EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dare Iyashere	v	Gist Limited

Heard at: Watford Employment Tribunal **On**: 7, 8 and 9 February 2024

Before: Employment Judge Anderson
B Saund
D Sagar

Appearances
For the claimant: In Person
For the respondent: S Brochwicz-Lewinski (counsel)

JUDGMENT

1. The claimant's claim of discrimination on the grounds of age and disability is dismissed.

2. The claimant's claim of unfair dismissal is dismissed.

REASONS

Background

1. The claimant was employed by the respondent from 31 May 2016 and dismissed, on notice, for misconduct on 2 June 2021. The claimant brings a claim of unfair dismissal and discrimination on the grounds of age and disability. The respondent's case is that the claimant was dismissed fairly for a conduct matter, and it denies discrimination.

Disability Status

2. In a judgment dated 31 July 2023, following a public preliminary hearing on 27 July 2023, EJ Quill found that, for the purposes of s6 of the Equality Act 2010 the claimant had the disability of back pain/sciatica from no later than 9 March 2021 and from a date prior to the commencement of his employment with the respondent, had a disability of anxiety.

The Hearing

3. The parties filed a joint bundle of 289 pages. The claimant filed a witness statement. The respondent filed two witness statements, one from John Davis, the disciplinary hearing manager and one from John Leadley, the appeal hearing manager. At the end of the first day of the hearing the claimant requested a witness statement from Michael Power be admitted into evidence. The statement was produced for the disability status hearing referred to above. The respondent did not object to the inclusion of this document.

4. There was some discussion at the outset of the hearing about the list of issues. A list of issues was produced by EJ Frazer at a preliminary hearing on 4 August 2022. Neither party asked for this list to be amended. The list included a disability discrimination claim based on the disability of sciatica. The claimant said at this hearing that he also relied on the disability of anxiety. The tribunal noted that in the decision of EJ Quill dated 31 July 2023, the judge recorded that the claimant made clear at that hearing that he had not intended to abandon an argument that he had mental impairments which constituted disability, notwithstanding that he had not raised that at the first preliminary hearing. Whilst acknowledging, as raised by Mr Brochwicz-Lewinski, that the claimant had not set out his case about anxiety discrimination, the tribunal proceeded on the basis that both of the disabilities of sciatica and anxiety were relied upon by the claimant in his claim that he was discriminated against by way of dismissal.

5. Oral judgment was given at the end of the hearing. As explained to the parties, the case law and statute considered by the tribunal was not included in the oral judgment, but it would be included if written reasons were requested. The claimant requested written reasons and the relevant law has been included within these reasons.

The Issues

6. The following list was agreed upon at the hearing on 4 August 2022. As noted above, the tribunal considered anxiety as a disability, in addition to sciatica, as part of the discrimination claim.

1. Unfair dismissal

1.1 What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

1.2 If the reason was misconduct, did the Respondent act reasonably in all
the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

1.2.1 there were reasonable grounds for that belief;

1.2.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;

1.2.3 the Respondent otherwise acted in a procedurally fair manner;
1.2.4 dismissal was within the range of reasonable responses.

2. Disability
2.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:
2.1.1 Did he have a physical or mental impairment namely sciatica?
2.1.2 Did it have a substantial adverse effect on her ability to carry out
day-to-day activities?
2.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
2.1.4 Would the impairment have had a substantial adverse effect on
her ability to carry out day-to-day activities without the treatment or other measures?
2.1.5 Were the effects of the impairment long-term? The Tribunal will
decide:
2.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
2.1.5.2 if not, were they likely to recur?

3. Direct age discrimination (Equality Act 2010 section 13)
3.1 The Claimant's age group is 45 to 50 and he compares herself with people in the age group of 20s/ under 30.
3.2 Did the Respondent do the following things:
3.2.1 Dismiss the Claimant.
3.3 Was that less favourable treatment?
The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.
If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.
3.4 If so, was it because of age?
3.5 Was the treatment a proportionate means of achieving a legitimate aim?
3.6 The Tribunal will decide in particular:
3.6.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
3.6.2 could something less discriminatory have been done instead;
3.6.3 how should the needs of the Claimant and the Respondent be balanced?

4. Direct disability discrimination (Equality Act 2010 section 13)
    4.1 Did the Respondent do the following things:
        4.1.1 Dismiss the Claimant.
    4.2 Was that less favourable treatment?
        The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.
        If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.
        The Claimant has not named anyone in particular who he says was treated better than he was.
    4.3 If so, was it because of disability?

