Case Number: 1303066/2021

EMPLOYMENT TRIBUNALS

Claimant | Respondent

Mr Jaswinder Gill -v- **Aeroplas (UK) Ltd**

FINAL MERITS HEARING

CONDUCTED IN PART REMOTELY BY THE CLOUD VIDEO PLATFORM

Heard at: **Centre City Tower, Birmingham** On: **3 & 4 November 2022**

Before: **Employment Judge Perry, Mr E Stanley & Mr J Reeves**

Appearances

For the Claimant: **Mr T Gill (son & lay representative)**

For the Respondent: **Mrs C Thomas (HR advisor)**

REASONS

1. Oral reasons were given to the parties at the conclusion of the hearing on both liability and remedy. A Judgment, the text of which for the assistance of the parties is repeated below was sent to the parties on 1 December 2022.

> *"1. The claimant's complaint that he was unfairly dismissed by the respondent is well founded. The respondent is ordered to pay to the claimant the sum of £7,635.63 as compensation for unfair dismissal calculated as follows:-*
>
> | | |
> |---|---|
> | *Basic Award* | *£5,758.50* |
> | *Loss of statutory rights* | *£350.00* |
> | *Sub-total* | *£6,108.50* |
> | *Uplift (25%) - failure to follow ACAS Code* | *£1,527.13* |
> | *Total* | *£7,635.63* |
>
> *2. The respondent contravened part 5 of the Equality Act 2010 and the claimant was subjected to discrimination in contravention of s.15 (something arising from) Equality Act 2010. The claimant is awarded:-*
>
> | | |
> |---|---|
> | *Injury to feelings* | *£9,100.00* |
> | *Reduction (25%) - failure to follow ACAS Code* | *£2,275.00* |
> | *Sub-total* | *£6,825.00* |
> | *Interest* | *£809.00* |
> | *Total* | *£7,634.00* |
>
> *3. The Employment Protection (Recoupment of Jobseekers Allowance & Income Support) Regulations 1996 do not apply."*

2. Reconsiderations were sought by both parties on 7 & 8 December 2022. Both applications were refused on 8 December 2022 on the basis there were no

reasonable prospects of the original decision being varied or revoked in both cases. Reasons were provided. At the same time as seeking a reconsideration the respondent sought written reasons. They follow.

THE BACKGROUND TO THIS HEARING & THE CLAIM

3. The claim form was presented on 7 July 2021 and includes complaints of unfair dismissal and discrimination because of something arising from disability (s.15 Equality Act 2010 (EqA)). The disability relied upon (epilepsy) is conceded.

4. Early conciliation started on 11 June 2021 and ended on 1 July 2021.

5. We heard evidence from Mr Jaswinder Gill, the claimant (we will refer to him as the claimant throughout for ease of distinction from his son), Mr Taminder Gill, his son and Mr Kudji Pawar the respondent's operations manager all of whom provided witness statements.

6. Mr Harkesh Narda, a foreman who worked alongside the claimant, provided a witness statement concerning how the claimant's seizures (see (14) following) appeared to affected the claimant and his personal view on the appropriateness of the claimant working at the respondent's site. He was not called and so it was agreed we would give his evidence such weight as we deemed appropriate.

7. Mr Gill snr told us he does not speak English and gave evidence via an Punjabi (Indian dialect) interpreter.

8. We had before us a bundle of 120 pages. References in square brackets below are to the page of the bundle.

9. The facts we relay below were essentially agreed during the course of the hearing. The legal issues [37-40] that we need to address were summarised at a case management discussion on the 9 December 2021 [34-40]. We clarified them again at the start of this hearing. The law as set out below was that summarised by the Tribunal and agreed with the parties again during the hearing.

THE AGREED FACTS

The Parties

10. The Claimant was born in April 1958 and was employed by the respondent as a pot department packer from 1 June 2010 until 28 May 2021 (when he was 63).

11. The Respondent was established in 1980 makes thermoplastic injection mouldings via 34 injection moulding machines with various press sizes from 80 tonne up to 580 tonnes. It employs approx. 74 -76 people from one site in Tipton. Its accounts for the year earnings for 31 December 2020 showed it turned over £9.4M in 2020 down from £10M in 2019 and made an operating profit of £370K in 2020 compared to £131K in 2019.

