EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Open GI Ltd

Heard at: Cambridge by video **On:** 24, 25, 26, 27 and 28 July 2023

Before: EJ Dobbie, sitting with members Mrs Goding and Mr Allan

Representation
Claimant: In person
Respondent: Miss J Bradbury

These proceedings are the subject of a Restricted Reporting Order and an Anonymisation Order.

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The Claimant's claim for unfair dismissal succeeds;
2. The Claimant's claim for discrimination for something arising in consequence of disability (under s.15 Equality Act 2010 (EqA)) succeeds in respect of the performance improvement plan (PIP) for not completing work on time. The other three claims under s.15 EqA are dismissed;
3. The claim for direct disability discrimination is dismissed; and
4. The claims for failures to make reasonable adjustments are dismissed.

REASONS

Introduction

1. The Claimant worked for the Respondent from 15 February 2017 until X's dismissal on 22 August 2022. At all material times, X suffered from a mental impairment which X describes as PTSD and non-organic psychosis.

2. On 5 September and 3 October 2022, the Claimant presented two claim forms to the Tribunal for the same claims, but naming different

respondents. The case was subsequently confined to that advanced against the Respondent.

3. The Respondent conceded that the Claimant satisfied the definition of a disabled person in law at an early stage in the case. The Respondent also accepted that knowledge of the Claimant's disability was conceded.

4. The matter was listed for a five-day hearing to decide liability and remedy. The issues were identified and agreed by the parties during the course of the hearing as being:

Issues

Unfair dismissal

(i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that it was an SOSR, namely an irretrievable breakdown in trust and confidence caused by the Claimant's behaviour.

(ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

(iii) If the Claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604;
b. would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
c. did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

EQA, section 13: direct discrimination because of disability

(iv) It is not in dispute that the respondent dismissed the Claimant.

(v) Was that treatment "*less favourable treatment*", i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on hypothetical comparators.

(vi) If so, was this because of the Claimant's disability?

EQA, section 15: discrimination arising from disability

(vii) Did the following thing(s) arise in consequence of the Claimant's disability:
   a. The need to leave the office spontaneously and without notice at times due to feeling overwhelmed;
   b. Slamming X's glass down and slamming a door / walking out of the meeting on 17 August 2022;
   c. Taking longer to complete work than someone not suffering X's disability;
   d. X's attendance at X's manager's house on 20 August 2022 and X's behaviours whilst there.

(viii) Did the Respondent treat the Claimant unfavourably as follows:
   a. Criticism for leaving the office without notice;
   b. Accusing X of being violent / aggressive in respect of X's conduct in the meeting on 17 August 2022 and suspending X;
   c. Placing X on a PIP in respect of the time taken for X to complete work;
   d. Dismissing X on 22 August 2022.

(ix) Was the reason for why the Respondent treated the Claimant in any of the ways described because of any of the things listed in paragraph (vii)?

(x) If so, has the Respondent shown that the unfavourable treatment / was a proportionate means of achieving a legitimate aim? The Respondent relies on the following as its legitimate aim(s):

   (a) Business and safety requirements. The basic need to be aware of where the employer's employees are at any given time. This includes safety concerns. The reasonable requirement that employees show basic courtesy and manners and are seen by other employees to show these traits.
   (b) Discipline and safety reasons. To maintain a reasonable level of expectations of behaviour within the office and towards other employees. This is to protect and be seen to protect the safety of all employees.
   (c) Business requirements. The respondent has the legitimate aim of having its employees work to an acceptable level and to meet customer timescales. To

place the employee in a position where, previous steps having failed, there is a greater opportunity for the employee to succeed in their work. To allow the employer to closely observe the employee and collaboratively reach solutions.

(d) Protecting the safety of Mr Amphlett, all staff and others.

Reasonable adjustments: EQA, sections 20 & 21

(xi) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

a. Setting deadlines for work done;
b. Requirement to inform a manager if leaving the office spontaneously during the work day;
c. Requirement not to slam glasses and doors and walk out of meetings.

(xii) Did any such PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled at any relevant time, in that:

a. X was placed on a PIP
b. X was suspended.

(xiii) If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage at each material time?

(xiv) If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant; however, it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:

a. Extending the time for the Claimant to complete X's work by 10-50% of that estimated;
b. Not requiring the Claimant to inform anyone if X felt the need to leave the office spontaneously during the work day due to feeling overwhelmed;
c. Overlooking X's behaviour on 17 August 2022 or not overreacting to it

(xv) If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

Procedure

5. The matter was heard by video by a full panel. The panel received written statements and oral evidence from:
   (i) X
   (ii) Karen Donoghue
   (iii) Ian Wright
   (iv) Marvyn Amphlett (X's manager)
   (v) Carl Mannion
   (vi) Bernie Pelster

6. There was an agreed hearing bundle which comprised of 704 pages. The Claimant also advanced various additional documents to be admitted, some of which were accepted by the Tribunal. Part way through Mr Amphlett's evidence, the existence of another disclosable document became apparent and that too was admitted into evidence.

7. The parties were informed not to assume that the tribunal would read every page of the documents provided and to ensure that if a page is not referenced in the statement but the party wanted the tribunal to consider it, they must take the tribunal to it either in cross-examination or closing submissions.

8. It was raised at the outset that it appeared that the Claimant intended to bring a claim for direct disability discrimination in respect of X's dismissal. Miss Bradbury agreed that it was set out in the claim form and confirmed that she and her client were able and ready to deal with that despite it not being recorded in the list of issues agreed at the case management preliminary hearing.

9. On the afternoon of the first day of the hearing, X indicated X's wish to apply to amend X's claim to include claims for "Employment Rights Act bullying". I informed X that X is permitted to apply to amend X's claim at any time but that it has to be for claims that are within the jurisdiction of the tribunal and I explained that a freestanding "bullying" claim did not exist. I also informed X that if X did make an application, it would take time to determine and might lead to the case going part heard, or, if the application was accepted, the Respondent might apply to adjourn the matter if they were not ready to deal with the new claim and that might also lead to the matter going part-heard or postponed. X confirmed that X did not wish to make any further applications to amend.

10. Numbers in square brackets below are references to pages in the agreed hearing bundle unless stated otherwise (using the pdf page number rather than the manuscript number on each page where these differ).

Findings of Fact

11. X was diagnosed with anxiety and depression in 2015 [127]. Page [121-135] indicated that X was referred for mental health support and counselling from 30 September 2019 to 1 July 2020 for PTSD. The report records that X attempted suicide in 2015.

12. In April / May 2020, X was admitted to hospital for over a month under the Mental Health Act, ostensibly for psychosis. X was prescribed Olanzapine but ceased taking it (on X's own accord) by July 2023 [130]. X deleted a work project whilst on sick leave in hospital. The Respondent did not treat the matter as a disciplinary offence because the Claimant was hospitalised at the time [144]. The Respondent arranged a phased return to work for the Claimant and discounted disability-related absences when assessing X's Bradford factor score. It therefore did not discipline X for absence levels that could otherwise have led to capability proceedings.

13. X was discharged from the mental health service on 1 July 2020. In the report it is recorded that in late 2019, X was getting once a week

flashbacks that cause X to zone out "10 mins or until someone taps me" [126]. It was also recorded that X was getting an anxiety state once a week since 2013, during which X's heart races and X is distracted. The record also states that X was suffering fluctuating mood which caused a lack of motivation which lasts a day and that once a week X could not sleep more than 2-4 hours [126-7]. At the point at which X was discharged, X reported improved symptoms [131].

14. The Respondent's Occupational Health (OH) provider produced a report on the Claimant on 22 September 2020 which stated:
    (a) No permanent adjustments were necessary [148];
    (b) That at the time X was under the care of the early intervention team with appointments every 2 weeks and waiting for CBT;
    (c) X was fit for work and can understand right from wrong [149];
    (d) OH recommended a wellness action plan with a mentor [149]; and
    (e) OH stated that in their opinion, X would be 'disabled' under the Equality Act 2010 (EqA).

15. In October 2021, X was diagnosed with unspecified nonorganic psychosis [168] and it was recommended that X would benefit from a Care Coordinator and CPA level of care by a community psychiatric nurse. The report recorded that X's mood was low at this time and X was on antidepressants and anti-psychotics. X was having counselling from a psychologist at the time and was to be seen by Consultant Psychiatrist again in 3-6 months [170].

16. Marvyn Amphlett (MA) became X's manager in April 2021. By 23 March 2022, MA placed X on an informal Performance Improvement Plan (PIP) [221] with four objectives. The objectives to improve were: 1. Attendance at the office every day (not working from home) and that holiday and any medical appointments had to be pre-agreed; 2. To reduce X's use of headphones whilst at work and only listen to music when using headphones; 3. To complete work within agreed timeframes and to an appropriate standard; 4. To coordinate and schedule training plans for cross-team training. The deadline for review was set as 20 April 2022 [222].

