



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Kirby

**Respondent:** Royal Mail Group Limited

**Heard at Newcastle CFC by CVP**

**On: 23 and 24 June 2022**

**31 October – 2 November 2022**

**Before:** Employment Judge Johnson

**Members:** Mrs D Winter  
Mr G Gallagher

## Representation

**Claimant:** Mr A Effiong (lay representative)

**Respondent:** Mr R Chaudhry (solicitor – advocate)

# RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:-

1. The claimant's complaint of unfair dismissal is not well-founded and is dismissed.
2. The claimant's complaint of automatic unfair dismissal for making protected disclosures is not well-founded and is dismissed.
3. The claimant's complaints of being subjected to detriments for making protected disclosures are not well-founded and are dismissed.
4. The claimant's complaints of unlawful disability discrimination (failure to make reasonable adjustments) are not well-founded and are dismissed.
5. The claimant's complaints of unlawful disability discrimination (unfavourable treatment because of something arising in consequence of disability) are not well-founded and are dismissed.

# REASONS

1. The claimant in this case was represented by Mr Effiong, his lay representative and the respondent was represented by Mr Chaudhry, solicitor advocate. The claimant gave evidence himself but did not call any other witness evidence. The claimant had tendered a witness statement from Mr Michael Ransom, but Mr Ransom did not attend at the hearing and Mr Effiong confirmed that he would not rely upon Mr Ransom's statement. Mr Chaudhry called to give evidence Mr Thomas Carver (delivery office manager), Mr Stephen Spencer (OPG postman), Miss Helen Worfell (independent appeals manager), Mr Ben Todd (resource manager) and Ms Anne Williams (delivery line manager). The claimant and the witnesses for the respondent had all prepared typed and signed witness statements, which were taken "as read", subject to questions in cross-examination and questions from the Tribunal. There was an agreed bundle of documents marked R1 comprising an A4 ring binder containing 357 pages of documents. Both Mr Effiong and Mr Chaudhry prepared written closing submissions, for which the Tribunal was most grateful.
2. By a claim form presented on 15 June 2020, the claimant brought complaints of unfair dismissal, automatic unfair dismissal for making protected disclosures, being subjected to detriments for making protected disclosures and unlawful disability discrimination. The respondent defended the claims. The case has been extensively case managed, with preliminary hearings before Employment Judge Green on 4 September 2020, Employment Judge Aspden on 18 December 2020 and Employment Judge Sweeney on 29 March 2021. The purpose of those preliminary hearings was to properly identify the claims being pursued by the claimant, to identify the issues (the questions which the Employment Tribunal would have to decide) and to make such case management orders as were appropriate in all the circumstances).
3. The hearing was originally listed for 7 days and commenced on 23 June, but had to be abandoned because the claimant was unable to proceed due to ill health. The case therefore reconvened with an agreed time estimate of 5 days from Monday 31 October to Friday 4 November 2022.
4. The claims presented by the claimant may be briefly summarised as follows. The claimant was a postman, employed by the respondent from 7 June 2004 until he was dismissed with effect from 18 March 2020. The respondent's reason for dismissing the claimant is a reason related to his conduct, namely his behaviour over the weekend of 5 and 6 October 2019. The respondent alleges that the claimant refused to perform his contractual duties on the morning of Saturday 5 October, was sent home and then made abusive and insulting posts about his colleagues on Facebook. When he attended for work on Monday 7<sup>th</sup>, he was abusive to his managers. The claimant did not deny refusing to undertake his duties and did not deny making the Facebook posts. The claimant's case is that his behaviour was influenced by his mental health condition (which amounts to a disability) and therefore should not have been regarded as "misconduct" which justified dismissal. The claimant further alleged that his dismissal amounted to unlawful disability discrimination (failure to make reasonable adjustments and unfavourable treatment because

of something arising in consequence of his disability) and further that the respondent had to make further reasonable adjustments to accommodate his disability by changing the route over which he was required to perform his postal duties. Finally, the claimant alleged that he made an anonymous telephone call to the Respondent which amounted to a Protected Disclosure and that this was the reason why he was suspended and dismissed.

