He also raised a new point which was that diabetics sometimes needed to urinate instantly, which happened less frequently but was what happened to him on that occasion. The claimant stated in his appeal that he had informed the respondent that he was a diabetic in his pre-employment questionnaire and that he had spoken to the occupational health provider before beginning his employment. He also stated that he had washed down the urine with fresh water. We find that he had not done so when Mr Griffiths saw and spoke to him as Mr Griffiths confirmed in his contemporaneous email sent to the respondent moments after the incident.

43. The claimant submitted a letter from his GP to support his appeal. That letter was dated 6 May and written by his GP, Dr Codlin. The GP confirmed that the claimant was suffering from poorly controlled diabetes. She described the medication he was prescribed and stated that this medication can cause problems with the frequency and urgency of urination. She confirmed that the claimant was prescribed another drug to help him with his blood pressure and that drug increases the frequency and the amount of urination. The GP stated that the combination of these drugs can cause a much increased need to urinate compared to people who are not taking these medications. The GP considered that the diagnosis and the medications prescribed for them were mitigating factors which the respondent ought to consider as they could have contributed to the incident which resulted in the claimant's dismissal. She urged the respondent to consider this as part of the claimant's appeal.

44. The Tribunal had copies of the claimant's medical records in the hearing bundle, which covered the period of 14 years between his diagnosis and the time of dismissal. There was no mention in those records of the claimant consulting his GP about incontinence related to his diabetes, or at all. The notes did not contain any record of the claimant discussing incontinence with his GP or being treated for incontinence, specifically the need to urinate urgently or frequently; related to his diabetes or at all.

45. The claimant attended an appeal hearing with Ms Doona, the respondent's head of HR on 12 May 2020. The claimant attended with his trade union representative, Joanna Richards.

46. In the appeal hearing the claimant submitted that his diabetes meant that he was often rendered incontinent and that he had no choice but to urinate in the yard at Select Hire, on 28 April. Ms Doona was also given a copy of the letter from the claimant's GP referred to above.

47. Ms Doona wrote to the claimant on 26 May. She stated that when he began his employment, the claimant failed to inform the respondent that he had an issue with incontinence. He also did not do so when he was asked whether there were any reasonable adjustments that he wanted the respondent needed to make for him. She pointed out that he had not disclosed any potential side effects that he may have encountered whilst managing his diabetes. It was his responsibility to notify his manager of these matters and if he had done so, every attempt would have been made to support him. He was now, retrospectively, telling her about an issue with incontinence but that was not something that could be considered after the event. Ms Doona's decision was to uphold the decision to terminate the claimant's employment on the grounds that he had failed his probation.

48. At the end of her letter, Ms Doona informed the claimant that the respondent was open to offering him furlough pay until he finds other employment and whilst the scheme exists. He was told that if this was something that he would like to consider he should contact her to discuss it. The claimant did so and the respondent processed furlough pay for him for a period. The claimant found alternative employment on 14 July 2020. He earns an equivalent amount at this new job as he did at the respondent.

Law

49. The Tribunal considered the following law as submitted by the parties.

50. The claimant complains of disability discrimination in the form of discrimination arising from disability (section 15 Equality Act EQA) and a breach of the duty to make reasonable adjustments (sections 20 and 21 EQA).

51. Section 15 EQA provides that:

A person (A) discriminates against a disabled person (B) if –

a. A treats B unfavourably because of something arising in consequence of B's disability, and

b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim

Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability.

52. The claimant relied on the case of *Basildon and Thurrock NHS Trust v Wearasinghe* [2016] ICR 305 in his submissions. In that case Langstaff P set out the two stage test that was subsequently refined by Simler J in the case of *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090*, EAT*, in which she stated that *"…this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."*

53. Both parties agreed that the question was not about Mr Jenkins' motive in dismissing the claimant, which was agreed to be unfavourable treatment, but what was in his mind at the time.

