



EMPLOYMENT TRIBUNALS

Claimant

Mr M Khan

Respondent

-v-

Splendid Hospitality Group LLP

FINAL MERITS HEARING

(CONDUCTED IN PUBLIC AS A HYBRID HEARING VIA THE CLOUD VIDEO PLATFORM)

Heard at: **Centre City Tower, Birmingham**

On: **28 to 30 October 2024**

Before: **Employment Judge Perry, Mr I Morrison & Ms H Russell**

Appearances

For the Claimant: **In person**

For the Respondent: **Miss V Hall (consultant)**

REASONS

An oral judgment was given on the afternoon of 30 October 2024. The claimant sought written reasons by email at 16:33 that day. Whilst the judgment was promulgated on 5 November 2024 at the time of signing these reasons the judgment has not as yet been uploaded to the Employment Tribunal's Decisions website (<https://www.gov.uk/employment-tribunal-decisions>).

The reasons below, are provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues.

References below in circular brackets are to the first paragraph (if more than one) of these reasons to which the cross reference refers. Those cross references are provided for the assistance of the reader. The reader is asked to note that sometimes the transposition software used by HMCTS may mean that the cross references are not properly transposed and/or an error generated.

References in square brackets are to the page of the bundle in the form [hard copy/e-bundle], or where preceded by a document reference or the initials of a witness, that document or witness statement.

INTRODUCTION

1. This claim concerns allegations of direct discrimination based on
 - 1.1. race (the claimant identifies as British Pakistani with brown skin colour) and
 - 1.2. disability (anxiety)
2. The claim was case managed at a case management hearing chaired by Employment Judge Codd on 1 March 2024 [58] at which the issues were identified. We return to them in a moment.



3. The dates of conciliation and presentation are set out in the chronology below. Whilst no timing issues arise we have also included in the chronology the earliest date a claim could have occurred without the need for it to part of conduct extending over a period or for the tribunal to exercise its discretion to extend time.

THE EVIDENCE

4. We had before us
 - 4.1. witness statements from
 - 4.1.1. The claimant (whom we shall refer to as Mr Khan or “C” in the chronology)
 - 4.1.2. Miss Gabriella Debska (whom we shall refer to as “GD” in the chronology), who issued a final written warning to Mr Khan and the general manager of the respondent’s Worcester (Nunnery Way) restaurant
 - 4.1.3. Mr Richard Williams (whom we shall refer to as “RW” in the chronology), the dismissing officer and general manager (RGM) of the restaurant at which Mr Khan worked when the majority of the events that concern us took place.
 - 4.2. a bundle that initially comprised 274 pages, a chronology and cast list prepared by the respondent and written submissions from both parties that they were allowed to expand upon.
5. Mr Shaiban the appeal officer and RGM of the respondent’s Hall Green restaurant was not called as a witness. In any event we noted that despite dealing with the appeal he was the same level same level as dismissing manager.

APPLICATIONS

6. At the start of the hearing Mr Khan had only been sent a hard copy of the final version of the bundle not an e-version. We ensured a copy was sent to him and explained he could check that against the hard copy while the panel were reading.
7. In advance of the hearing the respondent lodged a 50+ page additional bundle to support an application it had made previously but intended to repeat to strike out the claim on the basis Mr Khan had behaved vexatiously. Miss Hall told us the application would take 10 minutes and she intended to make it orally.
8. The judge indicated the respondent had ample opportunity to make that application prior to trial and thus sought to clarify why an application had not been made on notice, expressed concern that had not been put into writing because of the prejudice it would cause to the claimant by being taken by surprise, indicated his concern that time allowed to hear the case appeared to be tight and that making the application could place the hearing in jeopardy, expressed doubts that 10 minutes would not be sufficient to be taken through 50 pages let



alone her make submissions on top and accordingly asked her to think again. Having taken instructions she confirmed the application was not pursued.

9. Miss Hall put the Tribunal on notice that following the case management hearing the claim had challenged the way the issue were set out without putting forward what he said the issues should be. Having heard from the claimant it appeared to the panel that what he was seeking was that both acts of less favourable treatment be argued as both direct race and disability discrimination. The judge indicated in the circumstances that appeared to be no more than a relabelling and asked Miss Hall what if any prejudice that would it cause the respondent. She accepted it would not and did not object.
10. That being so we explained the need to relay evidence in relation to disputed matters to Mr Khan, to challenge the respondent's witnesses about disputes by asking them questions about their statements and any relevant documents and then summarising the case at the end.
11. We return to the issues in a moment.
12. Having adjourned to read the witness statements and relevant documents from the bundle Mr Khan was cross examined. The panel sat until 4:30 to ensure he had completed his evidence and could be released from his affirmation at the end of the day.
13. At the start of day 2 Mr Khan sought to include an additional paper which was granted. He then proceeded to cross examination the respondent's witnesses.
14. At end of day 2 and the conclusion of Mr William's evidence (the last of the respondent's witnesses) Mr Khan sought to raise with him detriment not argued when Mr Khan sought to amend the list of issues on day 1. The judge explained as a result those questions were not put to him in cross examination. The issue concerned a complaint that Mr Khan's hours had been reduced which he said repeatedly were in this claim form (that is correct that issue is mentioned [19] in a document lodged [18] at the same time as his claim form). Given it was already 4:30 pm the judge indicated we would address that the following day if Mr Khan wished to pursue it.
15. The start of the hearing on day 3 was delayed by approximately 20 minutes. Before the panel could explain the reason for that Mr Khan commented that the hearing starting late was a disgrace. The judge explained to Mr Khan that before forming a view he might wish to hear the explanation the judge was about to give. The judge then apologised to both parties for the delay explained he had been delayed assisting a colleague (in the absence of the regional judge) with a case on which a problem had arisen and in addition the panel had briefly scanned the respondent's submissions that had been lodged over the end of day adjournment. Further, the judge pointed out to Mr Khan the panel had sat later than was the norm on the hearing days to date so if anything there was a net gain of time, not loss.



