EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109610/2021

Held at Inverness on 15, 16, 17 & 18 August and 16 September 2022

Employment Judge J M Hendry
Members N Richardson
F Parr

Mr W J G Mowatt	**Claimant** **In Person**
Pegasus Express Limited	**Respondent** **Represented by** **Mr G Millar,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's application for a finding of unfair dismissal is not well-founded and is dismissed.

REASONS

1. The claimant in his ET1 sought a finding that he had been unfairly dismissed from his employment as a Depot Superviser by the respondent. A number of

other claims were made by the claimant including claims for disability discrimination which were withdrawn leaving only the claim for unfair dismissal to be determined by the Tribunal.

2. The respondent's position was that they had fairly dismissed the claimant on the grounds of gross misconduct.

Issues

3. There was no formal list of issues. However, issues had been identified at the first preliminary hearing (JB48-51). In relation to the dismissal the claimant did not accept that he had been guilty of the conduct complained of. He regarded the disciplinary process as being unfair particularly in relation to what he saw as a lack of a proper investigation, failure to be provided with the "necessary paperwork" and the lack of impartiality of Ms Murphy who dealt with the appeal. We mention the claims for disability discrimination as although withdrawn they had some background relevance to the unfair dismissal claim. Disability status had been accepted. The claimant relied on stress and depression. The claimant argued that the PCP was a requirement to work excessive hours, that this put him to a substantial disadvantage because of his condition and that the two adjustments he argued for were adequate training and reduced hours.

Evidence

4. The Tribunal had the benefit of a Joint Bundle of documents prepared by parties to which on the first day of the hearing the claimant was allowed to add further documents by consent. The Tribunal heard evidence from Jim Cowie, the former Managing Director and owner of Pegasus Express and thereafter from Ms Jacki Murphy, a former Director of the company and the Finance Officer. Ms Murphy was also a share holder in the business. The business had been sold following the claimant's dismissal. The claimant gave evidence on his own behalf.

Facts

Background

5. The claimant has spent his working life in the transport industry in various roles including that of a driver. He is highly experienced and knowledgeable. He had initially worked for the respondent as an agency worker and was then offered a contract in 2016 as a driver. The claimant's starting date was 27 June 2016 (JB68). The claimant's contractual documentation was produced (JB9-16). The claimant was given a contract of employment (JB16). He signed a health questionnaire (JB11) on 19 August 2019 indicating that he had diabetes which was controlled by tablet medication.

6. The respondent company have a staff handbook which was available to employees which includes their disciplinary policy. The policy gives examples of gross misconduct defining it as "*a serious breach of contract and includes misconduct which, in our opinion, is likely to prejudice our business or reputation or irreparably damage the working relationship of trust between us"* (JB85).

7. The respondent's disciplinary policy also provided as follows at Clause 9.10:-

> "*The purpose of our investigation is for us to establish a fair and balanced view of the facts relating to any disciplinary allegation against you, before deciding whether to proceed with a disciplinary hearing. The amount of investigation required will depend on the nature of the allegations and will vary from case to case. It may involve interviewing and taking statements from you and any witnesses, and/or reviewing the relevant documents.*"

8. The respondent's managers took confidentiality of their business practices and customers very seriously. Their industry is highly competitive. They had a small core of customers who provided the bulk of their work. They had emphasised to staff including the claimant on a number of occasions that any unauthorised use or disclosure of confidential information would be treated as a serious breach of contract (JB97).

9. The claimant was promoted to Depot Superviser in August 2017.

10. The respondent operates an electronic delivery software system called "Stirling" which provides the respondent with detailed management information at their Glasgow Headquarters.

11. The claimant's Line Manager was Ms Caroline Loran, Business Operations Manager who was based in Glasgow.

12. The claimant was given a job description in December 2019 (JB101) setting out his principal duties as Operations Superviser (Inverness).

13. There was a significant turnover of drivers in the respondent's business. This was not uncommon in the industry. This led to the respondent using agency staff.

14. The claimant was responsible for the depot. Only he and another member of staff Duncan Mackay were able to open and shut the depot.

15. The respondent's business was a busy one. They provided freight services throughout the Highlands. Freight would be taken up in large vehicles to Inverness. The vehicle would be unloaded at the depot and the freight distributed to smaller vehicles for more local delivery on various routes or ''runs''.

16. The claimant was very busy. The main part of his day was early in the morning getting vehicles loaded and drivers assigned to particular "runs". The claimant would be regularly contacted by customers throughout the course of the day and at home in the evening.

Difficulties at work

17. The claimant began suffering from stress. It was noticed by the company's management that his performance seemed to be erratic. There would be good weeks and bad weeks from their perspective.

18. The claimant found that work was getting on top of him. Not only did he have to deal with the administration work but because of a lack of staff he would often have to load or unload lorries himself using a forklift truck and deal with the various problems that arose routinely with the delivery of items of freight. The use of agency drivers meant that he often had to enter the driver's delivery records into the respondent's IT system when they had not used or not used properly, the hand held devices they were given to record deliveries. This led to additional work and stress for the claimant who would have to complete the digital ''paperwork''. He had received no structured or formal training on the various IT systems used.

19. In addition, at or about this time the claimant was having difficulty managing his diabetes and was failing to attend appointments with his Doctor.

20. Because of the stress the claimant was under his management of his diabetes became poor.

21. Mr Cowie received a text message from the claimant's partner Ms MacDonald on 13 October 2019 indicating that she was worried about the claimant's health and indicated that he was stressed and worrying about supervising the Inverness depot.

22. On 1 November during a discussion with Ms Loran the claimant became very upset. He was sent home. The respondent's management was concerned at the situation in Inverness. They saw the claimant's behaviour as erratic. The respondent's managers formed the view that he would often overreact to any criticism construing it as a personal attack.

23. It was agreed that Mr Cowie would meet the claimant on 4 November at the Holiday Inn in Inverness. At the meeting the claimant was initially asked whether he would be prepared to leave the company on an agreed basis. He declined. The respondent offered to return the claimant to a purely driving role. The claimant also declined this offer.

24. Mr Cowie offered to give the claimant an opportunity of improving indicating that if he took this opportunity they would provide support and additional training for him. The claimant took this third option. It was, therefore, agreed that the claimant would have three months to improve his performance. The respondent would recruit an "admin person" to assist the claimant with ''paperwork'' and act as liaison between Glasgow and Inverness.

