EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Azzouz Mghizou **v** **Mitie Care and Custody Limited**

Heard at: Watford by CVP **On**: 25, 26 and 27 July 2022

Before: Employment Judge Alliott

Members: Mrs Claire Buckland
Mr Adarsh Kapur

Appearances
For the Claimant: Mr Gary Lee (Solicitor)
For the Respondent: Ms Anna Greenley (Counsel)

RESERVED JUDGMENT

The majority (EJ Alliott and Mr. Kapur) judgment of the Tribunal is that:

1. The Claimant was not unfairly dismissed.
2. The Claimant was not wrongfully dismissed.
3. The Claimant's claims for unfair and wrongful dismissal are dismissed.

The minority (Mrs C Buckland) judgment of the Tribunal is that:

4. The Claimant was unfairly dismissed.
5. The Claimant was wrongfully dismissed.

The unanimous judgment of the Tribunal is that:

6. The Claimant's claims of disability discrimination are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent, a provider of immigration removal centre management and operations and secure escorting services for the Home Office, latterly as a Detention Custody Officer, from 1 April

2008 until dismissal with effect on 19 December 2019. By a claim form presented on 17 April 2020, following a period of early conciliation from 16 March to 31 March 2020, the claimant brings complaints of unfair dismissal, disability discrimination and breach of contract The claim is essentially about the dismissal of the claimant. In summary, the respondent's defence is that the claimant was dismissed for gross misconduct.

The issues

2. The issues as recorded by Employment Judge Gumbiti-Zimuto at the preliminary heading heard on 3 February 2021 are as follows:-

Disability

(i) Whether the claimant is a disabled person within the meaning of section 6 of the Equality Act 2010 on account of a mental impairment of chronic anxiety?

(ii) The respondent accepts that the claimant is disabled in respect of the physical impairment of Crohn's disease.

Discrimination arising from disability

(iii) Was the claimant treated unfavourably? The parties agree that the decision to dismiss the claimant is unfavourable treatment.

(iv) Was the reason for unfavourable treatment due to something arising as a consequence of the disability? The claimant submits that the "something arising" from the mental impairment of chronic anxiety was difficulty concentrating and performing his duties in the immediate aftermath of the incident with the detainee without additional support being given to complete duties.

(v) Was the treatment a proportionate means of achieving a legitimate aim? Namely, maintaining establishment security processes and operating its staff rules and disciplinary processes fairly and consistently in order to maintain establishment security and safety.

(vi) Did the respondent know or could it reasonably have been expected to know that that the claimant had a disability (chronic anxiety)? If not, when ought the respondent to have been aware of the claimant's disability?

Indirect discrimination

(vii) Has the respondent applied to the claimant a PCP? The claimant contends that the PCP was the requirement for him to competently carry out his contractual duties without any assistance at all material times.

(viii) Did the PCP put the claimant at a particular disadvantage in comparison to others? The claimant contends that the PCP put him at a particular disadvantage compared to others without his disability, in averting dismissal on the pretext of his conduct.

(ix) Was the claimant disadvantaged by the PCP?

(x) Was the PCP a proportionate means of achieving a legitimate aim? Namely, maintaining establishment security processes and operating its staff and disciplinary processes fairly and consistently in order to maintain establishment security and safety.

Unfair dismissal

(xi) Was the claimant dismissed for a potentially fair reason, namely conduct?

(xii) If so, did the respondent conduct a reasonable investigation?

(xiii) Did the respondent have reasonable grounds to sustain its belief that the claimant was guilty of misconduct?

(xiv) Did the respondent believe that the claimant was guilty?

(xv) Was the dismissal within the range of responses open to the respondent?

(xvi) Did the respondent and the claimant comply with the ACAS Code of Practice?

Remedy

(xvii) If the claimant's claims succeed what compensation is appropriate in all the circumstances? Should there be an award for injury to feelings and, if so, in what amount?

(xviii) Should any compensation awarded be reduced in terms of *Polkey v AE Dayton Services Limited* and, if so, what reduction is appropriate?

(xix) Should any compensation awarded be reduced on the grounds that the claimant's actions caused or contributed to his dismissal and, if so, what reduction is appropriate?

(xx) Has the claimant mitigated his loss?

Wrongful dismissal

(xxi) Did the claimant breach the contract of employment?

(xxii) If so, was that breach serious enough to be repudiatory breach?

(xxiii) Did the respondent waive the breach?

(xxiv) If not, how much notice is the claimant entitled to? (The claimant was entitled to 11 weeks' notice pursuant to section 86 ERA).

The law

3. Both parties have made extensive submissions on the law in their written closing submissions. The fact that the same are not repeated here does not mean that we have not taken them fully into account.

4. In this case, with the exception of the question as to whether or not the claimant consciously or unconsciously contributed to the confrontation with the detainee, the core facts are not in dispute. Consequently, in this section on the law we have concentrated on the law in relation to the fairness of the decision to dismiss and, in particularly, whether or not it has fallen within the range of reasonable responses of a reasonable employer.

5. It is for the respondent to show the reason, or if more than one the principal reason, for dismissal.

6. The respondent has to show that it genuinely believed in the reason and that that reason was based on reasonable grounds following a reasonable investigation. In this case the reason given is gross misconduct which is a potentially fair reason.

7. If the respondent demonstrates a potentially fair reason for the dismissal, then it is for us to go on to consider whether it was fair taking into account the matters set out in s.98(4) Employment Rights Act 1996.

8. As submitted by the respondent:-

> "When considering whether dismissal was a fair sanction, it is trite law that it is not for the Tribunal to substitute its own view of the appropriate penalty for that of the employer. The position was summarised by Phillips J giving judgement for the EAT in Trust Houses Forte Leisure Ltd v Aquilar [1976] IRLR 251,
>
> > "It has to be recognised that when the management is confronted with a decision to dismiss an employee in particular circumstances there may well be cases where reasonable managements might take either of two decisions: to dismiss or not to dismiss. It does not necessarily mean if they decide to dismiss that they have acted unfairly because there are plenty of situations in which more than one view is possible."

9. The ACAS Code of Practice on Disciplinary and Grievance Procedures recognises that an employee might be dismissed even for a first offence where it constitutes gross misconduct (para 23).

10. Further submissions from the respondent are as follows:-

> "Per Beldam LJ in Paul v East Surrey District Health Authority [1995] IRLR 305 at (34), an Employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding whether a repetition is likely. Thus an employee who admits the conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees conspired to accuse him falsely."

And

> "Where an employee puts in issue his or her length of service as a factor to be weighed in the decision whether to dismiss, especially if it is long service with little or nothing by way of disciplinary record, the starting point is that in a case of gross misconduct there may be little role for long service (Harvey on Industrial Relations Binder D16(g)). In AEI Cables Ltd v McLay [1980] IRLR 84, Ct Sess, it was said that in such a case it would be wholly unreasonable to expect an employer to have any further confidence in the employee and to continue the employment; the gravity of the offence outweighed the factor of the length of service."

11. In addition, the claimant made the following submissions to us:-

> "While the Burchell test is relevant to establishing the employer's belief in the employee's guilt – and therefore to establishing the reason for dismissal – it applies equally to the question of whether it was reasonable for the employer to treat that reason as a sufficient reason to dismiss in the circumstances. When assessing whether the Burchell test has been met the Employment Tribunal must ask itself whether what occurred fell within the range of reasonable responses of a reasonable employer.
>
> The Court of Appeal has held that the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached – see J Sainsbury plc v Hitt [2003] ICR 111 CA, 7. Whether an employee's behaviour amounts to misconduct or gross misconduct can have important consequences. Gross misconduct may result in summary dismissal, thus relieving the employee of the obligation to pay notice pay and potentially justifying the sanction of summary dismissal.
>
> In the case of Turner v East Midlands Trains Ltd [2013] IRLR 107 at paragraph 17 the Court of Appeal had confirmed that the range of reasonable responses test applies not only to the result but also to the investigation.
>
> " …the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see Whitbread plc v Hall [2001] IRLR 275 CA; and whether the pre-dismissal investigation was fair and appropriate: see Sainsbury's Supermarkets v Hitt [2003] IRLR 23CA."

