EMPLOYMENT TRIBUNALS

Claimant: Mr David Roberts

Respondent: Openreach Limited

JUDGMENT having been sent to the parties on 28 February 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This was a seven-day case heard at Manchester Employment Tribunal from 12 February 2024 to 20 February 2024 inclusive.

2. At the outset of the hearing the respondent accepted that the claimant was a disabled person and that the respondent knew that the claimant was disabled at all material times by reason of stress and anxiety.

3. Both parties were represented by counsel and during the course of the hearing the issues narrowed considerably to those of: (a) discrimination arising from disability, in breach of s15 Equality Act 2010; and (b) unfair dismissal, in breach of s94 Employment Rights Act 1996. All of the issues in dispute effectively distilled into the dismissal of the claimant, whether this was unfair and/or discriminatory.

Evidence

4. The documentary evidence was extensive. We considered documents over five folders which amounted to a total of 1,994 pages. We heard evidence from:

a. the claimant, who was at all material times a Customer Service Engineer for the respondent

b. James Green, a Patch Lead

c. Julian Perrett, the claimant's Patch Manager and line manager

d. Chris Foley, Patch Manager and disciplinary investigation manager

e. Chris O'Connell, Chief Engineer and the claimant's Patch Lead

f. Fred Parker, Senior Engineering Area Manager and disciplinary/dismissal manager.

The claimant's statement amounted to 102 pages. The rest of the witness evidence totalled up to 182 pages.

5. We considered the written statements of Karen Kendrick (the claimant's former trade union representative), Robert Morgan (the grievance manager) and Aled Edwards (the grievance appeal manager). We did not hear from these three latter witnesses, nevertheless we considered their evidence. We gave less weight to the evidence of the three witnesses we did not hear from, but the weight of the evidence was effectively in accordance with their relevance to the matters under issue. So as this evidence was of marginal relevance to the issues, at most, there was no disadvantage not hearing from these three.

6. The key witnesses in this case were the claimant and the dismissing officer, Mr Parker.

The Law

7. In respect of discrimination arising from disability, s15 Equality Act 2010 ("EqA") precludes discrimination arising from disability:

> "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."

8. Subsection (1) does not apply if A shows that A did not know or could not reasonably have been expected to know that B had a disability, so knowledge is key and knowledge was apparent in this case.

9. S15 EqA is aimed at protecting against discrimination arising from or in consequence of someone's disability rather than the discrimination occurring because of the disability itself, which is covered under direct discrimination. The term "unfavourably" rather than the usual discrimination term of "less favourably" means that no comparator is required for this form of alleged discrimination. So, for example, where a disabled employee was viewed as weak or unreliable because, say, he had taken periods of disability related absence, and that this had caused his dismissal, the person may not suffer a detriment because he was disabled as such but because of the effect of that disability.

10. So far as unfair dismissal, the claimant claimed that he was unfairly dismissed in contravention of s94 Employment Rights Act 1996 ("ERA"). S98 sets out how the Employment Tribunal should approach the question of whether the dismissal is fair.

First, the employer must show the reason for dismissal and that this reason was one of the potentially fair reasons set out in s98 ERA. If the employer is successful at this first stage, the Tribunal then must determine whether the dismissal was fair under s98(4) ERA.

11. The s98(4) ERA test can be broken down to two key questions:

(1) Did the employer utilise a fair procedure?

(2) Did the decision to dismiss fall within the range of reasonable responses open to a reasonable employer?

12. The respondent said that it dismissed the claimant for a conduct-related reason, pursuant to s98(2)(b) ERA. Although the claimant denies the misconduct in question, there is no dispute that this was a conduct-related matter. For misconduct dismissal an employer needs to show:

(a) An honest belief that the employee was guilty of the offence;

(b) That there were reasonable grounds for holding that belief;

(c) That these came from a reasonable investigation of the incident.

13. These principles were laid down in *British Home Stores v Burchell*[1]. The principles were initially developed to deal with dismissals involving alleged dishonesty. However, the *Burchell* principles are so relevant that they have been extended to provide for all conduct-related dismissals. So, conclusive proof of guilt is not necessary – what is necessary is an honest belief based upon a reasonable investigatory process.

