EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Claydon	**and**	Secretary of State for Business, Energy and Industrial Strategy

Heard in London Central Employment Tribunal:

Before: Employment Judge Nash **Date:** 9-12 October 2023
Members: Ms Olulode
Ms Holgate

For the Claimant: In person
For the Respondents: Mr McHugh, of Counsel

JUDGMENT having been sent to the parties and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Following ACAS early conciliation from 22 April to 26 May 2022 the Claimant presented his claim on 23 June 2022.

2. At this hearing the Tribunal had sight of an agreed bundle to 839 pages. All references to documents are to this bundle, unless otherwise stated.

3. In respect of witnesses the Tribunal heard from the Claimant on his behalf. On behalf of the respondent, the Tribunal heard from Miss S Sotherton, Head of Media who made the decision dismiss and Miss E Jones who at the material time was its Deputy Director of Strategic Communications a Grade 1 Civil Servant who heard the appeal.

Preliminary and Procedural Matters

4. At the close of the first day of the hearing, the claimant's evidence had not yet closed. According to the timetable, his evidence was to continue the next day. Before

being released for the evening, he was warned that he must not speak to anyone about the case whilst on oath overnight and would be asked to confirm this the following morning. He was advised that once he had completed giving evidence the next day and been released from his oath, he would then be free to speak without any restrictions about the case. He confirmed that he understood.

5. On the morning of the second day the Claimant emailed the Respondent to state that he did not wish to continue on health grounds. He later told the tribunal that he sent this email to the tribunal, but the Tribunal records were unable to confirm this.

6. The email included a list of questions for cross examination and stated that he relied on his witness statement. Accordingly, the Tribunal was not confident that the claimant had made an informed and considered decision to withdraw his claim. It wrote that day to the Claimant and left a telephone message asking him to confirm whether or not he was withdrawing his claim. The Claimant's union representative - who was not all the record - replied that the Claimant was unwell and in effect applied for an adjournment to the third day. The Respondent did not object and there was sufficient time in the listing to complete the hearing. Accordingly, the Tribunal granted the adjournment.

7. On the morning of the third day the Claimant did not provide adequate medical evidence going to his inability to attend on the previous day. The Tribunal accepted that it was difficult for him to provide evidence in light of delays with the NHS and the very short notice. The Tribunal was satisfied that a fair hearing was still possible and that the Claimant did not want to withdraw. The respondent did not object. Accordingly, the tribunal proceeded with the hearing.

8. However, it then transpired that between close of the first day and the start of the third day of the hearing and whilst on oath, the Claimant had discussed his case with his union representative including the list of cross examination questions provided on the second day. The Respondent applied for a strike out under Rule 37 of the 2013 Rules on the basis of the Claimant's scandalous and unreasonable conduct.

9. The Tribunal heard evidence and submissions. The claimant said that he had already drafted the list of cross examination questions and the union had merely given him what he described as a "mental jog". He accepted that he had been discussing with his union representative matters that is directly regulated to the evidence he was yet to give. He accepted that his discussion with his union was bound to have some impact on the evidence he was likely to give. He said he was depressive and needed a little bit of help.

10. The tribunal directed itself in line with the authorities of *Bolch Chipman* (2004) IRLR 140 and *Abergaze v Shrewsbury College of Arts & Technology* (2009) EWCA Civ 96 that the factors to be considered were: (a)was the conduct complained of scandalous, unreasonable or vexatious conduct in the proceedings; (b)the result of that conduct was that there could not be a fair trial; (c)the imposition of the strike out sanction was

proportionate. If some lesser sanction is appropriate and consistent with a fair trial then the strike out should not be employed.

11. The tribunal accepted the respondent's submission that the claimant's conduct was scandalous. It was a plain and flagrant disregard of tribunal instructions. Nevertheless, the tribunal did not accept the respondent submission that a fair trial was no longer possible or that strike out was proportionate for the following reasons.

12. The respondent was put at a disadvantage because the claimant had undermined the purpose of the tribunal's warning - which was to ensure unvarnished account could be given in evidence. Nevertheless, the respondent who was represented by counsel could cross-examine the claimant and make submissions, including on any impact on the claimant's evidence by the discussion with the union. Further, this was not a case in which there was a striking factual disparity between witness accounts. The core facts of the case, abusive messages sent by the claimant, were not in dispute. Most of the claimant's evidence had already been given in cross-examination and counsel had estimated that only a further 20 minutes at most would be required. Finally, there remained sufficient time in the listing the case to be heard.

13. Accordingly, the tribunal refused to strike out the application and the hearing proceeded.

The Claims

14. The two claims before the Tribunal were under s.15 Equality Act 2010 discrimination arising from disability and under s.98 Employment Rights Act 1996 for unfair dismissal.

The Issues

15. At a case management hearing on 13.9.22 a very short list of issues had been prepared. The Tribunal, in light of the fact that the Claimant was unrepresented, discussed the issues with the party and the following updated list of issues was agreed:

Unfair dismissal

(1) What was the reason for dismissal? The Respondent relied on conduct, a potentially fair reason.

(2) Was the decision to dismiss based on a reasonable investigation leading to a reasonable and genuine belief in the Claimants culpability (known as the *Burchell* test)?

(3) Was the procedure fair more generally?

(4) If the procedure was unfair, should there be any so called *Polkey* deduction, that is could and would the employer have dismissed fairly in any event had it followed a fair procedure?

(5) Sanction – that is did the decision to dismiss fall within a reasonable range of responses available to the employer at the time?

(6) If the dismissal was unfair, had the Claimant contributed to his dismissal and if so in what proportion?

Section 15 – discrimination arising from disability

(1) It was agreed that the Claimant was a disabled person by virtue of s.6 by reason of his depression.

(2) Did the Respondent have actual or constructive knowledge of the Claimant's disability at the material time?