54. The claimant referred to the case of *Asda v Raymond* [2018] 12 WLUK 254 which has similar facts to the instant as the employee also had diabetes and was a lorry driver. He too had urinated at the side of the lorry in a yard and had been caught doing so by a security guard. In that case, the tribunal upheld the section 15 claim as it found that the claimant's disability placed him in a predicament and his employers had not made appropriate enquiries because if they had, they would have recognised that it was a symptom of his medical condition. In that case, the tribunal found that the operative cause of the claimant's dismissal had been his disability. There was also a dispute in that case as to whether it was reasonable for the employer to conclude from the CCTV evidence that the employee had urinated in the yard. The employee admitted doing so.

55. In the case of *Pnaiser v NHS England* [2016] IRLR 170*,* EAT, the court gave the following guidance as to the correct approach to a claim under EqA 2010 s 15:

'*(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination

case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: (see Nagarajan*)…..A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).*

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression "arising in consequence of" could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) *a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, "discriminatory motivation" and the alleged discriminator must know that the "something" that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe *as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in*

consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

As Langstaff P held in Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."*

56. Once the claimant satisfies section 15 EQA, the burden shifts to the respondent to show that the unfavourable treatment was legitimate and proportionate. The claimant referred to the case of *Akerman v Livingstone* [2015] UKSC 15 in which the Supreme Court set out a 4 stage approach to determine whether the respondent has met this burden; as follows: the aim is sufficiently important; the measure taken by the employer to achieve that aim must be rationally connected to the legitimate objective and the means taken must be proportionate to the legitimate aim. The tribunal must look to the overall balance between the end and means. It has to 'consider whether or not a lesser measure could have achieved the employer's legitimate aims' (*Naeem v Secretary of State for Justice* [2017] UKSC 27).

57. Section 20 sets out the duty to make adjustments as follows:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply…

(i) The duty comprises the following three requirements,

(ii) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(iii) The second requirement is a requirement, where a physical feature puts the disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage,

(iv) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

58. Section 21 deals with the consequences of a failure to comply with the duty:

"(1) A failure to comply with the first, second or third requirements is a failure to comply with a duty to make reasonable adjustments.

(i) A discriminates against B if he fails to comply with that duty in relation to that person.

(ii) A provision of an applicable Schedule which imposes a duty to comply with the first, second and third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of another provision of this Act or otherwise."

59. In the case of *Environment Agency v Rowan* [2008] IRLR 20 the EAT set out Guidance on how an employment tribunal should approach a complaint of a failure to make reasonable adjustments under what was then section 3A(2) of the DDA by failing to comply with the Section 4A duty. The tribunal must identify the following (amended since the EQA 2010):-

1 the provision, criteria or practice applied by or on behalf of an employer, or;

2 the physical feature of premises occupied by the employer;

3 the identity of non-disabled comparators (where appropriate); and

4 the nature and extent of the substantial disadvantage suffered by the claimant.

60. The EAT held that an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through this process. Unless it has identified the four matters as set out above it cannot go on to judge if any proposed adjustment is reasonable.

61. A substantial disadvantage is one that is *'more than trivial'* and whether such existed is a question of fact to be ascertained objectively (Statutory Code of Practice). The Code also confirms that the onus is on the employer to make the reasonable adjustment once it is aware of the substantial disadvantage and not on the employee to request it.

62. In assessing discrimination complaints tribunals would be expected to go through a process to determine whether the claim was proven in relation to the burden of proof. In the case of *Project Management Institute v Latif* [2007] IRLR 579 Mr Justice Elias stated that:

"The key point is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of duty. There must be evidence of some apparently reasonable adjustment which could be made …… we do think it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not".

63. If the tribunal concludes, following application of that process, and with the burden on the claimant, that there were steps which it would have been reasonable for the respondent to take in order to prevent the claimant from suffering from the disadvantage in question; then the burden would shift to the respondent to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that another reasonable adjustment had been made or the adjustment identified by the claimant was not a reasonable one to make.

