EMPLOYMENT TRIBUNALS

Claimant: Martyn Sterry

Respondent: Newspace Containers Ltd Lydney

Heard at: in person in the Bristol Tribunal **On:** 13 – 15 May 2024

Before: Employment Judge Woodhead
Ms C Monaghan
Ms G Mayo

Appearances

For the Claimant: in person

For the Respondent: Mrs J Barton (HR Business Partner)

JUDGMENT

1. The unanimous judgment of the Employment Tribunal is as follows:

   1.1 The complaint of unfair dismissal is not well founded and is dismissed.

   1.2 The complaints of unfavourable treatment because of something arising in consequence of disability are not well-founded and are dismissed.

   1.3 The complaints of failure to make reasonable adjustments for disability are not well-founded and are dismissed.

REASONS

2. Judgment was given with oral reasons at the conclusion of the hearing on 15 May 2024. Having heard the judgment and reasons the Claimant was clear that he wanted full written reasons and so those written reasons are being issued at the same time as the written judgment.

THE ISSUES

3. The Claimant was employed by the Respondent from 8 July 2019 until his employment was summarily terminated on 10 February 2023. His last role at the company was as SAP Administrator in the Stores area.

4. Early conciliation through ACAS commenced on 5 March 2023 and a certificate of early conciliation was issued on 23 March 2023. The Claimant presented his claim on 28 March 2023.

5. At a hearing on 18 January 2024 it was found that the Claimant was disabled pursuant to the Equality Act 2010 because of type II diabetes, depression and anxiety.

6. The Claimant accepts that he was dismissed because of his conduct towards a colleague on 20 January 2023 but says, amongst other things, that his health conditions were not taken into account as he says they should have been. The Claimant brings claims of unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments.

THE HEARING

7. This claim was listed for a hearing of four days. Unfortunately the Tribunal service had to limit this hearing time to three days.

8. A Preliminary Hearing for case management was held on 5 October 2023 at which a list of issues ("**the LOI**") was agreed and directions set for this full merits hearing in case management orders (the "**CMO's**").

9. At the start of this hearing the parties confirmed that the LOI properly represented the matters that we needed to decide for them. The LOI is reproduced in the appendix to this document. At the start of the hearing the Respondent confirmed its justification defence to the arising from disability claim and that is recorded in the LOI.

10. At the start of this hearing:

    10.1 We explained the normal sitting day and asked if anyone participating needed any adjustments. No adjustments were raised. We made clear that anyone could ask for a break if they needed it.

    10.2 We explained the normal Tribunal hearing process (including cross examination, re-examination, tribunal questions, submissions and deliberation) and made clear that the parties could ask questions at any time if they were unclear on what was expected. Both parties confirmed that they had prepared their questions for cross examination.

    10.3 We explained the importance of the LOI as defining the matters that we would be asked to determine and therefore the focus that the parties should put on those issues in cross examination;

    10.4 We explained the need for the parties to challenge the other party on things that they say which are relevant to the LOI and which are disputed.

    10.5 We explained that if a party conducting their cross examination (Party A) does not challenge witnesses for the other party (Party B) on a point that is in dispute or which is material to Party A's case then the Tribunal is entitled

to accept the evidence of Party B (take it at face value) on that point and that could affect the ability of Party A to establish their own case.

10.6 We discussed the hearing timetable (and we kept this under review as the hearing progressed). In the event the time available for cross examination for each party did not need to be guillotined.

11. We were provided with:

11.1 a bundle of documents totalling 362 pages;

11.2 an agreed chronology and cast list; and

11.3 the Claimant's witness statement (this was very short and totalled only 2 pages);

11.4 witness statements for the Respondent's witnesses who were:

11.4.1 **Mrs J Barton** (HR Business Partner);

11.4.2 **Mr N Carroll** (Materials Manager and the Claimant's line manager);

11.4.3 **Mr W Wilkinson** (Health and Safety Manager and the disciplinary investigation manager);

11.4.4 **Mr W Elliott** (Commercial Director and the dismissing manager) and

11.4.5 **Mr K Heard** (Technical Director and the dismissal appeal hearing manager).

12. The Respondent's witness statements totalled approximately 36 pages.

13. In this judgement references to page numbers in the bundle are included in parenthesis. References to paragraphs in the witness statements use the witnesses' initials, the letters 'WS' and then the paragraph number).

14. The CMOs provided (para 33 - 35 page 85):

> "33. *The claimant and the respondent must prepare witness statements for use at the hearing. Every person who is going to be a witness at the hearing, including the claimant, must produce a witness statement.*
>
> *34. A witness statement is a document containing everything relevant to the issues that the witness wants to tell the Tribunal. Witnesses will not be allowed to add to their statements unless the Tribunal agrees.*
>
> *35. Witness statements should be typed if possible. They must have paragraph numbers and page numbers. They must set out events in the order they happened. The witness statement should refer to the documents in the Hearing Bundle that the party relies on and give the page number of the document in the Hearing Bundle. The statement must address each of the allegations detailed in the list of issues below and set out any financial losses and any other remedy the claimant is seeking*."

15. The Claimant's witness statement did not set out the basis for his claim in any detail and did not comply with the CMOs. After discussing this with the parties we agreed that the Claimant's evidence, contrary to the indication in the CMOs, should give evidence first and we would ask him to explain the key points in the LOI. We did this with open questions based on the LOI. Owing to the fact that this took up hearing time which should not have been needed (had the Claimant's witness statement fully explained his evidence) we explained that we considered it fair to reduce the time available to the Claimant to cross examine the Respondent's witnesses. In the event we did not have to curtail the Claimant's cross examination.

16. We also gave the Claimant the opportunity to comment on the Respondent's justification defence to his arising from disability discrimination claim (that defence not having been specified until the start of the hearing).

17. We gave the Respondent time to consider what the Claimant had said over night after the first day.

18. We made clear that the Claimant would need to be focused in his preparation in the evening after the first day on his questions for the Respondent's witnesses.

19. On the second day of the hearing (14 May 2023) the Claimant's evidence was concluded just before lunch and we started to hear the Respondent's evidence which concluded by 16:15.

20. The parties said that they felt that the guidance that we had given them in respect of how to focus cross examination had been helpful.

21. We warned witnesses not to speak about the case while they remained under oath during breaks in the hearing.

22. At the end of the second day we took some time to explain to the parties that they had the opportunity to make submissions the following morning.

23. The Claimant said that he felt that we had taken detailed notes and listened to what had been said and that he did not have anything else that he wanted to say.

24. The Respondents did want to sum up their case and, on that basis, we agreed that we would reconvene at 10 am the following morning so that the Respondent could make their submissions and the Claimant could reply and/or make his own submissions.

25. Both parties had case authorities (in the case of the Claimant a first instance decision) that they wanted us to take into account. The Respondent had helpfully printed copies of each case that they passed up to us. They both said that they would speak to us about those authorities the following morning. The cases were:

    25.1 Respondent - **Philip McQueen v General Optical Council: [2023] EAT 36**

    25.2 Claimant – **Mr P Dytkowski v Brand PB Ltd** – first instance decision of the Employment Tribunals from a hearing on 21-23 June 2020 (2402856/2019)

26. We explained that ideally we would provide a verbal decision to the parties but the paramount importance was that we reach the right decision and that would take as much time as that needed.

27. We explained that we would try to give the parties an indication as to whether we thought that would be achievable before the end of the day, during the day on 15 May 2023 .

28. We explained that if verbal reasons were given for the decision then only a short judgment giving the outcome in the case would be produced by the tribunal and that would go on the Employment Tribunals website which is available to the public.

29. We said that parties are entitled to ask for the full written reasons. Those reasons would also go on the Employment Tribunal decisions website. Sometimes parties do not want written reasons to be available to the public on that website. This was not to deter the parties from asking for full written reasons, as is their right, but simply to explain the consequences.

30. We thanked the parties for the way they had conducted themselves in the hearing. Although it had been understandably tense at times, the parties had been respectful of each other. The Respondent, for example, had acknowledged the value that the Claimant had added to their business and the unfortunate nature of the situation that had arisen. The Claimant, to his credit, also thanked Mrs Barton for the work that she had done in the disciplinary process that she had run. He was sorry for the work he had caused her.

31. On the third and final day of the hearing we heard submissions from the parties and consulted with them on whether it would be possible to give them an oral decision (if we had time to make that decision) at the end of the day and how late they could be available. We explained the delays that can arise if a reserved written judgment is given.

32. We heard the parties' closing submissions from 10 am until after 11 am. We then deliberated and kept the parties up-to-date on our progress indicating to them at 2pm that we hoped to be in a position to give them oral judgement at 16:30. In the event we gave judgement between around 16:15 and 17:15.

33. As referenced above, the Claimant said that he wanted written reasons because he intended to appeal and because he did not think that he had put forward the evidence that he should have done. We made clear that we made the decision based on the evidence before us, and suggested that the Claimant might want to take advice on the basis on which he could appeal or ask for reconsideration.

FINDINGS OF FACT

34. Having considered all the evidence, we find the following facts on a balance of probabilities.

35. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are

relevant to the legal issues.

36. The Respondent is a designer and manufacturer of portable accommodation and modular buildings. It is a relatively small employer which at the time of the events in question had around 147 employees. We were told that it now has fewer employees. It has only more recently recruited Mrs Barton as a specialist HR Business Partner and she has been putting in place better HR processes.

37. The Respondent's disciplinary policy provides, amongst other things (161):

> *DISCIPLINARY PROCEDURE AND ACTION*
>
> *The primary objective of the Company's Disciplinary Procedure is to ensure that all disciplinary matters are dealt with fairly and consistently and, where there has been a breach of discipline, to encourage an improvement in individual conduct or performance.*
>
> *Disciplinary Procedure*
>
> *In all cases the Company will first investigate all allegations of potential disciplinary offences to establish the facts before deciding whether to invoke the Disciplinary Procedure.*
>
> *It may be necessary for the Company to suspend the employee whilst an investigation is taking place. Any suspension will be kept to a minimum and will be on full pay. Suspension does not in itself constitute disciplinary action.*
>
> *Where the Company decides to invoke the Disciplinary Procedure, it will write to the employee, setting out the basis and grounds for potential disciplinary action and inviting the employee to a disciplinary meeting. The Company will give the employee reasonable notice of the requirement to attend the meeting to allow the employee to prepare his or her case.*
>
> *Employees are entitled to be accompanied by a fellow employee or by a trade union official at the disciplinary meeting, the Company encourages employees to make use of this entitlement.*
>
> *The Company will give the employee the opportunity to state his or her case at the disciplinary meeting before it decides whether or not to take any disciplinary action.*
>
> *Following the disciplinary meeting, the Company may take disciplinary action against the employee. In any event, the employee will be informed of the outcome of the meeting as soon as possible.*
>
> *Employees have the right to appeal against any disciplinary action taken against them, or in the event of their dismissal, in accordance with the Disciplinary and Dismissal Appeals Procedure.*
>
> *Disciplinary Action*

The severity of the disciplinary action, if any, will be determined by the severity of the offence. For relatively minor first offences the Company will normally impose a Verbal Warning. If the employee persists with the offence in question, the Company may, having followed the Disciplinary Procedure in each instance, apply a Written Warning followed by Final Written Warning and eventually dismiss the employee.

For more severe first offences the Company may apply a Written Warning or Final Written Warning if appropriate. In cases of gross misconduct the Company will normally dismiss the employee summarily, i.e., without notice.