14. Accordingly, so far as the unfair dismissal was concerned, the emphasis of this case at this hearing was whether the Tribunal could be satisfied in all the circumstances that the respondent was justified in dismissing the claimant for the reasons given i.e. in relation to his purported misconduct.

15. ACAS has issued a Code of Practice under s199 Trade Union & Labour Relations (Consolidation) Act 1992. Although the Code of Practice is not legally binding in itself, Employment Tribunals would adhere closely to the relevant Code of Practice when determining whether any disciplinary or dismissal procedure was fair. The ACAS Code of Practice represents a common-sense approach in dealing with disciplinary matters and incorporates principles of natural justice.

16. In operating any disciplinary procedure or process the employer will normally be required to do the following:

- deal with the issues promptly and consistently;
- establish the facts before taking action;
- make sure the employee was informed clearly of the allegation;

[1] [1978] IRLR 379

- allow the employee to be accompanied to any disciplinary interview or hearing and to state their case;

- make sure that the disciplinary action is appropriate to the misconduct alleged;

- provide the employee with an opportunity to appeal the decision.

17. In *West Midlands Co-operative Society v Tipton*[2] the House of Lords determined that an appeals procedure was an integral part of deciding the question of a fair process. Indeed, a properly conducted appeal can properly reinstate an unfairly dismissed employee or remedy some procedural deficiencies in the original hearing.

18. In judging the reasonableness of the employer's decision to dismiss an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer did, in fact, chose. Consequently, the question for the Tribunal to determine is whether, in all of the circumstances, the respondent's decision to dismiss the claimant fell within the band or range of reasonable responses open to a reasonable employer: see *Foley v Post Office; HSBC Bank plc v Madden*[3]*.* The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision was reached: *J Sainsbury plc v Hitt*[4] and *Whitbread plc (t/a Whitbread Medway Inns) v Hall*[5]*.*

Our findings of fact

19. We (i.e. the Tribunal) made findings in respect of the following facts. We did not resolve all of the disputes between the claimant and respondent merely those matters which we regarded as appropriate to determining the issues of this case. In determining the following facts, we placed particular reliance upon contemporaneous or near contemporaneous correspondence, emails and documents. We approached the witness statements with some care because this evidence was prepared sometime after the events in question and for the purposes of either advancing or defending the claims in question.

20. The claimant began work for the respondent on 26 April 2007.

21. On 22 January 2021 the claimant was assigned the task and completed the job that later leads to the respondent disciplining and dismissing him for gross misconduct.

22. On 25 January 2021 Mr Green, the Patch Lead, informed Mr Perrett, the claimant's Patch Manager that the claimant had allegedly breached health and safety policy and working practice and allegedly failed to provide a customer with the required quality of service. Mr Green undertook work to connect the other customer.

[2] [1986] ICR 192
[3] [2000] ICR 1283
[4] [2003] ICR 111
[5] [2001] ICR 669

23. The claimant was absent from work with stress and anxiety from 26 January 2021 [see Hearing Bundle page 231].

24. The claimant's GP wrote to the respondent on 15 March 2021 explaining the claimant's current health position [HB1313].

25. On 23 April 2021 the claimant was advised of the disciplinary investigation [HB229] and on 29 April 2021 the claimant returned to work on a phased basis [HB230-231].

26. On 7 May 2021 Mr Foley rang the claimant and informed him he was being investigated for climbing a pole without carrying out the required safety checks. The claimant was working from home at this time [HB1514-1522]. Mr Foley undertook an initial fact-finding meeting. The claimant was suspended [HB235-237].

27. A further fact-finding investigation was undertaken by Mr Foley on 2 June 2021 [HB1523-1540] and he concluded his investigation on 25 June 2021 [HB1541-1542].

28. On 28 June 2021 the claimant was informed the matter would be progressed to a disciplinary hearing [HB1552-1553]. The claimant's trade union representative requested that the disciplinary hearing was heard by an independent out of area manager, which it was [HB996].

29. On 29 September 2021 the claimant raised a grievance in respect of the disciplinary process and for disability discrimination [HB820-821].