25. Following this meeting Ms Loran went to Inverness to provide the claimant with additional training in early December.

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26. Mr Cowie and Ms Murphy travelled to Inverness on 18 December 2019 and met the claimant to review progress. A record of the meeting was made by the respondent's management (JB107/108). The company had recruited an Admin assistant ''Kirsty'' to assist in the depot.

27. The notes record that this would allow the claimant to supervise the physical operations. The claimant repeatedly complained about drivers not following instructions and completing paperwork. He agreed that the training by Ms Loran had been useful and agreed he was competent to run the depot. He did not say the training was inadequate. The notes recorded that the respondent's management still had very serious concerns about the claimant's stress levels.

Health

28. Mr Cowie followed the meeting up by letter (JB109-112) dated 20 December.

Mr Cowie wrote:-

"*It has been made quite clear to you in each of my visits and during Caroline's depot visit, that there is no routine requirement for you to be working outwith your normal hours. In fact there have been several times we have insisted that you go home. During our discussion on 18 December it was agreed that as of 3rd January 2020 your attendance hours will be 5.45 – 15:45 with a one hour unpaid lunch break that must be taken. You stated that you do not take your lunch break choosing to work because that's your preference. You also raised*

further concerns regarding the attendance in the depot to cover Phoenix early morning and for arrival of additional trucks. I must stress emphatically that I expect you to carry out 45 hours paid work each week, and take a daily break of one hour. It was agreed that due to the nature of the role there will be occasions when overtime is required but this must be agreed with others either myself or Caroline prior to being completed.

There has been no improvement in the amount of overtime that you undertake, and as of 3 January 2020 I will not sanction payment of any additional hours unless it has been agreed with either myself or Caroline. ***I want to make it clear that it is about managing your health and not about managing costs.***"

29. The letter also noted that the claimant had raised the adequacy of his IT training (JB110) and accepted that he had signed a record confirming an understanding of each task. He was told to approach Ms Loran if he needed further help or training. After the performance improvement plan had been agreed in early November 2019 the claimant was provided with detailed targets. The claimant received additional support in particular from Jacki Murphy to train the claimant in relation to the respondent's financial system DPR and the information the claimant was expected to provide. Ms Loran spent a period of training in Inverness depot. The claimant was unhappy with the quality of the training. Both Ms Murphy, Ms Loran and the claimant were busy with other tasks during this period and he felt the training was inadequate. However, he did not express this view to the respondent's management.

30. The were no difficulties in November and December: the claimant's work improved.

Covid

31. In March 2020 the Covid Pandemic occurred. There was a decrease in the amount of general freight work but the Inverness depot remained busy because of the transport of medical supplies to various sites throughout the Highlands. In August 2020 Mr Cowie received information from Caroline Loran that the claimant was still struggling with the IT system. At this time Mr

MacNab, the Commercial Director of the company was based in Inverness. This caused some friction with the claimant.

32. In September the claimant became agitated and upset over difficulties in printing off delivery notes. They were sent via the internet from Glasgow. If the delivery notes did not arrive the claimant would have to hand write the notes for the drivers. At this time the claimant's partner was in contact with Caroline Loran to say that the claimant was having difficulties managing his type 2 diabetes. The claimant had been repeatedly asked to attend his G.P. but did not want to attend. Mr Cowie e-mailed Ms Loran copying Mr Mowatt on 3 August (JB113) about the use of the Stirling system.

33. Following receipt by the respondent of two Fit Notes from the claimant's G.P. (JB120/121) the respondents wrote to the claimant on 9 September confirming that he would be put on lighter duties. The letter confirmed that following departure of the Admin Assistant who had been recruited the Glasgow office, would take back the administrative work. A Mr Duncan Mackay would be taken off driving duties to cover the warehouse duties. Mr Cowie wrote:

"*This in fact means that you will be based in the office, with no requirement to carry out any of the more physical duties, that fits well with the requirement to carry out lighter duties. It also means that you will be able to complete the tasks within your basic hours without the need for additional hours…. When Callum contacted you at the end of your shift (16:00) you stated that the reason why you needed to work on was because you had lots to do, but were unable to clarify what tasks were outstanding. You then went on to state that you could not "live off" 45 hours basic pay, and also that you had to stay at the depot until 17:00 as you were awaiting for a lift. I must stress emphatically that I expect you to only carry out 45 hours paid work each week, and take a daily break of one hour. It was agreed that due to the nature of the role, there would be occasions when overtime would be required but this must be agreed with either myself or Caroline prior to being completed….. If you need to wait at the depot for a lift, you must wait in the rest area and must not carry out any work related tasks.*

If you wish to discuss any of the above further please feel free to contact me."

34. There was contact between the claimant and Ms Loran on 9 September about the Stirling system (JB117). When asked about understanding the system he wrote:

"*I understand bits but not it all. Very little training. Promised step by steps. Can never get anyone on the phone to advise or help."*

35. The claimant's G.P. in his fit note (JB121) indicated the claimant was fit enough to work up to 60 hours "max" per week and no early mornings (3am starts).

36. Concerns were raised by Mr MacNab with Mr Cowie on 17 November. Mr MacNab wrote to Mr Cowie (JB124):

"*Further to our conversation my observations are as follows:*

John panics from first thing until the trucks come as sub-contractors and drivers are all out then settles. He is stating that he is working too many hours 73 last week and needs help first thing as his office duties suffer. Most agency drivers can't or won't use XDAs so John enters them once they are delivered. Eddie has issues identifying pallets and can't/won't use the scanner so John is up and down the stairs scanning and pointing at vans to be loaded. Eddie has intimated that he doesn't like the warehouse work to go to John and I."

37. On 23 November the claimant e-mailed Ms Murphy and Ms Loran sending them details of medication that he was now being prescribed. His medication was Sertraline. He complained that it was difficult to speak to Ms Loran and ask her advice. Ms Murphy e-mailed the claimant on 26 November (JB128):

"*I think the fact that Joe is up there, and that Caroline was up there before him, demonstrates we have concerns about the depot's performance. We are receiving complaints from customers about service, recent examples being XPO freight yesterday, Phoenix routes not being adhered to, lack of clarity on what freight is actually in the depot. Whilst every pallet that has to go out may go out, a successful operation is much more than that.*

I understand that agency drivers are slower on the road than our own drivers and that times need to be spent showing them how to operate the XDA, but unfortunately that whilst we have staff shortages due to sickness and vacancies we must use them.