12. The claimant's role involved lifting the moulded plastic pots off a belt and placing them on wooden pallets. He was then required to wrap the pallet with plastic, seal the plastic wrapping tight using a Liquid Petroleum Gas (LPG) gun and then move the wrapped pallet using a hydraulic trolley to a storage area. He completed approximately nine pallets per day.

13. The claimant worked in a bay approx. 40m x 20m holding a number of other machines in which 3 operatives worked, all in lines of sight with the claimant.

The historical background of the claim

14. On 20 February 2014 the claimant fell ill whilst at work and was taken to Sandwell Hospital by ambulance. He was diagnosed as having a mild stroke. Following the stroke, he continued to have suffered seizures and he was diagnosed with epilepsy.

15. The claimant told us his recognition of his pre-seizure symptoms has improved significantly over the years and he was normally able to identify when one was about to occur approximately 10-20 minutes before he had a seizure.

16. He had seizures as follows- December 2014, October 2016 and February 2017

17. As to the following further seizures an ambulance had to be called to work or in one case he fell ill at work (†):- August 2017, October 2017, September 2018 (†), June 2019, December 2019 and 23 October 2020.

18. In October 2017 the claimant underwent an Occupational Health Assessment [49-51]

19. As to the incident (†) in September 2018 the claimant fell ill whilst at work and a senior Manager (Jasbir Gakal) took him home. Shortly after arriving home, the claimant had a seizure and was taken to hospital by ambulance.

Events after 23 October 2020

20. Following the last seizure at work on 23 October 2020 the claimant never returned to work again.

21. A risk assessment was thereafter undertaken [53-62]. The date of that occurred (16 November 2020) was not initially provided to us and only supplied during the hearing.

22. In January 2021, the claimant received a phone call from Mr Pawar requesting he attend the respondent's premises for an appointment with its Occupational Health Doctor on 18 January 2021. The Occupational Health dated 25 January [68-69] that followed addressed 5 specific questions. We do not know precisely what they were or what the occupational health doctor was told because a copy of the OH referral was not before us. The report concluded that *"Mr Gill appeared to be suffering with relatively poorly controlled epilepsy. He remains at risk of further seizures at work and, at least until I receive further background information from his GP, he should be considered as unfit for work. The longer-term outlook and his fitness to return to alternative work can be considered, on receipt of further information from the GP."*

23. We need to record at this point that it is the claimant's assertion that the statement his epilepsy was poorly controlled at was at odds with the actuality and he challenges the basis for the occupational health physician's view

primarily on the basis that Mr Girmal Garkal, its operations manager, acted as an interpreter at that meeting.

24. The respondent held a further meeting with the claimant on 11 February to seek his consent to request a GP report. The claimant gave that authority on 22 February 2021 [70], the respondent contacted the claimant's GP on 17 March [71-72] and the GP provided an advice dated 4 May [73-75]. The claimant told us having waived his right to see it before it was sent to the respondent he did not see that report before a decision was made.

25. The principal factual dispute in this claim concerns Mr Pawar's assertion [KP/14] that he had a telephone conversation with the Claimant inviting him to attend a meeting. In his witness statement Mr Pawar said that he told the claimant during the call that the meeting was to discuss the report because it was likely to result in bringing the claimant's employment to an end and the claimant stated he was not interested in attending another meeting.

26. Mr Pawar accepted before us he did not give that warning – instead we were told Mrs Thomas had said that at an earlier meeting with the claimant on 11 February 2021.

27. Whilst there was a dispute if that call occurred at all, due to what it was alleged to relate to and subsequent events, if it did occur that must have been between the date of the GP's advice, 4 May 2021 and 12 May 2021, that latter date being the date of a letter was sent by the respondent to the claimant [76].

28. Having identified that the report had been received from the claimant's GP the respondent's letter of 12 May it stated that if the claimant wished to discuss it with the respondent he could let them know and they would arrange a mutually convenient time to meet. Those comments aside the 12 May letter went on to say that the GP report had identified that epilepsy was a condition needing long-term treatment and that there was a possibility of relapses and further seizures the claimant should not be working in an environment with dangerous machinery and moving vehicles.

