



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Chrusciel

**Respondent:** DHL Services Limited

**Heard at:** Birmingham Employment Tribunal      **On:** 4-8 November 2024

**Before:** Employment Judge Kight, Mr E Stanley, Mrs S Bannister

## Representation

Claimant: In person

Respondent: Mr C Rix

**JUDGMENT** having been sent to the parties on **11 November 2024** and written reasons having been requested by both parties in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## INTRODUCTION

1. By ET1 dated 20 March 2023 following a period of early conciliation between 16 January and 21 February 2023, the claimant brought claims for unfair dismissal, sex discrimination and disability discrimination.
2. The claimant withdrew her claim for sex discrimination at a preliminary hearing conducted by EJ Broughton on 1 March 2024 and so that claim was dismissed on withdrawal, leaving the claims of unfair dismissal and discrimination arising in consequence of disability for this Tribunal to determine.
3. The claimant represented herself, assisted by a Tribunal appointed interpreter, Ms Swallow, because English is not the claimant's first language. The Tribunal was very grateful to Ms Swallow for her services during the hearing and particularly her ability to maintain sufficient speed of interpretation to allow an effective and efficient hearing. The respondent was represented by Mr Rix of Counsel.
4. At the start of the hearing, the Tribunal asked the claimant whether there were any reasonable adjustments which she required to ensure that she was fully able to participate in the hearing. These were noted and accommodated by the Tribunal where needed. The claimant was content with the Tribunal's

suggestions about adequate breaks and understood that if she needed any more frequent or lengthy breaks that these too could be accommodated.

5. In terms of evidence, the Tribunal was provided with a bundle which ran to 427 pages and written witness statements for the claimant and Mr Adam Hobrow, for the claimant and Mr Adrian Flanagan, Mr Mark Westwood and Mrs Claire Baker for the respondent. All those witnesses save for Mr Hobrow attended the hearing and gave live evidence. It was explained to the claimant at the start of the hearing that Mr Hobrow not attending the hearing meant that whilst his statement would be read, the Tribunal would have to decide how much weight to give to it. The Tribunal read the statement but given Mr Hobrow was not employed at the time to which the events in this claim relate and he did not attend, it attached little weight to its contents. Page 308 of the bundle was a statement from the claimant's sister who also did not attend the hearing. The Tribunal was not taken to that statement by either party during the hearing and no reference was made to it but as the Tribunal did not hear oral evidence from the witness herself, it adopted the same approach as with the statement of Mr Hobrow and did not attach weight to it.
6. The claimant also produced a leaflet which accompanies her medication and sets out the potential side effects. Mr Rix did not object to this additional disclosure, though it was caveated with the assertion that this leaflet may not have been the same as the leaflet the claimant said she showed to the respondent during the disciplinary process. Mr Rix also produced detailed written closing submissions and both parties gave oral submissions for which we thank them. Mr Rix provided copies of an agreed chronology, cast list and key reading list for the Tribunal.
7. During the preliminary session at the start of the hearing, the Tribunal established that the issues had narrowed since the preliminary hearing. It was accepted by the respondent that the claimant was disabled by virtue of the impairments of epilepsy, depression and anxiety and that at the material time, the respondent knew about these disabilities. It was also not in dispute that the claimant was dismissed on 20 December 2022 and that a dismissal would amount to unfavourable treatment.
8. For the purposes of the claimant's claim pursuant to **section 15 of the Equality Act 2010**, the claimant was asked to clarify how she said her conduct, which had been identified as the "something", arose in consequence of her disabilities. She explained that the elements of conduct which were so affected were that:
  - 8.1. In relation to her conduct on 30 November 2022, her failure to report the damaged scanner was because she had panicked due to her anxiety and depression.
  - 8.2. In relation to her conduct on 6 December 2022, the claimant had reacted as she had because of the side effects of her epilepsy medication.
9. The issues for the Tribunal to determine in relation to liability were therefore:

In relation to the claim for unfair dismissal:

- 9.1. Whether the claimant's conduct was the reason for dismissal and if so, whether it was a potentially fair reason?
- 9.2. If so, whether the respondent formed a genuine belief that the claimant had committed that conduct, based on reasonable grounds and having carried out a reasonable investigation?
- 9.3. If so, whether both the process that was followed and the decision to dismiss the claimant were reasonable, i.e. that they fell within the "band of reasonable responses".
- 9.4. If the claimant was found to have been unfairly dismissed, whether she contributed to her conduct and/or whether had a fair procedure been followed she would nevertheless have been dismissed.

In relation to the claim for disability discrimination:

- 9.5. Whether the claimant's dismissal was because of something arising in consequence of her disabilities, including the side effects of her medication, the "something arising" having been the claimant's conduct as set out at paragraphs 8.1 and 8.2 above?
- 9.6. If so, whether dismissal in the circumstances was a proportionate means of achieving the respondent's legitimate aims as set out in their amended grounds of resistance (pages 60-61 of the bundle) as being:
  - 9.6.1. "To ensure that standards of behaviour and discipline are maintained and consistently enforced at the site in respect of the claimant and her colleagues
  - 9.6.2. To ensure a safe working environment for the claimant, her colleagues and others on site
  - 9.6.3. To ensure that the policies and procedures are strictly followed to maintain standards of behaviour and ensure incidents are promptly reporting in line with these policies. Further a consistent approach to enforcement, and to the consequences of non-compliance is imperative in maintaining the credibility of the policies and the standard of behaviour required"

## **FINDINGS OF FACT**

10. The claimant started working for the respondent, a provider of logistics support, as a warehouse operative on 29 November 2012. At the material time she was and had for a few months been working night shifts (8:45pm to 6am) 4 shifts per week at the Jaguar Land Rover warehouse called Tyrefort, which was a safety critical environment. Her role involved picking products sent to her as a "task" using a scanning device which cost the respondent over £1500 and is variously called an "RDT", a "gun" or a "scanner" and once she had picked these items, she was required to put them into a sequenced order.
11. The claimant has had epilepsy since around 1998 and since she commenced her employment with the respondent she has had some seizures at work.

Consequently, adjustments were made by the respondent to the claimant's working environment which included that she only worked on the ground floor, did not operate FLT's and did not pick glass products. At the material time she was working predominantly in areas 3 and 4 of the warehouse.