[…]

Dismissal: *at its complete discretion and in appropriate circumstances, to take 'action short of dismissal which may include demotion, transfer to a different post or another appropriate sanction. The employee is dismissed either with or without notice. Dismissal without notice is referred to as "summary dismissal" and is normally restricted to cases of gross misconduct.*

[…]

Gross Misconduct (167)

Set out below are examples of behaviour which the Company treats as gross misconduct. Such behaviour may result in dismissal without notice. This list is not exhaustive.

[…]

• assault, acts of violence or aggression

• unacceptable use of obscene or abusive language

38. The Claimant started employment with the Respondent as a Container Fabricator and then subsequently became a SAP Administrator in early 2021.

39. The Claimant's pre-employment medical questionnaire dated 08 July 2019 (329) made clear that he had had two periods of absence totalling 25 days in the previous three years and that he was taking the medication ramipril (blood pressure), fluoxetine (antidepressant) and antibiotics. He said that he did not have any illness or medical condition that might affect his ability to perform his duties and that he did not consider himself to have a disability.

40. The Claimant was issued with pairs of safety footwear on 02.09.2020 (302), 16.04.2021 (303) and 01.10.2021 (304).

41. In November 2021 the Respondent reviewed the expenditure it was incurring on safety footware (306). An email to the Claimant in respect of boots for another employee (Clive) records on 2 November 2021 a buyer employed by the Respondent (Mr O Grey) saying to the Claimant (305):

> "*Clive - yes order him boots, price to be lower- wayne has agreed that we are going to review all boots and prices to be drastically cut along with range of available options, cant have people having whatever they fancy. Would be like 8 styles to choose from and that's it, similar to how we had it*."

42. In October 2021 the Claimant applied for the position of chargehand but was unsuccessful (278). The Claimant resented this and raised it a year later in a meeting with Mr Carroll on 15 December 2022 to discuss an occupational health (OH) report (277-278 and NCWS 1.2). He made clear in December 2022 that it frustrated him and he could not let it lie.

43. In September 2022 the Claimant had an annual OH consultation which generated a Health Surveillance Certificate on 7 September 2022 (252). The certificate does not reference poor mental health or diabetes. However the OH questionnaire (330) prepared at the time:

    43.1 references the Claimant's diabetes and stress/anxiety/depression medication (metformin tablets and fluoxetine respectively); and

    43.2 indicates that the Claimant had not seen his GP or specialist for a year.

44. The questionnaire does not mention a problem with the Claimant's safety shoes or with control of his diabetes or mental health. In any event, the detail on the questionnaire was not issued to the Respondent at the time and only came to the Respondent's hands as part of the preliminary hearing to determine disability.

Safety shoe replacement request

45. We accept Mr Carroll's undisputed evidence that in October 2022 the Claimant asked about ordering an expensive pair of safety shoes that were above the company limit. Mr Carroll advised him that he knew they were too expensive, and that he could not order them.

46. We accept Mr Wilkinson's summary of the sequence of events in respect of ordering a replacement pair of safety shoes (322-323):

> *On 9th November 2022, Mark Remnant from the Purchasing team came to see me and informed me that he had received an email request from Newspace Stores to order a pair of Timberland Disruptor Chukka boots for Martyn Sterry and as the cost of the footwear was £108.12 +Vat, he wanted to check if its was ok to order these.*
>
> *I told Mark that as the footwear was significantly outside our normal price range I could not authorise this as I had already had a discussion with our MD, Paul Scott and agreed that we would be setting a maximum value of £60 for safety footwear in normal circumstances. I told Mark that I would be issuing a communication regarding this to all department managers.*
>
> *I had a verbal communication with Nathan Carroll on the same day to*

> *discuss Martyn Sterry's request, Nathan informed me that he had not been initially made aware of the footwear request to Purchasing and that Martyn had asked Robbie Payne, the stores assistant to email the request. I informed Nathan that the footwear had not been authorised and that I would be putting out a communication regarding safety footwear requests. Nathan told me that Martyn had informed him that he had requested the footwear because of his diabetes.*
>
> *On 10th November 2022, Martyn Sterry emailed Purchasing asking them to confirm if his footwear request had been turned down.*
>
> *Also on 10th November 2022, I emailed a communication to all department managers, supervisors and chargehands clarifying that the company would provide safety footwear up to the value of £60 and that requests above this value would not be ordered except in the cases of advice from our occupational health provider.*

47. We note here that on 10 November 2022 Mrs Barton sent an email to Claire Hughes (the Respondent's OH adviser) as follows (253) "*I am looking into a situation relating to the above and wonder if you know any suppliers who provide health and safety boots specifically intended for people with diabetes? I have done some research and found a couple but thought you may have come across this before.*".

48. Mr Wilkinson's summary, which we accept, goes on:

> *On 11th November 2022, Martyn Sterry came to see me to ask why his request had been refused; I explained what the company policy was on safety footwear and that exceptions would only be made following advice from occupational health. Martyn told me that he had requested the Timberland Disruptor boots as he felt that they would be suitable for his foot condition due to his Diabetes. He also informed me that his current footwear was not suitable for his condition and that he needed the boots that he had requested as they were leather and breathable and he had read online that these aspects were what he required. I told Martyn that I had not previously been made aware that he suffered from Diabetes, or that he was having problems with his feet due to his condition, I did also ask him why he had ordered two pairs of his current footwear the previous year if they were not suitable for his condition, he could not give me a reason for this, although he reiterated that he felt that the footwear he required needed to be leather as it was a natural material*
>
> *I informed Martin that we would be putting a range of safety footwear that employees could choose from in the coming days and that exceptions to this range would only be made if the occupational health provider recommended safety footwear with specific characteristics for individuals.*

49. On 15 November 2022 Mrs Barton wrote a letter to the Claimant (254) with respect to consent to his referral to OH. The same day Mrs Barton also then sent a further email and formal referral form to Claire Hughes (255-258). That referral

said:

> *Martyn has worked at the Company since 8 July 2019 and suffers from diabetes. Martyn rarely takes time off work, and his attendance is good. Martyn has requested this referral due to an issue relating to safety boots as Martyn had ordered a particular style of safety boot, Disruptor Chukka with Dynamic Anti-fatigue footbed which was expensive in relation to the cap the company allows for safety boots. The company allow a maximum of £60 (true value being £80 as the company receive 20% discount). Martyn has been advised that this boot is too expensive, and Martyn advised that he advised his line manager, before he ordered the boot, that the reason ordering this particular boot relates to his diabetes. The company is aware that people suffering from diabetes need to ensure they wear shoes which are comfortable and well-fitted, and 1 would like to understand how the Company can support Martyn to ensure he has appropriate footwear. I believe there may be a range of safety work boots which are intended for sufferers of diabetes, and it would be extremely helpful to understand if the boot referred to above is the best work boot to support Martyn's condition or whether you have any recommendations relating to appropriate safety boots.*

50. Mr Wilkinson's summary, which we accept, went on:

> *On 25th November 2022, Martyn Sterry emailed me to advise that Claire Hughes (Occupational Health Nurse) had told him that Elten Maddox safety trainers had been recommended to her for people like himself. He sent me a link to these footwear on the Arco website.*
>
> *As I received his email on a Friday afternoon, I did not get an opportunity to discuss this with Martyn until the following Monday.*
>
> *On Monday 28th November 2022, I received an email from Jane Barton forwarding an email from Claire Hughes, saying that she had attached a link to Martyn's OH report to trainers that had been used by diabetics in another company which were found to be comfortable, Claire had said that the trainers were just over £100.*
>
> *I then went online to look at the product data sheet of the Elten Maddox safety trainers to determine what the aspects of the footwear were that would prove to be suitable for Martyn. I immediately found the trainers for sale at an online retailer for under £60.*
>
> *On reviewing the data sheet, I could see that the footwear was made with a synthetic upper which Martyn had already informed me was not suitable for his condition, the one benefit that I could see was that the sole of the shoe cushioned impact and returned energy to the wearer. I did note that the footwear safety toe cap was made from steel, I felt that a composite toe cap would probably be better for Martyn as they are much lighter, thus less fatigue on the feet.*
>
> *Later that morning Martyn [**We note that this was on 29 November***

> ***2022 see WWWS12****] came to see me and asked if I had received his email about the shoes Claire had recommended, I told him that I had and that I had looked at the footwear, I told him that I had seen the shoes for sale at under the company limit of £60, but that I felt that there may be better options available that would meet the needs of his condition.*
>
> *Martyn and I then looked at various different footwear, settling on Albatross Vigour Impulse Low safety trainers, this footwear had an upper made of leather, were breathable, had a composite toe cap and midsole, had an anatomically formed footbed, and the sole of the shoe cushioned impacts and returned energy to the wearer. The price of the shoe was £72.50, which was over the company maximum spend, but justified given the concerns Martyn had raised.*
>
> *Martyn was happy to try these shoes on the basis that if they proved to be unsuitable, we would look at options again.*
>
> *The shoes were due to be delivered the following day on 29th November 2022, I spoke to Martyn a couple of days later to ask him how he was getting on with the footwear and he informed me that they were 'rubbing a little bit' and we had a talk about that could be expected with any new shoes until they wore in. I told him to let me know if he had any further problems. Martyn did not report any further issues with his footwear to me until I interviewed him as part of a disciplinary investigation on 26th January 2023*

51. On 29 November 2022 Ms Hughes at the Respondent's independent OH service sent an email to Mrs Barton (273) saying (report at 268-269):

> *My appointment with Martyn went well, there is some definite rubbing on his right foot and it did seem to align with where the top of the metal cap came on his work boot. I did a thorough examination of both feet and they were in good order, apart from the swelling.*
>
> *However, the majority of our discussion focused on his mental health problems. He gave a long-standing history of problems going back as far as early childhood. His report reflects his account and he requested that it was added. Jane - I am in no doubt that he does have some deep-rooted behaviour tendencies outside of the normal spectrum but with no formal diagnosis. So, for me his 'obstinance' in wanting more expensive work boots than the company's allowance is two-pronged - his traits and his diabetes.*
>
> *I included the link from a recent recommendation - the employee himself told me they were extremely comfortable so I am afraid this is the best I can offer.*

52. The next day, 30 November 2022, Mrs Barton sent an email to Mr Wilkinson and Mr Carroll reporting what OH had said in respect of his foot (274). The Claimant did not want others to know about his state of mental health (JBWS10):

> *I have received the report from OH following Martyn's appointment and I*

have provided info regarding the workboots below. Claire has added a link to boots that she has been recommended and Martyn advised that these were very comfortable. Extract from report below:

He is a long-term type 2 diabetic with good control through oral medication. He told me that his right foot has become swollen and sore and associates this to his safety shoes. On examination of his both feet, his skin is intact and there are no obvious signs of rubbing, broken or infected areas. Circulation appears normal. The bridge of his right foot is markedly swollen and I believe it is likely to be caused by the ill-fitting of his safety boots. He told me they are uncomfortable. Any trauma to his feet is likely to be a problematic to him.

I am afraid I am not able to advise on the best safety shoe for him but have been recommended these as a suitable alternative.

https://www.arco.co.uk/Web-Taxonomy/Personal-Protective-Equipment/Safety-Footwear/Safetv-Trainers/ELTEN-Maddox-Black-Red-S3-ESD-Safetv-Trainers/p/PIM000000000016874

Nathan, we should meet with Martyn to discuss the report although Wayne I believe you have ordered him some boots.

I will do a letter to Martyn inviting him to a meeting to discuss the above although I am unable to release the whole report.