29. The letter recorded that the report also advised that the claimant "need[ed] to work in an environment that is safe should [he] have a seizure whilst at work, and therefore [the claimant] should not work with or operate heavy machinery" that the respondent had arranged for its independent Health and Safety Adviser to revisit the Risk Assessment for his role, that as aspects of the assessment gave similar indications to the GP report, and as it was unlikely the claimant would not have further seizures the respondent could not ensure his safety in its workplace. It continued that having considered if there any other suitable alternative roles available, it concluded there were none.

30. It went on to conclude that the respondent had no alternative but to reluctantly bring the employment relationship to an end on 17 May 2021, they would continue to pay him furlough until 17 May followed by a further 12 weeks in lieu of his notice period together with any holidays accrued but not taken. The claimant was advised of his right to appeal within 7 days.

31. It is not disputed that the respondent had by 12 May made a final decision. At that point it there was no clear evidence before us to show the claimant had seen the OH report, GP letter or the risk assessment and thus had an opportunity to dispute their contents before the respondent took that decision.

32. A further letter was sent on to the claimant by he respondent on 25 May [77] noting that he had not asked to meet to discuss the medical report and had not submitted any appeal against the decision to bring the employment relationship to an end before repeating the conclusions it had reached and its rationale for them before going on to set out the sums he would be receiving .

33. The claimant's son states his father did not open those letters until he (the son) visited his father on Thursday 27 May 2021 as his father waited for him to visit to deal with any correspondence.

34. That day, Thursday 27 May 2021 the claimant's son emailed the respondent [78] thus:-

> *"Although my father is very disappointed regarding the decision to end his employment contract, he does acknowledge the points you make regarding the risks involved in continuing with his employment and he accepts the justifications for this decision. He would like to thank you for all your support throughout his employment with Aeroplas."*

The letter then went on to ask for clarification of the payments they claimant would receive.

35. Following that clarification being provided the claimant's son sent a further email on Sunday 30 May [79] thanking the respondent for the clarification, stating that *"we have been advised that in addition to the 12 weeks notice pay, my father is entitled to statutory redundancy pay…"* and seeking clarification of how much that would be. It was only after that was request for statutory redundancy pay was rejected on 4 June that the claimant's son sought to raise an appeal on his father's behalf. It is accepted that appeal was out of time [85]. Before doing so the claimant's son again referred to having speaking to "their advisor" [84]. The appeal was rejected on 9 June [86] by the respondent.

36. Any remaining factual matters that we need to relay we will address in our conclusions.

THE LAW

37. The matters that we need to address today were summarised and agreed at a case management discussion on the 9 December 2021 [34-40] . We clarified them again at the start of this hearing and as it progressed.

Discrimination Arising from Disability (s.15 EqA)

38. Given all the other elements are conceded by the respondents, the sole remaining argument that concerns the section 15 Equality Act complaint, relates to justification.

39. A justification "defence" in the s.15 context relates to the unfavourable treatment (whereas justification for indirect discrimination relates to a PCP).

40. The relevant legal principles have been summarised thus [1]:

> *"(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 863 at [31].*
>
> *(2) The classic test was set out in Bilka-Kaufhas GmbH v Weber Von Hartz (Case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must 'correspond to a real need ... are appropriate with a view to achieving the objectives pursued and are necessary to that end' (para 36). This involves the application of the proportionality principle, which is the language used in regulation 3 itself. It has subsequently been emphasised that the reference to 'necessary' means 'reasonably necessary': see Rainey v Greater Glasgow Health Board (HL) [1987] ICR 129 per Lord Keith of Kinkel at pp 142-143.*
>
> *(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.*
>
> *(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."*

41. Although section 15 (like s.19) places the burden of establishing justification firmly on the employer, it will be for the employee to challenge an assertion that there was nothing else that could have been done; as Baroness Hale observed:

> *"47. … The burden of proof is on the respondent, although it is clearly incumbent upon the claimant to challenge the assertion that there was nothing else the employer could do. Where alternative means are suggested or are obvious, it is incumbent upon the tribunal to consider them. But this is a question of fact, not of law, and if it was not fully explored before the employment tribunal it is not for the EAT or this court to do so." [2]*

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[1] *MacCulloch v Imperial Chemical Industries plc [2008] ICR 1334 EAT at [10]*
[2] *Essop v Home Office, Naeem v MOJ* [2017] UKSC 27; [2017] 1 WLR 1343 SC