12. The claimant's employment was subject to various policies and procedures, which she was aware of. These included a diversity and respect at work policy, a disciplinary and grievance policy and procedure and various safe system of work policies and procedures including those in relation to the operation of the RDT and its Stop Call Wait procedure for responding to incidents. During her employment the claimant received training on these last two policies, which included safety awareness, operating the RDT, safe handling and reporting of damage, defects or faults. It is clear that the respondent took the reporting of all incidents and damage to property, in particular RDT's, seriously.
13. The respondent's disciplinary policy contained within it a non-exhaustive list of examples of conduct which could amount to gross misconduct. This included: "deliberate or serious breaches of conduct, standards/rules and procedures; any action which can be construed as an intention to deceive the business; deliberate, repeated or serious breaches of Health and Safety procedures, rules and Safe Systems of Work; deliberate damage or destruction of Company property...; and other action contravening the Diversity and Respect at Work policy."
14. In addition to epilepsy, the claimant has also had depression and anxiety since approximately 2016. The claimant had been taking lamotrigine for around twenty years to manage her epilepsy. The claimant described the effects of epilepsy and depression and anxiety and her medication for those conditions on her day-to-day life in a disability impact statement and further document (pages 34 and 50 of the bundle). She listed these as: not being able to drive; not being able to work at heights, interference with her sleep; taking more time off work; not permitted to pick glass items; the medication lamotrigine, which she takes for her epilepsy can make her aggressive, irritable or agitated which can make day-to-day relations with other employees and people in general challenging for her; she needs take tablets with her on holiday and that her epilepsy can depress her and make her anxious which can make it difficult for her to deal with people, especially in stressful situations.
15. An issue in dispute is whether the claimant's epilepsy medication, lamotrigine made her aggressive, irritable or agitated at the time of her conduct on 6 December 2022 and/or whether the claimant's anxiety and depression caused her to panic so that she did not report damage to the RDT on 30 November 2022.
16. In relation to the side effects, in addition to her oral evidence, the claimant relies upon the photograph of her medication leaflet which referred to the fact that it can cause side effects, including aggression or irritability or feeling agitated in one in ten patients who take the medication. It also highlights the expectation that patients who have these side effects will report them to their doctors. This of course implies that 90% of patients taking this medication do not have these side effects and those that do will follow the guidance and more likely than not report them to their doctors. The Tribunal considered letters from the claimant's consultant neurologist and GP, as well as occupational health reports to see whether there was any evidence of the claimant reporting that she had suffered

with these side effects prior to the disciplinary process. None of those documents demonstrated that the claimant had reported such side effects, and it was noted that she had previously taken other types of medication but had reported side effects and stopped taking them before the events to which this claim relates.

17. In relation to the claimant's anxiety and depression causing panic we were mindful that it may be common for people with anxiety and depression to be more susceptible to panic but looked for any evidence which demonstrated that this was in fact the case for the claimant. The medical evidence indicated that the claimant's anxiety is more health related: examples from the bundle were at page 291 "I also remember her as being almost pathologically anxious and of hypochondriacal nature" and page 315 "suffers from high levels of anxiety particular [sic] in relation to health issues". Again, there was no medical or other evidence to suggest that prior to the disciplinary proceedings, the claimant had identified or reported that she panicked about things or was more prone to panicking about things that happened to her because of her anxiety and depression.
18. The claimant had a spell of absence between 21 and 29 November 2022 due to injuring her knee following her shift on 18 November 2022. She had a return-to-work meeting on her first shift back and an absence investigation meeting on 1 December 2022 during which time she discussed the impact of her knee injury. In answer to questions about medication she did not mention any of her epilepsy medication or any side effects of any medication. We find that the focus of the claimant's responses to questions of this nature during these meetings were on her knee injury which had been the reason for her absence. We draw no inference from the fact that there was no discussion about the effects of her disabilities or her epilepsy.

### **The 30 November 2022 incident**

19. Towards the end of the claimant's first shift back, at approximately 05:30 on 30 November 2022, the claimant spoke to her First Line Manager, Paul Cook and said she had run out of tasks to do. He wanted the claimant to do a particular task, picking wheel arch inners, which the claimant found on her scanning device. The claimant was angry about having to do this task so close to the end of her shift as she felt she may not have enough time to do it, but she nonetheless accepted the task (after rejecting several others) and started to complete it at around 05:38.
20. Working close by to the claimant was a colleague, Mark Bogle. It is the respondent's case that the claimant complained to Mr Bogle about being given this task and in doing so called Mr Cook a "fat bastard". The claimant's evidence on whether she did in fact call Mr Cook a "fat bastard" was a little unclear. In her evidence to the Tribunal, she denied using the word "fat" and said she did not recall using the word "bastard" or the conversation itself. She accepted however in cross-examination that use of the phrase would amount to a breach of the respondent's diversity and respect policy.
21. When she was picking one of the parts in her task, the claimant had difficulty separating out two parts which were stuck together. She had to use some force to separate them. This was a common occurrence, but the claimant accepted that she did find it frustrating. The claimant carried out this action whilst also

holding her scanner and the scanner ended up on the floor. The claimant's evidence was that she dropped the scanner accidentally. She denied, when it was put to her in cross examination that she deliberately dropped or threw the device to the floor. Whether the scanner was dropped deliberately or not, it was accepted by the claimant that the result was that the handle came off the device, the screen became cracked, and the claimant was unable to continue to use that scanner to complete her task because the screen froze with two applications open on it.

22. The claimant spoke to Mark Bogle about the scanner, which he subsequently described as *“the handle was broke off and the screen was cracked...the display was divided into two screen displays and I could not get into any mode it was broken [sic]”* (page 135 of the bundle) and which the claimant accepted in cross-examination was an accurate description. Mr Bogle was unable to fix the issue with the screen and said he advised the claimant to hand the device in at the desk. The claimant went to the desk and asked another colleague Shaun Nicholls for a scanner, and he gave his device to her. The claimant put her original scanner down with her printer and continued with and completed her task using the other non-broken scanner and went home. She did not report to management that she had dropped her original scanner, or that it had been damaged or broken in any way. Nor did she hand the scanner in to anybody. The claimant accepted in cross-examination that failing to report the broken scanner was a breach of the respondent's safe system of work and Stop Call Wait policy and that such failure to report could result in disciplinary action.

23. In her witness statement the claimant stated that when she returned to work for her next shift, she was approached by Mr Cook who asked the claimant where the scanner she had dropped was and the claimant told Mr Cook it was on her workstation desk with the label printer. This evidence was not challenged by the respondent and so the Tribunal has no reason to question it. We find that Mr Cook was made aware of the damaged scanner and efforts were underway to establish what had happened to it. At this point the scanner could not be found.