17. On 6 April 2022, MA invited X to a formal stage one meeting under the Capability Policy scheduled for 8 April 2022 [240]. The period for achieving the objectives was extended to 6 May 2022 due to a period of annual leave [246].

18. On 24 May 2022, the first-stage formal capability meeting was convened. In respect of the first objective, MA stated X was not attending every day as X should have done. MA stated that X had improved in respect of the second and third objectives and X reported that the fourth objective (the training) had been arranged and was due to proceed. The outcome of the meeting was a written warning on the basis that X's time keeping and attendance at work had not improved adequately. Further objectives were set with a review date four weeks later. The warning was to remain on X's files for six months [263]. In live evidence, I clarified with MA that the reference to time keeping meant attending physically at work on time, not X's delivery of work to deadlines and he agreed that was correct and that there had been an improvement in terms of working to deadlines.

19. The next stage of the PIP started on 30 May 2022, when objectives were set [268]. Despite the reported improvement in X's performance to deadlines and improved quality of work, the plan records that "further evidence to support this progress is required to satisfy this objective" [267]. Weekly review meetings were planned and the plan end date was 27 June 2023 [268-9]. This was later extended to 20 July [310]

20. On 7 June 2022, the Respondent received a letter from X's early intervention team (Tyra Bowe) which referred to X suffering episodes of flashbacks in which X would stare and go blank for up to 30 minutes. It also stated X was undergoing therapy. The specialist suggested that the Respondent should make reasonable adjustments, but she did not specify what they should be [265]. At the end of her letter she invited the Respondent to contact her for any "questions or concerns" [266].

21. On 15 June 2022, Karen Donoghue (KD) replied thanking Tyra Bowe (TB) for her letter [284] and stated she would be in touch if she had any questions [284]. TB replied on 23 June 2022 stating she was looking forward to hearing from KD [283].

22. On 15 July 2022, X raised an informal grievance about equal pay and that X was being asked to do tasks outside X's role [313-4]. There was no mention in this grievance of X's mental health nor that the matters being performance managed were affected by X's mental health [313].

23. On 18 July 2022, there was an informal grievance meeting [317]. The notes suggest that no mental health issues were raised.

24. On 20 July 2022, X raised a formal grievance about the PIP [326-7]. X stated that there were five reasons for work not being delivered within the estimated time. None of X's reasons pertain to X's mental health or any affect it had on X's ability to work to deadlines.

25. Also on 20 July 2022, KD contacted TB again stating she wanted to discuss X's mental health with her [282]. TB replied that day suggesting a time to speak the following week [281]. KD made clear that she was seeking help in how to support X in the PIP process [281] and TB stated she would call KD on the Monday [280].

26. On 22 July 2022, X received the informal grievance outcome as to equal pay and the scope of X's role. X's grievance was not upheld save that it was stated that if X's performance improved in line with the PIP, X would receive a pay increase [330].

27. On 27 July 2022, a formal grievance meeting was held with Ian Wright (IW). During that meeting, X stated (with respect to the process for estimating delivery dates for work) "with my mental health it does not fit with my style I should be given freedom to give estimate for how long I think I will take". X also explained that X felt under pressure from the PIP leading X to use annual leave days to take time off for X's mental health [346].

28. On 2 August 2022, the Respondent wrote to X dismissing X's grievance. The outcome letter noted the discission about the Claimant's mental health deteriorating as a result of the PIP and IW encouraged X to inform X's manager in future when necessary. No one at the Respondent took any action at this stage to suggest any reasonable adjustments to the PIP process, rather the Respondent merely encouraged X to raise the matter again in the future.

29. On 3 August 2022, X appealed the grievance outcome and mentioned reasonable adjustments for mental health stating "this may be in the form of some extra time to complete projects and work items" [350].

30. On 11 August 2022, the grievance appeal meeting was convened with Carl Mannion (CM) as chair. When asked how X's medical condition affects X's ability to complete work on time, X stated: "I might start crying or I could stare into space for a few minutes, at worst it can be quite overwhelming and I need to step away from the desk and take time to calm down" [365]. However, X stated that the accuracy of X's work was not affected by X's condition [366].

31. On 12 August 2022, CM issued the grievance appeal outcome agreeing to a 10% increase on all estimated timescales for X to deliver X's work by as a reasonable adjustment due to X's mental health condition [369].

32. On 15 August 2022, X posted a message on work Teams channel stating "The office blame game with Marvyn Amphlett (09:00-17:30) sick of this" [432]

33. On 17 August 2022, the stage-two capability hearing was held under the formal part of the process [422]. X was informed at the outset that X could be issued with a final written warning. It was clear from the notes that X had not appreciated prior that X was at risk of a final written warning.

34. At the meeting, MA stated objective 1 had been met, namely satisfactory attendance at the office and that X had been able to inform MA when X had sick leave or medical appointments [423]. In the discussion about objective 2 (completing work to deadlines and to an appropriate standard) MA recorded that there had been some improvement but asked X about a particular project that is said to have taken X three times the estimate to complete. X explained that due to X's mental health condition, X is sometimes self and critical and doubts X's ability and this stymies X's ability to finish the work, resulting in frustration and anger and needing to take time off work (which X used annual leave for) [425]. Various other projects were discussed under objective 2 and whilst there was no clear statement that objective was 2 not met, this can be readily inferred from the record of the discussion [425-430]. There was nothing to suggest that the overruns discussed (which occurred before the reasonable adjustment of 10% extra time) had been retrospectively reviewed to see if the 10% would have made a difference. It was recorded that objective 3 was met [430]. As to objective 4, the meeting notes do not record whether it was in fact met but this can be inferred from the discussion. Accordingly, at stage 2 of the formal process, X was only failing to meet Objective 2 (completing work to deadlines and to an appropriate standard).

35. Despite passing three of the four objectives, MA issued X with a final written warning at end of the meeting, orally [431]. The meeting was at times heated and X accepts that X slammed a glass on the table and walked out of the room, slamming the door, before returning to finish the meeting.

36. On 18 August 2022, X C ordered sex doll, vajazzle kit and “bag of dicks” and anonymously sent them to MA. X told a colleague by a message that X had sent them as “a little present for taking me to hr” [418]. However, the managers at the Respondent were not aware of this message until later, after the dismissal.

37. On 19 August 2022, MA wrote to X warning X of X’s recent conduct. MA stated that X was refusing to do work and he also referred to the message on the Teams chat. MA informed X that if X’s behaviour does not improve, it could lead to a formal process for misconduct [432].

38. Also on 19 August 2022, X received the final written warning [420]. X was warned that if there was no improvement within 6-8 weeks, X could be dismissed at a stage 3 hearing [421]. MA reported in his email that when he tried to speak to X by telephone about these matters on 19 August 2022, X hung up the call.

39. X stated in X’s live evidence that X attempted suicide on 19 August 2022.

40. On 20 August 2022, MA received the first parcel sent by X (the sex doll) to his home. The parcel did not have anything on or in it that indicated it came from X. At this stage, MA and the Respondent’s managers were not aware of the message X had sent to a colleague about the parcels. MA did not immediately assume that X had sent it.

41. On the evening of Saturday 20 August 2022, X accepts that X attended the home address of MA, having purchased a bottle of white spirit and travelled there on the train. X stated X believed MA was not home because his car was not on the drive. MA’s neighbours came out of their home and spoke to X when X was outside MA’s property. X explained to the Tribunal that after X spoke to the neighbours, X poured the white spirit away to dispose of it, some way away from MA’s home, across the road. MA was unaware of any of this until the fire service attended at his property and informed him of the matter and washed down a fence panel to remove the white spirit. MA reports that the fence panel was approximately 1m away from his home.

42. MA also stated that he obtained a description of the person who his neighbours had reported and provided a note he had made on his iPhone where he had written down what his neighbours had told him. It stated: “Chubby face and body type. Five foot eight height. Stubble. Dark hair. Black jumper, blue jeans, trainers. Black backpack red seam / stripe… bulging bag. Had some liquid container… asked where to dispose of… called fire and police…”

43. That evening, MA received two phone calls, one at 21:00 hours in which the caller stated: “you’re lucky to have your own home”. MA reported it to the police at 21:02. Then at 23:02, MA received the second call in which

the caller stated: "dead man walking" and hung up. MA reported this too. MA stated that he recognised the voice as X. In evidence, X stated X had no recollection of making any such calls.

44. MA called Nigel Blackbird (NB) late that night to inform him of the events. NB contacted Bernie Pelster (BP) to inform her. BP contacted the facilities department to close / terminate X's access to work premises.