(3) Did the sending of the Claimant's messages on which the Respondent relied as a reason to dismiss arise in consequence of the Claimants disability?

(4) Was there the necessary link between the sending of those messages and the dismissal?

(5) If the Claimant had been discriminated against, could the Respondent rely on its stated legitimate aim being the health and safety and welfare of employees?

(6) If so, was dismissal a proportionate means of achieving that legitimate aim?

The Facts

16. The tribunal considered all the evidence before it. If a piece of evidence is not specifically referred to in this judgment, this does not mean that it was not considered, only that the tribunal did not consider it proportionate to record all the evidence.

The Background

17. The Respondent is a government department. The Claimant worked as an enquiry unit advisor starting on 20 May 2019. He said that he had a history of depression from his mid-20s and had been on and off medication. At the material time he had been taking Mirtazapine.

18. The Claimant worked in a team of enquiry unit advisors, together with a line manager and a unit manager Mr Oaks. He and his colleagues answered calls and emails from the public. His period of employment was a disruptive time. The unit had to deal

with Brexit and then Covid and lockdowns starting in March 2020. The Claimant worked from home from 2020.

19. The Respondent operates under the Civil Service Code. It operated a disciplinary policy which defined gross misconduct as including serious verbal abuse.

The Incident

20. The Claimant had previously been taking 7.5ml of Mirtazapine a day. The Claimant told the Tribunal that he had discussed coming off his anti-depression medications about three years previously with his GP. His GP had advised him to follow the common practice of alternating the dose while coming of the medications, that is - one day on, one day off.

21. He told the tribunal that he decided to come off his medications in August 2021 without further reference to the GP, although he could not recall any specific dates. He then took his medications erratically, sometimes he took a dose on one day and then nothing for two days. He never came off the medication completely. There was no corroborating evidence as to the Claimant's erratic pattern of taking medication, save that he told occupational health in November 2021 (by which time he was back on his medications) that he had been coming off his medication in August.

22. On or around 18 August 2021 the Claimant's laptop broke down and it took about five days to resolve this. At the end of August the Claimant went on a short holiday to France. His last day before the leave was 27 August. He stopped work early at about 3pm and there was a discussion with his line manager that this might be treated as going absent without leave.

23. According to the Claimant's witness statement, he travelled to France the next day, Saturday 28 August. On the way he researched the Respondent's internal procedures for bringing up workplace concerns. He was worried about understaffing in his unit and the mismanagement of a colleague's poor sickness record and wanted to alert senior management.

24. The claimant then sent anumber of messages to the respondent which formed the crux of the case. The exact chronology of the messages sent by the Claimant was not very clear. The Claimant's witness statement, which he drafted himself, was exceptionally lengthy at 68 pages and was not chronological or coherent. The Respondent's disciplinary investigation did not provide a chronology of the material messages. In the bundle two versions of the same material WhatsApp message were shown with different times at 11.11am and 10.09 pm.

25. Having considered the evidence, the tribunal found, on the balance on probabilities that the most likely chronology was that contained in the Claimant's witness statement.

26. The claimant sent his line manager a message to the effect that his line manager had ruined his holiday and he threatened to resign if the line manager gave him a warning for what he termed a petty procedural issue. The tribunal understood this referred to his stopping work early on the Friday and the possibility of a sanction.

27. His line manager replied

> Enjoy your holiday and don't worry. We will need to discuss when you are back as walking out isn't acceptable really. But its not the end of the world . there were very few calls today so it was surprising. Anyway have a great time, enjoy getting away and relax as much as possible.

28. The tribunal found on the balance of probabilities that this message from the line manager, which was relaxed in tone, was sent before the material abusive WhatsApp messages. Due to the nature of the material WhatsApp messages, it was implausible that such an email would have been sent following the material WhatsApp message.

29. The tribunal now turns to the material WhatsApp message at page 40-41. The first WhatsApp message from the claimant to the respondent was as follows:

> Oooo. Eeeee. What better way to relax and irritate your manager helpfully than by kicking back enjoying steak and chips in Paris helpfully flicked the v sign for cunt and taking pleasure in the fact his family will drown soon in lakes of blood. (picture of a v sign) oh I forgot to add to my rant can you tell your mates to call you a big fat sweaty sadistic spurs asshole when the next op arises, that part I forgot..sorry…(grin emoji)

30. The next morning 29 August the Claimant sent an email from his work email address to his manager's manager Mr Oaks at pages 56-57 "on the subject of Tottenham supporters". This was an incoherent and disjointed email in which he referred to his manager as having a life others would envy with no children, a wife in Canada, no covid deaths and no responsibilities to the elderly except his father. It contained further personal abuse of his line manager. It alleged that a colleague was "not that ill" and was "Stringing it out" for maximum pain inflicted in revenge. The claimant stated that his line manager was moaning, having a "hissy fit, please don't discuss with him". The message stated that the line manager "should lighten up at the massive piss taking he got off me for shitting on my holiday and drop all charges against me…I don't have a mental issue for the record issue….I avoided murdering a member of the public".

31. The Tribunal found that, when composing this message, the Claimant was still concerned about a possible disciplinary for leaving early on the Friday and he was worried about the effect of his earlier WhatsApp and he was seeking to involve his manager's manager in advance of.

32. Mr Oaks replied on 31 August asking to discuss the matter when the Claimant returned, or sooner if he wished.

33. On Sunday 5 September the Claimant replied to Mr Oaks by email. The email stated that his (the claimant's) intelligence was being insulted over the same colleague's medical absences. He said that his line manager

> received two 'fierce and vile (red faced smile emoji) football hooligan-esque' messages of disapproval from me but he is a Spurs fan, so im sure he can take it now they are top of the league and that Spurs fans dish it out. He knows my banter and my messages were not intended to be serious, except elements of the first. I don't really wish he would 'drown in a lake of blood' (Conan the Barbarian quote) for example and it has been a year after all without any lads office football banter, and I miss it dearly… (sic)

34. On 6 September Mr Oaks emailed the Claimant to say they would need to discuss the matter.

35. The Claimant returned to work on 9 September and replied to Mr Oaks that day. By that time the WhatsApp's and emails had been reported to Human Resources who were considering how to proceed. Mr Oaks and HR were discussing whether there might be a mental health aspect to the Claimants behaviour.

