EMPLOYMENT TRIBUNALS

Claimant:	Mr D Sidney
Respondent:	Vertu Motors Plc
Heard at:	Newcastle CFCTC in person
On:	25, 26, 27 & 28 July 2023, Deliberations on 17 August 2023

Before:	Employment Judge Loy
Members:	D Winship DN Catell

Representation

Claimant:	In person
Respondent:	Mr T Benjamin of counsel

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is that:-

1. The claimant's claims of direct disability discrimination contrary to section 13 Equality Act 2010 are not well-founded and are dismissed.

2. The claimant's claims of discrimination arising in consequence of disability contrary to section 15 Equality Act 2010 are not well-founded and are dismissed.

REASONS

Background

1. By a claim form dated 7 November 2022 the claimant brought a number of claims against the respondent.

2. The respondent denied all liability to the claimant.

3. A public preliminary hearing took place before Employment Judge Aspden on 11 and 17 April 2023. At that hearing decisions were made on which of the claims set out in the claim form would be allowed to proceed to a final hearing.

The claims and issues

4. The issues that remain to be determined at this final hearing are the following:

   - The complaint that the respondent discriminated against the claimant by dismissing him; and

   - That the respondent discriminated against the claimant by rejecting his appeal against dismissal.

5. Those issues are set out at paragraph 39 of Employment Judge Aspden's case summary of the public preliminary hearing (bundle page 157).

6. The claimant's case is that both of the issues identified at paragraph 4 above are instances of direct disability discrimination contrary to section 13 Equality Act 2010 ('EqA').

7. In addition, or in the alternative, the claimant's case is that the first of those issues (i.e. the dismissal) was discrimination within section 15 EqA as an instance of unfavourable treatment because of something arising in consequence of disability. The claimant's claim as clarified at the public preliminary hearing is that the respondent dismissed him because of his conduct towards Mr Sedgwick and that this conduct arose in consequence of his disability.

8. The claims identified at paragraphs 6 and 7 above are set out at paragraphs 40 and 41 of Employment Judge Aspden's case summary of the public preliminary hearing (bundle page 157).

9. The claimed was given permission to amend its grounds of resistance in the light of the clarification of the issues. The respondent took that opportunity and denied all liability in respect of the revised issues.

10. At paragraph 3 of the respondent's Amended Grounds of Resistance ('(A)GOR'), the respondent accepted that the claimant was disabled within the terms of section 6 EqA at all times relevant to these proceedings.

11. However, at paragraph 4 of the (A)GOR, the respondent denied that it had either actual or constructive knowledge of the claimant's disability at any time prior to the appeal stage of the respondent's disciplinary process. If the respondent is able to show that at the time of the claimant's dismissal it did not have either actual or constructive knowledge of the claimant's disability, the effect of section 15(2) EqA would be that the section 15(1) EqA would not apply at the time he was dismissed.

12. There appeared to be a discrepancy between the claims and issues identified by Employment Judge Aspden at the public preliminary hearing on 11 and 17 April 2023 and the respondent's (A)GOR. In particular, at para 5 of the (A)GOR the

respondent says that the claims that Employment Judge Aspden allowed to proceed were:

"*5.1 Direct discrimination pursuant to section 13 EqA; and*

5.2 Discrimination arising from disability relating to the dismissal and appeal pursuant to section 15 EqA." (emphasis added).

13. That is not the tribunal's reading of Employment Judge Aspden's case summary which confined the claim under section 15 EqA to the claimant's dismissal and not to the decision to reject the claimant's appeal against dismissal. However, since the respondent appears to have understood and prepared for the claimant's claim under section 15 EqA to apply both to its decision to dismiss the claimant and to its decision to reject his appeal against dismissal, the tribunal proceeded on the basis that both dismissal and appeal were in issue under both sections 13 and 15 EqA.

14. The scope of the respondent's acceptance that it had knowledge of the claimant's disability only at the stage it rejected the claimant's appeal (but not before) has already been noted. The tribunal also notes that it was also the respondent's position that the claimant's conduct that led to his dismissal and to the rejection of his appeal did not arise in consequence of his disability.

15. The tribunal was provided with an agreed bundle of documents comprising 711 pages. On the morning of the first day of this hearing, the claimant provided an additional document which was a picture of where his company car was parked during the period under consideration. The respondent took no objection to the inclusion of that document in the bundle which was then numbered page 712. References to page numbers in this judgment are references to page numbers in that bundle. References to paragraph numbers in witness statements are referred to as such.

Evidence

16. The claimant gave evidence on this own behalf. He called no additional witnesses. The claimant produced two written witness statements. His first statement comprised 231 paragraphs over 38 pages and one appendix. His second statement comprised 515 paragraphs over 56 pages. The claimant was cross-examined by Mr Benjamin.

17. The respondent called three witnesses who all produced written statements.

- Mr Lee Wilkinson, Used Car Sales Manager, who produced a written witness statement of 32 paragraphs over 12 pages. Mr Wilkinson was cross-examined by the claimant.

- Mr Christopher Franklin, Head of Business at BMW Teesside, who produced a written witness statement of 44 paragraphs over 16 pages. Mr Franklin was cross-examined by the claimant.

- Mr Anthony Masterson, Franchise Director BMW Teesside, who produced a written witness statement of 20 paragraphs over 18 pages. Mr Masterson was cross-examined by the claimant.

The Tribunal's approach to the evidence

18. Before moving to our findings of fact, we set out in a number of points of general approach, some of them commonplace in our work.

19. In this case, as in many others, evidence and submission touched on a wide range of issues. Where we make no finding on a point about which we heard, or where we do make a finding, but not to the depth with which the point was discussed before us, that is not oversight or omission. It is a reflection of the extent to which the point was truly of assistance to us.

20. While that observation is made in many cases, it was particularly important in this one, where the events were emotive, and where the claimant had not had professional advice and was inexperienced in the law and procedure of this tribunal.

21. We approach this case on a number of common sense understandings. The tribunal does not expect anyone to go to work and achieve perfection when they get there. Everyone who goes to work makes mistakes. That applies equally to employees, line managers and senior managers. The appropriate standard in our cases is that of the reasonable employee and the reasonable employer, given all the circumstances at the time.

22. Our approach should include an understanding of proportionality. In the artificial setting of tribunal litigation, the focus is on how the individual claimant was managed. We should not lose sight of the fact that at the time that the events in question occurred, nobody may have given these events the importance which the artificiality of our process requires.

23. We must also avoid the wisdom of hindsight and focus on how events unfolded at the time that they took place rather than being informed retrospectively and with the benefit of the detailed forensic analysis which is inherent in the tribunal process. That is a particular application in this case when it comes to the tribunal assessing what the respondents either knew or could reasonably be expected to have known about the likely state of the claimant's mental health during the time when the instances of alleged unlawful discrimination happened.

24. There were many radical disagreements between the claimant and the respondent's witnesses on a number of aspects of the events, either by way of background matters or managerial decision, that led to the termination of his employment. The tribunal gained no assistance when determining the factual and legal issues in this matter from the overwhelming majority of such disagreements.

25. It is not the tribunal's role to adjudicate on each and every matter of disagreement between employer and employee unless it is necessary to the fair and just disposal of the claims. Where the tribunal has not directly addressed any such disagreements that is not (as we have said) an oversight by the tribunal. It is a

reflection of the fact that the tribunal must focus on resolving the matters that are actually factually and legally in dispute and to do so in a proportionate manner.

26. Indeed, this decision would have been many times longer, without shedding any further light on the factual and legal merit of the matters in dispute, had the tribunal taken a different approach. The tribunal recognises that the claimant in particular felt very strongly indeed about many of the events that occurred. The claimant spent a considerable amount of time in his witness statement and in cross-examination expressing his feelings, often in highly emotional terms, towards a particular event. However, it is the tribunal's responsibility to remain analytical both in its assessment of the evidence and its application of the relevant legal principles to its factual findings. The tribunal means no disrespect at all to the claimant, his family and friends or to the respondent or any of the respondent's witnesses by going about its role in that way.

Findings of fact

27. The claimant commenced employment with the respondent on 10 February 2021 as a Sales Executive at the respondent's BMW Teesside dealership. The respondent is a car dealership operating across England and Scotland.

28. Mr Wilkinson was the claimant's line manager. Mr Wilkinson was the manager of the used car sales team at BMW Teesside. At the time, Mr Wilkinson managed a team of 7 Used Car Sales Executives.

29. In September 2021, Mr Wilkinson decided to extend the claimant's initial six months probationary period. By a letter dated 10 September 2021 (bundle 243) Mr Wilkinson explained his reasons for so doing. Mr Wilkinson set out his appreciation of the claimant's performance while identifying the following problem areas: the claimant's attitude towards other team members; customer satisfaction feedback and knowledge of the respondent's product and systems. This letter followed a probationary review meeting which took place on the same day as the letter was sent. The decision was to extend the claimant's probationary period for a further two months to be reviewed on 5 November 2021. The claimant passed his probationary period upon that further review.

30. During cross-examination the claimant contested the legitimacy of Mr Wilkinson's decision to extend his probationary period. The tribunal was satisfied that Mr Wilkinson had sound reasons for doing so. As Mr Wilkinson said, feedback from customer experience was done through Customer Satisfaction Surveys which are sent to a percentage of customers by the manufacturer (BMW) seeking information in relation to customer experience. This information is then fed back by BMW to the respondent. There is no reason whatsoever to suppose that either BMW or the respondent was doing anything other than responding to the information received from their customers.

31. The tribunal was also satisfied that Mr Wilkinson had good cause to address the claimant's attitude towards his work colleagues. Mr Wilkinson explained at paragraph 5 of his witness statement that the claimant had been 'quite aggressive' towards his teammates generally during his probationary period. At paragraph 3 of his witness statement, Mr Wilkinson referred to an incident in which the claimant had come across aggressively towards him when the claimant

requested to sit in a particular place in the dealership. This incident occurred shortly after the claimant commenced his employment in February 2021. Mr Wilkinson describes being 'taken aback' by the claimant's tone. The claimant explained to Mr Wilkinson that he wanted to sit closer to where he would be able to be the first to get in front of customers, presumably to generate sales. Nevertheless, it was not the claimant's reason for wanting to sit in a particular place, but rather the aggressive way in which approached the matter that had surprised Mr Wilkinson. For reasons that will be clear from the findings below, the tribunal had no difficulty at all in accepting that the claimant was someone who was prone to being confrontational and aggressive in his interaction with others.