24. The claimant believed that no further action was going to be taken by the respondent in respect of the broken scanning device. She said that she had met with Mr Cook and Stuart Ratcliffe, Operations Manager, who told her they could not find the scanner and had decided not to take any action because they had no evidence to prove the damage.

### **The 6 December 2022 incident**

25. During her shift on 6 December 2022 the claimant approached Mr Cook to ask whether she could alter her shift times by 20-30 mins so that she could get enough sleep as well as attend the telephone Occupational Health assessment which was due to take place at 14:30 on 7 December 2022. Accounts varied as to whether the claimant asked to finish her shift earlier or start her next shift later, but it was not in dispute that Mr Cook refused the request. When Mr Cook told the claimant she could not do what she had asked for, the claimant challenged Mr Cook and asked why. This, we find was an acceptable question to ask once. However, after replying to the claimant, she continued to ask “why” becoming louder and louder. Whilst the claimant did not accept that she shouted at Mr Cook, she did accept that she did continue to ask why, and she

did raise her voice to Mr Cook. She accepted that this was unacceptable behaviour which amounted to a breach of the respondent's diversity and respect policy.

26. Following Mr Cook and the claimant's discussion, Mr Cook was unhappy about the way that the claimant had spoken to him and complained to Mr Ratcliffe about it. This prompted an investigation into the claimant's conduct on both 30 November 2022 and 6 December 2022. Witness statements were taken from Mr Bogle and Mr Nicholls, and they were both interviewed along with Mr Cook and another employee, Andrew Rens.

### **Occupational health assessment**

27. In the meantime, the claimant attended her occupational health telephone assessment at 14:30 before attending work for her shift that night. An occupational health report was prepared the same day (7 December 2022). The claimant accepted in her oral evidence that what was written in the report was an accurate assessment of what she discussed with the occupational health adviser. Key extracts from that report were:

27.1. "Assessment with Agnieszka today confirmed that she experiences fits in her sleep and during the daytime. Her last day time fit was reported to be in October 2022. She remains under the care of her specialist and is seen twice a year in clinic. Her long-term medication remains unchanged and is known to be better tolerated without adverse effects. Agnieszka tells me that she gets an approximate two-minute warning prior to a daytime fit and acts upon this by putting herself into a safe place. It is common for her to feel anxious and have a headache following this. Having had an open and honest discussion with me today, I am told that she is coping well with day-to-day tasks. She sleeps well following a night shift and is not currently feeling excessively tired or fatigued" (page 132 of the bundle).

27.2. "Stress is also a known trigger to seizures. It remains important that she does not become overwhelmingly tired or excessively stressed" (page 134 of the bundle).

28. The Tribunal noted that there is no reference within the report to the claimant saying that she was suffering with side effects from her medication, or to her being excessively stressed or anxious at that time. There is also no reference to depression or to the claimant having any issues with panicking because of anxiety or depression. Bearing in mind the timing of this assessment, a week after the incident with the scanning device and the day after challenging and raising her voice to Mr Cook, the Tribunal finds that if she had felt excessively stressed or anxious, or believed that she had become more irritable or angry as a side effect of her medication, she would have raised this to occupational health. This was an opportunity for her to mention such issues, which she did not take.

### **The investigation meeting**

29. Alan Davies, Operations Manager was appointed as investigation manager and at some point, on 8<sup>th</sup> December, the claimant was informed of the investigation into her conduct and was suspended on full pay. She was handed two letters,

one advising her of her suspension and another inviting her to attend an investigation meeting on 12 December 2022 (pages 146-149 of the bundle).

30. Both letters described the allegations under investigation very generally as *“it is alleged there was damage to company property that you failed to report and that now we are unable to locate. There is also an allegation into your conduct that may be deemed a breach of the diversity and respect at work policy.”* With regard to the damage to company property, the Tribunal finds that it would have been evident to the claimant that this reference was to the scanner which had been broken.
31. The claimant attended her investigation meeting with Mr Davies over two days on 12 and 13 December 2022, meaning that she had time to reflect overnight on the potential seriousness of the situation between the two meetings. Mr Davies was accompanied at the meeting by Tom Follows, who took notes. The claimant was accompanied by Aaron Kilroy, a trade union representative.
32. On 12 December 2022, Mr Davies asked the claimant about her shift on 30 November 2022. He asked the claimant whether she was aware of:
- 32.1. any damage to company property,
  - 32.2. any damage to RDT guns,
  - 32.3. whether she used an RDT gun which was damaged, and
  - 32.4. whether she showed a damaged gun to anyone else.
33. She replied “no” to each of these questions. Only when asked whether she recalled a conversation with Mr Cook about picking wheel arch liners did she remember both that conversation and that the RDT “fell down on the ground”. The claimant went on to say, in response to the question “did you inspect the gun after it fell?”, “yes it was fine, carried on picking” (pages 161-163 of the bundle). The Tribunal finds that the claimant did not tell the truth deliberately when she answered that question.
34. The claimant was also asked “Was the gun and printer in full working order when you completed the task?”, to which she replied, “Yes it was” (page 164 of the bundle). The Tribunal found that technically this was correct, that the gun she was using to complete the task was in full working order because it was a different device. On balance, bearing in mind that the claimant was conversing in English during this meeting, not her first language which is Polish, the Tribunal did not accept the respondent’s submission that this answer was intended to be dishonest or misleading. The Tribunal found that the claimant was being asked about the device with which she completed the task and as such there was room for confusion on her part.
35. However, later in the meeting Mr Davies told the claimant he had read a statement from Mr Bogle in which he suggested that he had witnessed the claimant damaging a gun and that she had handed the damaged gun to him for him to try and repair it. He asked the claimant where the gun was and she replied, “I don’t know it was 2 weeks ago”. She went on to say she couldn’t remember whether she handed a damaged gun to Mr Bogle or even whether Mr Bogle was there. She confirmed again that the gun and printer were in working order at the end of shift (page 166 of the bundle). The Tribunal found at this point the claimant would not have been under any illusion that Mr Davies



was in fact talking about the device which the claimant knew was damaged and unworkable and therefore that her response to this question was untruthful and misleading. The claimant also said she could not remember taking Mr Nicholls' gun to complete the pick.