Applying law to facts

Credibility

64. Where there are conflicts of evidence between the parties, the Tribunal preferred the respondent's evidence for the following reasons:

65. The claimant's version of events on the 28 April was not supported by the evidence. When he first spoke to Mr Jenkins to report what happened, he stated that he offered to wash away the urine with water. In the statement he gave to Mr Jenkins on the following day, he stated that he was going to wash it down but was stopped by Mr Griffiths shouting at him. That is contradicted by the evidence in his witness statement where he stated that he immediately washed it down with water from the bottle he kept his cab and that he was approached by Mr Griffiths while doing so. It is likely that the statement he made at the time, when he first reported it to Mr Jenkins,

is the truth and that subsequently, he tried to change it as he realised that this is what he ought to have done.

66. The claimant's evidence in his witness statement and to the tribunal was that he had disclosed his diabetes to the respondent when he completed the Optima Health questionnaire. In his witness statement, he stated that he informed Mr Jenkins and Ms Doona at interview that he had Type II Diabetes. We did not find this evidence to be credible. If he had disclosed his diabetes to Optima Health, it would have been on their assessment form as they would have no reason to withhold that information from the respondent. The purpose of the assessment process is to assess suitability for the job and to find out if a prospective employee needs adjustments and whether they can be accommodated. It would defeat that purpose if the information that someone was disabled was withheld from the respondent. It is therefore our judgment that the claimant's evidence about a conversation that he had on the telephone with Optima Health the week after he began his employment, is a complete fabrication.

67. The claimant disputed that he had spent 20 minutes in his cab at the Select yard before stepping out to urinate in public. However, it is our finding that this is what he said to Mr Jenkins when he first reported what had occurred and what he stated the following day. He did say that he had been '*busting for a wee'* when he first arrived at the yard. He attempted to change that in his witness statement and at the hearing, but we did not find that evidence to be credible.

68. The claimant stated in his witness statement that it would have been dangerous for him to get out of his cab to find a toilet or to ask where the toilets were. When challenged about this in evidence in the hearing he stated that Counsel had '*misinterpreted'* what he had said but that is what he said. It clearly was not dangerous for him to get out of his cab as he did so to urinate in the yard.

69. The claimant refused to answer a question from the respondent's Counsel as to whether it was acceptable for him to urinate whenever and wherever he chose, even if he needed to urinate because of his diabetes. When he was asked whether he agreed that urinating in public showed a lack of judgment, he refused to answer.

70. It is for those reasons that the Tribunal found the claimant to be evasive when giving evidence and we concluded that his evidence was not credible.

The list of issues

Disability status

71. It was agreed between the parties that the claimant had been a disabled person by reason of his Type II Diabetes at the start of his employment with the respondent.

> *Did the respondent have actual or constructive knowledge of the claimant's disability?*

72. It is this Tribunal's judgment that the claimant disclosed his Type II Diabetes to the respondent in a conversation with Mr Jenkins shortly after he began his employment. The respondent was therefore aware of the claimant's disability from a few weeks after he began his employment.

73. Mr Jenkins asked the claimant whether he required any adjustments and he stated that he did not. The claimant failed to put the respondent on notice about any issues with incontinence arising from or related to his diabetes or of any adjustments that he might need to address those issues. It was not obvious that a person with Type II Diabetes would have incontinence issues. If the claimant's diabetes led to him having incontinence issues, this is something he would have needed to share with the respondent when he was asked whether he needed any adjustments or at any time during his employment and before the incident on 28 April 2020, and he failed to do so.

74. *The complaint under section 15 Equality Act 2010. (The numbering is from the agreed list of issues) issues were as follows:-*

> *1. Has the Respondent treated the Claimant unfavourably because of something arising in consequence of his disability?*
>
> *2. The unfavourable treatment alleged is the respondent's decision to dismiss the claimant. The claimant alleged that the something arising in consequence of his disability was his inability to control his bladder.*
>
> *3. Did the claimant's action of urinating in the yard arise in consequence of the claimant's disability?*

75. The claimant was dismissed on 30 April 2020. This was undoubtedly unfavourable treatment.

76. The next question for the Tribunal was: why did the respondent do that? Applying the questions in the *Basildon* and the reasoning in *Pnaiser* above; firstly, why did Mr Jenkins dismiss the claimant? What, objectively was the reason? What was in Mr Jenkins' mind at the time he made the decision to dismiss the claimant? Secondly, was there an uncontrollable/urgent need to urinate which the claimant suffered from, arising from the claimant's disability/medication?

