EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112333/2021

Held at Inverness on 24, 25, 26 & 27 April and 30 June 2023

Employment Judge J M Hendry
Members D McDougall
F Parr

Mr D Geddes	**Claimant** **In Person**
Calmac Ferries Limited	**Respondent** **Represented by** **Ms S Mackie,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is as follows:

1. **That the claimant's dismissal was unfair.**
2. **That the respondent company shall pay to the claimant a monetary award of Six Thousand Six Hundred and Eighty Seven pounds (£6687) made up of a basic award of £1467 and a compensatory award of £5220.**
3. **That the claims for disability discrimination being not well founded are dismissed.**

E.T. Z4 (WR)

REASONS

1. The claimant in his ET1 sought findings that he had been unfairly dismissed and also discriminated against on the grounds of his disability. The respondents' position was that the claimant had been fairly dismissed on the grounds of misconduct following a thorough investigation and disciplinary process.

2. The respondent company indicated that they were not aware of "an adjustment disorder" suffered by the claimant or that he took medication that might cause anxiety and depression. They did not accept that the claimant was disabled at the relevant time.

3. The case proceeded to a case management hearing on 13 January 2022. The Judge noted "*As I understand it from the details of the claim at para. 8.2 of the claim form, the discrimination claim appears to comprise complaints of discrimination arising from disability, in terms of section 15 of the Equality Act 2010 and a failure to make reasonable adjustments in term of section 20.*" The claimant was asked to provide further information in relation to his disabilities including preparing an Impact Statement which he duly did. The case was subject to a further case management discussion on 4 April 2022 following provision by the claimant of Further and Better Particulars.

4. The file discloses that there was lengthy correspondence in relation to the claimant's disabilities, the recovery of medical records and so forth. A hearing was arranged to take place on 30 November 2022 before Judge Tinnion to decide whether the claimant was disabled during various relevant periods. I will not rehearse the detailed reasons but the Judge recorded as follows:-

> "*1. During the relevant period of time (11 February 2021 – 6 August 2021), the Claimant was not disabled under s.6 of the Equality Act 2010 because of an adjustment disorder impairment.*
>
> *2.The Claimant's application to amend his ET1 Claim Form to add a claim that on 22 November 2019 the Respondent breached a duty to make*

reasonable adjustments under ss.20-21 of the Equality Act 2010 by failing to provide him with advanced rotas ideally monthly to address disadvantages arising from his epilepsy impairment is denied.

5. *The Claimant has leave to amend his ET1 Claim Form to include an averment and claim that in the period 11 February 2021 – 6 August 2021 the Respondent breached a duty to make a reasonable adjustment for him by failing to conduct a risk assessment concerning his eyesight/partial vision.*"

4. On the issue of that Judgment a final hearing was arranged. The respondent's agents had however written to the Tribunal on 9 March seeking strike-out of a claim based on an allegation dated 26 June 2018.

5. The respondent's agents, no doubt conscious that the claimant was a party litigant had written to him on 23 December 2022 setting out their understanding of the effects of Judge Tinnion's decision and the allegations that were still before the Tribunal. There was a discussion prior to the case beginning on the 24 April which agreed that the following allegations remained to be considered:

1. *"On 26/5/21 I was suspended for alleged misconduct. I felt this was unjust as during an investigation meeting I was asked by Fiona Galbraith whether I had completed a medical declaration form. I responded by informing Fiona I had never seen or filled out one of those forms during my entire employment with CalMac".*

2. *"On 6/8/21 I was discriminated against when I was dismissed from my employment for gross misconduct. I received a letter telling me of my dismissal from Don Mcckillop. I felt this unfair as CalMac had not considered my disabilities to have contributed to the issues leading up to my dismissal. I truly believe if I had been given the help, I needed I would still be working at CalMac and the situations would not have led to the extent that they did".*

3. *"I was put at a disadvantage when asked to complete port assistant duties and work in the car park. I felt I had no choice as I did not want further altercations with my supervisor. In these circumstances I was treated unfavourably due to my partial sight".*

4. *"I have also felt upset as a work colleague has questioned my blindness. I think Calmac have failed to support me as a disabled employee and it was unfair to terminate my contract without trying to get me help to see if*

I was able to find a way to work through my issues. As an Outport Clerk my official duties in my contract did not include working in the carpark but I often had to do this as it was expected of me even although my vision made this a danger to me and I felt uncomfortable. I did not feel able to speak to my supervisor about this, as our communication was at an all time low. This was also the case with my previous port manager".

6. The respondent reserved their position *vis- a- vis* time-bar.

7. At the outset of the hearing the Tribunal raised with parties whether or not the claimant should proceed first. This had not been decided at the various case management discussions and although it is common in discrimination claims for the person alleging discrimination to proceed first it seemed to the Tribunal that there was a claim for unfair dismissal and that claim was likely to be the most significant claim and that issues in relation to discrimination in any event formed part of the whole circumstances of the dismissal that the Tribunal would require to consider. Accordingly, Ms Mackie helpfully agreed to proceed first although this caused a short delay. We would thank her for her assistance to the Tribunal in this matter. Taking her witnesses first assisted the Tribunal's understanding of the case and was also of assistance to the claimant who as a party litigant was unfamiliar with the process of giving and taking evidence.