5. Discrimination arising from disability (Equality Act 2010 section 15)
    5.1 Did the Respondent treat the Claimant unfavourably by:
        5.1.1 Dismissing him.
    5.2 Did the following things arise in consequence of the Claimant's disability:
        5.2.1 the Claimant's sickness absence
        5.2.2 the Claimant's slower productivity caused by his sciatica.
    5.3 Did the Respondent dismiss the Claimant because of those things?
    5.4 Was the treatment a proportionate means of achieving a legitimate aim?
    5.5 The Tribunal will decide in particular:
        5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
        5.5.2 could something less discriminatory have been done instead;
        5.5.3 how should the needs of the Claimant and the Respondent be
        balanced?
    5.6 Did the Respondent know or could it reasonably have been expected to
    know that the Claimant had the disability? From what date?

Submissions

7. Both parties made oral submission after the evidence was completed. A synopsis of those submissions is set out below.

8. For the respondent, Mr Brochwicz-Lewinski said that this was essentially a straightforward unfair dismissal claim in terms of fact and law with some elements of disability discrimination thrown in or overlaying it. All three elements of the Burchell test had been satisfied by the respondent. The fact that the claimant now claimed he had tried to present his car for a search and believed his search obligations to be over is a position that lacks credibility as is his claim that all of the meeting notes were fabricated. On the matter of disability, the respondent is still in the dark as to how that works. Plainly the dismissal was nothing to do with disability. The claimant has not suggested that it was to do with anxiety. That does not form any part of his case. The claimant still maintains that the reason was sciatica or something arising from

it, but he did not put that to the witnesses. The respondent's witnesses were not aware of the claimants claimed drop off in performance. This is a conspiracy theory advanced by the claimant on the basis of nothing, simply seeking to undermine the decision to dismiss. It is for the claimant to establish a prima facie case on discrimination. He does not come close to that. A claim of age discrimination has not been advanced in any shape or form.

9. The claimant said that this is a case of unlawful sacking and disability discrimination. He said the balance of proof is inside the company. He could not defend the claim as the only person who could have come to defend it would have been Wayne, but he was not here for the claimant to question. If the security guard had attended, he could have told the tribunal that he was not in the box when the claimant returned with his car keys. No footage was provided to the claim and documents were missing. He cannot subpoena documents or witnesses because this is not a criminal case. The claimant had not expected the respondent to dig into previous disciplinaries. After four years of good service, he received four back-to-back disciplinaries. That is very unusual. He had made mistakes before those disciplinaries in his employment, but had no disciplinary action taken against him. The claimant said he had asked for 16 witnesses from the respondent to attend and had written 170 questions to ask the witnesses that did attend but he could only ask four of those questions. The adjustment he had to his duties was made unofficially as Wayne knew about his disability. The respondent deliberately failed to call Wayne for this reason. The case is unjust. He did not have a chance to put his case across in the disciplinary process. The respondent had failed to bring a policy to the hearing to substantiate its claims about access to the premises when an employee is not working. The respondent was probably banking on him backing down, but the claimant came to the tribunal to tell his story.

Relevant Findings of Fact

10. The claimant was employed by the respondent (a company that transports food items to supermarkets) as a warehouse operative from 31 May 2016. He worked a night shift which generally commenced at 21:30, ending around 05:30 the following day.

11. The claimant's date of birth is 2 October 1970 and he was 50 years old at the time of the events complained about in these proceedings.

12. The respondent has a Search Policy. The purpose of the policy is:

> *…to minimise the problems caused by the unauthorised removal of property belonging to Gist, its customers, employees or visitors. The policy also helps to encourage employees to do the right thing, acting as a deterrent to reduce the temptation to steal.*

13. Under this policy searches can be random or where there are grounds for suspicion. As well as body searches and bag searches, searches of employee's cars are carried out.

14. At some point during the period 2018 to 2020 the claimant was given permission by one of his line managers, Wayne, to be excused from setting up dollies (a type of transportation cart). Conflicting evidence was given about the reason for this adjustment. The claimant said that it was made because he raised with his manager that he needed duties that included less bending because of his medical problems. Mr Davis said that he was aware of the arrangement but understood it to have been implemented for management purposes, specifically because the claimant was difficult to manage. He said that the claimant's job still involved heavy manual work. This adjustment was not referred to in a witness statement made by Michael Power for the purposes of the disability status hearing on 27 July 2023. Mr Davis did not refer to it in his witness statement. Mr Davis left the respondent's employment in 2022 and his only part in these proceedings has been to make his statement and attend at the hearing. He was not aware of Michael Power's statement. The tribunal finds that the claimant did have an adjustment to his duties in that he was excused from loading dollies, and that he requested this adjustment because at the time of the request he was suffering from back pain. The tribunal note that EJ Quill gave full consideration to this claim in his decision of 31 July 2023 and accepted that the claimant was not carrying out the full range of duties, though he could not determine whether this was authorised or a unilateral decision by the claimant. From Mr Davis' evidence it is clear that the adjustment had been agreed with Wayne.