The Investigation

36. On 9 September Miss Sotherton was asked to be the decision maker for the investigation of the claimant's messages. There was discussion as to whether the Claimant should be suspended. Miss Sotherton, having consulted the requisite policy, decided that the conduct was potentially sufficiently serious to warrant suspension, and the Claimant was suspended by way of a letter of 15 September.

37. The Claimant replied to Miss Sotherton the same day describing the incident as an "unutterably ridiculous situation. Silly WhatsApp message between blokes to bury the issue" of the colleague's sickness absences which he referred to as including long holidays. He said that the colleague was malingering. He referred to the issue as a "silly row and totally pointless", and stated the colleague was "terrorising" the department with his absences.

38. In cross examination he accepted this email was not apologetic or contrite, and said he was confused at the time.

39. The Claimant again contacted o Miss Sotherton on 16 September saying that he had apologised to his line manager and that the comments were not literal. He stated that he would not want to drown the line manager's family because that would worsen the staffing situation in his department. He referred to the messages as football laddish banter which should be taken in jest. He made complaints about pressure on the department going forward in particular in light of the colleague's absence records. He stated that he had come off anti-depressant medication which "left me more irritable than normal to understate the matter". Essentially the claimant was stating that staffing issues in his were exacerbated by the poorly managed sickness absences.

40. In cross examination he said he was being manipulative in sending this message. He was seeking to minimise his messages as banter and was panicking.

41. In another email on 16 September he stated

> I intended my comments as vicious banter not serious. I accept though hard humour can be dangerous as it can cause offence. Its naive of me though. Had he for example said a distant relative drowned and I found your remarks offensive then I would have apologised unreserved immediately…'

42. In cross examination over this email, the claimant said that the consequences of his actions were becoming apparent to him, and he was panicking. He accepted that there were elements of lying in this email. He was trying to diminish what had happened but knew it was reportable, and he had hoped to get away with it as banter.

43. On 16 September the Claimant sent a WhatsApp message to his line manager saying "I am genuinely sorry if messages caused offence". He went on to state that he was still somewhat slightly annoyed that the line manager had had a sense of humour failure over football banter. He said it was unlikely that he would genuinely want the family to drown in lakes of blood. There was further criticism of Mr Oaks and of his colleague with the sickness absences.

44. The line manager replied but did not say that the apology was accepted.

45. There were further emails from the Claimant describing the situation as "ridiculous" and saying that he had just come off a mild anti-depressant. He made further references to football banter and stated "Jeez Louise man. It's a 90s lads movie. I gotta give up lairy banter.. I was just being beast." He went into details about the impracticability of drowning the manager's family in a lake of blood – including a reference to needing abattoirs. He described the independent investigation as "preposterous". He stated, "I think I was fairly crafty to begin with. My goal is to force out [his colleague] quickly before October. I'd assumed I'd be let off over sweary WhatsApp messages. I need to look a bit mental. The medication stuff is the truth. Hehe I cocked it up.

46. The Claimant sent a further email to Miss Sotherton on 25 September stating that, "the entire row from the early evening of the Saturday WhatsApp messages was manufactured by me to get through to the management strata to an authority figure…" He further stated 'I knew if I pushed [the line manager] with foul language or bizarre threats he'd be affronted and likely report though I got the 'to who' bit wrong. And I slightly panicked. I apologised to him but apologising for deliberate calculated language". He again referred to his colleague as a malinger in his unit.

47. The Claimant agreed in cross examination he had considered the language in his messages carefully to ensure that it was offensive enough to get him reported.

48. He emailed on 7 October Miss Pallott (the newly appointed investigation manager):-

> This is a ridiculous matter that has got way out of hand. I have achieved my long term objective of speaking to an authority figure to raise [the colleague's} absences. That was all I intended. Now I'm being forced to relive and apologise for messages that were calculated to raise attention. I'm baffled. Are the remarks offensive? Yes-ish. We're they designed to be? Yes. I spent about an hour trying to find a way of actually using the rude C word without calling Chris in an accusatory way the C word. Same with Lakes of Blood and muppett. They were all calculated to be 'woooohoooo!' smash the cymbals and bang the drum sort of thing. There's no clear evidence of a replacement being found so the job in the medium term until Xmas will be ridiculous. Everybody is burying their head in the sand and focusing on the fact that I made up a series of menacing sounding comments. Of course I did. And I've been successful from my perspective as a lowly enquiry advisor. I've been successful because im now through to you and HR.

49. In cross examination he said by this point he knew that sooner or later he would have to apologise.

50. Miss Pallott commenced her investigation. She met with the Claimant with a note taker on 15 October. The Claimant accepted that he understood what was involved in this meeting and he was accompanied by his union representative. The tribunal accepted the notes as a fair summary of the meeting.

51. He told Miss Pallott that he had sent the message and then thought it was not guaranteed that he would get reported so he concocted a second message with a more dramatic image. He was fearful that he might have been interpreted as applying the "c word" *to* the manager, so he redrafted. He told Miss Pallott that, that "rather than putting a lot of work into finding somebody else I could speak to as a decision maker about the problems. I just kicked up a fuss by pushing [the line manager's] buttons, went up the ladder effectively."

52. He said that he had already calculated preparing an apology before he had sent the messages. He confirmed he was aware of the base standards of conduct in the Civil Service Code and he that he should treat colleagues with respect at all times. However, he said that he was at his wit's end. The Claimant in cross examination said that he was nervous at this meeting and kept back a lot of information.