32. There is another aspect to the claimant's preference to sit in the showroom area which is relevant to the tribunal's considerations. At page 22 of the bundle (part of the claimant's claim form) the claimant says that he made Mr Wilkinson aware of his past mental health experiences and his struggles with anxiety and depression in the context of not wanting to move to sit upstairs away from the showroom floor. Mr Wilkinson does not accept. Mr Wilkinson (paragraph 8 of his witness statement) says that the claimant made no reference to his mental health when discussing his preferred area to sit within the dealership. Mr Wilkinson says that the claimant gave a different (and only) explanation, which was that he wanted to be the first person to speak to customers entering the dealership to maximise his sales opportunities. The tribunal prefers the evidence of Mr Wilkinson, primarily because of the claimant's tendency to retrofit his evidence to fit his case in these proceedings and the candour and straightforwardness with which Mr Wilkinson gave his evidence.

33. Mr Wilkinson explained that there were occasions in which he discussed mental health in general terms with the claimant. Mr Wilkinson accepted that he had a few conversations with the claimant about the claimant's anxiety. At paragraph 8 of his witness statement, Mr Wilkinson explained that the extent of his knowledge of the claimant's mental health was *'solely that he sometimes got anxious.'* The claimant told Mr Wilkinson that he had suffered from anxiety in the past but that it was *'under control with medication.'*

34. Mr Wilkinson shared with the claimant that he too had suffered from anxiety in the past and gave the claimant some tips on how he might manage it involving exercise and diet. The claimant subsequently told Mr Wilkinson that he had taken Mr Wilkinson advice *'and felt loads better.'* Mr Wilkinson says that at no time did the claimant ever say to him that he had a disability or any long-term mental health condition.

35. Mr Wilkinson also gave evidence that he had experience of managing colleagues with longer term mental health conditions and that he had made time to support them and refer them to the BEN charity. The BEN charity is an automotive industry organisation that partners with employers in the sector to support the mental health and welfare of its workers and their families. Mr Wilkinson's evidence at paragraph 9 of his witness statement was that he would have done the same for the claimant had he had any concerns beyond the experiences the claimant shared with Mr Wilkinson and that Mr Wilkinson had indeed experienced himself and had shared with the claimant. Mr Wilkinson further explained that he had no reason to believe that anything about the claimant's behaviour or

performance was indicative of anything more severe than generalised anxiety. The claimant had never taken any sick leave during his employment other than due to covid or the neighbour incident (see below). On neither occasion was any sick leave attributable to the claimant's mental health.

36. Mr Wilkinson also pointed out that the claimant had not recorded any mental health concerns on his New Colleague Medical Questionnaire (bundle page 214). In that questionnaire the claimant is asked a direct question: *'please provide details of any mental health condition that we need to be aware of in order to make necessary adjustments to your working environment.'* The claimant's reply is: '*N/A'* i.e. not applicable.

37. The claimant was taken to this question and answer in cross-examination. It was the claimant's case in the litigation phase of this dispute that he had a long term mental health condition before he commenced employment with the respondent. However, the claimant was unable to provide any adequate explanation why he provided the answer he did to the direct question in the medical questionnaire about his mental health. If he had actually been experiencing a mental health condition with an adverse effect on his ability to carry out day-to-day activities, the tribunal does not accept that he would have answered that question in the way that he did. The tribunal was not satisfied that the claimant genuinely thought that he was experiencing a significant mental health condition in February 2021 or that he had had such a condition that he thought was likely to recur.

38. On 29 July 2021, the claimant sent an email to the team at BMW Teesside. It is clear from the terms of his email that the claimant was enjoying working life at the dealership. The claimant, who was about to go on holiday, thanked everyone *'for the support you have given me over the last few months that has helped me settle in to life at BMW Teesside and I absolutely working with guys and I can't thank you all enough… This is definitely the best team I have worked with and we all have an exciting future…'*.

39. The claimant had Monthly Check-ins with Mr Wilkinson between March 2021 April 2022. There is no mention in the 12 written records of those check-ins at pages 215-240 of the bundle of any mental health concerns that may have amounted to a disability. There is a single reference at the April 2022 check-in to medication. The claimant says: *'this month was a massive struggle with everything going on in his life and the medication he was taking.'* That check-in was in the context of the violent incident with the claimant's neighbour. The tribunal returns to the question of the claimant's mental health in the light of that incident below.

40. On 17 February 2022, the claimant texted Mr Wilkinson at 07:19 to say that he was *'… gonna have a cheeky extra half-hour in bed!!! Knackered ! I'll be in near 9 bud!*' At 08:39 Mr Wilkinson replied, *'Take the day off as ya day off.'* The claimant explained that he was tired after having returned the previous evening from Reading where he had successfully completed the process of becoming a BMW Accredited Sales Executive. The claimant did not receive Mr Wilkinson's response before he needed to set off for work. Mr Wilkinson was trying to speak to the claimant on the phone when the claimant noticed a letter had been placed on his windscreen. At paragraph 37 of his witness statement, the claimant said that he was *'..infuriated by this discovery.'* Having arrived home late the previous

evening, the claimant had to park outside a house of one of his neighbours rather than outside his own property. The effect of the note on his windscreen was to request the claimant not to park outside his neighbour's house. The claimant explained that he posted the note back through his neighbour's door and drove to work.

41. In the evening of Sunday, 20 February 2022, a slab was thrown through the claimant's window landing in his front room. Around 21:00 the claimant called the police. The police arrived at his home at 02:00 i.e. the early hours of Monday, 21 February 2022. The claimant was unhappy that it had taken the police 5 hours to arrive. Unhappy at what he saw as the late arrival and the demeanour of the police officer who came to his home, the claimant told the police officer to *'get the fuck out of my house'* (paragraph 61.6 of the claimant's witness statement).The claimant said that he told his partner *'I'll sort it myself'* and that *'it needs nipped in the bud'* (paragraph 61.9 of the claimant's witness statement).

42. In the early afternoon of Monday, 21 February 2022, the claimant took the slab that had been thrown through his window and his own hammer, left his home and proceeded to his neighbour's property. The claimant then through the brick through the window of his neighbour's house and proceeded to use his hammer to damage his neighbour's car. His neighbours were outside their property at the time. The claimant was then seriously assaulted by his neighbours causing him significant physical injuries, including significant facial injuries. The claimant had to go to hospital for treatment. He was released from hospital the following day. His neighbours also damaged the claimant's car. The claimant's car was a company vehicle belonging to the respondent.

43. On Tuesday, 21 February 2022, the claimant contacted the respondent. The claimant was told that Mr Wilkinson wanted to have a video call with the claimant. The claimant's facial injuries were apparent to Mr Wilkinson on that call. The claimant had a customer-facing role and it was clear that he would not be in a position to return to work until his injuries had healed.

44. There was a dispute between the claimant and Mr Wilkinson about whether Mr Wilkinson had enquired at that point about the claimant's well-being (pages 18-22). The claimant said that Mr Wilkinson did not ask him about his well-being and did not show any empathy. Mr Wilkinson took issue with that. It was accepted by the claimant that at that he had stage a good personal relationship with Mr Wilkinson. Mr Wilkinson said that he was not the type of person or leader to fail to ask about the claimant's welfare when he had suffered such significant injuries and that the claimant was fully aware that was the case (paragraph 6 of Mr Wilkinson's witness statement). The Tribunal preferred Mr Wilkinson's evidence to the claimant's. The claimant accepted that Mr Wilkinson had discussed mental health and well-being with him before the neighbour incident. It was clear from the documents in the bundle at pages 689-700 that the claimant kept in touch with Mr Wilkinson after his dismissal letting Mr Wilkinson know how his case against the respondent was progressing. Mr Wilkinson's responses were professional and diplomatic. The claimant also accepted that Mr Wilkinson had gone for a drink with him after his dismissal to support him. The tribunal does not consider that Mr Wilkinson would have neglected to ask about the claimant's well-being when the claimant had suffered serious injuries while at the same time

enjoying a positive and supportive relationship with him up to and after his dismissal.

45. Mr Wilkinson also referred to a WhatsApp exchange with the claimant, on Monday 23 May and Tuesday, 24 May 2022 (bundle page 701). On 23 May 2022, the claimant sent a WhatsApp to Mr Wilkinson attaching a copy of his document setting out his appeal against dismissal. On 24 May 2022, Mr Wilkinson replied wishing the claimant good luck with his appeal while saying that he didn't agree with what the claimant had said in his appeal document about Mr Wilkinson not asking the claimant how he was on 21 February 2022. The claimant replied, *'I can't recall. Don't worry about it…'.* The tribunal did not consider that to be the natural response of an employee who genuinely felt aggrieved by the way in which he had been spoken to by Mr Wilkinson at the time.

46. Returning to the claimant's monthly check ins with Mr Wilkinson. The tribunal noted above that in the Check-in for April 2022 there was a reference to the fact that the claimant had struggled in the period since the neighbour incident and was taking medication. The tribunal agreed with the evidence of Mr Wilkinson that the difficulties the claimant had following that incident were understandable. Mr Wilkinson plainly understood, whatever the rights and wrongs of what happened on 20 and 21 February 2022 (see below), the incident was likely to have impacted the claimant not just physically but mentally. However, there was no reason based on that event for Mr Wilkinson to believe that the claimant had any pre-existing mental health condition or that the ongoing impact of that incident on the claimant's mental health was likely to be of a long term nature.

47. At the risk of stating the obvious, it does not follow from the fact that the claimant had been involved in an unpleasant incident which led to him being physically injured that it was inherently likely that he would as a result experience long-term mental health problems. The claimant had recovered sufficiently from his injuries to return to work on 10 March 2022. There was no evidence from the claimant that he told Mr Wilkinson in terms that he believed he was experiencing long-term mental health difficulties resulting from the neighbour incident. Although the tribunal will return to the question of medical evidence later, at this stage there was no medical evidence given to the respondent to that effect either.

48. The claimant was on sick leave between 21 February 2022 and 8 March 2022. That was a total of 12 days all of which was attributable to the neighbour incident. The claimant received his basic pay throughout this period of absence including pay in respect of the first discretionary 3 days of his absence (bundle page 105).

49. During his absence, the claimant completed a number of online training modules. At this hearing, the claimant maintained that it was inappropriate for Mr Wilkinson to put pressure on him to do so given his injuries. It appeared to be the claimant's case that this was some indication of a lack of concern on the part of the respondent for his well-being. The tribunal did not accept the claimant's interpretation of these events.

50. It was the respondent's case that it was the claimant who was very keen to return to work and who voluntarily actioned some outstanding coursework remotely while he was convalescing. The tribunal rejected the claimant's contention that

he was somehow being pressurised, inappropriately or otherwise, into undertaking work whilst he was recovering from his injuries.

51. The claimant's contention was wholly inconsistent with the contemporaneous documentation much of which was from himself. On 23 February 2022, Mr Franklin (Head of Business at BMW Teesside) sent an email at 11:54 to those team members under his management who had not completed a 'Retail Standards at RISK' online course. The claimant was not singled out to complete this course. He was simply one of the recipients to Mr Franklin's email. It appears that Mr Franklin was sweeping up all of those employees who had not as yet completed an important course that was required for regulatory reasons.