36. Mr Davies also asked the claimant whether she got on with Mr Bogle and whether there was any reason why Mr Bogle would make up a story about this. The claimant confirmed she got on with Mr Bogle, that they had not fallen out but that "he likes making up stories" (page 166 of the bundle).
37. At the start of the reconvened meeting on 13 December 2022, the claimant handed Mr Davies a leaflet about her epilepsy medication. She stated that she had been to see her doctor and had asked for information on side effects. She told Mr Davies she had also spoken to her doctor about what was going on in her personal life and had been prescribed anti-depressants. She said there were a lot of side effects from her tablets and all the things that had happened to her were making her feel that everything is going the wrong way. Mr Davies asked the claimant what her reason for telling him this was, and she said it related to her not being able to remember certain things. She referred to having a "disruptive sleep pattern". She did not state that she was suffering with the side effect of irritability at this point, but before the meeting ended her trade union representative stated "There is an issue with her mental health. Her home life and this has been building up for a couple of months. The type of medication she is on also has side effects". Mr Davies asked, "are you confirming that she has anger issues at work?" to which Mr Kilroy replied "No but it is possible with tablets she is taking. I understand that she has been taking them for 20 years not really had a big issue before but with all added stress going on it could affect. She knows there is an issue and is seeking help".
38. The Tribunal found that whilst this is a direct reference to side effects of medication and anger, it is not a sufficiently clear indication that the claimant was in fact suffering these side effects or that there was an impact on her conduct, just that it was a possibility which had come to the claimant's mind after her first investigation meeting the day before.
39. In relation to the incident on 6 December 2022 the claimant initially stated she could not remember how she responded to being told she could not start work later. It was put to the claimant that her response was very angry and loud. After a short adjournment the claimant stated "I am aware that I get angry but don't recall shouting at Paul. Usually, I can keep it in but if everything is going against you, I blow". She said the three individuals whose statements were referred to "had made a misjudgement".
40. Mr Davies was handed a written statement from another employee, Liam Leake. In that statement (page 177 of the bundle) Mr Leake claimed that Mr Bogle had made a lot of complaints about the claimant's performance and attendance. He added that he believed the claimant was "always targeted by Mr Bogle and others and it was not fair". Mr Davies picked up on the complaints, but the Tribunal found he failed to appreciate the allegation that the complaints were targeted and unfair.

41. Mr Davies decided that there was a case to answer and in line with the disciplinary and grievance procedure, Adrian Flanagan was appointed as disciplinary manager, and the claimant was invited by letter to attend a disciplinary hearing. That letter was dated 14 December 2022 (page 178-179 of the bundle). It set out the allegations in the same way as in previous letters. It also included reference that the allegations are very serious and could constitute gross misconduct for which the disciplinary action could be up to summary dismissal.

### **The disciplinary hearing**

42. The disciplinary hearing took place on 16 December 2022. Mr Flanagan was accompanied by James Edwards, HR Resolution Manager who took notes. The claimant was accompanied by Mr Kilroy as trade union representative. At the start of the hearing, the claimant confirmed that she understood why the meeting was being held and the Tribunal accepted that the claimant by this stage knew about what the allegations against her were despite the invitation not specifically setting them out in detail.

43. During the hearing the Claimant gave her account of the conversation with Mr Cook on 6 December 2022. The Claimant did not accept that she was aggressively getting louder or was so loud that it attracted the attention of others. She referred to Mr Cook allegedly telling her “if you don’t stop shouting, I will tell about that gun”. This, the Claimant subsequently alleged amounted to Mr Cook blackmailing her. The Tribunal found that this allegation was without merit for the reasons set out below (see paragraph 50).

44. The Claimant accepted however that hypothetically the conduct alleged was not acceptable before stating “but what’s happening in my life now makes me crazy, makes me sad. I have a lot of things going on in the background. If something has happened and things going against you, you feel like nothing gets better. If the whole world is against you.” The Tribunal noted that the claimant did not link either her conduct, or what was going on in her life to her disabilities or her medication or its side effects.

45. In relation to the incidents on 30.11.22, Mr Flanagan took the claimant through what had happened. After some discussion about the claimant’s use of the scanning device to reject work, Mr Flanagan asked the claimant to say what her emotions were after being asked to complete the task by Mr Cook, whether she was frustrated or annoyed. The claimant confirmed that she was. She explained that she did not recall a conversation with Mr Bogle before she started picking in which she was alleged to have said “talking about Paul Cook, that fat bastard has just give me a pick to do at this time”. She denied calling anybody “fat” and in response to being asked “but are you ok with bastard?” she replied “everyone swears” neither admitting nor denying whether she said the word. She said she did not remember the conversation.

46. The claimant accepted that when she dropped the scanner, she did not report it. She said this was because she was panicking that something would happen because the scanner wasn’t working, and she would get into trouble. She could not explain why, if the damage was accidental, she thought she would get into trouble or be disciplined for accidental damage. She could not name anyone

else who she knew to have been disciplined for accidental damage to a scanner.

47. Mr Flanagan explained to the claimant that whilst the scanner had not been located when the disciplinary investigation had started, it had been found a couple of days earlier and showed the claimant the scanner. In evidence Mr Flanagan told the Tribunal that he had not found out where the scanner had been or who had found it, but that it had appeared on the desk of the IT manager who was responsible for dealing with damaged or faulty scanners and passed to him. There was no photograph of the damaged scanner, but Mr Flanagan described it in his witness statement as having a smashed screen which was detached and a handle which was snapped from the holder. At the disciplinary hearing Mr Flanagan described the scanner as having “no life” and that he had not seen damage of this severity before on many other occasions when they had been dropped. He believed that the scanner had hit the floor with a great deal of force. The claimant said that the scanner had not been that damaged by her and someone else could have done it.
48. The claimant was asked again about the statement from Mr Bogle and why he would have made it up. The claimant’s response was that he didn’t like her. She did not expand upon this. Mr Flanagan asked the claimant what in Mr Bogle’s statements she said was a lie. The claimant said that it was not a lie, she couldn’t remember.
49. Mr Flanagan then gave the claimant the opportunity to add anything more she wanted to say, and the claimant replied “my mother blamed me for my sister. I can’t – I don’t know – a lot of people say I’m sick but it’s not my fault. I didn’t choose that. No one wants to be sick. There are things that you don’t know what to expect. I done this first time about 3 months ago. I don’t remember, a guy told me about this. It’s not nice, if you tell people about your own life. It’s not easy with something like that. I can’t have kids. Everything in my life”. The claimant added that she was taking anti-depressants. The claimant did not refer to her epilepsy medication or to any side effects of it. She did not link her disabilities or her medication to the alleged conduct.
50. The claimant said to tell Mr Cook that she did not mean any offence. “If he felt that way, I am sorry to him”. Mr Kilroy followed up with “She regrets what she’s done. She knows she’s done wrong. She is seeking help for it and agrees with the statements you have made”. Mr Flanagan explained he would take some time to digest the information, probably over the weekend, before reaching a decision.
51. The hearing was re-convened on 20 December 2022 for Mr Flanagan to deliver his decision. The Tribunal accepted Mr Flanagan’s evidence that, in the intervening period, he considered carefully what he had heard and read during the disciplinary process. In his oral evidence, Mr Flanagan explained that he did not consider it necessary to investigate further the claimant’s allegation that Mr Cook had blackmailed her. He said he did not believe it to be relevant. We accept that this was a reasonable conclusion for Mr Flanagan to draw at the time, based on what Mr Cook had said when interviewed, which was that on 6 December 2022 when the claimant had been getting angrier and angrier, shouting louder and louder he said “I asked her to calm down and mentioned that previously something had happened to the RDT you was using