15. On or around August 2020, following a disciplinary process, the claimant received a conduct warning over 'Incorrect Loading/Temperature failure'.

16. On 21 October 2020, following a disciplinary process, the claimant was given a first written warning for lateness. He did not appeal the warning.

17. On 3 November 2020, following a disciplinary process, the claimant was given a final written warning for 'Failure to load out an ambient customer order'. The claimant did not appeal the warning. The letter setting out the warning included the following information:

> *This warning will be placed in your personal file and will remain active for a period of 12 months from today's date. Further issues of conduct may lead to Investigation / Disciplinary in line with the company's policies and procedures.*

18. On 3 March 2021 an investigation commenced into an allegation that the claimant had failed to follow training. The outcome was that the respondent decided to take no further disciplinary action but would provide further training to the claimant. The claimant said in oral evidence that the investigator, Kieran Nethercott, had not taken the matter further on the advice of John Davis. The claimant said that he had raised with Kieran Nethercott that John Davis had told him to begin this disciplinary procedure. Mr Nethercott then consulted John Davis on what to do. This matter was not put to Mr Davis in cross examination and was not an allegation raised in the claimant's witness statement. There is no evidence to support the claimant's claims and the tribunal finds that Mr Nethercott, after considering the claimant's explanations

for the 'failure to follow training' allegation decided that there was not a disciplinary case to answer, based on that evidence and nothing else.

19. On 6 March 2021 the respondent decided to search all employees and a random sample of employee's vehicles. Mr Davis said in his witness statement that this was because:

> *…there had been stock going missing and so all employees were to undergo a personal search and some vehicles were to be searched to try and find the person responsible.*

20. Staff were searched at the end of the shift, at 05:30. The claimant was searched, and two packets of biscuits were confiscated, pending an investigation into whether they were the claimant's property or the respondent's property. It was later determined that the biscuits were the claimant's property.

21. The claimant was advised by Terry McCafferty (TM) that his car would be searched. In addition to Mr McCafferty and the claimant, Asmat Mehmood (AM) and Kieran Nethercott (KN) were present. The claimant said that he did not have keys for the car and could obtain them from his girlfriend. He called his girlfriend in the presence of the other employees but got no answer. He left the respondent's premises. The claimant returned the next day at approximately 02:00. He collected the car and drove it away without it being searched.

22. On 8 March 2021 Michael Powers, one of the claimant's line managers, suspended him from work. The suspension was confirmed in a letter of the same date setting out the reason as

> *…investigation into the allegation of:*
> - *Failure to submit to a vehicle/search/Failure to comply with company search policy*
> - *Gross Misconduct*

23. Mr Powers interviewed AM on 8 March 2021. KN gave a written statement on 9 March 2021 and TM gave a written statement dated 2 April 2021. The claimant also provided a written statement around this time, for the purposes of the investigation, though it is undated. Sam Meunier, a Team Manager, was the investigation manager and he interviewed the claimant for the purposes of the investigation on 8 April 2021. The claimant was supported by a union representative, Daniel Rew-Dixon, at that meeting. The meeting was adjourned to allow Mr Meunier to investigate some of the matters raised by the claimant and reconvened on 14 April 2021. At the end of the meeting Mr Meunier advised the claimant that he had decided that the matter should go forward to a disciplinary meeting. A note taker attended both meetings, and notes of the meetings were typed and provided to the claimant. Although there is space on the proforma meeting notes form for all attendees to sign the notes, only Mr Meunier did so.

24. The claimant was invited to a disciplinary meeting on 21 April 2021 in an undated letter. The charge was:

    - *Misconduct- Failure to submit to a vehicle search also failure to comply with the company search policy*

25. The letter included the following paragraph:

    > *You should be aware that a possible outcome of the disciplinary hearing could be a formal disciplinary warning as outlined in the company's disciplinary procedure. Please note, the serious nature of the allegations against you are classed as misconduct and could result in a disciplinary sanction up to and including dismissal.*

26. The claimant was on sick leave with sciatica and urticaria from 20 April to 20 May 2021. The disciplinary meeting was rescheduled to 25 May 2021 and then again to 2 June 2021. John Davis, Site operations Manager was appointed as the disciplinary hearing manager.