I am aware that Inverness is on level one and that restrictions may not be so severe, however it is important to minimise interaction with other households, and I cannot see any reason why Ellen needs to be in the depot in normal circumstances. Your e-mail to her which you have copied me into is completely over the top…. Of course she can come into the yard, just not the internal area."

38. When the issue of the claimant's partner being in the depot had been raised with him he had become very upset. He had taken down posters in the office about Covid that his partner had given him. He had e-mailed her telling her not to come the yard.

39. Ms Murphy had e-mailed the claimant on 26 November (JB129):

"*Can I also remind you that due to Covid restrictions currently in place, visits from third parties should be kept to an absolute minimum, and therefore it isn't appropriate that Ellen is in the office. Please ensure that if she is visiting you meet outside or off the premises.*"

40. Ms Murphy made a note of events (JB130).

41. On 4 December the claimant reported receiving a shock from an electrical socket (JB131). The respondent immediately arranged for an engineer to check the system but could not find any fault.

42. There continued to be issues in relation to records of deliveries being properly completed. Ms Loran e-mailed Mr Cowie on 4 December indicating that she believed drivers were not being shown how to use the devices prior to departing the depot.

43. On 4 December the claimant e-mailed Mr MacNab for a statement of his employment rights under section 1 of the Employment Rights Act and asking whether the company followed the Equality Act 2010 (JB137). Later on the

same day the claimant e-mailed Mr MacNab asking what the process for a subject access request was to obtain copies of all papers relating to him (JB139).

44. In late November the claimant raised an issue about what he regarded as a lack of contact with Caroline Loran. Ms Murphy became aware of this and e-mailed the claimant on 26 November advising that Joe MacNab was based in Inverness and business questions could be referred to him. The claimant did not form a good relationship with Mr McNab.

45. On the 26 November he asked Joe MacNab if he could take the following day as a holiday. The claimant had not previously requested or given notice of this. Mr MacNab refused because the respondent was short-staffed. At that point the claimant indicated that as he was on medication he would simply take the next day off sick.

46. Ms Murphy and Ms Loran became aware of the situation and telephoned the claimant. They were concerned whether the claimant was fit to be at work at all. The claimant confirmed he was fit and had just said what he had said to Joe MacNab to provoke a reaction. The claimant was asked by Jacki Murphy why he needed the following day off and he indicated that it was to go to an interview. He was asked what sort of interview and confirmed that it was a job interview. Ms Murphy said that if it was a job interview and the prospective employers were aware that he was at work then they would surely be prepared to meet him after hours. The claimant agreed and at that point Ms Murphy left the call. Ms Loran was then taken aback by the claimant's further statement that he was going for an interview with M & H Carriers who were a major competitor of the respondent. The claimant also said that the job was pretty much his and he would be taking all the ''Pallex Phoenix'' work, currently carried out by the respondent, with him when he left. The respondent's managers knew that this work was critical to the company. They came to the view that this must mean that the claimant was discussing commercially sensitive information with this competitor.

47. Mr MacNab and Ms Loran prepared statements. An invitation to a disciplinary hearing was prepared and sent by internal mail on 4 December. The letter along with other mail went missing. It included a new credit card for Mr McNab.

48. On 4 December the claimant became increasingly distressed and upset throughout the morning. Ms Murphy contacted him advising him that he was being suspended. Mr MacNab told the claimant to get out and leave his keys. The claimant believed he was being dismissed and didn't "register" that he was only being suspended.

49. The allegations being made against the claimant related to the holiday request and assumed disclosure of confidential information. The claimant stormed out of the premises indicating that he was going to jump off a bridge. Mr MacNab was concerned about this and worried about the claimant's behaviour. He attempted to contact the claimant's partner. Eventually the respondent's management contacted the Police because of their concerns for the claimant's welfare. The claimant was eventually contacted by telephone and it was discovered that he was at home.

50. The claimant had planned holidays and Ms Murphy indicated that he should take the holidays but remain on suspension. She told him that: "*during this period he must not undertake any work for Pegasus Express Limited and you must not contact any of our customers, suppliers or business contacts. If you are contacted by any of our customers, suppliers or business contacts during this period of suspension and holiday then you must not respond and simply forward any message onto Caroline Loran, as your line manager*" (JB15).

51. The claimant was e-mailed a copy of the invitation to a disciplinary hearing and a copy of the disciplinary policy and his contract of employment (JB161). The claimant e-mailed Ms Murphy on 4 December at 15:09:

"*Jacki could you please forward a copy of instruction you sent out I request this under the gdpr rules as I am named in it. Secondly looking at your letter you sent to me I will be calling Caroline as a witness as she has missed bits out her statement about Fortec.*

Also my subject access request I would like her reply on it and details of any cost.

You have been using my car for company work and was told I would be paid for it but this has never happened."

52. Ms Murphy responded that calling Caroline Loran as a witness was something that he should raise with Mr Cowie. She wrote: *''If you believe that she has missed something out, then you will be given every opportunity during your disciplinary hearing to include any relevant evidence that you want Jim to take into account''.*(JBp161)

53. The claimant was admitted as a voluntary patient to Newcraigs Hospital on the 6 December. The claimant's partner e-mailed Ms Loran (JB164).

54. The claimant obtained a letter from his doctor Dr. Goudie from the Riverside Medical Practice on 7 December indicating that the claimant had become very medically unwell. During this period the claimant had been told not to contact customers. He indicated after he had received the e-mail from Ms Murphy that he had already been in contact with customers who had called him.

55. On 8 December Mr Cowie received an e-mail from "William G Mowatt" purportedly on behalf of the claimant (JBp169). It stated:

"*I am his next of kin and dealing with matters along with his partner Ellen MacDonald.*

My reason to contact you is to request a copy of your staff policy on stress and mental illness in the workplace and request a contact name and e-mail address in Pallex to whom I believe you work with.

Pallex seem to have a well documented mental health policy on the internet and what I can find Pegasus do not have such as John's illness would off been picked up a lot sooner if they had as all employers have a duty of care to there staff which seemed to have failed this time."

