Case No: 1406262/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr B Forrester Hayes

Respondent: Scania (Great Britain) Ltd

Heard at: **Bristol Employment Tribunal**

On: **12 March 2025 (by video); 13, 14 & 17 March 2025 (in person); 18 March 2025 (by video).**

Before: **Employment Judge Ferguson**

Representation
Claimant: Mr M Williams, counsel
Respondent: Mr R Wayman, counsel

Judgment and reasons having been given orally on 18 March 2025 and the Claimant having requested written reasons on 21 March 2025 before the Judgment had been promulgated, the following Judgment and Reasons are issued.

JUDGMENT

It is the judgment of the Tribunal that:

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

2. The claim for damages for breach of contract (notice pay) is not well-founded and is dismissed.

3. The complaint of direct disability discrimination is not well-founded and is dismissed.

4. The complaint of discrimination arising from disability is not well-founded and is dismissed.

5. The complaint of failure to make reasonable adjustments is not well-founded and is dismissed.

6. The complaint of harassment related to disability is not well-founded and is dismissed.

REASONS

INTRODUCTION

1. By a claim form presented on 15 December 2023 the Claimant brought complaints of unfair dismissal, wrongful dismissal and disability discrimination.

2. A final list of issues was agreed at a case management hearing on 2 November 2024. At the start of the final hearing the Claimant withdrew complaints relating to an incident with Simon Rogers in February/ March 2023. A number of other changes to the list of issues were also made by agreement, mainly simplifying and removing duplication. It was agreed that all issues on remedy, except those relating to any deductions for Polkey or contributory fault, would be left until after judgment on liability.

3. The agreed issues to be determined are:

Unfair Dismissal

1. What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for dismissal under s.98(2) of the Employment Rights Act 1996.

2. Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstance?

3. The Claimant challenges the fairness of the dismissal as follows:

    i. Failure to properly investigate, the 'Lunch box incident' (On 11 July 2023 one of the Claimant's colleagues tampered with his lunchbox and contaminated, crushed and manually interfered with his food) by not reviewing the covert video taken of the Claimant.

    ii. Shortly after the 11 July 2023, the Claimant spoke to Gurpreet Virk about the Lunchbox incident on a few occasions. Each time Gurpreet Virk told him, 'because nobody would own up to it, there is nothing that we can do about it'

    iii. Failure to properly consider the full context of the Claimant's response to the Lunchbox incident, including his ADHD and his apology to [TA]. On about 20 July 2023, the Claimant was informed by Craig Sutton, that the 'two incidents were separate issues'.

4. Did Gurpreet Virk abuse the referral to occupational health and did this have a negative impact on the process?

    i. On about 18 July 2023, in a meeting with Martyn Perry, the Claimant was informed that the occupational health involvement would

provide him with an opportunity to discuss his health challenges, feelings, and work-related difficulties arising from his ADHD.

ii. The Respondent failed to provide the Claimant with a copy of the occupational health referral on time. The Claimant requested the occupational health referral in July 2023, but it was not disclosed to him until 19 October 2023.

iii. On about 18 July 2023, Gurpreet Virk coercing the Claimant into believing that the occupational health referral was to help him in his job and would provide the Claimant with the required reasonable adjustment at work.

iv. Failure to obtain the Claimant's approval regarding the occupational health report before using it at the disciplinary hearing. The occupational health report could have been critical in assisting the Claimant to understand the Respondent's concerns and to address any issues arising from his ADHD. The delay in providing this information disadvantages the Claimant, preventing him from properly defending himself during any related disciplinary or capability proceedings.

5. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with those facts?

   i. The Claimant states that allowing [AM] to continue working with the Respondent even after he wrote derogatory statements under a customer's van, namely alluding 2 other apprentices being gay. This employee was confirmed to have defaced the customer's property and was still allowed to work for the Respondent. The Claimant says he was treated inconsistently in relation to how [AM] was dealt with.

   ii. The Claimant says the sanction of summary dismissal was outside of the range of reasonable responses given that he was almost at the end of his apprenticeship, suffered from ADHD, had been provoked by bullying and had apologised to [TA].