12. Paragraph 24 of the ACAS Code of Practice on Disciplinary and Grievance Procedures states that the employer's disciplinary rules should give examples of what the employer regards as gross misconduct, ie, conduct that he considers serious enough to justify summary dismissal.

13. What constitutes gross misconduct is a mixed question of fact and law (Sandwell & West Birmingham Hospitals NHS Trust v Westwood UK EAT/0032/91). In this case the Employment Appeal Tribunal summarised the case law on what amounts to gross misconduct and found that it involves either **deliberate wrongdoing or gross negligence** (Mr. Lee's emphasis) (paragraph 113).

14. In cases of deliberate wrongdoing, it must amount to wilful repudiation of the express or implied terms of the contract (Wilson v Racher [1974] ICR 428). The Employment Appeal Tribunal held that the Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case.

15. Wherever there are factual issues in dispute they must be investigated (Scottish Daily Record & Sunday Mail [1986] Ltd v Laird [1996] IRLR 665 Court of Session).

16. It is well established that before the disciplinary hearing commences the employee must know the full allegations against him. Disciplinary charges should be precisely framed, and the evidence used during the hearing should be confined to those charges (Strouthos v London Underground Ltd [2004] IRLR 636 CA). Charges must be squarely put (London Ambulance v Small [2009] UK CA Civ 22).

17. Impartiality is quintessential to a reasonable investigation (Sovereign Business Integration Ltd v Trybus EAT/01/0707). An investigator should look for evidence which weakens as well as strengthens a case against an employee. The common and reasonable practice of having an investigation meeting, is to identify for the investigator, both points in need of further investigation. The duties of reasonableness and impartiality require the investigator to follow up lines of enquiry suggested by the employee. In A-v-B [2003] IRLR 405, the EAT held that the gravity of the charges and the potential effect on the employee are relevant to the question of what is a reasonable investigation and in Salford Royal Foundation Trust v Roldan [2010] IRLR 721, the Court of Appeal enunciated the principle that if the dismissal was likely to "blight" a claimant's career, the Employment Tribunal would be required to scrutinise the respondent's conduct of the matter all the more carefully."

Disability discrimination

18. S.15 Disability Discrimination

    18.1 The parties have accepted that the decision to dismiss the claimant was unfavourable treatment.

    18.2 As the claimant has submitted:-

    "In Basildon & Thurrock NHS Foundation Trust v Weerasinghe UK EAT/0397/14, the President of the EAT, Mr Justice Langstaff, sitting alone, held that there were two distinct steps to the test to be applied

by Tribunals in determining whether discrimination arising from disability has occurred:

- Did the claimant's disability cause, have the consequences of, or result in, "something"?

- Did the employer treat the claimant unfavourably because of that "something"?

18.3 In Pnaiser v NHS England and another [2016] IRLR 170 the EAT summarised the proper approach to claims for discrimination arising from disability as follows:

- The Tribunal must identify whether the claimant was treated unfavourably and by whom;

- It then has to determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the motive of the alleged discriminator in acting as he or she did is irrelevant.

18.4 The Tribunal must then determine whether the reason was "something arising in consequence of [the claimant's] disability", which could describe a range of causal links. That stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

18.5 The knowledge required is of the disability; not knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

18.6 It is not necessary for an employer to be aware that the "something" arises in consequence of the employee's disability for it to be liable under s.15, if it treats the employee unfavourably because of that "something". The test is an objective one. In City of York Council v Grosset [2018] EWCA Civ 1105, an employee was dismissed for misconduct. The employer was liable under s.15 even though it was not aware that the employee's actions were due to their disability."

Indirect disability discrimination

19. As per the claimant's submissions:-

"To establish indirect discrimination under s.19 of the Equality Act 2010, a claimant must be able to show that the PCP

- Puts or would put persons with whom they share a protected characteristic at a particular disadvantage compared to others

- Puts or would put the claimant to that disadvantage."

Wrongful dismissal

20. Was the claimant in fundamental breach of his contract of employment such that the respondent was entitled summarily to terminate it?

The evidence

21. We were provided with a bundle running to 673 pages.

22. We had witness statements and heard evidence from the following:

    (i) The claimant

    (ii) Mr Martin Hatch, Deputy Centre Manager at Heathrow Immigration Removal Centres for the respondent and the dismissing officer.

    (iii) Mr Paul Rennie, Centre Manager for Heathrow Immigration Removal Centres for the respondent who heard the appeal.

23. In addition, we were provided with two witness statements of Ms Ellie Sewell, Area Manager for Overseas Escorting for the respondent who conducted the investigation. Although the respondent intended to call her as a live witness, by the time of this hearing she had apparently left the respondent's employment and was not available to give evidence.

24. The respondent supplied us with a cast list of witnesses and a chronology.

25. Both parties submitted lengthy written closing submissions. The Claimant's is 18 pages long and the Respondent's 25 pages long.

Applications

26. Various applications were made before us during the course of this hearing.

The witness statements of Ms Ellie Sewell

27. This case was originally listed to be heard in November 2021 but was postponed. Witness statements on behalf of Ms Ellie Sewell were exchanged by the respondent who always intended to call her to give oral evidence. However, by the time of this hearing, Ms Sewell had left the employment of the respondent and was, apparently, unable to attend to give evidence.

28. Although the respondent was aware of the reluctance of Ms Sewell to give evidence some weeks ago, the respondent did not inform the claimant that she was not going to attend to give evidence. The first that the claimant became aware of her absence was on the morning of the first day of this hearing.

29. Consequently, Mr Lee, on behalf of the claimant, submitted that we should exclude the witness statements of Ms Ellie Sewell.

30. Having considered the documentation in the bundle, which included extensive documents relating to the investigation conducted by Ms Ellie Sewell, we decided that we would admit and read the witness statements of Ms Ellie Sewell but subject to submissions as to what, if any, weight was to be placed upon them given that they were untested hearsay evidence.

An application to place before us a statement by Mr Ali Lakda.

31. Mr Lakda was the claimant's line manager on the evening of 18/19 November 2019. His statement formed part of the investigation conducted by Ms Sewell. It is referred to in the investigation report and was served on the claimant in advance of his disciplinary hearing. Clearly this document should have been in the bundle but was not. The relevance of the statement is that it apparently contained Mr Lakda's observation that the claimant had, in some way, exacerbated the confrontation with the detainee. That evidence is clearly prejudicial, potentially, to the claimant. We are aware from the dismissal letter of Mr Hatch that because that issue was one person's word against another, Mr Hatch did not rely upon it and solely relied upon his observations of the claimant as seen on the CCTV of the incident. Accordingly, we declined to admit that document on the basis that it was not relevant to any issue that we were considering and disregarded what it may or may not have contained.

Application for specific disclosure

32. After the conclusion of Mr Rennie's evidence, Mr Lee made an application for specific disclosure of all documents relating to the disciplinary process of a fellow employee called Robert Howell. It was asserted by Mr Lee that on the same day that the claimant was suspended Mr Howell had failed to undertake patrols, had not conducted a morning roll count and yet was not dismissed.

33. The issue of comparable treatment of a colleague was raised expressly by the claimant in his appeal hearing. Consequently, the claimant has been aware of this being part of his claim from the very outset. Disclosure was ordered in May 2021. The appropriate time for requesting specific disclosure of these documents was long ago. In our judgment it is totally unsatisfactory to make such an application at the end of the evidence. Had we consented then, in all probability, this case would have had to be adjourned to allow the respondent to locate the said documents and we would have been faced with a part-heard case against a background where the witnesses for the respondent may well have had to be recalled. In our judgment, this application was far too late and we declined to accede to it.