45. BP spoke to MA on Sunday 21 August 2022. MA followed up later with an email of the call. It reported the two telephone calls and the fire department visiting his home, as well as events on 17 and 19 August 2022. There was no mention whatsoever of the parcels [495].

46. BP took legal advice and decided to suspend X. This was communicated to X (in a letter sent by email) at 21:21 on 21 August 2022, giving two reasons, namely that it was suspected that X had:

> "1. Behaved in an aggressive, threatening and violent manner towards your colleagues in the meeting dated 17 August 2022 at which you were issued with a final caution in relation to the Company's formal Capability Procedure; 2. That you behaved in an aggressive and threatening manner as you contacted your line manager, Marvyn Amphlett by telephone on 20th August 2022 and made verbal threats to him about his home and also made the comment "dead man walking" in a later call…".

47. The letter also invited X to attend an investigatory interview meeting the following day (22 August 2022) at 2pm by Teams [497-503]. That evening, BP ensured that staff were informed to work from home the following day, not to come to the office.

48. The letter of suspension made no mention whatsoever of X's visit to MA's home, nor the parcels. When asked about this in her live evidence, BP stated this was because:

> "In the suspension letter I referred to the two situations, the events of 17 August and the phone calls. Part of the reason for that was because at the time, the neighbour had given a description, but Marvyn had not himself seen the person [that attended his property] and I did not know X and I wanted to make sure we were only putting in the suspension things that in our reasonable belief were definite. I was confident Marvyn knew X's voice and others had witnessed the events on 17 August, so that was serious enough to warrant suspension. I left out the visit to Marvyn's house because I wanted to think about it more and get more evidence from the police because at that point they were looking for X and were unable to locate X. When I came into the office on the Monday, I set about how best to do the investigation meeting as well as getting more information about the incident."

49. X replied to the suspension email / letter within 15 minutes, at 21:36. X stated "I do not recall the points outlined in the letter happening, please provide evidence of this happening" [502]. At 08:33 on 22 August 2022, X wrote to KD stating X would not attend the meeting due to "false allegations". However at 08:59, X sent a further email stating X had been advised X needed to attend the meeting. Then at 09:35, X sent a further email to KD requesting that the meeting be delayed by five days to enable

X's representative to attend as a witness (to the events of 17 August 2022). At 12:15 and again at 12:18 on 22 August 2022, X indicated that X's witness was available to attend the meeting at 2pm, not to re-arrange it and asking that the representative / witness be sent the link to the meeting [506].

50. At 13:33 on 22 August 2022, KD sent an email to X which stated that the investigatory meeting had been postponed to enable the Respondent to review the information and take legal advice [505].

51. The next communication between X and the Respondent was the Respondent's letter of dismissal sent by email at 17:29 on 22 August 2022. The letter referred to the meeting of 17 August, the terminated telephone call on 19 August, X's attendance at MA's house on 20 August and the fire brigade attending and the two telephone calls on the evening of 20 August 2022. No mention is made of the parcels. The letter then states:

> "As a result of your very serious behaviour towards Marvyn we do not believe that it would be feasible for you to continue to work in the organisation. This arises out of concerns generally about the safety of both Marvyn and our other employees. We believe therefore there has been an irretrievable breakdown in relations. Whilst it could have been open to the Company to address the issues concerning your conduct that occurred on 17 and 19 August 2022, I can confirm that your dismissal is not because of those events… I can confirm that the Company's decision to terminate your employment is because we do not believe that it is reasonable for you to continue working with your colleagues based on the allegations concerning your behaviour on 20 August 2022. As such, the principal reason for the decision terminate your employment is the irretrievable breakdown in relations arising from your behaviour. We believe your dismissal to be a dismissal for some other substantial reason" [516].

52. X was dismissed without notice effective that day. Hence this date is the effective date of termination.

53. BP was asked by the tribunal what had happened between the 9pm on 21 August (when the Respondent had decided to convene an investigatory hearing for the two matters listed in the suspension letter (above)) and the decision to dismiss X less than 24 hours later for the reasons set out. BP stated that on 22 August 2022:

> "I spoke to Marvyn several times, he was distressed and frightened and we discussed getting CCTV on his home. It was very emotional for him but I was also trying to find investigation chairs. Best practice is that people involved prior do not get involved again in the process, so we asked Nigel to ask another Delivery Lead to do the disciplinary investigation and Nigel to be reserved for a disciplinary hearing. The Delivery Lead expressed deep concern that she may get death threats or her house attacked and Nigel expressed the same fears and said he did not want to be involved. I spoke to HR manager and asked her to do the investigation and I would do the disciplinary, should there be one. She said yes, then she spoke to her husband and changed her mind because she was deeply concerned and they have two small children. I asked the Chief Operations Officer whether if I do the investigation, would he do the disciplinary. He said he was concerned for me because I have two small children too, and he also did not want

to put himself in harm's way. We reasonably believed [X] had tried to set fire to MA's house and threatened him on the telephone saying "dead man walking". I felt as Chief People Officer, I of course have a duty of care to X, but also to others and whilst ideally we would conduct an investigation, with what had happened, everything was so severe, it was just not possible to conduct one. I was worried even just writing the dismissal letter and I was worried of reprisals. But as Chief People Officer, I had to do it"

54. On 23 August 2022, X put up a post on LinkedIn making critical comments about MA and stating X had been unfairly dismissed and discriminated against because of X's mental health. X also detailed MA's home address [518]. The Respondent wrote to X on 23 August 2022 requesting that X remove the post and stating it had been reported to LinkedIn [511].

55. X confirmed in X's live evidence that whilst X was suicidal on 19 August 2022, X did not need or seek any additional mental health support at the time of or around the time of the events and the dismissal. X stated that X went about setting up X's own self-employed business which opened in October 2022.

RELEVANT LEGAL PRINCIPLES

Unfair Dismissal

56. Section 98 Employment Rights Act 1996, states:

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) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

…

(4) Where 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.

57. In cases of ordinary unfair dismissal, where the employee has at least 2 years' service, the Respondent carries burden of proof in showing the sole or principal reason for dismissal. Then there is a neutral burden on whether the dismissal for that reason was fair or unfair in all the circumstances (Boys and Girls Welfare Society v McDonald [1996] IRLR 129).

58. We reminded ourselves that, following Sainsbury's Supermarket Ltd v Hitt [2003] IRLR 23 and Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, the tribunal is not asked to consider what it might regard as fair, but what a reasonable employer might consider in same circumstances. This is known as the "range of reasonable responses" test.

59. In British Leyland (UK) Ltd v Swift 1981 IRLR 91, CA, the Court of Appeal stated:

> 'The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view.'

Reason for dismissal

60. An employment tribunal is not obliged to find that the reason for dismissal was that advanced by either party. In Kuzel v Roche Products Ltd 2008 ICR 799, CA, the Court of Appeal held (at paras 59 and 60):

> 'As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side.'

61. Where the facts of a case fall squarely within one of the section 98(2) ERA reasons, there cannot simultaneously be an SOSR reason, because by definition, SOSR is some *other* substantial reason. In some cases, the reason may appear to fall within one of the section 98(2) ERA reasons, but in fact does not. In Wilson v Post Office [2000] IRLR 834, an employee with a poor absence record (due to genuine ill-health) was dismissed for failure to satisfy the employer's attendance policy. A tribunal found that the reason for dismissal was capability, but the Court of Appeal held that the reason was the employee's failure to meet the requirements of the policy, which was SOSR.

62. In a suitable case the employer may rely upon the breakdown in trust and confidence as SOSR, even where the employee's conduct has contributed towards that breakdown (see for example Ezsias v North Glamorgan NHS Trust [2011] IRLR 550, EAT).

63. In Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11 (25 April 2012, unreported) the EAT, under Langstaff P (as he then was) recognised the dangers for employees in permitting employers to use the SOSR reason when the cause of the breakdown was misconduct by the employee. The EAT held unambiguously that in a loss of trust case, a tribunal can look at the facts behind that loss and whether on all the facts the dismissal was unfair under s 98(4) ERA. At paragraph 38 the President stated:

"as a matter of principle if it were to be open to an employer to conclude that he had no confidence in an employee, and if an Employment Tribunal were as a matter of law precluded from examining how that position came about, it would be open to that employer, at least if he could establish that the reason was genuine, to dismiss for any reason or none in much the same way as he could have done at common law before legislation in 1971 introduced the right not to be unfairly dismissed. Lord Reid in Ridge v Baldwin [1964] AC 60 observed that the law of master and servant was not in doubt; that an employer could dismiss an employee for any reason or none. It was to prevent the injustice of that that the right not to be unfairly dismissed was introduced. The right depends entirely upon the terms of the statute, but there is every good reason, we think, depending upon the particular facts of the case, for a Tribunal to be prepared to consider the whole of the story insofar as it appears relevant and not artificially, as we would see it, be precluded from considering matters that are relevant, or may be relevant, to fairness."