42. Whilst it is for the alleged perpetrator to justify the provision, criterion or practice the authorities make clear that the alleged perpetrator is not required to provide evidence of justification; Tribunals are expected to use their common sense, reasoned and rational judgment. What may not be prayed in aid are subjective impressions or stereotyped assumptions [3]. In practice that requires [4]:-

> *"62. The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective pursued ..."* [5]

43. It is important to emphasise that assessment here does not give rise to a margin of discretion or *'range of reasonable responses'* test. Further, the test of determining proportionality is objective so it is no bar to the act being justified if the alleged perpetrator had not turned its mind to the question of proportionality at the time and thus matters that have come to light after the event can be relied upon [6].

Unfair dismissal

44. Where, as here, an employee, has been continuously employed for 2 years, that employee has the right not to be unfairly dismissed. In such cases it is for the employer to show the reason (or, if there was more than one, the principal reason) for dismissal was one of the potentially fair reasons set out in sub-s. 94(1)(b) and (2). The reasons relied upon here by the respondent are capability and some other substantial reason (based on health and safety concerns)

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[3] see Elias J in *Seldon v Clarkson Wright and Jakes* [2009] IRLR 267 EAT at [73] affirmed by the Court of Appeal and Supreme Court and in *Homer [2009] IRLR 601* EAT per Elias (now LJ) at [48] and also paragraph 4.26 of the Code.

[4] per AG Kokott which was adopted following a reference to the EUECJ by the Supreme Court in *Ministry of Justice v O'Brien [2013] ICR 499*

[5] *see Del Cerro Alonso (Free movement of persons) [2007] EUECJ C-307/05, [2008] ICR 145 para 58, and Angé Serrano v European Parliament (Case C-496/08P) [2010] ECR I-1793, para 44.* Albeit that is essentially a restatement of *R. (Elias) v Secretary of State of Defence[2006] EWCA Civ 1293, [2006] 1 WLR 3213* where Mummery LJ gave the following guidance on what was required :-

> *"[151] ... the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*

Which in turn is a repeat of his view in Hardy & Hansons plc v Lax [2005] IRLR 726 CA at [31 & 32], a view that was endorsed by Lady Hale in Homer at [20-23].

[6] *Cadman v Health and Safety Executive [2004] IRLR 971*

45. If a potentially fair reason is shown by the employer, the Tribunal must then go on to assess the fairness of the dismissal. The starting point for that determination is the words of s.98(4) ERA. The burden of doing so for s.98(4) is neutral:-

> *"…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."*

46. In cases such as this before dismissing that will require the employer to:-

46.1. take steps to establish the true medical and health and safety position

46.2. consult with the employee, and

46.3. consider the availability of alternatives including alternative employment.

47. The Tribunal must not carry out its assessment of the reasonableness of the employer's conduct using its own subjective views as to what was the right course to adopt for that of the employer [7]; in many, (though not all) cases there is a "***band*** *[sometimes called the range]* ***of reasonable responses****"* within which one employer might take one view, and another might quite reasonably take another. The role of the tribunal is to decide in the circumstances of each case whether the decision to dismiss the employee fell within ***the band of reasonable responses*** which a reasonable employer might have adopted. If the dismissal falls within ***the band*** the dismissal is fair: if the dismissal falls outside ***the band****,* it is unfair [8].

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[7] *Orr v Milton Keynes [2011] ICR 704 CA*
[8] *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT*

Just & Equitable reduction (including "Polkey").

48. Where an employer argues that the employee would or might have ceased to be employed in any event had a fair procedure been followed, or alternatively would not have continued in employment indefinitely the Tribunal must assess, using its common sense, experience and sense of justice if the employer could fairly have dismissed and, if so, what were the chances that the employer *would* have done so?

49. The Tribunal is not called upon to decide the question on the balance of probabilities but instead to reduce compensation by a percentage representing the chance of losing employment. It is a hypothetical enquiry that may have to be undertaken, owing more to assessment and judgment than it does to hard fact [9].

50. The Tribunal is not must not judge this on the basis of what it would have done if it were the employer or a hypothetical fair employer but the what the actual employer would have done, on the assumption that the employer would this time have acted fairly though it did not do so beforehand [10].