27. The meeting took place on 2 June 2021. The claimant attended with his union representative Daniel Rew-Dixon. A note taker attended, and notes of the meeting were provided to the claimant after the meeting. At the outset of the meeting the claimant raised that he was unhappy with the notes from the investigation meetings. He showed the amendments he wanted to make to Mr Davis. Those amendments are recorded in the disciplinary meeting notes and also shown in an annotated version of the investigation notes included in the bundle. There was then a discussion about whether all of the amendments the claimant wanted to raise had been raised and if he was happy to proceed. The conversation is noted as follows:

    > *JD: All corrections have been satisfied*
    > *DR: When you mean all corrections, means are you happy all notes are correct?*
    > *JD: Yes, are you happy to continue?*
    > *DI: Yes*
    > *JD: This is a rearrange meeting by your request from the investigation 6th*
    > *DI: What I said that day on the investigation meeting, everything I said that day is not on the notes.*
    > *JD: No, I am sorry we have already covered, and you said you were happy with it,*
    > *DI: This is why I didn't want you on the investigation*
    > *JD: Well, you have me.*
    > *[Union rep]: Dare has misunderstood JD initial question in regards to whether we was happy with all corrections*
    > *and would like to add information. Dare would be reading out what he believes should've been on the investigation notes - document 21*
    > *JD Is document 21 all that you would like adding?*
    > *DI Yes*

28. Document 21 was the statement written by the claimant as part of the investigation process. It was the claimant's position, put to Mr Davis in cross examination, that he had refused to allow the claimant to include all of the amendments or issues he wanted to raise about the investigation meetings notes at the hearing. Mr Davis denied this stating that the claimant had been given the opportunity to raise his concerns. The tribunal finds that the notes of the disciplinary meeting show clearly that the claimant was given an opportunity to set out in full any disagreement that he had with the investigation meetings notes and these were duly recorded and included in the evidence available at the disciplinary meeting.

29. At the end of the meeting, which had run into 2 June 2021, being conducted on the night shift, Mr Davis made the decision that the claimant had committed the act of misconduct he was accused of and that he should be dismissed on notice. He said that he had taken into account both the claimant's five years of service, and the fact that he had a live final written warning. The dismissal was confirmed in a letter dated 2 June 2021 in which the claimant was told that he would be paid one month notice in lieu.

30. The claimant had a right of appeal against the decision. He wrote to John Leadley, the Warehouse Manager and the disciplinary appeal manager, on 8 June 2021. He stated that he wished to appeal because he had demonstrated that he had followed the policy to the best of his ability, the disciplinary meeting was poorly held, and the notes of the investigation meeting were incorrect.

31. The appeal hearing took place on 23 June 2021. The claimant attended with his union representative Daniel Rew-Dixon. Mr Rew-Dixon raised that he believed that investigation meeting's notes had not been verified and that he had not been allowed to make changes to those notes at the disciplinary meeting. When Mr Leadley asked him to set out what it was in the notes that he believed to be wrong Mr Rew-Dixon said that he could not remember as it was so long ago but because the notes were not signed, they were worthless.

32. On 6 July 2021 Mr Leadley wrote to the claimant setting out that he upheld the dismissal and his reasons for doing so, addressing each of the points raised by the claimant in the appeal hearing.

33. The claimant said on many occasions throughout his oral evidence and in his cross examination of the respondent's witnesses that the notes of the investigation, disciplinary and appeal meetings were incorrect, had been tampered with, recorded statements he had not made and were missing a number of statements he had made. He said that the fact that the notes did not make sense was proof that they had been fabricated. This was not a matter raised by the claimant at either of the preliminary hearings, in his ET1 or in his witness statement. His trade union representative did not raise with Mr Leadley that he believed that the disciplinary notes had been tampered with and there is no evidence before the tribunal that, for example, the union complained about such a matter to the respondent. Mr Davis denied that the notes had been tampered with. Both of the respondent's witnesses denied

that the claimant had raised with them that they should check CCTV for 7 March 2021 to see if the gatehouse was staffed when he came to collect his car.

34. The tribunal found that the notes of all the meetings conducted as part of the disciplinary process did make sense and found that there was no evidence that they had been tampered with or changed or that they failed to record important parts of the meetings. The tribunal finds that the notes, though not a verbatim record, are a true record of the investigation, disciplinary and appeal meetings.

35. In the disciplinary process meetings with the claimant the events of 6 and 7 March 2021 are discussed and references are made by the interviewers and the claimant to the statements taken from TM, AM and KN. The claimant takes issue with the statements and various conclusions that the respondent drew from those statements. The points of conflicting evidence are as follows:

36. The claimant said to Sam Meunier that he told TM he would need to go home to get the car keys and TM agreed to that. Statements were taken from TM, AM and KN in the subsequent disciplinary process and each statement refers to the claimant simply walking off. There is no reference to him discussing with TM that he would leave to get the keys and return. The claimant was given the opportunity to raise this matter. It was recorded in the notes and Mr Leadley took the approach in the appeal hearing of asking the claimant whether, if that was true, how this impacted what happened on 7 March 2021.