52. It was perfectly open to the claimant to point out to Mr Franklin that he was unable to complete the course because, unlike other recipients of the email, he was on sick leave recovering from his injuries. Rather than do that, the claimant completed the online course and sent an email to Mr Wilkinson, which he copied to Mr Franklin. It was in the following terms: '*I completed the one you requested? Let me know if I need to do others!'* This is not the response of an employee who genuinely felt at the time the events unfolded that he considered that he was being *'bullied and harassed'* by the respondent's by being asked to complete online courses during sick leave. On 25 February 2022, the claimant sent another email to Mr Franklin regarding an online course, this time SAF (Specialist Automotive Finance) Renewal. Again, the claimant's email is wholly inconsistent with his contention that he was being bullied and harassed into completing courses while on sick leave. The claimant's email says: *'Already on it! Got another two attempts!'*. Even allowing for the natural willingness of an employee to please their managers, the claimant's enthusiastic response wholly undermines the criticism that he seeks to make of the respondent. Again, far from feeling bullied and harassed, the claimant expressed enthusiasm and invited more course work to be sent to him.

53. On 4 March 2022, the claimant sent a WhatsApp message to Mr Wilkinson in which he said: *'Can't wait to get back to the graft. Feel free to FaceTime.* Not only does this again suggest that the claimant was not feeling the victim of bullying and harassment, it is plainly indicative of the claimant's laudable desire to get back to work.

54. The tribunal considered the claimant's evidence as advanced at this hearing on how he was treated during sick leave to be unreliable. It may be that the claimant has come to believe that that was how he felt at the time. However, it is the tribunal's view that the claimant is revising his actual experience in the light of subsequent events. The tribunal is not saying that the claimant is seeking to mislead the tribunal, rather that the claimant has come to believe in a version of matters which supports his case in these proceedings but which is not one in which he genuinely believed at the time they in fact occurred.

55. On 9 March 2022, the claimant returned to work.

56. On 10 March 2022, the claimant had a conversation with Mr Wilkinson and Mr Franklin about the neighbourhood incident. The purpose of the meeting was for the respondent's managers to understand what had happened leading to the

attack on the claimant, the damage to the company car and the claimant's sick leave. Both Mr Wilkinson and Mr Franklin were shocked by the claimant's account of the incident with his neighbour. As Mr Franklin says at paragraph 6 of his witness statement, he was shocked not just by what happened to the claimant but also by the claimant's own behaviour during the incident. Mr Franklin explains that he considered both the claimant's and his neighbour's behaviour to have been *'extremely violent and… aggressive.'* That assessment was based on the claimant's own account of the incident. The tribunal agree. It is simply not possible to interpret the behaviour of each party to the incident in any other sensible way.

57. The claimant provided a great deal of evidence in this witness statement and under cross examination by way of explanation and justification for his conduct. The tribunal was not assisted by that, not least because on the claimant's own account he had thrown a slab through his neighbour's window and damaged his neighbour's car over 12 hours after the same slab had been thrown through his own window. Mr Franklin goes on to say that: '[He] found it incredible that [the claimant] had got himself into that position. The tribunal considered that to be an entirely reasonable assessment of what happened based on the claimant's own version of events.

58. At paragraph 8 of his witness statement, Mr Franklin says that he gave further consideration to what he had been told on 10 March 2022 and decided that it was appropriate to hold a further meeting with the claimant and for a notetaker to be present. That further (albeit aborted) meeting took place on 11 March 2022. The notes of the meeting are at pages 253-255 of the bundle. On any view, that meeting did not go well.

59. The claimant refused to go through the incident again and left the meeting some 20 minutes after it had begun. All of that period of 20 minutes was taken up with a disagreement between Mr Franklin and the claimant about whether it was appropriate at all for Mr Franklin to require the claimant to provide his account again, particularly in a formal setting with a notetaker. The notes of the meeting (bundle pages 253-255) reflect the position at the time taken by both Mr Franklin the claimant.

60. Mr Franklin's position was that he wanted a formal note so that consideration could be given as to whether or not it was appropriate to take disciplinary action against the claimant. Mr Franklin had been taken aback by the account he had received the previous day and had reflected. The claimant was employed by the respondent selling high value cars and was a certified BMW Sales Executive. The claimant's company car had been damaged as part of the aftermath to the claimant's retaliation. The claimant represented the company and people knew where he worked because of the claimant's own social media posts. Mr Franklin was concerned about the potential impact to the respondent's brand.

61. The claimant's position was that he had been through the matter the previous day and thought that they *'had drawn a line in the sand about it.'* He said that it was the employers role to protect him and that he was worried about saying anything that would incriminate him. He said that if the police didn't need to take a statement it was not necessary for the respondent to do so. He and his family

had been the victim of a crime. He said that he thought the company wanted to punish him despite no action being taken against him by the police. As the notes reflect a page 254, the claimant said '… *nobody wants to me punished but you [i.e. Mr Franklin], in my eyes.'*

62. The claimant was even more forceful in his witness statement. At paragraph 75 and following the claimant says that he was *'ambushed'* by Mr Franklin. He says that he told Mr Franklin *'there and then and more than once that he [Mr Franklin] was 'Disgusting!!!... The only man in the world who wants to punish me!'*. He says that Mr Franklin acted *'abhorrently'* and that Mr Franklin *'…put the spotlight on me instantly on my return, contributing more than anything before to my disability.'*

63. This is one of the occasions where it is necessary for the tribunal to separate the facts of the matter from the emotion that it generated in the claimant. The tribunal considered that the respondent had every reason to make a formal record of what had happened. It was perfectly understandable that Mr Franklin took stock and considered matters further after the verbal account that he and Mr Wilkinson had been given on 10 March 2022 by the claimant. There was no commitment by Mr Franklin or Mr Wilkinson that a line had been drawn in the sand about the matter the previous day. The tribunal concluded that it was the claimant who wanted to consider the matter over and done with but that the respondent had not given him any reason to believe that would be the case. The tribunal quite easily understood why the respondent would want a formal record of such a serious incident. Although the incident had taken place outside of the workplace, a company car had been damaged and it was perfectly feasible that the incident might attract adverse publicity with the result that the respondent would want to be sure that it properly understood what had happened if it was approached for comment. The company plainly had its own legitimate interest in what had happened independent to and separate from the legitimate interest of the police. It was clear from the evidence of the respondent's witnesses, including Mr Franklin, that the respondent places a significant importance of the company's brand values includes colleagues taking responsibility for their own actions. The tribunal straightforwardly understood why the claimant's behaviour might be seen to be in conflict with that value.

64. By a letter dated 14 March 2022, the claimant was issued with a letter of concern from Mr Franklin regarding his involvement in the incident of 20/21 February 2022. The claimant was told that this was not a formal disciplinary letter and that it did not constitute any formal disciplinary action. The purpose of the letter was to make the respondent's expectations clear to the claimant. He was expected to uphold the brand values both of the respondent and act appropriately as a BMW Certified Sales Executive. The claimant was warned that any re-occurrence of such conduct or where company property is placed at risk could result in the respondent's disciplinary process being triggered. In the circumstances, the tribunal considered that the respondent dealt with this shocking matter with a relatively light managerial touch.

65. On 23 March 2022, the claimant had a return to work meeting with Mr Wilkinson. Mr Wilkinson accepted in his evidence that he was in error in not carrying out this return to work meeting earlier. However, the tribunal does not accept the claimant's contention that this was some form of missed opportunity. At

paragraph 54 of his first witness statement, the claimant says that the delay in his return to work was: *'…[a] crucial, fundamental mistake by… Lee Wilkinson. They failed their duty of care towards me. I was not assessed for my mental and physical health. They let me down.'*

66. The inescapable difficulty with the claimant's characterisation of the delay in his return to work interview lies in his own words at the time. The Return to work & Self Certification Form is at pages 404 to 405 of the bundle. The claimant did not contest the accuracy (as opposed to the timing) of this form. In so far as relevant, the form records the following:

*'**Do you feel better?** Day by Day I'm feeling better but it will be a slow process.*

***Are you taking any medication?** Yes! Sertraline which is for PTSD!*

***If so, how do they affect you?** They affect me in a positive way and make me feel much better*

***Is this a recurring illness?** Physically no and same as mentally*

***If so, what is the prognosis?** I will be on a repeat prescription for three months when it will be reviewed*

***Are there any adjustments we could make?** I feel better being at work and don't need any adjustments just understanding.*

***Is there anything else you wish to bring to our attention?** NO.*

67. The tribunal finds that there was no material harm or prejudice to the claimant as a result of Mr Wilkinson's delay. The tribunal will come back to the claimant's medical evidence below. However, the tribunal notes that when the claimant says he had been prescribed *'sertraline which is for PTSD!'*, it is no part of the claimant's case either that he was diagnosed at any stage relevant to these proceedings with PTSD or that he was prescribed sertraline for PTSD.

68. The claimant made the narrow distinction between having been prescribed sertraline for the condition with which he had been diagnosed (anxiety and depression) and the fact that sertraline may also be prescribed for a condition with which he had not been diagnosed (PTSD). The claimant never explained why he chose to make that distinction. In any event, the tribunal learned nothing of any relevance to these proceedings from the fact that the claimant's medication could be prescribed for medical conditions with which the claimant was not at any stage diagnosed. The tribunal comes back to this matter below when looking at the interaction between the claimant and his GP at the relevant time, particularly in respect of the pressure that the claimant placed on his GP to diagnose him with PTSD when his GP plainly did not agree with that diagnosis.

69. The tribunal concluded that on any fair reading of the information that the claimant provided at his return to work meeting on 23 March 2022, there was nothing to suggest that he might be suffering from any form of long term mental health condition likely to come within the terms of section 6 EqA or that the respondent

was on notice to make any further additional enquiries in order better to establish his medical condition. On the contrary, the claimant told Mr Wilkinson that he felt much better; that neither his physical nor mental health was a recurring illness; that he felt better being at work; and that he did not need any adjustments just understanding. In due course, his physical injuries healed and he began once again to achieve sales.

70. On 17 March 2022, Mr Franklin received by email a complaint from a customer. That email is at pages 259-261 of the bundle. The customer was extremely unhappy about correspondence that he had been sent to him by the claimant. In error, the claimant had sent to the customer some internal correspondence between him and another sales executive. This was attached to an email deliberately sent to the customer giving him the information he had asked for. The comment to which the customer took offence was in the following terms:

'He [the customer] wants to know a back end of a fart! Can you also give him an idea of servicing costs and also confirm warranty on battery.'

71. The customer went on to say:

'If this is the attitude your sales team takes on honest enquiry to purchase a £25,000 vehicle from yourselves I will NEVER step foot on a BMW forecourt again…

We will not be coming to test drive the vehicle on 18 March as previously arranged, I expect our £500 deposit to be refunded ASAP.'