53. The new safety footwear was provided to the Claimant on 30 November 2023 (268-269, 273).

Meeting on 15 December 2022 to discuss OH report with respect to safety shoes

54. Mr Carroll sent a letter to the Claimant dated 7 December 2022 (page 275) inviting him to a meeting to discuss the OH report (as suggested in Mrs Barton's email).

55. The Claimant's evidence, in response to Tribunal questions, was that the office where he worked was attached to the stores and was within the same unit and that he only needed the safety footwear if he was going from the office into the stores or outside to the yard but that he spent most of the day in the office.

56. The Claimant conceded that he could have taken his safety shoes off in the office (he would have needed to put on other shoes because the office floor was often dirty) but that is something he could have done. We accept Mr Heard's evidence that Mr Heard had a pair of slip on safety shoes so that he could easily move from his office into areas where he needed the protection of safety footwear.

57. The Claimant also explained in his oral evidence that he carried on wearing the shoes he was issued with by the Respondent on 30 November 2022 in a new job he gained after leaving the Respondent's employment and that he bought insoles for them.

58. We find based on the evidence that we heard that the issue with the Claimant's foot being rubbed by the safety cap in his old shoes had eased with the provision of the new shoes. Whilst those new shoes needed to break in, the remaining concern of the Claimant's was that he felt that the shoes needed more cushioning. This was not a question of pain but the Claimant explained that it is often the case with people who have diabetes that they have poor circulation in the feet and extremities and an insole providing more cushioning would have given him more comfort and made his feet feel less fatigued.

59. The Claimant explained in evidence that a contributing factor to the problem with his foot was that it was being pressed on by the toecap of his old shoes when he was sitting down in the administration office where he worked with his foot flexed and the ball of his foot on the floor.

60. At the meeting on 15 December 2022 (276 – 278), which Mrs Barton attended for support, there was a discussion about a number of other matters including:

    60.1 The resentment the Claimant still harboured for not having been made chargehand;

    60.2 A dispute about the Claimant having been asked to move his van;

    60.3 The perception that the way the Claimant challenged things he was unhappy about was aggressive. Mrs Barton gave an example of an occasion where the Claimant went into her office swearing at her. The Claimant apologised for that and said that his nature is that he does "suffer and get aggressive". The Claimant explained:

        > *"I am bottling it and I know when it goes it blows. If you are on the wrong end of it, it is not nice, it is that Fight or Flight. As I was bullied at school I learned to fight, and aggression came out*".

    60.4 Mr Carroll's reassuring the Claimant that his work had been good recently and that the Claimant could always come and speak to him if he needed to.

61. As regards the discussion of the Claimant's safety footwear at the meeting on 15 December 2022:

    61.1 The Claimant confirmed that the swelling in his foot had gone down;

    61.2 The Claimant said, in response to a question about the new shoes, "*They are not comfortable; I did not pick them*".

    61.3 The Claimant told Mr Carroll and Mrs Barton that he thought he needed insoles for the new shoes. Mr Carroll agreed to order them for the Claimant and this was left with Mr Grey (buyer for the Respondent).

    61.4 Mr Carroll said that many people at the Respondent found Sketchers shoes comfortable but the Claimant dismissed this. Mr Carroll pointed out at the hearing in the Tribunal that the Claimant was wearing Sketchers shoes. The Claimant did not dispute this.

62. We find that the Claimant complained about the shoes that had been ordered for him (which we understand were leather) without being able to justify why the ones he had chosen would have been better, except to say 'you pay for what you get'. He criticised the Respondent for being concerned about cost and being insufficiently concerned about his health without being able to explain why the more expensive shoes were more likely to be better for him as a diabetic person. This was despite the fact that Mr Wilkinson had spent time with him looking at the data sheets for various products and had clearly given it thought. The Claimant conceded in the meeting on 15 December 2022 that, just because the shoes he had chosen were more expensive, it did not mean that they would be more comfortable but he said 'I am taking the gamble'.

63. After the meeting the Claimant thanked Mrs Barton for her consideration and understanding in an email (279).

64. At the end of the meeting on 15 December 2022 the Claimant gave Mr Carroll a copy of his OH report to take away and read in confidence and having read it Mr Carroll returned it to Mrs Barton so that it could be shredded (278). The OH report of 24 November 2022 records in so far as we have not already provided detail above (268-269):

> *Current Situation*
>
> *As you are aware Mr Sterry has been based in stores since commencing his employment with Newspace some 3 years ago.*
>
> *He tells me that he has a long-standing history of mental health problems starting in early childhood and that remain ongoing. His describes symptoms that include excessive worrying, over-thinking and racing thoughts that he cannot shut off, ruminating about problems, fluctuating mood swings, anxiety, low confidence and self-esteem, anger, irritability, frustration and depression.*
>
> *He says that he can place too much pressure on himself to be the best in whatever he does and this can cause conflict with others, especially if he feels he needs to stand up for himself. He says that he has found some situations in work challenging and perceives that he is unfairly treated at times in comparison to others. This compounds his anxiety and can seem to impair his ability to interact with others. He is being treated with appropriate medication to help with his anxiety and depression.*
>
> *He tells me that he has impulsive tendencies, spending significant money on the latest gadgets or best equipment to support hobbies that he never sees through. He told me that he has never had a formal diagnosis of a neurodevelopmental disorder, but he may well have characteristics of autism that drive his negative behaviours. Confirmation of diagnosis would need to be made through a formal psychological assessment.*

65. It was left that the Respondent would order insoles and the Claimant would say if he had any other problems with the shoes.

66. On 22 December 2022 the Respondent commenced a Christmas shut down which lasted into the end of the second week of January 2023. Mr Carroll conceded that the question of insoles slipped his mind and they were not ultimately provided to the Claimant.

67. The Claimant returned to work following the Christmas break on Monday 16 January 2023.

68. The Claimant told us that the lack of insoles was causing him some discomfort (not pain) the following day, Tuesday 17 January 2023, but he did not report this to anyone. As we find above, he could have taken the shoes off and put on normal shoes without a protective toecap for most of the day while he was in the office where he predominantly worked.

69. The Claimant sent Mr Grey an email on 20 January 2023 (the day of the incident which ultimately led to the Claimant's dismissal) which we accept shows the Claimant chasing Mr Grey for the insoles. The email read (362):

> "**subject**: *nudge nudge*
> **body of email**: *Amazon Order @ Many Thanks".*

Incident on 20 January 2023

70. On 20 January 2023 there was an incident between the Claimant and one of his colleagues, Mr R Payne. We accept the findings of the investigation which was subsequently conducted. In summary:

    70.1 Mr Payne was in the stores office with Mr D Hoare, Mr Carroll, Mr J Thomas and the Claimant;

    70.2 There was a conversation about football which developed into banter and teasing.

    70.3 Mr Payne said to the Claimant that he was not going to listen to the Claimant's opinion due to a discussion about the sweeper system that had taken place some months prior.

    70.4 This resulted in some laughter and the Claimant started to become angry.

    70.5 Although not a finding of the investigation, it appears to be agreed by the parties that the Claimant started shouting to himself. The Claimant was searching the internet for a counterargument to Mr Payne on the football issue they were discussing.

    70.6 Mr Payne then left and we accept that he did so in order to remove himself from the tense situation that had developed and as he felt the discussion was over.

    70.7 The Claimant continued to shout and then, going past Mr Hoare (who was also laughing) came out of the office and physically attacked Mr Payne, who was seated, by putting his hands around his throat.

70.8 Mr Payne pushed the Claimant away but did not retaliate and then the Claimant again put his hands on Mr Payne's throat.

70.9 We accept the evidence we heard that this did not cause Mr Payne any physical injury and no significant pressure was applied to Mr Payne's throat.

70.10 Mr Payne then pushed the Claimant away from him against the wall at which point Mr Carroll and Mr Hoare came and intervened, with Mr Carroll taking the Claimant away.

70.11 The witnesses recorded the Claimant having used foul language but this did not weigh at all heavily in the disciplinary process that followed. Their recollection of the comments was as follows and we record them because they give an insight in to the nature of what happened and why:

70.11.1.1 Mr Hoare recalled the Claimant saying to Mr Payne: "*don't laugh at me you cunt, do you want to see what I can do I'll fucking show you*" or "*don't fucking wind me up you cunt, I will fucking show you*"

70.11.1.2 Mr Carroll recalled the Claimant saying to Mr Payne: "*Don't you laugh at me*" "*I will show you what I do you fucking cunt*"

70.12 All three witnesses expressed surprise or shock at how the situation escalated so quickly and all described the Claimant as being the aggressor and how he had shouted at Mr Payne that he was going to show him what he was about, before he then attacked him.

70.13 The Claimant was unable to recall the incident, describing an amnesia or brain fog.

71. The Claimant did not dispute what had happened. Mr Carroll suspended the Claimant on 20 January 2023 and confirmed his suspension by letter on 23 January 2023 (173-174).

72. We find on the evidence presented to us that the Claimant had a history or willingly engaging in banter.

Investigation process

73. We find that, under Mrs Barton's able guidance, Mr Wilkinson carried out a thorough investigation which involved the following principle steps and culminated in an investigation report being produced (191) which recommended a disciplinary hearing:

73.1 Mr Payne provided a statement on 20 January 2023

73.2 Mr Thomas provided a statement on 20 January 2023

73.3 Mr Hoare provided a statement on 20 January 2023

73.4 The Claimant provided a statement on 20 January 2023

73.5 The Claimant was invited to an Investigation Meeting on 23 January 2022 (175-176)

73.6 Mrs Barton emailed the Claimant on 23 January 2023

73.7 Mr Payne attended a documented Investigation Meeting on 25 January 2023 (177-176)

73.8 Mr Thomas attended a documented Investigation Meeting on 25 January 2023 (179-180)

73.9 Mr Carroll attended a documented Investigation Meeting on 25 January 2023 (181-182)

73.10 The Claimant attended a documented Investigation Meeting on 26 January 2023 accompanied by Mr Saunders (the Respondent's Gatehouse Keeper and someone in whom the Claimant said he confided) (183-186)

73.11 Mr Hoare attended a documented Investigation Meeting on 26 January 2023 (187-188)

74. In his investigation meeting Mr Payne acknowledged that there had been at lot happening in the company, that people felt a pay rise was not high enough (and the Claimant had expressed the opinion that people did not deserve the pay rise), and that things had been building. Mr Payne said that he could still work with the Claimant (but came to work to get paid and do a job and not to get grabbed by the throat) and that he did not want the Claimant to lose his job. He indicated that it would be awkward at first but that if the Claimant looked him in the eye and shook his hand and said it was all his fault, then that would be fair enough.

75. We accept Mr Carroll's evidence, which was not disputed, that he became aware during the investigation from Mr Hoare that there had been an occasion two months prior to the incident in which the Claimant had jumped up after Mr Payne said something and went to go after Mr Payne to confront him, but Mr Payne had gone the other way (NCWS 20 and 188).

76. Mr Wilkinson finalised his investigation report on 30 January 2023 (191).

Claimant's GP consultations on 20 and 23 January 2023

77. On 20 January 2023 (the day of the incident) the Claimant was concerned about what he had done and managed to get a late appointment with his GP.

78. He explained in response to our questions that at that appointment his GP doubled his dose of fluoxetine (being the antidepressant medication that the Claimant had been taking).

79. He said the GP checked his blood sugar levels and blood pressure but did not recall there being any discussion of concerns about his diabetes having been a contributing factor. The focus was on his antidepressant medication.

80. The Claimant saw his GP again on the Monday morning. The Claimant cannot remember much of what was discussed at that meeting but he thinks it might have been then that he was referred for a neurodiversity assessment (which has still not been undertaken due to well known pressures on those services). The Claimant recalls feeling better than he had done on the Friday when the incident happened but said that the GP explained that it can take some time for an increase in the dose of fluoxetine to take effect.