30. A reconvened disciplinary hearing went ahead on 30 September 2021 [HB827-847] and on 27 October 2021 the claimant was advised that the disciplinary had been placed on hold whilst his grievance was being investigated [HB893].

31. The claimant's grievance was heard on 4 November 2021 [HB894-1010, 1426-1467] and the grievance outcome was sent to the claimant on 6 January 2021. The claimant's grievance was not upheld [HB1091-1100]. He appealed the outcome on 12 January 2022 [HB1121-1126].

32. On 18 January 2022 the claimant and his trade union representative met with Mr Parker who confirmed the disciplinary decision. The claimant was given notice of dismissal and his employment ended on this day [HB1134-1138].

33. The claimant appealed against his dismissal on 21 January 2022 [HB1181-1182].

34. The claimant's grievance appeal hearing was heard on 10 February 2022 [HB1468-1475] and the outcome was sent to the claimant on 13 April 2022, which dismissed his appeal [HB1221-1232].

35. On 14 February 2022 the claimant's disciplinary appeal was heard [HB1476-1479] and the disciplinary appeal outcome was sent to the claimant on 9 March 2022. This dismissed his appeal [HB1240-1243].

Our determination

36. So far as our reasons, we deal with the discrimination allegations first.

Disability Discrimination

37. In respect of the unfavourable treatment relied upon (issue 4 of the revised agreed list of issues), *the unfavourable treatment relied upon* by the claimant, was the decision to dismiss him on the grounds of his misconduct. This was a decision made by Mr Parker, Mr Parker being the alleged discriminator.

38. So far as the *"something" arising in consequence of the claimant's disability* (issue 5), this identified the claimant's difficulty in coping with stressful, unfamiliar or difficult situations, and/or feeling very anxious and/or difficulty in concentrating and/or difficulty with decision making. It was not the claimant's pleaded case that he suffered difficulties with his decision making. There was no amendment or application to amend the details of complaint. This identified the claimant's case. The claimant said that he had difficulties in concentrating. The claimant relied upon stress and anxiety but stress and anxiety covers a whole plethora of matters. Issue 5, also referred to difficulties in decision making, and again that was not part of the claimant's pleaded case. Nevertheless, we did consider the claimant's case at its widest.

39. So far as the claimant's conditions of anxiety and stress-related depression were concerned, we went through the medical evidence very carefully. We considered all of the claimant's GP notes and we noted that there was a significant episode of anxiety in 2009. Nevertheless, throughout the GP notes, we could detect nothing that was consistent in the record of poor decision-making recorded in the claimant's medical evidence.

40. The claimant said that his GP told him one thing and recorded another in the notes [HB1332]. We do not believe him. We determine that the claimant made this up to suit his case. We make this determination because the claimant was not at all convincing in his evidence on this matter and that the claimant's version was at odds with the rest of the medical evidence. We do not accept that on this very significant matter the claimant's GP did not record the claimant's medical record fully or accurately.

41. We also noted that there was no pattern that we could discern of poor decision-making asserted at the end of the disciplinary process. We accept that the claimant had anxiety and that he also suffered from stress. But in terms of medical causation, we were not at all satisfied that this arose from the impairment contended.

42. We make that determination on the basis that it was not part of the claimant's pleaded case. There was no history of impaired or difficulties in making decisions throughout the claimant's medical evidence but particularly from 2009 onwards. Furthermore, there was no record of poor decision-making in the claimant's employment history prior to the events under our scrutiny and at the time of our scrutiny, and there was no pattern asserted in the disciplinary process.

43. *Did the respondent treat the claimant unfavourably because of something arising in consequence of his disability* (issue 6). We accept the respondent's submission on the 2-stage test for causation, pursuant to *Pnaiser v NHS England*[6]:

[6] [2016] IRLR 170

(1) What was the reason for, or cause of, the treatment? (2) Was that reason or cause something that arose in consequence of the claimant's disability?