when she had been angry and now she was getting angry again". In addition, it did not appear plausible to Mr Flanagan, or to the Tribunal, that Mr Cook had any motivation to first cover up damage and then decide or threaten to report it.

52. Mr Flanagan's findings were set out in an outcome letter which was sent to the Claimant on 22 December 2022. The Tribunal accepted that they were Mr Flanagan's findings and the reasons his decision. The Tribunal notes two particular matters:

52.1. the outcome letter draws out the allegations into several points; Mr Flanagan found that the claimant's conduct in relation to the scanner was deliberate and that during the disciplinary process she had tried to deceive the respondent, by not initially accepting that she had damaged the scanner and it had not worked after she had dropped it and she had known about that when in fact she was fully aware of this.

52.2. In respect of the claimant's explanation of factors which contributed to her conduct, Mr Flanagan formed the view that this was related to personal issues outside of work causing her distress, rather than that there was a disability-related reason which had contributed to her conduct. When asked about this in evidence Mr Flanagan confirmed and the Tribunal accepted that he did take into account the potential for the claimant's disabilities to have contributed, as well as the contents of two leaflets he said the claimant had shown him during the disciplinary hearing. However, he said that the leaflets showed fifty-five side effects, and the only one he noted was a reference to anger. He said he had expected that if the claimant was relying upon this as a contributory factor, she would have provided a doctor's letter as she had suggested she would during the investigation meeting, but she had not. He did not believe that the claimant had in fact been suffering with side effects of her medication which caused her to behave as she had.

53. Mr Flanagan decided that in the circumstances, the claimant had committed gross misconduct and summary dismissal was the appropriate sanction. In evidence, the claimant put to Mr Flanagan that a final written warning would have been a fairer sanction. Mr Flanagan disagreed and when probed further on this point said he always considered every possible sanction but, in this case, it was the cumulative effect of the overall picture that led to the decision. He said, and the Tribunal accepted, that the claimant's actions in respect of the scanner overall amounted to gross misconduct, but that if it had just been the alleged breaches of the dignity and respect policy then they individually would have only amounted to misconduct warranting a written warning. He felt he could not apply a lesser sanction than dismissal because the claimant had not shown remorse, she had not demonstrated any accountability for her actions by not admitting to causing the damage and there was a real risk if the claimant was not dismissed that she would not report matters that were reportable under respondent's procedures in future including a risk that she would not report more serious matters which could endanger safety.

**The claimant's appeal**

54. The outcome letter informed the claimant that she had a right to appeal, which the claimant exercised by letter of 5 January 2023. The Tribunal notes that the grounds of appeal did not address the reasons for dismissal set out in the dismissal letter save in relation to an assertion that issues in her personal life were disregarded. She alleged that the process was biased and complained about Liam Leake's statement and her allegation of blackmail by Mr Cook not being investigated. She took issue with Mr Bogle and Mr Nicholl's statements being preferred over her evidence and a perception that Mr Bogle had insinuated that she was a violent person. She challenged the level of damage she had caused to the scanner and the finding that she had dropped it deliberately. The Tribunal noted that the claimant made no reference to her disabilities, to her medication or its side-effects or to there being any connection between these things and her conduct in her appeal letter.
55. Mark Westwood was appointed to hear the claimant's appeal, as a manager who had no previous involvement with the claimant or the matter. An appeal hearing took place on 26 January 2023. Mr Westwood was accompanied by Claire Baker, HR Resolution Manager who acted as note-taker and who in evidence told the Tribunal that she supported Mr Westwood from a HR perspective in reviewing his outcome. The claimant was accompanied by Paul Alders, trade union representative.
56. The Tribunal was satisfied that the appeal hearing was conducted appropriately, and that the claimant took the opportunity to explain the reasons why she felt her dismissal was unfair. Again, although Mr Westwood asked the claimant about her health problems and the claimant gave some information about her health, she did not say that her conduct was connected to her disabilities, her medication or to any side effects.
57. Mr Westwood considered the claimant's grounds of appeal, and the additional information the claimant had said during the appeal hearing before reaching the conclusion that he had not seen any evidence to persuade him that Mr Flanagan's decision to dismiss was wrong. In his appeal outcome letter and witness statement for these proceedings, Mr Westwood set out in detail the rationale for his decision on the appeal grounds. This was largely unchallenged by the claimant, save in respect of his findings about the claimant's grounds of appeal that she had been blackmailed by Mr Cook and this had not been investigated and her ground of appeal that she had been dismissed to avoid the cost of making her redundant.
- 57.1. In relation to the blackmail allegation, like Mr Flanagan, Mr Westwood was satisfied that on the evidence it seemed highly unlikely and a very drastic response with great risk to Mr Cook, especially with all the other evidence provided, that Mr Cook would have agreed to cover up a failure to report a broken RDT to prevent the claimant asking him the same question.
- 57.2. In relation to the allegation about avoiding the cost of redundancy, Mr Westwood concluded that there was no evidence to support what the claimant had alleged. The Tribunal heard no evidence on this matter either.

**LAW**

**Unfair dismissal**

58. **Section 94(1) of the Employment Rights Act 1996 (ERA 1996)** states:

(1) An employee has the right not to be unfairly dismissed by his employer.

59. **Section 98 ERA 1996** states:

**98 General.**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) relates to the conduct of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

...

60. **Section 94 ERA 1996** provides a right not to be unfairly dismissed and **section 98 ERA 1996** sets out that for a dismissal to be fair, there must first be a potentially fair reason. **Section 98(2)(b) ERA 1996** provides that conduct is a potentially fair reason, which is the reason relied upon by the respondent in this case. The burden of proving that there is a potentially fair reason and that was the reason for dismissal is on the respondent.