77. The first question requires the Tribunal to examine Mr Jenkins' mind at the time he decided to dismiss the claimant. It is this Tribunal's judgment that at the time he made the decision to dismiss the claimant, Mr Jenkins believed that the claimant had urinated in the client's yard despite having an opportunity to use the toilets at Worksop when he collected the load, a second opportunity to use a toilet when he stopped at Woodhead and a third opportunity at Wincham since there were toilets there for his use. He was also aware that the client placed additional toilets in the yard for lorry drivers to use during the Covid-19 lockdown, in order to make them more accessible. He concluded that once he arrived at the Select Yard, the claimant spent 20 minutes in the cab, even though in his words, he was '*busting for a wee'* and that this demonstrated that it was unlikely that he was suffering from an urgent, immediate need to urinate at the time he did so in the yard. There had been time for the claimant to have asked someone in the yard to show him where the toilets were. His evidence was that there were other drivers there, as he was in a queue of lorries which was not moving. Clearly there were also members of the client's staff around who he could have asked for the toilet, as Mr Griffiths saw him urinating in the yard.

78. It is our judgment that Mr Jenkins concluded that the claimant made a poor choice, which he agreed was a disgusting act, to urinate at a client's premises and in public. He chose to do so rather than use a toilet earlier, use the empty water bottle that was in his cab, or ask staff or other drivers for a toilet. Mr Jenkins believed that this was caused by the claimant leaving it too late to ask for the toilet rather than as a consequence of his diabetes or his diabetes medication.

79. In our judgment, Mr Jenkins had made adjustments for other employees who had disabling conditions. He would have made adjustments for the claimant, had the claimant made it known that he needed any. If the claimant was aware that his impairment meant that he could not wait to urinate and that he needed to do so immediately, it was not clear to the Tribunal why he sat in the cab of his lorry for 20 minutes when he arrived at the depot, knowing that he was already '*busting for a wee'* on arrival. These are the facts that were in Mr Jenkins' mind at the time he made the decision to dismiss the claimant. Mr Jenkins was clear in his evidence that the claimant was dismissed for urinating in the Yard and not because his diabetes meant that he had a more frequent need to urinate.

80. The claimant's explanation of his conduct was that the need to urinate arose urgently, as a consequence of his disability. Did his misconduct arise in consequence of his disability?

81. The claimant had the burden of proving that a sudden need to urinate immediately, arose from his disability/medication. The medical records provided did not support his case. There was no mention in them of the need to urgently urinate. The GP letter referred to a possible need for frequent and urgent urination as a result of the diabetes medication but that did not mean that the claimant would have no control over where and when he urinated. It did not support his case that he needed to urinate whenever or wherever the urge came on him. Also, that is contradicted by his statement that he sat in the cab for 20 minutes on arrival at the yard, even though he was '*busting for a wee'* when he got there.

82. By the time this incident occurred, the claimant had been a Type II Diabetic for approximately 14 years. If this had been an issue or a feature of his impairment then, in our judgment, it is likely that he would have sought advice from his GP about it, at some point during that period of time. There was no mention of incontinence or of the urgent need to urinate, in his medical records.

83. The only evidence he did produce was the letter from his GP, which he gave to Ms Doona, to support his appeal. That letter was vague and as stated above, did not support the claimant's case that a feature of his diabetes was an urgent and immediate need to urinate and to do so in public, as the claimant did on the day. As a long-distance lorry driver, which was the claimant's choice of career, it is likely that he would be on the road and unable to stop to use a toilet for many hours at a time. Mr Jenkins looked at the respondent's tachograph which showed that the claimant drove for hours without stopping. The respondent was sceptical that it was possible that the claimant stopped and got out, urinated and returned to his cab without it registering on the tachograph, as he submitted. As we did not find the claimant a credible witness, we did not find this evidence helpful or likely to be true.