53. The investigating officer also interviewed Mr Oaks and the line manager. On 18 October the Respondent decided to add the WhatsApp messages to the line manager in September to the investigation. On 20 October the Respondent wrote to the Claimant to inform him of this and offered him the chance to be re-interviewed, which he did not take up.

54. At the Respondent's instigation, the Claimant was referred to occupational health. The Respondent told the Claimant that it would be good to speak to occupation health

because of the medication withdrawal issue. On 22 November Miss Sotherton received the occupational health report, which said that the Claimant was fit to work at that stage. It reported that he had reported an underlying medical condition of depression since his mid-twenties and had been on and off medication. At the material time, he had been on the medication for five or six years and had been told three years earlier that he would need to come off. He did so in August 2021 following the GP instructions but without support. There was nothing in the occupational health report to suggest that his decision making ability was impaired in August 2021. He only said that he had come off aggressively the anti-depression medication and became more irritable. There was nothing in the occupational report to suggest that they had seen any GP records.

55. In early November, on the Claimant's case, he was no longer taking his medication erratically but had gone back to the pre-existing stable pattern.

56. A draft investigatory report found that there was no dispute about the facts of the incident. One of the witnesses said that the workload was not particularly high immediately prior to the messages but the Claimant had suffered disruption from his laptop breaking down.

Dismissal

57. On 20 January the Respondent invited the Claimant to a disciplinary meeting. The letter formally warned the claimant of the possibility of dismissal. It told him that he could provide the names of witnesses but that he was not permitted to speak his colleagues. The investigation report was enclosed.

58. The Claimant provided an additional statement at page 457 for the hearing. He said that he had apologised, and that he had been taking Mirtazapine long term and had been coming off erratically at the time of the misconduct. He referred to family pressures. He said that he had a mental health appointment arranged. He stated that he had been in an irritable and tired state when he had sent the messages and he was in an unstable fatigued state of mind, and that if the manager had been genuinely upset, then he (the claimant) was upset. He acknowledged that the comment about the blood had been a mistake.

59. The dismissal meeting occurred on 31 January 2022. The Claimant was accompanied by his same union representative and Miss Sotherton by a note taker. The Tribunal had sight of a transcript and a summary, with no material challenge to their accuracy.

60. According to the notes, the Claimant told the meeting that he had been winding the line manager up deliberately and had realised at the beginning that he would need to apologise. The Claimant told Miss Sotherton (and repeated this to the tribunal) that he had thought the line manager would think the message out of character and so realise the Claimant wanted the line manager to report him. He told Ms Sotherton that gross misconduct was the highest charge and accordingly this would bring the matter to the attention of persons in the highest authority. In cross examination he stated that he

did not at this point understand what gross misconduct was. The Tribunal did not accept this evidence, the Claimant was in the middle of disciplinary process, he had seen letters setting out the charges, and had received the investigatory report explaining gross misconduct and its consequences.

61. Miss Southerton told the Claimant that she wanted to give him an opportunity to speak about his mental health and that, as he had cited mental health as a mitigation, she asked him expand on this. The Claimant said the circumstances including work events were "closing in" on him, he had been in a fraught state since April that year and maybe should have talked about his mental health, of which he was ashamed. He was worried about being seen as a schizophrenic and he intended to get full mental health help. He did not say in terms that his mental health, and specifically his coming off the medications, was linked to his sending the messages. He said that he knew that his strategy in sending the messages to his line manager as a way of attracting the Respondents attention was risky. He said that he was appalled by his behaviour and asked if he could resign to protect his future employability.

62. Miss Southerton told the Tribunal that she thought the Claimant was generally contrite. The panel reconvened the next day and Miss Southerton decided to dismiss. According to the letter of dismissal, the charges which were proven were,

- WhatsApp and emails constituting serious verbal abuse and aggressive behaviour contrary to the disciplinary procedures;
- serious abuse of a colleague;
- a breach of departmental standards of conduct including the use of offensive language, and behaving in a way likely to cause offense and distress; and
- a breach of the Civil Service Code in that he had acted in a way which was not professional and did not deserve to retain confidence.

63. Miss Southerton set out the mitigation as being the Claimant's personal circumstances, his wider mental health concerns, his good record, and that the misconduct was out of character. She stated this had been a very difficult decision and the Claimant had provided very compelling mitigation. However, she relied on the Claimant's admission that the messages were premeditated and deliberate, she believed he was frustrated at his colleague. She concluded that his trust had irretrievably broken down between the Claimant and the Respondent. The claimant was dismissed for gross misconduct.

<u>The Appeal</u>

64. The Claimant appealed by way of a letter on 7 February 2022. His grounds were that his mitigation should have been accepted, no distinction had been drawn between the different types of misconduct, and there was no reason to believe that the misconduct would re-occur.

65. Miss Jones was appointed as the appeals officer as she had no connection with the Claimant. On 23 February she invited him to the appeal stating he had the right to be accompanied and asking for any reasonable adjustments he might need.

66. The appeal meeting occurred on 8 March 2022 and the Claimant was represented by the same union representative. In the meeting the Claimant said that his colleague (with the sickness absences) had a vendetta against the department. He explained that he had been coming off anti-depressants at the material time. He said that he sent the messages because he felt his line manager had been harsh with him and was failing to address chronic under resourcing in the unit. His intention was to "kick up a row" within HR. He said that his mental health had not been taken into account nor had his work situation and his family. He went on then to say that his conduct had not been scheming or premeditated .

67. The union representative said in terms that the Claimant would not have committed the gross misconduct if he had been in better health. The Claimant said he agreed with this but he did not expand.

68. Miss Jones provided an outcome letter on 18 March 2022. According to this, she was not able to say if the Claimant's mental health meant that he was not responsible for his actions. She referred to the OH report, stating that the OH report did not indicate that his mental health had meant the Claimant was not responsible. She therefore assumed that the Claimant was responsible for his actions. He was fully aware that his actions were likely to cause harm or offence. She refused the appeal.