72. Mr Franklin passed the matter to Mr Wilkinson to investigate. Mr Franklin gave support to Mr Wilkinson during the investigation. An investigation meeting took place on 23 March 2002. The notes of that meeting are at pages 273-274 of the bundle. At that meeting claimant referred to the medication he was on for his mental health. He also referred to the email he sent as: *'a tired lazy email'.* The claimant criticised Mr Franklin's involvement at the investigation stage. Mr Wilkinson explained Mr Franklin assisted him because he had not previously done an investigation under the respondent's disciplinary process. The tribunal did not find it necessary to consider this point further given that the tribunal was not dealing with a claim of unfair dismissal where greater focus is often placed on procedural matters.

73. By letter dated 11 April 2022, the claimant was invited to a disciplinary meeting with Mr Franklin (bundle pages 278-279). The notes of the disciplinary hearing are at pages 280-285 of the bundle. The claimant accepted that he was *'mortified'* when he realised his mistake and again repeated that it was a *'tired lazy email'* (bundle page 284). Mr Franklin enquired about the claimant's mental health at the end of the meeting. He asked the claimant to contact the BEN charity for support. The claimant said at that point:

'… I'm a lot better now getting better every day the issue with my neighbour sorted out communication is much better much happier place just physical I need to start eating and go to the gym.'

74. The outcome of the disciplinary meeting was the claimant was given a first written warning to stay in his file for 12 months. The claimant's response was:

'I just wanna apologise to [the respondent] I made a mistake and I accept it.'

75. The claimant was informed of his right to appeal Mr Franklin's decision. The claimant did not do so.

76. At paragraph 116 of his first witness statement, the claimant refers to the disciplinary meeting with Mr Franklin. He says:

'… I am pleading my case about the mental condition I am in. I am banging on about my mental health. I mention my first day as having to take medication for Panic Disorder Anxiety disorder… I repeat the harrowing details of my trauma.'

77. As the tribunal has already noted, Mr Franklin took the time of the end of the meeting to get an update on the claimant's mental well-being. The claimant's response was that he was *'getting better every day'* and that his problems were *'just physical'*. Again, it is difficult to reconcile the claimant's version of events in his own words at the time the they occurred with the version of events the claimant retrospectively presented to the tribunal.

78. By a letter dated 21 April 2022 (bundle pages 286-287), Mr Franklin confirmed the outcome of the disciplinary meeting. In particular, that the claimant would receive a first written warning for serious breach of the respondent's values. Mr Franklin ended the letter by explaining that the company would support the claimant and reiterating that the company had referred the claimant to the BEN charity.

79. Although the claimant did not appeal Mr Franklin's decision, he contacted the customer who had made the complaint on 20 October 2022, many months after his employment had terminated. The claimant did not inform the company that he intended to do so. The claimants sought to justify the email that he had sent to the claimant by reference to the fact that the customer had not been informed before about the incident with his neighbours on 20/21 February 2022. The claimant enclosed photographs of his injuries in his email to the customer's.

80. This led the customer to contact Mr Franklin on 22 October 2022 (bundle pages 474). The customer expressed his shock at being contacted by the claimant and expressed concerns at an apparent breach of data protection. The customer emailed Mr Franklin again on 25 October 2022 expressing his concern at the claimant repeatedly contacting him despite being asked not to do so by the customer.

81. Mr Franklin discovered that the claimant had obtained the customer's email address from the respondent when it had responded to a data subject access request from the claimant. In error, the company had not redacted the customer's email address. When cross-examining Mr Franklin, the claimant made reference to the company's breach of data protection. The claimant never explained why he felt it appropriate to use information he was plainly aware had been sent to him in error and in breach of data protection regulation for the purposes of contacting the customer directly himself.

82. On 27 April 2022, the claimant responded to a staff survey being undertaken by the company. One of the questions related to whether or not staff considered the respondent to be 'a great place to work.' The claimant's response is on page 290 of the bundle. He says:

Done and big tick/yes! It could be better with a heated smoking shed with seats and ashtrays though fit for a BMW Accredited Sales exec! [smiley emoji]

83. In his first witness statement and during cross-examination the claimant suggested that he was being sarcastic. The tribunal did not accept that explanation. Had the claimant genuinely intended to be sarcastic, it is unlikely he would have gone on to provide the humorous addition set out above and have completed his response with a smiley faced emoji. The tribunal concluded that the claimant was seeking to explain away evidence which he was concerned might reflect badly on the overall version of events he presented to the tribunal.

84. On 30 April 2022, the incident that led to the claimant's dismissal took place. On the morning of 30 April 2022, Mr Wilkinson was contacted by phone by Mr Neil Sedgwick. Mr Sedgwick was the New & Approved Used Sales Business Manager at the Vertu Teesside BMW dealership. Mr Wilkinson was on his way to work. Mr Sedgwick was concerned about the claimant's behaviour in the workplace that morning. Mr Sedgwick told Mr Wilkinson that the claimant had been aggressive and had been swearing. Mr Wilkinson asked Mr Sedgwick to get statements from the team members who had witnessed what happened so that Mr Wilkinson could speak to the claimant from an informed standpoint. Those statements are at pages 291-293 the bundle. The statements are from Mr Sedgwick, Thomas Gordon, and Jonathan Sutcliffe.

85. The context was team members were gathering at the dealership for an early morning meeting at 08:15 on Saturday, 30 April 2022. That meeting was arranged before the normal start time because the respondents chief executive, Mr Robert Forrester, was to be visiting the dealership that day. For obvious reasons, the team wanted to create a good impression. The claimant did not get the message convening the meeting which had been sent to him very late the night before. The claimant's normal start time was 08:30. Although there was some dispute as to the precise minute of his arrival, the broad consensus was that the claimant arrived at approximately 08:35.

86. Relevant extracts from the statements about what had happened on the morning of 30 April 2022 are as follows:

Mr Sedgwick

When Mr Sedgwick asked the claimant why he had come in late the claimant replied:

Because I don't live in Middlesbrough like everyone else

I have been driving around is that a fucking good reason

When Mr Sedgwick asked the claimant why he was saying such things the claimant replied

I am not fucking bothered

When Mr Sedgwick said that if the claimant was to continue in that vein he would send him home the claimant replied

Send me fucking home then as I will gladly go home

Mr Sedgwick also referred to the fact that had heard the claimant call another salesman the previous day

'a daft cunt'

Mr Gordon

I have to travel from Newcastle and don't live in Middlesbrough like everyone else

I have been fucking driving Robert around showing him the sites, is that a good enough reason

I am not fucking bothered

Send me fucking home then as I don't care

Mr Gordon also recalled the claimant calling the colleague ***a daft cunt*** a comment that the claimant had repeated to the whole team upstairs.

Mr Gordon recalled the claimant ignoring Mr Sedgwick's instruction that he should go home

Mr Sutcliffe

Because I don't live in Middlesbrough like everyone else

I've been driving Robert around is that a fucking good reason

Because I am not bothered

Send me fucking home then

87. The claimant was heavily critical of these statements because he felt that they had been taken in what he described as collusion. The claimant pointed to the fact that they were all sitting together in the office and to similarities amongst the statements.

88. The tribunal was not persuaded by those criticisms. First, the consistency between the statements may of course be a reflection of: the fact that they all heard the same thing at the same time; the fact that the statements were taken

immediately after the incident occurred; and the fact that the claimant's language was memorable for its colour. Secondly, it was never made clear to the tribunal whether the claimant had any meaningful factual disagreement about what he was reported to have said and done. It was never consistently the claimant's case that he had not sworn or had not said, in one form or another, the things attributed to him by the three witnesses. The tribunal again reminded itself that it was not dealing with a claim for unfair dismissal when the matter of the reasonableness of an investigation (including in an appropriate case the circumstances in which statements were taken) may have formed a greater focus of the tribunal's required analysis. In any event, the tribunal found the statements reliable, not least because they broadly accorded with the claimant's own version of what happened.

89. On 4 May 2022, Mr Wilkinson carried out an investigation into this incident. The minutes of this meeting at pages 295-298 of the bundle. That investigation meeting is significant for a number of reasons.

90. First, the way in which the claimant expressed himself. He describes the BMW Teesside dealership as *'a shit show'*. That is remarkable language to use given the claimant knew that he was being investigated for the potential misconduct of swearing at Mr Sedgwick, who was one of the business leaders at the dealership.

91. Secondly, the claimant was aggressive towards Mr Wilkinson. Amongst other things, he described Mr Wilkinson's investigation as: '*not much of an investigation'.* That was disrespectful. The claimant shown similar confrontational behaviour in the tribunal when he said to Mr Benjamin at the end of Mr Benjamin's cross examination: *'is that all you've got?'* The claimant apologised to Mr Benjamin for that remark when he realised it had been overheard by the tribunal and had been told by the tribunal that it was wholly inappropriate behaviour. He referred to the contention that he was late on 30 April 2022 as *'bullshit'*. The claimant said to Mr Wilkinson, *'let's fucking move on, fucking shit show*. The claimant then proceeded to walk out of the meeting before Mr Wilkinson had finished and without seeking Mr Wilkinson's permission. That was reminiscent of the claimant's decision to walk out of the meeting with Mr Franklin regarding the neighbour incident on 11 March 2022.

92. Thirdly, the claimant accepted that he had sworn swearing on 30 April 2022 and made no challenge to the language that the witnesses had said that he had used. Indeed, the claimant again referred to his colleague 'Will' as 'a daft cunt' at his meeting with Mr Wilkinson.

93. Fourthly, it was the claimant's position in response to the allegation that he had sworn at a manager that: *'I swear a lot anyway so it's nothing new'.* The tribunal found that significant because it was the claimant's case at this hearing that the conduct for which he was dismissed was conduct that arose in consequence of his disability. On 4 May 2022, his position was very different. His position during the management phase was that he swore as a matter of course, not that he did so for any reason related to his mental health.

94. Fifthly, the claimant was critical of Mr Sedgwick. He said that Mr Sedgwick had been trying to belittle him and used this as a form of justification for his own bad language and behaviour.

95. The claimant followed up on this in his email to Mr Franklin and Mr Wilkinson sent on 4 May 2022 at 21:35 (bundle pages 300-302). In the email he said that Mr Sedgwick had got his backup, he had become irritated and angry because he felt that Mr Sedgwick was calling him out in front of others. The claimant accepted in that email that he had said: *'I been driving Robert around showing the joys of Middlesbrough where the fuck do you think I've been?'.* The tribunal noted that this was essentially the same words that the witnesses had ascribed to him in their statements. The claimant goes on in that email to say that Mr Sedgwick: *'… Basically talked to me like a kid and when you talk to Darren Sidney like a kid I'm gonna act like a kid.'* Again, the claimant is giving a conscious reason why he spoke and behaved as he did on 30 April 2022 and doing nothing whatsoever to suggest that the statements that had been taken inaccurately recorded what had happened. Rather, the claimant is attempting to justify not contradict the reported events of that morning.