16. Mr Khan then apologised but rolled his eyes when doing so. The judge indicated that if he wished to apologise he should do so in a manner that suggested it was genuine. He later did so and the apology was accepted.
17. Having identified that Mr Khan had also lodged closing submissions, they were located. In the interim the panel returned to the issue raised the previous evening.
18. Having explained the prejudice that would cause to the respondent and the potential effect on the trial of Mr Khan having to be recalled, potentially a new witnesses found and called for the respondent and relevant documents located Mr Khan indicated he did not wish to pursue the matter.
19. The panel indicated his view aside it wished to investigate the issue not least to see if that complaint should have been apparent to the respondent based on the contents of the bundle. The issue forms a single line in the details of complaint document which runs to just over a page.
20. We considered the contents of the bundle. The argument being raised appeared to be based on a number of payslips between 23 January to 28 May 2023 [266-273]. The claimant did not say in his witness statement [MK/24] who reduced his hours or when, merely that his hours were cut and that was discriminatory. Nor did he provided a table or analysis of the payslips showing the hours worked and where they allegedly dropped.
21. Mr Khan appeared instead to argue that the hours he worked were less than the hours he could have worked over a two week period. We checked his contract [134]. It provided for 4 guaranteed hours per week [135]. The hours worked as shown on the payslips varied both up and down and there was little consistency as to the hours offered and accepted each fortnight. Based on the variation in the payslips there was no clear point at which his hours reduced. Further in the light of the lack of detail we set out above it would have been difficult for the respondent to know who the allegation of reducing his hours was made against or when (and thus who to call) and given the risk to the trial being completed we again asked Mr Khan if he wished to pursue that allegation. He confirmed he did not.
22. The panel then read the submissions of Mr Khan and those of the respondent in full. Both parties were given the opportunity to supplement them orally.

BACKGROUND

The history of events is set out in the chronology that follows:-

2016	C diagnosed with anxiety	81
2016	Post diagnosis C left London and moved to the Midlands	
2017	C registered with current GP practice	82



2017-2019	C undergoes counselling with Birmingham Healthy Minds sporadically (C says once a quarter - as required)	82
2020-2023	C undergoes counselling with the Samaritans	84
2020/2021/2022	C told us he was prescribed Diazepam by his GP (the GP refers to medication not the type, does or when)	84
2021	C lost previous job which C states made his anxiety worse	
20 April 2021	GP letter	82
19 August 2021	Claimant's employment started Worked at the drive through KFC franchise R operated at Clews Road Redditch – based on what we heard he mainly worked at one of the serving hatches C accepts no mention made of anxiety to R when he joined	
23 June 2022	Discussion card between C and his line manager whom we shall refer to as "X"	147
Pre September 2022	Incident involving the colleague we shall refer to as "Z" R: "Z" was on the shop floor with colleagues and a friend and swore – R investigated – identified no customers present – "Z" apologised and accepted she had done wrong and a verbal warning was issued to all the staff concerned C: "Z" swore profusely even when asked to stop by C – yet no action taken – no apology to customer & no acknowledgement "Z" did wrong – C present	149
2022	Incident involving the colleague we shall refer to as "Y" R: "Y" became locked in toilet cubicle, had panic attack and damaged cubicle – she was apologetic. R investigated and concluded no action was warranted C: that account is a fiction – the door handle was fine throughout my time there – "Y" deliberately damaged the cubicle. C refers to a photo and queries how could someone accidentally do that	258



19 December 2022	Investigation meeting minutes RW, Ryan Rowe (RR) (a shift runner) & C Notes reference the incident involving “Z” as being over 3 months ago	149
21 December 2022	Investigation minutes Karen Green and RW – <i>“If [C] does the slightest thing wrong [X] over exaggerates ... if [C does something wrong] [X] would react on a scale of 1 to 10 as 10 but if someone else then like a 2”</i>	150-151
3 January 2023	Outcome re disciplinary hearing regarding performance on 30 December 2022 conducted by Asam Masood RGM <i>Behaviour resulting in damage to customer/company relationships namely;</i> <ul style="list-style-type: none">• <i>That on 7th December you refused to serve a customer due to issues with their app, then refused to go back to your station when asked by the shift runner when the customer came into store resulting in a customer complaint over your service and attitude. In addition you also failed to follow a reasonable instruction from an immediate supervisor to return to your work station.</i>• <i>That on 12th December you showed and discussed a social media post relating to another company with a customer causing them to complain. In doing so, you were also in unauthorized possession of your mobile phone on shop floor.</i>• <i>That on 17th December you refused to park a car up waiting for an order, saying the staff on middle were incompetent and when questioned you told the shift runner to “stick it”. In addition, you also failed to follow a reasonable instruction from an immediate supervisor to request the customer parked up.</i> <i>You were given every opportunity to explain and account for the matters of concern listed above.</i> <i>I have taken note of your explanations and of your assurances that you will be able to</i>	153-154