8. The Tribunal heard evidence from Fiona Galbraith, the respondent's area Operations Manager, Ms Patricia Harewood HR Business Partner, Mr. Donald John McKillop, Area Operations Manager (Clyde area), and from Mr Alexander Lee Cross, Head of Engineering. The claimant gave evidence on his own behalf. The Tribunal had the benefit of a bundle of documents prepared by parties and a chronology of events.

Facts

9. The claimant is a 39 year old man who has lived in Ullapool in Ross-shire for many years. He was employed by the respondent as an Outpost Clerk in their ferry operations based in Ullapool from 16 October 2009 until 5 August 2021.

10. The respondent is a major provider of passenger and vehicle ferries on the West Coast of Scotland. They are a large employer with a dedicated HR Department. There are generally five or six full-time employees in Ullapool, supplemented in the summer season by a couple of additional part-time employees. The claimant was employed full-time. His monthly pay before tax was £1600. His take home pay was £1,100.

Road traffic accident

11. The claimant was involved in a road traffic accident in 2001 when he was a young man. He suffered a significant brain injury which left him with a number of physical and mental conditions namely, epilepsy, diabetes, insipidus, hypoparathyroidism and partial blindness. (He cannot see out of his right eye). He has taken medication for epilepsy since 2014 which appears to have successfully prevented him having fits.

12. Following the road traffic accident the claimant became a campaigner for road safety assisting organisations such as Highland Constabulary with road traffic awareness events in the highlands. It was widely known in the village of Ullapool that he had been involved in a serious road traffic accident and had sustained significant injuries. It would be apparent to an observer looking at the claimant closely that he had sight problems. Those problems affected the way he walked and held his head.

13. The respondent did not have a complete record of the claimant's injuries and conditions. When the claimant was employed he completed a pre-employment health questionnaire (JB256/257) and disclosed that he had substantial visual defects and took medicine for diabetes. The form did not detail the extent of his impairments or address any adjustments that might be needed. The respondent arranged for the claimant to undergo a medical examination at the Health Centre in Ullapool on 16 September 2010 (JB258).

The report that was prepared was not kept and was not available to those involved in the disciplinary process.

14. The claimant's main leisure activity is playing darts with a local 'pub' team. Because he does not have stereoscopic sight he has poor depth perception but has persevered to overcome this in order to be able to play the game.

15. The claimant had reached an understanding with the port manager Iain McIver that because of his eyesight impairment they would try not to ask him to load vehicles in the car park particularly in the dark. He emailed Mr McIver on the 26 September 2019 (JBp67/68) about staff shortages and problems with the rota. The claimant had to know in advance what his work schedule was to be to allow him to take his epilepsy medicine at an appropriate point. He indicated in the email that he felt he was being denied opportunities to advance and he was feeling low.

16. Mr McIver responded on the 22 November 2022 that the company would carry out a workplace assessment regarding the claimant's visual impairment. This was never carried out.

Calmac Employee Assistance Programme

17. The respondent company have an Employee Assistance Programme which is widely publicised both on notice boards and on their intranet. It allows access by employees to assistance including assistance for mental health difficulties. The respondent also has in place a process whereby they can notify the company any medication or changes to medication which might impact on their ability to carry out their work. The claimant did not utilise either of these systems.

18. On 12 September 2019 Patricia Harwood the respondent's Regional HR manager emailed Corporate Communications setting out the support available. It gave details of how to access HELP and SAIL for *''practical,*

emotional, health and social assistance". The email also contained a copy of the communication about these matters which was printed and displayed on the staff notice board at port offices (JB164-165).

19. On 26 February 2020 Patricia Harwood emailed all employees with details of a Mental Health Awareness for Line Manager Courses. The communication contained a reminder about access to assistance and support. (JB166).

Investigation

20. Towards the end of February 2021 a Ms Maggie Graham, the Senior Port Assistant in Ullapool and the claimant's line manager, wrote to the company's HR department. She complained about the claimant behaviour towards herself. She said she knew of at least two female employees who had left the company because of Mr Geddes' bullying and poor behaviour (JB175). She indicated that Mr Geddes had complained about doing three freight shifts a week. These were additional duties.

21. On 3 May 2021 Fergus Munro and employee in Ullapool emailed Ms Dolanna MacLeod in the HR department, with concerns about the claimant's behaviour towards Maggie Graham, which had occurred on 29 and 30 April 2021 (JB292-294).

22. Iain Taggart an employee in Ullapool also emailed Ms MacLeod with concerns about the claimant's bullying and harassment towards Maggie Graham on 6 May 2021 (JB295-297).

23. The respondent's HR department received an Employee Complaint Form completed by Ann 'Maggie' Graham dated 10 June 2021 in the in relation to the claimant's behaviour. Ms Graham named Ian Taggart and Fergus Munro as witnesses in the complaint (JB170-176).