96. In that same email, the claimant addresses his medical condition. The claimant refers to his traumatic experience regarding the neighbour incident and says as follows:

> *'The Meds helped me massively mentally and I felt great and improved every day. However this was offset with the side-effects which ravaged me physically and caused numerous problems and pain which you are privy to. I've tried to call doctors for this but can't get the help I had no choice to make the decisions myself to stop taking them which you are not supposed to do…. It's obvious this would have an adverse affect on me and would affect my mood with mood swings. At home I have been ratty over the last 10 days and on Saturday was a bad day to be irritating Darren Sidney. I am not making excuses but you have no idea what I've been through and still going through…'*

97. Mr Wilkinson then produced an investigation report which recommended that the matter proceed to a disciplinary hearing to consider formal action against the claimant. Mr Wilkinson concluded on the basis of his investigation that he had: *'a reasonable belief that on Saturday 30 April [the claimant] used foul, abusive, objectionable or insulting language and behaviour towards a manager. This is a serious breach of the respondents values. Specifically, professionalism and respect.* The tribunal also noted that *'Foul, abusive, objectionable or insulting language or behaviour'* is identified as an example of gross misconduct in the respondent's disciplinary procedure (bundle page 196).

98. By a letter dated 5 May 2022, the claimant was invited by Mr Wilkinson to a disciplinary hearing to consider the allegation that had been made against him (bundle pages 307–308). That letter says that the allegation was to be considered by the respondent as one of potential gross misconduct.

99. On 11 May 2022, Mr Franklin conducted the disciplinary hearing. The hearing lasted for 2 hours and 18 minutes. The notes of the hearing are at pages 318-339 of the bundle. Mr Franklin asked the claimant whether he had read the

documents that were enclosed with the letter convening the disciplinary hearing. The claimant's response was that he had not done so because they would have made him *'sick as pig shit'* (bundle page 318). The tribunal did not think the claimant's language to be well chosen, not least because the claimant was facing serious disciplinary action for amongst other things swearing in front of a manager. This was not the only occasion during the disciplinary meeting the claimant used bad language. He also said that Mr Sedgwick had, *'lost his bollocks'* by not sending him home on the day of the incident.

100. The claimant's position at the disciplinary meeting regarding the alleged misconduct was at times difficult to follow. Mr Franklin said that he found it difficult to get a straight answer out of the claimant during the hearing (Mr Franklin's witness statement paragraph 34). The claimant would admit swearing at one point and then deny it at another. As Mr Franklin says at paragraph 40 of his witness statement, '*he would swap from saying his behaviour was acceptable because everybody swears, to saying he was irritated to saying that he was only being sarcastic'.* The tribunal accepted Mr Franklin's evidence, not least because the claimant replicated exactly that equivocation during cross-examination.

101. At page 322 of the bundle, Mr Franklin is recorded as having asked the claimant the direct question, *did you swear?* The claimant's answer is at best equivocal. He replied , *'Don't know not bothered if I did put down I did I was irritated .'* That is self-evidently not a straightforward answer.

102. On page 338 of the bundle, the claimant again appeared not to dispute that he had sworn Mr Sedgwick. He said that he had had a bad day on 30 April 2022 and that he was, *'not condoning my language could be terrible I have a worse tongue a gypsy's granny.'*

103. The disciplinary meeting was adjourned on the afternoon of 11 May 2022 for Mr Franklin to consider his decision. The meeting was reconvened the following day, 12 May 2022. Mr Franklin's decision is recorded at page 339 of the bundle. Mr Franklin explained that he had thought long and hard and come to the conclusion to terminate the claimant's employment with immediate effect for gross misconduct for breach of values. Mr Franklin explained that this was not the first time that the claimant had misconduct himself and that he was concerned that there could be further use of *'aggressive colourful language'* in future. The claimant was informed of his right of appeal.

104. By letter dated 13 May 2022, Mr Franklin confirmed his decision to terminate the claimant's employment (bundle pages 341-344). Mr Franklin set out the mitigation that the claimant had provided at the disciplinary meeting. Two of those points are as follows:

- *You recently stopped taking your sertraline medication as it was affecting your bowels. You believe that withdrawals of the medication may have contributed towards your actions.*

- *You do not feel you have been properly supported at coming back to work from being on sick leave. He did not receive a back to work plan and believe the*

business was only bothered about the company property that was damaged when you had an altercation with your neighbour, not your mental health.

105. The claimant was therefore making a direct link between the effect of withdrawing from his medication and the actions that had led to the termination of his employment.

106. Mr Franklin explained his decision to dismiss the claimant at paragraphs 40-42 of his witness statement. The tribunal accepted that explanation. Mr Franklin says the claimant failed to accept any responsibility for his behaviour. He felt that the claimant had reached a conscious decision to speak to Mr Sedgwick in the way that he did. Mr Franklin justified reaching that conclusion by reference to remarks the claimant made during the disciplinary meeting including that he would *'act like a kid if treated like a kid*' (pages 301 and 336 of the bundle) and to the various references claimant made to Mr Sedgwick having got the claimant's '*back up'* and to the claimant's perception that he had been spoken to by Mr Sedgwick in an overly authoritative manner and having been asked a *'stupid question'* by Mr Sedgwick.

107. The stupid question being referred to was Mr Sedgwick asking the claimant why he had arrived late. The claimant made a great deal of the fact that he was not aware of the request for team members to get together at 08:15 on the morning of 30 April 2022. Mr Wilkinson's message to that effect had arrived very late the night before and the claimant had not had an opportunity to read it. The tribunal derived no assistance from this dispute. The reason that the claimant was asked to account for his language and behaviour had nothing at all to do with whether or not the claimant was late. That may have been the occasion on which the claimant used the language and behaved the way he did, but that was not to the reason why he faced further disciplinary action.

108. Mr Sedgwick cannot be expected to be perfect. The fact that Mr Sedgwick may have been unaware that the claimant was unaware of the timing of the meeting cannot begin to be any form of sensible justification for the claimant's aggressive behaviour and foul-mouthed public outburst. Indeed, the claimant had called a work colleague a '*daft cunt'* the previous day in a completely different context demonstrating that it was the claimant's propensity to use bad language that was the problem not the rather mundane trigger which led to it.

109. The tribunal had sympathy with Mr Franklin's difficulty in ascertaining precisely what the claimant's position was in response to his alleged misconduct. The claimant's evidence at the tribunal was also equivocal. The claimant continued to maintain competing and irreconcilable positions. At times the claimant took each of the following approaches:

- to deny that he had behaved aggressively and sworn;
- to accept that he had behaved aggressively and sworn but that he was justified in so doing because of Mr Sedgwick's own behaviour;

- to accept that that he had behaved aggressively and sworn but that this was attributable to his mental health condition either generally or as a result of withdrawal from medication;

- a mixture of all three positions.

110. By letter dated 23 May 2022, the claimant appealed the decision to dismiss him. That letter is at pages 363-372 of the bundle. It is a long letter. The claimant's position regarding the events on 30 April 2022, is that he was sorry the situation occurred but that both he and Mr Sedgwick could have handled it better. The claimant says that he was *'irritated and agitated to be called out as a liar'.* This was another reference to Mr Sedgwick saying that the claimant had arrived late on 30 April 2022.

111. There was no basis to the contention that Mr Sedgwick had called the claimant a liar. It was, as the tribunal has already found, a simple misunderstanding. That sort of misunderstanding will no doubt occur on a day by day basis in an employer as large and busy as the respondent. That misunderstanding was based on the fact that Mr Sedgwick incorrectly assumed that the claimant (like the rest of his work colleagues) had received the request to come to work early at 08:15 that day. The tribunal accepted the claimant's evidence that did not receive that group request and did not open the message from Mr Wilkinson until after he attended work on 30 April 2022.

112. The tribunal rejects the claimant's characterisation that he was being called a liar by Mr Sedgwick or that the claimant could reasonably have understood Mr Sedgwick to be so doing. As we say, it was a simple misunderstanding that could and should have easily been resolved professionally and without the need for any form of confrontation.

113. On 19 May 2022, a letter was sent from the respondents GP practice (Dr Jane Allan MRCGP) to the claimant (bundle page 386). That letter was in turn provided by the claimant to the respondent in advance of his appeal against dismissal. That letter is consistent with the claimant asking his GP practice to send a letter on his behalf to explain his mental health history. The contents of the letter are as follows:

'Dear Sir/Madam

I first met Mr Sidney on 15/3/22. At this time, he stated to me that he was under a lot of stress at the car dealership where he worked. He reported that he wanted to continue to work despite recently having been the victim of a severe assault.

He was seen by one of my colleagues on 9 March 2022. At this time, he reported increasing anxiety since the assault, poor sleep, and low mood. He was started on sertraline 50 mg once daily. A further telephone consult with a colleague on 5 May 2022 stated he was having severe diarrhoea related to the medication he been given. At this time the medication was changed to citalopram. He had been without medication currently for 10 days. (I imagine he had waited to get an appointment to discuss).

I would expect worsening mood, poor concentration, altered sleep and increase stress levels when stopping this medication and with medication change overs.

Mr Sidney has a history of depression since 1993. It appears to have been mostly well-controlled. He required citalopram when he was experiencing changes in his mood and again in April 2020. Jan 2020 citalopram 30 mg. November 2019 low mood concerned regarding borderline personality or bipolar disorder. Advised talking helps. Jan 2019 mood is stable. December 2018 low mood and depression for years. Found work to be stressful.

If you require any further information, please don't hesitate to contact us at the surgery.'

114. The pertinent information in that letter is that the claimant had been prescribed sertraline 50 mg on 9 March 2022, but that he was not taking that medication on 30 April 2022. The incident with Mr Sedgwick occurred on that date. Dr Allan goes on to say that she would expect worsening mood, poor concentration, altered sleep and increase stress levels as a result of withdrawal from medication. It appears from the letter that the claimant did not first seek medical advice before withdrawing from his medication. The letter also points out that the claimant has had a history of depression since 1993. The claimant's depression appears to have been mostly well-controlled at the point he joined the respondents employment.

115. The GP letter does not say that there is any connection between the claimant's behaviour on 30 April 2022 and his underlying mental health situation. That is so even though the claimant sought this letter from his GP when he knew that he had been dismissed for aggressive behaviour and repeated swearing. It follows that both the respondent when it considered the claimant's appeal and the tribunal when it considered the claimant's case had no explicit or implicit medical evidence to the effect that the claimant's behaviour on 30 April 2022 arose in consequence of his diagnosis of his anxiety or in consequence of his history of depression. The closest Dr Allan's letter gets to making any potential connection between the claimant's medical situation and his behaviour is when she says that stopping medication may lead to a worsening of the claimant's mood. At the risk of stating the obvious, experiencing low mood is a very long way from explaining aggressive behaviour and swearing in the workplace.