	<p><i>resolve the matters of concern above. At this time, I have decided not to continue with the formal disciplinary procedure and not to issue a formal warning. However, this letter is to be treated as confirmation that we have discussed the matters above and you have accepted responsibility and will make every effort to address the issues we identified.</i></p> <p><i>... I require an immediate and sustained improvement in the areas that we have discussed. I therefore expect the following standards/improvements to be reached immediately.</i>“</p>	
First half 2023	Therapy (no therapy post summer 2023)	84
3 February 2023	meeting between Lewis Goodway (LG) (a team leader) & C for not handing out receipts	157
19 February 2023	Discussion record between Ashleen Dunne (Asst. GM) and C concerning a message he had posted on a group chat C responded <i>“Its 100% justifiable. I was angry”</i>	158
20 February 2023	Any acts prior to this date are potentially out of time	
2 March 2023	Discussion record between Dan King (DK) (Asst. GM) & RR and C concerning an incident where C told a customer who complained about an order to take cheese off a burger themselves	159
Incident 5 march note undated	meeting between DK and C for serving expired gravy (C had thrown away some gravy near the end of shift)	160-162
7 March 2023	<p>investigation meeting between LG and C for not handing out receipts and poor attitude/image of receipts not handed out</p> <p>C asserts this was the first mention by him to R that he suffered from anxiety</p>	<p>By hand 163-164</p> <p>typed 165-168</p> <p>oral</p>
10 March 2023	<p>C invited to disciplinary hearing on 20 March 2023</p> <ul style="list-style-type: none"> • <i>That on 5th March 2023 you attempted to serve expired gravy to customers because</i> 	169-170



	<p><i>you threw the wrong batch away. This is regarded as a breach in food safety rules.</i></p> <ul style="list-style-type: none"> • <i>That on 7th March 2023 you failed to follow a reasonable instruction from an immediate supervisor to hand out guest receipts because it was cold.</i> <p>6 documents enclosed</p>	
12 March 2023	<p>meeting between [X] and C for</p> <ul style="list-style-type: none"> • not handing out receipts • answering office phone • overcharging customers 	173-175
14 March 2023	<p>Disciplinary invite for meeting on 20 March 2023 amended to add additional allegation concerning intervening events</p> <ul style="list-style-type: none"> • <i>That on 12th March you refused to follow a basic management instruction of handing out guest receipts. This is regarded as gross misconduct.</i> <p>further document sent (item 7)</p>	176-177
20 March 2023 14:00	Disciplinary Meeting chaired by GD	178-184
20 March 2023 11:11	<p>email from C re alleged discrimination</p> <p>C accepts a response was sent by RW substantively in this form</p>	188 186-187
21 March 2023	Draft final written warning	189-190
22 March 2023	<p>Final Written Warning issued by GD</p> <p><i>“You have admitted to not handing out guest receipts and disregarding your immediate supervisors’ instructions on multiple occasions. You have also described a lack of care regarding the serving of expired product and have admitted that you do not think that it is a serious breach of food safety procedure contrary to your training and our procedures. I find your nonchalance pertaining to this matter and your</i></p>	193-194



	<p><i>blatant disregard to your training and the health and safety of customers concerning given the far-reaching implications that serving expired product would have had.</i></p> <p><i>- You explained that you did not hand out receipts to customers despite being asked to numerous times as it was too cold however I find that this explanation is not acceptable given that it appears that the cold only affected you when it came to executing this direct instruction from management but not at any other time that the window was open.</i></p> <p><i>- I am satisfied you are provided with the necessary uniform to keep as warm as possible when working on the drive-thru window. I am also satisfied that you have completed all your induction training which clearly outlines the food safety procedures and policies thereby not excusing your conduct.</i></p> <p><i>- The Company's Disciplinary policy states these acts amount to Gross Misconduct</i></p> <p><i>- In mitigation, I have taken into consideration the fact that you mentioned that you suffer from anxiety which you have mentioned can be worsened by the cold. I do however want to point out that you had never discussed this with management at any point prior to your hearing, in the specific context of the cold causing you anxiety. Moving forward however, should your condition worsen or if you require additional support, please update your management team and they can review and see how you can be supported which may also include gaining your consent to access a medical report from your GP. You also raised some issues of concern that you have said have occurred in store and I can assure you that</i></p>	
--	--	--



	<p><i>these will be looked into and dealt with in store by the RGM however, the issues you raised do not have any bearing on this disciplinary matter and as such have not been considered in the decision-making process.</i></p> <p><i>I have therefore decided to issue you with a Final Written Warning. The Company requires an immediate, substantial and sustained level of improvement in your conduct regarding the following of reasonable instructions from any of your management team, all company rules and procedures as well as the strict following of the food safety procedures, especially regarding expired product. I must stress that any future breaches of any of the Company's rules, policies or procedures may result in further disciplinary action being taken and may result in the termination of your employment.</i></p> <p><i>This warning will be placed in your personal file but will be disregarded for disciplinary purposes after a period of 12 months."</i></p> <p style="text-align: right;">[Our emphasis]</p> <p>C accepts he did not hand out receipts but not that he handed to customers out of date of gravy. C relies on [160-162] re the latter. C also asserts</p> <ul style="list-style-type: none">• Former justify because of cold and stress and grief from customers and other staff members complaining re weather – each time window open another 15-20 secs of cold• All other workers mixture of white and black – not sanctioned <p>R suggests C accepted he had done so on one occasion [181] – C states that related to throwing away gravy – in the context of the question that is in conflict</p>	
--	---	--