24. Ms Graham had previously complained about the claimant's behaviour and attitude. She had raised two incidents. The first he said took place on 28 April 2021. She alleged that the claimant asked why he was working so many freight shifts despite being assured by her that this was being "looked at". Ms Graham had explained because a member of staff had left the freight shifts had to be covered until new members of staff were trained. She explained that because of Covid staff required to work in ''bubbles'' there were other factors involved in staffing the shifts. Mr Finlay Macrae returned to the office and asked what was going on. Mr Geddes said that he could not talk to Ms Graham. She told him she'd done all she could and if he wasn't happy he should contact management or the Union. At a later point she asked him why he didn't want to cover "freight shifts". His reply was that he didn't want to talk to her and to speak to the Port Manager. He said he'd sent an e-mail to the Port Manager, Ian Don MacIver who was based in Stornoway and he was still awaiting a reply. When she said that she was next in the reporting line he said "I couldn't give a fuck". He said she wasn't a manager and he did not want to talk to her. He told her: "You swagger around this office, back straight……" then said that "things wouldn't change until she took off the blazer and went back to wearing her Calmac fleece". She warned him about his behaviour towards her.

25. The second incident she referred to was on 6 May. She said that she had asked Mr Geddes if he was prepared to do an extra freight shift. He agreed to do it but attempted to revisit the same arguments from the previous week. He became aggressive and said he couldn't talk to her and stormed out the office He became aggressive towards other employees present telling them repeatedly to "shut up".

26. On 13 May 2021 Laura Gilliland an employee in Ullapool emailed Ms Dolanna Macleod with her concerns about what she described as being the claimant's *''negative and confrontational behaviour''* in the Ullapool office on 13.05.2021 (JB298-299).

27. Ms Fiona Galbraith, Area Operations Manager, suspended the claimant from work on the 20 June pending an investigation into allegations that he had breached the Conduct and Standards policy though serious insubordination, intimidation and the use of foul and abusive language to a senior member of staff (JB177).

28. Ms Fiona Galbraith interviewed Maggie Graham (JB178-182). On the 27 May she interviewed Laura Gilliland (JB183-186). On the same date she interviewed Iain Taggart (JB187-190) and Fergus Munro (JB191-194). The interviews were minuted.

29. Ms Graham had at the meeting on 27 May 2021 that she was scared of Mr Geddes and his behaviour made her sick. Ms Gilliland indicated that her view was that the claimant wanted to "show Maggie in a bad light" (JB185). Ian Taggart indicated the claimant "undermines everyone behind their backs and creates a bad atmosphere". He had challenged the claimant about the way he treated Maggie Graham as being unfair and thought it might be because she was a woman. Fergus Munro suggested that the claimant's behaviour was worse when there were no male members of staff present (JB193). Ms Gilliland at the meeting she had on 6 June said that the claimant created a very tense uneasy atmosphere in the workplace: "you can tell when he comes in, if he's in a bad mood. The atmosphere is awful" (JB209).

30. On 27 May 2021 Fiona Galbraith wrote to the claimant to invite him to a meeting to investigate allegations that the Conduct and Standards policy had been breached by his serious insubordination, intimidation, and the use of foul and abusive language towards a member of staff (JB195).

31. The claimant attended an investigation meeting on 1 June. (JB196-204). It was minuted.

32. By email dated 3 June 2021 Marianne MacAulay, an employee, had told Fiona Galbraith that she had she witnessed the claimant's behaviour towards Maggie Graham which had made her uncomfortable. She reported that on her second week working for the respondent the claimant had approached her when she was waiting to collect her son from school and he had said: '*'has Maggie started being a bitch yet''* (JB300-301).

33. Fiona Galbraith met Maggie Graham, Laura Gilliland and Marianne MacAuley again on the 16 June to ask further questions. The meetings were minuted (JB205-207, 208-210, 208-210). Following this she wrote to the claimant on the 21 June advising him that she needs to investigate matters further and inviting him to a second investigation meeting (JB214).

34. The claimant attended a second investigation meeting on the 30 June. (JB215-220). It was minuted. During the discussion the claimant began to raise other matters with Ms Galbraith. Ms Galbraith advised the claimant that the meeting had now ended, and that they could not discuss other things.

35. As a result the claimant emailed Fiona Galbraith with a list of 5 additional points following the investigation meeting (JB169). He said that he had been on a disability awareness course which he had found helpful and that it should be made mandatory as no one else in the Ullapool Office had been on one. He alleged that on the 11 February Maggie Graham had said to Laura Gilliland *''I think he has mental health issues''* referring to him. He had overheard this and it had upset him. He made reference to difficulties working in the Ullapool Office and that he was seen as awkward as he was the one to ask questions on behalf of colleagues.

36. Ms Galbraith decided that the matter should proceed to a disciplinary hearing. Donald McKillop, the Area Operations Manager was approached and agreed to hear the disciplinary case. He was an experienced manager who had dealt with disciplinary proceedings in the past.

Disciplinary

37. Mr McKillop wrote to the claimant to inviting him to a remote disciplinary hearing. The disciplinary offences were that on various dates (28 April and 6 May) he had breached the Conduct Code through serious insubordination, intimidation and the use of foul and abusive language to staff. He attached a copy of the Conduct and Standards policy and the disciplinary policy together with a list of anonymised investigation notes of the witnesses (JB221-222).