64. In Harvey's on Industrial Relations and Employment law (a leading practitioner's text) it states:

"A tentative suggestion is that the position we seem to have reached is as follows:
(1) Loss of trust should not be resorted to too readily as some form of panacea (*A v B*; *McFarlane*; see also the subsequent decision in *Z v A* UKEAT/0380/13 (9 December 2013, unreported)).
(2) In particular, if there are specific allegations of misconduct the employer should rely primarily on those and be prepared to prove them in the normal way (a point made strongly by the Court of Appeal in *Perkins* in the parallel area of awkward personality).
(3) However, in a strong enough case an allegation of (terminal) loss of trust may come within SOSR and justify dismissal (*Ezsias*, where arguably a vital factor was that the patient interest was suffering because of the dysfunctional nature of the hospital department).
(4) Where this is the case, it may not be enough for the employer to establish merely the fact of that loss of trust because a tribunal may (not must) look into the background to that loss to consider the fairness of the dismissal in the light of all the facts (*Sylvester*)."

Reasonableness of the dismissal

65. Ordinarily, a reasonable process is a requirement of a fair dismissal. However, where there is a complete breakdown in working relations, an employer may be entitled to dismiss the employee without following a procedure, on the basis that a process would be futile. This will only apply in "exceptional" cases. In Gallacher v Abellio Scotrail Ltd EATS 0027/19, the EAT held that this was a rare case where the tribunal was entitled to reach the conclusion that a dismissal procedure could be dispensed with because it was reasonably considered by the employer to be futile in the circumstances. Choudhury P stated (at paragraphs 43-46):

"The fact that no procedure is followed prior to dismissal would in many cases give rise to the conclusion that the dismissal was outside the band of reasonable responses and unfair. Such procedures, including giving the employee an opportunity to make representations before dismissal and to appeal against any

dismissal, are fundamental to notions of natural justice and fairness and it would be an unusual and rare case where an employee would be acting within the band of reasonable responses in dispensing with such procedures altogether… It is well-established but there may be cases, albeit rare, where the procedures may be dispensed with because they are reasonably considered by the employer to be futile in the circumstances. Such a situation is contemplated in *Polkey v Dayton* , where Lord Bridge stated as follows:

> "It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under s.98(4) may be satisfied"

45. In the present case, the Tribunal expressly stated that it did not consider that any procedure would serve any useful purpose: see [254].

46. In fact, the Tribunal went further than merely concluding that the procedure would not serve any useful purpose and went on to state that "if anything it would have worsened the situation ". This Tribunal heard the evidence over a number of days and was well-placed to form views as to the position between the two protagonists at the time of the Claimant's dismissal. Its conclusion that a procedure would have "worsened" the situation was open to it in the rather unusual circumstances of this case."

66. The test is an objective one in that the tribunal must ask whether an employer, acting reasonably, could have made the decision that it would have been futile to follow proper procedures. However, there is no requirement that the employer did in fact consider and make a deliberate choice to dispense with a procedure (Duffy v Yeomans and Partners Ltd 1995 ICR 1, CA).

67. The Acas Code of Practice on Disciplinary and Grievance Procedures only applies to "disciplinary situations". This includes misconduct and poor performance, but specifically excludes dismissals for redundancy or the non-renewal of a fixed-term contract (paragraph 1, Acas Code).

68. In Jefferson (Commercial) LLP v Westgate UKEAT/0128/12 the EAT, Langstaff P presiding, considered the words "Disciplinary situations include misconduct and/or poor performance" in the Acas Code. It considered that "the word 'include' might suggest that misconduct and poor performance is not a conclusive list". However, in this particular case, where the relationship between the parties had irretrievably broken down, the EAT concluded "there is nothing in our view to suggest that the Code of Practice had anything in particular to say in respect of the situation which the tribunal identified here".

69. In Lund v St Edmund's School, Canterbury UKEAT/0514/12, the EAT held that the Acas Code did apply to a dismissal for SOSR in circumstances where the relationship between the parties had broken down due to the fact that the disciplinary procedure had been invoked when conduct issues emerged. It was the fact that disciplinary proceedings had been initiated which was the crucial factor.

70. In Rentplus UK Ltd v Coulson [2022] ICR 1313 EAT, at paragraphs 29 and 30, the EAT cited a different passage from Harvey's and concluded that the Acas Code can apply to SOSR dismissals in certain circumstances:

> "In Phoenix House Ltd v Stockman [2017] ICR 84 , Mitting J suggested Keith J's comments in Lund are obiter and that the Acas Code can never apply to a SOSR dismissal. I share the doubts of the editors of Harvey on Industrial Relations and Employment Law:
>
> > "[1922.01] The Acas Code of Practice No 1 on Disciplinary and Grievance Procedures can apply to a dismissal for 'some other substantial reason' (SOSR), at least where the employee is facing disciplinary measures. At one stage a view gained ground for some reason that it might not be applicable at all to SOSR. This was always highly dubious because the Code itself only excludes two categories of case (redundancy and fixed-term contracts) and so as a simple matter of interpretation it should be applicable to all other categories where there is the necessary culpability/disciplinary connection. In other words, it is a matter of substance, not of the particular category to which the dismissal is ascribed. Subject to one unfortunate aberration, the balance of the case law accepts that. In Lund v St Edmund's School, Canterbury [2013] ICR D26 it was held that there could be an uplift in compensation under TULR(C)A 1992 section 207A in an SOSR case where the employer had not complied with the Code. When the matter arose directly in an SOSR unfair dismissal liability context in Hussain v Jurys Inn Group Ltd UKEAT/283/15 (unreported) 3 February 2016, the Employment Appeal Tribunal considered that the employer had been wrong to assume that the Code did not apply. This was obiter because the decision was that there had been no breach of the Code on the facts anyway, but Lund was considered and the appeal tribunal's view was clearly expressed. Moreover, indirect support is given for this view by the case of Holmes v QinetiQ Ltd [2016] ICR 1016, where it was held that the Lund approach also applies in cases of medical incapability (i e the Code applies if the employee is being disciplined for abuse of sickness procedures, but not in relation to genuine illness/incapacity). However, when the question of the Code's applicability arose again directly in relation to SOSR cases in Phoenix House Ltd v Stockman [2017] ICR 84, a different appeal tribunal held that the Code does not apply to SOSR cases at all. This was in the context of a section 207A uplift of compensation, which was viewed as a penal provision which must be applied strictly, restricting it to misconduct cases per se. It was held that Hussain was wrongly decided. However, (1) this appeal tribunal did not have Simler J's judgment in Holmes before it and (2) the judgment contains some odd comments about the possibility of some parts of the Code being applicable. A decision of the Court of Appeal on this point is clearly now desirable. In the meantime, it is arguable that the weight of authority is against Phoenix House, which itself may be viewed as per incuriam because it was taken in ignorance of the almost contemporaneous decision of the Employment Appeal Tribunal President in Holmes."
>
> 30. If an employer considers that an employee is guilty of misconduct or has rendered poor performance, I incline to the view that the Acas Code is applicable even if it said that dismissal is for SOSR because it resulted from the response of fellow employees to the misconduct or poor performance that had led to a breakdown in working relationships. However, it is not necessary to determine the

point in this appeal. I consider it is clear that the applicability of the Acas Code is a matter of substance rather than form. I do not consider that an employer can sidestep the application of the Acas Code by dressing up a dismissal that results from concerns that an employee is guilty of misconduct, or is rendering poor performance, by pretending that it is for some other reason such as redundancy."

Disability discrimination

71. Section 13 EqA states:

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.

72. This carries a two-stage test: Firstly, a claimant carries the burden of proving (by leading facts form which the tribunal could infer) that they have been treated less favourably than a real or hypothetical comparator was or would have been treated. There must be no material differences between the circumstances of the comparator and employee (s.23 EqA). Secondly, the Claimant carries the burden of proof (i.e. in leading facts from which the tribunal could infer) that the reason for the treatment is because of disability.

73. Lord Nicholls stated in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337 at paragraph 8 that:

"No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."

74. The less favourable treatment must be because of a protected characteristic. This requires the tribunal to consider the reason why the claimant was treated less favourably, i.e. to consider what the respondent's conscious or subconscious reason was.

75. The reverse burden of proof under s.136 EqA applies. In Efobi v Royal Mail Group Ltd [2021] ICR 1263 the Supreme Court confirmed that the two-stage approach identified in relation to the previous anti-discrimination legislation in the cases of Igen v Wong [2005] ICR 931 and Madarassy v Nomura [2007] ICR 867 remained valid under the Equality Act.