	C does not appeal FWW	
22 March 2023 (17:10-17:44)	Note of investigation meeting regarding C bringing balloons into work and handing them out to customers	195-198
22 March 2023 (21:02-21:26)	Note of investigation meeting regarding swearing at a shift runner [X] C says in response to question do you know why you are here "no because I've not done anything wrong"	191-192
22 March 2023	Claimant suspended. (referred to in R's letter of 6 April)	Not in bundle but see 199 of 06/04/23
24 March 2023	Suspension letter	Not in bundle but see 199 of 06/04/23
6 April 2023	C invited to investigation meeting on 10 April 2023 for use of inappropriate language on the shop floor	199-200
10 April 2023 14:00	Investigation meeting between Sophie Hyde (Asst. GM) and C for inappropriate language on the shop floor <i>"MK: ... a customer when ... paying for it kept adding more stuff adding time to the order, so that made the order time sky rocket, then [X] blamed me for it. I didn't swear at [X] I just used the F word but not at him it was a private conversation."</i> ... <i>"MK: I remember using the F word, I felt he was being incompetent all day, I felt he was being hostile to me all day."</i> ... <i>"SH: When you say you used the F word in what sense did you use it in</i>	201-205



	<p><i>MK When [X] was blaming me for the timer being high, I think I said its not my Fucking fault.</i></p> <p><i>SH Do you believe this language was appropriate</i></p> <p><i>MK Yes, ... [alleging the following in support of him being discriminated against] [Z] swore very loudly and abuse at a customer on the first window so that other customers on the DT could hear”</i></p> <p><i>...</i></p> <p><i>“SH: Is it correct that you told [X] you can do whatever the fuck you want in response to his comment about the timer</i></p> <p><i>MK Yes it was so long ago I can't remember what I actually said SH Can you explain why you chose to use inappropriate language in response</i></p> <p><i>MK Yes, he was going at me all day, I think he deserved it</i></p> <p><i>SH Did [X] use any inappropriate Language towards yourself during this altercation?</i></p> <p><i>MK no although in previous incidents he has</i></p> <p><i>SH Can you give me an example of this</i></p> <p><i>MK Yes one example of this is he said in front of the driver that I'm the most stupid person he's ever met, second incident he made a comment implying that I was a 'pedophile', [sic.] he said that he knows why I want to work over all of half term it's because all the kids will be here”</i></p>	
<p>10 April 2023 16:06</p>	<p>C messages Respondent with a critical review of Z</p>	<p>206</p>
<p>19 April 2023</p>	<p>Outcome from SH re meeting 10 April re use of the “F word” in presence of “X”</p> <p><i>“On this occasion, the Company will not be initiating formal disciplinary action in respect of [X] previously using</i></p>	<p>208</p>



	<p><i>inappropriate language towards yourself, which you claim has triggered your response on this occasion, but restates the absolute unacceptability of your conduct. Upon your return to work, a mediation meeting will be held between yourselves and your line manager. You should be aware that no further similar breaches of the Company's rules will be tolerated."</i></p> <p>Claimant's suspension lifted</p> <p><i>Also before us was a draft of the above (not on letterhead) dated 18 April 2023</i></p>	207
Thu 20 Apr 23	Customer threatens TC	
20 April 2023	Mediation between RW, C and TC	None but see 209 of 26/04/23
24 April 2024	<p>GP letter</p> <p>Which relayed that Mr Khan had been a patient with the GP's practice since April 2017 and had been having anxiety attacks since 2016 and that they have persisted since then (that is to say those anxiety attacks started prior to him having become a patient at the practice).</p> <p>It went on to say that losing his job in 2023 had made his anxiety worse and he had consulted a "zoom Doctor" because of that. It stated he had been having therapy from January 2023 and further indicated that he attended the surgery on several occasions since June 2020 as a result of his anxiety, had been prescribed medication and that he had been receiving counselling frequently since 2020.</p> <p>Unfortunately the Mr Khan's medical records were not supplied to be able to enable us to be able to verify whether the comments made by his GP in that letter were based upon instructions that Mr Khan had given to the GP or were supported by contemporaneous notes in his GPs records.</p>	84
26 April 2023	outcome from RW of mediation meeting on 20 April 2023 re use of inappropriate use of	209 & oral account of RW



	<p>language on shop floor, and inappropriate use of language towards others.</p> <p><i>“On this occasion, the Company will not be initiating formal disciplinary action in respect of the use of language on shop floor, and inappropriate use of language towards others due to your intentions were not to cause harm but restates the absolute unacceptability of your conduct. You should be aware that no further similar breaches of the Company’s rules will be tolerated.”</i></p>	
27 April 2023	<p>Documented conversation between LG and C concerning inappropriate comments made to a customer and the use of inappropriate language (use of word idiot) on shop floor.</p> <p><i>“LG How are you and how has your shift been buddy?</i></p> <p><i>MK Good and thanks for the extra shift</i></p> <p><i>LG Do you know why you are here?</i></p> <p><i>MK Because I called someone an idiot but they provoked it</i></p> <p><i>LG A customer has phoned and complained. Do you think its acceptable to say that to a customer?</i></p> <p><i>MK Yes because they ordered a krushem in a non timely manner after they received food.</i></p> <p><i>LG So what actually happened?</i></p> <p><i>MK Customer asked for a krushem delaying the DT because it was ordered so late then I said to the next car the idiot in front ordered krushems at the last second.</i></p> <p><i>LG the two cars were on the phone to each other and the customer heard you calling them an idiot. You have been using stupid and idiot all night. Is that acceptable in front of the customer?</i></p> <p><i>MK no but acceptable if they cause me stress. Im allowed to call them a stupid idiot if they behave in a frustrating manner. I have heard worse in this place. Between</i></p>	210