38. The respondent's Conduct and Standard's Policy provides for behaviour that will be treated as gross misconduct (JB154) this includes:

- Assault, acts of violence or aggression;
- Bullying;
- Unacceptable use of obscene or abusive language;
- Serious insubordination.

39. The disciplinary hearing took place on the 19 July by Teams. It was minuted (JB223-229). When challenged about the use of bad language at the meeting on 19 July the claimant indicated that foul language was used on a general daily basis.

40. On 22 July 2021 a second meeting took place with the claimant to allow Mr McKillop to ask further questions before reaching an outcome (JB230-233). At the meeting on 22 July the claimant gave further information to Mr McKillop about his conditions. He indicated that he was taking medication for his diabetes and the medication had prevented him having seizures during his sleep. When asked about the medical declaration form and he indicated he was not aware of it until it had been mentioned to him by Fiona Galbraith. He was asked about the side effects that can result in depression, anxiety and frustration. The claimant responded:

"*I only found out when I read up on that myself. I have an appointment next month with the Epilepsy Nurse in Raigmore and I will take it up with her. She keeps tabs on me, talks about seizures and, touch wood, I have not taken any in a long time. I live by myself, but generally my muscles are aching if I have bitten through my tongue which is the harsh reality of having a seizure. As I said this hasn't happened in a long time but the hospital still keeps tabs on me.*"

41. When asked about side effects he indicated he would ask the Epilepsy Nurse.

42. The respondent's HR sent a copy of the disciplinary notes to the claimant on the 23 July and ask him to check them which he did. The claimant returned the hearing notes signed and dated, subject to spelling corrections (JB234-235). Mr McKillop had a further meeting with Maggie Graham to discuss additional details provided by the claimant in the meeting on 22.07.2021 (JB236-237).

43. Mr McKillop considered the evidence before him. He found that the claimant had acted as the witnesses had alleged and had breached the Code of Conduct in his behaviour towards Ms Graham. He was summarily dismissed the claimant by letter dated 6 August 2021 (JB238-240). Mr McKillop wrote (JB239):-

"*Whilst we cannot confirm if you've made all comments, we are of the view that given the initial complaint and evidence presented by witnesses, as well as the number of witnesses who separately came forward, there was a volume of similar examples that was substantial in nature and provided evidence that you were in breach of the conduct and standards policy.*

We are of the view that your behaviour could be regarded as serious insubordination, intimidating and unacceptable and in addition to the confirmation that you have used foul and abusive language. But even if your behavior cannot be regarded as serious insubordination or intimidating in any sense, we conclude there is no doubt whatsoever that it did seriously affected the well being of your Senior Port Assistant in the main but also had an effect on other colleagues who were at various times upset, anxious and troubled by your behaviour. In addition, even when your colleague was visibly shaken and others made it very clear to you that you should not speak to a colleague the way you were, you told another to shut up. Therefore rather than modify your behaviour as a result of their reaction, you continued to behave in this

manner and that almost suggests that you were deliberately trying to upset your colleague and caused disharmony.

It's also noted at various stages of the process, you referred to your visibility impairment which we are aware of and additionally made reference to seizures and medication that may cause frustration, anxiety and depression. Whilst you do not appear to suggest that these may have either influenced your behaviour or act as mitigating factors for your behaviour you have made reference to them and we therefore thought it appropriate to take your points into consideration.

At the point of reaching conclusions it is noted that, there is a theme running through the witness statements that, your behaviour was aimed at one person having considered that if there was a change in mood or behaviour as a result of medication, then this may have impacted on your overall behaviour to all and not directed, in the main, at one person.

Taking all this into consideration we find your actions amount gross misconduct……"

Appeal

44. The claimant appealed the decision to dismiss him (JB241). He said that the decision was too harsh and did not take account of his ''disabilities'' The claimant submitted a letter from Vision Express about his prescription for glasses, a copy of his current Saltirecard and a letter from his GP Surgery signed by a Dr Brown which stated: *''..the above named patient experienced a head injury in a car crash in 2001 and has suffered from the following complications: diabetes insipus, prolonged adjustment disorder, and also suffers from epilepsy ….He continues to see the epilepsy nurse ..and has been seen by a psychiatrist who diagnosed him with a prolonged adjustment disorder ..During one clinic letter it is commented that he defined his mood as feeling easily frustrated and jealous of everyone around him.''*

45. On 12 August 2021 the respondents wrote to the claimant to confirming receipt of his appeal (JB242). Mr Alex Cross Head of Engineering Performance and Policy was asked to deal with the appeal.

46. The claimant was invited to attend an appeal hearing (JB243) on the 20 August by Teams.

47. On 25 August 2021 the claimant sent Alex Cross an email enclosing documents he would like to submit in support of his appeal. The attached documents are

    1. His letter to Fiona Galbraith;

    2. a copy of a vision test dated 03.11.2020;

    3. A copy of his Saltire Card; and

    4. A copy of a medical letter from Dr Tom Brown dated 11.08.2021 (JB244-248).

48. The appeal hearing took place on the 25 August 2021. It was minuted. *(*JB249-252*).* The claimant was accompanied by his sister. She said that staff moving things on his desk led to frustration and he had gone to senior members of staff about this. She drew attention to her brother's medical problems saying ''*We feel that DG's adjustment (dis) order hasn't been addressed properly by the company, there have been no referrals to Occupational Health…He is just seen as someone who gets angry..*''

49. On 2 September 2021 wrote to the respondents proposing an amendment to the disciplinary appeal hearing notes (JB252).