The facts

34. The claimant was employed on 1 April 2008 by Kalyx Limited and, via a succession of "TUPE" transfers, was employed by the respondent from 1 September 2014.

The claimant's disability

35. An open preliminary hearing has been heard by Employment Judge Milner-Moore to determine as a preliminary issue whether the claimant was a disabled person for the purpose of s.6 of the Equality Act by reason of chronic anxiety.

36. Obviously enough, we are bound by Employment Judge Milner-Moore's judgment. On 12 July 2021 she ruled that the claimant was disabled within the meaning of s.6 of the Equality Act 2010 by reason of anxiety.

37. We have within our hearing bundle the claimant's two impact statements, the written submissions for the preliminary hearing and Employment Judge Milner-Moore's reasons.

38. The written submissions for the preliminary hearing summarised the claimant's evidence concerning the effects that his chronic anxiety had on him on a day to day basis. The effects are summarised under headings titled; Children and Family, Shopping, Using the Telephone, Watching Television or Reading a Book, Getting Washed and Dressed, Preparing and Eating Food, Carrying out Household Tasks and Taking Part in Social Activities. The general assertion is made that the claimant's mental impairment…"Has an adverse effect on his ability to carry out normal day-to-day activities in regard to his concentration and cognitive functions affecting the stability of his mood."

39. In her findings of fact Employment Judge Milner-Moore dealt with the effects on normal day to day activity as follows:-

> "32. I consider it likely that this condition has had an adverse effect on the claimant's ability to carry out normal day to day activities. In light of the evidence from the claimant and from his medical records, I consider that, since 2014, the claimant has from time to time been adversely affected in relation to the normal day to day activities. He has become reluctant to engage with strangers or do ordinary activities such as going shopping. He has been reluctant to, or found it difficult to, engage in normal socialising with friends. He has experienced loss of appetite. He has had periods of worrying excessively and these matters have impacted on his ability to concentrate on ordinary matters."

40. It is noticeable that no specific evidence has been given of any effect that the claimant's anxiety with low mood may have had on his work. The impact statement refers in general to side effects from medication of loss of concentration and memory, references a repeated feeling of danger after a stressful event and refers to his anxiety adversely impacting his concentration and the quality of his decision making when he is under pressure. We have had no medical evidence as to how the claimant's disability of anxiety with low mood would affect him in the event of being

exposed to a stressful situation. The nearest we have is the September 2017 OH report (set out below, para 46) which sets out symptoms that can arise from mental ill health but does not assert that they are present and the GP letter dated 20 July 2020 which states:

> "In my opinion and given Mr Mghizou's documented history of stress at work requiring periods of leave, it could certainly (>80%) have affected his ability to-carry out his duties (in situations of severe stress) – such as that which led to his dismissal."

41. In his closing submissions Mr Lee, on behalf of the claimant, puts it as follows:-

> "39. It is contended for the purposes of section 6(3) of the Equality Act 2010, paragraph 4.16 of the ECHR Code and the 2011 Guidance on Disability that disabled persons suffering with chronic anxiety would have a mental impairment and would share the protected characteristics of being cognitively impaired in regard to the substantial adverse effects pertaining to, inter alia, concentration and irritability (source NHS website…) with other people who have cognitive impairment.
>
> 40. The claimant contends that these adverse effects arise from his disability, and they substantially adversely affect his cognitive functions relating to concentration and decision making, and that these adverse effects could well happen, when he is triggered by stressful situations."

42. We take judicial notice that the disability of anxiety with low mood will encompass a wide range of severity from mild to very severe and that the symptoms and effects will vary significantly.

<u>The respondent's knowledge of the claimant's disability</u>

43. As per the Code of Practice on Employment (2011):

> "5.13 If the employer can show that they:
>
> - Did not know that the disabled person had the disability in question; and
> - Could not reasonably have been expected to know that the disabled person had the disability,
>
> Then the unfavourable treatment does not amount to discrimination arising from disability.
>
> 5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person".
>
> 5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the

> circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.
>
> …
>
> 5.17 If an employer's agent or employee (such as an Occupational Health Advisor or a HR Officer) know, in that capacity, of a worker's … disability, the employer will not usually be able to claim that they do not know of the disability, and that they cannot therefore have subjected a disabled person to discrimination arising from disability."

44. In this case the claimant points to a number of documents he says put the respondent on notice or at least on a train of enquiry concerning his disability.

45. The GP's summary letter dated 20 July 2020 indicates that the claimant was signed off work for seven days in August 2014 with stress both at home and at work. He was signed off for four weeks in 2016 with stress at work. We do not know the date but in July 2016 he was being disciplined for ACDT discrepancies. He also had an ongoing grievance during 2016 alleging bullying and victimisation against a manager. Both were probably the catalysts for his stress. He was signed off for four weeks in July 2017 with stress at work. We do not have the 3 July 2017 fit note. However, in May 2017 at a review his flexible working arrangement, which consisted of being on permanent night shifts, was terminated and he was returned to the standard shift pattern as of 29 June 2017. The Claimant referred to this as leaving him extremely stressed. It appears to us that that is why he went off sick with stress. In September 2017 the claimant was signed off with stress at work for a further two weeks. In our judgment, the fact that the claimant was periodically being signed of work for stress at work would not put a reasonable employer on a line of enquiry to see if he was disabled. In our judgment, that would be too great a burden given that stress at work must be one of the most common diagnoses given by GPs when signing individuals off work.

46. In September 2017 the claimant was referred to Occupational Health. The report dated 13 September 2017 records as follows:-

> "Mr Mghizou has been suffering from nausea and vomiting recently to an extent that this caused him to incur absence. He also suffers from chronic anxiety, and his general practitioner (GP), continues to monitor and to treat both conditions.
>
> Relevant history/current situation
>
> As detailed in your referral, Mr Mghizou has a recent absence related to stress and anxiety and had returned to work, however he is currently off work with nausea and vomiting. His intended return date, all being well is: 18.9.17.
>
> Mr Mghizou relates that the trigger for his anxiety is both work related and due to financial concerns owing to his absence. He continues to be monitored and treated by his general practitioner and his GP is referring him to NHS counselling services for longer term counselling.

> …
>
> Opinion / Recommendations
>
> Mr Mghizou's anxiety is not entirely work related, there are work related factors. However there are also financial concerns owing to his absence. Mental ill health can have an adverse effect on an individual's cognitive ability. In terms of insomnia, fatigue, lack of concentration, poor memory and an inability to focus. However these symptoms are likely to improve with treatment therapies. With effective clinical management and employer support, his condition should improve, and his likelihood of absence will therefore reduce.
>
> In my opinion, this case is likely to be covered under the disability provisions of the Equality Act at the current time. However as you are aware this would ultimately be a legal rather than a medical interpretation."

47. Based on this report, we find that the respondent knew that as of September 2017 the claimant had chronic (that is to say long term) anxiety and that OH considered him to have a disability within the meaning of the Equality Act. We find that the respondent therefore knew that the claimant was disabled within the meaning of the Equality Act 2010 at that time.

48. On 6 May 2018 the claimant put in a grievance. This merely alludes to being signed off work in July 2017 for stress.

49. During 2018 the Claimant continued to press for flexible working to allow him to work permanently on night shifts. This was refused on a number of occasions.

50. A letter dated 14 May 2019 from Dr Obi, Occupational Health Physician, to Mrs Gambling, HR Co-Ordinator at the respondent, refers to the claimant having disgruntled feelings with his employer "which for him are sources of perceived stressors". This is in the context of the claimant wanting to remain on night shifts. Dr Obi advised management to conduct a stress risk assessment.