	<p><i>customers and staff. Eg a customer threatened Tim.</i></p> <p><i>LG So how does a customer threatening Tim compare to you unprovoked calling a customer an idiot?</i></p> <p><i>MK I was provoked it caused stress. Because I asked if they wanted anything else and they said no on the headset.</i></p> <p><i>LG So it is unfair for a customer to change their mind?</i></p> <p><i>MK Yes because it caused a panicked reaction. I was thinking [if] a customer can abuse Tim (threaten, ill beat you up) I can call a customer an idiot.</i></p> <p><i>LG it is completely unacceptable to behave like that to anyone. Staff member or customer.</i></p> <p><i>MK I have heard a lot worse. I did not use the word stupid only idiot.</i></p> <p><i>LG I will leave this here as no progress is being made.”</i></p>	
27 April 2023	C suspended from work by phone by LG for inappropriate language on shop floor	211
28 April 2023	<p>C invited to disciplinary hearing on 2 May</p> <p><i>“... on 27th April 2023 you made inappropriate comments to a customer causing a customer complaint namely when serving customers on the drive thru you referred to a customer as an “idiot.</i></p> <p>...</p> <p><i>You are advised that if the allegation is believed to be proven, it will be considered Gross Misconduct under the Company Disciplinary Rules and your employment may be summarily terminated.”</i></p>	212-213
2 May 2023	<p>C’s disciplinary hearing chaired by RW</p> <p><i>“RW So you think a customer being rude to a team member gives a different team member the right to be rude to a different customer?</i></p>	214-220



	<p><i>MK Yeah well the customer wasn't rude he was threatening</i></p> <p>....</p> <p><i>RW:So you believe your actions are acceptable and justified?</i></p> <p><i>MK Yes I don't regret any second of it</i></p> <p>...</p> <p><i>RW: ... You do not regret your actions or feel remorse</i></p> <p><i>MK No I do not regret my actions at all and I would do it again and again"</i></p>	
<p>28 April 2023</p>	<p>Disciplinary Hearing Outcome Letter</p> <p><i>"- You have admitted to calling a customer an "idiot".</i></p> <p><i>- You have failed to provide an acceptable explanation for your rudeness behaviour towards a customer.</i></p> <p><i>- You have failed to provide an acceptable explanation for your behaviour, resulting in damage to customer relationships.</i></p> <p><i>- I believe that you showed no remorse to your actions.</i></p> <p><i>- I consider your actions to amount to Gross Misconduct.</i></p> <p><i>Therefore, I have decided to take the severest sanction an employer can take against an employee and to summarily dismiss you with effect from 2nd May 2023. You are not entitled to notice pay.</i></p> <p>..."</p> <p>The only copy we have of that letter is not on letterhead. The respondent suggests that accordingly was a draft. The date stated on it was before the disciplinary hearing. We concluded that rather than that suggesting the outcome had been prejudged that that was an error which emanated from the invitation letter (which bore the same date) being used as a template for it.</p>	<p>221-222</p>
<p>2 May 2023</p>	<p>C appealed his dismissal.</p>	<p>223</p>



	<p><i>“I would like to make an extremely serious and valid allegation of discrimination, considering the manner in which I was evidently treated differently to other comparators such as Jasmine, who treated the customer so awfully complained about her misconduct online – [RW] has previously fully defended her terrifying misconduct.</i></p> <p><i>My manager has shown ignorance to my disability (anxiety disorder) and to the specific facts of the case, such as a week before, a customer acted in a very threatening and hostile manner to [X].”</i></p>	
9 May 2023	Disciplinary appeal hearing invitation	225
16 May 2023	Disciplinary Appeal Hearing Chair: Mohamed Shaiban RGM (Hall Green)	226-229
19 May 2023	Disciplinary Appeal Hearing Outcome <p><i>“I have considered carefully all the facts presented and listened to and taken account of your comments. Based on evidence presented I believe there was no discrimination to the way in which your case was dealt with compared to others as the cases are very different. I also believe that whilst you mention your anxiety being a contributing factor towards you swearing at the customer, I feel that you haven’t provided sufficient evidence to support this claim. You have been employed for over 18 months and you have admitted to have been exposed to the same or similar issues and have been able to manage the customers expectations without the use of inappropriate language. Therefore, I believe there has not been any discrimination towards your disability of anxiety disorder.</i></p> <p><i>I am satisfied that the matter was dealt with properly and thoroughly at the Disciplinary Hearing and that the correct decision was made at the Hearing and consequently I am unable to uphold your appeal.”</i></p>	230-231



19 May 2023	early conciliation start	5
12 June 2023	early conciliation end	5
13 June 2023	Claim presented	6-19

THE LAW

Disability

23. The issue of whether a claimant is a person with a disability as defined by the statutory scheme is one for the tribunal rather than for doctors ¹. The onus is on a claimant to prove that s/he was disabled for the purposes of the Act at the relevant time.
24. In determining whether a claimant is disabled we are required to consider the [statutory guidance](#) on matters to be taken into account in determining questions relating to the definition of disability issued under s.6 Equality Act 2010 (EqA) relating to the definition of disability.
25. Therefore, whilst four questions must be considered when determining whether an individual is disabled for the purposes of the Act ²:-
- 25.1. Does the claimant have an impairment which is either physical or mental?
- 25.2. Does the impairment affect the claimant's ability to carry out normal day to day activities and does it have an adverse effect.
- 25.3. Is the adverse effect substantial – not trivial?
- 25.4. Is the adverse effect long term?
- it is important to look at the overall picture ³.
26. The date to assess whether the impairment has a substantial and long term adverse effect on the claimant's ability to undertake normal day to day activities and thus the question of disability itself is the date of the alleged discriminatory act and not at the date of the Hearing ⁴.
27. As to the meaning of “**likely**” Appendix 1 of the Code follows the ratio of the pre EqA authority in [SCA Packaging Ltd v Boyle \[2009\] ICR 1056](#) where the House of Lords unanimously approved the meaning of ‘likely’ in this context was “**could well happen**” in preference to “**probable**” or “**more likely than not**”.