116. On 23 May 2022, the claimant sent a redraft of this letter of appeal (bundle pages 393-402). The claimant starts his letter with a quotation from (presumably) an academic from Cambridge University. It is in the following terms:

'We found a consistent positive relationship between profanity and honesty; profanity was associated with less lying and deception at the individual level integrity at the social level… *Swearing is often inappropriate, but it can also be evidence that someone is telling you their honest opinion. Just as they aren't filtering their language to be more palatable, they're also not filtering their views.'*

117. This was consistent with the claimant's case that he believed that he was justified when he had sworn on the basis (as he understood the research) he was more likely to be being honest. This seemed to the tribunal to somewhat miss the point.

The claimant was not being criticised for the sincerity of his beliefs that Mr Sedgwick had behaved somehow inappropriately. He was being criticised for the inappropriateness of behaving aggressively and using foul language in towards a manager. To the extent the tribunal found any assistance in this quotation, it was in the observation, which is also a matter of ordinary common sense, that '*swearing is often inappropriate'.* This seems to have been lost on the claimant.

118. By a letter of 24 May 2022, the claimant was invited by Mr Masterson, Franchise Director, to attend an appeal hearing on 9 June 2022. Mr Masterson identified himself as the manager responsible for conducting the appeal and also informed the claimant that Sam Green, HR Employee Relations Manager, would be present at the appeal hearing as a note taker. The appeal hearing was originally going to take place at Stockton but was relocated at the claimant's request to Peterlee.

119. The notes of the appeal hearing are at pages 427-414 of the bundle. Mr Masterson confirmed in his witness statement that he familiarised himself with all of the documents relevant to the appeal before he undertook it, including reviewing the letter from the claimant's GP at page 386 of the bundle. The claimant was accompanied by a colleague, Mr Marsden, during the appeal hearing.

120. From Mr Masterson's perspective the appeal hearing did not start well. While Mr Masterson was attempting to introduce the hearing, the claimant interrupted him to tell that it was his [the claimant's] meeting and said word to the effect that to *you [Mr Masterson] will listen to every point I raise.* Mr Masterson said that he found this aggressive and an approach which he had not come across before in his long career including substantial experience of handling the appeal stages of disciplinary and grievance matters. Mr Masterson explained that he found the claimant aggressive and argumentative at the appeal hearing.

121. Mr Masterson attempted to find out whether the claimant believed his behaviour towards Mr Sedgwick was acceptable and whether his profanity was acceptable. The claimant said profanity had been around, '*since communication began' (bundle page 428)*. The tribunal accepts the accuracy of that as a free-standing proposition, but again the claimant failed to address the material point which was whether or not it was appropriate to use profanity in an exchange with a senior manager in the circumstances which prevailed at the respondents Teesside BMW dealership on 30 April 2022.

122. It was also the claimant's position at the appeal hearing that he had a right to swear and profanity and honesty went hand-in-hand. This left Mr Masterson with the impression that the claimant thought he should not be challenged about his language.

123. The claimant also spoke about his mental health during the appeal meeting. The claimant did not say at this meeting that he considered his behaviour and language to be attributable to his mental health. His position on swearing was radically different i.e. that he had the right to swear and exercised that right frequently. It is obvious that this is a very different thing from attributing what the respondent saw as misconduct to something arising in consequence of the

claimant's disability. The claimant's observations on his mental health at the appeal hearing were confined to the observation that Mr Wilkinson and Mr Franklin had not supported him during his absence as a result of the neighbour incident on 20/21 February 2022 and on his return to work in March 2022.

124. Mr Masterson asked the claimant directly whether or not he had told either Mr Wilkinson or Mr Franklin that he had been unwell on 30 April 2022. Mr Masterson felt that he did not get a direct answer to that question. Mr Masterson pointed out that as far as Mr Wilkinson and Mr Franklin knew, the claimant was keen to get back to work after the neighbour incident and that he had returned to work and performed well. That included the claimant achieving what the respondent calls a 'hat trick' when a sales executive completes 3 deals in a single day. Mr Masterson referred in his witness statement that he had seen the WhatsApp message at page 700 of the bundle in which Mr Wilkinson is informed by the claimant that the claimant, '*Can't wait to get back to graft.'* Mr Masterson acknowledged that the neighbour incident would have been stressful to the claimant, but concluded that there was no reason for Mr Wilkinson or Mr Franklin to suspect that the claimant was unwell as the claimant was back to work, achieving sales and did not report any concerns to anybody until he was challenged about his conduct in relation to the customer complaint and then the incident of 30 April 2022.

125. Mr Masterson concluded the appeal hearing by confirming to the claimant that he would carry out further investigation including into the claimant's mental health. Mr Masterson then spoke to Mr Franklin, Mr Sedgwick, Mr Mistry, Mr Sutcliffe and Mr Wilkinson.

126. By a letter dated 21 June 2022, Mr Masterson informed the claimant of his decision not to uphold the claimant's appeal and to confirm his dismissal on the grounds of gross misconduct. That letter is at pages 466-469 of the bundle. Mr Masterson went through each of the points that he understood the claimant was relying upon in support of his appeal. That included the claimant's contention that he had the right to swear. Mr Masterson concluded that whereas he could not refute the claimant's right to swear he said that there was;

'… a time and place to do so. In a professional, prestigious franchised environment, about a CEO's visit, or indeed during a formal investigation process, is unprofessional, unacceptable and totally inappropriate. In itself this is a serious breach of [the respondent's] values (bundle page 467).

127. Mr Masterson also addressed the question of the claimant's mental health. Mr Masterson concluded that neither Mr Wilkinson nor Mr Franklin could have reasonably been aware that the claimant was not fit for work when he returned on 9 March 2022 after the neighbour incident. Mr Masterson pointed out that the claimant had admitted that he had declined a fit note from his GP because he wanted to return to work and that he had received a CT scan to check for any damage to his head. Mr Masterson said that the management team at the dealership were not medical professionals and they were actively led to believe by the claimant that the claimant was fit to return and wanted to return to work.

128. Mr Masterson also referred to the return to work meeting (bundle pages 404-405) completed on 23 March 2022. The tribunal has already noted that the claimant's position was that his medication (sertraline) made him feel much better; the claimant said he felt better being at work and didn't need any adjustments just understanding; and that he had no recurring illness. Mr Masterson concluded and the tribunal agreed that in those circumstances there was no reasonable basis to suggest that Mr Wilkinson or Mr Franklin had any reason to believe the claimant was anything other than fit to return to work and had no reason to make any further enquiries to second-guess what was being represented to them by the claimant himself.

129. Mr Masterson therefore upheld the decision taken by Mr Franklin to dismiss the claimant for gross misconduct with effect from 11 May 2022.

130. The tribunal was provided with medical records from the claimant's general practitioner for the period from January/February 2022 to January 2023. Those documents were not available to the respondent's management at any time prior to Mr Masterson's decision to dismiss the claimant's appeal against dismissal. The information the tribunal found helpful from those records is set out below.

131. The tribunal had sight of an undated form from the claimant's GP (bundle pages 609-610) . The purpose of the form is for the GP to get advice about a patient who might need referral to specialised mental health expertise. The document is not itself a referral form, but appears to be seeking advice as to whether a referral is required. Although undated, the form was completed shortly after the claimant's employment was terminated since his recent termination of employment is referred to in the document. The form says the following under the heading 'Current Problem'.

'I would be most grateful for your review of this 50-year-old gentleman who is struggle[ing] greatly with his mental health.

Current symptoms include dizziness at times, difficulty reading, low mood, stress, emotional instability, poor sleep, alcohol excess (1 bottle at night sometimes more). Some increase in smoking up to 20 per day. Suicidal thoughts.

There is a long history of mental health issues since an overdose aged 17. He reports repeated self-harm which has continued until present day with scars on his left arm and left side of abdomen. He has never been treated for this.

Seems to struggle with controlling self if something is not done immediately for example threatened to complain to practice when his concerns were not immediately dealt with and was initially insistent that I put the diagnosis of PTSD on his Fit note which I did not.

Recently fired from job as a car salesman in an incident with serious head injuries after being involved in a situation where he tried to smash a car up after someone threw a brick through his window the people whose car it was then attacked him.

Treated with intermittent SSRI over the years has not had prolonged treatment and did not engage in counselling services for any prolonged time.

Appeared to blame others and have difficulty at times accepting responsibility for his actions in events.

Mr Sidney is concerned that he may also have post-concussion syndrome.

I am investigating the physical issue but do wonder if this gentleman may have an underlying personality disorder. I have discussed this with him today and advised him that more specialist review is needed. Given that he has now been fired from his job he is keen to gather information that may explain to work what has been going on.'

132. The tribunal noted that there is nothing in that referral which provides any medical support for the contention that the claimant's conduct and swearing at work on 30 April 2022 (or indeed the way he behaved during the neighbour incident on 20/21 February 2022 or sending the email to a customer that led to a complaint on 17 March 2022) was in any way connected to any underlying mental health issue which he may have been experiencing.

133. The high watermark in the form of any potential connection is when the GP reports something the claimant said to her i.e. '*he is keen to gather information that may explain to work what has been going on (emphasis added).*' Clearly the GP is aware of the claimant's objective, otherwise it could not have been referred to in the form. The GP is also aware that the claimant has been dismissed, albeit that there is no reference to the circumstances or reason for his dismissal in the note. If the claimant had shared with his GP why he had been dismissed it is difficult to understand why that information has not been referred to directly in the form.

134. The GP also makes telling comments about from the claimant's confrontational behaviour. The GP says that the claimant seems to *'struggle with controlling self if something not done immediately'* and gives as an example a complaint that the claimant made about the timeliness of the attention he is receiving from the GP practice. It is also telling that the claimant was prevailing upon his GP to diagnose him with PTSD but that the GP declined to do so.

135. Putting this evidence together with the evidence referred to at paragraphs 67 and 68 above, where the claimant has been ambiguous about why he had been prescribed sertraline, the tribunal has concluded that it is more likely than not that the claimant was trying to persuade his medical practitioner to make a diagnosis of PTSD so they could he could use that as a way to defend or explain his behaviour in the workplace, particularly what happened on 30 April 2022. The tribunal also considers it more likely than not that the claimant was seeking to leave the impression with his employer that his sertraline had been prescribed *for* PTSD when it is clear from the GP form that this diagnosis was not one with which his medical practitioner agreed. In other words, the claimant was trying (albeit unsuccessfully) to mislead the respondent in an effort to fortify his position in his disciplinary and appeal hearings regarding what might explain his behaviour the on 30 April 2022.

136. Looking at the further medical evidence provided to the tribunal. On 15 March 2022, the claimant had a consultation with Dr Allan. Dr Allan's notes record the following account being given to her by the claimant.