44. The first question requires consideration of Mr Parker's conscious or unconscious thought process: see *T-Systems Limited v Lewis*[7]. The "something" need not be the sole or main reason, but it must have a significant (or more than trivial) influence. Mr Parker did not consider the reason that the claimant transgressed on 21 January 2021 was caused by the *something* related to his disability. We were satisfied that the dismissal was based on Mr Parker's perception that the claimant ignored or did not properly adhere to the respondent's health and safety policy. There was no evidence for us to conclude that the respondent took into account that the claimant had difficulties in coping with stress, that he had difficulties in coping with unfamiliar or difficult situation or that he was feeling very anxious, or that he had difficulties in concentrating, even for that matter that he was dismissed for difficulties in his decision making. Mr Parker regard the claimant as wilful by insisting that his actions were safe, and he rejected the contention that the claimant's judgment was impaired. He regarded the claimant as knowing and calculating that he was effectively cutting corners and he regarded the claimant as fully aware of the possible serious consequence of his careless approach.

45. The claimant said that he undertook and satisfied a hammer test, which we determine was not consistent with his case on his purported impaired judgment. He "pinched" another line which showed a lackadaisical attitude as was not fixing the pre-climb label.

46. The claimant's contention that he could not rely upon his managers for support does not arise from his disability. This contention stems from an allegedly unsupportive environment, which we reject on the basis of the other documentary evidence around a rigorous health and safety culture and, in particular, the evidence of Mr Perrett and others to the contrary, which we preferred as being more credible.

47. Effectively, issue 7 on *proportional means of achieving a legitimate aim* falls away because we reject the causation point. Issue 7 goes to justification for the dismissal. In any event the claimant's dismissal was proportional and justified on the basis of the respondent's legitimate aims identified at issues 7(1) to 7(3).

48. For the above reasons, the claimant's claim of disability discrimination fails.

<u>Unfair Dismissal</u>

49. We then proceeded to determine the unfair dismissal claim.

50. The key question for us at the outset was the categorisation of this disciplinary offence – whether it was a misconduct matter or whether it was a gross misconduct matter. The dismissing officer, Mr Parker, said that the claimant had climbed a 40-foot pole, and he perceived that this was life-threatening if the claimant had fallen off. So far as the Tribunal is concerned, it was possible that this might have been a life-threatening situation but we felt that this was overstated. It was more likely that, if the claimant fell because of the pole being unstable, then he might suffer a serious injury or injure or possibly cause a fatal accident to a pedestrian or other road user. That

[7] EAT 0042/15

said, in any event, this was clearly a gross misconduct offence, or more relevant, it was within the range of reasonable responses to label this as a gross misconduct offence.

51. There were issues about whether or not the claimant could see the bottom of the pole, in his visual test. This was not a major point, but the Tribunal was divided on this point. One member (the minority) accepted the claimant's account that he could see the bottom of the pole to conduct the visual inspection; the majority view was that he could not. We saw the photograph; the mud was dirty, and the vegetation was high. However, that was not key to our decision making, because Mr Parker did not determine that issue. We suspect, like the majority of the Tribunal, he did not believe the claimant's account.

52. Overall, the Tribunal had reservations about the decision making of the dismissing officer. Mr Parker took a number of easy options, but in respect of the visual inspection Mr Foley said that the pole was 12 inches under water when he inspected it because of the watermark visible. When the claimant climbed the pole, Mr Foley could not ascertain how high the water had been at that particular point but in any event Mr Parker made no clear determination on anything other than what the claimant admitted. He was presented with a very thorough disciplinary investigation, and he chose not to make determinations in respect of the totality of that disciplinary investigation. He chose particularly not to make clear determinations in how he regarded not fixing of the pre-climb label and his determination in respect of the pair pinching line was less than clear or satisfactory.

53. Nevertheless, the claimant admitted that he did not fix the pre-climb label and he contended that he did the hammer test, under water. Throughout the process, the claimant admitted that he had removed someone's line, which was called "pair pinching". Although this was not regarded by the respondent as a dismissible offence in itself, this was serious because the claimant said that he had deliberately removed someone's line, i.e. he cut off a service to one customer to give to another customer because he said the other customer complained. Mr Parker was equivocal whether he saw that offence as gross misconduct or misconduct, but the precise label is not determinative as the legislation does not refer to gross misconduct, it refers to mere misconduct and Mr Parker said at one stage that he did not regard pair pinching as a dismissible offence.