84. In our judgment, it is unlikely that the claimant would apply for and undertake a job where he knows that he is likely to have difficulty on a daily basis because of his physical impairment. He also did not mention it to his employer even when he was specifically asked by Mr Jenkins whether there was anything that he needed the respondent to do for him related to his disability. He only mentioned it to the respondent after he was caught by Mr Griffiths and knew that it was likely to be raised with his employer.

85. On balance, it is our judgment that the claimant's action of urinating in the client's yard, in public, rather than asking for a toilet did not arise as a consequence of his disability. Instead, it showed a lack of judgment and was an act of misconduct. As he stated when asked, it was done on the spur of the moment. The evidence did not support his claim that the act of urinating in the yard, in public, when there were toilets around for his use

and additional facilities in the yard, was a manifestation of or arose from his Type II Diabetes.

> *4. If the Claimant is found to have been treated unfavourably, can the respondent show the treatment to be a proportionate means of achieving a legitimate aim. The legitimate aim pleaded by the Respondent is maintaining its reputation and good relationship with its customers as well as having employees whom the Respondent trusted and to avoid any issues relating to breaches of health and safety.*

86. It is this Tribunal's judgment that the respondent's decision to dismiss the claimant was not because of something arising from the claimant's disability of Type II Diabetes. The evidence did not support his case that a consequence of his disability or the medication was a need to urinate urgently/immediately and frequently. The GP's letter stated that the medication *may* (our emphasis) give rise to the need for urgent and frequent urination. It is our judgment, that the reason for dismissal was because the claimant chose to urinate in the yard, in public, rather than ask to use a toilet, which was readily available for him to use, or to use toilets provided for his use before he got to the yard, or to ask about a toilet when he got to the yard and saw that there was a queue of lorries waiting to unload and knew that he would have to wait. He also chose not to use the empty water bottle that was in his cab at the time, which he accepted in evidence was something that long-distance lorry drivers frequently did. In our judgment, the causative link between his Type II Diabetes/medication and the claimant's decision to urinate in the yard, in public, was not made out.

87. Also, the respondent was concerned that this occurred at the start of the pandemic when issues of hygiene and social distancing were at the forefront of its mind as a responsible employer. It was concerned about damage to its reputation as a responsible employer. This was a lucrative client for the respondent and the jobs of the claimant's colleagues could have been in jeopardy if the respondent did not take decisive action and lost that client. This was in a time of economic uncertainty. Those were legitimate aims of the respondent – to keep its client, maintain job security for its staff and its business and to safeguard the health and safety of its employees and that of the Select Yard.

88. In the circumstances where the claimant was on probation and had displayed a serious lack of judgment in urinating in public when there were facilities available for him to use and no evidence that he could not use a toilet; it was not in breach of section 15 to terminate his employment.

89. The claimant's complaint that the respondent's decision to dismiss him was in breach of section 15 of the Equality Act 2010 fails and is dismissed.

Section 20 Equality Act 2010. (1) Was the respondent under a duty to consider reasonable adjustments?

90. The respondent knew before April that the claimant had Type II Diabetes. It did not, however, know that the claimant had an urgent need to urinate and that whenever that urge came on, he would not be able to control it and would need to immediately urinate wherever he was. The respondent was not aware of that. The respondent asked the claimant if there were any adjustments that he would need and he stated that there were none.

91. It was our judgment that the claimant had not told the respondent about his diabetes in the pre-employment documents or forms that the completed or in his interview with Mr Jenkins. He did not *have* to disclose his disability at that stage but if there were adjustments that he required it would have been helpful for him to have done so at the earliest opportunity. The claimant had been a diabetic for 14 years leading up to this incident and if this was a feature of it, we would have expected him to have mentioned it to his employer. He did not do so until he was being disciplined for the incident. The respondent was not aware of the possibility that the requirement to only use toilets for urination could cause the claimant substantial disadvantage, until he urinated in the Select Yard.

(2) Did the respondent have actual or constructive knowledge of the claimant's disability and of the substantial disadvantage alleged by the claimant?