51. The tribunal is entitled to take into account evidence which came to light after the dismissal [11] but it is for the employer to bring forward such evidence. The Tribunal must however have regard to any material and reliable evidence which might include any evidence from the employee [12].

52. A degree of uncertainty is an inevitable feature of this exercise and the Tribunal must recognise there are limits to the extent to which it can confidently predict what might have been. The mere fact that an element of speculation is involved however is not a reason for refusing to have regard to the evidence.

53. It may be that the evidence available to the Tribunal is so riddled with uncertainty and so unreliable that no sensible prediction can properly be made.

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[9] *V. v Hertfordshire County Council UKEAT/0427/14 per Langstaff P at [1 & 21-25]*
[10] *Hill v Governing Body of Great Tey Primary School UKEAT 0237/12, [2013] IRLR 274* per Langstaff P
[11] *Devis v Atkins [1977] IRLR 314* at [39] HL
[12] *Software 2000 Ltd v Andrews [2007] IRLR 568 at [54]*

Whether that is the position is a matter of impression and judgment for the Tribunal. A finding the employment would have continued indefinitely should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored [13].

Contributory conduct.

54. For both ss. 122(2) and 123(6) the Tribunal also must consider what conduct/action (respectively) of the employee occurred before s/he was dismissed or notice was given. For the compensatory award (s.123(6)) the conduct must also have been culpable or blameworthy and caused or at least contributed to the decision to dismiss. It follows for s.123(6) that the action had occurred and the employer must have been aware of it [14].

55. For both ss. 122(2) and 123(6) the function of the Employment Tribunal is to take a broad common-sense view of the situation, and it 'shall' reduce the basic and compensatory awards if it is just and equitable to do so in the light of its assessment [15]. The Tribunal's findings on contribution should be kept separate where possible to findings on liability [16].

56. Whilst the power to reduce for contributory conduct pursuant to s.122(2) (the Basic Award) is wider than s.123(6) and the Tribunal is entitled to take into account any reduction under s.123(1) in assessing what is just and equitable pursuant to s.123(6) normally the reduction will be the same for both ss. 122(2) and 123(6) [17].

Non-compliance with a Code of Practice.

57. For certain types of claim, of which this is one [18] and which concern a matter to which a relevant Code of Practice applies, if the Tribunal determines an employer (or employee) has failed to comply with a relevant Code of Practice

[13] *Software 2000 as above*
[14] *Nelson v BBC No.2 [1979] IRLR 346 (CA)*
[15] *Hollier v Plysu [1983] IRLR 260 (CA)*
[16] *London Ambulance Service v Small [2009] IRLR 563* (CA)
[17] *Rao v CAA [1994] IRLR 240 (CA)*
[18] the jurisdictions listed in Schedule A2 Trade Union and Labour Relations (Consolidation) Act 1992

and that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, respectively increase (or decrease) any award it makes to the employee by no more than 25% [19].

OUR CONCLUSIONS

Discrimination Arising from Disability (S.15 EqA)

58. The panel accept that the aim advanced by the respondent namely the health & safety of the workforce was a legitimate one and for reasons we will go on to, genuine.

59. We find the respondent has failed to show is that the dismissal which is the unfavourable treatment relied upon was relevant, necessary and thus the alternatives were not proportionate.

60. We come to that view because whilst the respondent has provided medical evidence from both its occupational health provider and the claimant's GP, we heard that some of the points made were disputed, these include incorrect comments alleged over seizures increasing and the existence of other medical conditions such as diabetes. Further, Occupational Health suggested that on receipt of the GP report that had been sought that the respondent revert to Occupational Health. The respondent did not and the claimant's GP did not check on the number of seizures before reporting. It was only when Mr Gill Jr later did that, that that was confirmed they had not increased.

61. Nor was it clear and obvious that the reports had been sent to the various entities involved, such that they all had sight of the same. Whilst the claimant declined the option to see those reports, for the most part, it appears as though at least in relation to the occupational health report an issue arose in relation to that this morning, it suggests it was otherwise. Crucially we find there was a failure on the respondent's part to *formally* invite him to a meeting following the receipt of all those reports, to discuss the issues and their content. By *formally* we of course mean in writing supplying with that invitation a copy of those

[19] Respectively s. 207A(2) & (3) Trade Union and Labour Relations (Consolidation) Act 1992

documents. There remained a dispute over whether the informal, that is telephone invite occurred.