56. Mr Cowie responded to the email from William G Mowatt that he was unable to communicate with him in relation to Mr John Mowatt without his express approval. He could not comment on whether or not Pallex had a particular policy and commented that their business was not bound by any such policy.

57. The claimant's disciplinary hearing was adjourned until the claimant was fit enough to return to work.

58. On 31 December the claimant indicated that he would start again in the new year. He was due to be on holiday until the end of January.

59. On 5 January he was sent a further invite to a disciplinary hearing to take place on 11 January. He warned that given the potential seriousness of the allegations that one of the possible outcomes might be dismissal with notice. He asked that his partner accompany him to the disciplinary hearing. This was allowed.

60. The claimant was signed off work on 8 January for a further two weeks. The disciplinary hearing was further postponed at his request. It was re-arranged for the 27 January.

61. The respondent received a fit note from the claimant's G.P. which indicated that he would be fit to return to work on some sort of phased return. Mr Cowie e-mailed the claimant on 25 January and asked the claimant for his views on the number of hours or days he felt he could work and when he might be able to return to the 45 hour working week. The claimant confirmed his view on what a phased return would look like. This was to be discussed after the disciplinary hearing.

Disciplinary hearing 27 January 2022

62. The disciplinary hearing was chaired by Jim Cowie, a Mr Julian Giulianotti took notes. The claimant had prepared a statement and provided a copy of the statement to Mr Cowie and was allowed to read it out. Shortly after the hearing and before a decision had been reached or communicated the respondent received a number of e-mails from someone called Donald Forsyth. Mr Forsyth seemed supportive of the claimant and very knowledgeable about facts which the respondents believed were only known to the claimant or other attendees at the disciplinary hearing. Mr Cowie e-mailed the claimant to ask about his connection to Donald Forsyth. In responding the claimant mistakenly copied to Mr Cowie an e-mail to his partner. It was clear to the respondent that the claimant was aware of the content from the e-mails from Donald Forsyth. At this time the respondent's managers received information that the claimant had been in contact with one of the respondent's key customers Bullet Express despite the instructions not to contact clients.

63. As a consequence a second disciplinary hearing was arranged on 5 February to deal with these new allegations. The respondent's management was concerned about these matters and contacted their solicitors Messrs. Gilson Gray. The agents wrote to the claimant asking him to desist from contacting the respondent's clients.

64. On 29 January Donald Forsyth e-mailed NHS. He complained about the way the respondent delivered goods there (JB206). On the same date Mr Forsyth complained to Bullet Express about Pegasus Express. Mr Heron from Bullet Express was in contact with the claimant. The claimant e-mailed them on 29 January (JB210):

"*Willie I have just received a copy of an e-mail that you sent a Donald Forsyth that said I had been sacked. At this present time I have not been sacked from Pegasus Express and therefore am still currently employed by them……"*

65. On the 1 February Mr Cowie emailed the claimant suggesting that he had some connection with a Donald Forsyth who had been contacting clients. (JB214).

66. A letter was sent to the claimant on 2 February in relation to the new disciplinary hearing:

"*1. Following your suspension and the previous disciplinary hearing, you were advised to not make any contact with customers or contacts in my invitation letter of 4th December 2020. We have now been made aware that you made contact with Willie Herron of Bullet Express. Your actions are in direct contravention of that direct instruction. I have attached a copy of my original letter containing the instruction and also the email exchange you had with Willie Herron;*

2. On Friday 29th January 2021, someone using an email account in the name of Donald Forsyth began emailing our customers and contacts with the intention of damaging the reputation of Pegasus Express Limited. The information that Donald Forsyth had, in terms of contact information and details about particular jobs could only have come from someone within the organisation who had access to all that information. I specifically asked you to confirm the identity of Donald Forsyth and to ask about your links with Donald Forsyth and you have failed to respond. The allegation is that you were the person who had provided information to Donald Forsyth and you were in collusion with Donald Forsyth, with the sole aim to damage the reputation of Pegasus Express Limited.

3. You mistakenly blind copied me into an email to Ellen on 1st February 2021 timed at 10.36 in which you stated "Read this and phone me when you get a chance do we tell them what we have been given or keep for tribunal. With the info About Garve on Saturday and the kinbrace man. And about Matthew not coping and being stressed The email from Willie said Sacked and the text you have from Caroline and her saying it was to threaten me I think we push at Bullet see where this is coming from." This email suggests that as well as deliberately not responding to my email, you are planning on taking the company to an employment tribunal and indeed are intent on trying to gather as much information as possible about ways in which to claim against the company; and

4. Someone representing you has been sending out texts to presumably everyone within your contact list on your personal mobile phone, including our customers, indicating that you have been sacked and providing details of the allegations with your denials, in an attempt to clear your name. This is an internal matter and you are expected to maintain confidentiality. By providing these details to a large number of people, you are allegedly in breach of that confidentiality."

67. The letter continued:

"*I do not intend to call any witness to the hearing, however attach the relevant e-mails letters and I will be considering at the hearing. If you want to call any relevant witnesses to the hearing please let me have their names as soon as possible. If there are any documents you want to be considered at the hearing, please provide copies as soon as possible.*"

68. At about this time other clients of the respondent company were contacted including an important client called "Gorilla Glue". Mr Cowie wrote to the claimant on 4 February adding additional issues to be discussed at the disciplinary hearing (JB219) namely:

"*1. A private and confidential envelope sent by internal mail to the Inverness depot addressed to Joe McNab, which has been opened and passed on to you by someone called Ali. I need to understand why, if the envelope was addressed to Joe McNab, it somehow was handed to you, via someone called Ali;*

2. Your awareness and authorisation of the text that was sent out on Tuesday 2nd February on "behalf of the family of John Mowatt" to a number of different

individuals multiple times, containing details of the previous disciplinary hearing;

3. Your explanation of how some unidentified person had got both my personal mobile number and that of Jacki Murphy, and was sending texts about Gorilla Glue.

4. What contact or communication you have had with drivers, customers, business contacts or others relating to Pegasus from the point of your absence on 4 December 2020."

69. The disciplinary meeting took place on 11 February. Notes of the meeting were transcribed (JB221-228). The claimant denied having anything to do with the missing letters. The claimant denied knowing Donald Forsyth. He was asked about the e-mail to his partner. He was asked what the reference to "what we have been given" was and he indicated that he wouldn't respond because he had been asked not to disclose this. He indicated that he had not been in contact with customers. He said that he had hadn't contacted customers but "Ellen had". Ellen was his partners first name. He claimed that she had done this without his knowledge.