92. It is therefore this Tribunal's judgment that the respondent had actual knowledge of the claimant's disability but had no knowledge of the substantial disadvantage alleged by the claimant. It was not obvious that a diabetic would have incontinence issues. The claimant did not provide the respondent with evidence of this and he did not raise this with the respondent, even when he was asked whether there were any adjustments that he required as a diabetic. The respondent did not have knowledge of the substantial disadvantage alleged by the claimant until after the claimant had committed the act of misconduct.

93. The respondent had taken reasonable steps to find out if the claimant required adjustments. It did so by asking the claimant if there were any adjustments that he required. Having lived with Type II Diabetes for many years, it was reasonable for the respondent to assume that the claimant would know what adjustments he required. He stated that he did not require any.

(3) If so, has the respondent applied the PCPs set out above? And lastly, (4) has the claimant been put to a substantial disadvantage in comparison with persons who are not disabled?

PCP (a) requiring employees to use the toilets to urinate

94. It is this Tribunal's judgment that the respondent, like most employers, operates a PCP that its employees would not relieve themselves by urinating in public, in a client's yard, where employees and customers were present. It is also a PCP that the respondent would treat urination in the client's yard, in public, during the working day as a misconduct issue.

95. It was not a PCP that the respondent would dismiss employees who are in their probation without going through the disciplinary procedure. The respondent did operate a disciplinary procedure here. The respondent conducted an investigation, a disciplinary hearing and the claimant was able to appeal against his dismissal. He was aware of the allegation he faced, and he was given the opportunity to defend himself against the allegation.

96. The claimant's case is that his diabetes meant that he had an uncontrollable urge to urinate and that whenever it came on, he had to urinate immediately and it could not wait. There was no evidence to support that or that it arose as a consequence of his disability or the medication prescribed to manage it. Also, in this Tribunal's judgment, even if the GP's letter could be taken to confirm that claimant's diabetes may cause him to want to urinate more frequently and urgently, the evidence was that he could have used the water bottle that he had in the cab at that moment or he could have asked someone for the toilet when he first got to the site, before he became so desperate and when he knew that he needed the toilet. The respondent had already provided the SNAP account for its drivers and made them aware of the availability of rest stops with toilets that they could use. The respondent would not have known, before 28 April, that those were inadequate for the claimant as he had not made the respondent aware.

97. The respondent's application of the PCP, requiring employees to use toilets to urinate did not put the claimant at a substantial disadvantage in comparison to employees who are not disabled as the claimant had alternatives that he could use rather than urinate in public, in the client's yard. The claimant could have used a toilet. His disability did not prevent him from using a toilet. There were toilets available to him. He was able to ask someone for the toilet and there were people that he could have asked. Even if a feature of his diabetes medication was a frequent and urgent need to urinate, that did not mean that he could not have used a toilet. It was not his case that using a toilet would have put him at a substantial disadvantage.

98. It is this Tribunal's judgment that the respondent did operate the first PCP but that the duty to make reasonable adjustments did not arise as the respondent was not aware of the substantial disadvantage alleged by the claimant. Also, the claimant was not put to a substantial disadvantage in comparison to persons who are not disabled as he could use a toilet and

there were toilets available for his use along the way before he got to the Select Yard and also at the yard.

PCP (b) treating urination in the yard as a conduct issue

99. The respondent did treat this as a conduct issue. It was Mr Jenkins' evidence that if another driver urinated in the yard, it would be a disciplinary matter and a matter of gross misconduct.

100. The reason for the claimant's dismissal was his misconduct and Mr Jenkins belief that it was unlikely that a consequence of the claimant's diabetes/medication was a frequent and urgent need to urinate so that he could not wait until he got to a toilet but had to do so in the client's yard.

101. The claimant's submission was that once he produced the GP's letter, the respondent was under a duty to make a reasonable adjustment by not dismissing him or by giving him a sanction short of dismissal such as a warning or suspension.

102. It is our judgment that the GPs letter suggested that the claimant's medication and/or his diabetes could result in the need for frequent and urgent urination but that did not explain the claimant's decision to urinate in the yard. The GPs letter did not explain why the claimant did not ask for a toilet on his arrival at the site, why he did not use measures such as the water bottle in the cab or why he had not used the toilet at the other sites he visited before he got to the Select Yard.