62. As a result, that led to there being no opportunity for the conflict over the contents to be addressed, following the necessary warning about what was being considered and the documents having been received, so that the claimant was properly aware of the potential outcomes and what they might entail.

63. Thus the medical evidence and what underlay that was in doubt.

64. As to the risk assessment, there was no evidence that that was ever mentioned or copied to the claimant prior to the instigation of the claim. Whilst there was a suggestion that there were previous risk assessments, they were not provided, so it was not open for the Tribunal to assist what the change in risk was.

65. That is highly relevant given the number of seizures the claimant underwent over the years.

66. The risk assessment also showed that if steps were taken, the risk "x" (multiplied by) likelihood score could be substantially reduced.

67. In our judgment, there was an insufficient engagement by the respondent in the written evidence as to why that was not possible.

68. Whilst the respondent told us it could not employ extra colleagues, as per one of the suggestions in the risk assessment, the respondent did not engage in the way we would have expected with why other alternatives would not work. There was no engagement with the fine detail. Orally, a new issue concerning a problem the respondent was encountering with its insurers was raised.

69. Those matters all demonstrate the respondent's failure to engage with the rationale in the way we would have expected. That was in contrast to what we accept was a clear concern in relation to risks associated with the job that the claimant did. We accept Mr Pawar was genuinely concerned that the risks

associated with the LPG gun were the claimant to have a seizure whilst using it. But there was no real engagement why the claimant's role couldn't be split, and the LPG gun aspect passed to someone else, or other alternatives used.

70. The respondent raises legitimate complaints in our view about the claimant's stance about justification. Whilst it raises alcohol as a credibility issue, in his witness statement the claimant says that he had reduced his intake significantly. Whilst the respondent asserts the claimant said in cross examination, he was not drinking at all, we accept that may have been an interpretation issue regarding the use of the words "spirits". There were Punjabi (Indian dialect) speakers on both sides as well as the court appointed interpreter.

71. At a deeper level, the issue was not actually over the consumption of spirits but whether the claimant was drinking at all. We accept when clarified the claimant was merely saying that he had reduced his consumption and was not drinking spirits. The underlying point is whether the *couple of beers* the claimant said that he was drinking was the actuality because of the report from the chemical pathology clinic and the fact that his drinking continued to be raised by various medical professionals. We return to that as a contribution point below.

72. As to other credibility issues, Mr Gill Jr. initially accepted that the view he set out in his email of the 27 May was his view, not his father's and it was probably better in his view for his dad to retire. The respondent suggests therefore that accords with what the email said that its stance was justified and that it is now at odds with the way Mr Gill portrays it as discrimination. Mr Gill Senior's refusal to confirm his son's email was not his view but his son's and was not what he told his son at the time despite repeated opportunities to do so was not his view or reflective of it. That casts into doubt what was not only Mr Gill Senior's view at the time but also that of Mr Gill Jr.

73. That is further supported by the fact that the discrimination was not raised initially. Firstly, pay was raised, then redundancy, and discrimination only in the claim form. That was never raised as a grievance despite Mr Gill having had the opportunity to take advice. Similarly, the claimant's failure to engage in a

meeting, to appeal until the 4 June and/or to attempt to locate another job despite the claimant's age, lack of English and disability making it difficult, all suggest that Mr Gill junior accepted the position and that called into question the claimant's view.

74. There were further doubts as to the claimant's credibility in relation to his position regarding the letters of the 12 and 25 May. Whether or not he knew they were from the respondent, they were Recorded Delivery letters. His son, who represented him before us dealt with his affairs for the most part. Neither adequately explained why they left those letters almost two weeks.

75. Despite all of those matters, and that they do neither Mr Gill nor his son any credit, for the reasons we give above, the respondent had the burden upon it to justify the dismissal and given the disengagement with the issues, we find it has not done so.

UNFAIR DISMISSAL

76. In relation to unfair dismissal, we accept the genuine reason was the health & safety risk to Mr Gill. We say that because despite the inconsistencies in Mr Parwar's evidence that we refer to above and below, we find Mr Parwar had genuine concerns for the claimant's health. We accept that at the time of the incident in October 2020, that the claimant's work colleagues felt that they had lost him and he had passed away.