61. If there is a potentially fair reason for dismissal then the Tribunal must go on to consider, under **section 98(4) ERA 1996** whether in the circumstances (including the size and administrative resources of the employer's undertaking)

the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee taking into account equity and the substantial merits of the case. The burden of proof at this stage is neutral.

62. In deciding reasonableness, the Tribunal is guided by the three-stage test set out in **BHS v Burchall [1980 ICR 393]**. The Tribunal should consider whether the employer had a genuine belief in the misconduct alleged and whether that belief was held on reasonable grounds formed after a reasonable investigation.
63. The Tribunal must also decide whether the sanction of dismissal fell within the range of reasonable responses open to a reasonable employer. The Tribunal must not substitute its own view for that of the respondent, but instead apply the range of reasonable responses test (see **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23/Iceland Frozen Foods v Jones [1982] IRLR 439**). The test applies to all aspects of the dismissal process including the procedure adopted and the investigation.
64. In terms of procedural unfairness, the Tribunal was reminded that when considering whether there were any procedural flaws which caused unfairness the proper approach is for the tribunal to consider the fairness of the whole of the disciplinary process. The purpose is to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at a particular stage. The Tribunal should not consider the procedural process in isolation but should consider the procedural issues together with the reason for dismissal as it has found it to be and decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss (see **OCS v Taylor [2006] ICR 1602/ Sharkey v Lloyds Bank EATS 0005/15**).

### **Disability discrimination**

65. **Section 136 Equality Act 2010 (EqA)** sets out the burden of proof provisions which apply to any of the claims under the EqA which the Tribunal has jurisdiction to hear. **Section 136(2) EqA** states: “if there are facts from which the court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred”. **Section 136(3) EqA** then states: “but subsection (2) does not apply if A shows that A did not contravene the provision”.
66. These provisions enable the Tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant to prove facts from which the Tribunal could conclude that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that it did not commit the unlawful act. That approach has been settled since the case of **Igen Ltd v Wong [2005] IRLR 258** and it was reaffirmed in **Efobi v Royal Mail Group Limited [2019] IRLR 352**.
67. The statutory burden of proof provisions have a role to play only where there is doubt as to the facts necessary to establish discrimination. Where the Tribunal can make positive findings on the evidence one way or another as to whether

the claimant was discriminated against, they have no relevance. This was confirmed by Lord Hope in **Hewage v Grampian Health Board [2012] IRLR 87** and is consistent with the views expressed in **Laing v Manchester City Council and anor 2006 ICR 1519, EAT.**

68. The claimant presented a claim for discrimination arising from disability. The relevant section of the EqA is therefore **section 15 EqA**, which states as follows:

(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.

69. The unfavourable treatment must be shown by the claimant to be "because of something arising in consequence of [her] disability".

70. In **Pnaiser v NHS England [2016] IRLR 170** the EAT set out the following guidance:

70.1. A Tribunal must first identify whether there was unfavourable treatment and by whom.

70.2. The Tribunal must determine the reason for or cause of the impugned treatment. This will require an examination of the conscious or unconscious thought processes of the putative discriminator. 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 amount to an effective reason for or because of it. Motive is irrelevant.

70.3. The focus of this part of the enquiry is on the reason for or cause of the impugned treatment.

70.4. The Tribunal must determine whether the reason or cause is something arising in consequence of the claimant's disability. The causal link between the something that causes the unfavourable treatment, and the disability may include more than one link. The more links in the chain the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

71. The 'because of' enquiry therefore involves two stages: firstly, A's explanation for the treatment (and conscious or unconscious reasons for it) and secondly, whether (as a matter of fact rather than belief) the "something" was a consequence of the disability. It does not matter precisely in which order these questions are addressed.



72. The Tribunal was referred by Counsel for the respondent of the need to clearly address the question of whether the ‘something’ relied upon by the claimant arose in consequence of the disability (**British Telecommunications plc v Robertson EAT 0229/20**) and to the case of **T-Systems Ltd v Lewis EAT 0042/15**, which confirmed that the phrase ‘something arising in consequence of’ the disability should be given its ordinary and natural meaning
73. A respondent employer will avoid liability if it is able to objectively justify the unfavourable treatment that has been found to arise in consequence of the disability. The aim pursued by the employer must be legal, it should not be discriminatory in itself and must represent a real, and objective consideration. The EHRC Code on Employment, in relation to proportionality, notes that the measure adopted by the employer does not have to be the only way of achieving the aim being relied on, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (4.31). The Tribunal was also referred by Counsel for the respondent to guidance set out in authorities of **Stott v Ralli Ltd [2022] I.R.L.R. 148**; **Bank Mellat v Her Majesty’s Treasury (No. 2) [2013] UKSC 39** and **Birtenshaw v Oldfield [2019] IRLR 946** in relation to legitimate aims and the issue of proportionality.
74. The Tribunal also notes the need to delineate its findings in respect of both the claim for unfair dismissal and discrimination as per **Northumberland and Tyne and Wear NHS Foundation Trust v Ward EAT 0249/18** and that it is by no means a “given” that a finding that dismissal is not a proportionate means of achieving a legitimate aim must also render such dismissal to be unfair pursuant to the ERA 1996 (see **City of York Council v Grosset [2018] IRLR 746**).

## **FINDINGS**

### **Unfair dismissal**

#### **Reason for dismissal**

75. The Tribunal accepts that the claimant’s conduct was the potentially fair reason for dismissal and that both Mr Flanagan and Mr Westwood formed a genuine belief that the claimant had committed the relevant conduct as set out in the dismissal letter.

#### **Reasonable grounds**

76. Based on its findings of fact as already outlined, the Tribunal is satisfied that Mr Flanagan and Mr Westwood formed their genuine belief on reasonable grounds:

- 76.1. In respect of what happened on 6 December 2022, the claimant admitted that she had repeatedly challenged Mr Cook and although she did not accept that she had shouted and increased her volume, there were statements from Mr Bogle, Mr Nicholls and Mr Cook that this had been the case. Whilst the claimant had challenged the recollections of these witnesses, there was no reliable evidence to support her assertion that it was inaccurate or made up.