54. A large part of the case turned on the hammer test. The claimant did not say at any point that he heard a metallic ring, which we accepted was the point of the test and the expected sound required to ensure the pole is sound and safe to climb up. The claimant merely said that he undertook the hammer test, and he passed the test. Mr Parker determined that the claimant could not have heard the metallic ring, he said that it was obvious. He referred to the laws of physics, i.e. sound is distorted under water. Both Mr Green and Mr Foley said that the claimant could not have heard the correct metallic ring and these were experienced engineers. In any event, Mr Parker asked for verification from Mr Arrowsmith [HB422] so he did not necessarily proceed on an assumption, notwithstanding this was the understanding of all three of these experienced engineers.

55. The conclusion Mr Parker came to was that the claimant undertook a test where he could not be sure of the outcome of the test because there was no integrity to the

test. For Mr Parker the matter was straightforward, the test was unreliable so therefore the pole was not safe to climb, and the claimant should not have climbed the pole. He put himself and others in danger. That was a breach of the health and safety guidelines and that amounted to the gross misconduct.

56. In respect of the process that the respondent undertook, so far as the ACAS procedure and the key parts of the ACAS Code of Practice, we were satisfied that the respondent dealt with all of those matters that we raise above.

56.1 The respondent dealt with the issues promptly. The claimant was on sick leave; the respondent did not raise this with the claimant whilst he was off ill, which was within the range of reasonable responses for the employer. The claimant was off sick due to stress, and they waited until he said he was able to return to work.

56.2 The respondent established the facts before taking action. The investigating officer did a very thorough job. A detailed report was made, and the investigator made sure that the claimant was informed of the allegations. So far as the investigation was concerned, we had some concern that the claimant was provided with a whole plethora of documentation before an investigatory meeting. That undermined the progress that could be made at that investigatory meeting as it was not satisfactory for an employee to turn up at an investigatory meeting and be provided at that stage with extensive material. However, this was rectified in the circumstances because although the meeting could not make sufficient progress, the respondent waited for the claimant to respond, and the claimant responded fully. He was not ambushed. So in terms of the totality of a fair process, that did not impinge any unfairness. It merely undermined the progress that could be made at that particular meeting.

56.3 The claimant was invited to a disciplinary hearing and was made aware of the allegations beforehand. So, he knew what he was being called to account for. He was accompanied by a trade union representative, and so far as we could see the claimant's trade union representative did an effective job; she was certainly not passive in the process. It appears to us she took her role seriously and she engaged fully. The claimant was allowed to state his case, and that case was engaged with.

56.4 The allegations/charges were proportionate, as explored above.

56.5 The respondent provided the claimant with an opportunity to appeal the disciplinary decision.

57. In terms of the *Burchell* test, we were all agreed that Mr Parker had an honest belief that the claimant was guilty of the offence. Where we are split between the majority and the minority on whether there were reasonable grounds for holding that belief, and where we split again on the reasonableness of the investigation of the claimant's medical condition.

58. So far as the investigation of the incident was concerned, this investigation was thorough. The claimant subsequently raised his ill health, and one Tribunal member

(of three) felt that that was not sufficiently explored or investigated. We deal with this point in more detail later.

59. The claimant accepted that he had made some safety mistakes. The claimant accepted that he should have contacted the managers before climbing the pole.

60. So far as the possible comparators with similar incidents – in particular Mr Flanagan's circumstances – we regarded the claimant's circumstances as not compatible. Both were safety issues, but there were different dismissing officers and different circumstances. We detail this point below as we specifically address the claimant's counsel's, Mr Ali's, points.

61. Of crucial importance to the majority, was the dismissing officer conviction that in coming to his decision, he said that he could not be assured that the claimant would not do the same health and safety offence again. According to Mr Parker, the claimant attempted to justify what he regarded as the unjustifiable. The claimant did not have sufficient insight to what he had done wrong, so the respondent could not rely upon him not repeating this health and safety transgression again. Given this, any action short of dismissal was insufficient and inappropriate according to Mr Parker, which the majority accepted as within the range of reasonable responses.