50. At the appeal hearing the claimant had explained that he had a car crash and had various side effects and indicated there had been changes in the make-up of the office in Ullapool. Since he started he said "*I'm always looking for lots of answers to work things and I get frustrated quite easily*". His representative who was his sister, Miss MacCrae indicated that the whole picture should be looked at as the situation. She gave as an example that

things were often moved on his desk which he wouldn't notice because of his eyesight. This was done "*almost as a joke*" and was a major issue for the claimant. He complained that the adjustment disorder had not been addressed and there had been no referrals to occupational health and he had not had the support he properly should have had. He said "*he was just seen as somebody who gets angry and that's not a nice place to work. I think with the right help he could be an asset to Calmac, he is committed to his job*." The claimant indicated that he had not spoken to anyone about his disability. He indicated there was some doubts raised in the witness statements as to whether he was actually visually impaired. The claimant stated that he had been diagnosed with depression but got low at times (JB251). He indicated that others in the office knew of his disability.

51. Mr Cross wrote to the claimant on 7 September:

"*The fact that you have suffered several medical conditions because of a car accident in 2001 is noted. However, we do not accept your medical conditions and/or associated medication caused or contributed to your behaviour towards Maggie Graham. You indicated in the appeal hearing that you were always looking for lots of answers and tend to become frustrated. You indicated that you targeted Ms Graham with your frustrations because she was in charge. Having reviewed the evidence and the outcome of the disciplinary hearing, it is clear to me that your conduct went beyond expressing your frustration. Rather, you chose to engage in a series of personal attacks directed towards Ms Graham which could be characterised as bullying. Your conduct was abusive and personal towards Ms Graham. I am satisfied there is no link between you and any medical condition you have and your decision to bully Ms Graham. Even if your medical condition had caused you to become frustrated, that does not in my view provide adequate explanation as to why you acted in the manner you did. This is not one or two isolated outbursts……*

In connection with the concerns, you have raised about your medical conditions not being adequately addressed, again we do not see sufficient evidence that, had any further reasonable adjustments been put in place, this would have prevented you from acting aggressively towards your colleagues. As such we do not believe this to be a mitigation for the way you have conducted yourself towards your colleagues and more specifically towards Maggie Graham. We also note that you failed to say what reasonable adjustment might have made a difference. Mr Cross made reference to two formal warnings since 2017 for similar conduct."

52. Following his dismissal the claimant applied for and received Universal Credit. He was still in receipt of Universal Credit at the date of the hearing.

53. The claimant contacted ACAS and obtains an Early Conciliation Certificate (JB17).

54. In early November the claimant applied for work at the Summer Isles Enterprises (JB272/273). The claimant applied for a job with Highland Council on the 6 December 2021. He was unsuccessful. He applied for a job at the Lochbroom Filling Station on 30 March 2022 but the application was not progressed as he did not provide a referee who wasn't a family member. He made no effort to ask the respondents for a reference. He applied or a job in TESCO on 9 May (JB275) and at Christmas 2021 as festive relief which was his last application for work.

Witnesses

55. We found the respondent's witnesses generally both credible and reliable witnesses. They gave their evidence in a clear professional manner and evinced no antipathy towards the claimant. It was clear to us that in particular Ms Galbraith had tried to gather as much evidence as possible. The claimant was, at points, a less persuasive witness but overall we accepted much of his evidence. It was clear that he had some very limited insight into how his behaviour might affect others. Where we found his evidence impossible to accept was the suggestion he had made efforts to secure work which we deal with below.

Submissions

56. Ms Mackie asked the Tribunal to accept that the respondent's witnesses had given credible and reliable evidence. Her position was that the employers had

carried out a detailed and fair investigation. Even at the stage of the hearing there was no clear position taken by the claimant was to which of his conditions he said had cause him to act in the way he had. It was significant that one of the employees considered that the claimant had an issue with women in authority such as Ms Geddes. His behaviour had been spoken to by the majority of his colleagues. She distinguished the case of ***Daley***. Much, she submitted, will depend on the particular facts of a case. In this case the employers' actions fell within the band of reasonable responses open to them.

57. If the Tribunal found in his favour the Tribunal should consider reductions in any awards to take account of his poor behaviour. ***Polkey*** was also a live issue as it was apparent that the claimant's dismissal was highly likely to have occurred in any event. Reinstatement would not be practicable. His job has been filled and in any event the relationships he had with other staff would make this impossible. There was no other place he could be redeployed to. Turning to mitigation of loss the claimant had made little initial efforts to obtain work. He had not sought a reference from the respondent. After Christmas 2022 he made no discernible effort to obtain work. The claim for discrimination had really not been backed up by evidence and Ms Macke reminded the Tribunal would, standing the earlier Judgment, have to relate to his visual impairment. They were time barred and should be dismissed.