70. Mr Cowie considered the matter. He believed the claimant's actions had led to a breakdown in trust and confidence with them. He decided to terminate his employment. He wrote:

"*Although I do not find you guilty of disclosing information, it is the fact that you had been dishonest about the M & H comment and the fact that you seem to regard the release or threat of release of confidential information almost as a weapon to use against the company. For me that is a very serious matter that destroys the trust and confidence that I need to have in you as a member of the management team.*"

71. In relation to the second disciplinary matter Mr Cowie indicated that he took into account that the claimant had been unwell and that there had been a clear breach of the instruction not to contact customers and was behind the e-mails from Donald Forsyth. The claimant was given four weeks' notice. His contract was due to end on 17 March.

72. Following the issue of the letter the business continued to receive information that customers and clients were being contacted and complaints made about matters within the knowledge of the claimant. Mr Dennis from Phoenix Healthcare Distribution e-mailed Mr Cowie on 19 February with reference to a "smear campaign". He had received emails critical of the respondent from a ''Donald Forsyth'' This name and email account had been used previously. Mr Cowie had contacted his legal advisers to assist him. He also offered Phoenix an audit of their operation to reassure them. Mr Dennis responded:

"*Thanks for the open offer of audit. It will be something we will look to progress and continued support on the detailed schedule to prove GDP compliance.*"

73. Mr Mowatt appealed on 21 February (JB238). His grievance of appeal were as follows:-

"*1/ At no time have I been asked to provide any form of statement, during the process, and none has been otherwise been sought/obtained from me.*

2/ At no point was there an investigation 3/ The timing of me being told that events (of 26th November) were potentially a problem for the business is also highly suggestive of unfairness. This coming directly of the back of a health & safety incident report having been made by myself. Why did it take until Friday 5th December to suspend me?

4/ At no point was anyone approached at M & H to verify if I had/had not spoken to them. Therefore there is no evidence that I have breached confidentiality.

5/ At no point was there a mention of a "second envelope" until my second disciplinary. The fact that Joe McNab stated he saw that I was "restless and agitated" is very concerning. I asked for help and asked for an ambulance as I was feeling unwell and had done for some time (there are messages going back to September – 8 in total saying I was struggling, feeling stressed or had enough to Caroline) and he refused. Had Joe McNab phoned that ambulance it would not have resulted in you having to involve emergency services to do a welfare check on me. Had Joe McNab phoned that ambulance, Ellen would not have gone upstairs that weekend and found me with a belt around my neck. Had Joe McNab phoned that ambulance it may not have resulted in an emergency admission to hospital.

6/ How the whole disciplinary process has been conducted especially from the outset. Caroline was informed by telephone call which was followed by an email on the 7th December stating I had been admitted to hospital. The very next day (8th December) Jim Cowie emailed me saying they were proceeding with the disciplinary and even giving a new date. This showing a lack of empathy and gravity of the situation.

7/ Relevant paperwork regarding my disciplinary which has now been requested both by my solicitor and myself has still not been forthcoming which therefore hinders me in this appeal process. I therefore request yet again any paperwork regarding my case and any emails and texts from "Donald Forsyth.

8/ Regarding the accusation of me asking for the day off and not saying I was looking for a gp appointment. As per point 5, I had been saying since September that I felt my stress levels were rising and my ability to control them were lessening. My main concern was that the first time I went off with stress Jim came to Inverness and asked me to accept a settlement. Now, after turning down again what would be seen as a very low amount (Pegasus solicitor in agreement) I find myself dismissed."

74. The claimant e-mailed Mr Cowie on 24 February:

"*Any information I disclosed is under the PIDA Act 1996 and it is in the public interest due to being NHS stocks and as such it is protected under the Whistleblowing Act.*

Furthermore any disclosure to Pallex was under the same Act."

75. The claimant wrote in relation to Bullet Express:

"*Have you copies of these e-mails and if so where did you get them as they were private e-mails. If they had been disclosed by a third party there may be a breach of GDPR.*"

76. Bullet Express had passed e-mails it had received about Pegasus to Mr Cowie.

77. Mr Cowie wrote to the claimant on 24 February:

"*Unfortunately you chose to completely ignore my requests and are continuing to make contact with customers and contacts with Pegasus Express, with the sole aim to try and damage this business. When I e-mailed you on 19 February 2021 you seemed to deny sending any e-mails or making any contact, however it has come to light that you have made the following contact with our customers and contacts.*"

78. Mr Cowie then detailed contacts with Bullet Express, XPOLogistics, Expio Wolsely and Phoenix. He continued:

"*It is clear to me that you are taking deliberate steps to make false accusations of wrong doing and impropriety against Pegasus Express, with the sole aim of damaging or destroying this business. Whilst I can appreciate you would have been disappointed with my decision to terminate your employment, your behaviour is totally unacceptable, therefore I have taken the decision to terminate your contract with immediate effect on the basis of gross misconduct.*"

79. Mr Mowatt e-mailed NHS copying the e-mail to Mr Cowie on 24 February (JB243). This was purportedly a freedom of information request:

"*Good Evening*

Under FOI Act please supply the following –

Deliveries to Dr Gray are made by NHS

Lorry to Pegasus Express Inverness who then forward it to Dr Grays

1 – What is the cost of the delivery to Dr Grays from Inverness

2 – What Risk assessments have been done for the delivery at Dr Gray

3 – What rules are in place for mixing the load with other companies goods eg Plumbing materials and access to NHS goods by third parties

4 – What guidelines are in place about cages being broken down and stripped by Non NHS Staff after coming off NHS lorry but before delivery to Dr Grays

5 – What is the appointed time for the delivery at Dr Grays on a Mon/ Wed/Friday."