5. A somewhat unusual aspect of this case was that very few, if any, of the acts were actually in dispute. Where there was a dispute on the facts, the Tribunal made the findings set out below having heard the evidence of the claimant, the witnesses for the respondent, having examined the relevant documents and considered the closing submissions of Mr Effiong and Mr Chaudhry. Those findings are made on a balance of probability.
6. The claimant was employed by the respondent as a postman and his service began on 7 June 2004. The claimant's delivery route was in Billingham, Teesside. He reported for work to the Stockton delivery office. The claimant originally worked a 38 hour per week, but subsequently requested that he work the same delivery route as his wife and agreed to his hours being reduced to 30 hours per week to match those of his wife.
7. The respondent accepts that from May 2012 the claimant suffered from stress, anxiety and depression to such an extent that it amounted to a mental health impairment which satisfied the definition of "disability" in Section 6 of the Equality Act 2010, and that the respondent was aware of that disability as from that date.
8. There are occupational health reports in the hearing bundle dated 16 May 2012, 20 June 2012, 11 April 2018, 18 November 2019, 16 January 2020, and 23 May 2020. All confirm the claimant's mental health condition, but none make any reference to any physical impairment which could amount to a disability. None referred to any physical impairment which would adversely affect the claimant's ability to undertake normal postal duties.
9. The claimant alleged that the round he was required to undertake in making postal deliveries was one of the more difficult in the area, in that it was long and undulating. The claimant's opinion in that regard was contradicted by Mr Stephen Spencer, who provided detailed evidence to the effect that the terrain on that route is not flat and has highest points of 15 metres and a lowest point of 7 metres. However, there are various start points throughout the route and those inclines are not walked in their entirety. Mr Spencer acknowledged that there were challenging parts of the route on Imperial Road and New Road, which had elevated paths and properties with steep drives. However, Mr Spencer's description of the route was such that it was "not exceptional and similar to many duties throughout the area." The claimant's case in this regard was that his stress, anxiety and depression were exacerbated when he became tired due to the physical demands placed upon him by undertaking his postal duties on that route. There was no medical evidence whatsoever to support that contention from the claimant. The Tribunal preferred the evidence of Mr Spencer and found it unlikely that the claimant's postal route had any meaningful impact upon his mental health or well-being. The claimant made no complaint to this effect at any time prior to the institution of these proceedings.

10. The evidence of the respondent's witnesses was to the effect that the claimant had a reputation for being somewhat difficult and at times less than co-operative. In particular, the Tribunal accepted the evidence of the respondent's witnesses to the effect that the claimant regularly and repeatedly complained that insufficient time was being allocated to him to enable him to complete his round and that he was being denied overtime (and payments that would go with overtime) in which to do so. The evidence of Anne Williams in particular was that she found the claimant to be somewhat intimidating and someone who would "easily switch from being nice, to being aggressive." Miss Williams described the claimant as "quite volatile and he just kept having a go about the duty that he had chosen and this made me feel intimidated and I started to struggle to deal with his behaviour. If I asked him if he was okay, he would get aggressive with me." However, as at the time of the disciplinary proceedings which led to his dismissal, the claimant was regarded by the respondent as having a clean disciplinary record.
11. On the morning of Saturday 5 October 2019, the claimant reported to the Stockton delivery office, where he was due to commence his delivery round at 8.30am. Instead of going into the office to collect his bag for delivery, the claimant stood at the gate outside the office and refused to commence his delivery round. His manager Anne Williams was reluctant to confront the claimant because she was anxious about how he may react. She therefore reported the matter to the resource manager in the office, Mr Ben Todd. Mr Todd described Miss Williams as "visibly upset and crying when she came to see me. She said that he had become abusive towards her and that he was refusing to go out on delivery and was standing on the gate." Mr Todd went outside to speak to the claimant and told him that Anne Williams had complained that he had sworn at her and that he was refusing to go on his delivery round. Mr Todd asked the claimant to come into the office to discuss the issues. The claimant refused to do so. The claimant told Mr Todd that he had been to visit a colleague Mr Robbie Ayre, who was then in hospital suffering from alcoholism. The claimant expressed concern about the way Royal Mail had treated Mr Ayre. The claimant then went on to complain that he was being treated in the same way and that he and his partner were not receiving any help or support from the respondent. The claimant refused to go into the office, refused to undertake his duties and insisted that the operations manager Mr Jamie Walton should come out to see him. Mr Todd explained that it was Mr Walton's day off and therefore he was not available to speak to the claimant. The claimant then asked for his trade union area representative Mr Paul Leigh to come to speak to him. Mr Todd explained that Mr Leigh wasn't available either as it was also his day off. The claimant then said that both of those gentlemen should have been in work if he (the claimant) was at work. Mr Todd suggested that the claimant wait until the Monday morning to speak to either of those two, but the claimant refused to do that. Mr Todd sensed that the claimant was becoming agitated and aggressive, so he told the claimant that he was going back to the office to speak to another trade union representative, Mr Steve Spencer. As Mr Todd walked away from the claimant, the claimant shouted that the way he felt he felt like killing himself. Mr Todd's response was to say that if the claimant continued to make such threats then he would have to call the police.
12. Mr Todd contacted Mr Paul Leigh, who in turn spoke to the claimant and told him to calm down and to undertake his delivery and that any issues could be

addressed on the Monday morning. The claimant continued to refuse to undertake his duties and in the opinion of Mr Todd, was becoming more aggressive in his refusal to undertake his work. Mr Todd then instructed the claimant to go home to cool off, but the claimant refused to do so and continued to stand at the gate. Eventually the claimant left the premises and returned home.