6. If it did not adopt a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

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

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

Direct Discrimination

9. Did the Respondent treat the Claimant less favourably because of his disability by undertaking the following actions:

   i. The tampering with the Claimant's lunchbox on 11 July 2023 (the Lunch box incident)

ii. The failure to properly investigate the lunchbox incident, as set out above at paragraph 16(i).

iii. Shortly after the 11 July 2023, the Claimant spoke to Gurpreet Virk about the Lunchbox incident on a few occasions. Each time Gurpreet Virk told him, ‘because nobody would own up to it, there is nothing that we can do about it’

iv. At the disciplinary hearing on 20 July 2023, the failure to see the causal link between the lunch box incident, the Claimant’s disability and the Claimant’s response. The Claimant was told by Craig Sutton that the two things were ‘separate issues.’ (The two things were the lunchbox incident and the Claimant’s response to it)

v. The circulation of the video of the incident, taken by Max Sealy with the Claimant’s lunchbox, or the Respondent failed to prevent its circulation.

vi. Max Sealy covertly filming the Claimant during the lunchbox incident.

vii. Dismissing the Claimant.

10. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon the following actual/hypothetical comparators:

    i. The Claimant relied upon a hypothetical comparator

    ii. The claimant relies upon an actual comparator in respect of his dismissal – [AM] - The Claimant asserts that the Respondent allowed [AM] to continue working with the Respondent. This employee was confirmed to have defaced the customer’s property and is still allowed to work with the Respondent.

11. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

12. If so, what is the Respondent’s explanation? Can it prove a non-discriminatory reason for any proven treatment?

Discrimination Arising from Disability

13. Did the Claimant suffer unfavourable treatment as a result of “something arising in consequence of the Claimant’s disability”?

    i. The Claimant asserts that as a consequence of his ADHD, he has a higher likely hood of impulsivity and a tendency to overreact. As a consequence of this, the Claimant sent a snapchat message to colleagues on or about 11 and 12 July 2023.

14. Was the Claimant was treated unfavourably by the Respondent by the following:

i. The disciplinary measures taken by the Respondent in response to the Claimant’s impulsive behaviour, which arose directly from his disability, namely:

   a. Suspending the Claimant

   b. Commencing a disciplinary investigation

   c. Holding a disciplinary hearing

ii. The Claimant was dismissed.

15. Can the Claimant prove that the Respondent treated him as set out in paragraph 26 above because of the “something arising” in consequence of disability?

16. Can the Respondent show that the treatment show that the treatment was a proportionate means of achieving a legitimate aim? It/he/she/they relies upon the following

    i. As to the business aim or need sought to be achieved – A business aim or need of protecting staff from aggressive, threatening and abusive language

    ii. As to the reasonable necessity for the treatment, the Respondent asserts that it was appropriate given the level of behaviour to suspend and investigate the Claimant and dismiss him

    iii. As to proportionality the Respondent asserts that it was appropriate given the level of behaviour demonstrated by the Claimant.

17. Alternatively, can the Respondent show that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

Harassment

18. Did the Respondent engage in unwanted conduct as follows:

    i. Tampering with the Claimant’s lunch box on 11 July 2023

    ii. Max Sealy covertly recording the Claimant during the lunchbox incident, and the circulation of the video

    iii. On 20 July 2023, the Claimant raised concerns with Craig Sutton about the lack of investigation of the lunchbox incident. Mr Sutton said that the lunchbox incident and what the Claimant did were two separate matters.

19. Was the conduct related to the Claimant’s protected characteristic?

20. Did the conduct have the purpose or effect or violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him/her?

21. Was it reasonable for such conduct to have had the effect on the Claimant in all of the circumstances?

Failure to make Reasonable Adjustments

22. Did the Respondent apply the following provision, criteria and/or practice ('the PCP') generally, namely:

    i. The practice of adopting a zero tolerance policy to any form of perceived abuse.

23. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with for persons who are not disabled in that:

    i. The Respondent failed to consider the seriousness of the 'Lunch box incident'

    ii. The Claimant was subjected to a disciplinary hearing.

    iii. The Claimant was dismissed.

24. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant asserts that the following adjustments were reasonably required:

    i. Taking the 'Lunch box incident' seriously and conducting a proper investigation.

    ii. Offering the Claimant with support or alternative measures to manage his responses or taking into account the emotional regulation difficulties caused by ADHD following the 'Lunch box incident'. Had the Respondent taken this action, the Claimant would not have been dismissed.

    iii. Taking into consideration the impact of the 'Lunch box incident' during the disciplinary process.

25. Did the Respondent not know, or could the Respondent not reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

Breach of contract and/or Notice Pay

26. Was the Respondent entitled to dismiss the Claimant without notice because he his conduct amounted to a fundamental breach of the contract of employment? If not, it is agreed that the notice period was one month.

4. I heard evidence from the Claimant and, on his behalf, from Sam Tree. On behalf of the Respondent I heard evidence from Max Sealey, Kieran Marvell, Martyn Perry, Gurpreet Virk, Craig Sutton and Steve James.

5. I had an agreed bundle of 295 pages.

6. Some adjustments were made to the hearing process for the Claimant's disability, including breaks every hour during the Claimant's evidence and ensuring that questions asked in cross examination were short and clear.

FACTS

7. The Claimant commenced employment with the Respondent as an apprentice technician on 3 February 2020. The Claimant was 16 years old at the time. He was due to complete his apprenticeship in May 2023, but there were some delays as a result of the pandemic, so the completion date was put back to September or October 2023.

8. The Claimant's employment contract states that there was no guarantee of an offer of employment at the end of the apprenticeship. Is also included the following clause about conduct:

> "An apprenticeship is a two way relationship – in return for training and on-the- job experience provided by the Company, you are expected to behave in a responsible manner and make every effort in the workplace, at the Training Centre and in any accommodation provided as part of your training. You will be asked to sign a Learner Contract that sets out your responsibilities during this apprenticeship. You will also be given an Employee Handbook - this sets out the standards expected of you in the workplace.
>
> Failure to adhere to these standards and responsibilities may result in disciplinary action and could ultimately result in the apprenticeship being terminated.
>
> There is no obligation for the Company to offer you employment once your apprenticeship is completed, and how you behave throughout the apprenticeship may be one of the factors that affects the Company's decision whether to offer you employment after you have completed your apprenticeship."

9. The disciplinary policy lists examples of "issues that are normally regarded as gross misconduct", which includes "Fighting, assault on another person or threatening behaviour towards another person". It also states that where gross misconduct has occurred, "the result will normally be summary dismissal without notice or payment in lieu of notice".

10. The Claimant was diagnosed with ADHD at the age of five. He took medication for the condition from the ages of 7 to 14, at which point it was decided to stop because of potential side effects. Since then he has tried to self-manage. There is no dispute that he had ADHD at all material times and that it constituted a disability under the Equality Act 2010.

11. The Claimant informed his manager, Adrian Wilkinson, about his ADHD when he started his employment with the Respondent, but said he did not want it to be common knowledge.

12. The Claimant worked at the Respondent's Swindon depot, where there were a number of other young men amongst the apprentices and technicians. It is not in dispute that there was a culture of "banter" and "pranking" each other. This included on occasion interfering with each others' tools or tool boxes.