62. We now address the Mr Ali's eight points.

62.1 In respect of the first point about climbing the pole, we have already said that this was gross misconduct because there was a potential for death or serious injury. The line pinching, both a reasonable employer and this employer did not regard this as a dismissible offence on its own. The line pinching did not come within the examples of gross misconduct (at page 255 of the hearing bundle) but it sat with in the misconduct definitions at page 255. We note that the disciplinary procedures were not contractually binding [HB250, 349].

We deal with the rest of Mr Ali's submissions at point 1 in various other places below as appropriate.

62.2 The claimant contended that the respondent had simply assumed that the hammer test under water was ineffective, and no-one carried this out. That argument is clutching at straws. We heard from 3 experienced engineers and saw correspondence from Mr Arrowsmith, who was not directly involved but was consulted [HB442]. All stated the obvious, i.e. that a hammer test below water would not effectively work, it would not produce the type of sound that was required for the test. The dismissing officer said it was so obvious that the hammer test would not work that it never should have occurred to the claimant to try it. Mr Ali expressed surprise that this occurrence did not happen more often in the UK, in winter and spring in particular, and the fact that it did not, Mr Parker suggested, was a clear indication that it was unheard of for someone to attempt a hammer test under water. In our unanimous view no reasonable employer could accept a hammer test done under water could produce a reliable sound or result – the laws of physics argument advanced by Mr Parker.

Mr Parker rejected the claimant's contention that this was a was a unique situation. He accepted the claimant had never climb a pole when the bottom of

it was submerged in water, but he did not accept that this situation was unique in terms of being called out to an incident such as this. For the dismissing officer, the key was that there was a supportive system available for the claimant, which was to phone for advice. There was a helpline available – which was part of the guidance and part of the process to go through if in doubt. The claimant says that the helpline does not usually give a definitive answer, but the point is that this was a resource available should the claimant have any doubts about how to exercise his judgment. Yet the claimant did not ring the helpline, and that was hugely significant for the dismissing officer, and it was within the range of reasonable responses to be so concerned. In the absence of contacting the helpline, it was even more inexplicable for Mr Parker as to why the claimant did not contact his or any supervisor. The claimant could have contacted Mr McConnell (the patch lead), he could have contacted his line manager (Mr Perrett), he did not try to contact any of the three patch leads nor did he call, or attempt to call, any of his other 30 engineering colleagues for advice.

The claimant did not attempt to contact any colleague because we believe the investigation officer, Mr Foley, interpreted the situation correctly. Mr Foley did not believe that the claimant did the hammer test at all. He said he could not see how it could be done properly under water against the resistance of the water. Mr Foley's analysis sounds the correct interpretation, which might have been relevant had *Polkey* applied. That said, Mr Parker accepted what the claimant said about undertaking a hammer test. However, he determined the situation slightly differently, because Mr Parker, appropriately in our view and in the view of the reasonable employer, determined that the test had no integrity, i.e. it could not be relied upon. In addition, the test provided that a tester should not put ladders against the pole as that would undermine the integrity of the test. Mr Ali's point that there was no prohibition about conducting the hammer test underwater or part-submerged is facile. It was not outside the range of reasonable responses for the dismissing officer to hold a view consistent with all of the other engineers and with Mr Arrowsmith and make a determination that there was no way the metallic ring could be heard.

62.3 It was on Mr Ali's third point, the occupational health report, where the Tribunal's significant split arose. Page 227 of the hearing bundle refers to the respondent getting an occupational health report. The majority view was that this report is clearly about reasonable adjustments to facilitate the claimant's return to work. The claimant had not returned to work by this stage but more importantly the disciplinary investigation and disciplinary hearing had not properly commenced, therefore the majority's view that that an occupational health report would have made no difference.

At page 205 there was the return to work interview, between the claimant, the claimant's trade union representative (Ms Kendrick), Mr Culshaw (who was the claimant's line manager manager). An occupational health report was mooted. The respondent was wrong to say that the claimant refused an occupational health report as the claimant merely said he had no objections to proceeding at that stage without the occupational health report. This was important for the minority view. The claimant at this meeting did not say that his stress or anxiety impaired his judgment. The meeting records that due to him worrying about

the covid situation, he had failed a course three times which added to his ongoing mental health and anxiety, and the report proceeded to say that the claimant had now been fully vaccinated, so he feels more confident that he has some protection from covid, which helped to reduce his anxiety. This was on 12 March 2022.