13. The claimant's evidence to the Tribunal was that thereafter he went to the local off licence and bought a small bottle of whisky, which he then drank. The claimant then posted two comments on Facebook about his colleagues' treatment of Mr Ayre, in the following terms:-

*"How about let's not say a prayer and go and fucking see him. All Royal Mail staff in Stockton hang your heads in shame you cunts."*

*"I'll tell them all tomorrow when I go in, I don't care, fucking sick to my back teeth of after thoughts and oh I don't know what to say, put it this way if Rob was not in hospital and it was one of us in there, I'd put my mortgage on him going to see any of us. Really fucking upsets me it does."*

14. Those posts were seen by a number of the claimant's colleagues at the Stockton delivery office. Anne Williams in particular stated in her evidence, *"These made me feel sick as it was completely unacceptable to say such things."*

15. When the claimant reported for work on Monday 7 October, he was invited into the office to meet with Mr Ben Todd. The claimant was accompanied by his trade union representative Mr Steve Spencer. Mr Todd informed the claimant that he was being suspended due to the nature of the comments he had made on Facebook. The claimant's response was to start shaking his head and swearing under his breath. The evidence of both Mr Todd and Mr Spencer in this regard was entirely consistent. The claimant as he left the office, stood in the doorway and began to point his finger at Mr Todd in an aggressive manner which Mr Spencer described as *"not acceptable"*. Mr Spencer described how the claimant stood in the doorway to prevent anyone from leaving to the extent that Mr Spencer felt trapped, unable to leave the room and vulnerable as the claimant could become violent at the slightest provocation. Mr Spencer and Mr Todd allowed the claimant to finish what he was saying before he left the office.

16. The claimant's precautionary suspension was confirmed by letter, which appears at page 165 in the bundle. The claimant was then invited to attend a fact finding meeting under the respondent's disciplinary procedure, which meeting was to take place on 11 October. Minutes of that meeting appear at page 169-178 in the bundle. In attendance were Mr Kirby, Mr Spencer and Mr Todd. Mr Todd raised the claimant's behaviour on the Saturday morning, the Facebook posts over the weekend and the claimant's behaviour on the Monday morning. The claimant admitted that he had made the Facebook posts but stated that, *"I wasn't in the correct frame of mind."* At the end of the meeting Mr Todd informed the claimant that he would receive minutes of the meeting within the next 3 days. Upon hearing that, the claimant again got up and stood in the doorway of the manager's office pointing to Mr Todd and stating in a raised voice that Royal Mail had done *"fuck all for him"* and to *"stop bringing my fucking wife into this"* and that *"nobody listens to me about my*

*fucking duty.*” Mr Spencer described the claimant as being in an “*emotional and agitated state*”.

17. Following the fact finding meeting, Mr Todd concluded that the claimant’s conduct should be accelerated to a formal disciplinary hearing and that due to the serious nature of the allegations and the potentially serious sanction which may be imposed, would have to be dealt with at a level of authority higher than his own. By letter dated 11 October 2019, the claimant was invited to attend a “*formal conduct meeting*” on Friday 1 November to consider the following matters:-

- (i) Abusive behaviour towards manager.
- (ii) A serious breach of communications policy.

The letter enclosed details of the investigation, copies of the relevant witness statements and other documents which were to be referred to at the disciplinary hearing. The claimant was advised of his right to be represented at the disciplinary hearing.

18. The hearing was conducted by Mr Thomas Carver, delivery office manager, who confirmed to the Tribunal that he was trained in the respondent’s conduct policy and had carried out several conduct investigations, some of which had resulted in dismissal and some in lesser penalties or no penalties.

19. Minutes of the meeting appear at page 183-184 in the bundle. Shortly after the meeting began, the claimant’s trade union representative Mr Paul Leigh indicated that he felt that the claimant was unfit to continue, due to his emotional state of mind. It was agreed that the hearing be postponed and that in the meantime, the claimant would be referred to occupational health. The occupational health report appears at page 189. The report itself states that the assessment was cut short due to Mr Kirby’s emotional well-being. The occupational health doctor confirmed that the claimant would be unfit for the workplace for at least 8-12 weeks, due to his emotional well-being. A further occupational health report was obtained on 16 January 2020 which appears at page 213A in the bundle. That report contains the following observations:-

*“Mr Kirby tells me he is physically capable of performing his role and is keen to return to work. I am of the opinion Mr Kirby is unfit to work and will remain so until the current investigation process is completed. Mr Kirby will require a period of time to recover after the process is concluded prior to returning to work. In my opinion, Mr Paul Kirby would be considered as disabled under the Equality Act. The condition this relates to is anxiety. He would benefit from being given advance notice of the questions to be posed, so that he can prepare himself in advance.”*

20. Mr Carver agreed to that recommendation and by a letter at page 214 in the bundle, invited the claimant to attend the postponed disciplinary hearing on 12 February. In that letter, Mr Carver set out the questions which he required the claimant to answer. Those 6 questions appear at page 220 in the bundle. The claimant has not taken exception to the nature of any of those questions in the course of these proceedings.