51. An OH review letter dated 28 May 2019 refers to stress and anxiety causing the claimant's Crohn's disease to flare up and this was again in the context of the claimant's campaign to remain working on night shifts.

52. On 17 June 2019 the claimant lodged a further grievance. This was in the context of being placed back on day shifts and refers to stress and anxiety being caused to him due to him being unable to have a day-to-day relationship with his children which in turn caused his Crohn's disease to be exacerbated.

53. The claimant put in a further grievance on 19 June 2019. In that he refers to his stress and anxiety emanating "from the virtually untenable emotional effects of working day shifts which substantially compromises my ability to maintain any balanced relationship with my children".

54. On 3 July 2019 the claimant was signed off work for four weeks for "work related stress causing flare up of Crohn's disease and psoriasis". An

accompanying GP letter refers to the claimant experiencing a lot of work-related stress and saying that he would benefit from workplace adaptions (such as night shifts).

55. The respondent has always admitted that the claimant has the disability of Crohn's disease. In our judgment, apart from the September 2017 OH report, the context of the stress and anxiety at work referred to in the various documents is that it arose from specific issues at work such as being disciplined, a bullying grievance and, latterly, having to work on day shifts which caused problems with his relationship with his children which in turn exacerbated his Crohn's disease. This was the reason why the claimant wanted to remain working permanently on night shifts. In our judgment, on those documents alone, it would not be reasonable to expect an employer to be pout on a line of enquiry to see if the claimant had a disability of anxiety with low mood.

56. There is no evidence before us that prior to November 2019 the Claimant had ever had an episode of work related stress arising consequent upon a stressful confrontation with a detainee.

57. Nevertheless, the fact remains that the respondent did know that the claimant had a disability of chronic anxiety in September 2017. Whilst it was hoped that the claimant's condition would improve thereafter with treatment, no such recovery can be guaranteed and so it was always possible that the claimant would continue suffering from chronic anxiety. Given Dr Obi's advice and that the claimant was signed off work with stress in July 2019, so we find that the respondent could reasonably be expected to make further enquiries to find out if the claimant had a disability. Consequently, we find that the respondent could reasonably have been expected to know that the claimant had the disability of anxiety with low mood and find that the respondent did have the requisite knowledge thereof.

<u>The claimant's work</u>

58. The claimant was employed as a Detention Custody Officer ("DCO").

59. The respondent's "HR procedures, Disciplinary Procedure" provides a non-exhaustive list of gross misconduct, The relevant ones are as follows:-

> "● Seriously breaching our health and safety procedure.
>
> ● Any conduct, either at work or externally that may have a negative effect on the company or any misuse of the company name.
>
> ● Gross negligence/incompetence – where you make a mistake that has a major impact on the company or other employees.
>
> ● Anything else that is likely to seriously breach your contract of employment."

60. The night shift residential DCO duties included the following:-

> "**Patrols**

Hourly patrols to be completed and recorded ensuring any Health and Safety hazards are removed and reported.

Roll call

Night Roll count and morning Roll count is to be communicated to the DSM (Duty Shift Manager). Ensure that all detainee room doors are secured for night state."

61. In addition, the Heathrow IRC Local Security Strategy System dealing with security at night states:-

> "3. The centre roll must be checked:
>
> - At 21:00 hours after the centre lockdown.
> - At 08:00 hours prior to the opening of the centre at 08:00.
>
> This is in accordance with the directives on accounting for detainees and must be recorded in the Occurrence Book and on a Roll Count Sheet.
>
> 4. All secure doors and gates must be checked in the service area by staff and checked regularly throughout the night. Officers undertaking this task must sign for this action in the Unit Diary in the Visitor's Control. All duty shift managers must be made aware of the action to take in case of escape, death in custody, or any other contingency. "

62. The unit the claimant worked on had about 40 rooms or cells. Each room had a "wicket" or observation hatch in the door which allowed the room or cell to be looked into from the outside. However, it was clearly a regular occurrence for the wickets to be blocked off by the detainees to prevent custody officers looking in from the outside. In such circumstances, the only way to check the occupants of the cell would be to open the door.

63. During the night shift a patrol was scheduled to take place once an hour at a random time. The purpose of the patrol was to check that the doors remained locked and to be available in the event that any detainee wanted to call out for help or for any other reason. We were told that the patrol would take approximately 10-15 minutes to do. The fact that the patrol had taken pace and the time of it along with a signature or initials would be entered onto the daily log.

64. In addition, the DCO was required to conduct "Assessment, Care and Detention Teamwork" ("ACDT") wellbeing checks on detainees who had been identified as at risk from suicide or self-harm. A number of specific observations of the detainee was prescribed along with a prescribed number of conversations. In addition, the DCO was required to conduct "Vulnerable Adult Care Plan" ("VAC Plan") checks on detainees, also consisting of a number of observations. We were not told if there was a log of these observations and conversations, but, if there was, it has not been placed before us. Since the claimant suggested that he had undertaken these observations, the timings of them could have been highly relevant.

65. All the units were covered by CCTV. However, rather surprisingly, we were told that there was neither a routine nor random review of the CCTV footage to ensure that the patrols recorded in the daily log had actually taken place. We were told that the respondent relied on the honesty and integrity of the workforce and, occasionally, spot checks by the DSM.

66. The morning roll count required the DCO physically to check each and every detainee. The DCO was required to observe them and the fact that they were well. Generally, this could be done by looking through the wicket. However, if the wicket was blocked off or the detainee was asleep then the DCO would have to open the door to undertake a physical check. Opening the door involved a risk assessment. Generally speaking, the claimant could summon another employee so that two people were present but, depending on the circumstances, the full response team could be requested to be on hand. Once the roll count had taken placed the claimant had to submit the number to the DSM.

67. The claimant was expected to wear his uniform at work.

68. It is clear to us, and we find, that working in a detention centre was an inherently stressful job. By definition, the overwhelming majority of those detained did not want to be there and there was clearly an ever present risk of confrontation. The staff were all trained in physical restraint techniques. When it was put to the Claimant that many of the detainees were vulnerable and had mental health issues he agreed and volunteered that many were violent too. He accepted that some were suicide risks. Mr Rennie told us that the role is a challenging one and that staff face issues every day. He commented that in 12 years working in this environment the Claimant would have come across many serious incidents. We agree that it is inconceivable that the claimant would not have been involved in stressful confrontational situations in the 12 years he had worked as a detention Custody Officer, including the 5 years since the onset of his anxiety disability. However, no evidence has been placed before us of the claimant ever having difficulty concentrating and performing his duties to the extent that he failed to do his job or had to ask for support and assistance.

69. Mr Hatch told us that the respondent has a range of support mechanisms for those staff who may have been unfortunately involved in a verbal or physical confrontation. There was a care team on site and mental health first aiders. Staff volunteered to support other staff. They were available by phone 24/7 and the telephone number was published on the daily rota. Mr Rennie told us that generally speaking staff could have one hour out after any incident. He told us that all Duty Shift Managers had a discretion to send staff home for the remainder of the shift if necessary. Whilst that might have posed a problem on the night shift, it was not an insurmountable problem in that other staff could have been deployed. The claimant was clearly aware of these support mechanisms as, in the notes of his appeal hearing, he refers to managers giving at least an hour off after any incident. We find that the respondent did have reasonable arrangements for dealing with any potential staff reaction to a confrontation both with support and temporary cessation of duties. This support was not automatic and both

Mr Hatch and Mr Rennie told us that it would be incumbent upon the employee to inform their line manager of any difficulties experienced and request time off or other support.