76. The discriminatory reason need not be the sole or even principal reason for the less favourable treatment. In Nagarajan v London Regional Transport [1999] ICR 877 Lord Nicholls stated at page 886E-F:

"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain

how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others......If racial grounds.....had a significant influence on the outcome, discrimination was made out."

77. Section 15 EqA states:

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."

78. Simler P in Pnaiser v NHS England [2016] IRLR 170, EAT, (at paragraph 31) set out the following guidance as to the correct approach to a claim under s.15:

> '(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport [1999] IRLR 572…*
>
> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression "arising in consequence of" could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link…

(e) For example, in *Land Registry v Houghton UKEAT/0149/14*, *[2015] All ER (D) 284 (Feb)* a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator…

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."

79. In O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145, [2017] IRLR 547, the Court of Appeal (Underhill LJ) suggested that the test for reasonableness of a dismissal (for an unfair dismissal claim) and the test for whether a decision was proportionate (under the justification defence in s.15 EqA) were similar. He stated (at [53]):

"The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law."

80. However, Sales LJ in City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746 held at [55] that:

"Underhill LJ was addressing his remarks to the particular facts of that case, and was not seeking to lay down any general proposition that the test under s 15(1)(b) EqA and the test for unfair dismissal are the same. No doubt in some fact situations they may have similar effect, as Underhill LJ was prepared to accept in *O'Brien*. But generally the tests are plainly distinct, as emphasised in *Homer [v Chief Constable of West Yorkshire Police [2012] UKSC 15*, *[2012] IRLR 601*]"

81. The focus in a claim under s.15 EqA is on whether the unfavourable treatment, such as dismissal, can be justified as a proportionate means of achieving a legitimate aim. Accordingly, even where there is held to be an

unreasonable / unfair process leading to that conclusion, it does not of itself mean there has been a breach of s.15 EqA. However, in the law of unfair dismissal, an unreasonable procedure is likely to mean the dismissal is unfair even when as a matter of substance, the ultimate decision to dismiss was reasonable.

82. Nevertheless, the process leading to the employer's decision can be relevant under s 15. HHJ Barry Clarke put the point as follows in Department for Work and Pensions v Boyers [2022] EAT 76, [2022] IRLR 741:

> "In… a case involving dismissal, the ET must undertake the balancing exercise required by section 15(1)(b) EqA by focusing on the outcome – the dismissal itself – but it remains open to the ET to weigh in the balance the procedure by which that outcome was achieved. It will be more difficult for a respondent to show that it acted proportionately when dismissing a disabled employee if, as happened in this case, it has led no evidence on how its decision-makers thought their actions would serve the legitimate aims relied upon. It will also be more difficult for a respondent to show that it acted proportionately when dismissing a disabled employee if it has led no evidence on how, as part of the process culminating in dismissal, its decision-makers considered other, less discriminatory, alternatives to dismissal."

83. As to the justification defence, the treatment will be objectively justified if: 1) there is a legitimate aim which is legal and non-discriminatory, and one that represents a real, objective consideration; and 2) the means of achieving that aim is / are proportionate (i.e. appropriate and necessary in all the circumstances). Proportionality will involve an objective balance between the discriminatory effect of the condition, and the reasonable needs of the party who applies the condition.

84. Sections 20 and 21 EqA state:

"**20 Duty to make adjustments**

> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
> (2) The duty comprises the following three requirements.
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage ...

21 Failure to comply with duty

> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person ..."

85. In a claim for failure to make reasonable adjustments, the burden of proof does not pass to the employer until:

(a) The tribunal is satisfied that on the balance of probabilities the claimant was substantially disadvantaged in comparison with a person who does not share the disability. For a disadvantage to be 'substantial', it must be "more than minor or trivial" (s.212(1) EqA).

(b) The claimant or tribunal has suggested an adjustment that it is alleged the employer should have made, in sufficient detail to enable the employer to deal with it. The duty to make reasonable adjustments is on the employer (Cosgrove v Caesar and Howie 2001 IRLR 653, EAT).
(c) There is evidence that is at least capable of leading a tribunal to conclude that the proposed adjustment would be reasonable and would eliminate or reduce the disadvantage.

86. If the burden shifts, the employer then has the opportunity to demonstrate that the proposed adjustment was not reasonable (Project Management Institute v Latif UKEAT/0028/07).

87. When determining if an adjustment is reasonable, the EHRC Employment Code sets out some relevant considerations, such as: the practicability of a step; the type and size of the employer; the financial and other costs of making the adjustment and the extent of any disruption caused; and the extent of the employer's financial or other resources.

88. However, the duty is also subject to an employer's knowledge defence, namely that the employer will not be subject to the duty if they did not know, and could not reasonably have been expected to know that the employee has a disability and was likely to be placed at the disadvantage (sch 8 para 20 EqA 2010).

89. The EHRC Code states (at paragraph 5.21) that if an employer has failed to make a reasonable adjustment which would have prevented or minimised an employee's disadvantage, it will be very difficult for it to show that the treatment was objectively justified for the purposes of a discrimination arising from disability claim under s.15 EqA.

Conclusions

Unfair dismissal

Reason for dismissal

90. In determining what the sole or principal reason for dismissal was, we reminded ourselves that this must be what was in the mind of the decision maker at the time of the decision to dismiss and that the Respondent bears the burden of proving a potentially fair reason. In this case, the Respondent relies on SOSR namely an irretrievable breakdown in trust and confidence caused by the Claimant's behaviour.

91. We noted that BP stated she was the one who recommended dismissal and this was approved by the Board. We considered carefully the evidence she gave as to the reasons for the decision. We noted that BP's answers in live evidence frequently strayed into focusing on the conduct itself, not the existence of a breakdown in trust and confidence resulting from it. For example [emphasis added]:

(i) When asked by the Judge: "did you consider the impact the loss of X's job might have on X?" BP answered "Yes, but weighing up all evidence and seriousness of actions X had taken, in particular having

regard for other employee's safety health and wellbeing, regardless of finances I feel it was the right thing to do.";

(ii) When asked why she did not conduct an investigatory process or ensure one was conducted, BP explained the difficulty in obtaining a chairperson (as above) then commented: "We reasonably believed X had tried to set fire to MA's house and threatened him on the phone saying "dead man walking";

(iii) When asked "what changed between the suspension letter on 21 August, when you felt that the visit to Mr Amphlett's house was not definite enough to include in the letter and needed to be investigated and then dismissing X for it on 22 August?" she stated: "It was not just for that behaviour, it was for the death threats too which are substantial in themselves, it was a Sunday, I had phone call with Marvyn, but that's different from speaking face to face. I was almost in a state of shock that this could happen just because of a PIP and needed time to reflect on it and I did not want to exacerbate a situation if X was escalating.";

(iv) When questioned further about her thought process, BP stated: "I spoke to the solicitor again on the Monday and to Marvyn and then got the information about the prank parcels and the probability that it was X at the house became more likely on balance of probability… there were layers of activity coming from X. I trusted that neighbours gave a correct description and that Marvyn reported X's voice and identified it to me correctly… and there was a link between the comment about being lucky to have a house and the attempt to burn it down, they were thematically linked. These were serious threats of harm";

(v) When asked whether BP took the view that the events of 20 August 2022 were the more serious matters, she stated: "Yes that was the basis of the decision. If the only situation was the events of 17 and 19 August, there would not have been this situation. I don't know what action if any would have been taken but not a SOSR dismissal for that earlier behaviour."

99. When asked why the letter of dismissal did not offer X a right of appeal against the dismissal, BP stated "because it is not required in SOSR dismissals".

98 Accordingly, we find that whilst there was a lost of trust and confidence in X by 22 August 2022, this was solely due to the Respondent's belief that X had committed the behaviours reported between 17 and 20 August 2022 (X's conduct). Therefore, we find that the loss of trust and confidence was an ancillary reason, not the sole or principal reason for the decision. We find that the Respondent seized upon the rubric of "SOSR" following legal advice which led the Respondent to believe that it was lawful to terminate X's employment immediately, without any process, if it purported to dismiss X for this reason. This was convenient / expedient for the Respondent because it proved difficult to find a chairperson to convene an investigatory hearing as set out above and would have led to delays in dismissing the Claimant and would have required an appeal stage as part of a fair process.

However, the reason underlying the loss of confidence and the inability to secure a chairperson was X's alleged conduct. Therefore, we find that the principal (though not the sole) reason for dismissal was a conduct reason.

99 We do not suggest that BP or anyone else was dishonest with the tribunal in stating what the reason was SOSR. However, having heard the evidence, we have reached the conclusion that, as a matter of fact, it was conduct (not SOSR) and that the Respondent simply mislabelled the real principal reason for dismissal.

100 We have considered below whether the outcome of the unfair dismissal claim would have differed if we held that the real reason was SOSR and have concluded that it would not.