21. The conduct meeting took place on 12 February 2020. Mr Carver conducted that meeting. The claimant attended together with Mr Neil Bendalow, his

trade union representative. Minutes appear at pages 221-236 in the bundle. Those notes were sent to the claimant and he was invited to make amendments, which he did and returned them to the respondent. On 15 March, Mr Carver invited the claimant to attend a decision meeting on 18 March, again at the Stockton delivery office. At that meeting, the claimant was informed that Mr Carver had concluded that the claimant was guilty of inappropriate behaviour towards his manager and of posting derogative comments which had been uploaded on to Facebook. Mr Carver concluded that the claimant's behaviour amounted to gross misconduct for which the appropriate sanction was summary dismissal. Mr Carver provided a full report setting out the nature of the investigation, disciplinary process and reasons for his decision. The claimant was advised of his right to appeal.

22. It was put to Mr Carver by Mr Effiong in cross-examination, that he had failed to give sufficient weight to the nature of the claimant's mental health condition, when categorising his behaviour as "gross misconduct". Mr Effiong's submission was that the claimant's conduct could not be "*culpable*" because it could not have been intentional, due to the impact of his stress, anxiety and depression. The Tribunal accepted Mr Carver's evidence that he had specifically addressed his own mind to that particular question. Mr Carver considered that Mr Todd and Mr Spencer had done all they could to reassure the claimant whilst he was waiting at the office gate and that the claimant fully understood the standards expected of him with regard to undertaking his duties. Mr Carver specifically recorded that the claimant had told him that he knew that heavy drinking adversely impacted upon his depression, but that he continued to have bouts of heavy drinking anyway. The Tribunal found that Mr Carver had reasonably addressed his mind to the points in mitigation put forward on Mr Kirby's behalf and the Tribunal found that it was reasonable for Mr Carver to conclude that the claimant's behaviour could not fairly be explained by his depression justified by his drinking. Mr Carver concluded that the claimant had acted in an intimidating, threatening, derogatory or discriminatory manner and in so doing was in breach of the respondent's standards of behaviour and code of conduct.
23. The claimant submitted an appeal, which appeal was conducted by Helen Worfell on 22 April. At the claimant's request, that appeal hearing took place by telephone. Notes of the hearing prepared by Miss Worfell appear at pages 266 in the bundle. Those notes were sent to the claimant after the hearing, amended by him and returned.
24. Following the appeal hearing, Miss Worfell interviewed Ben Todd, Jamie Walton, Tom Carver, Steve Spencer and Anne Williams. Miss Worfell also again referred the claimant to occupational health, specifically asking whether there was a link between the claimant's behaviour and his mental health and whether that would include causing him to drink excessively and post derogatory comments on social media about his colleagues. The occupational health report appears at page 330. It records that the claimant "*admitted having relied on alcohol consumption in the past but states that his present intake would not be classed as excessive.*" The occupational health doctor goes on to say, "*it is also my opinion that the behaviour described in the referral was not involuntarily caused by an underlying medical condition. As such it is reasonable to expect that he would be able to adhere to the code of conduct expected of RMG's employees. Panic attacks by their nature are*

*a subjective perception. Individuals with severe chronic depression retain the capacity and conscious control over their actions and choices. As such the behaviours at work are unlikely to be directly caused by an underlying medical condition over which Mr Kirby had no voluntary control.”*

25. Having considered the contents of that report, the Tribunal found it reasonable for Miss Worfell to reject the claimant’s plea that he was not in control of his faculties and thus unable to control his behaviour on the morning of Saturday 5 October outside the delivery office, or when posting the derogatory comments on Facebook over that weekend.
26. The Tribunal accepted Miss Worfell’s clear and unequivocal evidence that she had carefully considered all of the submissions made on behalf of the claimant, including his previous good record and his apology for his behaviour. The Tribunal accepted Miss Worfell’s concerns about the likelihood of repetition of the claimant’s behaviour, so that in all the circumstances of the case, dismissal was the appropriate sanction.
27. The Tribunal found that Mr Carver and Miss Worfell carefully followed the respondent’s detailed policies and procedures for disciplinary investigations and hearings. There was no challenge by the claimant to the fairness of the investigation, the disciplinary hearing or the appeal hearing. The Tribunal found it reasonable for both Mr Carver and Miss Worfell to conclude that the claimant’s conduct was culpable, that the claimant was in control of his faculties at the time and that it amounted to a clear and obvious breach of the standards of the behaviour expected of the respondent’s employees.
28. In his evidence, the claimant alleged that he had made a qualifying disclosure under the respondent’s whistle blowing policy, when he had made an anonymous telephone call to the respondent’s “Employee confidential disclosure” telephone line, on or about 3 November 2019. The claimant alleged that the information he disclosed during that telephone call amounted to a qualifying disclosure and that the making of the disclosure was the principal reason why he was dismissed (and not for his misconduct) and also that the making of the disclosure had a material influence on the decision to send him home, suspend him, dismiss him and refuse his appeal. The first of those two alleged detriments can clearly be disregarded as (whether or not they were “detriments”) as they were imposed prior to the making of the alleged protected disclosure and therefore cannot have been imposed for any reason related to that disclosure.
29. The record of the telephone call at page 202 in the bundle contains sufficient information for that to amount to a qualifying and protected disclosure. That was not disputed by the respondent. The claimant’s difficulty in all of this is that he accepts that the call he made was made anonymously and that at no time did he inform the recipient of the call of his name or indeed provide any other information which could lead to his identify. Mr Effiong’s submission about this disclosure was that it was made to the respondent (because it is their confidential helpline), was therefore in the possession of the respondent and that the Tribunal should infer that those decision-makers in the disciplinary process must have been aware of the disclosure. Mr Effiong referred in his submissions to the respondent’s investigation into the issues raised by the claimant and submitted that the nature of the complaint and the nature of the investigation must have made it clear that the complainant was