80. The claimant e-mailed the NHS to seek information about deliveries to the Western Isles Hospital (JB244). The respondents were advised by XPO Logistics that the claimant was harassing an employee Scott Carey (JB245). Mr Carey texted Mr Cowie (JB248):

"*Hi Jim, got this text from John. Can you nip this in the bud pls, I want no involvement or my customer in what ever has happened with John. I will seek HR advice tomorrow at XPO.*"

81. Mr Carey e-mailed Mr Cowie on 25 February (JBp250):

"*Please can I reiterate, John Mowat has not been abusive or aggressive to me, but he is now harassing me on my company mobile. I have an operation to run and do not have the time for whatever has happened. I am getting stressed about this and wish for this to stop.*"

82. The claimant contacted Stanford Logistics on 19 February (JB252):-

"*I will be issuing information until the Whistle Blowing Act 2010 shortly which Will involve your company being named they have done nothing wrong The Information relates to NHS deliveries to DR GRAYS Hospital Elgin.*"

83. Ms Murphy was appointed to deal with the appeal. She had not taken part in the decision to dismiss the claimant. She wrote to him on 25 February (JB253) arranging a meeting by Teams on 5 March. She wrote:

"*I'll be using the documentation provided to you for the disciplinary hearings, as well as the decision letters from Jim Cowie and your appeal e-mail. If there are any further documents you want to be considered at the hearing, please provide copies as soon as possible. If you don't have those documents please provide details so that copies can be obtained.*"

84. On 17 February Inverness staff were advised that Mr Mowatt was no longer employed by Pegasus (JB259).

85. During this time the respondent's senior managers were being contacted by customers and contacts who in turn had been contacted by Mr Mowatt. They ended up having to spend a considerable amount of time re-assuring their customers and contacts offering to disclose information and allow audits of their processes. They were also contacted by the Health & Safety Executive, SEEPA and one of their vehicles was stopped by VOSA outside Inverness. The claimant received documents for the appeal. He e-mailed Jacki Murphy (JB264):

"*Jacki,*

Following advise today all this paperwork you sent me is in breach of data protection as the data does not belong to me in this case it belongs to Stanford and nhs Scotland

It has now been reported as a breach."

86. Ms Murphy wrote to the claimant giving him the outcome of the appeal on 19 March (JB267):

"*I have decided to uphold the original decision that your employment was to be terminated, which was confirmed to you in writing on 16 February 2021 and 24 February 2021. I explained that if your appeal was successful then you would be reinstated, you said that if you were re-instated you would probably resign. Although you later said that you had been flustered which is why you gave that answer, a common theme throughout the hearing was the clear examples of the way in which the relationship of trust and confidence has broken down…..You made a number of accusations against the company, including that the way in which the company operated was in some way unlawful, but without providing me with any details whatsoever. You kept repeating an allegation about a fraud being committed, but when pushed refused to provide me with any evidence. This is not something that you had ever raised during your employment and in your role of supervisor, if you have any doubts or concerns about any practice, then you should be bringing them to the attention of Caroline as your line manager, or myself or Jim as directors. You claimed that the entire disciplinary process was started because of health and safety concerns you raised, but as mentioned, the only issue we are aware of is the incident reported on 4 December 2020 about the socket, which was investigated that day by an independent electrician and no fault found. I reached the conclusion that you have no trust and confidence in the company.*"

87. A dispute had arisen between the respondent and the claimant about property that the claimant indicated was his which had been left at the company premises. Attempts were made to return the property.

88. Notes were typed up of the appeal hearing (JB272-280). Prior to the appeal the claimant had sent a digital copy of Ms MacDonald's hand written notes of the earlier disciplinary hearings. Ms Murphy explained that she had been unable to open and read the attachment or print it off. The claimant had the opportunity of explaining what the points made in the notes were but did not do so. The claimant e-mailed Pallex on 19 March (JB282):

"*Harry do you wish photographs of the stolen property. I have them and now know where they are. The customer this was going to was in NHS Inverness.*"

89. The claimant contacted Harry Marshall of Pallex about alleged thefts. He was told that the issue had been passed urgently to the Director of Operations to investigate (JB p283).

90. The claimant made a complaint to the Information Commissioner about the invitation to a disciplinary hearing letter which had been lost on 4 December (JB285). Mr Cowie received information at the end of March that Mr Mowatt had been contacting Pallex "on a daily basis" (JB286). For the respondents the claimant had taken undisclosed digital recordings of disciplinary meetings. The claimant asked for his goods to be delivered to his house. He wrote to Ms Murphy about this on 29 March (JB293). He complained that if his partner had to pick up the goods she would be filmed because there was CCTV footage at the front of the depot. He wrote: "*What guarantee do I have it will be destroyed or it will not be used for other purposes.*"

91. The claimant was in contact with Cumbria Logistics a client of the respondent in about March.

92. The company wrote to Mr Mowatt on 29 March (JB298/299) about his various subject access requests and right to personal data. Ms Murphy was advised on 30 March by a Mr Frank Sweeney of Stanford that the claimant was in contact direct with him and his customer the NHS. He made complaints that a Pallex customer called Luxury Wood (who sold dried firewood) had goods stolen from them whilst being delivered by Pegasus. On 1 April the claimant chased up personal data held by the company (JB308). The claimant was in contact direct with Luxury Wood company on 13 April. He indicated to them that he would order their products but he told then that *"your delivery company take wood out before you get it*". On 16 April he e-mailed again: "*I would buy from you but I've seen your drivers steel off he pallet."*

93. He e-mailed Ms Murphy on 13 April about his property:

"*Jacki,*

There's a list of stuff missing and damaged.

The desks and seats are all in good condition when left but when delivered back were all damaged and Michael saw this.

So my other stuff has been stolen by Pegasus. Do I have to get the police involved?"

94. Ms Murphy responded that the property on the list given to them by him had been delivered and that the second hand furniture that he was referring to was damaged beforehand. The claimant made claims for petrol expenses in relation to events including one going back three or four years (JB332). In May the respondents, after much toing and froing with the claimant delivered property to the claimant's house. Around 20 May a van driver had been asked to deliver it. He contacted the respondents in the course of the delivery about difficulties that had arisen and provided them with a hand written letter of the events (JB374/375). He wrote:

"*Went to customer's house, rang bell*

Women answered door told her I had a package for her and it had to be signed for, she was happy to do this then I heard a male voice shouting do not sign for anything (more than once) the woman then said she was not going to sign so I told her I would have to take the package back to the van and call the depot.