Fairness of the dismissal

101 We reminded ourselves that there is a neutral burden of proof in respect of this matter and that we are to judge the Respondent's process and decision on the basis of whether a reasonable employer could have behaved in the same manner and made the same decisions. It is not for us to judge whether *we* think the Respondent behaved reasonably or not. Further, that such decisions and behaviour must be judged on the basis of what the employer knew at the time, as opposed to what it might have learned later.

102 Given our findings on the real principal reason for dismissal, the case of <u>BHS Ltd v Burchell 1978 IRLR 379</u> applies. This requires the tribunal to decide:

(i) Did the Respondent genuinely believe that the employee was guilty of the alleged misconduct?;

(ii) If so, was that belief reasonably formed and maintained?

(iii) At the time the Respondent held its belief, had it carried out an investigation that was reasonable?

103 We remind ourselves of the information that BP had available to her at the time she made the decision to dismiss, which was as follows:

(i) An allegation, made by MA by email and discussed by telephone, that on 17 August 2022, X had slammed the glass during the meeting, walked out of the meeting and slammed the door [495];

(ii) MA's allegation that X had terminated a phone call ("hung up" the phone) on MA on 19 August 2022. She was informed of this in MA's email [495] and possibly discussed this by telephone also;

(iii) That a sex doll had been received at MA's home on Friday 20 August 2022 and a second parcel had been received on Monday 22 August 2022. BP accepted that there was nothing to link the packages to X at this time (they were not aware of the messages X had sent to X's colleague) and the parcels are not mentioned in the email MA sent to BP at [495]. However, BP's evidence was that upon learning of this from MA by telephone, it seemed to fit a pattern of behaviour which led her to conclude that X had sent them and that this conclusion in turn assisted her in being confident that X was the person described by MA's neighbour and that X was guilty of all of the acts alleged;

(iv) MA's recounting to BP orally (by telephone) the description his neighbour had given him. BP did not have any independent evidence from the neighbour, nor did she have MA's iPhone note. She solely had what MA reported to her orally and MA's opinion that the description matched X's appearance. In her live evidence, BP accepted "I did not deal with [X] regularly to know if that matched";

(v) MA's allegation that he had received two threatening calls (with the content described above) and that he recognised the voice as being that of X;

(vi) MA informed BP he had reported the calls and the visit to the police and informed BP that the fire service had attended his house and washed down a fence panel;

(vii) MA's assertion that around the time of the second phone call on 20 August 2022, a car with multiple occupants was outside his home and left after he reported it to the police;

(viii) X had stated in X's email on 21 August 2022, that "I do not recall the points outlined in the letter happening, please provide evidence of this happening." On 22 August 2022, X stated by email that the allegations in the suspension letter (which only included the matters of 17 and 19 August and the phone calls) were "false allegations"; and

(ix) X lived approximately 90 miles from MA's home and did not drive.

104 It should be recalled that BP did not have: the messages X had sent to a colleague (which linked X to the parcels); knowledge of the third parcel; X's full account of matters; any evidence from the police or fire service; any evidence directly from MA's neighbours or any photo of X to be able to assess for herself whether the description given to MA "matched" X or not. In short, she relied entirely on what MA had told her and his opinion as to X's voice and that the description given by the neighbour "matched" X.

105 Based on this, and BP's evidence to the tribunal more generally, during which we deemed her to be a credible witness, we find that she did genuinely believe that X had committed the conduct described.

106 We also find that it was reasonable for her to accept MA's account that he identified X's voice from the phone calls and to conclude that it was X who visited MA's home, due to the neighbour's description and MA telling her be considered it matched X. It was reasonable for BP to trust that MA accurately reported events to her (including the neighbour's description) and that MA was able to recognise X's voice and conclude that the description given by the neighbour matched X. MA was X's line manager and as far as BP was aware, he had no reason to fabricate these matters. Therefore, whilst there was scope for error and there ought to have been an investigation, BP held a genuine and reasonable belief that X had acted in the ways described.

107 However, we find it falls outside the range of reasonable responses that the Respondent took the decision to dismiss X for such serious matters without giving X any opportunity whatsoever to reply to the matters. BP knew that X said X did not recall the events listed in the suspension letter and that they were false allegations. At the bare minimum, the Respondent ought to have given X the chance to comment on *all* of the allegations by some method. As it happened, X was dismissed primarily for very serious allegations not all of which had been specified to X before dismissal.

108 The allegations of attending MA's home appeared for the first time in the dismissal letter. That act, alongside the calls (which were set out in the suspension letter) were jointly described in the dismissal letter as "much more serious allegations" than the events on 17 and 19 August. In the vast majority of conduct situations, a live meeting (face to face or virtually) would be a minimum requirement of fairness of a disciplinary process. We have taken into account the Respondent's difficulty with being able to find a chairperson to do the meeting. We accepted BP's evidence that staff effectively refused to do so. Notwithstanding that, we find it was outside the range of reasonable responses for the Respondent to take the decision to dismiss X without giving X *any* opportunity whatsoever (orally or in writing) to comment on / answer *all* the allegations which were in the Respondent's mind at the time and obtain X's account. X was actively engaging in email correspondence and agreed to meet by Teams. X was willing and able to engage. The Respondent denied X the opportunity to do so.

109 Where allegations are particularly serious (as is the case here) there is an ever greater need to give the individual a chance to comment on them before taking a decision. Therefore, we find that the dismissal was not fair or reasonable because the process was outside the range of reasonable responses.

110 We have considered whether the narrow exception in Polkey and Gallacher applies to the case and have decided that it does not. In Gallacher, the claimant was a senior manager whose continued good working relationship with her manager was critical. The tribunal found not only that a procedure would not have served any useful purpose, but that it would have worsened the situation. The EAT held that this was a conclusion it had been entitled to reach because this was a situation where two senior managers lost trust and confidence in each other due to differing opinions on work related matters. The evidence was that the claimant recognised the breakdown in the relationship and had no interest in repairing it. In these circumstances, the tribunal's conclusion could stand.

111 In **Polkey**, Lord Bridge stated (as set out above) that

"…if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under s.98(4) may be satisfied."

112 BP's evidence to the tribunal was not that an investigation would have been futile. Indeed on 21 August 2022, she felt that certain allegations

were not even clear / certain enough to include in a suspension letter (including X's attendance at MA's home on 20 August) and she took the view that those that were listed in the suspension letter needed investigation, hence why she scheduled a meeting and went to some lengths to secure a chairperson. Had BP conducted an investigation, she would have had X's reply, and might have obtained direct evidence from MA's neighbour, police reports, evidence from the fire service, the colleague's messages with X, a photo of X (to compare to the description) and perhaps some other evidence (X's and MA's phone records etc). We now know what some of those sources of evidence would have revealed. However, at the time, she did not know what they might have revealed. At the time BP took the decision to dismiss without any of this investigation / evidence, she cannot have known what it might show. Therefore, we find that the narrow expectation to the general need to conduct a dismissal process did not apply in this case.

113 Even if we are wrong on the principal reason for dismissal, and it was genuinely principally due to an SOSR (breakdown in trust and confidence) we would still have found that the lack of process was outside the range of reasonable responses and hence that the dismissal was unfair. This is because (in reliance on the cases above) and general principles of fairness and justice, where the basis of the SOSR reason is alleged misconduct which is not irrefutably proven (such as catching an employee red-handed or on CCTV stealing etc, i.e. very narrow exceptional circumstances) fairness requires that the employee be informed of the "charges" and given a reasonable opportunity to reply to them in some way. As stated above, the Respondent did neither. It only informed X of some of the allegations (omitting the most serious) and failed to give X any opportunity to reply to the allegations before it concluded X was guilty and summarily dismissed X. Therefore, irrespective of whether the reason for dismissal was misconduct (as we have found) or SOSR (as argued by the Respondent) we find that the dismissal is unfair.

Polkey and contribution

114 We have already considered Polkey in the context of when a process can be dispensed with altogether yet the dismissal still found to be fair (as above).

115 We now consider the effect of the main rule in Polkey, where the House of Lords stated that the compensatory award may be reduced or limited to reflect the chance that the claimant would have been dismissed in any event (i.e. that any procedural errors accordingly made no difference to the ultimate outcome). Even if the tribunal finds that the outcome would have been the same, this rule does not render the dismissal fair, but it allows the tribunal to assess any compensation according to what might have occurred if a fair process had been followed. In assessing this, the tribunal must consider what the actual employer would have done, not what a hypothetical reasonable employer would have done. This requires consideration of the employer's likely thought processes and the evidence that would have been available to it.

116 Where there has been no disciplinary hearing at all, the relevant question for the tribunal is not whether, if the employer had conducted a

disciplinary hearing, that hearing would have been fair, but whether if there had been a fair disciplinary hearing, the ultimate decision would still have been dismissal (Whitehead v Robertson Partnership [2004] UKEAT/0378/03).