70. On 25 March 2019 a notice to staff was issued by Mr Rennie. This states as follows-

> "This notice further reminds staff of the importance of completing a visual check of all rooms during the morning roll count prior to calling through your figures to the relevant DSM. The morning roll count is integral part of our establishment security processes.
>
> When roll count is called the staff designated to each unit should:
>
> - Do a visual head count of all detainees on the unit.
> - Record the count once complete in the Unit Occurrence Log.
> - Check that the count you have completed tallies with that of your Unit Roll Board.
> - Check both the figures against DMS.
> - Only once this has been completed should you call through your figures to the DSM.
> - If during this process a discrepancy in the figures is highlighted this **must** be reported to the DSM immediately as further action may be required.
>
> When reporting the unit figures **you** are accountable for the figures that you report, so must ensure that **you** follow the correct process. Failure to follow this specified process will be classed as a serious breach of security that may result in disciplinary action being taken."

71. We were told that this reminder was sent out following a recommendation consequent upon an Inquest at which the morning roll count had been found to be deficient. We find that this was a clear reminder to staff of the importance of the morning roll count and that failure to follow it could lead to disciplinary action. We do not find that the conditional nature of the reference to disciplinary action in any way undermines its potential seriousness.

72. On 13 June 2019 a broadly similar night state lockdown process notice to staff was reissued setting out the same procedure.

The night of 18/19 November

73. On 18/19 November 2019 the claimant worked the nightshift at Gore House. The shift was from 21:00 until 08:00 the next day. The daily diary indicates that the current role was 56 with one temporarily absent. We have taken this to mean that there were 55 detainees on the claimant's section. Seven detainees were subject to ACDTs and two detainees were on VAC plans.

74. At 21:51 hours there was an incident involving a detainee who we shall refer to as Detainee X. The detainee had become aggressive, was hitting his room door and causing disruption.

75. The build up to this incident is as follows. Each cell has a call button. It appears that Detainee X was repeatedly pressing his call button. Ms Sewell's investigation report dated 6 December 2019 states:-

> "In interview, DCO Mghizou states that the off-going day shift had warned him [Detainee X] had made requests and that as soon as the unit was secured [Detainee X] started pressing his cell call. DCO Mghizou stated that he was answering the cell call from the unit office. The cell call report for [Detainee X]'s room (G11) between 21:00 and the time of the incident (21:51) is 141 pages long and shows a pattern of the cell call being pressed and then reset by staff. There are 27 occurrences of the comms staff answering the cell call from the handset in comms between 21:00 and the time of the incident."

76. When asked about the cell call in his investigatory meeting on 2 December 2019 the following exchange is recorded:-

> "Ms Sewell: Do you recall comms making you aware of a cell call to G11?
>
> "Claimant: No I called them as he kept pressing it and I was answering from the intercom in the office."

77. When asked about this issue in his disciplinary hearing on 19 December 2019, the following exchange is recorded:-

> "Mr Hatch: the cell call report for [Detainee X] is 141 pages long and shows a pattern of the cell call being pushed and reset by staff, 27 occurrences when the cell call bell was pressed and when it wasn't answered in two minutes it transfers to the comms room. 21.08 the bell is pressed with nine minutes before you answer.
>
> Claimant: must have been checking ACDT or paperwork."

78. In her investigation Ms Sewell viewed the CCTV of the relevant location. This indicates that at 21:17 the claimant went to Detainee X's cell. From the CCTV he was there until 21:20 talking to Detainee X. When asked about this in the investigatory meeting, the following is recorded:-

> "Ms Sewell – from looking at CCTV: what were you saying to [Detainee X] between 21:17 and 21:20? Do you recall?
>
> Claimant: wanted to see why he was banging, as soon as I spoke he was swearing, the wicket was covered, I asked him to uncover it, he kept swearing "Fuck you up, you fat bitch". Asked why he was banging door so I could help him but would not say. I said when he calmed down I would go back."

79. The claimant asserts that initially the Detainee X was requesting juice from the kitchen but later started asking for bedding.

80. The claimant and at least one of the responders, Mr Ramadan, considered that Detainee X was under the influence of alcohol. In an email from Mr Ramadan he refers to talking to Detainee X after the incident and states:

> "He told me the reason why he kicked off due to calling his cell buzzer and kept asking for bedding."

81. The post-incident report from DCO Howells, who also attended in response, refers to Detainee X being very aggressive towards 3 members of staff as he had not been given his bedding.

82. Thus it was that Detainee X was banging his room door. The claimant informed Mr Ali Lakda, his duty shift manager. They both attended at the cell and decided to open the door. Mr Lakda's report is as follows:-

> "Upon arrival, duty shift manager opened the room door along with the unit officer, [Detainee X] became aggressive, abusive and attempted to assault unit staff, duty staff manager immediately intervened and took [Detainee X] towards the wall on the other side of the room using personal protection techniques to prevent any assault to the unit staff, [Detainee X] then resisted duty shift manager, became violent and bit me on my right hand causing bleeding and a deep wound. First response arrived and guiding holds were applied and [Detainee X] was relocated to CSU (Care and Separation Unit)"

83. In her investigation report Ms Sewell states:

> "DSM Aktar and DCO Mghizou attend G11 and DSM Aktar opens the door at 21:49 without any other members of staff being present. CCTV indicates there is a discussion between DSM Aktar and [Detainee X] during which [Detainee X] appears to be animated in his room and DSM Aktar remains in the doorway; during this exchange DCO Mghizou contacts comms via radio and requests the response team to attend. At 21:51:48 DCO Mghizou raises his hand in a manner which could be perceived as antagonistic and at this point [Detainee X] attempts to exit the room through DSM Aktar to gain access to DCO Mghizou. In the process of preventing this from happening, [Detainee X] bit DSM Aktar on the hand causing a superficial injury with broken skin for which DSM Aktar attended hospital for a tetanus jab."

84. When asked about this during his disciplinary hearing on 19 December 2019, the following is recorded:-

> "Mr Hatch: his hands are by his sides and he's not moving, but then you move towards the danger. Ali has the situation under some form of control, there is minimum force there, the detainee has a relaxed stance, unclenched fists by his side – then when you move towards him the detainee reacts and moves forward too.
>
> Claimant: I don't know why I stepped forward."

85. The response team arrived at 21:53 and Detainee X was taken to the CSU.

86. Following the incident the claimant had to complete some paperwork. First was a 'Use of Force statement' which is three pages long. The claimant answered two questions yes and no, put an X against two options

concerning personal safety techniques used, completed four lines of description and indicated on a body chart where he had made contact with Detainee X. The document is signed and dated 18 November 2019. In addition, the claimant completed an incident report. It is 17 lines long and is timed at 23:00 hours on 18 November 2019.

87. The last recorded patrol on the daily log for 18 November 2019 was at 20:30 hrs prior to the claimant's shift beginning. Between 21:00 and 24:00 hrs no patrol is recorded as taking place. The claimant entered the following:- "Paperwork after incident"

88. On the daily log for 19 November 2019 no patrol took place between 00:00 and 01:00. For the period 01:00-02:00 the claimant entered a patrol timed at 02:00. Thus, from the daily logs, it would appear there was a five and a half hour period when no patrols took place.

89. Thereafter the claimant recorded patrols taking place at 03:10, 04:29, 05:00, 06:00 and at 07:? (difficult to read)

90. We have had little or no evidence as to when the ACDT and VAC planned observations and conversations were due to take place or did take place. In the investigation meeting, when asked what he could recall about the ACDTs and VACPs, the claimant responded:- "7 ACDTs I think, one hourly I think."

91. In her investigation report Ms Sewell states:-

> "DCM Mghizou maintains that care plan checks were undertaken as required."