81. As regards the Claimant's type II diabetes, he was not taking insulin. He monitored his blood sugar (but did not then have a monitor on his arm or a phone app recording his data as he does now). He took 1g metformin tablets twice a day (99). Occupational health recorded on 24 November 2022 (268) that at that time the diabetes was under good control with through that oral medication.

82. We therefore conclude that there is insufficient evidence to suggest that the Claimant's diabetes contributed to his actions on 20 January 2023. We consider that it would have been picked up in the blood tests carried out by the GP and it would have then been discussed with the Claimant.

83. The Claimant did not refer to 'diabetic rage' as having caused or contributed to his conduct at any stage of the investigation, disciplinary or appeal process. He only raised it in these proceedings. We do not consider that there is evidence on which we could base a conclusion that the Claimant, on 20 January 2023, was suffering from a diabetic rage or episode. We find that the decision in **Mr P Dytkowski v Brand PB Ltd (2402856/2019)** is materially different on its facts.

Investigation meeting with the Claimant

84. At the Investigation meeting the Claimant said his memory was still a blur and he thought that Mr Payne had been trying to goad him a bit. He said that he had felt condescended in an earlier conversation and that Mr Payne, who he pointed out is younger, 'pushed his buttons' more than others but that it could have been anyone.

85. The Claimant spoke about (i) his anxiety and depression (ii) bereavements that he and others had recently suffered and (iii) worries about his parents. He said that anger was part of his depression and that it was a build up of issues and that his doctor and therapist said he was getting more and more down with things and that it releases something within that caused his reaction.

86. The Claimant drew a link between the last time something like this had happened in 2015 which coincided with neck pain and the fact that this time he had had pain in his foot. He said these things had been triggers and said he had been suffering but not dealt with it. Referencing his foot he said he felt he had to fight for everything and he could not just get it go. He complained about not having the insoles and said it was playing on his mind.

87. When asked how he thought he could handle a situation in the future if he felt goaded and what he could do differently to stop it escalating the Claimant said that the therapist upped his medication and said the guidance he had been given was that it would be better to ask certain people if they notice he was getting

irate or starting to get edgy. He said he should then phone and talk to someone or pick a couple of people he could go and talk to. The Claimant said that Mrs Barton would be a good person as he had spoken to her before. Mr Wilkinson asked the Claimant if he himself was aware of his triggers because not everyone knows everyone else's' situations. The Claimant said he was not aware when he 'went off' but was aware of the build-up. The Claimant returned again to blaming pain in his foot as making him angrier but we find that his foot had not hurt for some time and he had only recently come back from a long break from work when the incident occurred on 20 January 2023.

88. On the balance of probabilities, we find that the Claimant was still aggrieved at not being bought the shoes he wanted. However, in the circumstances it was not reasonable for him to have felt aggrieved.

89. At the meeting the Claimant was asked about what the Claimant felt about working with Mr Payne again. The Claimant indicated that he hoped that if Mr Payne understood the issue they could avoid it happening again. He did not at this stage offer to apologise to Mr Payne and pointed to the fact that Mr Payne had pushed him back. We do not consider that this justified the Claimant's actions as Mr Payne was defending himself.

90. The Respondent reiterated the point of contact that they had given him for support.

The Disciplinary Process

91. We find that Mrs Barton helped the Respondent conduct a thorough and fair disciplinary process. The preliminary steps in that process included the following:

    91.1 On 1 February 2023 the Claimant was invited by Mr Elliott to a disciplinary hearing on 6 February 2023 to answer allegations of gross misconduct. The Claimant was provided with the investigation documentation and the disciplinary policy (195-196);

    91.2 A disciplinary hearing was conducted by Mr Elliott on 06 February 2023 (198-203) at which the Claimant was accompanied by Mr Saunders . This was adjourned for further investigation and consideration to be given to matters raised by the Claimant;

    91.3 On 10 February 2023 the disciplinary hearing was reconvened and the Claimant was dismissed with immediate effect (208-211);

    91.4 Mr Elliott document his decision in a detailed dismissal letter of 13 February 2023 (212-214)

Disciplinary hearing and outcome

92. At the opening of the disciplinary hearing the Claimant said that he was trying to process what had happened, that he was embarrassed and sorry and that it was out of character for him to have acted as he did. He said he should have realised he wasn't coping very well and trying to be the strong man did not work. He said he recognised that mental health does not work that way. He said that his fluoxetine had been doubled and that unfortunately Mr Payne had been in the

wrong place, at the wrong time.

93. Mr Elliott expressed understanding and sympathy for the Claimant and acknowledged the difficulty of talking about mental health. He thanked the Claimant for showing some contrition. The Claimant later went on to say that he would apologise to all those involved and acknowledged that it could have been frightening for all of them.

94. When asked what he thought about coming back to work after what had happened the Claimant said he would apologise for his behaviour as it was not warranted, he would also be open about the challenges he has surrounding his mental health to make people more aware. He referred to the chemical imbalances in his brain and said that if he was more open he could 'nip the issues in the bud' so that they do not escalate. He referred again to grievances about being asked to move his van in the carpark and also the question of his safety shoes.

95. Mr Elliott, rightly in our view, considered that the Claimant was guilty of gross misconduct which might warrant summary dismissal and was trying to assess whether a lower sanction would be more appropriate. He was concerned about how quickly and unexpectedly the Claimant had become angry and assaulted another employee and was concerned about the risk of it happening again (the Respondent now being on notice of the risk). However, he acknowledged the Claimant's contrition and said he thought the Claimant's response was the best he could have hoped for in the circumstances (taking into account the Claimant did not think he was himself on the day of the incident and was taking steps to help himself and be more open about how he was feeling and was willing to apologise). Mr Elliott said he was "*trying to be in tune to real life rather than just say this is black and white and it is gross misconduct*" and he and the Claimant acknowledged that a key trigger for the Claimant was when he felt he was being laughed at. Mr Elliott adjourned the hearing to consider his decision.

96. On 9 February 2023 Mrs Barton shared the OH report of 24 November 2022 with Mr Elliott to help inform his decision (207).

97. The following day Mr Elliott reconvened the disciplinary hearing. He explained the factors that he had taken into account and expressed regret at having reached the decision that the appropriate outcome was to dismiss the Claimant summarily.

98. The Claimant apologised for the difficulties he had caused, said he thought this would happen / expected the outcome and acknowledged that it was a situation he had put himself in but said he would appeal. One of his main contentions was that he did not consider that dismissal was an outcome consistent with sanctions imposed on others. Mr Elliott had considered the question of consistency of treatment before reaching his decision but did not have all the details that then became available to the appeal hearing manager.

99. On 13 February 2023 Mr Elliott issued his outcome letter (212-214) which set out in detail the factors he had taken into account including:

99.1 The Claimant's length of service.

99.2 The Claimant's clean disciplinary record.

99.3 The question of consistency of treatment (to Mr Elliott's knowledge there had been no cases of one colleague physically attacking another in the same way).

99.4 The Claimant's ill health and in particular his mental health.

99.5 The fact that what the Claimant did was out of character.

99.6 The remorse that the Claimant had shown.

99.7 The Respondent's duty of care to its employees and health and safety obligations.

100. Ultimately Mr Elliott decided that, notwithstanding the greater openness with which the Claimant said he was going to approach his mental health, the Respondent's duty of care to others tipped the balance towards dismissal as he did not have sufficient confidence that a similar situation would not arise in the future. In evidence he also explained that the Respondent's workplace has items which could be used to inflict serious harm if someone lost control and became angry with a colleague (and we accept that evidence).

Claimant's appeal

101. The Claimant appealed on 15 February 2023 saying new evidence had come to light that should be investigated, the sanction imposed was inconsistent with the sanction on another employee and other grounds. He did not tick the box to indicate that he thought the sanction was too severe or disproportionate to the misconduct in question. More particularly the Claimant said: (219):

> *Previous employees have had altercation at the workplace and after investigation they were not dismissed by the company but reprimanded, which isn't consistent with my case.*
>
> *There has been numerous occasion employees have resorted to a physical matter but as I stated above they did not go on to lose their employment immediately like myself.*
>
> *Other altercations at the workplace haven't led straight to dismissal, which seems an unfair judgement on me due to my dismissal.*
>
> *Others have been given final warnings lasting 12-24 months.*
>
> *The decision was also made on culpability of my actions and how I am an adult and so responsible for my actions.*
>
> *There is no medical knowledge used or acquired to come to a justifiable decision on my culpability due to my mental health issues I am currently going through, only opinions.*

OH report from Claire Hughes in November suggested I may have a neurodevelopment disorder due to my characteristics and a formal psychological assessment would be needed to better understand my conditions.

But nothing has been done towards this and with my ongoing issue with my supplied safety footwear not being suitable and uncomfortable to me, which only added to my mental health and physical health conditions.

The company doesn't seem to have better knowledge and handling of people who may suffer or have mental health issues within the workplace and how to better approach and the correct ways in which to help and deal with it.

Some of the conversations, said or mentioned haven't been noted within the minutes.

102. By letter of 20 February 2023 the Claimant was invited to an appeal hearing to take place 24 February 2023 (222).

103. On 23 February 2023 Mrs Barton provided Mr Heard with details of previous disciplinary issues and how they had been sanctioned to help Mr Heard assess whether dismissal of the Claimant was consistent or inconsistent with the treatment of others (224-229).

Appeal hearing

104. Mr Heard chaired the appeal hearing (230-233) at which the Claimant was again accompanied by Mr Saunders.

105. Mr Heard checked his understanding of the Claimant's points of appeal and talked them through with the Claimant in turn.

106. The Claimant provided Mr Heard with documents for Mr Heard to consider and focused on:

106.1 The fact that he did not throw a punch and that Mr Payne had grabbed him. He said this meant the sanction on him had therefore been inconsistent.

106.2 The issue with his safety shoes. He said the company had a duty of care with mental and physical wellbeing which can be classed as a disability and should, as soon as they were aware of mental health issues, do everything they can. He said he had been walking about in pain and that people with diabetes can lose limbs, as experienced by his father in law, and that had played on his mind. As we have explained above, at the time of the incident we do not find that the Claimant was in pain but we do find that, on the balance of probabilities, he was more concerned than others might be about the impact his diabetes might have on his circulation in the future and the fact that diabetes sufferers can sometime suffer circulatory problems that can lead to amputation. There was no evidence that the Claimant had circulatory problems which might have meant that his was a

present risk to him.

106.3 The contents of an OH report prepared during his employment at a previous employer (328) dated 23 March 2017 which said (in so far as is relevant to this claim): "*Martyn suffers with a number of medical conditions which are being treated with medication. These conditions include high blood pressure, intermittent neck pain caused by nerve impingement at C5 and anxiety/depression. All the above conditions are manageable with medication and modification of behaviour.* ***Current situation****: […] Currently through recent changes in his role and working pattern he is finding his role challenging. He describes himself as feeling generally low and worn out.."*

106.4 The Respondent knowing about his mental health issues and nothing having been done about it.

106.5 An assertion that Mr Elliott had made his decision without medical knowledge.

106.6 Employment Tribunal decisions where it had been held that employers did not do enough for an employee's mental health.

107. In common with the disciplinary hearing, the appeal hearing needed to be adjourned for further consideration of matters raised by the Claimant. This included the Claimant giving consent to Mr Heard being provided with his OH report from 24 November 2022 so that he could have a better understanding of the Claimant's health (284).