Direct disability discrimination

28. Direct discrimination is prohibited by s.39 EqA. Section 13 EqA provides that direct discrimination occurs where because, of a protected characteristic, a

¹ [Abadeh v British Telecom plc \[2001\] IRLR 23](#)

² [Goodwin v Patent Office \[1999\] IRLR 4](#)

³ [Elliot v Dorset County Council UKEAT/0197/20](#) per HHJ Talyer

⁴ [Cruickshank v VAW Motorcast Ltd \[2002\] ICR 729 EAT](#) and [Richmond Adult Community College v McDougall \[2008\] IRLR 227](#)



person is treated less favourably than another person has been or would have been. That is an objective question and involves a comparison.

29. The use of “would” allows for a hypothetical as well as an actual comparison. In making that comparison s.23 EqA requires that the protected characteristic aside there must be no material difference between the circumstances of the complainant and the real or hypothetical comparator “*relating to each case*”⁵.
30. The question we therefore must address, is consciously or unconsciously, what was the alleged discriminator’s reason for acting as they did? ⁶ Unlike causation, which is a legal conclusion, the reason why a person acted as s/he did is a subjective question and one of fact ⁷. The tribunal must not concern itself with is “*if the discriminator treated the complainant less favourably on racial grounds, why did he do so?*” That question is irrelevant ⁸. Discrimination is not negated by the alleged discriminator’s motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably ⁹.

The burden of proof

31. Where a claimant has shown on balance the other required elements of a complaint are made out and the Tribunal has to consider the reason for the alleged treatment s. 136 EqA applies. That provides that if a claimant can prove facts from which the tribunal could decide, in the absence of any other explanation, that there has been a contravention of the EqA the tribunal must determine that the contravention occurred unless the respondent show the contravention did not occur.
32. The Supreme Court has given guidance given on the way that is looked at and made clear it involves a two stage process. The first stage involves ¹⁰:-
 - 32.1. A claimant has the burden of proving, on the balance of probabilities, those matters which he wishes the tribunal to find as facts from which the inferences could properly be drawn (in the absence of any other explanation) that an unlawful act was committed ([30]).
 - 32.2. The Tribunal is not prevented from taking into account evidence adduced by the respondent insofar as it is relevant in deciding whether the burden of proof has moved to the respondent ([20]).

⁵ The wording in s.23 EqA differs slightly to that used in the DDA 1995 (“relevant circumstances” see [Cordell v Foreign & Commonwealth Office](#) [2012] ICR 230 EAT)

⁶ An example is that of the shop keeper given by Lord Phillips in [Governing Body of JFS](#) [2010] 2 AC 728 at [21] “A fat black man goes into a shop to make a purchase. The shop-keeper says ‘I do not serve people like you’. To appraise his conduct it is necessary to know what was the fact that determined his refusal. Was it the fact that the man was fat or the fact that he was black? In the former case the ground of his refusal was not racial; in the latter it was. The reason why the particular fact triggered his reaction is not relevant to the question of the ground upon which he discriminated.”

⁷ [Chief Constable of West Yorkshire Police v Khan](#) [2001] UKHL 48 at [29]

⁸ [R. v Birmingham City Council, ex p. EOC](#) [1989] AC 1155, see Lord Goff at 1194.

⁹ Lady Hale in [JFS](#) at [57]

¹⁰ [Efobi v Royal Mail Group Ltd](#) [2021] ICR 1263 per Lord Leggatt



- 32.3. That will include any facts proved by the respondent which would prevent the necessary inference from being drawn ([30]).
- 32.4. Explanations (as opposed to evidence) must not be taken into account at the first stage. The language of s.136(1) requires that the Tribunal must ignore any explanation for those facts given by the respondent and assume that there is no adequate explanation for them ([22]).
- 32.5. The ET must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. No adverse inference can be drawn from the fact that the employer has not provided an explanation ([40]).
33. If a claimant can pass the burden to the respondent, the second stage requires a consideration of the subjective reasons which cause the employer to act as he did ¹¹.

“At the second stage, the ET must ‘assess not merely whether the [Respondent] has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities.’” ¹²

34. Where there are allegations of discrimination over a substantial period, a fragmented approach looking at the individual incidents in isolation from one another should be avoided as it omits a consideration of the wider picture ¹³.

OUR FINDINGS AND CONCLUSIONS

Disability

35. On 17 November 2023 Mr Khan was ordered by Legal Officer Metcalf to provide medical evidence and an impact statement by 29 December 2023 [51]. He supplied only minimal records. He told us he believed that Legal Officer Metcalf’s order had been addressed. That is despite Legal Officer Singh on 20 February 2024 directing both parties to confirm the up-to-date position with regards to the disability by reference to the order dated 17 November 2023 [55].
36. Mr Khan’s very brief impact statement [81] did not give any real detail of the effect on him of his anxiety episodes, their regularity, their length, whether he was on medication at the time and if so what, and if that medication lessened the effects of the episode or the likelihood of recurrence. Nor did he relay what that medication was and/or its strength. It would be an easy matter for him to do so. He did not.
37. We accept Mr Khan suffered from a mental impairment, anxiety, but despite the very low threshold we find he has not shown the burden being on him to do so

¹¹ [Shamoon v Chief Constable of the Royal Ulster Constabulary](#) [2003] ICR 337 at [7].