103. It was not discriminatory for the respondent to consider all the circumstances of the incident before making a decision on the incident on 28 April.

104. It is our judgment that the PCP of treating urination in a client's yard as a misconduct issue did not put the claimant at a substantial disadvantage as the claimant has failed to prove that even if the diabetes medication caused him to have a frequent and urgent need to urinate; that he had to do so in public, in the yard, rather than in a toilet. There were toilets provided for his use in the yard and all he had to do was ask to be shown where they were. He had been sitting in his cab for 20 minutes before getting out and urinating in the yard. This was not a manifestation of his Type II Diabetes. It was something he did on the spur of the moment.

105. In the circumstances, the claimant was disciplined for his misconduct. The need for an adjustment did not arise.

PCP (c) Dismissing employees in their probationary period without following the disciplinary procedure

106. The respondent did follow disciplinary procedure as it investigated the allegation against the claimant which they received from Mr Griffiths. The respondent then conducted a disciplinary hearing with the claimant and made a decision that the conduct was unacceptable and that the appropriate sanction was dismissal. The appeal was conducted by Ms Doona, who had expressed an opinion when she first read Mr Griffiths' complaint but who had largely stayed out of Mr Jenkins' process. Mr Jenkins had asked her advice on whether dismissal was an appropriate sanction.

107. We had evidence from her and concluded that she had approached the appeal with fresh eyes to hear the claimant's grounds of appeal. The claimant was in his probationary period. The decision to terminate his employment did put him at a disadvantage but it was not because of his disability but because of his decision to urinate in the yard rather than to ask for a toilet, during the 20 minutes he sat in the cab in the yard, when he was aware that he was '*busting for a wee'*.

108. It is therefore this Tribunal's judgment that the respondent was not under a duty to make reasonable adjustments. The duty did not arise as the application of the PCPs did not put the claimant under substantial disadvantage in comparison with persons who are not disabled. The claimant produced evidence at the appeal that the medication he was taking for his diabetes may lead him to need to urinate urgently and immediately. However, it did not explain why he sat in the cab for 20 minutes on arrival at the Yard when he knew that he needed to urinate. It did not prevent him from asking someone to show him where the toilet was and did not explain why he had not used any of the toilets that he passed on the way to the Select Yard, including rest stops, or used the facilities at Wincham or anywhere else, as he knew that he needed to urinate.

109. In those circumstances, it is this Tribunal's judgment that the duty to make reasonable adjustments did not arise.

110. It is also this Tribunal's judgment that the suggested adjustments were not reasonable.

The claimant suggested the following adjustments:

111. *Following the respondent's disciplinary policy notwithstanding that the claimant was still in his probationary period*. The respondent did follow a procedure in coming to its decision to dismiss the claimant.

112. *Agreeing that involuntary urination should not be dealt with as a conduct issue.* The claimant did not claim that he had an accident and urinated on

himself involuntarily. Instead, the evidence was that he made a decision to get down from his cab, step to the side of the lorry and urinate on the yard. This was not involuntary urination. It was inappropriate but, in our judgment, it was not involuntary. The claimant chose to do as he did.

113. *Considering a lesser sanction for the claimant in the circumstances such as extending the claimant's probationary period.* In our judgment, these suggested adjustments would not have alleviated any disadvantage as the claimant's act of urinating on the client's Yard was not a consequence of his diabetes or the medication but something that he chose to do, on the spur of the moment, rather than to ask someone for a toilet. The claimant was quite capable of using toilets and we did not have evidence that the toilets were inaccessible for him or any reason why he could not have used the toilets at the various stops he made before he got to the Select Yard or why he could not have used the toilets there.

114. In all the circumstances, the Tribunal's judgment is that the duty to make reasonable adjustments did not arise.

115. It is this Tribunal's judgment that the claimant's complaints of disability discrimination fail and are dismissed.

Employment Judge Jones
Date: 17 October 2022

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
Date:19 October 2022

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FOR THE TRIBUNAL OFFICE