in fact the claimant himself. Both Mr Carver and Miss Worfell accepted that they were aware of an investigation which was undertaken following the claimant's telephone call, but both vehemently denied that they or anyone else was aware of who had made the call. The Tribunal accepted the evidence of both Mr Carver and Miss Worfell in this regard. The Tribunal found that neither of them were aware that the claimant had made a qualifying and protected disclosure. The Tribunal found that it was not a case where the Tribunal could infer from an anonymous telephone call made to a confidential helpline, that the claimant himself had disclosed the information which led to the investigation. The allegations were that employees were driving without a Royal Mail driving licence, that staff were driving vans whilst intoxicated, that managers were forging signatures, that employees were not signing in or out, that fraudulent finish times were being added to timesheets, that overtime was fraudulently granted, that people were being suspended due to allegations of abusive language against managers when large groups of staff use swear words and that men think that laughing and joking with women in a certain way, including groping and touching, is acceptable. The record of the telephone conversation shows that when asked about how the complainant had heard about these matters, he replied "*word of mouth*". The Tribunal found that this was wholly insufficient for the Tribunal to conclude that either Mr Carver or Miss Worfell were in possession of any facts which could lead them to conclude that it was the claimant who had made the complaint. The Tribunal found that the claimant's telephone call had no influence whatsoever on the decisions of either Mr Carver or Miss Worfell.

### **The law**

30. The complaints relating to unfair dismissal, automatic unfair dismissal for making protected disclosures and being subjected to detriments for making protected disclosures are contained in the **Employment Rights Act 1996**:

#### **94 The right.**

*(1) An employee has the right not to be unfairly dismissed by his employer.*

*(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).*

#### **98 General.**

*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

*(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

*(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it—*

*(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

*(b) relates to the conduct of the employee,*

*(c) is that the employee was redundant, or*

*(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

*(3) In subsection (2)(a)—*

*(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

*(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*

*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case.*

**43 B Disclosures qualifying for protection.**

*(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*

*(a) that a criminal offence has been committed, is being committed or is likely to be committed,*

*(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*

*(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*

*(d)that the health or safety of any individual has been, is being or is likely to be endangered,*

*(e)that the environment has been, is being or is likely to be damaged, or*

*(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

*(2)For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.*

*(3)A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.*

*(4)A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.*

*(5)In this Part “ the relevant failure ”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).*

**47 B Protected disclosures.**

*(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*

*(1A)A worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—*

*(a)by another worker of W's employer in the course of that other worker's employment, or*

*(b)by an agent of W's employer with the employer's authority,*

*on the ground that W has made a protected disclosure.*

*(1B)Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.*

*(1C)For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.*

*(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—*

*(a) from doing that thing, or*

*(b) from doing anything of that description.*

*(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—*

*(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and*

*(b) it is reasonable for the worker or agent to rely on the statement.*

*But this does not prevent the employer from being liable by reason of subsection (1B).*

*(2) This section does not apply where—*

*(a) the worker is an employee, and*

*(b) the detriment in question amounts to dismissal (within the meaning of .*

*(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, “ worker ”, “ worker’s contract ”, “ employment ” and “ employer ” have the extended meaning given by section 43K.*

31. The complaints of unlawful disability discrimination engaged the provisions of the **Equality Act 2010**. The relevant provisions are as follows:

### **6 Disability**

*(1) A person (P) has a disability if—*

*(a) P has a physical or mental impairment, and*

*(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

*(2) A reference to a disabled person is a reference to a person who has a disability.*

*(3) In relation to the protected characteristic of disability—*

*(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*

*(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*

*(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—*

*(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*

*(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*

*(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).*

*(6) Schedule 1 (disability: supplementary provision) has effect.*

### **15 Discrimination arising from disability**

*(1) 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.*

*(2) 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 the disability.*

### **19 Indirect discrimination**

*(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

*(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*

*(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*

*(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

*(c) it puts, or would put, B at that disadvantage, and*

*(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

*(3) The relevant protected characteristics are—*

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- race;
- religion or belief;
- sex;
- sexual orientation.