58. The claimant asked the Tribunal to consider all the evidence and to accept that he had not been well treated. No account had been taken of his various deficits and impairments and the respondents had only looked at one side of the story. They had not investigated matters properly. They had not looked into the allegation that NMs Geddes had mentioned his mental health.

Discussion and Decision

59. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act"). If the reason

demonstrated by the employer is not one that is potentially a fair reason under section 98(2) of the Act, then the dismissal is unfair in law.

60. Conduct is a potentially fair reason for dismissal. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined by section 98(4) of the Act which states that it: "*depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."* That section was examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council*** [2018] UKSC 16. In particular the court considered whether the test laid down in ***BHS v Burchell*** [1978] IRLR 379 remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it was not concerned with that provision. He concluded that the test was consistent with the statutory provision. Tribunals remain bound by it.

61. The Burchell test remains authoritative guidance for cases of dismissal on the ground of conduct. It has three elements (i) Did the respondent have in fact a belief as to conduct? (ii) Was that belief reasonable? (iii) Was it based on a reasonable investigation?

62. Tribunals must also bear in mind the guidance in ***Iceland Frozen Foods Ltd v Jones*** [1982] ICR 432 which included the following summary:

> *"In judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer…….the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case 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.*"

63. The way in which an Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was also considered and the law summarised by the Court of Appeal in ***Tayeh v Barchester Healthcare Ltd*** [2013] IRLR 387.

64. Lord Bridge in ***Polkey v AE Dayton Services*** [1988] ICR 142, a Judgment of the House of Lords, referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct: *"in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation*."

65. A fair investigation should be even-handed and take into account evidence that could be in the employee's favour (***A v B*** [2003] IRLR 405, EAT), ***Leach v OFCOM*** [2012] IRLR 839/67).

66. Guidance on the extent of an investigation was given by the EAT in ***ILEA v Gravett*** 1988 IRLR 497, that:

> *"at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be 15 situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase."*

67. The band of reasonable responses has also been held in the case ***Sainsburys plc v Hitt*** [2003] IRLR 223 to apply to all aspects of the disciplinary procedure. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

68. Tribunals are required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. They are not bound by it.

69. The Code of Practice is supplemented by a Guide on Discipline and Grievances at Work, which is not a document that the Tribunal is required to take into account but which gives some further assistance in considering the terms of the Code of Practice. Under the heading "Investigating Cases" the following is stated:

> *"When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against. It is not always necessary to hold an investigatory meeting….." Under the heading of "Preparing for the meeting", which is a reference to a disciplinary meeting, is included "Copies of any relevant papers and witness statements should be made available to the employee in advance."*

70. A finding that there was gross misconduct does not lead inevitably to a fair dismissal. The test for gross misconduct is a contractual (objective) one based on an objective analysis of the evidence. Because a claim for wrongful dismissal is unsuccessful it does not mean that the dismissal was fair.

71. Finally, the Tribunal referred parties to the case of ***Daley v Vodaphone Automotive Ltd*** UKEAT/0146/20/JOJ and asked for submissions on the question of whether or not there had been a sufficient investigation of any mitigating factors such as the possible impact the claimant's various conditions, including adjustment disorder, may have had on his behaviour in the office towards his colleagues. The allegation that he had overheard Ms Graham say he had mental health difficulties and why he found freight shifts difficult. We noted that the claimant at the disciplinary stage had made reference to becoming frustrated and having anxiety and depression although this had been recorded as a possible side effect of medication he took for

epilepsy. No occupational health report had been sought and the claimant was not asked if he had obtained any information about these matters from the Epilepsy Nurse he was due to visit.

72. We were struck by the way in which symptoms of the adjustment order had been described in the GP'S letter and to his sister's description of him as being seen as someone who gets angry.

73. We raised the matter of the adjustment disorder conscious that at an earlier hearing it had been decided that the claimant had not proven that he was disabled by the adjustment disorder condition and that it was not clear from what he said during the disciplinary process he was saying this impacted on his behaviour. Nevertheless, it seemed to us that although that condition was held not to be sufficient to qualify the claimant as disabled in terms of the Equality Act it might still be capable of providing some mitigation or explanation which a reasonable employer would have investigated this and the other matters further.

74. Part of the background to this case was that the respondents took the view that they had publicised their support and assistance programmes sufficiently and that if genuine the claimant could have sought help from these. This seems a little optimistic given that there often a natural reticence to speak about medical conditions particularly mental health problems both on the part of those with such problems and managers dealing with them. We inferred form the claimant's evidence that he was very reluctant to speak to Ms Graham openly about his conditions hoping to speak to the Ferry Post Manger in Stornoway. We understood that he was absent from work though illness during this period.

75. One of the problems the Tribunal and the employer faced was that the claimant was not particularly forthcoming about the reasons for his behaviour nor did he show much insight into how his behaviour might impact on others. This condition and the lack of any understanding or support was raised by his sister, at the appeal stage which although relatively late in the day was clearly

a matter that left Mr Cross the appeal officer concerned as to whether these matters provided mitigation that should be taken into account. He told us in evidence that he had tried to find information about the claimant's epilepsy medicine and side effects on the internet to see if known side effects included anxiety and depression/low mood. He was unable to explain to us satisfactorily why that that despite these concerns he did not ask for an Occupational Health referral or advice on the effects of the medication, nor did he seek medical advice as to any likely impact the adjustment disorder might have. We found this very difficult to understand in the context of the claimant's sister describing him as being seen as an angry man, the alleged comment that he had mental health difficulties and the short description given by the GP (paraphrasing a Psychiatric Report) of the claimant's self-description.