108. The Respondent indicated a preference to reconvene for a face to face meeting for Mr Heard to give his decision. The Claimant said he only wanted a meeting if his appeal was successful.

109. Mr Heard gave a preliminary decision on some of the points of appeal on 2 March 2023 (234) as follows (we consider that he should have waited and given a decision when he was able to conclude all the points of appeal, but nothing in this case turns on this in our view):

> ***Point 1:***
>
> *You stated that previous employees have had altercations at the workplace, and, after investigation, they were not dismissed by the company but reprimanded, which is not consistent with your case.*
>
> ***Newspace Response:***
>
> *We have reviewed previous incidents where there have been altercations between members of staff and I can confirm that the disciplinary procedures were held in accordance with company procedures. I believe the particular situation you referred to related to two individuals getting into what appeared to be a scuffle or a physical fight where they both ended up on the ground. Having reviewed this case it was not wholly reflective of your own situation as the two individuals*

concerned were involved in a verbal altercation during a management briefing and presentation which continued after the meeting. One of the individuals was encroaching on the other's personal space when the verbal disagreement continued and the other pushed him away resulting in them both falling to the ground and no physical punches were thrown. It is clear that, in this case, both individuals were held mutually culpable whereas in your case, it was an unprovoked attack where the person you attacked did not retaliate but attempted to push you away to protect himself and remove your hands from his throat.

In order to adopt a thorough approach I also reviewed another verbal altercation which resulted in two individual swearing at each other due to a bearer being thrown to the ground and hitting a second employee on the leg. The employee who was hit on the leg reacted and started shouting and swearing and the employee who threw the bearer down reacted to this. The core issue in this case related to verbal aggression and joint pushing. This incident was prompted by an accident with no intention to cause physical harm and both individuals were held to be culpable.

Point 2:

You state that other altercations have not led straight to dismissal.

Newspace Response:

Point 2 and Point 1 are linked and as per the response to point 1, there were mitigating circumstances to the cases you state are similar to yours, but which involved verbal altercations with both individuals involved being held mutually responsible. From what I can see there was no verbal altercation as such and the attack was unwarranted and driven by one party.

Point 3:

No medical knowledge was used to Justify the decision to dismiss you and to ascertain the degree of culpability due to your health issues.

Newspace Response:

On examination of your Employment Medical Questionnaire completed prior to the start of your employment on the 8th of July 2019, you stated that you have not suffered from any illness or medical condition which might affect your duties. You had stated that you were taking Ramipril and Fluoxetine, which are prescribed for high blood pressure and depression respectively. No mention was made as to whether you were receiving therapy for depression at the time.

The extent and severity of your prescriptions were not made clear at the time for Newspace to make reasonable adjustments to work practices. Full disclosure would have provided better information to ensure that adjustments could have been implemented to ensure that you could

carry on with your duties and ensure the safety and wellbeing of colleagues.

During the appeal hearing, you shared an occupational health report, completed on the 23 rd of March 2017, which stated you had suffered from a number of medical conditions which are being treated with medication. These included high blood pressure and intermittent neck pain and anxiety/depression. The occupational health advice/recommendations at that time were a change in shift pattern and stated that this should be reviewed in four weeks' time to see if support was required to help you address concerns. Again, this information could have been shared in confidence with Newspace, who would have been obliged to comply with non-discriminatory legislation and therefore not discriminate your job application based on disability.

On the 22nd of September 2022, you attended an occupational health consultation. The subsequent report stated that your diabetes was under control and that oral treatment was sufficient to manage symptoms. Your blood pressure was a little raised but a glucose home reading was to be made and the average reading would determine your target level at 48mmol/mol. An HbA1c level between 41-49 mmol/mol indicates you have prediabetes.

On the 15th of November 2022, you completed an accident report form stating that a swollen right big toe joint caused by diabetes was giving you concern.

On the 24th of November 2022, you attended a Workplace Wellbeing assessment. The subsequent recommendations included that a formal psychological assessment should be carried out to determine whether the stated symptoms are manifest. In addition, it was identified that the bridge of your right foot was markedly swollen, and it was believed by the OH assessor that this was caused by ill-fitting of your safety boots. The Occupational Health advisor said she was unable to advise on the best safety shoe for you but recommended some boots as a suitable alternative. These boots would have cost £130.

In terms of mitigating and contributory factors, the above summary could be acknowledged as follows:

• During your employment of the previous 3 years, you had not been involved with any prior disciplinary actions.

• Your psychological state of mind and the concerns regarding your health were documented prior to the event by Newspace.

• During the subsequent investigation of the incident on the 20th of January 2023, you had not exemplified formal remorse or memory of the event but acknowledge that you had had a disagreement with Robbie Payne.

• On the following investigation and formal interview on the 26th of

January, you took the effort to explain your problems and contributory reasons for your actions but within the meeting minutes there was no evidence of remorse, but instead some regret on behalf of your actions and the personal toll on your wellbeing.

My conclusion based on the assessment of the information provided is that Newspace were consistent within the application of its disciplinary procedures. However, the process should have followed the following advice/actions:

• Delay the disciplinary hearing until in receipt of medical advice to determine whether the employee is disabled under statutory definition.

• Make a referral to Occupational Health (OH) mental health experts with detailed questions around the statutory definition and protection.

• As Newspace had actual or constructive knowledge of the disability at the time of the incident based on the assessment compiled on the 24th of November 2022, determine whether this would affect the sanction instigated at disciplinary procedures.

• Consider the provision of safety shoes which are suitable; I note the OH Advisor felt unable to give advice on a suitable shoe, although included a link to a shoe that had been recommended, and consideration needs to be given as to how we can ensure the correct footwear is provided.

Therefore, in regard to the conclusion of the appeal process, I agree to delay the outcome of the appeal hearing until we are in receipt of the following information:

> *Attain a medical report to determine the severity of Martyn Sterry's mental illness and to determine the level of Martyn's culpability due to his illness and whether suitable reasonable adjustments could be made in the workplace to ensure the disciplinary process has been fair and robust.*

Newspace has agreed to delay the outcome of the appeal hearing pending receipt of the above information and until the medical information can be assessed in light of the previous disciplinary action. The view will be to formalize the final disciplinary decision and appeal outcome, based on the formal assessments taking place and being reviewed in the light of medical advice. Therefore, Newspace may reconsider its previous decision but reserves the right to uphold the appeal or implement appropriate disciplinary action in accordance with Newspace disciplinary procedures.

I know that Jane Barton has been maintaining contact with you so if you have any questions about the content of this letter please contact Jane in the first instance.

110. There was an email exchange between Mrs Barton and Ms Hughes of the

Respondent's OH adviser (281-288) which recorded:

Mrs Barton to OH – 1 March 2023

Thank you for our telephone discussion yesterday and for your time, I really appreciate it.

As I discussed Martyn was summary dismissed for grabbing a colleague by the throat in an unprovoked attack and we held the appeal hearing on Friday.

Martyn has obviously provided some mitigating information in defence of his actions and has focussed on his mental health and culpability.

Martyn provided an occupational health report from a previous employer and I have obtained Martyn's consent to share this with you.

I am not sure how much information you require but I thought I would provide you with the initial witness statements so you can fully understand the situation leading to Martyn's actions.

When Martyn joined the company he did not declare that he had a disability but simply stated the medication he was currently taking which was Ramipril and Fluoxetine (hbp and depression medication). In fairness at the time Martyn joined we did not have occupational health in situ nor did we have HR.

I have also provided the outcome of the disciplinary hearing for you and what was considered.

I have supported the Appeal Hearing Manager who has suggested the following:

- *Delay the disciplinary hearing until in receipt of medical advice to determine whether the employee is disabled under statutory definition.*

- *Make a referral to Occupational Health (OH) mental health experts with detailed questions around the statutory definition and protection.*

- *Newspace had actual or constructive knowledge of the disability at the time of the incident based on the assessment compiled on the 24th of November 2022 and determine whether the attack on a colleague could have been anticipated based on the knowledge the company had (from the OH report)*

- *Provide safety shoes as per occupational health (OH) recommendations - if there is any recommendations you*

can provide specifically for people with diabetes and safety boots that would be helpful.

One of the issues we need to understand is whether Mr Sterry was in control of his actions or whether his illness was so severe that he could be deemed to hold no culpability for his actions that day.

We are trying to balance our duty of care to Martyn whilst protecting our employees - the unexpected attack meant that there were no indications that Martyn might do this.

Should our decision be to overturn the dismissal and reduce to Final Written Warning we may need to complete a risk assessment to ensure signs can be spotted. Mr Sterry has been advised by "Let's talk" that he should share his illness with people and ask them to tell him when they observe him behaving differently or signs of anger etc – as said I believe this is shifting the onus of responsibility too much and some of our staff who have been subject to previous altercations may be wary of saying something like that to Martyn in case he reacted.

Claire I know you said you were meeting with Dr East on 16 March but I think that may be too long for us to conclude the appeal hearing and confirm back to Mr Sterry the appeal decision.

Would you be able to share these with Dr East and have a discussion and provide us with your input or if we need to refer to mental health professional?

OH to Mrs Barton on 3 March 2023 (287)

To upate, I am speaking to John East at 3pm this afternoon - so will get back to you over the weekend.

I want to make one thing clear though and I know this will be in my written notes - when I talked in my report about a psychological report - this was to confirm a diagnosis of autism or ADHD, not because I felt his anger issues were likely to overspill and that he was not able to control it. I did not feel that he was a risk to others when I assessed him in November.

Autism or ADHD can only be formally diagnosed by a psychologist (not nurse or GP) and I have clients that tell me they have the condition(s) because they have googled it or filled in an online questionnaire. My suggestion that he sought a psychologist assessment was merely to determine if he was neurodiverse in any way.

OH to Mrs Barton on 5 March 2023 (288)

I spoke with John East on Friday regarding this case and outlined

to him what happened in the workplace.

Although he has not had sight of the reports, we both agree from what we know, that there is not sufficient cause to overturn the company's decision - in our opinion.

If you want to call me, please do. I appreciate you have to find phone reception so let me know a time and I'll make sure I'm free.

Mrs Barton to OH 6 March 2023 (289)

Many thanks for your response and your discussion with Dr East.

As you are aware we did have a problem in that Martyn decided to order very expensive safety boots which was outside the scope of the company limit - individuals who require more expensive boots tend to add the additional cost. During discussions with Martyn about how he knew these boots would be suitable he said he didn't know but it was based on his research. Martyn has advised that the issue with his safety boots and because he was in pain, prompted or added to his reaction and I just wondered how likely this would be.

Based on your consultation with Martyn and the information provided is it your opinion that Martyn suffers from a disability which affects his day to day life?

I will give you a call - i have meetings until around midday today so happy to give you a call at your convenience.

OH to Mrs Barton 9 March 2023 (290)

Regarding MS. From my report and written notes of November 2022, I believe that he is likely to have described symptoms that align with some mental health illness or hidden illness and believe this was reflected in my report. I understand that he has not been diagnosed or treated by a psychiatrist or psychologist. Although he told me that he has been treated in the past by his GP.

Having said this, following my discussion with him, and knowing the symptoms/feelings/emotions that he described to me, I did not feel at that time that he was in mental crisis or that he was not capable of functioning or carrying out activities of daily living independently. His referral had been to discuss his work foot wear and not his mental health and I do not believe you had concerns for the latter.

In truth, I am also unsure if his illness would fulfil the definition of the Equality Act 2010, however I felt it likely as it considers short-term problems that recur over a period of one year or more long term.