76.2. In respect of the comment on 30 November 2022, whilst the claimant claimed to have no recollection of making a comment to Mr Bogle about Mr Cook, she had admitted that she was frustrated at being asked by Mr Cook to do the task he had instructed her to do. She had also not denied using the word “bastard” during the disciplinary hearing, saying instead that “everyone swears”, but had denied using the word “fat” from which the Tribunal accepted it was reasonable for Mr Flanagan to infer that the claimant had referred to Mr Cook as a “bastard” even though she may not be able to remember doing so. Again, Mr Flanagan and Mr Westwood also had the statement from Mr Bogle which although the claimant had said Mr Bogle liked to make up stories, when asked by Mr Flanagan which part of Mr Bogle’s statement was a lie, the claimant did not identify any specific points.

76.3. In respect of the scanner, after initially denying any damage, the claimant had admitted dropping the scanner at the investigation meeting and eventually at the disciplinary hearing that the drop had caused the screen to crack, the handle to come off and for it not to be usable for her to continue the pick. Mr Flanagan also had the witness statements of Mr Bogle and Mr Nicholls as well as the scanner in question to assess the extent of the damage for himself.

76.4. The Tribunal found there were reasonable grounds for Mr Flanagan to conclude that the claimant had deliberately dropped the scanner and had sought to deceive the respondent because of her initially claiming at the investigation meeting that there was no damage and she could carry on using the scanner and because her rationale for not reporting the damage did not ring true when she knew that not reporting something could result in disciplinary action because the policy said so, but the policy did not say that accidental damage could result in disciplinary action and she had no knowledge of colleagues being disciplined for accidental damage.

### **Reasonable investigation**

77. The Tribunal was satisfied that the respondent’s investigation was reasonable. For the reasons already outlined in its findings of fact it was reasonable for Mr Flanagan and Mr Westwood not to investigate the claimant’s allegation that Mr Cook had blackmailed her after she had already committed the alleged misconduct on 6 December 2022.

78. Similarly, although the respondent could have interviewed Mr Leake in relation to his statement, the Tribunal was satisfied that it was reasonable for there not to be further investigation into it. Even if Mr Leake’s statement had been interpreted differently by Mr Davies as evidence that the claimant was being targeted by Mr Bogle and others with unfair complaints, the claimant admitted that Mr Bogle’s description of the damage to the scanner was accurate, did not suggest anything specific that Mr Bogle had lied about in his statement and accepted that she had not fallen out with Mr Bogle or known of any reason why he would make things up.

79. The Tribunal found that it might have been prudent for Mr Flanagan and Mr Westwood to have located and looked at the occupational health report which was prepared on 7 December 2022 to see whether there was any other medical

evidence to suggest the claimant's known disabilities or medication had affected her conduct, but the Tribunal found that taking this step would not have made a difference to the outcome because the report did not disclose any such connection and therefore not doing so was not unreasonable.

### **Range of reasonable responses - Dismissal**

80. When considering whether dismissal was a fair sanction for the respondent to apply, the Tribunal reminded itself that it is not for it to decide whether it would have dismissed the claimant in those circumstances and to substitute its own view. Whilst the Tribunal may have considered the sanction of dismissal for a relatively long-serving, disabled employee who was encountering personal difficulties to be rather severe, it must look at whether dismissal fell within a range of reasonable responses open to an employer. Only if it can be said that no reasonable employer would dismiss in the circumstances would dismissal fall outside the range of reasonable responses and in this case the Tribunal is not satisfied that dismissal fell outside that range.
81. This was a case where the respondent has clear policies and reporting procedures, including those which relate to safe systems of work, which it trains its workforce on, did train the claimant on and which it requires and is entitled to require strict compliance with. It sets out clear examples of gross misconduct in its disciplinary procedure which Mr Flanagan genuinely believed on reasonable grounds the claimant had breached. It was reasonable for Mr Flanagan to conclude that the claimant's initial reluctance to accept that she had damaged the scanner and her failure to report it demonstrated a lack of accountability for her actions and that in a safety critical environment, like a warehouse, deliberate damage to company property and concealing the same by failing to report it could not be tolerated, as otherwise there would be a risk such behaviour could happen again.
82. The Tribunal accepted Mr Flanagan's evidence that he considered each of the acts of misconduct separately, as well as what would have been the case if the claimant had reported accidental damage to the scanner but concluded ultimately that the conduct concerning the scanner was of itself gross misconduct warranting dismissal and the cumulative effect of all the conduct together warranted dismissal.
83. Whilst the claimant suggested in her witness statement that she was treated inconsistently in being dismissed in the circumstances, the Tribunal was not satisfied that the examples she provided showed materially the same circumstances. The Tribunal was not given any examples of like scenarios to claimant's where a lesser sanction had been applied.

### **Process**

84. In terms of the process followed, the Tribunal concluded that this too was fair. The respondent followed its disciplinary procedure, with different investigating, disciplining and appeal managers of increasing levels of seniority. It carried out a reasonable investigation and it held appropriate investigation, disciplinary and appeal meetings with the claimant and the claimant received written invitations to those meetings. The claimant was accompanied throughout by trade union

representatives and had every opportunity to make representations and produce her own evidence at each stage.

85. There were elements of the process which the Tribunal considered could have been done differently, such as telling the claimant in advance of the disciplinary hearing that the damaged scanner had been found and setting out more specific detail of the nature of the allegations against the claimant in the invitations to the investigation and disciplinary hearings. However, the Tribunal did not find that not taking these steps was prejudicial to the claimant because she confirmed she was aware of the allegations against her at the disciplinary hearing and she knew what damage had been caused to the scanner without being shown it.
86. The Tribunal saw no evidence that the investigation conducted by Mr Davies was biased, as the claimant had claimed. At most the statement Mr Leake produced was misinterpreted in terms of its focus and the point the claimant had hoped would be made by it – that Mr Bogle had been unfairly targeting her and presumably that this might explain why he had produced his statement as part of this investigation - was not appreciated. However, the Tribunal did not find that was evidence of bias or that it was a procedural error not to investigate it further. Mr Leake's statement was not evidence that Mr Bogle's statement in this investigation was false and in fact the claimant accepted that Mr Bogle was not lying in his statement.
87. Taking all its findings into account therefore, the Tribunal concluded that the claimant was fairly dismissed and therefore her claim for unfair dismissal was not well founded and failed.