76. The respondents argued that the claimant had said he had not discussed his conditions to management by which he meant local management and that was blameworthy. One of the matters that gave us concern was whether the witnesses who had given evidence during the disciplinary process were actually aware of these medical/physical issues, or some of them, either from observing the claimant or through local knowledge. The two managers involved in the disciplinary process did not seem to pick up on the fact that if the claimant had suffered from these various conditions since his accident, long before his employment started, why there was no record of them in his personnel file. It appeared from the evidence that the claimant had been referred for a medical assessment before being offered the job but the report had not been filed in his personnel file and subsequently forgotten. From the outset this hampered their investigations which took place in an atmosphere of there being some scepticism that the claimant had any of these conditions including visual impairment or that they were really of any great significance. We noted that photographs were produced by the respondent showing the claimant playing darts with his team. There appeared to be an underlying suggestion that his visual impairment was not as bad as he said it was. We understood that a member of staff had picked these up from Facebook.

77. In the ETI the claimant had made reference to bumping into things and being anxious about working in the car park loading vehicles. It was stated in the ET3 that *''This was never drawn to the attention of local management''* or raised through the company support schemes. We would observe that the respondents accepted that apparently the other staff In Ullapool had made no mention of the claimant having any difficulties including sight problems. This was surprising given that they would have worked in close proximity to the claimant and at the very least noticed he had only one working eye. Ultimately the credibility of these witnesses was a matter for the employers assessment but if medical evidence had been obtained, perhaps through an occupational health referral, the picture would have been much clearer and they might have been a little more sceptical about a professed lack of knowledge of the claimant's various medical and physical difficulties.

78. We would observe that we found it a little difficult to accept the idea that the fact the claimant had been involved in a serious road traffic accident and had various deficits as a consequence would not be widely known in a small village like Ullapool and almost certainly known by at least some members of staff.

79. The claimant first seems to have raised the issue of disability at the meeting on the 1 June (JB 203). It was not raised with Ms Graham at the 16 June meeting although it was put to her on the 28 July if she knew he took medication for his diabetes which she confirmed. Whether she knew about his brain injury, the extent of his visual impairment and concerns about working in the car park, the need for him to take medication for his epilepsy and have a regular shift pattern were not explored. These matters also do not seem to have been put to other witnesses to assess the state of knowledge the staff had.

80. We concluded, although with some hesitation that the investigation carried out by the respondents into important matters of possible mitigation had fallen out with the band of reasonable responses open to them. They had a duty to consider evidence that could be mitigatory. No reasonable employer would have ignored these matters indeed Mr Cross's attempt at ''Googling'' information about the effects of the epilepsy medication shows that he thought the matter might be capable of being mitigatory.

81. Mr McKillop wrote in his dismissal letter (JB 240) that the claimant had not suggested that his visual impairment or medication caused him frustration, anxiety and depression or had been relied upon as mitigation. The claimant is certainly not particularly clear as to any particular cause but the issue is he was saying he suffered from these symptoms irrespective of the causes. Neither the claimant not the respondents' managers were well placed to address any likely impact his various conditions and medications had particularly the adjustment disorder mentioned by his GP. Mr McKillop's assertion in any event does not sit well with the recorded comments at the hearing on the 22 July where epilepsy medication and possible side effects are discussed and the claimant indicates that he would raise it with the epilepsy nurse the following month. There was no evidence that this was followed up.

82. Mr Cross who dealt with the appeal should have focussed on the grounds of appeal which was that the penalty was too harsh. He was alerted to various matters by the claimant who mentioned difficulties in his mental health. Side-effects of medication were discussed (JB231) at the disciplinary hearing and that these might lead to depression and, anxiety and frustration. We accept that Mr Cross clearly took this matter very seriously and he told us that he carried out his own investigations which included consulting the NHS website about possible side effects of the claimant's medication. This demonstrated to us that he was open to accepting that there might be some mitigation for the claimant's actions to be found in his health. We could not understand that

given this view he had not simply sought an Occupational Health Report which would have at least clarified the claimant health conditions and possibly given a view as to any likely impact on his behaviour. We were also somewhat puzzled at the assertion made in the letter rejecting the appeal that any possible mitigation had to be rejected because the behaviours consisted of more than one or two outbursts.

83. The Tribunal considered these matters carefully. The case was not without difficulty. We would add that there were some merits to the investigation and the way the disciplinary evidence for the charges was explored and evidence taken. It was otherwise quite thorough. Bearing in mind the serious nature of the charges and the need for a careful investigation it was in relation to a failure to explore possible mitigation that led us to conclude the dismissal was unfair.

84. We had to consider what was likely to have occurred had Mr Cross sought medical advice. This was not in itself an easy task as the claimant had not produced any further medical evidence other than what had been produced in the disciplinary process. The Tribunal understood that it might take up to six weeks for the claimant to be assessed by the respondent's Occupational Health providers. That might have entailed some further short investigations and a further hearing. Looked at broadly it was likely that an investigatory process should have taken a further 8 weeks.