69. The Claimant then applied to the Employment Tribunal.

The Law

70. The law on discrimination arising from disability is found at s.15 of the Equality Act 2010 as follows: –

> 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.

71. The law in respect of the burden of proof in discrimination claims is found at s.136 of the Equality Act as follows: —

> 136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

72. The law in respect of unfair dismissal is found at s.98 of the Employment Rights Act 1996 as follows: –

98.— General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) ….
(2) A reason falls within this subsection if it—…
(b) relates to the conduct of the employee,…
(4) [Where]2 the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

Submissions

73. The Tribunal received written submissions from the Respondent which were provided to the Claimant in good time for him to consider. It heard oral submissions from both parties.

Applying the law to the facts

Section 15 Equality Act 2010 - Discrimination Arising from Disability

74. The Tribunal firstly considered whether the Respondent was on actual or constructive notice of the disability. Under s15(2) the burden of establishing is on the Respondent to show that it was not on notice.

75. According to the Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the Code')

5.14
It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should

> consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.
>
> 5.15
> An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment.
>
> 5.17
> If an employer's agent or employee (such as an occupational health adviser or a HR officer) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability, and that they cannot therefore have subjected a disabled person to discrimination arising from disability.

76. The Tribunal also had regard to the example at paragraph 5.15 of the Code of a disabled person who is suffering from depression with two years' service. A sudden deterioration in his time keeping and performance and change in behaviour at work should have alerted the employer to the possibility that these were connected to a disability. In those circumstances it is likely to be reasonable for an employer to explore the reasons for these changes with the worker.

77. In the view of the tribunal, this example was analogous to what happened in this case. It was the Respondent that raised the possibility of there being a mental health issue. It instructed occupation health to advise on the Claimant's mental health.

78. The Tribunal considered the Respondent's actual or constructive knowledge at the time of the dismissal. It knew that the Claimant had a mental impairment – depression - because it was told so by occupational health. It was further informed that this had been going on for more than a year - as set out in the occupational report. The tribunal, accordingly, considered if the Respondent was on constructive notice that this impairment had for more than a year had a more than trivial impact on the Claimant's ability to carry out day to day activities.

79. The Respondent was told in clear terms by OH that there was a risk of mood swings, irritability and increased depression if the claimant's medication was varied. The respondent of its own motion wondered whether the claimant's conduct might be related to a mental health issue. In these circumstances, the Tribunal found that the Respondent had not discharged the burden that it was not on constructive notice. Accordingly, the Respondent could reasonably have been expected to know that the Claimant was a disabled person.

80. The Tribunal then considered what it viewed as the crux of this case - was there the necessary link between the something the Claimant contended arose in respect of the consequence of his disability (the messages) and the unfavourable treatment (the dismissal)?

81. This is a two stage test. A tribunal must be satisfied both that the messages were something arising from the disability and also that the dismissal was caused by the messages. According to the then President in *Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT*

> 'On causation, the approach to S.15… is now well established... In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability?

82. In respect of the first stage of the test – the link between the messages and the dismissal - in the view of the tribunal, this was uncontroversial. The unfavourable treatment was the dismissal which was the action of Ms Sotherton (see *Pnaiser v NHS England and anor 2016 IRLR 170, EAT).*

83. According to *Sheikholeslami*, this question,

> involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a *more than trivial part of the reason for unfavourable treatment* then stage (i) is satisfied. (emphasis added).

84. In this case the tribunal had no doubt that the messages amounted to an effective cause of the dismissal (see *Urso v Department for Work and Pensions 2017 IRLR 304, EAT*). The investigation and dismissal and appeal meetings focused on the messages. The dismissal letter stated in terms the link between the messages and the decision to dismiss. The tribunal sets out below under its findings in respect of unfair dismissal, further reasoning as to the link between the messages and the decision to dismiss. The tribunal found that the messages were more than a trivial part of the reason for dismissal.

85. According to *Sheikholeslami,* the second part of the causation test – the link between the "something" (the messages) and the disability is an objective question for the tribunal based on evidence. Thus, the tribunal had to determine whether the messages arose in consequence of the claimant's disability. For the avoidance of doubt, it was irrelevant if the respondent knew of this consequence.

86. The Code at paragraph 5.9 provides

> The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability...

87. The code gives an example

> A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the 'something' (that is, the loss of temper) that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker.

88. The burden of proof is on the Claimant to show that there is a link between the disability and something arising, that is the messages. If he can do this, the burden shifts to the respondent.

89. The Tribunal was taken to no medical evidence to establish such a link. The claimant's GP records were not in the bundle. However, they were on the Tribunal file (presumably because they had been relevant to whether or not the Claimant satisfied the definition under s.6). The Tribunal asked the Claimant during the hearing whether he wanted to rely on these GP records he said he did not. The Tribunal bore in mind that the Claimant was an unrepresented party but, on his case, he had not spoken to the GP at the material time about his medication or coming off the medication. Further, he had been asked at both the dismissal and appeal hearings about his medical situation and he had not relied on were referred to his GP records. Further before the Tribunal, the Claimant was making the case that there was a link between his dismissal and his mental health and his coming off of his medications. He was receiving advice from his union up to and during the hearing. In the view of the tribunal, if the GP records assisted his case, he would have relied on them.

90. There was therefore no contemporaneous medical evidence before the Tribunal. Further, there was no letter or report or any other evidence from a GP or treating physician that if the Claimant had come off his medication in the manner described, then this at least in part might have resulted in his misconduct.

91. The only medical evidence was the occupational health report. The tribunal accepted the claimant's account that this was based on brief telephone call with a nurse. There was no indication that OH had access to GP records. The OH report was based on the Claimant's account couple of months after coming off the medication. By the time of the report he was back on his medication. The Claimant described himself as angry and irritable. The OH report stated that the side effects of coming of the medication so quickly could be mood swings, irritability and increased depression. However, it is not refer to loss of judgment, any disinhibition or an inability to control oneself.