117 According to Wilkinson v Driver and Vehicle Standards Agency [2022] EAT 23, the EAT stated that the task for the tribunal is to identify and consider, on the evidence, what would have happened had there been no unfair dismissal. This requires the tribunal to consider the likelihood (expressed as a probability or chance) that a fair dismissal would nevertheless have resulted. In the context of a dismissal for conduct, the tribunal should consider whether, even if a fair dismissal was a possible outcome, would the employer in fact have dismissed as opposed to imposing some lesser penalty.

118 In the present case, the tribunal asked the Claimant whether X would have given the same answers to the employer as X did to the tribunal if X had been called to an investigatory hearing. X confirmed that X would have done. During the hearing, the Claimant accepted that X attended MA's home with a flammable liquid and stated: "I was nearly going to set his house on fire but there was no attempt to do that".

119 Accordingly, we find that if there had been a fair dismissal process, the employer would have asked X about the key events and at that time X would have given this answer. Had X done so, we have no doubt that the Respondent would have thereafter taken the decision to summarily dismiss X (relying on the narrow exception to the rule in Polkey discussed above).

120 The investigatory meeting was scheduled for 2pm on 22 August 2022. Therefore, we find that had that process been conducted, the Respondent could have fairly dismissed the Claimant on that day in light of the answers given and at that stage it would have been reasonable to have taken the view that a further process was futile, such that the Respondent could and would have lawfully have dismissed the Claimant that day.

121 In any event, even if we are wrong on the Polkey deduction, we have gone on to consider whether there should be a discount for contribution. Under s.123(6) ERA it states:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

122 Given that the Claimant admitted to attending MA's home as stated above, and that X sent the parcels, we find that X did cause the dismissal and that X's contribution to the dismissal was 100%.

Section 13: direct discrimination because of disability

121. The less favourable treatment and "detriment" relied on is the dismissal. It is not in dispute that the Respondent dismissed the Claimant on 22 August 2022 and it is accepted that such a claim is in time.

122. Notwithstanding the fact that we have found the principal reason for dismissal was X's behaviours between 17 and 20 August 2022, we remind ourselves that for direct discrimination, if X's disability was *an* effective cause, it could simultaneously amount to direct discrimination.

123. However, we have found that there is no evidence from which the Tribunal could find that the reason was in any way due to X's disability. In X's own evidence, X stated that X believed the reason for dismissal to be that "with that number of absences recorded prior, this may have been the motivation to single me out and dismiss me with a PIP". We find that this could only ever amount to a claim under s.15 EqA (for something arising in consequence of disability) rather than disability itself. We also find that there is no evidence to suggest that disability itself played a part in the decision. Indeed, prior to the events in question, the Respondent had indicated a reasonably supportive approach to the Claimant's mental health which tends to contraindicate that it would dismiss X for X's disability. Specifically it had: overlooked a prior disciplinary matter (when X deleted a project whilst detained under the Mental Health Act; agreed to discount periods of disability absence from X's sickness record for performance management purposes; agreed to give X 10% extra time on projects; and provided X with the opportunity to have a mentor and other support.

124. Therefore, we do not find that X was treated less favourably than a person who behaved the same way but did not have X's disability. Further, we do not find that the reason for dismissal was in any way because of disability.

Section 15: discrimination arising from disability

125. Under this head of claim, we have determined each act / incident separately.

Criticising the Claimant for leaving the office without notifying management

126. In respect of whether the Respondent criticised the Claimant for leaving the office without notice, we find that the Respondent did include an objective in the PIP that the Claimant must be in the office and must inform management if X had to leave spontaneously. At risk under the PIP were warnings and the possibility of escalation up the stages of the capability process, which could ultimately have resulted in dismissal.

127. There is no statutory definition of "unfavourable treatment". In Williams v Trustees of Swansea University Pension and Assurance Scheme and another [2018] UKSC 65, the Supreme Court stated that the concept of "unfavourable treatment" is broadly analogous to the concepts of disadvantage and detriment found elsewhere in EqA. We find that being placed on a PIP is something that X reasonably considered changed X's position for the worse or put X at a disadvantage. We have reminded ourselves of the concept of detriment under the EHRC Code. We have also

placed reliance on the comments made by CM in the internal process in which he stated "I know from a personal level it [the PIP] feels like it is personal, but it is not designed to put stress and pressure on the individual… The PIP isn't designed to be a punishment" [367].

128. We then went on to consider whether the omission to inform management of leaving the office was something arising in consequence of X's disability. When asked by the Tribunal why X felt unable or did not want to inform X's manager if X had to leave the office unexpectedly, the Claimant answered that X believed X should not have to do so. X stated: "I would say as long as I am available on Teams what is the problem?" and "I did not feel the need to communicate, to tell them I was walking 20 minutes to work home to work. If I am available on Teams then I am working". X also acknowledged that when X's manager asked X to inform him prior to leaving spontaneously, X was able to do so and did, as was recorded in one of the PIP review documents [423]. In an email between X and the Respondent's solicitor at page [554], dated 15 July 2023, X stated "Office attendance should be my decision, at my new place, we decide where we work from. No one decides "what's best" for us… I am an adult, I decide what's best for me."

129. Accordingly, we find that X did not want to inform management of X's decision to leave work spontaneously because X felt it was unnecessary. We do not find that the expectation to do so was "unfavourable". Further, we do not find that anything about the expectation was difficult or problematic for X because of X's disability or any consequences of X's disability. The issue appears to be that X believed it to be unnecessary micro-managing. We considered X's evidence that at times X would need to leave the office because X felt overwhelmed as a result of X's disability, and X was not prevented or impaired from so doing. Nor was X criticised for so doing. However we do not find, based on X's answers set out above, that X's ability to *inform management* was impacted by X's disability.

130. Finally, even if X's omission to inform management of leaving the office was something arising in consequence of disability, we find that requesting that X inform management of X's whereabouts was justified. The Respondent advanced the following relevant legitimate aims:

> "Business and safety requirements. The basic need to be aware of where the employer's employees are at any given time. This includes safety concerns. The reasonable requirement that employees show basic courtesy and manners and are seen by other employees to show these traits.
>
> Discipline and safety reasons. To maintain a reasonable level of expectations of behaviour within the office and towards other employees. This is to protect and be seen to protect the safety of all employees.
>
> Business requirements. The respondent has the legitimate aim of having its employees work to an acceptable level and to meet customer timescales. To place the employee in a position where, previous steps having failed, there is a greater opportunity for the employee to succeed in their work. To allow the employer to closely observe the employee and collaboratively reach solutions."

131. We considered that the first of these (the health and safety need to know where employees are during working hours) was legitimate and important. If the building had to be evacuated for a fire, and X had attended that morning but left without informing anyone, people (firefighters) could risk their lives seeking to evacuate X when X was not there. This is therefore a proportionate request when counterbalanced against the inconvenience of X being required to tell X's manager if X left the office.

Suspension for certain behaviours between 17 and 20 August 2022

132. As to the second claim under s.15 EqA, we firstly consider whether X's actions in slamming a glass down and slamming a door / walking out of the meeting on 17 August 2022 was something arising in consequence of disability. In cross examination, X stated that X's condition does not cause X to get angry or aggressive. There was no medical evidence to suggest this sort of behaviour would be more likely due to X's disability. X also accepted that sometimes X would get angry in response to something, not because it was triggered by X's disability. X described that X was agitated and irritated in the PIP meeting because X felt criticised and was unaware that X was at risk of a final written warning until the meeting. On balance of probabilities, we find that X has not demonstrated facts from which we could conclude that X's behaviours that day were caused by X's disability.

133. Had we found otherwise, we would have found that suspending X for this pending investigation was unfavourable treatment. However, we would have held that it was nonetheless justified because this sort of behaviour can cause alarm and distress to colleagues. Indeed, we heard evidence from MA who explained the impact that the events had on him. The suspension was not just for the behaviour in the meeting on 17 August, but also for the telephone calls on 20 August 2020. Therefore, we find that suspending X to investigate these matters and describing such behaviours as aggressive was justified. We note that X was not suspended immediately on 17 August 2020, or even shortly after. It was not until the telephone calls on 20 August 2020 that the Respondent chose to suspend X. Given the content of the calls and the fact that MA was confident he had recognised X's voice, it was understandable that the Respondent felt it would be inappropriate for X to be working under MA, or at all, either from home or in the office until the matter had been investigated and determined.