## **20 Duty to make adjustments**

*(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; and for those purposes, a person on whom the duty is imposed is referred to as A.*

*(2) The duty comprises the following three requirements.*

*(3) 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.*

*(4) The second requirement is a requirement, where a physical feature 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.*

*(5) 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.*

*(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.*

*(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.*

*(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.*

*(9)In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—*

*(a)removing the physical feature in question,*

*(b)altering it, or*

*(c)providing a reasonable means of avoiding it.*

*(10)A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—*

*(a)a feature arising from the design or construction of a building,*

*(b)a feature of an approach to, exit from or access to a building,*

*(c)a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or*

*(d)any other physical element or quality.*

*(11)A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.*

*(12)A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.*

*(13)The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.*

## **21 Failure to comply with duty**

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

*(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*

*(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.*

## **136 Burden of proof**

*(1)This section applies to any proceedings relating to a contravention of this Act.*

*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

*(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

*(5) This section does not apply to proceedings for an offence under this Act.*

*(6) A reference to the court includes a reference to—*

*(a) an employment tribunal;*

*(b) the Asylum and Immigration Tribunal;*

*(c) the Special Immigration Appeals Commission;*

*(d) the First-tier Tribunal;*

*(e) the Special Educational Needs Tribunal for Wales;*

*(f) an Additional Support Needs Tribunal for Scotland.*

### **123 Time limits**

*(1) Proceedings on a complaint within section 120 may not be brought after the end of—*

*(a) the period of 3 months starting with the date of the act to which the complaint relates, or*

*(b) such other period as the employment tribunal thinks just and equitable.*

*(2) Proceedings may not be brought in reliance on section 121(1) after the end of—*

*(a) the period of 6 months starting with the date of the act to which the proceedings relate, or*

*(b) such other period as the employment tribunal thinks just and equitable.*

*(3) For the purposes of this section—*

*(a) conduct extending over a period is to be treated as done at the end of the period;*

*(b) failure to do something is to be treated as occurring when the person in question decided on it.*



*(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

*(a) when P does an act inconsistent with doing it, or*

*(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

32. The reason proffered by the respondent for its dismissal of the claimant, was a reason related to his conduct. At page 251 in the bundle in his report supporting his decision to dismiss the claimant, Mr Carver refers to a consistent pattern of behaviour on Saturday 5 and Monday 7 October 2019 when the claimant behaved in an abusive and aggressive manner towards his managers. The Facebook comments (which were never denied by the claimant) was regarded by Mr Carver as being a serious breach of Royal Mail's policy.
33. Mr Effiong on behalf of the claimant submitted that the real or principal reason for the claimant's dismissal was because he had made a protected disclosure in his anonymous telephone call to the respondent's employee confidential disclosure helpline. The Tribunal found that the making of that telephone call had no influence whatsoever on the decisions of either Mr Carver or Miss Worfell. Mr Effiong sought to persuade the Tribunal that the circumstances in the claimant's case were similar to those of the employee in **Royal Mail Group Limited v Jhuti** [2019] UK SC – 55. Mr Effiong's submission was simply that information imparted by the claimant to the respondent's anonymous helpline should be attributed to the employer generally, including Mr Carver and Miss Worfell. The Tribunal found that there were no similarities between the Jhuti case and that of Mr Kirby. The present case is not one where fictitious allegations had been raised against the employee with a view to securing his dismissal because he had really made protected disclosures. That submission by Mr Effiong was rejected.
34. In misconduct dismissals, the Employment Tribunal obtains guidance from the well-known case of **British Home Stores Limited v Burchell** [1978] IRLR 379, in which the Employment Appeal Tribunal laid down a three-stage test. First, did the employer reasonably believe that the employee was guilty of the misconduct in issue when taking the decision to dismiss (on which question the respondent bears the burden of proof, in terms of demonstrating the reason for dismissal and that it is a reason careful of being fair for section 98 purposes?). Secondly, did the respondent have reasonable grounds for that belief? Thirdly, did it carry out a reasonable investigation? On the latter two questions, the burden of proof will be neutral as between the parties. In asking those questions the Employment Tribunal must be careful not to fall into the area of substitution, that is of substituting its view for that of the employer. Rather, the test to be applied by the Tribunal in determining the fairness or otherwise of the dismissal is that of the band of reasonable responses – a standard that applies not only to the actual decision but also to the process adopted by the respondent in reaching that decision.
35. In the present case, the Tribunal was concerned with a conduct dismissal where the conduct in question did not arise from just one incident, but three

separate incidents. The first was the claimant's conduct on Saturday 5 October, secondly the posting of the Facebook comments and thirdly his behaviour on Monday 7 October. It is clear from Mr Carver's decision (supported on appeal by Miss Worfell) that he took into account all three incidents when deciding that the claimant should be dismissed because of his conduct on each of those three occasions. The Tribunal was satisfied that the respondent held a genuine belief that the claimant had committed those acts of misconduct. Indeed, the claimant did not deny the behaviour, only that he sought to excuse it because of his mental health condition. Similarly, the investigation carried out was reasonable in all the circumstances, taking into account the information available to the respondent and the claimant's admissions as to what had happened. Accordingly, the respondent held a genuine belief on reasonable grounds after a reasonable investigation that the claimant had committed the acts of misconduct.