92. In his disciplinary hearing on 19 December 2019, when being questioned about patrols, the claimant is recorded as saying the following:-

> "I had seven ACDT, meant next one due 9.30."
>
> and
>
> "Mr Hatch: on the unit there were seven ACDT, two VAC plans and for four hours there were no patrols; I understand there was an incident but as you did not tell anyone you were not doing the patrols they were not done?
>
> The claimant: I believe ACDT were all covered as there were no issues."

93. In its closing submissions the respondent suggests that the claimant conceded that he had not done the unit patrols (and therefore the ACDT checks) in his disciplinary hearing. We are not sure that that concession has been made. It appears to us that the claimant has been maintaining that the ACDT checks did take place hourly. The claimant's oral evidence on this was vague. He stated that he did some ACDTs before and some later and that he did not think he did them hourly.

94. As stated before, we have no evidence of any ACDT/VAC plan logs as to when the observations took place and no analysis of the CCTV appears to

have been undertaken to investigate. If the claimant was undertaking hourly ACDT and VAC plan checks following the incident then that suggests that he was not experiencing difficulty concentrating and performing his duties in the immediate aftermath of the incident due to his anxiety. He was capable of doing those checks and so could have done the patrols. It is hard to imagine that he was unable to do a 10-15 minute patrol. If he did not undertake those checks for five hours, then that compounds and exacerbates his failure to conduct the standard hourly patrols.

95. At approximately 7am on 19 November 2019 the claimant submitted the morning roll count for Gorse house to DCM Lakdar at 55. The house roll report for 19 November 2019 has a manuscript entry on it saying "roll correct at 07:15 hrs".

96. Following the incident with Detainee X Mr Firat Loveridge, head of residence at Colnbrook Detention Centre, referred the matter to Ms Sewell for an internal investigation. The daily log had clearly been examined by then and the lack of patrols between 21:27 and 01:55 identified. (It would appear that CCTV may have indicated that a patrol took place at 21:27. If it did, it was not recorded in the daily log). The investigation was to look into why the cell door was opened with only two members of staff present and why no unit patrols had been completed.

97. On 25 November 2019 the claimant was invited to an investigation meeting on 2 December 2019 "to investigate an allegation that a security breach occurred on Monday 18 November 2019 and that on the same date unit patrols were not completed." The claimant was informed he was entitled to be accompanied by a work colleague or Trade Union official.

98. On 2 December 2019 the investigation interview took place with Ms Sewell. The interview minutes indicate that the circumstances surrounding the confrontation with Detainee X were gone into. The following exchanges are recorded:-

> "Ms Sewell: Did you complete unit patrol/pegging tours between 21:27 and 01:55?
>
> The claimant: No. I was still shaky. He was in a fight mood, it was ridiculous. I was speaking to Ali lots, had to write three or four reports. SRIs for razor & lighters, Police Request Form, Injury and UOF Report, needed to calm down to do it. After that I carried on with normal duties.
>
> Ms Sewell: Did you make Ali aware that you were unable to complete unit patrols?
>
> Claimant: I don't think I did.
>
> Ms Sewell: Did you complete all the required ACDT/VACP/FNC checks?
>
> Claimant: I assume so."

And

> Ms Sewell: Do you recall what time approximately you completed the morning roll count on the morning of 19 November?
>
> Claimant: 07.00 ish.
>
> Ms Sewell: Did you complete the roll count when you did a unit patrol?
>
> Claimant: No
>
> Ms Sewell: Did you conduct the morning roll count as per guidance in NTSs?
>
> Claimant: No, being honest, I did not do a roll check.
>
> Ms Sewell: Any reason why?
>
> Claimant: Everything going on that night, I knew no-one was leaving the unit. I did check on my last patrol, did not want to agitate detainees, not safe to open doors anyway. [Detainee X] had told his mates to get involved so it was not safe for me to open on my own, not enough staff to assist me.
>
> Ms Sewell: CCTV in the pegging report show you completed patrols at 06:14 and 07:13 on the morning of 19 November; at what point did you complete the door to door visual roll count?
>
> Claimant: I didn't."

99. Following that meeting the claimant was suspended on full pay pending a full investigation into the allegation that he did not complete a roll count on the morning of 19 November 2019. The claimant questions why he was not suspended prior to this. The explanation is simple, namely that it was only at the investigation meeting that it was discovered that the claimant had not completed the morning roll count before submitting the figure to his DSM.

100. On 6 December 2019 Ms Sewell completed her investigation report. In our judgment the report is a comprehensive review of the evidence available to Ms Sewell and results in four recommendations concerning the claimant that he faced disciplinary proceedings for conducting himself in a non-professional manner which escalated the behaviour of Detainee X, failing to undertake patrols between 22:27 and 01:55, not conducting the morning roll count and wearing a personal issue duffel coat.

101. In due course HR appointed Mr Martin Hatch, Deputy Centre Manager at Heathrow Immigration Removal Centre, to conduct the disciplinary hearing.

102. On 11 December 2019 the claimant was invited to attend a disciplinary meeting, the charge being:-

> "Serious security breach – not undertaking patrols and failure to conduct the role count"

103. The letter goes on to state:-

> "No decision has yet been taken on what disciplinary action, if any, will be taken as a result of this meeting. However, I do need to inform you that due to the severity of the allegations made, one of the potential outcomes is dismissal."

104. The claimant was informed he was entitled to be accompanied by a work colleague or Trade union official. All relevant documents were sent to the claimant in advance.

105. On 19 December 2019 Mr Martin Hatch conducted the disciplinary hearing with the claimant. At the outset Mr Hatch outlined the matters to be investigated, which included an allegation that the claimant's behaviour was antagonistic and inflamed the situation and that he had been wearing personal clothing during that shift. It is fair to say that these two allegations do not appear in the letter inviting the claimant to the disciplinary hearing. Nevertheless, they were matters specifically identified as worthy of disciplinary action within the investigation report which had been sent to the claimant. However, from the notes of the disciplinary hearing it is clear to us that the claimant was able to respond to these allegations. Further, the allegation that the claimant had antagonised the confrontation with Detainee X, whether by failing to respond to the room calls and/or inappropriate behaviour, were found not proved and without intent. Further, Mr Hatch considered the failure to wear uniform on its own would not warrant any further action against him other than advice and guidance. Consequently, in our judgment, the failure to outline the allegations in the letter inviting the claimant to the disciplinary hearing did not render the procedure unfair.

106. When asked about the unit patrols, the claimant sought to explain this by saying that he was in and out of DSM Lakda's office and that he was calling him, that he was doing paperwork and that he did not report that he was not doing the patrols as he did not think there was anyone else who could have done them. The following exchange took place:-

> "Mr Hatch: During interview you clarified you understood the importance of undertaking patrols, why did you not contact the DSM to say they were not being done?
>
> Claimant: I was shaking, I needed to calm down, I had reports to do.
>
> Mr Hatch: Did you report the fact you needed time out to the DSM?
>
> Claimant: No but it is clear it should be considered, he was assaulted, I was about to get punched, stress levels makes my thing go up again, I calmed down and carried on with my patrols but in that period, I was not right.
>
> Mr Hatch: But you did not discuss this with the DSM so I would be reasonable to assume the DSM did not know you needed some time or that the patrols were not being done.
>
> Claimant: No, he should have checked I was ok."

107. They then went on to discuss the morning roll check. The following exchange is recorded:

"Mr Hatch: Okay on to roll checks, you didn't do a roll check in the morning?

Claimant: No

Mr Hatch: Why not?

Claimant: For my own safety. He was banging the door before and incited his mates to do the same at the same time plus the incident they knew he had gone to SEG, for my own safety. What is the policy of doing the roll counts during curfew time?"

And

"Claimant: … I cannot unlock doors without control and when the wicket is shut you need to open the door.

Mr Hatch: I agree but either you or the DSM would arrange for someone from a unit to come and assist you then you go assist them, the DSM would make a decision if in doubt. The question is did you make any attempt to count the unit?