Discrimination Claims

85. The claimant's disability claims were, because of the earlier Judgment restricted to claims in relation to his sight loss and a failure to carry out a risk assessment. This made it impossible for him to pursue the overheard reference to his mental health as an incident of harassment under the Equality Act. What the claimant told us germane to his sight impairment was that it had been agreed with the previous Port Manager that because of his visual impairments he would not be required to work loading cars and lorries at night where he would be at risk because of his lack of depth perception and

restricted width of sight. He gave us no examples of when this informal adjustment had been contravened or specific dates and times. Any such claims appeared out of time. Even if he had asked us to use our just and equitable powers of extension of time under Section 123 of the Equality Act we would not have done so as the respondent had no notice of his position. He had not raised the issue with Ms Graham who had become his line manager nor lodged any grievance drawing management's attention to the earlier understanding with the Port Manager. He did not in his evidence suggest any other adjustments.

86. The question of a risk assessment was raised. The claim arose on or about the end of 2019 and the claimant took no steps to remind the respondents or their management that it was still outstanding. However, a risk assessment is not an end in itself and it seemed to us that apart from not having to load vehicles at night we had no evidence of any adjustment needed in relation to his visual impairment. The claimant could not give us any specific occasions when this had occurred. These claims fall to be dismissed.

Remedy

87. The claimant is entitled to a basic award. That sum is as follows. He had 11 years' service. His weekly gross pay was £400 (£400 x 11 + £4400).

88. A basic award can be reduced. This is dealt with in Section 122 of the Act.

"*122 Basic award: reductions.*

(1)….

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

89. It is not easy to assess the claimant's culpability although we accepted his evidence that he becomes easily frustrated and suffers from low moods. It

must have been apparent to the claimant that his behaviour towards Ms Graham was out of order. Indeed, so bad was it that his colleagues intervened. He had also two expired warnings we understand for behavioural issues that were referred to in the disciplinary process. That said the context in which the behaviour took place was important in this particular case although we focus on the employee's behaviour. There was some basis in the claimant's sister's comment that there was a lack of support. That might go a little far but there was certainly a lack of understanding of his various deficits and any recognition as to how these might impact on him and any current warnings unless Ms Graham's protest that he couldn't speak to her in that manner can be regarded as such There was certainly no current formal warnings. The award must be just and equitable and in the circumstances we were of the view that a reduction of the award by two thirds would be appropriate. The award will therefore be £1467.

90. As he was unfairly dismissed the claimant is entitled to compensation. That compensation must be what is just and equitable. Section 123 of the Act is in these terms:

"*123 Compensatory award.*

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

Mitigation of Loss

91. We accepted that well paying permanent jobs are at a premium in the western Highlands and even part time seasonal work not that easy to obtain. We also accept that given the claimant's eyesight that involved travelling would impossible. However, even allowing for the fact that the claimant was naturally upset at losing his job there is no evidence of his seeking work after his unsuccessful application in early December 2021 some three months after his dismissal. He was unconvincing in his attempts to explain his efforts to us.

For example, he did not try and follow up the opportunity at the local filling station by seeking a reference from the respondents. We regret that we concluded that he seemed content to remain unemployed. As at the date of the hearing he had not worked since leaving the respondents. The work that might be available would be likely to be scarce over the winter so we were prepared to accept that it might be the spring of 2022 before seasonal work might be available. The claimant will therefore be entitled to compensation covering the period up to early May 2022. This is a period of 9 months. His loss of wages for this period amounts to £9900 (9x £1100). He will be entitled to £500 for loss of statutory rights.

92. That is not the end of the matter. When considering the compensatory award we are looking at all the circumstances. We are not necessarily bound to reduce the compensatory award by the same percentage as the basic award. In this case if the respondents had carried out further investigations and in particular obtained an Occupational Health Report that would have added at least two months in our estimation to the overall disciplinary process. The claimant would have been paid in full during this period.

93. We also have to consider what is just and equitable and once more the claimant's conduct must be taken into account. The dismissal here was not rendered unfair simply because of procedural failings. The fact that these failings might have provided the claimant with some mitigation for his actions was implicitly recognised by Mr Cross looking to see if there were side effects to the claimant's anti-epilepsy medication. If dismissal had truly been a foregone conclusion he would not have carried out this exercise. We concluded that there was a small but not wholly insignificant chance that the claimant might have kept his job.

94. We also need to consider what is called a ***Polkey*** reduction factoring in what would likely to have happened if the disciplinary process had been carried out properly. This involves a degree of speculation. Considering the whole

circumstances we were strongly of the opinion that it would have been highly likely that the claimant would still have been dismissed especially given the breakdown in the relationships in the office. In these circumstances we will reduce the balance of the compensatory award by 90% to reflect these matters. The claimant's compensation will be £5220 (2 months wages £2200 plus 10% of the balance of 7 months £110 x 7 plus 10% of £500).

Employment Judge: J M Hendry
Date of Judgement: 11 July 2023
Date sent to Parties: 19 July 2023