I do not believe that he was a risk to either himself or would behave in such a manner that may risk others personal physical and emotional/mental safety and wellbeing, and do not believe that symptoms of his condition were sufficient to lead him to assault a colleague at the time of my consultation with him.

OH to Mrs Barton 14 March 2023 (291)

I would agree that I had no undue concerns about his ability to be in work and none were raised to me from yourself or his manager when I met MS in November last year. I note that you have not requested a review appointment since so can only assume that you had not become aware of any changes to his health or if so, did not feel they warranted a OH review.

[…]

111. On 15 March 2023 Mr Heard sent a letter to the Claimant to update him and confirm that he was still obtaining information.

112. On 24 March 2024 Mr Heard issued his appeal hearing decision and decided not to uphold the Claimant's appeal (241-248). He returned to address the question of whether the Claimant's dismissal had been consistent with the treatment of others and concluded that there were distinguishing features that did not render the Claimant's dismissal inconsistent. He found, reasonably in our view, that the issues with the Claimant's safety shoes did not provide an explanation for the Claimant's conduct on 20 January 2023 or render him not culpable for his actions. He found, based on the guidance of OH, that the Claimant's health conditions did indicate that the Claimant was not responsible for his actions. Mr Heard considered that the Claimant should have been more forthcoming before the incident if he felt that adjustments were needed for his mental health.

113. The Claimant then had the following email exchange with the Respondent's OH adviser:

Claimant to OH 31 March 2023 (295)

I wanted to ask you if Newspace had contacted you about me and my condition?

Unfortunately i lost control at work and grabbed a colleague around the throat,

It was a build up of anger led by Newspace ability to ignore my Mental Health and Physical Health, They never resolved my injury to my right foot which was continuously giving me pain and discomfort.

The pain and other ongoing issues between me and certain staff at Newspace was getting me more and more depressed and anxious,

This led or massively contributed to me losing control of my anger which released in a short burst and then calm soon after.

I am seeking Mental Health Help and i am currently going for assessments to ascertain what my condition maybe.

The reason i wanted to talk to you, Newspace indicated you and a colleague believe that even with my condition,

I still would be aware and culpable for my actions at the time of the event? I can honestly say i wasn't.

So, I just wanted to ask if it was true you and your colleague actually indicated that or as Newspace made up.

If you did, can you please enlighten me on why you believe i was aware and evidently culpable.

OH to the Claimant 3 April 2023 (294)

Jane Barton outlined to me over the phone the incident you were involved in in work. Sorry I am unable to find the date that she called but assume it was shortly after the event. She told me that you could not recall the event and asked my opinion as to whether I felt this was possible that you could have no memory of it. I verbally advised that I could not give an opinion on that specific matter.

I did confirm with her the following but made it clear that this was my opinion following our meeting in November 2022.

> *From my report and written notes of November 2022, I believe that he is likely to have described symptoms that align with some mental health illness or hidden illness and believe this was reflected in my report. I understand that he has not been diagnosed or treated by a psychiatrist or psychologist. Although he told me that he has been treated by his GP.*
>
> *Following my discussion with him and knowing the symptoms/feelings/emotions that he described to me, I did not feel at that time in November that he was in mental crisis or that he was not capable of functioning or carrying out activities of daily living independently. His referral had been to discuss his work footwear and not his mental health and I do not believe you had concerns for the latter.*
>
> *I was unsure if his illness would fulfil the definition of the Equality Act 2010, however I felt it likely as it considers short-term problems that recur over a period of one year or more long term.*

> *Following my meeting with him in November, I did not believe that he was at risk of harm to either himself or would harm others and do not believe that symptoms of his condition were sufficient to lead him to assault a colleague. This is my opinion at the time of my consultation with him.*
>
> *Martin - on balance and considering your past history of long-standing mental health problems, I did not feel you were a risk of harm to yourself because there were not thoughts or plans of suicide and to others, because there were no previous incidents of assault in your past working history that I was made aware of.*
>
> *At this time, I did not feel concerned that you would not be able to take responsibility for your actions.*

THE LAW

114. Notwithstanding the order in which the issues are summarised in the LOI, we considered it more appropriate to reach our findings first on the allegations of discrimination and then consider the question of whether the Claimant was unfairly dismissed. We therefore set out the law that we have applied in that order.

Discrimination under the EqA

115. The Equality Act 2010 (EqA) protects employees and applicants for employment from discrimination based on or related to a number of 'protected characteristics' (section 4). These include disability (section 6).

Discrimination arising from disability - section 15 EqA

116. Section 15 EqA provides: "(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".

117. As to what constitutes "unfavourable treatment", the Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230** held that it is first necessary to identify the relevant treatment and it must then be considered whether it was unfavourable to the Claimant.

118. The Court said that little was likely to be gained by differentiating unfavourable treatment from analogous concepts such as "detriment" found elsewhere in the Act, referring to a relatively low threshold of disadvantage being needed. One could answer the question by asking whether the Claimant was in as good a position as others.

119. What caused the unfavourable treatment requires consideration of the mind(s) of alleged discriminator(s) and thus that the reason which is said to arise from disability be more than just the context for the unfavourable treatment. There need only be a loose connection between the unfavourable treatment and the alleged

reason for it, and it need not be the sole or main cause of the treatment, though the reason must operate on the alleged discriminators' conscious or unconscious thought processes to a significant extent **(Charlesworth v Dronsfield Engineering UKEAT/0197/16).**

120. By analogy with **Igen**, "significant" in this context must mean more than trivial. Whether the reason for the treatment was "something arising in consequence of the Claimant's disability" could describe a range of causal links and is an objective question, not requiring an examination of the alleged discriminator's thought processes.

121. Simler P in **Pnaiser v NHS England [2016] IRLR 170, EAT**, at [31], gave the following guidance as to the correct approach to a claim under **section 15 EqA**:

> '*(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****. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.*
>
> *(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. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

*(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.

(g) There is a difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.

(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."

122. The burden of establishing a proportionate means defence is on the Respondent. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardys & Hansons plc v Lax [2005] IRLR 726** per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: **Hardys & Hansons plc v Lax [2005] IRLR 726, CA**.

123. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** it was said, approving Mummery LJ in **R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

124. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice [2017] UKSC 27**.

125. A complaint of discrimination arising from disability will also be defeated if the Respondent can show that at the time of the unfavourable treatment, it did not know and could not reasonably be expected to know that the Claimant was a disabled person.

Reasonable Adjustments

126. By section *39 (5) EqA* a duty to make adjustments applies to an employer. By section *21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

127. *Section 20(3) EqA* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer 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.

128. Under s.20(5) EqA the obligation to make reasonable adjustments with regard to an auxiliary aid is set out as follows:

> 'The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary *aid'*

129. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.

130. The duty to make reasonable adjustments only arises where the employer has knowledge (actual or constructive) that its employee is disabled and likely to be placed at a substantial disadvantage as (Paragraph 20 (1)(b) Schedule 8 of the Equality Act 2010).

131. In **Environment Agency v Rowan 2008 ICR 218** and **General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4** the EAT gave general

guidance on the approach to be taken in reasonable adjustment claims. A tribunal must first identify:

131.1 the PCP applied by or on behalf of the employer

131.2 the identity of non-disabled comparators;

131.3 the nature and extent of the substantial disadvantage suffered by the Claimant in comparison with the comparators.

132. Once these matters have been identified then the tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them.

133. The phrase PCP is interpreted broadly. The EHRC Code of Practice on Employment (2011) ("**the Code**") says at paragraph 6.10:

> "*[It] should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions*."

134. The Code goes on to provide at Paragraph 6.24, that *"there is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask);* At paragraph 6.37, *that Access to Work does not diminish or reduce any of the employer's responsibilities under the 2010 Act.* At paragraph 6.28 the factors which might be taken into account when deciding if a step is a reasonable one to take:

> *Whether taking any particular steps would be effective in preventing the substantial disadvantage; The practicability of the step; The financial and other costs of making the adjustment and the extent of any disruption caused; The extent of the employer's financial or other resources; The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and the type and size of the employer*.

135. In **Lamb v The Business Academy Bexley EAT 0226/15 the EAT** commented that the term "PCP" is to be construed broadly "having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".

136. It is also generally unhelpful to distinguish between "provisions", "criteria" and "practices": **Harrod v Chief Constable of West Midlands Police [2017] ICR 869**.

137. There is no formal requirement that the PCP actually be applied to the disabled Claimant. The EAT said in **Roberts v North West Ambulance Service [2012] ICR D14** that a PCP (in this case, hot desking) applied to others might still put the Claimant at a substantial disadvantage.

138. There are some limits to what can constitute a PCP. In particular there has to be an element of repetition, actual or potential. A genuine one off decision which was

not the application of policy is unlikely to be a "practice": **Nottingham City Transport Ltd v Harvey [2013] All ER(D) 267 (Feb), EAT**. In that case the one-off application of a flawed disciplinary process to the Claimant was not a PCP. There was no evidence to show that the employer routinely conducted its disciplinary procedures in that way.

139. In **Ishola v Transport for London [2020] ICR 1204** the Court of Appeal said that all three words "provision", "criterion" and "practice" "..carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."

140. The test of reasonableness imports an objective standard. The tribunal must examine the issue not just from the perspective of the Claimant, but also take into account wider implications including the operational objectives of the employer.

141. It is not necessary to prove that the potential adjustment will remove the disadvantage; if there is a "real prospect" that it will, the adjustment may be reasonable. In **Romec v Rudham [2007] All ER (D) 206 (Jul)**, EAT: HHJ Peter Clark said that it was unnecessary to be able to give a definitive answer to the question of the extent to which the adjustment would remove the disadvantage. If there was a 'real prospect' of removing the disadvantage it 'may be reasonable'. In **Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)**, EAT: HHJ McMullen said that 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage'. In **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10, [2011] EqLR 1075**, the EAT said that, when considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage.

142. Schedule 8 EqA (Work: Reasonable Adjustments) - Part 3 limitations on the duty provides:

> *S. 20. Lack of knowledge of disability, etc*
>
> *(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know— (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement. Under Part 2 and an interested disabled person includes in relation to Employment by A, an employee of A's.*

143. If relied upon, the burden is on the Respondent to prove it did not have the necessary knowledge. The Respondent must show that it did not have actual knowledge of both the disability and the substantial disadvantage and also that it could not be reasonably have been expected to know of both the disability and the substantial disadvantage.

Unfair dismissal

144. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

145. Under s98 (4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

146. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, tribunals have been given guidance by the EAT in *British Home Stores v Burchell* [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:

    146.1 did the respondent genuinely believe the claimant was guilty of the alleged misconduct?

    146.2 did it hold that belief on reasonable grounds?

    146.3 did it carry out a proper and adequate investigation?

147. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of *Burchell* are neutral as to burden of proof and the onus is not on the respondent *(**Boys and Girls Welfare Society v McDonald*** **[1996] IRLR 129, [1997] ICR 693**).

148. Tribunals must decide whether it was reasonable for the respondents to dismiss the claimant for that reason in all the circumstances of the case.

149. We have also reminded ourselves that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision or to decide what we would have done in these circumstances.

150. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (***Sainsbury's Supermarkets Ltd v Hitt*** **[2003] IRLR 23, CA**)

151. When considering the question of the employer's reasonableness, we must take

into account the disciplinary process as a whole, including the appeal stage. (***Taylor v OCS Group Limited*** **[2006] EWCA Civ 702**).