Claimant: No I didn't as I had no-one leave the wing and I was scared about his mates.

Mr Hatch: Were you scared to open the wicket?

Claimant: No.

Mr Hatch: Did you make any attempt to do the roll count by trying to observe through the wicket and if it was blocked contact the DSM?

Claimant: No

Mr Hatch: Why not?

Claimant: I had to consider my safety and no-one left the wing.

Mr Hatch: But safety was not an issue unless you needed to unlock, did you inform the DSM you didn't feel safe?

Claimant: No I didn't, if I could open the door alone I could have done it."

108. Later the following is recorded:-

"Mr Hatch: Why did you say you report the roll as correct, you could have said its not done but you said, I did it: I checked it as correct and I can account for x amount of people?

Claimant: I didn't say I did it, I gave the figure.

Mr Hatch: Which is your findings in reporting the roll as correct, why did you report the roll as correct.

Claimant: I didn't say I did it; I gave the figures.

Mr Hatch: So is that normal to just call and give the figure?

> Claimant: Yes. Ali is stating the same point as you and management did nothing, in his statement.
>
> Mr Hatch: Read for AL statement "He could have asked staff to give him a hand, we have had several incidents like this, this is no excuse to not do the roll count, if he had asked I would have assisted but he didn't ask".

109. Later when discussing the consequences and a possible escape the claimant referred to a detainee needed a magical tool to open the window.

110. The disciplinary hearing was adjourned and shortly afterwards Mr Hatch sent the claimant a letter of dismissal. The allegation of failing to respond to room calls was not substantiated. The allegation that the claimant had compromised security and safety by inappropriate behaviour towards the detainee was partially upheld but there was no evidence of intent found. The allegations of failure to complete standard patrols and failing to undertake the morning roll check were proved. As already indicated, the uniform allegation was substantiated but deemed not sufficiently serious to take matters forward. The dismissal letter concludes:-

> "In deciding an appropriate award, I have to ensure that the award not only acts to prevent recurrence but also acts as a deterrent to others. I also have to consider the commercial impact this incident has on the company. There has been evidence of gross misconduct and taking everything into consideration I have concluded that the only course of action I can take is to terminate your employment with the company with immediate effect. I have considered your length of service, however, due to the severity of the allegation, I find the sanction as reasonable and proportionate. I am also not convinced you fully recognised the severity of the allegation."

111. In his witness statement Mr Hatch puts it as follows:-

> "32. To preserve life and prevent escape are two of our primary objectives at Heathrow IRC, and indeed across all Mitie detention services. The claimant had failed to uphold both these and showed a complete lack of acknowledgement of his wrongdoing and a lack of understanding of the importance of his fundamental duties. I may have awarded a less severe sanction had he evidenced he had appreciated this and taken some learning, he did not.
>
> 33. At no point did the claimant raise his chronic anxiety to me. If he had then I would have looked into this, but even if this prevented him from performing his duties he failed to tell anyone about it and appreciate the importance of doing so. Therefore, it is likely that I would have given the same sanction although I would have taken medical advice into consideration."

112. In his oral evidence he stated that failures in relation to the morning roll count resulted, in the majority of cases, with dismissal. He acknowledged that in his investigatory meeting with Ms Sewell the claimant had referred to being shaky but made the point that everyone was likely to be shaky after such a confrontation and it was a very common trait. He made the point that the claimant did not take responsibility for his own actions and was seeking to blame the company, Mr Lakda and everyone else and he did not receive the reassurance he wanted that it would not happen again. He told

us that the March 2019 notice to staff concerning the morning roll count process was issued following a recommendation from an Inquest during which it had emerged that roll counts were not always happening.

113. The claimant appealed against his dismissal on 7 January 2020. He raised a number of issues but essentially was contending that the decision to dismiss him was unduly harsh. It is noticeable that in his appeal the claimant takes issue with Mr Hatch's conduct, Mr Lakda's conduct and Ms Sewell's conduct. He disputes much of the evidence, for example alleging that two patrols and not four patrols were missed which is actually inaccurate. He alleges a breach of an agreement in relation to his Crohn's disease disability and alleges race discrimination and victimisation for making a protected act. What he singularly does not address is the suggestion that difficulty concentrating and performing his duties due to his disability of anxiety caused or contributed in any way to him failing to do the controls or conducting the morning roll count. All that there is is a vague reference to failing to provide him with adequate support following the incident on 18 November 2019.

114. The appeal was heard on 4 February 2020 by Mr Paul Rennie, centre manager for Heathrow immigration removal centres. The claimant was accompanied by a work colleague. Mr Rennie went through each of the points in the appeal letter. The claimant was repeatedly asked why he had not conducted the patrols. Apart from blaming Mr Lakda for calling him into his office and referring to Detainee X as smelling of alcohol, he merely referred to trying to calm down.

115. When dealing with the morning roll count the following exchange took place:-

> "The claimant: Staff have been doing the roll count in 15 minutes, you think this is possible? They have been doing it against the policy, not accessing locked door.
>
> Mr Rennie: This is not about other officers. Nothing justifies not doing roll count."

116. The comment by the claimant may suggest that omitting to do the physical check on the morning roll count and simply submitting the figures may not have been a one-off incident. The appeal was adjourned on a number of occasions for Mr Rennie to make further enquiries, not least concerning an alleged comparator who had not been dismissed.

117. The claimant was called on 12 February 2020 and informed that his dismissal had been upheld. This was confirmed in a letter of the same date.

Conclusions

118. We find that the claimant did fail to conduct three patrols between 22:00 and 01:00 on the night of the 18/19 November 2019. We find that based on the CCTV observations the claimant undertook a patrol at 9:27, although this was not recorded on the daily log. The next patrol undertaken took place at 1:55/02:00. There was therefore a period of approximately four and a half hours where no patrols were made. We find that, notwithstanding the

claimant's assertions in his investigatory interview/disciplinary hearing, the claimant probably did not undertake the ACDT and VAC plan observations during that period. We find that the claimant probably sought to mislead Ms Sewell and Mr Hatch as he appreciated the seriousness of not undertaking those welfare observations. If we are wrong about the claimant failing to undertake the ACDT/VAC plan observations during that period and that he did do them, this would suggest that any problems arising out of his disability of anxiety would not have prevented him from undertaking the normal patrols.

119. We find that the claimant did not forget to do or overlook doing the patrols. This is because he has written on the daily log: "Paperwork after incident" in order to explain why he has not undertaken those patrols. We find that this demonstrates that he knew patrols were due, made a conscious decision not to do them and made the entry to explain to anyone viewing the log why no patrols had been undertaken.

120. We find that the claimant failed to conduct the morning roll count by physically checking the 55 detainees in their cells/rooms. Whilst the claimant has expressed concerns about his safety as regards Detainee X's friends had he opened the cell doors, we find that the claimant did not even try to undertake the morning roll count by seeing what could be observed through the wickets.

121. We find that the respondent had a range of support mechanisms for those members of staff who had been unfortunately involved in a physical or verbal confrontation with a detainee. We find that the claimant was well aware of these support mechanisms, in particular that staff could have time out after such an incident to recover and, in certain circumstances, might be sent home for the remainder of the shift. Nevertheless, we find that the claimant did not inform his duty shift manager, Mr Lakda, that he was having any problems, that patrols were not being undertaken and/or the morning roll could not be undertaken and had not requested additional staff support when opening cell doors as necessary.

122. We find that the claimant should have been aware of the high importance of the morning roll count and that disciplinary action could result in a failure to undertake it due to the notice to staff issued in December 2019.

123. We find that failing to conduct routine patrols, ACDT/VAC plan observations and failing to conduct a physical check of detainees for the morning roll count constituted misconduct.