92. Apart from the OH report, there was no evidence that it is a known or recognised side effect of coming off the medication - particularly in an erratic manner - that a

person becomes disinhibited or behaves significantly uncharacteristically. There was simply no other information about the effects of withdrawal from Mirtazapine. There were no internet articles or news articles indicating this, for instance.

93. Accordingly, the Tribunal had no medical evidence either from a medical professional with knowledge of the Claimant or more generally of the effects of erratic withdrawal from this medication, save that it could cause mood swings, irritability and depression.

94. The first time that it was stated in clear terms that the withdrawal from the medication had an impact on the Claimant's conduct was by the union representative in the appeal meeting in March 2022, over six months after the misconduct. The Claimant agreed in this meeting with what the union said, but he did not expand on it. It was not the Claimant, but the union who brought up this point.

95. The Tribunal further noted that during the investigation and disciplinary the Claimant voluntarily made a number of references to the effects of medication – but he only referred to himself as being irritable and tired. He made no reference to a loss of judgment, disinhibition or an inability to control himself. Nor did he suggest that he had done anything else at the time which was consistent with such disinhibition.

96. In view of the Tribunal this was all consistent with the Claimant not thinking at the time that there was a link between coming off the medication and the disability and his misconduct. It was the union which suggested this to him as line of defence and for the Claimant it was peripheral. Whilst the claimant made this case briefly in terms in his claim form, the great majority of his 26,000 word witness statement went to justifications for sending the messages. There was comparatively very little about the effects of the medication and/or the coming off the medication on his conduct.

97. The claimant did focus on his medical condition in the questions submitted to the tribunal during the hearing. He had - whilst on oath - spoken to the same union representative during his evidence. Following this conversation, he had submitted questions to the tribunal which he wished to ask the Respondent witness, going to his mental health medication. These questions had a very different emphasis than that found in his 68 page witness statement, which was mainly a history of his employment.

98. The Claimant told the tribunal that these questions - going primarily to his mental health - had been written out before he spoke to the union. When he spoke to the union in the middle of his evidence, the union had merely made minor changes to the drafting, and given him "a mental jog". The Tribunal did not accept this account. The claimant had had the chance to set out all matters he considered relevant to his case in his tribunal witness statement. The very great majority of this very lengthy statement went to his justifying sending the messages, rather than his mental health. It was only after speaking to his union that he sought to foreground his mental health. This was a very considerable change in emphasis in his case. This was consistent with it being the union representative who had made the argument that the claimant's conduct should be blamed on issues with his medication and disability, whilst the claimant was making

other arguments in the dismissal and appeal hearings. The tribunal therefore found that the Claimant had spoken to his union during his evidence about his experience in cross examination, and the union had advised him to change the emphasis of this case.

99. Accordingly, the Tribunal found that the Claimant did not think seriously at the time, nor by the time of the tribunal hearing, that the messages had been written in consequence of coming off the medication. This was consistent with the Claimant's view that he was to some extent justified in sending the messages. His evidence on this point was somewhat inconsistent. He said in the dismissal meeting that he was appalled that he had sent the messages. However, in his witness statement he said it was "high time" that the Respondent apologised to him. Whilst the Tribunal accepted that a party's position has a tendency to harden during litigation, it was relevant that the Claimant believed by the time he drafted his witness statement that he had been seriously wronged by the Respondent.

100. The emphasis from the Claimant throughout was not that he sent the messages because he was disinhibited due to drug withdrawal, but because he had a plan to deal with what he believed was a very real problem in his unit - the understaffing and mismanagement. It was a deliberate and premeditated strategy to raise an issue in the department. He had considered using the grievance procedure but rejected this and decided to commit gross misconduct. Further the conduct continued at least until 16 September, when he made the comments concerning abattoirs to his line manager.

101. His witness statement was written over a year after the incident, giving the claimant time to reflect on what had happened and come to a considered conclusion as to the reasons for this conduct. The emphasis was on his justifying the messages, at length, rather than on the messages being a result of a temporary loss of control.

102. The Claimant's view of whether the messages arose in consequence of the claimant's disability was not determinative of the question. This will was an objective question for the tribunal. Nevertheless, it was evidence to which the tribunal attached some weight in the absence of medical evidence.

103. The only medical evidence was the OH general statement that, if the claimant had withdrawn from his medication as he contended, mood swings, irritability and depression might result. The claimant himself only told his employer that he had become tired and irritable. This was a long way from the extreme nature of the messages he sent. Based on the evidence, the Tribunal could not find that the Claimant discharged the burden on him of showing that the messages were something that arose in consequence of his disability.

104. Nevertheless and for the avoidance of doubt the Tribunal went on to consider what it would have decided had the claimant discharged the burden of establishing the necessary link between the disability and the messages. The Tribunal would have gone on to consider whether dismissal was a proportionate means of achieving a legitimate aim, what is sometime referred to as, justification.

105. The Tribunal would have accepted the legitimate aim replied upon by the Respondent - being the health and safety and welfare of its staff, both employees and the public and protecting them from potentially serious verbal abuse, such as the use of the “c word” or a person’s family drowning in lakes of blood.

106. As in many s.15 cases, the Tribunal would therefore have concentrated on whether the dismissal had been a proportionate means of achieving the respondent’s legitimate aim.

107. The Claimant had limited insight in his misconduct. Contrary to what he said, he had not apologised personally to his line manager. He had told the manager, if you are offended I would apologise. But he then went on to criticise the line manager for an alleged sense of humour failure. In view of the tribunal, this was not a true apology, and his contrition was contingent and incomplete.

108. He did apologise in the dismissal meeting in January 2022 and said he was appalled at his behaviour, but this was four months later and not directed personally to the line manager.