36. The Tribunal was satisfied that some reasonable employers in all the circumstances of this case would have dismissed the employee because of his conduct.
37. Accordingly, the claimant's complaint of unfair dismissal is not well-founded and is dismissed. Furthermore, his complaint that he was automatically unfairly dismissed for making protected disclosures is also not well-founded and is dismissed.
38. The claimant has alleged that he was subjected to detriments because he had made those protected disclosures. In deciding whether any detriment has been imposed because the claimant made protected disclosures, the test is slightly different to that where the employee has been dismissed. The Tribunal must consider, not whether the making of the disclosure was the principal reason for the imposition of the detriment, but whether the making of the disclosure had any material influence on the imposition of the detriment.
39. The claimant alleges that being sent home on Saturday 5 October was a detriment. The Tribunal found that this was not a "detriment" in the sense that the claimant was placed at any kind of disadvantage. He had made it clear that he would not undertake any work, so there was no point in him remaining at the respondent's premises. The claimant has not alleged that he was deducted any wages because of him missing that shift. The Tribunal found that the claimant was sent home for his own well-being and accordingly no detriment was imposed. Furthermore, the decision to send him home was in no sense whatsoever influenced by any protected disclosure.
40. The Tribunal found that the decision to suspend the claimant following his behaviour on Saturday 5<sup>th</sup>, Monday 7<sup>th</sup> and the posting of the Facebook comments, was in no sense whatsoever influenced by the making of any protected disclosures. The person who made those decisions was wholly unaware that the claimant had made a complaint to the anonymous helpline. Accordingly, the making of a protected disclosure could not have had any influence on the decision maker. The Tribunal repeats that the same principle applies to the decision to dismiss the claimant and the decision to dismiss his appeal. For the reasons set out above, Mr Carver and Miss Worfell were unaware of the making of the protected disclosures. This was not a situation where information given to an anonymous helpline could be imparted to any of the decision makers. The claimant's complaint of being subjected to

detriment for making protected disclosures are not well-founded and are dismissed.

41. The respondent has acknowledged throughout these proceedings that the claimant is and was at all material times suffering from a mental health impairment which satisfies the definition of disability in section 6 of the Equality Act 2010. The respondent has conceded throughout that it was aware at all relevant times and had the appropriate knowledge of the claimant's disability.
42. The claimant alleges that being sent home on 5 October, being suspended on 7 October and ultimately being dismissed all amounted to unfavourable treatment because of something arising in consequence of his disability. For the reasons set out above, the Tribunal found that being sent home on 5 October did not amount to unfavourable treatment. The Tribunal accepted that being suspended and ultimately being dismissed did amount to unfavourable treatment.
43. The Tribunal then had to consider whether that treatment was because of "something" which arose as a consequence of the claimant's disability. The claimant's case, as presented by Mr Effiong, was simply that because he suffers from a mental health impairment, then he could not be expected to be in control of his faculties at the time the alleged acts of misconduct took place and therefore his behaviour was "something" which arose as a consequence of his disability. The Tribunal found that Mr Carver and Miss Worfell properly addressed their minds to that possibility. Additional medical evidence was obtained from the respondent's occupational health specialist, who made it clear that the claimant's behaviour was not involuntarily caused by an underlying medical condition and that it was reasonable to expect the claimant to be able to adhere to the respondent's code of conduct. The Tribunal accepted that finding and was satisfied that the claimant's behaviour was not "something" which arose as a consequence of his disability. Even if that had been the case, the Tribunal was satisfied that the respondent's suspension and dismissal of the claimant were in all the circumstances a proportionate means of achieving a legitimate aim. The legitimate aim was the requirement for employees to adhere to the respondent's policies and codes of conduct. In the absence of any meaningful way in which the claimant could have satisfied the respondent that he was able to do so, it was entirely proportionate for the respondent both to suspend and ultimately to dismiss the claimant.
44. Accordingly the claimant's complaints of unfavourable treatment because of something arising in consequence of his disability, contrary to section 15 of the Equality Act 2010, are not well-founded and are dismissed.
45. Finally, the Tribunal address this mind to the claimant's complaints that the respondent had failed to make reasonable adjustments, contrary to sections 19-21 of the Equality Act 2010.
46. The claimant alleged that the respondent applied a provision criteria or practice of expecting him to carry out his full contractual duties, which meant completing a postal round with bad terrain, lots of steps, severe hills and a 10 mile walk each day. The claimant alleged that this put him at a substantial disadvantage because of his mental health impairment, in that he became tired at the end of the round and thus more susceptible to the exacerbation of

his anxiety and depression. The claimant alleged that he should have been given a postal round with less distance to walk and more gentle terrain. Whilst the Tribunal accepted that the claimant was required to undertake his postal duties in the manner described, the Tribunal was not satisfied that the claimant was placed at any substantial disadvantage by the application of that provision criteria or practice. The Tribunal was not satisfied that there was any connection between the postal round and its impact on claimant's mental health condition.