13. On or around 4 February 2021 an incident occurred between the Claimant and a colleague, KH. KH had wrapped up one of the Claimant's tools in electrical tape, he said in retaliation for the Claimant unplugging the airline for the grease reel he was using. The Claimant challenged KH, grabbed him by the collar and held onto him. KH then hit the Claimant. A supervisor intervened. Both the Claimant and KH were suspended, and following an investigation and disciplinary hearings both were given a final written warning, to last nine months. The disciplinary hearing was conducted by Adrian Wilkinson. The Claimant produced a statement for the disciplinary process in which he wrote:

> "I have been brought up knowing that you do not mess around with other people's belongings without permission, especially a person's tools resulting in me getting so fed up with it. I like most am fine with a few jokes ect but there is a point when it goes to far and I should have reported it to Martyn before hand.
>
> I am by no means excusing my behaviour and I know that I should have told somebody what was going on, but I did not want to rock the boat.
> I have worked so hard to get this apprenticeship I did not want to get anybody into trouble either, also I would like to say I do get on with [KH] and like him but feel the incidents above have not helped and would appreciate a fresh start so hopefully we can go forward together in our apprenticeships and both learn a valuable lesson from this.
>
> I will in future come and see somebody or perhaps my mentor if I have any problems.
>
> Having had these few days to think about what happened I have also decided that maybe its time my supervisors in confidence knew that I have ADHD, while this is not an excuse either I am hoping it will help them to understand the way I think and why and how I do things a bit particular or different at times i.e. way I'm so particular about my tools and methods."

14. When informing the Claimant of the outcome, Mr Wilkinson said that the conduct would usually end in dismissal but "due to age and naivety" a final written warning was given. He said he was willing to offer the Claimant "a second chance at redemption" and explained the impact on his future prospects if this had ended in dismissal. In the outcome letter Mr Wilkinson wrote:

> "I took into consideration several factors, including: your honesty during the investigation process; your realisation that your actions were inappropriate; and your lack of experience of dealing with conflict at work.
>
> In future we expect you to raise any concerns that you have with your supervisor if you do not feel able to raise them with the person concerned in a calm and professional manner."

15. As at July 2023 there were five apprentices employed by the Respondent at the Swindon depot. Their ages ranged from 16 to 21. Two other apprentices

worked on the same shift as the Claimant (evening shift, 2pm to 10.30pm) and two worked on the earlier shift (6am to 2.30pm).

16. On 11 July 2023 the Claimant arrived for work shortly before his shift was due to start at 2pm. He had brought a lunch bag, which he put in the tea room, as was his normal routine. Around 20-30 minutes after starting his shift he went to the tea room for a drink. He found that his lunch bag had been tampered with. Max Seley, an apprentice from the early shift, was in the tea room waiting for a lift home. The Claimant says he found his crisps smashed, chocolate bars crushed and someone had opened his sandwich box and poked finger sized holes through the sandwiches. They had also opened tea bags and sprinkled tea leaves all over his lunch bag. He says he was upset, dismayed and angry, and now had no food until he got home (around 11pm).

17. Given that the staff on the Claimant's shift were working, he assumed it was someone from the previous shift who had tampered with his lunch.

18. Mr Sealey secretly videoed some of the incident on his phone. The video footage of around 30 seconds in length was viewed during the hearing. It starts at a point apparently soon after the Claimant had opened his lunch box and discovered what happened. The following is an agreed transcript:

Claimant:	I'm going to find out who did that Someone's getting fucked … and broke all my crisps Mate, did you see who did that?
Mr Sealey:	No, I was out there until quarter to three.
Claimant:	Mate it was probably, it was [TA – an apprentice on the early shift[1]] – I am going to fuck him up for it.
Mr Sealey:	I don't know who it was. I was outside until quarter to three.
Claimant:	(Takes phone out of pocket) [inaudible, something about "message"]
Mr Sealey:	I was still cleaning my tools
Claimant:	If I see his fucking toolbox open tomorrow – I'm going to fuck everything up in there.
Mr Sealey:	You do anyway.

19. Mr Sealey's evidence was that he started filming the Claimant because he was worried he was going to do something to TA. He said TA was vulnerable and the Claimant always picked on him.

20. In his oral evidence he said he could not remember exactly what the Claimant had said before he started filming, but said he must have mentioned TA because that was the reason he started filming.