### **Disability discrimination**

88. To recap, the claimant's claim is one for discrimination because of something arising in consequence of disability. The respondent conceded that the claimant is disabled by virtue of epilepsy, depression and anxiety and that the respondent knew this at the material time.
89. In determining this claim, we have followed the guidance set out **Pnaiser** (see above).
90. The first question is whether there was unfavourable treatment of the claimant by the respondent. The respondent sensibly conceded that dismissing the claimant amounted to unfavourable treatment
91. The Tribunal had to next decide what caused the claimant to be dismissed or rather why Mr Flanagan decided to dismiss her. It was clear in this case that the reason for the claimant's dismissal was her conduct.
92. The Tribunal must then consider whether the conduct arose in consequence of the claimant's disabilities. Here, as was clarified at the outset of the hearing, the claimant relied upon two aspects of her conduct only as arising in consequence of her disability.
93. The first aspect of the claimant's conduct which she said arose in consequence of her disabilities was her not reporting the damaged scanner, which she said was because she panicked because of her anxiety and depression. The

Tribunal took a broad approach to establishing whether there was a causal connection of some kind between the claimant not reporting the damaged scanner and her anxiety and depression but concluded that the evidence does not support this assertion.

93.1. As already identified in its findings there was no evidence, medical or otherwise to suggest that prior to the disciplinary proceedings, the claimant had identified or reported that she panicked about things or was more prone to panicking about things that happened to her because of her anxiety and depression.

93.2. The medical evidence seemed to suggest that the claimant's anxiety was predominantly health related and not more generalised.

93.3. None of the claimant's own explanations for why she panicked during the disciplinary process centred on or even mentioned this being a feature of her depression and anxiety. Her explanation related to a fear of the potential consequences of reporting the damage, that she might be disciplined. In her appeal letter she rationalised these fears by referring to a perception that "management seem to be coming down much harder on people lately and more and more people are getting sanctions for things they wouldn't have in the past". This, the Tribunal found, does not support a link between the panic and the claimant's anxiety and depression. The Tribunal found on balance that the level of damage to the scanner and the claimant's belief that it would get her into trouble if management found out about it, were the reason for any panic and her decision not to report the damage, even though the claimant was aware that the failure to report the damage was itself a disciplinary matter. Further, the Tribunal concluded that if the claimant had genuinely thought that the cause of her panic was her depression and anxiety, she would have raised this during the disciplinary process and she did not.

94. The second aspect of the claimant's conduct which she said arose in consequence of her disabilities was her reaction to Mr Cook telling her that her request had been refused on 6 December 2022, which the respondent found amounted to a breach of the dignity and respect at work policy. The claimant said that this conduct arose in consequence of her disability because it was caused by a side effect of her epilepsy medication. Again, the Tribunal was not satisfied that the claimant had proved the necessary link on the evidence even broadly speaking.

95. The Tribunal already identified in its findings of fact the lack of medical evidence to suggest that the claimant actually suffered these side effects, rather than that it was a possibility that the medication can cause the relevant side effects in one in ten patients who take it.

96. The Tribunal therefore found that objectively and giving the phrase "something arising in consequence of" its ordinary and natural meaning, the claimant had not demonstrated the necessary link between the "something" which resulted in her dismissal, her conduct, and her disabilities.

97. This meant that her claim for disability discrimination failed at this juncture.

98. However, the Tribunal went on to consider what it would have concluded if it was wrong in finding that the claimant's conduct did not arise in consequence of her disabilities.

**Was dismissal because of the "something"?**

99. In his closing submissions Mr Rix conceded on behalf of the respondent that the claimant's dismissal was because of her conduct insofar as it related to the scanner incident on 30 November 2022 and so therefore if that conduct had arisen in consequence of the claimant's panic from depression and anxiety it would have been because of something arising in consequence of disability. Mr Rix distinguished that conduct from the claimant's conduct on 6 December 2022, arguing that if only the conduct of 6 December 2022 could be said to have arisen in consequence of disability, that conduct was not an effective cause of the claimant's dismissal.

100. The Tribunal considers there is some merit to Mr Rix's argument, given that Mr Flanagan's witness evidence was clear that had the only conduct which had been found against the claimant been her conduct on 6 December 2022 then she would not have been dismissed, whereas had the only conduct which had been upheld was the scanner related conduct the claimant would still have been dismissed. However, after careful consideration, the Tribunal concluded that this was not the factual position and whilst the claimant's conduct on 6 December 2022 may not on its own have resulted in dismissal, when making his decision to dismiss, Mr Flanagan still made findings in relation to it and took it into account albeit potentially as a lesser component. That is evident from Mr Flanagan's oral delivery of the decision to dismiss and the dismissal letter, neither of which stated that this conduct had not formed a part of the basis of his decision to apply the sanction of summary dismissal. Therefore, the Tribunal would have found that even if hypothetically the only conduct that arose in consequence of disability was the incident on 6 December 2022, it was nonetheless sufficient to amount to an effective cause, of the unfavourable treatment, namely the claimant's dismissal.

101. As such, in the hypothetical circumstances where either or both "something's" had been found to arise in consequence of dismissal, the Tribunal would have needed to look at whether the respondent's treatment of the claimant was objectively justifiable.

**Objective justification**

102. The respondent identified the legitimate aims relied upon in its amended grounds of resistance, as set out above, and the Tribunal heard oral evidence from Mr Flanagan. Those aims related to the need to maintain and enforce standards of behaviour, ensure a safe working environment and to ensure that policies and procedures are strictly followed, highlighting the prompt reporting of incidents, in particular. The Tribunal would have accepted that these are legitimate aims for employers to pursue and given the safety critical environment in which the respondent operates, the Tribunal appreciated the need, in particular, for strict compliance with reporting requirements.

103. Having heard the evidence of Mr Flanagan as to his rationale for dismissing the claimant and in particular his concern around the risk of repeated non-reporting of incidents the Tribunal would also have accepted that

dismissing the claimant in view of her conduct was in pursuit of those legitimate aims.

104. The question for the Tribunal would have really been whether dismissal was proportionate, and this is a balancing exercise. The impact of the treatment on the claimant was obviously significant, she lost her job with the respondent after a period of long service.

105. However, again referring to Mr Flanagan's justification for dismissing the claimant, there were elements of deceit which had been identified which had damaged trust. There was a lack of evidence of remorse and understanding on the claimant's part of the serious nature of her actions. In view of these matters and of the nature of the most serious conduct around failing to report in spite of knowing the importance of such a process and that this could warrant disciplinary action, there was a genuine risk that if the claimant remained in employment, even with a lesser sanction, that there could be a repeat of the behaviour which may, in a safety critical environment. In those circumstances the Tribunal would have found that dismissal in this case would have been a proportionate means of achieving the respondent's legitimate aims.

## **CONCLUSION**

106. The Tribunal confirms therefore that the claimant's claims for unfair dismissal and discrimination arising from disability failed and were dismissed.

*EJ Kight*

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Signed by: Employment Judge **Kight**

Signed on 28 November 2024