109. The claimant had continued to trivialise the conduct for a long period claiming it was only “laddish banter” and saying that his manager should not have been offended, he referred to the respondent’s concerns over his misconduct as “ridiculous” or “preposterous” or a “silly row”. He tried to justify the misconduct on the outlandish basis that the line manager should have realised that he was deliberately committing gross misconduct to get the matter to HR.

110. Further, the claimant had come off his medication without the advised medical supervision. The respondent would be aware that the claimant might do this again. The claimant had told the respondent he was intending to get help for his mental health issues, but there was little evidence that he had taken any steps to do so, even four months after the incident.

111. The tribunal would have found that it was proportionate for the respondent not to want to take the risk of the misconduct reoccurring. Whilst the claimant had not done anything like this previously, he had persisted in the misconduct, and then persisted in trivialising or seeking to justify it for a period of some months. The claimant did not tell the respondent in clear terms that he had made a mistake in the way he had withdrawn from his medication and this was the cause of the misconduct. He did not provide the respondent with any reason to believe that he had insight into his condition and was taking active steps to avoid a re-occurrence. He did not for instance provide a letter from his general practitioner or any other medical evidence showed that there was a medical reason for the misconduct. Further, it was only at the appeal stage that his union, not the claimant, raised that withdrawal from his medication had an impact on the misconduct.

112. All of this would have led the respondent to believe that the claimant had limited insight into his condition and the way he managed it. Accordingly, there would have been genuine reasons for the respondent to be concerned about his conduct in future.

113. At the time of the dismissal and appeal he was still frustrated, if not angry, with his colleague because of the poor sickness record. The tribunal would have considered that the respondent might have moved the claimant to another department as an alternative to dismissal. However, there was a significant risk that this would only move rather than solve the problem, and the claimant might fall out with another colleague or manager in future. Further, the respondent might well struggle to place the claimant in another Department considering his record.

114. A finding that dismissal would have been proportionate would have been consistent with the claimant's witness statement wherein he believed it was high time the respondent apologise to him. Further, he claimed that the respondent enjoyed a grovelling apology, of which there was no evidence. Whilst the tribunal would have accepted that parties' positions often harden during litigation, the comments in the witness statement were consistent with the claimant's lack of insight and therefore the respondent's concerns about a repeat, particularly as the claimant was in a public facing role.

115. Accordingly, the Tribunal would have found that dismissal would have been a proportionate means of achieving the respondent's legitimate aim, having balanced the relevant factors. Accordingly, had the claimant made out the necessary link between the dismissal and misconduct, the section 15 claim would have failed because the respondent would have been able to discharge the burden upon it of showing that the unfavourable treatment was justified.

Unfair Dismissal - section 98 Employment Rights Act 1996

116. The tribunal firstly considered whether the respondent had a potentially fair reason for dismissal.

117. The tribunal found that the reason in the respondent's mind for dismissing the claimant was conduct. The tribunal relied on its reasoning as set out above. In addition, there was no material evidence of any other motivation of the respondent's part. To the extent that the claimant was saying that the respondent seized on his misconduct as an excuse to exit him, there was little evidence going to this. In fact, there was evidence of some concern on the respondent's part for the claimant. It was the respondent who raised the possibility of mental health. It was the respondent who referred him to occupational health.

118. Further, the messages in themselves were so serious that it would have been surprising if they did not provoke a serious response, particularly in the civil service. The claimant's own case was that he deliberately sought to provoke his manager and get reported for misconduct because he had an ulterior motive.

119. For these reasons the Tribunal found that the reason operating in the respondent's mind when dismissing the claimant was conduct. As this is a potentially fair reason for dismissal under section 98 the tribunal went on to consider reasonableness.

120. The tribunal directed itself in line with the authority of *British Home Stores Ltd v Burchell 1980 ICR 303, EAT* (as modified by the Employment Act 1980 in respect of the burden of proof). The tribunal considered whether the respondent had a genuine and reasonable belief in the claimant's culpability following a reasonable investigation.

121. A tribunal may not substitute its view of what constitutes a reasonable investigation or reasonable belief for that of the employer. According to *J Sainsbury plc v Hitt 2003 ICR 111, CA*:

> 'The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.'

122. The investigating officer met and interviewed the relevant witnesses the claimant (who was accompanied by his union representative), the line manager and Mr Oakes. The claimant accepted that he knew what the investigating meeting was about. The allegations were put to him and the tribunal was satisfied that he understood them and was well aware of them, because he himself had sent the messages. The claimant was given a full opportunity to have his say in the meetings and had said a great deal.

123. The tribunal considered whether the failure to reinterview the claimant about the later WhatsApp message took the investigation outside of the reasonable range. The tribunal found that it did not because the claimant was informed of this decision and offered the chance to be reinterviewed, which he did not take. Further, the claimant was given a chance to discuss these matters and make full representations in the dismissal and appeal meetings.

124. The tribunal found that both the investigating and dismissing officers held reasonable and genuine beliefs in the claimant's culpability. This was unsurprising as the core facts were not in dispute and the claimant fully admitted having sent the messages. The claimant, in cross examination before the tribunal, accepted that the investigating officer had the right to conclude that there was a case to answer.

125. Accordingly, the Tribunal found that the respondent had, in effect, passed the *Burchell* test and it went on to consider procedural more generally.

126. The tribunal found that the respondent operated an unexceptional procedure. The claimant was invited to a disciplinary meeting in advance of which he was informed of the charges and of the risk of dismissal. He was accompanied by his union representative. He was given a full opportunity to make his case and representations in

the meeting. The transcript showed that the claimant was able to say a great deal in the meeting. The panel adjourned to consider its decision. The claimant was given an independent appeal and was again represented by the same union representative.