'Came in to talk about recent assault

States parked in a place on the road note from neighbours advising him not to park there states was not blocking anyone… Parked there again sometime later… That evening a large slab was thrown through his partner's window

States they called police who didn't arrive until early hours of the morning at which point he asked them not to come into the house. States he later saw the people who felt were responsible and smashed their car. They went on to beat him up… Feels better with sertraline… Jaw ache… Feels vision isn't what it was. Some right ear pain.

137. It is noteworthy that the claimant did not refer to the fact that he threw the slab back through his neighbour's window the following day in the account that he is recorded as having given to his GP. The tribunal is not naïve about people wanting to put their best foot forward and not necessarily giving a 'warts and all' account and wanting to portray themselves in a good light. However, it appears that the claimant was deliberately filtering the information about what happened on 20/21 February 2022 when he gave his account of the neighbour incident to his GP. The relationship between GP and patient is, of course, one of confidentiality with the only other likely recipients of GP records to be the respondent and the tribunal.

138. On 5 May 2022, the claimant indicated in a telephone consultation that he had *'stopped medication 10 days ago and symptoms have stopped…'* The claimant's medication was changed to citalopram with which the claimant had never had an issue in the past.

139. On 16 May 2022, the claimant is reported as saying to his GP practice that he *'wants a letter explaining his mental health and the effect it had on him.' The claimant also describes himself as being 'Emotionally all over the place'.*

140. On 18 May 2022, the claimant has a further consultation with Dr Allan. Dr Allan record records it in the following terms:

'Given letter of concern from company due to damage company car in incident previously reported. In work there was a request for information re electric vehicle.

Sent email to colleague for more information . Email had on it that 'he wanted more information than the back end of a fart…

Last Sat CEO visit arrived 8:25 started 8:30 normally. Told when he arrived he should have been there as 8:15 swore in a conversation with a colleague that day. Following Weds third investigation started being 10 minutes late and swearing at a team leader still sacked then for gross misconduct. No issues 16 months prior to this.

141. On 19 May 2022, Dr Allan writes a short text message to the claimant in the following terms;

'Dear Mr Sidney,

I understand that you have requested PTSD on your sick note. It is not a diagnosis that I agree with at this stage, nor is it one that I would be prepared to make in primary care. I've written a letter to you…..

You are welcome to view it and we can look at any amendments once it has been processed by the secretaries.

Thanks, Jane Allan

142. The letter being referred to is the letter from Dr Allan is at page 386 of the bundle to which has referred to above.

143. It appears that the claimant is once again trying to persuade his GP to make a diagnosis of PTSD.

144. Also on 19 May 2022, Dr Allan refers to a complaint that the claimant has made about his GP practice. Dr Allan's message related to that is in these terms:

'Dear Mr Sidney,

I also understand that you are not happy with the consultation that we had and that you have decided to put in a complaint regarding this matter stop I hope that you have been given the complaints procedure information. You may feel more comfortable seeing an alternative practitioner in the future which can be arranged if you so wish?

Thanks, Jane Allan"

145. On 19 May 2022, the claimant had an exchange with a clerical worker at the GP practice. The clerical worker records the following:

'… I asked what this was regarding and patient told me it was about a complaint. Interrupted me before I could say anything further to say not to tell him to send us this in writing as he wants me to put him through to a manager now… Patient insisting a manager calls him back right away…

146. The final entry of any assistance is on 25 August 2022. The claimant's proposed referral to a psychiatrist was refused.

The relevant law

Direct disability discrimination

147. Section 4 EqA provides that disability is one of the protected characteristics.

148. Section 13 EqA concerns direct discrimination and provides that:

> *"13 Direct discrimination*
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

149. The test requires a comparison exercise in order to determine whether the treatment complained of is because of disability. The requirements of an appropriate comparator is set out in section 23 EqA. Section 23(1) provides as follows:

> *"23 Comparison by reference to circumstances*
>
> *(1) On a comparison of cases for the purposes of section 13 …there must be no material difference between the circumstances relating to each case."*

150. Section 23(2) EqA provides that where the protected characteristic is disability the comparison of the circumstances relating to each case for the purposes of section 13 include a person's abilities.

151. The EHRC Code of Practice (2011) at para 3.23 explains that although the circumstances need not be identical, the circumstances that are relevant to the way the claimant was treated must be the same or nearly the same for the claimant and comparator. Where there is no appropriate actual comparator, it is incumbent on the tribunal to consider how a hypothetical comparator would have been treated: Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646, CA.

152. Section 136 EqA identifies where the burden of proof lies. It is for the claimant to prove facts sufficient to establish a prima facie case. At this stage, the tribunal must have regard to all of the facts, from whichever party the evidence originated. A prima facie case is established if, in accordance with section 136(2), there are facts from which the tribunal could decide, in the absence of any other explanation, that the employer contravened the provision concerned. A difference in status and a difference in treatment is not, without more, sufficient material from which a tribunal 'could decide' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination: Madarassy v Nomura International [2007] ICR 867. That is not a rule of law, however, there should be some fact or feature which the tribunal identifies as potentially capable of supporting an inference of discrimination: Jaleel v Southend University Hospital NHS Foundation Trust: [2023] EAT 10.

153. However, there will be no contravention if the employer shows that it did not contravene the provision: section 136(3). This is the second stage and it is only reached if the claimant has successfully discharged the burden on him/her; it requires careful consideration of the employer's explanation for the treatment

complained about: Igen Ltd v Wong [2005] ICR 9311 approved by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054.

154. It is not always obligatory to follow the two-stage process, particularly where the tribunal is in a position to make positive findings on the evidence one way or another (Hewage).

155. In the case of direct discrimination, it is necessary to consider the mental processes, conscious or unconscious, operating on the mind of the alleged discriminator: Amnesty International v Ahmed [2009] ICR 1450 EAT. Motive is irrelevant. In order for the treatment to be 'because of the protected characteristic', it is sufficient that it was an effective cause. It need not be the main or sole cause.

156. In some cases, the best way to approach the question whether or not there has been direct discrimination within the meaning of section 13 EqA is by asking what was the reason why the conduct or omission in question occurred. That is the effect of the decision of the House of Lords in: Shamoon v Chief Constable of the RUC [2003] ICR 337.

Discrimination arising from disability

157. Section 15 EqA concerns discrimination arising out of disability and provides that:

"15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability; and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

158. 'Unfavourably' must be interpreted and applied in its normal meaning; it is not the same as 'detriment' which is used elsewhere in the EqA.

159. Guidance on the correct approach to a claim under section 15 EqA was provided by Simler P (as she then was) in Pnaiser v NHS England [2016]IRLR 170. The EAT gave the following guidance:

- A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respect relied on by B.

- The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the

reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amounts to an effective reason for or cause of it.

- The tribunal must determine whether the reason/cause (or, if more than one, a reason or cause) is 'something arising in consequence of B's disability'. The causal link between the 'something' that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of a disability may require consideration, and it would be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

160. A respondent may objectively justify unfavourable treatment if it can establish that the treatment was a proportionate means of achieving a legitimate aim. To be proportionate, the treatment must be an appropriate means of achieving the legitimate aim and also reasonably necessary in order to do so: Homer v Chief Constable of West Yorkshire [2012] UKSC at [20-25].

161. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. It is for the tribunal to conduct that balancing exercise and make its own assessment of whether the latter outweighs the former: there is no range of reasonable responses test. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys and Hanson plc v Lax [2005] EWCA Civ 846 Pill LJ at [19-34].

Conclusions

Matters of witness reliability

162. The tribunal did not find the claimant to be a reliable witness for a number of reasons.

163. The claimant was inconsistent in his position throughout. At times, he would suggest that he had a right to swear and was exercising it. At other times, he suggested that it was Mr Sedgwick's fault that he had sworn on 30 April 2022. At other times, he tried to persuade the tribunal that the witnesses to the incident of 30 April 2022 had colluded in putting their statements together while at the same time appearing to agree with the essence of what they had said about his language and behaviour that morning.

164. The claimant was also prone to exaggeration, such as when he described the attack on his home on 20 February 2022 as being *'like Russia attacked Ukraine'* (bundle page 254) and his hyperbolic description of Mr Franklin's efforts to get a

written note of the neighbour incident as an *'ambush'* and treating him '*abhorrently'*.

165. The claimant also gave implausible explanations, such as when he tried persuade the tribunal that when he said that the respondent was 'a great place to work' he was merely being sarcastic (see paragraph 82 above). The claimant's similar attempts to pass off his language and behaviour on 30 April 2022 as sarcasm were similarly implausible.

166. The claimant's written statement and his oral evidence was also inconsistent with the contemporaneous documentation which was often in his own words, such as his contention that he had brought his mental health difficulties to the respondent's attention before his appeal against dismissal. The record of his return to work meeting with Mr Wilkinson on 23 March 2022 (bundle pages 404 – 405) was in stark contrast to that contention.

167. In contrast, all of the respondent's witnesses gave evidence straightforwardly, were consistent in their evidence which also reflected their contemporaneous written documents. Mr Wilkinson in particular was quite prepared to make concessions when it was proper of him to do so, such as accepting responsibility for the delay in setting up a return to work meeting with the claimant after he returned to work following the neighbour incident.

Direct disability discrimination – section 13 EqA

168. It is accepted by the respondent that it dismissed the claimant and that it rejected the claimant's appeal against dismissal. The treatment complained of is therefore not in dispute.

169. The respondent does not accept that it treated he claimant less favourably than it would have treated a hypothetical comparator or that if it did so that it was because of the claimant's disability.

170. The claimant relies on a hypothetical comparator (there being no named actual comparator identified by the claimant). That hypothetical comparator is a person who behaved in the same way as the claimant but who did not have a disability. That behaviour is the claimant's conduct on 30 April 2022 and with the same preceding history of his behaviour on 20/21 February 2022 (which led to a letter of concern) and the customer complaint on 17 March 2022 (which led to a first written warning). It also includes the claimant's behaviour at internal meetings in connection with the incident of 20/21 February 2022 and the incident of 30 April 2022. Would that hypothetical comparator have been treated more favourably i.e. would the comparator not have been dismissed?

171. The tribunal found most assistance from the case of Shamoon v Chief Constable of the RUC [2003] ICR 337. This is a case where the tribunal found it a straightforward matter to identify the reason why the claimant was treated by the respondent in the way that it did; and a straightforward matter to conclude that considerations of disability played no part whatsoever in the respondent's decisions to dismiss the claimant and to reject his appeal against that dismissal.

172. It is not sufficient for the claimant to show that he had a disability and that he was treated unfavourably. Nor is it sufficient to establish liability for direct

discrimination for the claimant to show that the respondent's treatment may have had an adverse effect on the claimant's mental health (although for the avoidance of doubt the tribunal makes no finding at all on that point). The claimant must show that he was less favourably treated than the hypothetical comparator would have been and that the less favourable treatment was *because of* the protected characteristic of disability.

173. The tribunal makes these elemental points because at no stage did the claimant seriously contend that the treatment about which he complained was because of his mental health.