37. There is also a conflict of evidence around the explanations that the claimant said he gave for not having his keys, and the explanations recorded in the witness statements of TM, AM and KN. The claimant said to Sam Meunier that he lost his key twice during that shift. He said that he lost it once and it was handed back to him by a security guard. He then said that he lost it again. He said in oral evidence that he left it on a table and someone from management picked it up. This was not a claim he has raised before this hearing.

38. AM records the claimant as saying he did not have the keys, that the vehicle was his partner's car and she had dropped him off in that vehicle, that she had come with a friend and returned in the friend's vehicle. AM also stated that when he searched the claimant prior to the car search, there were keys in his pocket.

39. KN said that the claimant told him he did not have a car then in answer to a question from TM agreed a Corsa was the car he was using but it was not his, it was his girlfriend's.

40. TM said in his statement that the claimant initially said he did not have a car on site and his girlfriend had dropped him off. TM told the claimant he knows which car he drives, and they went to that car. The claimant then said that his girlfriend had driven him in, and she went home in a friend's car with the keys.

41. In a statement written shortly after 6 March 2021 the claimant stated that he drove the car to work, met his girlfriend outside as she wanted something out of the boot, and that by the time the car search was carried out at the end of the shift he had misplaced his keys.

42. These matters and the claimant's objections to the statements were discussed at the disciplinary process meetings. The claimant had the opportunity to put forward any points he wished to make, and these are recorded in the notes.

43. For the purposes of the decision the tribunal needs to make on whether the claimant was unfairly dismissed and/or suffered age or disability discrimination, it is not necessary for it to make a finding on which version of any of these disputed accounts it prefers.

44. It is the claimant's case that he returned to the respondent's premises on 7 March 2021, around 12 hours after he left with his keys, in order to facilitate a search of his vehicle. He said in his witness statement and in oral evidence that when he arrived there was no-one staffing the security gate, he waited for 15 minutes and as there was no-one around he took his car and went home, this being a non-working day for him.

45. This was not a matter raised with Sam Meunier at the investigation meetings or with John Davis at the disciplinary meeting. When asked why he had not returned and submitted to a search he said to Sam Meunier it wasn't his day in and no one had called him or left a note on his windscreen. To John Davis he said that he did not think the matter was serious and he didn't know he was meant to present himself before collecting his car . The claimant said a number of different things to John Leadley. The first interaction was as follows:

> *JL: Ok, you were sent home for the key that's your version of events, you came back why didn't you didn't submit for a search, that would have solved everything.*
> *DI: I wasn't on shift, I came back expecting security there.*
> *JL: We have 24/7 cover in security. Did you go to security?*
> *DI: Why would I go to security?*
> *LT (Human Resources): to do the search surely?*
> *JL: Why do I have to phone you again, to check that you have a key? You should report to us as you've read the policy you know it's potential dismissal, why wouldn't you do that?*
> *DI: How many hours you do work, why would I report to site I didn't take anything? I thought the search was over.*
> *JL: You came back as you went to get a key, you didn't go to security half way through that process to get the search completed.*
> *DI: At that stage it wouldn't make a difference, I would have gone to security and should go and get searched why would I do that?*

46. There then follows a detailed conversation between the claimant, his union representative and Mr Leadley about why the claimant might not have

presented to security. The claimant then states that he went to security and there was no one there.

47. Again, the tribunal does not need to make a finding on whether the claimant attended at the gatehouse looking for security and there was no one available. It finds that the claimant had the opportunity to raise the matter and put his case to the respondent throughout the disciplinary process.

48. The claimant went on in oral evidence to say that he had been refused CCTV by the respondent which would have showed that security was absent at the gate when he arrived on 7 March 2021. He also said that he could not have entered the site to find someone to carry out the search because he did not have his pass with him, and it was against warehouse policy to enter the premises on a non-working day unless you are accompanied.

49. These matters were put to the respondent's witnesses. Mr Davis said that the claimant had never raised with him that he had attended at the gatehouse to see security and it had been unstaffed or asked for CCTV to prove his case. Mr Leadley agreed that the claimant had said he attended and there was no one there but did not ask him to check CCTV.

50. Mr Leadley said in oral evidence that the claimant could have accessed the administration building without entering the warehouse. Mr Davis said he was not aware of any policy that would stop the claimant coming on site, there were no such restrictions. He said a member of staff could just enter unattended and without a pass they would need to be signed in or given a temporary pass.

51. The tribunal finds that the claimant did not ask Mr Davis or Mr Leadley to check the CCTV to see if he waited at the gatehouse for security on 7 March. It has already found that the notes are a true record of the disciplinary process meetings and accepts the evidence of Mr Davis and Mr Leadley that this matter was not raised with them. It found the respondent's witnesses to be credible and the claimant presented no evidence to undermine that credibility.