127. The claimant had said at first that the union had advised him that were shortcomings with the respondent's procedure. The claimant was asked on more than one occasion during the hearing to identify these shortcomings. He told the tribunal he was unable to do so, save that he was not allowed to contact witnesses directly. The tribunal did not find that this took the procedure outside of the reasonable range for the following reasons. The letter inviting the claimant to the dismissal meeting told him in terms that if he had any witnesses, he should inform the respondent. The claimant did not have any witnesses and so did not contact the respondent. Further, there was nothing to stop the claimant bringing either medical evidence or medical witnesses if he believed this was relevant.

128. Accordingly, the tribunal found that the respondent had followed a fair procedure and had a genuine and reasonable belief in the claimant's culpability following a reasonable investigation. The Tribunal went on to consider the issue of sanction. In the view of the tribunal, this was the crux of the claimant's case.

129. When assessing reasonableness of sanction, again, a Tribunal may not substitute its view of what constitutes an appropriate sanction for that of the employer. A Tribunal may only consider whether the decision to dismiss came within a range of responses to the misconduct available to a reasonable employer in the circumstances.

130. In cross-examination, the claimant accepted that all the messages for which he was dismissed were offensive and contravened the civil service code. He also accepted that his choosing to escalate his concerns about staffing and management in his department by the means of sending these messages was hugely risky. However he said that he did not believe that they were highly inappropriate. This echoed the fact that he told the respondent on more than one occasion that the misconduct had achieved the desired effect.

131. The tribunal considered mitigation.

132. The tribunal considered whether the claimant's mental health and his erratic withdrawal from the medication took the decision to dismiss outside the reasonable range. The first difficulty for the claimant was that it was the respondent who raised this possibility. It then referred the claimant occupational health.

133. The claimant, in contrast, provided no evidence to the respondent that his mental health situation or withdrawal from the medication had an impact on his sending the messages. The only information in the hands of the employer was the occupational health report which was brief being based on telephone call with a nurse. The claimant failed to bring any medical evidence, including GP records, which might indicate that the misconduct had been caused wholly or in part by mental health and/or the erratic taking medication. This was in circumstances where the dismissal took a long time and

the claimant was represented by his union. The Claimant himself said that his mental health that improved during his suspension. Accordingly the claimant had a full opportunity to provide evidence going to this point but failed to do so.

134. The dismissing officer found the claimant to be contrite. It was noted that the claimant had a good record. The dismissing officer accepted that he had acted out of character in sending the messages. He did make a full apology in respect of the messages at the disciplinary meeting, although not directly to the line manager, and only when he was facing the prospect of dismissal.

135. The tribunal accepted that the claimant's working conditions were stressful. The nature of the job involved taking calls from the public who might be upset or at times abusive. The tribunal accepted that workers might occasionally need to "vent" their frustrations. The tribunal accepted that the claimant was on the balance of probabilities overworked, whether or not this was due to the mismanagement of the colleague's absence record. In the week immediately leading up to the misconduct his laptop had broken down and he was still having to field enquiries from members of the public. By happy chance, according to the line manager, there were less enquiries than usual, which was plausible in August. Nevertheless, the tribunal accepted that claimant would have been reasonably and genuinely stressed by this, particularly as he had been working at home in an isolated situation for many months due to the Covid lockdown.

136. The claimant's case was that the reason he sent the abusive messages was to bring management attention to the issue with understaffing due to mismanagement of a colleague's sickness absences. However, the tribunal did not accept his reasoning. His case was that he had no faith in using the grievance procedure and that it might backfire on him, after he researched it shortly before he sent the messages. However, fear of being victimised for raising a grievance was inconsistent with his therefore deciding to send obscene and threatening messages to his line manager. If he was worried about being victimised or subjected to a detriment, sending obscene and threatening messages was far more likely to result in this than a properly constituted grievance.

137. The claimant said that he kept matters back from the respondent during the disciplinary process. He told the tribunal that he had kept back both his concern about the Department management and his mental health. However in fact both were referred to during the process.

138. The claimant contended that the failure to suspend him immediately cast doubt on the appropriateness of sanction. He believed that he was kept in his role due to shortage of staff. The tribunal did not accept this contention because it saw evidence of an HR process discussing whether or not suspension was appropriate and considering the correct and relevant procedure. It did not cast doubt on the appropriateness of dismissal, for an employer to take time to consider carefully whether to suspend or not.

139. The claimant contended that the sanction of dismissal was unfair because of inconsistency. The tribunal advised the claimant on the law on inconsistency and the claimant said that he was not relying on any materially similar case. Neither was he

saying that he had been led to believe that such conduct would not lead to dismissal, that is he did not have a false sense of security. He said that he knew he was taking a risk by deliberately committing misconduct. Accordingly, applying *Hadjioannou v Coral Casinos Ltd 1981 IRLR 352, EAT,* the tribunal could not find that the dismissal was unfair by reason of inconsistency.

140. Further, there were allegations in his statement of offensive comments made about a disabled colleague. Further it was alleged that the line manager had said "do your job then fuck off". It was alleged that there was a colleague who regularly fell asleep at 3 PM. None of these matters were raised before the employer. It was unclear how any case based on inconsistency could succeed in the absence of any argument about a false sense of security, or comparable colleagues who not been dismissed.

141. The tribunal considered the claimant's case as to the mismanagement of the colleague's absences. But, even if the claimant's allegations were correct, and the tribunal was in no position to make findings, that could not take the decision to dismiss outside of the reasonable range. The claimant had told his employer that he deliberately chose to commit gross misconduct as a way of raising this issue, rather than using the grievance procedure.

142. In the circumstances of an employee who told his employer that he had deliberately committed gross misconduct to get the attention of human resources rather than using the grievance procedure, who minimised or sought to justify the misconduct for several months, and very serious nature of the messages, the tribunal could not find that the sanction of dismissal fell outside of the reasonable range.

143. The unfair dismissal claim is therefore dismissed.

Employment Judge Nash

Dated: 28 December 2023

Sent to the parties on:

…….....29 December 2023.....

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For the Tribunal Office