152. In ***AAH Pharmaceuticals v Carmichael EAT 0325/03***, His Honour Judge D M Levy QC held at paragraph 11:

> *It is clear in this case that the employer took very seriously conduct of the kind of which the Respondent was guilty and Lock v Cardiff Railway Company Ltd [1998] IRLR 358 gave a number of examples about the range of cases. We can well understand that 'no hats, no boots, no job' rule, to enforce safety on a construction site or a rule on personal hygiene in the food preparation industry, or the rules against carrying a cigarette lighter or matches in a petrol-chemical installation may all be vigorously enforced. In any particular case, exceptions can be imagined where, for example, the penalty of dismissal might not be imposed, but equally, in our judgment, when a breach of a necessarily strict rule has been properly proved, exceptional service, previous long service and/or previous good conduct may properly not be considered sufficient to reduce a penalty of dismissal.*

153. In reaching our decision, we must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

ANALYSIS AND CONCLUSIONS

154. Whilst we have structured our analysis and conclusions by issue, we were also careful to look at the evidence 'in the round' to determine whether it suggested that the Claimant had been subjected to the unlawful treatment of which he complains. Having done so we did not find cause to change our decisions on any issue or issues.

Knowledge of disability

155. We find that the Respondent knew about the Claimant's diabetes at the material times because he had discussed it with his line manager, Mr Carroll. On the balance of probabilities we consider that Mr Carroll knew that this condition amounted to a disability.

156. As regards the Claimant's anxiety and depression, we consider that the Respondent knew about this condition at the material time and in particular by 15 December 2023 knew or should reasonably have been expected to know that it amounted to a disability.

Discrimination arising from disability (Equality Act 2010 section 15)

Unfavourable treatment?

157. We accept that the Claimant's dismissal on 10 February 2023 and the rejection of his appeal against dismissal on 24 March 2023 amounted to unfavourable treatment.

What caused the unfavourable treatment?

158. We find that the cause of the Claimant's dismissal and the rejection of his appeal was the fact that the Claimant lost his temper and control and assaulted Mr Payne as described in our findings of fact on the incident on 20 January 2023.

159. Mr Elliott was particularly clear in his oral evidence to the Tribunal that he took into account the circumstances but decided that he could not adequately risk assess and manage the risk of the Claimant losing his temper in a similar way in the future and that the duty of care to other employees outweighed the other factors which might otherwise have pointed to him imposing a lesser sanction.

Was the reason or cause of the unfavourable treatment something arising in consequence of the Claimant's disability?

160. We accept that the Claimant's diabetes could cause his feet to swell and/or cause the Claimant to experience pain in his feet. It is clear that in November 2022 there was some swelling of one of his feet but there is no evidence that this was caused by the Claimant's diabetes. The Claimant said himself that he thought it might have been due to softening in the upper of the shoe and the way that he was sitting at his desk which his foot flexed such that the toecap of the shoe touched rubbed on his foot. In any event, as we explain above, by the time of the incident for which he was dismissed the Claimant was not in pain in his feet and could in any event have worn other, more comfortable shoes while in the office where he spent the majority of his time. There was insufficient evidence to suggest that his conduct on 20 January 2023 arose in consequence of diabetes causing his feet to swell and/or causing the Claimant to experience pain in his feet.

161. Whilst we accept that diabetes can cause memory fog and reduced cognitive function or black outs, the Claimant did not make this link to how he acted at the time and there was no evidence to suggest that his diabetes had had a bearing on is behaviour on 20 January 2023. As we have said in our findings of fact, the evidence is that the Claimant's diabetes was well managed at the time and no mention of this was made after the Claimant had had his blood tested on the day of the incident with Mr Payne.

162. We also accept that diabetes can cause mood swings, irritability, shortness of temper (which might lead to an overaction to minor matters) and potentially loss of control or diabetic rage. However, again the Claimant did not allege this during the disciplinary or appeal process (diabetic rage is a term only referred to since the start of these proceedings) and, as we have referenced above, there is no evidence that this was a cause or reason for the Claimant's behaviour on 20 January 2023.

163. Finally we also accept that depression could cause mood swings, irritability and a shortness of temper leading to an overaction to minor matters and that depression could be exacerbated by pain, anxiety or unhappiness.

164. We have reminded ourselves of the OH guidance including the report of 24 November 2022 which said, amongst other things (emphasis added):

> "*His describes symptoms that include excessive worrying, over-thinking and racing thoughts that he cannot shut off, ruminating about problems, fluctuating mood swings, anxiety, low confidence and self-esteem, anger, irritability, frustration and depression.*
>
> *He says that he can place too much pressure on himself to be the best in whatever he does and this can cause conflict with others, especially if he feels he needs to stand up for himself. He says that he has found some situations in work challenging and perceives that he is unfairly treated at times in comparison to others. This compounds his anxiety and can seem to impair his ability to interact with others. He is being treated with appropriate medication to help with his anxiety and depression."*

165. We have also reminded ourselves of the opinion of OH during the appeal stage which said, amongst other things:

> "*I want to make one thing clear though and I know this will be in my written notes - when I talked in my report about a psychological report - this was to confirm a diagnosis of autism or ADHD, not because I felt his anger issues were likely to overspill and that he was not able to control it. I did not feel that he was a risk to others when I assessed him in November."*
>
> *"Although he has not had sight of the reports, we both agree from what we know, that there is not sufficient cause to overturn the company's decision - in our opinion."*

166. It was perhaps unusual that OH went as far as to comment on whether this was sufficient to overturn the decision to dismiss.

167. We have taken into account that the Claimant's GP doubled his depression medication dosage on the day of the incident. However, we do not have any evidence of a medical nature that it was a particular depressive state that caused him to act as he did (whether from that GP or anyone else treating the Claimant). His medication could have been increased to deal with the consequences of the Claimant's conduct on 20 January 2023 (which had upset the Claimant) as much as addressing any pre-existing decline in his depression or anxiety prior to the incident.

168. We acknowledge that the OH advisers at the appeal stage were giving their advice based on a consultation which primarily focused on a separate matter (the Claimant's shoes) just under two months before the incident with Mr Payne. However, we have also taken into account that the OH adviser spoke to a Doctor about the matter and that the Respondent is a small employer and asked the OH adviser at the appeal stage whether a referral to a mental health professional was recommended (286). The OH adviser made no such recommendation.

169. As regards the issue with the Claimant's safety shoes, we accepted Mr Wilkinson's evidence that he spent a lot of time with the claimant choosing a pair of shoes that were sufficiently in budget and met the Claimant's requirements taking into account the advice they were able to get from OH (albeit that was limited). We set out in our findings of fact why we consider that by, the time it came to 20 January 2023, the Claimant at most found the shoes uncomfortable and not painful (but he did not complain at the time). The Claimant was unreasonably aggrieved at not having been provided with the shoes he himself wanted.

170. We have taken into account that the Claimant had also been aggrieved by other events at work (including being asked to move his van and not being given a promotion) and had suffered the stresses that he mentioned in particular at the investigation meeting with Mr Wilkinson.

171. However, we do not consider that there was sufficient evidence that on 20 January 2023 pain, anxiety or unhappiness led to a worsening of the Claimant's depression or that depression caused the Claimant to have a mood swings/irritability or shortness of temper such that he overreacted to such an extent that it could be said that his conduct on that day arose in a material way in consequence of his disability.

172. We find that it was the Claimant's dislike for being laughed at and not being able to answer or win the football discussion with Mr Payne's that led to the Claimant acting as he did (albeit in a way that represented an uncharacteristic loss of control). On the balance of probabilities we find that it is a personality characteristic of the Claimant that he sometimes suffers from a shortness of temper – this is something that he admits himself and which was recorded in the advice received by the Respondent from its OH advisers in November 2022 and which Mrs Barton herself had raised with him on 15 December 2022. The Claimant did not then say that he thought he had acted as he did towards her because of his diabetes, anxiety or depression.

Was the treatment a proportionate means of achieving a legitimate aim?

173. If we are wrong, and the unfavourable treatment of the Claimant was because of something arising in consequence of the Claimant's disabilities, we have gone on to consider whether such unfavourable treatment was justified as a proportionate means of achieving a legitimate aim.

174. The Respondent relied on the potentially legitimate aim of the need to protect its employees against acts of violence and operating a consistent disciplinary process based on the merits of each case. It said it took into consideration the factors and information obtained at the appeal and sought to balance its duty of care to the Claimant and to its other employees.

175. We consider that these are potentially legitimate aims. We need to assess whether the treatment was appropriate and reasonably necessary to achieve those aims?

176. We found Mr Elliott's evidence compelling. He had to consider the welfare of other employees. We accept that areas of the Respondent's workplace were potentially dangerous and that it was the unpredictability of the Claimant's behaviour and his acting out of character which was of particular concern. We accept that the

Respondent reasonably concluded that it was not clear, following the disciplinary and appeal, how that risk could be managed because the Claimant was not clear on what could be done. We do not consider that it was fair for the Claimant to suggest that his work colleagues should be placed under an onus to warn the Claimant if he appeared not to be himself. This was particularly in light of the potential for the Claimant to react badly to his colleagues. The Claimant appeared to agree with Mr Elliott on this when he was cross examining the Claimant. We also consider that it is important, notwithstanding an individual's state of mental health, that they exercise sufficient self control not to assault another employer in the way the Claimant did.

177. The Respondent, and Mr Elliott in particular, clearly gave careful thought to whether other less serious sanctions might be meet the aim of protecting other employees from acts of violence but, on the circumstances of this case, came to the reasonable conclusion that they could not.

178. As regards the Respondent's second justification argument, whilst not expressly argued by the Respondent, we consider that it is important that an Employer should be able to hold employees to a particular standard of behaviour did and not, by implication, run the risk of implying to the workforce that mental health grounds might make it acceptable for an employee to hold another by the throat in an unprovoked assault.

Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

Auxiliary aid - shoes

179. We do not consider that there was any failure on the part of the Respondent to provide the Claimant with an auxiliary aid. We consider that by 30 November 2022 an appropriate pair of safety shoes had been provided to the Claimant and that, to the extent that they were not comfortable and needed insoles, this did not put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability.

180. We consider that the shoes were replaced in reasonable time and any swelling in the Claimant's foot reduced.

181. We consider that any delay in obtaining the shoes was because of the Claimant's unreasonable and unsubstantiated request for shoes that were in excess of the budget. The shoes provided were, in fact, above the budgeted amount following the OH report and analysis by Mr Wilkinson.

182. In any event the Claimant did not need to wear safety shoes throughout the day. He could reasonable have been expected to take them off in the office and wear other softer shoes when siting at his desk (as Mr Heard did).

183. We consider that the Claimant's insistence on an alternative and more expensive pair of safety shoes related to the tendency he himself referred to in consultation with OH (namely his "*impulsive tendencies, spending significant money on the latest gadgets or best equipment to support hobbies*"). It did not relate to his diabetes. Had he been so concerned about his diabetes and circulation in his feet he would have changed footwear when he was in the office.

Disciplinary process PCP

184. We accept that the Respondent applied a provision, criterion, or practice (a "PCP") by following its disciplinary process with the Claimant.

Did the PCP put the claimant at a substantial disadvantage?

185. The Claimant asserted that he was subjected to a substantial disadvantage by this PCP compared to someone without the claimant's disability, in that he was more likely to breach the Respondent's disciplinary code of conduct because of his irritability and shortness of temper caused by his disabilities and was therefore more likely to face a sanction under it, including dismissal.

186. We accept that diabetes in some people might cause more frequent loss of temper or diabetic rage. However, there was no evidence that the Claimant was put at a substantial disadvantage as alleged. We refer to our findings above but the Claimant's diabetes was, on the evidence before us, being managed effectively and no evidence flowed from the Claimant's GP appointments on the day of the incident (when blood tests were done) and on the following Monday 23 January 2023 to suggest there was any abnormality in the Claimant's blood sugar that might have caused or had a material impact on his temper such that he carried out such a serious and unprovoked assault on a colleague.