77. We find Mr Parwar was genuinely upset when he described what potentially could have happened to the claimant when using the LPG gun.

78. It is extremely sad that this claim has arisen because we find Mr Parwar had a genuine affection for the claimant, that was clear from the evidence we heard that that friendship and affection is no more.

79. Despite this not being a misconduct dismissal, both best practice and natural justice together with the case law, require evidence gathering and then an engagement and discussion as to the potential outcomes.

80. We find the respondent was genuinely attempting to gather that evidence. The issues over the content of that evidence could have potentially been highlighted and addressed by it disclosing it and holding a meeting with the claimant having made plain the potential sanctions, right to be accompanied etc.

81. Whilst the respondent stated that it contacted the claimant by telephone, invited him to a meeting but the claimant was not interested in attending, the reason it is best practice to send invitations to meetings in writing, spelling out the potential outcomes, enclosing documents, as well as making notes of meetings and sharing them, avoids disputes of this sort arising.

82. Whilst doing so does not exclude the possibility of disputes, as the arguments here over the content of a telephone call between Mr Gill Jr. and Mrs Thomas show, it is best practice to do so, so there is a record on file.

83. The telephone call inviting the claimant to a meeting was disputed. Whilst Mr Parwar in his witness statement stated that dismissal was to be discussed (and we say that in terms rather than expressly) he accepted orally that that was not so and indeed we were told that that took place at a meeting with Mrs Thomas in February. That February meeting was to address the claimant's options to return to work following on from the occupational health advice. We have no minutes of either meeting.

84. There was thus no written invitation spelling out what the consequences could be for the claimant. Whilst the claimant did not speak English and it would have thus potentially have been at odds for the letters to have been drafted in English those letters would have set out/provided protections for both parties, and if minutes had been taken, also obviated arguments now raised, about the use of the interpreters and what was said at various meetings.

85. Had that written invitation been sent enclosing the evidence, the claimant could have reviewed it, been accompanied and if he wished, asked for a interpreter. Potential errors could have been corrected, it could have been ascertained if other medical evidence was required, alternatives discussed and in those ways

the criticisms we make as to the lack of openness, transparency and a rationale from the respondent lessened.

86. Given those failures, we consider that the actions of the respondent were outwith the band of reasonable responses and the dismissal procedurally unfair.

Mitigation

87. In relation to damages, the failure to attempt to mitigate has previously raised. Given the credibility points that we make, that in our view substantially called into doubt whether the claimant has failed to comply with his obligation to do so. We address our findings below to that end determining he did not do so and that being so no compensatory award should be made.

Polkey

88. As the so called "Polkey" arguments, this requires a prospective assessment of what would happen if a fair procedure had been undertaken.

89. The Occupational Health Assessment at [69] of the bundle makes clear that if the claimant remained at risk of further seizures, the only alternative was redeployment into another less risky role.

90. Whilst we have heard that the claimant has not had another seizure since he ceased working for the respondent, the medical evidence at the time does not suggest that there was any certainty that that would not recur, (nor recur now for that matter). That therefore cannot be discounted.

91. We accept Mr Pawar's evidence that another role in the factory was not available and the issues was whether adaptations could have been made to this role.

92. The nature of the exercise we have to undertake necessarily being speculative and prospective means it cannot by necessity be too precise. We assess that the likelihood that the claimant would have been dismissed in any event had a fair procedure been followed, was more likely than not (that is more than 50%). The assessment of what that risk actually is sometimes being described as a

general, or rough and ready assessment and trying to gauge that more precisely is always difficult. On the basis of the matters we refer to above whilst it was by no means a certainty it was nevertheless high and we therefore assess that as 2/3 (two thirds).

Contribution

93. In relation to contribution, the only substantive issue raised concerned alcohol intake. Whilst there was evidence before us that the claimant's medical advisors wanted him to reduce his alcohol there was little or no evidence before us that that had any impact on recurrence.

REMEDY

94. The basic award was agreed as £5,758.00 [120].

95. We set out above our concerns whether the claimant agreed with the decision to dismiss due to the safety concerns the respondent had. We find that the claimant's failure to mitigate support that view and that he did fail to do so.