¹² see the Igen guidance Annex at [12] and [Laing v Manchester City Council](#) [2006] IRLR 748 [51]

¹³ [London Borough of Ealing v Rihal](#) [2004] IRLR 642 CA applied in [Laing](#) [59] and endorsed in [Madarassy v Nomura International](#) [2007] IRLR 246 (CA)



that this had a substantial (non trivial) adverse effect on his ability to do normal day to day activities.

38. We find he was not a disabled person at the material time.

The discrimination complaints

39. Notwithstanding our finding on disability we have gone on to address the race and disability discrimination complaints.
40. We find there was a history of concerns about Mr Khan's behaviour. Mr Khan suggests amongst other matters this was the respondent being petty. The respondent disagrees.
41. The earliest disciplinary hearing proper that we could trace was conducted on 30 December 2022 by the then restaurant general manager (RGM), Asam Masood. In his outcome [153-154] Mr Masood found:-

"I have taken note of your explanations and of your assurances that you will be able to resolve the matters of concern above. At this time, I have decided not to continue with the formal disciplinary procedure and not to issue a formal warning. However, this letter is to be treated as confirmation that we have discussed the matters above and you have accepted responsibility and will make every effort to address the issues we identified."

42. Despite that assurance and acknowledgement we find Mr Khan's behaviour continued to be a repeated theme.
- 42.1. In her outcome of 22 March 2022 (following the disciplinary hearing of 20 March) Miss Debska found [193-194] that Mr Khan blatantly disregarded and failed to comply with procedure and to comply with requests from his supervisors.

Mr Khan continued to flout those warnings despite the assurance he had given to Mr Masood and the warning Miss Debska gave about repeat.

- 42.2. The investigation meeting on 10 April [201-205] conducted by Sophie Hyde, an assistant general manager, concerned an allegation that Mr Khan had used a swear word to one of his line managers whom we shall refer to as "X". Mr Khan said this:-

"MK: I didn't swear at [X] I just used the F word but not at him it was a private conversation. ... I remember using the F word, I felt he was being incompetent all day, I felt he was being hostile to me all day."

"SH: When you say you used the F word in what sense did you use it in



MK: When [X] was blaming me for the timer being high, I think I said its not my Fucking fault.

SH: Do you believe this language was appropriate

MK: Yes,”

“SH: Is it correct that you told [X] you can do whatever the fuck you want in response to his comment about the timer

MK: Yes ...” [before going on to caveat that]

- 42.3. Before us Mr Khan stated that phrase was not directed at his line manager. The outcome of that investigation dated 19 April 2023 [208] was that the respondent would not commence disciplinary action against Mr Khan (essentially because he had been provoked) but he was reminded that such behaviour was unacceptable and would not be tolerated.
- 42.4. We note there may have been ill feeling between X and Mr Khan based on what Karen Green told Mr Williams in the investigation meeting on 21 December 2022 [150-151] and that may have played a part in that decision and what we relay next.
- 42.5. On 20 April 2023 a mediation meeting was held between Mr Khan and X chaired by the branch manager, Mr Williams. Ms Hyde’s conclusion was repeated in the outcome following the mediation dated 26 April [209].
- 42.6. Similarly the event that allegedly gave rise to Mr Khan’s dismissal which we return to at (44).
43. Prior to the disciplinary hearing resulting in his final written warning Mr Khan complained he had been discriminated against and set out several comparators whom he says he was treated less favourably than [186-188]:
 - 43.1. Mr Khan alleges several cooks who did not order chicken were not reprimanded.
 - 43.1.1. The Respondent asserts that the cooks running out of chicken was not something it viewed as gross misconduct. Furthermore, Mr Khan was not a cook and did not know the circumstances that underlay that.
 - 43.1.2. Mr Khan accepted the cooks whom he alleged had not ordered the chicken were of various races, nationalities, colours and ethnicities including his own characteristics. It is difficult to see how the cooks with their wide range of characteristics all being treated in the same way for the same actions was favouring or putting them to less favourable treatment.
 - 43.2. As to the other comparators listed by Mr Khan, Mr Khan accepted that he had made an assumption about the skin colour of those listed at items 2, both items 3 and 5. In any event the respondent told us those individuals



were investigated as appropriate for the incidents concerned and their material circumstances were not the same as Mr Khan.