There was another incident at Morrisons immediately preceding that and the claimant was off on sick for a substantial period of time in close proximity to the index incident. The claimant's GP assumed [HB1313] occupational health involvement, and that was on 15 March 2022. The minority view was that it should have been obvious to the respondent that it needed to know whether the claimant had impaired judgment at this time, and to proceed without this enquiry was outside the band of reasonable responses. The respondent had to undertake an occupational health assessment. This would have delayed matters, but it would not have delayed matters significantly because the whole process was lengthy, and the costs was not excessive when compared to an employee with 15 years' service and a hitherto clear disciplinary record.

In contrast the majority view was that prior to the end of January 2022 the claimant had no mental health episode since November 2015 and this was a considerable period of time, see claimant's GP notes [HB1335]. The claimant's last attendance at his GP was eight months before and that was for a review of his medication. The respondent did not know about this review and there was no indication how they would know. Prior to that the claimant had a review of his medication two years eight months before these incidences, and that again was to review his medication, so the employer had no knowledge of the claimant's previous health difficulties since November 2015 [HB1335]. The claimant had a BT passport, which was updated to reflect covid.

The claimant had failed the NRSWA tests twice, but he had passed the test the day after, i.e. the day before the index incident. So, we reject the claimant's contention that his two test failures were indicators of an mental health difficulty because he had passed the NRSWA test before the incident. The other purported indicator, the Morrisons incident, was a week or slightly more prior to the index incident, but that was a minor concern about covid exposure, which we determine was entirely unrelated and could not affect the claimant climbing a potentially dangerous pole where he was on his own and it was not in an enclosed area.

It was obvious to Mr Parker, a reasonable employer and to us that the incident which led to the claimant's dismissal was not unique or sufficiently unusual such to inhibit the claimant's judgment. Mr Parker regarded the job as typical, one of restoring lines. The claimant had to deal with an irate customer; there were adverse weather conditions, but all of those were within the type of job that the claimant could be expected to come across on a reasonably regular basis. The whole job should have been within the claimant's capabilities according to Mr Parker.

The occupational health report envisaged by HR was regarding the claimant's return to work. The majority view was that the occupational health report (which was Mr Parker's point) would not have addressed medical causation because

it arose from the return-to-work interview [HB205]. An occupation health report would not have indicated that the stress and anxiety had impaired the judgment because that required an in-depth medical assessment such that was never contemplated by anyone at that stage. For the majority, the issue of possible poor judgment was not included or referred to in the claimant's BT passport. There was no history of poor judgment, the claimant engaged in the disciplinary process fully and was ably supported by trade union representatives. The majority had no criticism of the respondent's failure to pursue an occupational health assessment, which was speculative, there were no indicators suggesting this and it was not raised at the relevant stage by the claimant or his representative. To proceed without this was within the band of reasonable responses.

We looked carefully at the case of *British Telecommunications PLC v Daniels*[8] which Mr Ali had helpfully provided. So far as *BT v Daniels* is concerned. This judgment turned on its facts. The Employment Appeal Tribunal determined that the Employment Tribunal in that case was entitled to determine that management had failed in not commissioning an occupational health report, but we felt that those circumstances were significantly different, and that case did not lay down a proposition that an employer would be required, in circumstances such as our situation, to undertake a medical examination. It is purely an enabling authority as opposed to a declaratory authority, i.e. it did not say the employer have to do this or should do it, it merely said that in the circumstances of that case, the employer should have obtained an occupational health report.

We are mindful of Mr Parker's evidence, that he thought that the impaired judgment argument was a red herring. Many months after the event the claimant contended that he had done nothing wrong, that the tests were correct and that he did not put himself or others in danger. So, it was the lack of insight and not a manufactured after-the-event argument that convinced him that dismissal was the only viable response.

62.4 There is no medical evidence to support the contention that that the stress and anxiety had led to impaired judgment. That point is dealt with under disability discrimination above.