PIP for time taken to complete work

134. As to the third claim under s.15, namely placing X on a PIP in respect of the time taken for X to complete work, we firstly had to consider whether X's overruns in the work timetable / schedule was because of something arising in consequence of disability. In this respect, we noted that X suffered "vacant episodes" of up to 30 minutes where X might "zone out" at X's desk at work. Further, X suffered panic attacks and sometimes needed to walk away from work due to the frustration X felt. X also described how X would sometimes need to take half a day's leave to recover from X's frustration and negative ruminating thoughts. Accordingly, we do find that the Claimant's inability to complete work to set deadlines was affected by X's disability and hence a consequence of it.

135. As already found above, we do find that being placed on a PIP, being at risk of warnings (and dismissal) and being given a first and final warning (as X was) is "unfavourable".

136. We then had to consider whether it was justified to place X on a PIP in respect of this specific objective / criterion or at all.

137. We reminded ourselves of the following guidance form the EHRC Code:

> ### Relevance of reasonable adjustments
>
> 5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (see Chapter 6).
>
> 5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.

138. We find that overall, the PIP was justified up to a point, because there were four objectives not being met and not all of them were related to or caused by disability. The Respondent has a right to performance manage its staff to encourage what they deem to be the appropriate standard of work. Further, until 3 August 2022 [250], the Respondent cannot reasonably have been expected to have known that X needed extra time on projects due to X's disability. On this date, the Respondent learned of this need and agreed to make a reasonable adjustment shortly after. In doing so, the Respondent appears to accept that there was a legitimate need for extra time and that it was linked to disability and that it was reasonable to give X an extra 10% on all deadlines to assist X. However, given the link between reasonable adjustments claims and s.15 claims, we do not find that continuation of the PIP in respect of this objective / criterion was reasonable after the grievance appeal outcome. Nor do we find that imposing a final written warning on X partly in respect of X's failures to have delivered projects on time at a time when X had not yet been given the 10% adjustment was justified.

139. In short, as stated above, during the stage-two capability meeting, MA noted that X had met three of the four objectives. Therefore, when MA imposed the warning and continued the PIP, he did so based on a criterion that was related to disability and this was at a time he knew that X was entitled to and had been granted 10% extra time on *all* projects. MA did not retrospectively re-assess whether, allowing 10% extra time across all projects, X might have delivered the few that were out of time, on time. He nonetheless disciplined X by way of a final written warning.

140. From the point at which the Respondent was aware of the substantial disadvantage faced by the X in working to the deadlines set, it should have ensured that any capability management for delivering work on time had regard to the need for an adjustment and that there was an adjustment which had been made which was reasonable. This could have taken the form of starting to assess delivery to timescales only after

the 10% buffer had been introduced (and ignoring past results). Alternatively, it could have been achieved by factoring in what X's past performance would have been if X had been given that adjustment at the time. However, the failure to take it into account at all leads to the conclusion that continuation of the PIP and imposition of a final written warning was not justified. It did pursue a legitimate aim but it was not a proportionate or necessary method of achieving it because there were reasonable adjustments that should have been factored in that were not. There were less discriminatory ways of achieving the legitimate aims.

141. Accordingly, X's claim succeeds under s.15 in respect of the performance management after 11 August 2022, for not delivering work to deadlines.

Dismissal

142. As to the final claim under s.15, X maintains that it was discriminatory to dismiss X.

143. We firstly considered whether the behaviours for which X was dismissed arose in consequence of X's disability. We recall that X described that X had "looping thoughts", stress and was suicidal on and around 19 August 2022. We also note that X's behaviours were escalating from ordering prank parcels on 18 August, hanging up the call with MA on 19 August, the suicide attempt on 19 August and the behaviours on 20 August. We also note that X stated at the time (and maintains) X had no recollection of making the telephone calls. However, X has and does accept that X attended MA's home. We consider X's denial of recalling the calls is therefore a sincere denial (I.e. if X was trying to exculpate X, X would deny the more serious act also). Accordingly, we find there is evidence to demonstrate that X's actions (for which X was dismissed) arose in consequence of X's disability. On balance of probabilities, whilst there is no medical evidence, we find that the factual evidence indicates that X was suffering the effects of X's disability at this time in a more acute way that affected X's judgment and behaviour.

144. We have no hesitation in finding that the act of dismissal is "unfavourable".

145. We remind ourselves that unlike a claim for unfair dismissal, which requires the Tribunal to assess whether the Respondent's decision was reasonable based on the information available to it at the time, objective justification is not so limited. The Tribunal is permitted to consider whether, objectively, the dismissal was in fact justified (not whether the employer reasonably believed it to be so) and can have regard to all relevant material advanced at the hearing.

146. We consider that many of the factors relevant in determining whether dismissal is justified cross over with those that are relevant to whether it was fair or not (under the unfair dismissal claim), but as stated, the tests are different.

147. The legitimate aim advanced is safety and protecting staff from the risk of harm. Of course, employers have a duty of care to all staff. We accept that this aim is legitimate and it corresponds to the act of dismissing

X (who was seen as posing a threat to those aims). Considering the nature of X's actions that led to dismissal, for the same reasons we find that the Respondent could have lawfully dismissed X on 22 August 2022 (but for the procedural irregularities rendering the dismissal unfair) we also find that dismissal was a proportionate response. There was no less discriminatory way to achieve the aim given the nature of the acts. It would not have been appropriate to have X working from home, or reassigned to another manager or role. MA would have continued to be fearful for his wellbeing and property and the Respondent might reasonably fear that X could behave in similar ways to any manager that needed to address performance issues in the future.

148. Therefore, we find that the decision to dismiss X was justified and is not unlawful discrimination under s.15 EqA.

Reasonable adjustments claims: EQA, sections 20 & 21

149. We can deal with these final three claims rather more shortly because many of the relevant findings have already been made above.

Setting deadlines for work

150. For the same reasons and on the same evidence that we find that X's inability to comply with deadlines was something arising in consequence of disability, we find that it was a PCP that placed X at a substantial disadvantage. In short, the Respondent operates deadlines (as we would expect) so that customers can plan their business activities. This is perfectly reasonable and necessary. This requirement placed X at a specific deadline for pieces of work. X was substantially disadvantaged (i.e. suffered a disadvantage that was more than minor or trivial) in complying with deadlines than non-disabled people or people without the effects of X's disability. X's disability caused X to lose time in the ways described above. The disadvantage was being performance managed on a PIP and receiving warnings. Therefore, the duty to make adjustments is/was triggered.

151. We have then considered whether the Respondent can show that it did not know and cannot reasonably have been expected to know that X suffered the disadvantage (the Respondent having already accepted it knew of X's disability). We recall the comments made by X on 27 July 2022 (in the grievance meeting at [346]) and on 3 August 2022 (in the grievance appeal at [350]) and find that from that date, the Respondent knew or ought to have known that X was placed at the substantial disadvantage by the PCP. The Respondent convened the appeal hearing on 11 August 2022 and granted an adjustment (of a 10% buffer) shortly after. Accordingly, we find that around the time that the Respondent was under the duty to make an adjustment, it did so. We do not find that a 50% adjustment would have been reasonable, because that would essentially entail the Respondent paying double pay for the same work it would expect within a timeframe and/or having to engage another employee to ensure the rest of the work was done in time.

152. Therefore, this claim is not upheld because the Respondent did make a reasonable adjustment at the appropriate time.

Requirement to inform a manager if leaving the office spontaneously during the work day

153. As found above, we find that the Respondent did require / request that employees inform management if they needed to leave work premises spontaneously. Accordingly, we find that this was a PCP.

154. We accept that X felt this was disadvantageous in that X felt it was an unnecessary degree of monitoring. However, as stated above, we do not find that X's displeasure with this requirement was in any way linked to X's disability. It was a personal belief / preference. Accordingly, we do not find that X was placed at a disadvantage in comparison to people not suffering X's disabilities. Further, any disadvantage is minor or trivial. Therefore, this claim is not upheld.

Requirement not to slam glasses and doors and walk out of meetings.

155. We find that the Respondent did operate a PCP that this sort of behaviour is not tolerated. This is the basis of suspending X and part of the legitimate aims advanced.

156. For the same reasons and based on the same evidence that we held above that X's behaviour in this meeting was not a consequence of X's disability, we find that suspending X for it is not a substantial disadvantage in comparison to those without X's disability. In short, X did not find it harder to avoid such behaviour because of X's disability and hence X was not placed at a disadvantage which a non-disabled person would not have suffered.

157. Further and in any event, we find that the Respondent did not know and cannot have been expected to have known that there was any link between X's behaviour on 17 August and X's mental health such as to have knowledge of the substantial disadvantage. The Respondent reasonably believed that X's response on 17 August 2022 was an act of simple anger / irritation, not one caused or affected by X's disability. Accordingly, this claim is not upheld.

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Employment Judge Dobbie

____

Date 18 September 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

26 February 2024

FOR EMPLOYMENT TRIBUNALS