174. In terms of the claimant's dismissal, at paragraph 106 above the tribunal accepted Mr Franklin's explanation of the reason why he dismissed the claimant. Mr Franklin's conclusion, as set out in paragraphs 40-42 of his witness statement, was that the claimant reached a conscious decision to behave aggressively and use foul language towards Mr Sedgwick. At paragraph 102 above, the Tribunal finds that the claimant accepted that he had sworn at Mr Sedgwick in the terms that were ascribed to him by the witnesses to the incident of 20 April 2022.

175. At paragraph 102 above, the tribunal sets out the claimant's own account of the incident of 30 April 2022, in which he says '*not condoning my language could be terrible I have a worse tongue than a gypsy's granny.'* At the risk of repetition, that was the claimant's own position and it is not possible to reconcile that position with any alternative or additional analysis that it was the claimant's disability rather than his own accepted behaviour which was the reason why he was dismissed. The tribunal again reminded itself that it is not directly concerned with the reasonableness of Mr Franklin's decision since this is not a claim for unfair dismissal.

176. At paragraph 100 above, the tribunal accepted the evidence of Mr Franklin about the claimant's own position at the disciplinary meeting that led to the claimant's dismissal. Mr Franklin says, *'[the claimant] would swap from saying his behaviour was acceptable because everybody swears, to saying he was irritated to saying he was only being sarcastic.'*

177. Setting aside the claimant's continued change of position, what is most pertinent in terms of his claim of direct disability discrimination is that none of the three alternative positions advanced by the claimant during his disciplinary meeting were to the effect that he was dismissed because of his depression and anxiety.

178. The claimant's various positions were that his behaviour was justified because swearing was acceptable; alternatively that his behaviour was justified because Mr Sedgwick had irritated him; and in the further alternative that his behaviour properly construed was no more than sarcasm. None of those positions is compatible with the claim that the reason, or any part of the reason, that he was dismissed was because of his disability. The tribunal therefore rejects the claim's claim of direct disability discrimination on the basis that it was not even the claimant's own case that his disability was the reason or any part of the respondent's reason for his dismissal.

179. In the circumstances, the tribunal did not consider that this was a case where the two-stage approach to the burden of proof needed to be applied. The initial burden under section 136 EqA requires the claimant to prove facts sufficient to establish a prima facie case. Looking at the totality of the evidence, no such prima facie case was established not least because it was not in fact the claimant's own case that his disability formed any part of the respondent's decision to dismiss him.

180. The respondent's reason for dismissing the claimant was the claimant's aggressive behaviour and foul language (see paragraph 86 above). The claimant repeated that behaviour during his disciplinary investigations with Mr Wilkinson, see, for example, paragraphs 90 above where the claimant describes the Teesside dealership as *'a shit show'* ; paragraph 91 when he said to Mr Wilkinson *'let's move on, fucking shit show'* and paragraph 92 where he again referred to a colleague as '*a daft cunt'*.

181. The claimant further repeated that behaviour during his disciplinary hearing with Mr Franklin, see: paragraph 99 above where the claimant explains that he did not read all the documents attached to the letter convening his disciplinary meeting because they would make him *'sick as pig shit'* and when he describes Mr Sedgwick as having *'lost his bollocks'*.

182. Bearing in mind that the respondent's disciplinary procedure identifies foul, abusive, objectionable or insulting language or behaviour as an example of gross misconduct, the tribunal has concluded that there was no basis at all for the ostensible reason for the claimant's dismissal to be unpicked. As the tribunal has said, there was also no alternative explanation advanced by the claimant for the respondent's decision to dismiss him, including the argument that it was his mental health that was the reason Mr Franklin dismissed him.

183. Turning to the respondent's rejection of the claimant's appeal against dismissal. Much of the same analysis in relation to the claimant's dismissal applies equally to the respondent's rejection of his appeal. The claimant position on appeal was again that profanity had been around *'since communication began'* and that he had a right to swear. The claimant even introduced his revised letter of appeal with a quotation to the effect that profanity and honesty went hand-in-hand (see paragraph 117 above). The only rational analysis of the claimant's position was that he had sworn but should be forgiven (or at least not dismissed) which is plainly inconsistent with any contention that the rejection of the claimant's appeal was because of any considerations of disability.

184. The claimant was again aggressive during his appeal hearing (see paragraph 120 above). Mr Masterson upheld Mr Franklin's decision to dismiss the claimant for reasons which are set out at paragraph 126 above, namely the claimant's language and behaviour which Mr Masterson found to be unprofessional, unacceptable and totally inappropriate. The tribunal accepted that evidence from Mr Masterson. Again, the tribunal accepts that this was the sole reason why the claimant's appeal was rejected and that no considerations of disability played any part in Mr Masterson's decision to reject that appeal.

Discrimination arising from disability section 15 EqA

185. The tribunal follows the guidance in Pnaiser v NHS England [2016] 170.

186. It is accepted by the respondent that the decision to dismiss the claimant and the decision to reject his appeal amount to unfavourable treatment for the purposes of section 15(1)(a) EqA.

187. The tribunal has already identified what caused that unfavourable treatment i.e. what was the reason for it. The tribunal repeats paragraphs 173-183 above on the basis that the same treatment is relied upon by the claimant under both section 15 EqA and under section 13 EqA. It follows that our findings in relation to both sections about the reason why the respondent treated the claimant in the way that it did remain the same.

188. This brings us to the question of whether the reason/cause in paragraphs 173-183 above of the unfavourable treatment is 'something arising in consequence of the claimant's disability'.

189. As the tribunal says at paragraph 132 above, there is nothing in the letter from Dr Allan at page 386 of the bundle which provides any medical support for the contention that the claimant's behaviour and foul language at work on 30 April 2022 (or indeed his behaviour during the neighbour incident on 20/21 February 2022 or his behaviour on 17 March 2022 when sending the *'back end of a fart'* email) was in any way connected to any underlying mental health issue which the claimant may have been experiencing. That letter was sought by the claimant from his GP with the explicit objective of gathering information that *'may explain to work what has been going on' (see paragraph 133 above).* The claimant's GP had been made aware by the claimant of what had happened at work leading up to his dismissal. The claimant's GP is also plainly familiar with the respondent's medical history going back to 1993.

190. Despite all of that information, Dr Allan's letter makes no explicit or implicit link between the claimant's foul language and behaviour in the workplace and either his mental or physical health. If Dr Allan had considered there to be any link then she would almost certainly have said so. She did not. The nearest that the letter gets to providing any information from which it might conceivably be inferred that the claimant's mental health may have affected matters on 30 April 2022 is the reference to the fact that Dr Allan would expect 'worsening mood' as a consequence of the claimant withdrawing from his sertraline medication without first seeking medical advice. However, as the tribunal has found at paragraph 115 above, the likelihood of a worsening mood is a long way away from establishing a causative connection between withdrawal from medication and the use of aggressive behaviour and foul language by the claimant in the workplace.

191. The tribunal is fortified in reaching this conclusion because of the number of occasions and different contexts in which the claimant behaved in an aggressive and confrontational manner and used foul language. Those occasions and contexts predated the claimant's taking of sertraline in March 2020, let alone the

period during which he had decided not to take it due to its side effects. Those occasions included his behaviour at the dealership during his probationary period about where he preferred to sit; his behaviour when putting a slab through his neighbour's window on 21 February 2022; his behaviour and language when telling the police officer who turned up at his house on 21 February 2022 to 'fuck off'; his confrontational attitude to his GP practice; and his behaviour at his disciplinary investigation and disciplinary meeting when he used foul language and was confrontational despite those very matters being the subject of the disciplinary process he was undergoing.

192. Dr Allan's remark about the potential worsening of mood consequent upon unsupervised withdrawal from sertraline has also to be balanced against her other documentary evidence.

193. There are the attempts by the claimant to pressurise Dr Allan into giving him a diagnosis of PTSD. Attempts that she resisted. Those attempts have been referred to at paragraphs 131 and 141 above. Despite Dr Allan's clear position, the tribunal concluded that the claimant still trying to leave the impression with the respondent that he had been diagnosed with sertraline for PTSD. The tribunal did not accept the claimant's evidence that he was simply giving an example to the respondent of other conditions for which sertraline may be prescribed.

194. There are also a number of remarks in the claimant's GP notes which are telling. As set out at paragraph 131 above, the tribunal notes Dr Allen's remark that the claimant:

's*eems to struggle with controlling self if something is not done immediately for example threatened to complain to practice when his concerns were not immediately dealt with and was initially insistent that I put the diagnosis of PTSD on his Fit note which I did not.*

195. Significantly, Dr Allan does not ascribe the claimant's lack of self-control to his mental health his medication or withdrawal from medication. She ascribes it to the claimant's preference to get things done immediately when he wants them done.

196. The tribunal is mindful of the guidance in Pnaiser which makes clear that there can be a series of chains in the causal link between the disability and something arising in consequence of it. However, the tribunal is quite simply unable to identify anything in the light of all the evidence, medical and non-medical, which begins to suggest that the matters in respect of which the claimant was dismissed and for which his appeal against that dismissal rejected were in any way connected, however remotely, to his depression or anxiety.

197. The tribunal therefore concludes on the balance of probabilities that the 'something' identified by the claimant at the preliminary hearing before Employment Judge Aspden on 11 and 17 April 2023, namely his conduct towards Mr Sedgwick on 30 April 2022 (see paragraph 7 above), was not something that arose in consequence of his disability.

198. In the light of that conclusion, the claimant's claims under section 15 EqA must both fail on the basis that the claimant has not made out one of the essential elements that he needs to show in order to rely upon that provision.

199. In these circumstances, the question of constructive or actual knowledge of the claimant's disability does not strictly need to be determined. However, for completeness, the tribunal was satisfied that the respondent had shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability before the concession made by the respondent that it had knowledge before it took the decision to reject the claimant's appeal.

200. The tribunal has concluded that the claimant was overstating the extent to which he brought his mental health to the attention of the respondent before that time. As set out at paragraph 36 above, the claimant replied 'not applicable' to the question on his New Colleague Questionnaire asking whether he had any mental health condition that the respondent should be aware of. At paragraph 66, the claimant's answers on his return to work form on 23 March 2022 are wholly inconsistent with his position that he was constantly making the respondent aware of his mental health challenges. The claimant says that he is getting better day by day, he confirms that he has no recurring problems and says that he felt better being at work, needed no adjustments just *'understanding'.* Far from making the respondent aware of his disability or putting it on notice to make further enquiries, the claimant was actively portraying a positive account of his improving health which to the best of the respondent's knowledge was improving after the injuries he suffered in the neighbour incident of 20/21 February 2022.

201. The tribunal was therefore satisfied on the balance of probabilities that the respondent had shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability relied upon by the claimant.

202. In the circumstances, all of the claimant's claims fail and are dismissed.

Employment Judge Loy

11 December 2023

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