Back at the van a male from the house approached and filmed with a mobile, said I should have had a mask on when I was at his door. I asked him to let go of the door of the van and reiterated that if he wanted the package he would have to sign for it – further refusal, I tried again to close the van door. He then raised arm with clenched fist as if to strike me – I was on phone to office at the time, he then said he would sign the paperwork for package which I then proceeded to give him the paperwork for, he snatched it from me and screwed it up. As I was on phone I asked that they call police and let go of the door. Told office to cancel police. And I was able to drive away. Man continued filming. At no point in this altercation did I raise my voice to said person."

95. At the disciplinary hearing on 27 January the claimant was asked about whether he had received support and confirmed that he had (JB196).

96. The respondents received a copy of a WhatsApp message that had been circulated (JB218) it stated:

"*To whom it may concern I had been asked to issue this text/email on behalf of the family of John Mowatt.*

At this present time John sacked from Pegasus Express of today's date. He is still on the payroll but is off. Pegasus have made allegations against him which are untrue and baseless."

97. The claimant made a formal complaint against the driver (JB369).

98. The claimant e-mailed Ms Murphy on 19 May (JB360) to seek confirmation that the PPE that he wanted returned was clean and COVID free. He wrote: "*Also there is an issue with a lorry which will be reported direct to VOSA*."

99. On 19 May Ms Murphy received an e-mail from Mr Mowatt's e-mail address (JB352) signed Ellen MacDonald with a photograph of the yard. It stated:

> "*I will be reporting this mess to SEEPA and the Council as it is spilling out onto the public road. We also note Forklifts being used on roadway without the correct markings on them. Matthew Young and others were seen on the Forklifts.*"

100. It had been reported to Ms Murphy that the claimant had been seen outside the yard on a number of occasions. The respondent company was klater contacted by SEPA and the local Council.

Witnesses

101. We did not find the claimant a credible or reliable witness in relation to his narrative of events. In particular we did not believe that he was not connected to or involved in the numerous emails sent to the respondent's customers. We found his explanations for contacting the customers he accepted he had contacted unbelievable in the circumstances.

102. Mr Cowie was generally credible and reliable as a witness. He gave his evidence in a clear and measured manner. He did not display any antipathy towards the claimant and we accepted that he approached the disciplinary process in a fair manner. Ms Jackie Murphy was generally credible and reliable. We were convinced that she made efforts to be impartial when dealing with the appeal. She took that role seriously and approached the matter with an open mind.

Submissions

103. Mr Miller provided the Tribunal with written submissions. The dismissal was fair in his client's view. They held a reasonable belief that the claimant was guilty of gross misconduct. They had conducted a reasonable investigation and were entitled to reach the conclusion they had. The penalty of summary

dismissal was within the band of reasonable responses open to them, particularly given the claimant's behaviour and the context of that behaviour. His submission was that the dismissal was both procedurally and substantively fair.

104. If, however, the tribunal was not with him on that matter and considered that there has been some procedural irregularity, his position was that, the claimant would have been dismissed in any event, particularly given the sustained and damaging campaign he had waged against the respondent.

105. The claimant was in any event the author of his own misfortune and as such any award made should take into account the claimant's serious contributory conduct.

106. In addition to his unfair dismissal claim, the claimant had also initially suggested that the respondent had failed to consider reasonable adjustments in relation to his disability. The claimant was suggesting that the practice, criterion or provision that placed him at a substantial disadvantage compared to employees who did not share his disability was as set out in the note from Employment Judge Walker on page 50 of the joint bundle. It was requiring him to carry out 2 jobs, warehouse manager and depot supervisor without adequate training and to work hours well in excess of his contractual hours.

107. In summary, there was no such requirement placed on the claimant. To boost his salary he chose to work the hours that he did. He chose to manually input data that should have been input by the delivery drivers. He chose to wait at the depot until his partner was able to pick him up, a couple of hours after he should have stopped work.

108. Mr Mowatt's position was that there had been no proper investigation. The employers had made numerous assumptions. There were no statements obtained and they should have taken statements from witnesses such as their customer's managers. He had no notes of the appeal meeting. The employers had not been truthful in their evidence about a number of matters such as the training nor did they recognise the pressures he was under and the requirement to work long hours. There was no truly independent appeal. The company had wanted rid of him for a while as they could not cope with his stress condition. He had not even been offered an Occupational Health referral. The training had been inadequate and the respondents had not made reasonable adjustments to his working environment when the found out he was suffering from stress.

Discussion and Decision

109. 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 a potentially fair reason under section 98(2) of the Act, then the dismissal is unfair in law.

110. 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."*

111. 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.

112. 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?

113. 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.*"

114. 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.

115. 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*."

116. 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).

117. 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.*"

118. 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.

119. 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.

120. 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."*

121. A finding that there was gross misconduct does not lead inevitably to a fair dismissal. The test for gross misconduct is a contractual one based on an objective analysis of the evidence. In this case we did not find it necessary to make separate findings of gross misconduct as we comment upon later.

Investigation and Evidence

122. The law recognises that there is no standard of perfection required when judging the fairness of both a disciplinary investigation and the penalty imposed. The test is set out in the statute at Section 98(4) and as it reads "*depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee"* In the present case although the claimant suggested that he was dismissed because of his stress condition or because the respondent's managers wanted to remove him from his post we concluded that the reason for dismissal was conduct which is a potentially fair reason for dismissal.
123. There is no absolute requirement for an employer to take witness statements although these are often useful. In this case the claimant presented somewhat of a moving target and we also accept that there was an element of urgency in dealing with the matter that militated against taking these. The essential allegation were put to the claimant and he had an opportunity to respond. The test is what is reasonable in the circumstances. This is in fact reflected in the disciplinary policy (JBp87) where, in relation to investigations it states: *"the amount of investigation required will depend on the nature of the allegations and will vary from case to case. It* ***may*** *involve interviewing and taking statements …. "* (our emphasis)
124. At the time of the claimant's suspension the information known to the respondent is set out clearly in the disciplinary invitation letter. It is that he said he would just call in sick, he was attending an interview for a job that day and that he would be taking work with him. Crucially he was warned not to make contact with customers but he choose to ignore that injunction (JB145-147 and 151-154).