124. We find that Mr Hatch genuinely believed that the misconduct had taken place, principally because the claimant admitted it. We find that that belief was based on reasonable grounds following a reasonable, indeed thorough, investigation.

125. We have gone on to consider whether the decision to dismiss was within the range of reasonable responses of a reasonable employer.

The majority judgment (EJ Alliott and Mr Kapur)

126. We have taken into account that the claimant was a long-serving employee. It has been said, notwithstanding the references to previous disciplinary processes, he had an unblemished record. However, the claimant's length of service could be said to be such that he knew perfectly well of the vital importance of patrols and morning roll counts.

127. We have noted that the claimant's reaction during the disciplinary process has been to blame others and in some way to play down the importance of the patrols and the morning roll count. We note that Mr Rennie regarded his approach as being flippant.

128. In our judgment the respondent was entirely justified in treating the safety and security of detainees as of the highest importance. This is especially so as the morning roll count had been found to be deficient at an Inquest and recommendations made in May to ensure it happened. Prevention of death or harm to detainees whilst in custody is obviously of paramount importance to the detainees, in the discharge of the respondent's function and to maintain the reputation of the respondent with the Home Office. Similarly, the security of the detainees was another core function of the respondent.

129. What if the day shift had discovered a detainee dead in his bed and evidence emerged that the detainee had been calling out for help at midnight? In our judgment both the claimant and the respondent would be subject to extremely severe criticism and potentially exposed to criminal and other proceedings

130. We find that whilst this was a single incident, it was very serious.

131. In the circumstances, we accept that failures to conduct patrols and/or morning roll counts would normally involve the dismissal of the employee and that an important consideration for the respondent was upholding standards and sending a clear message to its workforce that such patrols had to take place. Further, that the employer was entitled to take into consideration the claimant's poor attitude towards what he had done.

132. Taking all the foregoing into account, in our judgment we cannot say that a decision to dismiss the claimant was outside the range of reasonable responses of a reasonable employer.

133. Further, in our judgment the failures were sufficiently serious to constitute gross misconduct justifying summary dismissal and that the claimant had been in fundamental breach of his contract of employment. Consequently, the respondent was justified in summarily determining his contract of employment.

The minority judgment (Mrs Buckland)

134. Mrs Buckland did not disagree with the seriousness of the claimant's failures. However, taking into account the claimant's length of service,

unblemished record and the fact that the failures took place in the aftermath of a physical confrontation with a detainee and were a one-off incident, in Mrs Buckland's judgment the decision to dismiss the claimant was outside the range of reasonable responses of a reasonable employer. Mrs Buckland considers that the range of reasonable responses would have ranged from a warning to a final written warning and would not have included dismissal.

135. For the above reasons, in Mrs Buckland's judgment the failures did not constitute gross misconduct and the claimant would have been entitled to his notice pay in any event.

Disability discrimination

136. S.15 Equality Act 2010 Disability Discrimination.

137. It is common ground that the unfavourable treatment relied upon is the decision to dismiss the claimant.

138. The alleged something arising as a consequence of the disability is as follows:-

    134.1 The claimant submits that the "something arising" from the mental impairment of chronic anxiety was "difficulty concentrating and performing his duties in the immediate aftermath of the incident with the detainee without additional support being given to complete his duties."

139. In his closing submission Mr Lee, for the claimant, goes further and contends as follows:-

> "40. The claimant contends that these adverse effects arise from his disability, and they substantially adversely affect his cognitive functions relating to concentration and decision making, and that these adverse effects could well happen, when he is triggered by stressful situations."

140. We accept that the claimant's disability of anxiety has led to him experiencing difficulty concentrating and being disabled with anxiety. We accept that he may have a greater susceptibility to this following a stressful incident.

141. The unfavourable treatment was the dismissal of the claimant by Mr Hatch. The reason for the dismissal is that the claimant had failed to conduct three hourly patrols, including ACDT/VAC plan observations, had not requested time off to recover from his DSM or informed his DSM that he was not undertaking patrols, had not requested assistance to conduct physical checks for the morning roll count and had not conducted the morning roll count. Further, that he had blamed everyone but himself for these failures and had shown a lack of insight.

142. We find that additional support was available for the claimant to complete his duties and that he was aware of this at all times.

143. We find that the claimant has not proved that he actually suffered a lack of concentration following the incident or that his decision making was in some way so impaired that it prevented him from undertaking his duties or reporting any difficulties to Mr. Lakda. The claimant was in his office. He says he was speaking to Mr Lakda a lot and had to write three or four reports, of which we have seen two. In addition he carried out a room clearance. We find that the claimant did not have a lack of concentration and/or difficulties in undertaking those tasks. Further, we find that the claimant did not forget or overlook conducting his unit patrols but made a conscious decision not to and sought to justify not doing so by writing on the daily log that he was completing paperwork. We find that the paperwork was probably concluded well before midnight on 18 November 2019. We find that, if the claimant was experiencing difficulties in undertaking his duties, it is inexplicable why, when dealing with Mr Lakda on a regular basis in the aftermath of the incidence, he did not request time off or a replacement to conduct the patrols. We do not find that his disability provides an explanation. Further, we find that the decision not to conduct the morning roll count was a conscious decision. By this time the claimant had recovered sufficiently to conduct 6 morning patrols. The morning roll count would have involved him in doing the same patrol but looking through the wickets. He made no attempt to do this. Further, we find that any lack of concentration or difficulties did not result in him failing to request assistance when conducting the morning roll call.

144. Consequently, we do not find that the unfavourable treatment was because of something arising in consequence of his disability.

145. <u>Section 19 Equality Act 2010 Indirect Discrimination.</u>

146. The PCP as finally recorded in the list of issues is as follows:

> "The claimant contends that the PCP was the requirement for him to competently carry out his contractual duties without any assistance at all material times."

147. In one sense the respondent did apply this PCP to the claimant as it is no more than stating that he was required to do his job. His job was to work on his own and so "without assistance".

148. However, in another sense this PCP was not applied to the claimant as he was not required to carry out his duties without assistance as assistance by way of support counselling, relief from his duties and additional back up from his manager and the first response team if required was available. We find that in this sense the PCP was not applied to the claimant.

149. However, whichever sense the PCP is taken in, we find that it did not put the claimant at a particular disadvantage compared with non-disabled employees. We find that all employees were, to a degree, at risk of having an adverse effect to a physical confrontation with a detainee. This was known to the respondent which had support mechanisms available.

150. The disadvantage contended for is: " … in averting dismissal on the pretext of his conduct". Mr. Lee in his closing submissions sought to elaborate on this alleged disadvantage as follows:

> "The Claimant additionally contends that the adverse effects of his disability, which could well happen when triggered, placed him at a particular disadvantage in being able to comply with the PCP, both in relation to managing the detainees concerned due to the manifestation of his irritability, and in relation to performing his roll counts duties in the immediate aftermath of the incident with the detainee without additional time or support being given to competently discharge his duties, due to cognitive impairment affecting his ability to concentrate."

We have already found that additional time and support was available if requested. In essence, in our judgment the claimant is contending that the disadvantage of the PCP was that his cognitive impairment caused him to commit the acts of misconduct found and, no doubt since they led to his dismissal, his subsequent response to being disciplined for them. We find no such causal link has been proved. As with our findings under the section 15 claim, we find that his disability of chronic anxiety did not cause or contribute to him not undertaking the patrols or failing to conduct the morning roll count. This was a conscious course of conduct and not due to a lack of concentration or poor decision making.

151. In any event, we find that a PCP of doing his job was obviously a proportionate means of achieving a legitimate aim. The patrols and morning roll count were to ensure detainee safety and security, the core functions of the respondent's business.

152. For the foregoing reasons, the claimant's claims are dismissed.

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Employment Judge Alliott

Date: 21 October 2022

Sent to the parties on: 21 October 2022

For the Tribunal Office