187. We accept that anxiety and depression could make someone more prone to breaching a disciplinary policy. However, for the reasons we have explained in respect of the Section 15 EqA claim there was insufficient evidence that the Claimant was put to such disadvantage.

188. We have nonetheless gone on to consider the adjustments that the Claimant says should have been made for him.

Should the Respondent have provided the claimant with the safety shoes which he requested?

189. For the reasons we have explained, there is no evidence that a failure to provide the Claimant with the safety shoes he requested was linked to the substantial disadvantage or that, had the Claimant been provided with the safety shoes he wanted then he would not have acted in the way he did on 20 January 2023 and that he would not therefore have fallen foul of the Respondent's disciplinary policy.

190. On the balance of probabilities we consider that, even had he been provided with the safety shoes he wanted and gone on to be involved in the banter that took place on 20 January 2023, he would have gone on to conduct himself as he did. As we have explained more fully above, the Claimant's request for the particular type of safety shoe he wanted was in any event not justified.

Should the Respondent have replaced the Claimant's safety shoes every six months or whenever the Claimant said that they had worn out or become too supple?

191. There was insufficient evidence to suggest that this adjustment was necessary given that the Claimant had an office based role and did not need to wear the safety shoes the whole time. In any event, the Respondent did replace the shoes when the Claimant requested and the delay in getting a replacement was because

of the Claimant's unjustified and unreasonable demands for a particular and expensive shoe.

Should the Respondent have accepted that the Claimant's disabilities were a cause or partial cause of is misconduct, and therefore have regarded that as a strong mitigating factor, which should have reduced the disciplinary sanction to a warning or final written warning?

192. For the reasons we have set out in respect of the Claimant's Section 15 EqA claim, we do not consider that reducing the sanction on the Claimant to a warning or final written warning would have been a reasonable adjustment in the circumstances. We consider that the Respondent had due regard to the options available to it and was justified in concluding that dismissal was the appropriate sanction given the seriousness of the Claimant's conduct and its concerns about its ability to manage any future risk.

Unfair dismissal

193. The Claimant accepted that the reason for his dismissal was misconduct. He does not dispute that the Respondent had a genuine belief in his misconduct held on reasonable grounds. His challenge to his dismissal focuses on dismissal as a fair sanction in all the circumstances of the case and whether the decision was within the band of reasonable responses open to a reasonable employer. It is not for us to decide what we would have done in the circumstances.

Inconsistency of treatment

194. The Claimant said that other employees were not dismissed for fights, in which they had thrown punches, but the claimant was dismissed for an incident in which he had not thrown a punch.

195. Mr Elliott took consistency into account at the disciplinary hearing stage and it was looked at more thoroughly at the appeal hearing stage by Mr Heard who was presented with details of other relevant disciplinary cases.

196. We accept the Respondent's position, having reviewed that evidence ourselves, that what the Claimant did was materially different to the situations that had arisen with other employees where lesser sanctions were issued.

197. Of course, mutual culpability does not necessarily mean that a physical altercation should not result in the dismissal of both employees. However, we consider that it was reasonable for the Respondent to view the Claimant's case as particularly serious because we heard evidence (which was not disputed by the Claimant) that on a previous occasion he had pursued Mr Payne but lost him and that on this occasion the discussion he was involved in had not warranted the Claimant's extreme reaction, the Claimant had sought out Mr Payne (Mr Payne having left the room) and had twice put his hands round Mr Payne's throat (the second time after Mr Payne had stopped him without retaliating).

Alleged failure to provide appropriate footwear

198. The Claimant asserts that the Respondent failed to take into account or give sufficient weight to the extent to which its own alleged failure to provide appropriate footwear had contributed to the Claimant's deteriorating mental health

and therefore to the incident. For the reasons we have explained, we do not consider that there was any such failure on the part of the Respondent or that this assertion represents mitigation which might lead us to conclude that the decision to dismiss was outside the band of reasonable responses or unfair in all the circumstances of the case.

Procedure – investigation of Claimant's health

199. The Claimant asserted that the Respondent failed to conduct a full and thorough investigation of the Claimant's health conditions to understand the extent to which they caused the Claimant's conduct. We refer to our findings in respect of the Claimant's disability claims.

200. The Respondent did take into account and factor into its decision making the Claimant's state of health before making a decision on the disciplinary sanction. At the appeal stage it went further and sought additional input from the Respondent's OH team. There was insufficient evidence to support a view that the Claimant's diabetes, anxiety or depression materially influenced his conduct on 20 January 2023. This was particularly the case as regards the Claimant's diabetes but we consider that in all the circumstances of the case the Respondent took a reasonable approach in respect of the Claimant's anxiety and depression.

201. Given the size and resources of the Respondent and given that at the appeal stage it asked its OH provider whether it should seek the advice of a mental health specialist, we do not consider that the Respondent unreasonably failed to obtain further medical evidence or advice before reaching its conclusions.

202. Mrs Barton provided good support to the Respondent and we consider that the investigation of the disciplinary issues was thorough fair and reasonable in the circumstances. We also consider that the disciplinary process that then followed was, under the stewardship of Mrs Barton, fair and thorough.

203. We considered the Respondent's decision to dismiss and the process followed 'in the round'. The Respondent clearly did not have a closed mind to the option of issuing the Claimant with a warning rather than dismissing him. We consider that the Respondent took account of the relevant factors (as we have summarised) and reached a fair decision on the evidence it had before it and followed a fair process which complied with the principles of natural justice.

204. We consider that Mr Elliott in particular gave his decision careful thought. We consider that Mr Heard would have taken more persuading that the Claimant's dismissal was not warranted and we do not consider that he was as fair as Mr Elliott was in acknowledging the contrition that the Claimant had shown.

205. However, we do not consider that this led to any unfairness in the process or the decision made and we consider that dismissal was within the band of reasonable responses, the Respondent having reasonably concluded that the Claimant was not confident of being able to recognise his triggers in the future and that it was not an adequate safeguard for the Claimant (taking into account that he said he would be more open about his state of mind) to expect others to tell him if he seemed not to be himself. We consider that the Respondent acted reasonably in concluding, on balance, that the predominant concern was for the wellbeing of its

other employees and that the proportionate step to ensure their health and safety was to dismiss the Claimant summarily from his employment.

_____

Employment Judge Woodhead

Date 24 May 2024

Sent to the parties on:

18th June 2024

For the Tribunals Office

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Appendix

AGREED LIST OF ISSUES

1. Unfair dismissal

1 .1 It is admitted that the claimant was dismissed

1.2 What was the reason for dismissal? The respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under s. 98

(2) of the Employment Rights Act 1 996. The claimant accepts this was the reason for his dismissal.

1.3 Did the respondent hold a genuine belief in the claimant's misconduct on reasonable grounds and following as reasonable an investigation as was arranted in the circumstances? Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts? The burden of proof is neutral here, but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows;

1.3.1 Inconsistency of treatment: other employees were not dismissed for fights, in which they had thrown punches, but the claimant was dismissed for an incident in which he had not thrown a punch;

1.3.2 The respondent failed to take into account or give sufficient weight to the extent to which its own failure to provide appropriate footwear had contributed to the claimant's deteriorating mental health and therefore to the incident;

1.4 Did the respondent adopt a fair procedure? The claimant challenges the fairness of the procedure in the following respects;

1.4.1 The respondent failed to conduct a full and thorough investigation of the claimant's health conditions to understand the extent to which they caused the claimant's conduct;

1.4.2 The respondent rejected the claimant's argument that his health conditions had caused or contributed to his conduct without first obtaining medical evidence or advice which supported that conclusion.

1.5 If it did not use a fair procedure, what is the percentage chance that the claimant would have been fairly dismissed in any event and, if so, when would that have occurred?

1.6 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant committed the misconduct alleged.

2. Disability

2.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide: 2.1.1 Whether the claimant had a physical or mental impairment. The claimant argues that the mental impairment of anxiety I depression and diabetes?

2.1.2 Did it have a substantial adverse effect on the claimant's ability to carry out day-to-day activities?

2.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

2.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

2.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

2.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

2.1 .5.2 if not, were they likely to recur?

3. Discrimination arising from disability (Equality Act 2010 section 15)

3.1 Did the respondent treat the claimant unfavourably by:

3.1.1 Dismissing him on 10 February 2023;

3.1.2 Rejecting his appeal against on his dismissal on 24 March 2023.

3.2 Did the following things arise in consequence of the claimant's disability? The claimant's case is that:

3.2.1 Pain, anxiety or unhappiness exacerbate the symptoms of his depression;

3.2.2 The claimant's diabetes can cause his feet to swell and/or to experience pain in his feet;

3.2.3 The claimant's diabetes can cause him to experience memory fog and reduced cognitive function or black outs;

3.2.4 The claimant's depression and diabetes can cause the claimant to experience periods of mood swings, irritability and a shortness of temper leading him to overact to minor matters; the claimant can experience 'diabetic rage.'

3.2.5 The claimant argues that this may have caused his reaction to his colleague on 23 January 2023.

3.3 Was the unfavourable treatment because of any of those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

3.4.1 1 Ensuring that it protected its employees against acts of violence and operated a consistent disciplinary process based on the merits of each case. It said it took into consideration the factors and information obtained at the appeal and sought to balance its duty of care to the Claimant and to its other employees.

3.5 The Tribunal will decide in particular:

3.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims?

3.5.2 Could something less discriminatory have been done instead?

3.5.3 How should the needs of the claimant and the respondent be balanced?

3.6 Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? From what date?

4. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

4.1 Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? From what date?

4.2 A "PCP" is a provision, criterion, or practice. Did the respondent have the following PCPs:

4.2.1 The application of the respondent's disciplinary policy

4.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he was more likely to breach the respondent's disciplinary code of conduct because of his irritability and shortness of temper caused by his disabilities and was therefore more likely to face a sanction under it, including dismissal?

4.4 Did the lack of an auxiliary aid, namely appropriate safety shoes put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the shoes he was provided with were causing swelling and/or pain in his feet?

4.5 Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

4.6 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant suggests:

4.6.1 The respondent should have provided the claimant with the safety shoes which he requested;

4.6.2 The respondent should have replaced the claimant's safety shoes every six months or whenever the claimant said that they had worn out or become too supple.

4.6.3 The respondent should have accepted that the claimant's disabilities were a cause or partial cause of is misconduct, and therefore should have regarded that as a strong mitigating factor, which should have reduced the disciplinary sanction to a warning or final written warning.

4.7 Was it reasonable for the respondent to have to take those steps and when?

4.8 Did the respondent fail to take those steps?

5. Remedy

Unfair dismissal

5.1 The claimant does not wish to be reinstated and/or re-engaged

5.2 What basic award is payable to the claimant, if any?

5.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

5.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

5.4.1 What financial losses has the dismissal caused the claimant?

5.4.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

5.4.3 If not, for what period of loss should the claimant be compensated?

5.4.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

5.4.5 If so, should the claimant's compensation be reduced? By how much?

5.4.6 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce his compensatory award? By what proportion?

5.4.7 Does the statutory cap of fifty-two weeks' pay or £93,878 apply?

Discrimination

5.5 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.6 What financial losses has the discrimination caused the claimant?

5.7 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.8 If not, for what period of loss should the claimant be compensated for?

5.9 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded forthat?

5.10 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.11 Should interest be awarded? How much?