52. The tribunal also finds that had the claimant wished to do so, he could have entered the respondent's premises in the early hours of 7 March 2021 to ensure that the car search was completed. It does not accept the claimant's claim that he was not allowed to enter for policy reasons. No such policy was presented. It could have been requested from the respondent and provided in the bundle. If it existed and it was denied to the claimant, he could have raised the matter with the tribunal before the hearing. The respondent's witnesses, two senior managers at the time of the events, denied that such a policy existed. This defence was not raised at any point in the disciplinary process or these proceedings until the claimant was giving oral evidence which, in the tribunal's view, further undermines the credibility of the claimant's evidence on this matter.

Credibility

53. The claimant raised a number of issues about the credibility of the respondent's evidence. The tribunal found that the respondent's witnesses

were credible, they were not evasive in their answers, the evidence they gave accorded with their witness statements. Where evidence was given outside of those statements it was in response to questions from the tribunal or the claimant. The claimant provided no evidence to support his claim that the witnesses were, in effect, lying, having fabricated the documentary evidence of their meetings with him. The only reason he gave for this claim was the respondent wanted to get rid of him due to productivity issues and he based this on the number of disciplinary matters taken against him from 2020 to the end of his employment, though no productivity issues were documented. The tribunal found the claimant's assertion that the respondent's witnesses were lying to be unproven and lacking in credibility.

54. The claimant made various claims throughout the hearing, unsupported by documentary evidence, that the respondent had deliberately obstructed him in putting forward his case by refusing to provide documents, CCTV footage and witnesses that he wanted to cross examine. The tribunal noted that the claimant is not new to the tribunal process and by his own admission had been involved in legal proceedings many times. It also noted that he was an intelligent man, well able to make the points he wanted to make. It noted that at the first preliminary hearing on 4 August 2022 EJ Frazer explained to the claimant the process for applying for a witness order. No applications were made, nor were there any applications for specific disclosure.

55. Mr Davis confirmed in oral evidence that there was an adjustment in place to the claimant's duties which was not referred to in a statement made by Michael Powers to the tribunal for the purposes of a disability status hearing. The tribunal accepts that Mr Davis was not privy to the preparation for the disability status hearing and no criticism is made of him. However, it is concerned that there is an apparent discrepancy in evidence provided for the purposes of that hearing and this final hearing. Having noted that, the tribunal is satisfied, for the reasons given below for its decision on the disability discrimination claim, that this had no impact on the outcome of this case. Furthermore it has not found that this issue was of sufficient concern that it undermines the respondent's evidence in support of its defence to this claim.

56. In contrast the tribunal found that the claimant's evidence was lacking in credibility. He raised issues in oral evidence and in submissions which had not been raised in pleadings or in his witness statements, and blamed any failure of his to provide evidence for an allegation he was making on the respondent having obstructed his attempts to obtain evidence.

Law

Discrimination

57. The discrimination claims are brought under sections 13 and 15 of the Equality Act 2010. Those sections are reproduced below.

58. 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.

59. 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.

60. For all Equality Act 2010 claims the burden of proof provisions as set out in section 136 apply. Section 136 reads:
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.
(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

Unfair dismissal

61. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

62. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

63. Misconduct is a potentially fair reason for dismissal under section 98(2).

64. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

65. In misconduct dismissals, there is well-established guidance for tribunals on fairness within section 98(4) in the decisions in *Burchell 1978 IRLR 379* and *Post Office v Foley 2000 IRLR 827*. The tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the tribunal must decide whether the employer held such genuine belief on reasonable grounds

and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the tribunal would have handled the events or what decision it would have made, and the tribunal must not substitute its view for that of the reasonable employer (Iceland *Frozen Foods Limited v Jones 1982 IRLR 439*, *Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23*, and *London Ambulance Service NHS Trust v Small 2009 IRLR 563).*

Decision and Reasons

Discrimination

66. The claimant brings a claim of age and disability discrimination. His claim is that his dismissal was an act of direct age and disability discrimination, or that his dismissal resulted from his sickness absence or slower productivity caused by sciatica.

67. On 31 July 2023 EJ Quill determined that the claimant was disabled by way of anxiety throughout his employment and by sciatica from 9 March 2021.

68. In the case of *Igen v Wong [2005] IRLR 258* the court of appeal gave the following guidance for considering discrimination claims. It is a staged process. The tribunal should make findings of primary fact to determine whether those show less favourable treatment and a difference in age or disability status. The test is: is the tribunal satisfied, on the balance of probabilities, that this respondent treated this claimant less favourably than it treated or would have treated a younger employee or a non-disabled employee.