96. It was agreed the claimant was paid his notice period. We find that due to what we find was his failure to mitigate any losses should be limited to the notice period (even if a loss were to be awarded there would then be a substantial reduction based upon the Polkey point that we have made).

97. We assess the loss of rights award as £350.00.

98. In relation to the injury to feelings award, the Vento mid-band level would start at £9,100.00 given the presidential guidance and date of presentation of this claim. Low-band claims are usually reserved for one-off incidents and matters of a similar level. Given this claim relates to a dismissal, we consider the starting point would normally be the mid-band and that that would be the appropriate level to truly reflect an act of discrimination.

99. Whilst the claimant refers to the adverse impact on his mental health, and depression, he did not engage in any real detail with how that was caused or linked to the discrimination other than in paragraph 27 of his witness statement.

Nor was any medical evidence supplied to support that assertion and thus us in determining where in the mid-band any award should fall.

100. Here, questions legitimately were raised as to whether the claimant felt he was actually being discriminated against at the time, or whether that was merely an adjunct to him being dissatisfied that he had failed to secure a settlement payment from the respondent.

101. That is reinforced by his failure to lodge a grievance in relation to his disability discrimination complaint (whilst he did attempt to appeal as we state above at no point prior to bringing his tribunal claim could the claimant point us to him having conveyed to the respondent he was complaining of discrimination.

102. We do not accept that the claimant was a credible witness in that regard, but that does not detract in our view from the fact that he has been discriminated against by virtue of being dismissed and thus we find that not only should the low/mid-band threshold be the starting point for any award but also the end point. We therefore assess the injury to feelings award at £9,100.00.

103. We have directed substantial criticism to both parties in relation to this matter. We set out our criticisms of the respondent in relation to the failure to follow the ACAS guidance and good practice in relation to consulting with the claimant with regards to his dismissal above so do not repeat it here. For the reasons we give above (79-86) that could have elicited information that called into doubt the advice the respondent received form Occupational Health and the claimant's GP. It was thus highly pertinent.

104. In relation to the claimant's failure to raise a grievance about the discrimination complaints he knew where to go and get advice, and got that advice. Having raised other matters, he clearly could have done that concerning the discrimination complaints and he provides no reasonable explanation in our view why he did not. He refers in emails to having taken advice.

105. Whilst he provided no good explanation why he took so long to try to appeal his dismissal the respondent could, had it wished, have extended the time for him to lodge an appeal. We consider that the basis the respondent provides for refusing to consider the appeal was not a reasonable one, it had formed a view based on the initial email from the claimant's son that the claimant accepted it was for the best and was now merely seeking to recant and seek monetary gain.

106. The whole of the tenor of the modern dispute resolution practice is to try to bring parties together and to raise those matters internally if possible, rather than becoming the subject of litigation.

107. Both parties failed to engage in that process. We find they were behaving unreasonably and that led to pertinent matters not being addressed or raised for which no good explanation was provided and the potential opportunity for the litigation to be avoided, missed.

108. The purpose of recent legislation including s.207A Trade Union and Labour Relations (Consolidation) Act 1992, the early conciliation scheme and r. 3 of the Employment Tribunal Rules of Procedure 2013 has the clear objective of promoting alternative dispute resolution.

109. With both regard to the dismissal and discrimination complaint we find that there had been a complete failure by both parties and by virtue of the matters we point to at (107) that it is just and equitable that the maximum reduction should be made to both the award for injury to feelings and the maximum uplift be applied in relation to the unfair dismissal award.

110. Accordingly an uplift of £1,527.13 shall be applied to the unfair dismissal award giving a total of £7,635.63 and a reduction of £2,275.00 to the injury to feelings award.

111. Interest is payable at £809.00 to the injury to feelings award, meaning that totals £7,634.00.

112. The aggregate award is £15,269.63.

113. Whilst the claimant was in receipt of state benefits (contribution based employment support allowance) the Recoupment Regulations do not apply to the same.

signed electronically by me
Employment Judge Perry
Dated: **30 January 2023**

JUDGMENT & REASONS SENT TO THE PARTIES ON
30/01/2023
Jelena Trifonova
FOR THE TRIBUNAL OFFICE