- 43.3. Mr Khan orally accepted he did not respond to request for information from the respondent regarding the remaining comparator named in item 4, that formed the basis for his complaint.
- 43.4. Mr Khan before us also relied on additional comparators.
- 43.5. The first comparator, whom we shall refer to as “Y”, was a co-worker whom the respondent accepted had damaged a toilet cubicle.
 - 43.5.1. The respondent asserts that having investigated it accepted that “Y” had a panic attack when she could not get out of the cubicle and the damage was caused by her attempts to get out. Mr Williams told us “Y” was apologetic and offered to pay for the damage [RW/11].
 - 43.5.2. Whilst Mr Khan accepted “Y” suffered from anxiety he portrayed Y’s acts as deliberate. We accept his evidence that “Y” suffered from anxiety.
 - 43.5.3. Again, we find “Y” was not comparable to Mr Khan. We find “Y” accepted responsibility for her actions and apologised. Mr Khan did not. Mr Khan forming the view that her actions were deliberate without having full knowledge of what had occurred we found was a sad reflection on Mr Khan’s inability to see anything from other than his own perspective despite having anxiety himself.
- 43.6. A further comparator was the colleague whom we refer to as “Z” who was alleged to have sworn in front of colleagues and friends on the shop floor and no action was taken against her.
 - 43.6.1. We find the respondent investigated this allegation. Contrary to Mr Khan’s account, it found no customers were present. The respondent told us and we accept that a warning was issued to those involved and Z apologised (albeit not in front of/to the people concerned).
 - 43.6.2. We find there is a stark contrast between Z and Mr Khan’s behaviour. Z accepted responsibility for her actions and apologised. Mr Khan did not. Indeed he expressly stated it would do the same again
- 43.7. Mr Khan also referred to a series of WhatsApp and other messages [252-258].
 - 43.7.1. Some relate to use of swear or inappropriate words, another asked why an individual existed, another showed following a reference to “gr8” a cheese grater and suggested it be used on an individual’s face.



- 43.7.2. Each appeared to be a single page (and/or it could not be verified from the messages alone that they formed part of a chain). There was thus an absence of detail who the members of the group were and what messages had passed before and after. There was no context. Mr Khan accepted he could not relay the context of what was said prior or post or how long it had gone on. Without that context we were not in a position to identify if the circumstances were comparable to those of Mr Khan and what if any mitigation was at play.
- 43.8. Mr Khan also referred to various posts by customers on social media identifying Health and Safety points as support for an assertion that demonstrated double standards on the respondent's part in that it sanctioned some individuals in relation to petty matters but did not sanction others in relation to what he viewed as serious health and safety matters.
- 43.8.1. Mr Khan accepted without challenging them that those posts were accurate and no evidential basis was brought forward to support the allegations made in those social media posts.
- 43.8.2. Nor was he able to bring forward evidence to suggest they were not investigated by the respondent or actioned if required.
- 43.9. Similarly, Mr Khan assumed that a social media post [224] related to Y on the basis she was a female manager (when there were 4 at the site) without providing any basis for that assertion.
44. The disciplinary hearing [214-220] that led to Mr Khan's dismissal held on 2 May concerned a complaint made by a customer who had heard Mr Khan calling him "an idiot" Mr Khan said this:-
- "RW:So you believe your actions are acceptable and justified?
MK: Yes I don't regret any second of it*
- RW: ... You do not regret your actions or feel remorse
MK: No I do not regret my actions at all and I would do it again and again"*
45. The explanation Mr Khan appeared to raise was that a customer had threatened his colleague "X" in the preceding days and the respondent's failure to address that meant he felt he was entitled to do what he wished when customers annoyed or offended him. Mr Williams the disciplinary officer did not accept that was mitigation, found Mr Khan showed no remorse, that Mr Khan would do the same again and so dismissed him.
46. We find the actual comparators put forward by Mr Khan were not comparable. Their material circumstances were not the same as his in each instance. In some, colleagues of various races were treated in the same way as each other on Mr



Khan's account, in others no action was taken following an investigation in the same way as no action was taken against Mr Khan in relation to the incident concerning the allegation of the "f word" being used by Mr Khan to "X".

47. Further, we find a hypothetical comparator would have been treated in the same way as Mr Khan was where
 - 47.1. He/she/they blatantly failed to comply with the respondent's procedures and to comply with requests from his supervisors (the final written warning)
 - 47.2. He/she/they had called a customer an idiot, showed no remorse and stated they would do so again (his dismissal)
48. We find Mr Khan was treated no less favourably than a hypothetical comparator would have been.
49. As we set out above, Miss Debska in the final written warning of 22 March 2023 [193-194] stated

"You have admitted to not handing out guest receipts and disregarding your immediate supervisors' instructions on multiple occasions. You have also described a lack of care regarding the serving of expired product and have admitted that you do not think that it is a serious breach of food safety procedure contrary to your training and our procedures. I find your nonchalance pertaining to this matter and your blatant disregard to your training and the health and safety of customers concerning given the far-reaching implications that serving expired product would have had."
50. Unsurprisingly, given (save for the issue of the gravy) those matters were not disputed Mr Khan did not appeal the final written warning.
51. Mr Khan accepted when it was directly put to him that the reason why he was dismissed was that given by Mr Williams, namely Mr Khan showed no remorse and he would do the same again. Mr Khan also repeated before us the view he expressed at the disciplinary hearing *"if a customer caused a 90 sec delay why can't you call him an idiot?"*.
52. We find that Miss Debska and Mr Williams came to similar views; namely Mr Khan had a blatant disregard for training, instructions and health and safety procedures, his view (that he could speak to customers (and colleagues) in the way he did) was unacceptable to the respondent and that he would do so again. That was a theme on his part as we have set out above.
53. We find Mr Khan did not and does not see that as an issue and instead we find he sought to deflect to others by referencing their behaviour. We find that those matters, his refusal to acknowledge he was wrong and his stated position that he would do so again was reason why he was issued the final written warning and why he was dismissed.



54. We positively find the reason Mr Khan was treated in the way he was for the reasons we give in the preceding paragraph and that was in no sense because of race or for that matter disability.

Summary

55. Accordingly, Mr Khan has not shown he was a person with a disability within the meaning of the EqA. Further we determined that Mr Khan was not discriminated against contrary to Part 5 EqA, his discrimination complaints fail and are dismissed.

Signed by: Employment Judge Perry

Signed on: 19 November 2024