69. If the tribunal is satisfied that the primary facts show less favourable treatment because of age or disability, the tribunal proceeds to the second stage. At this stage, the tribunal looks to the employer for a credible, non-discriminatory explanation or reason for such less favourable treatment as has been proved. In the absence of such an explanation, proved to the tribunal's satisfaction on the balance of probabilities, the tribunal will conclude that the less favourable or unfavourable treatment occurred because of discrimination.

Age Discrimination

70. There is no reference to age discrimination in the claimant's witness statement. He did not put any questions to the respondent's witnesses about age discrimination. Specifically, he did not put to either witness that in dismissing him (John Davis) or upholding the dismissal (John Leadley) that they had done so because of his age. Both witnesses denied discrimination in their witness statements.

71. In so far as the complaint of age discrimination is pursued by the claimant it is dismissed. There was no evidence at all before the tribunal which could

lead it to infer that the claimant was treated less favourably in being dismissed for a breach of the search policy, than those younger than him.

Disability Discrimination

72. The claimant states in his witness statement that he believes that the respondent conspired to sack him due to his disability/ill health. He goes on to state that that he had a clean four year record until he mentioned health issues and that is when he was targeted for dismissal. He does not state which disability he relies upon. In oral evidence he referred to sciatica being the reason that his performance was down at the end of 2020. He did not refer at all to anxiety throughout the hearing or in his pleadings other than to state at the outset that he relied upon it as a disability. He did not refer to it as being a matter connected to his dismissal. He did not put to either witness that his mental ill health was the reason why they decided to dismiss him or that the effects of anxiety on his performance were the reason.

73. In so far as any complaint of disability discrimination based on the disability of anxiety is pursued by the claimant it is dismissed. There was no evidence at all before the tribunal which could lead it to infer that the claimant was treated less favourably by being dismissed over a misconduct issue than those who were not disabled.

74. Any complaint of discrimination based on the disability of sciatica is also dismissed. EJ Quill has previously determined that the claimant was not disabled by sciatica prior to 9 March 2021 which was the date on which the condition became long term. This is a date after the incident took place which the respondent viewed as misconduct and because of which it says he was dismissed. It is also a date after which the investigation into that incident began, and a date after the other disciplinary actions against the claimant were commenced and concluded. Even if the respondent was aware that the claimant was disabled by sciatica as of 9 March 2021, and there was no evidence before the tribunal to show that it was, there was no evidence to show that this matter had any bearing on the conduct of the dismissal process or the eventual dismissal. The claimant did not refer to his sciatica as being a factor in the disciplinary process throughout the hearing or provide any evidence to show that he was treated differently during the disciplinary process than someone who was not disabled would have been treated. He did not put to the respondent's witnesses that discrimination on the grounds of his disability of sciatica was the reason for their actions and the witnesses denied in their witness statements that they discriminated against the claimant.

75. The claimant has failed to put any information before the tribunal which could lead it to infer that any of the actions of the respondent were motivated by discrimination, such that the burden of proof would then shift to the employer to provide an explanation as to why its actions were not discriminatory. The discrimination claims are dismissed.

Unfair dismissal

76. The question the tribunal needs to answer is whether the dismissal was fair or unfair. This is a two-stage process. The first stage is for the respondent to

show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.

77. The respondent's position is that the claimant was dismissed for conduct. Section 98 of the Employment Rights Act 1996 identifies a number of potentially fair reasons for dismissal which include at s98(2)(b) the conduct of the employee.

78. The claimant's case was that his productivity had dropped, or performance had decreased, because he suffered from back problems, namely sciatica, and because of this the respondent wanted to dismiss him and found a way to do so by targeting him with disciplinary processes that eventually led to his dismissal on 2 June 2021. There were no documents before the tribunal which showed that the respondent had concerns about the claimant's productivity such that it believed that it had to take action. Mr Lewinski said that the respondent has capability procedures which it can use in such circumstances. The tribunal notes that the respondent is also likely to have attendance procedures. The claimant was not subject to such procedures. Mr Davis said in oral evidence that he was not aware of concerns about the claimant's productivity.

79. The tribunal was mindful of the case law guidance limiting its ability to go behind earlier warnings (i.e. those that did not result in dismissal) where it was satisfied that those warnings were not issued for an oblique motive or that they were manifestly inappropriate (*Wincanton Group PLC v Stone [2013] IRR 178 Para 37*), but it did take consider the evidence provided in respect of those early warnings, as it was the claimant's case that they were connected, in that they were part of a plan to dismiss him. On the documentary evidence provided the tribunal was satisfied that those warnings were not issued for an oblique motive and were not manifestly inappropriate. On that evidence there was a clear reason for each warning issued after an appropriate investigation. The tribunal also took note of the fact that one of the investigations carried out did not lead to a warning.