47. Furthermore, the claimant had not undertaken any postal work following his suspension on 7 October. The claimant did not enter into ACAS early conciliation until 28 April 2020 and did not present his claim form to the Tribunal until 15 June 2020. Those complaints fall foul of the time limit in section 123 of the Equality Act 2010. The claimant has not put forward any evidence as to why it would be just and equitable for time to be extended in respect of that claim. The Tribunal takes into account the lack of merit in the claim itself and would in any event have refused to accept that it was just and equitable for time to be extended. The claim is out of time and the Tribunal does not have jurisdiction to hear it.
48. The claimant alleges that on 5 October, the respondent applied a provision criterion or practice of requiring him to carrying out his full contractual duties and that this put him at a disadvantage because he was susceptible to panic attacks and thus was unable to complete his round without first having an opportunity to recover and collect himself. The claimant alleges that it would have been a reasonable adjustment to give him time to collect himself by way of a comfort break or period of recovery, before commencing his round and day. The Tribunal was not satisfied that the application of the PCP of requiring the claimant to complete his usual round put him at any kind of disadvantage because of his stress, anxiety or depression. The Tribunal was not satisfied that the claimant was more susceptible of having a panic attack. Furthermore, the Tribunal was not satisfied that had the respondent given the claimant a further period of time on the morning of Saturday 5 October, that the claimant would have been able or willing to commence his rounds. Accordingly, the making of any adjustment sought by the claimant would not have removed the disadvantage.
49. Again, the allegations of this nature must have taken place before the claimant was suspended on 7 October 2019. Those allegations again fall foul of the time limit in section 123 of the Equality Act 2010. No explanation has been given by the claimant as to why he did not present his complaints within the time limit and the Tribunal is not satisfied that it would be just and equitable for time to be extended. The Tribunal does not have jurisdiction to hear that complaint and it is therefore dismissed.
50. The next allegation relates to the respondent applying a provision criterion or practice on 1 November 2019 that the claimant had to attend a face to face interview to discuss disciplinary charges. This related to the conduct meeting held on 1 November 2019 by Mr Carver. It was at that meeting that Mr Carver decided to suspend the meeting, once the claimant and his trade union representative had made it clear that the claimant was not fit to continue. Whether or not the claimant was placed at any disadvantage by being required to attend in person, as soon as it was made clear to Mr Carver that the claimant was not fit to continue, he stopped the meeting and postponed it

so that an occupational health report could be obtained. The Tribunal found that any disadvantage to which the claimant may have been put by being required to attend a face to face meeting was removed when the meeting was stopped and postponed until after an occupational health report had been obtained. Furthermore, this incident occurred on 1 November 2019 and falls foul of the time limits in section 123 of the Equality Act 2010. Again, the claimant has provided no explanation as to why he did not present this complaint within the three month time limit. The claim lacks merit in any event. The Tribunal is satisfied that it would not be just and equitable to extend the time limit. Accordingly the Tribunal has not had jurisdiction to hear that claim which is dismissed.

51. The claimant alleges that he was subjected to victimisation, contrary to section 27 of the Equality Act 2010, when he was dismissed and when his appeal against that dismissal, was itself dismissed. The claimant alleges that he made two protected acts, namely at the first interview on 1 November 2019 when he informed Mr Carver that he intended to make a complaint of discrimination and secondly when he made the anonymous complaint to the helpline on 3 November 2019. When considering allegations of being subjected to detriment because of a protected act, the claimant must consider the real reason for the imposition of the detriment. The Tribunal should ask why Mr Carver acted as he did when he dismissed the claimant and why Miss Worfell acted as she did when she dismissed his appeal. The Tribunal found that in each case the claimant's two alleged protected acts had no influence whatsoever on the decision to dismiss the claimant by Mr Carver and the decision to dismiss his appeal by Miss Worfell. The misconduct for which the claimant was dismissed occurred before the making of either of the alleged protected disclosures. The Tribunal found that there was no connection between either of those alleged protected disclosures and the detriments to which the claimant was subsequently subjected. Accordingly the complaints of victimisation are not well-founded and are dismissed.
52. For those reasons, none of the claimant's claims are well-founded and all are dismissed.

G Johnson

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**Employment Judge Johnson**

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Date: 19 December 2022