125. The suspension seems to then be the start of a quite extraordinary sequence of events documented in the flurry of emails and txts. The respondent's management came to the conclusion that it was highly likely that the claimant was either the author or the directing influence. It is hard not to agree that they had ample evidence to reach this conclusion. The emails and txts as Mr Miller submitted seemed to be designed to either to catch the respondent's out in some way or to discomfit them by contacting their key customer contacts with allegations of wrongdoing that contact then inevitably being reported to them. We do not intend examining all of these messages but their timing (following his suspension), the escalation after his dismissal, their subject matter and format all point towards the claimant's involvement. There are for example a number of emails where the font used is the same and the author repeatedly uses the word ''there'' for ''their'' such as at page 169.

126. We understand that in December the claimant was very unwell but he was realised from hospital quickly and the campaign against the respondent begins. The claimant was at the hearing less than persuasive when trying to distance himself from these matters suggesting that unknown to him his wife or daughter or some other interested party such as an aggrieved former employee might have sent these emails or used his email account to author some of the emails. The respondent's managers had a strong basis to reject these assertions as did we.

127. Before the initial allegations could be dealt with there was this developing situation of repeated contacts being made to the respondents' customers. The claimant at the hearing for the first time gave as an explanation that he was involved part time in his own small family business that used some to these customers and that this was the reason for the contact. We found this explanation wholly implausible. He had not alerted the respondent about this as a difficulty with the instruction he had not to contact customers and frankly we regard it as a pretext to do so.

128. Because of the documented contacts that had been made contrary to the express instructions given to the claimant four additional allegations were added to the disciplinary charges. The Minutes were provided to the claimant at a later point to comment upon but he did not challenge them nor was he able to explain to us what was he believed was missing or inaccurate. The disciplinary hearing was in our view conducted fairly and the detailed reasons set out for the claimant in the outcome letter. The claimant accepted no wrongdoing and showed no remorse or insight into his conduct. He was reminded that in his notice period he should not make contact with customers. He did so by contacting key customers. Even if successful in demonstrating the dismissal was unfair the claimant would have had considerable difficulties given his conduct in persuading the Tribunal that it would be just and equitable for him to be entitled to compensation. We also noted that he had expressed the view at the appeal hearing that even if reinstated he would probably resign (JBp180).

129. The claimant was dismissed for gross misconduct. He was clearly in breach of the direct repeated instruction given to him not to do so. The dismissal was fair in all the circumstances and within the band of reasonable responses open to the respondent. Asa we have narrated the claimant had made repeated contact with customers contrary to the instructions given to him and with the purpose of damaging the respondent's business. His conduct overall so sustained and serious as to have completely undermined the implied term of trust and confidence his employers required to have of a senior staff member and as such he was in material breach of contract (**Neary v Dean of Westminster** (1999) IRLR 288). In our view the respondent was entitled to dismiss him without notice.

130. The claimant also challenged the appeal which was dealt with by Jacki Murphy. The claimant argued that she could not be impartial pointing to her involvement as a witness in the initial conversation that led to his suspension. It is arguably a reasonable matter to raise whether or not she should have dealt with the

initial disciplinary leaving Mr Cowie to hear the appeal. But she would then have been criticised as she had been involved in the initial incident.

131. By the time the matter came to appeal the issues had grown considerably. In a small company with two working Directors, Mr Cowie and Ms Murphy, it would be difficult to fully insulate either from events like these but the problem is that there is no obvious candidate to deal with the appeal. The claimant suggested another manager but it would be very difficult for an employee to overturn a decision of the Managing Director. This is not a business with many tiers of management. In any event we concluded that Ms Murphy did approach the matter fairly and considered the claimant's position. We must say she did so in the light of almost overwhelming evidence indicating that the claimant had acted as alleged. We have no doubt that any other reasonable person hearing the appeal would have been bound to come to the same conclusion.

132. The present case has one important factor running through it which was the respondent's concern to protect their business by guarding their customers jealously. In such a competitive industry it is not an unreasonable stance and one we concluded that the claimant was well aware of. In contacting those customers both before and after his dismissal there was an element of the claimant taunting the respondent's management and in lay terms sailing as close to the wind as he could.

Disability Discrimination

133. The claimant led no evidence to support his claim for reasonable adjustments. We understood that he was not proceeding with his claim for disability discrimination but we are conscious that he is a lay person and we will, therefore, set out what our decision would have been based on the evidence before us.

134. The statutory basis for a claim for a failure to make reasonable adjustments is contained in the Equality Act 2018 (EA). It is in these terms:

"***20 Duty to make adjustments***

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

135. The original claim included claims for reasonable adjustments captured in Judge Walker's Note (JBp50) as providing training and reducing his hours. The claimant in his evidence and submissions did not seem to be insisting on these claims but we will deal with them anyway. The proposed PCP (which was not put to the respondent's witnesses was that he was, in reality, doing two jobs and having to work excessive hours. We did not accept that the evidence supported that proposition. When the respondent's managers became aware that he was not managing his diabetes well and suffering from stress they mad efforts to get the claimant to wok his contracted houses. This is well documented. He could not persuade us that there was such a PCP.

136. Even if we were wrong in this the respondent put in place reasonable adjustments. These are well documented. They appointed an Admin assistant to help the claimant and put in place training amongst other measures designed to support him.

137. There is also the issue of the respondent's state of knowledge to consider. Although the claimant was accepted to have been disabled under the EA that knowledge came about on the 7 December from the claimant's GP. Prior to this the GP had indicated that the claimant could continue to work latterly up to 60 hours per week (JB121). Even if there was a PCP that the claimant would work ''excessive hours'', which we do not accept, he was suspended for disciplinary matters on the 4 December and did not return to work. There was

no opportunity to assess either the adequacy of the adjustments in place or put further adjustments in place until his return to work.

138. Finally, the evidence we heard did not support the claimant. It showed that the respondent had repeatedly attempted to get the claimant to work fewer hours and believed that he was working the long hours because firstly he was waiting for his wife to finish work and give him a lift home and secondly to increase his earnings. His stress at work appeared to the respondent's managers to have been exacerbated by his own refusal to go to see his GP and manage his diabetes properly If, as he stated in evidence, he wanted to work less hours then it is notable that he never, as it were, called the respondent's bluff by stopping work at the time they instructed him to stop. Nor did he record what work he was required to deal with on particular dates and times outside his contracted hours to be able to raise it with his employers or give evidence to support his position here.

Employment Judge: J M Hendry

Date of Judgement: 4 November 2022

Date sent to Parties: 5 November 2022