80. On the second day of the hearing, at the claimant's request, a further document was admitted into evidence. This was a witness statement made by Michael Powers for the purposes of a public preliminary hearing that was held on 27 July 2023 to determine disability status. The gist of the statement is that in Mr Powers' view the claimant carried out a demanding manual job which included heavy lifting and he could not have done so with a bad back. He also notes that the claimant was 'not always the hardest worker' and makes no reference to there being any adjustments in place for the claimant as to the type of work he carried out. As noted above, the claimant claims and the tribunal accepts, that he asked for lighter duties at sometime between 2018 and 2020 and was excused from setting up dollies.

81. Taken at its highest, this evidence does not show that the disciplinary process instigated on 8 March 2021, or any of the disciplinary processes that preceded it were commenced with the purpose of dismissing the claimant over productivity concerns. There is no evidence that the respondent had

concerns about the claimant's productivity. The tribunal is satisfied on the evidence that the claimant was dismissed for misconduct.

82. The second stage as set out at s98(4) of the Employment Rights Act 1996 is to consider whether the dismissal was fair or unfair, having regard to the reason shown by the employer and whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation.

83. The tribunal is satisfied that the respondent had a genuine belief in the claimant's misconduct. The claimant was subject to the respondent's search policy. He was aware that the respondent wished to search his car on the night of 6 March 2021 and that he should return to the premises with the car key to allow that search to take place. On 7 March 2021 he left the respondent's premises in the car without it having been searched. These facts are not in dispute other than that the claimant says that he did not think that the respondent viewed the matter as serious because it had not left a note on his car.

84. The tribunal must then consider whether the respondent's genuine belief in the claimant's misconduct was based on reasonable grounds and after carrying out a reasonable investigation.

85. There were three witnesses to the incident on 6 March 2021 and it is undisputed that the claimant left the premises in his car on 7 March 2021 without it being searched. Statements were taken from the three witnesses, the statements were disclosed to the claimant, the claimant was interviewed by an investigating officer who decided that the matter should be referred to a disciplinary meeting. A disciplinary meeting was held on 2 June 2021. The claimant was provided with all relevant documentation for the meeting and was given the opportunity to make his case. The claimant was dismissed on notice and had a right of appeal which he exercised. Again, he was able to raise any matter he wanted to raise at the appeal hearing. The appeal manager set out in a lengthy letter the reasons why he decided to uphold the claimant's dismissal. At all stages of the disciplinary process the claimant was accompanied at meetings by his trade union representative.

86. The claimant's main complaint about the process was that the notes of the investigation meetings were fabricated and unsigned. The tribunal has found that the claimant and his trade union representative were given every opportunity at the disciplinary hearing and the appeal hearing to set out their concerns about the investigation meetings notes and those concerns are properly recorded in the notes of those meetings. To put it another way, the claimant's concerns about a defect in the investigation stage of the process were aired and considered by the decision makers.

87. The claimant also claimed that the meetings notes of the disciplinary and appeal hearing meetings were fabricated. The tribunal has found this claim to

be without credibility and found that the notes were the true records of these meetings.

88. Connected to the claimant's claim that the notes were fabricated is his claim that he asked for CCTV of his attendance at the respondent's premises on 7 March to be provided and viewed. The tribunal has found that he did not make this request in the disciplinary or appeal meetings.

89. The tribunal finds, on the evidence provided, that the investigation and disciplinary process was reasonable. Relevant witnesses were interviewed, the claimant had the opportunity to make his case at a hearing and to appeal a decision he did not agree with. He was advised from the outset that the process may lead to dismissal. No evidence was put forward to show that the respondent acted outside of its disciplinary policy.

90. The tribunal must then consider whether the decision to dismiss was within the range of reasonable responses. It is immaterial how the tribunal would have handled events; the test is simply whether a reasonable employer could have reached the decision to dismiss on the particular facts.

91. The claimant admitted in oral evidence that on the facts before the decision manager, Mr Davis, he had failed to submit to a car search. This conduct alone could have led to dismissal under the respondent's policies. The claimant was subject to a live final written warning and he had been advised that any further conduct matter could lead to disciplinary action in line with company policies. The tribunal finds that the decision to dismiss was within the range of reasonable responses to the claimant's conduct.

92. The tribunal concludes that the dismissal of the claimant by the respondent on 2 June 2021 was fair, and the claimant's claim of unfair dismissal is dismissed.

Employment Judge Anderson

Date: 13 February 2024

Sent to the parties on: 21 February 2024

For the Tribunal Office