62.5 We unanimously reject that this was a predetermined rubber-stamping exercise. This argument was based on an email of 7 September 2021 [HB1554]. Mr Parker was effectively asking to confirm which policies had been breached. By the time he had written that email the claimant had accepted that he had breached policy on the line-pinching allegation and the claimant had also said that he had undertaken the full range of pre-climbing instructions and assessment, particularly as he had fixed a label within that. This does not indicate to us a closed mind. The investigating officer had made certain investigations and put certain things into the realm, and Mr Parker did not resolve those. So, that indicates that Mr Parker did not have a closed mind, it indicates the other way because the dismissing manager ducked many issues. He sought to resolve matters on the issues he regarded the claimant admitting

[8] EAT 0554/11

or accepting and he did not merely adopt or rubber-stamp a comprehensive investigation report.

62.6 In respect of point 6, so far as paragraph 41(1) we have given our determination in respect of the medical evidence in detail. In respect of 41(2) about the issue about climbing pole DP82, Mr Green believed that the claimant had climbed DP82. Mr Foley came to a determination that it could be assessed by a stepladder, so therefore that allegation was not pursued, see Mr Foley's report [see HB1511], but at page 1541 he makes that determination quite clear, so that allegation fell away, effectively. Paragraph 41(3) deals with the hammer test – we have dealt with that.

62.7 In respect of penalty, gross misconduct is presumptive of dismissal. The employer still needs to consider mitigation and, if appropriate, aggravating features. In this case, mitigation was quite clear – the claimant has long service and a clean disciplinary record. Mr Parker dealt with this in his evidence. He said that he considered the longevity of the claimant's employment and his good service, but for him the aggravating feature was that he felt that the claimant had done something wrong, and the claimant continued (as he perceived it) trying to justify the unjustifiable. This lack of insight could not be remedied, which is explained above.

So far as not treating the claimant consistently with other employees, we have dealt with it briefly above, but the key point here is that this was dealt with by an out-of-area manager which the claimant had requested. He was not involved in the other disciplinary matters relied upon by the claimant. He regarded the claimant's health and safety offence as gross misconduct, which is presumptively a dismissal.

The majority felt that the decision was within the range of reasonable responses. Mr Parker said he had checked it with HR who, he said, regarded this as consistent with other case. The examples quoted by the claimant are not enough to undermine this contention. The Flanagan incident happened ten months later so it was not in the dismissing officer's mind at the time of dismissal. He could not have considered it, but in that incident the BT employee was disciplined. It is not the case that he was let off as there was a disciplinary sanction. Mr Parker regarded the claimant's behaviour as wilful. In the Flanagan incident, Mr Flanagan admitted responsibility and Mr Parker distinguished it accordingly; he said that the other matter was employee's carelessness. That matter involved careless parking and he regarded it as not directly comparable with climbing a pole. For any it to have the proper force it has to be effectively the same disciplining officer dealing with the same colleagues at the same time for us to get involved.

62.8 Point 8 was in respect of whether any unfairness could be cured at an appeal. As the dismissal was fair (which is the majority's view) then this made no difference. There was a 17-minute appeal hearing which went ahead as a paper review. We did not hear evidence from the appeal officer, so his account had limited value. Had it gone through as a re-hearing then, according to *Tipton*, the appear could have cured any defects that had happened before.

We took into account the outcome and the reasons given for this, but both had limited value.

63. We have not dealt with any *Polkey* matter and we have not dealt with any possible arguments in respect of blameworthy conduct or any other s122 ERA because they relate to remedy matters and according to the majority of the Tribunal the claimant was not unfairly dismissed.

64. In respect of the wrongful dismissal (i.e. breach of contract for the claimant's notice period, the majority view was that this was a gross misconduct offence entitling the respondent to dismiss on the information that they had. The minority view was that she could not be satisfied that this was a gross misconduct offence in terms of the allegations proven as the respondent did not obtain an occupational health report.

65. In summary therefore, unanimous decision of the Employment Tribunal is that the claimant was not discriminated against on the grounds of his disability. The majority determination is that the claimant was not unfairly dismissed.

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Employment Judge Tobin

27 August 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

.27 August 2024

FOR THE TRIBUNAL OFFICE