21. It is the Claimant's case that Mr Sealey must have started filming because he had either tampered with the Claimant's lunch himself or he knew who had done, and he wanted to film the Claimant's reaction for a laugh.

[1] Referred to throughout this document as "TA" because they are not a party or witness in the case, and it is unnecessary to include their full name.

22. I do not accept that the fact that Mr Sealey filmed the Claimant is sufficient evidence to find, on the balance of probabilities, that he was responsible for what happened to the Claimant's lunch or that he knew who was. The filming starts in the middle of the Claimant's reaction. If Mr Sealey had known about the prank before the Claimant discovered it, one would expect the filming to include the Claimant finding his lunch. It is entirely possible that Mr Sealey was on his phone while waiting to be collected and decided to film the Claimant – something that can be done very quickly on a smartphone – once the Claimant started to react. That might have been because it was generally considered funny to see colleagues reacting to a prank, or because he realised there was the possibility of retaliation.

23. There is no dispute that the Claimant messaged both TA and a technician from the early shift, AM[2], telling them what happened with his lunch and asking if they knew who had done it. In fact the Claimant says he messaged everyone on the early shift (at least five people), either by Facebook messenger or on Snapchat.

24. The Claimant had the following exchange with TA on snapchat:

Claimant:	I stg [swear to god] if it was u
TA:	Oh god
Claimant:	I stg Better not have been u
TA:	Not me mate
Claimant:	If i find out it was u Ur toolbox is fucked
TA:	That's cool. It wasn't me tho
Claimant:	If anyone on ur shift tells me otherwise ur toolbox is fuckef
TA:	Ok [thumbs up emoji]
Claimant:	Mate everyone has said no its clearly u
TA:	I really wasn't me mate
Claimant:	If it was u ur paying for my lunch if u dont ill cut ur tyre valves off Simple
TA:	It wasn't me and I ain't paying for shit mate Simple
Claimant:	Oh well if it was u and u say u aint paying good luck getting new tyres
TA:	That's cool cause it wasn't me mate
Claimant:	Thats fine mate cus when i found out it was u hide ur bike and lock ur box
TA:	[Thumbs up emoji]

25. The precise timing of the messages is not known because Snapchat does not show time stamps in conversations.

26. The Claimant also had the following exchange on Snapchat with AM:

AM:	What happened?

[2] As above, referred to as "AM" throughout

Claimant: Smashed all my fucking chrisps all my chocolates and put a finger through my sandwiches
Just a cunt whoevers done that
Fucked up all my food for tonight

AM: Yeah that's a bit much I would only do the crisps at worst not everything
Jason donorvans calling

Claimant: Nah not even
Pissed me off cus ive not even got loads of money to buy more
Short this month anyway

AM: Sorry mate I'm really not sure there's a list of people it could off been

Claimant: I know its someone on your shift so if i find out whose done it they are gunna get there shit fucked
Ive told [TA] if it was him im gunna tip his shit everywhere

27. The Claimant says he threw the contents of his lunch box in the bin and then went to report the incident to James Knight, a technician who was informally acting as a mentor to the apprentices. Mr Knight told the Claimant to report the incident. They went together back to the tea room and retrieved the Claimant's lunch from the bin before taking it to the office. In the office the incident was reported to Paul Brady, area manager, Martyn Perry, workshop controller, and Kieren Marvell, the Claimant's supervisor/foreman.

28. There is a dispute about whether the Claimant sent the snapchat messages immediately on discovering his lunch box or after reporting the matter in the office.

29. I am satisfied that the Claimant started sending messages to everyone on the early shift immediately on discovering his lunch, i.e. when he is seen taking his phone out of his pocket on the video footage. I do not accept, however, that the whole exchange with TA would have taken only 1-2 minutes as the Claimant claims. There are no time stamps on the messages, but I note in particular that the Claimant says at some stage, "Mate everyone has said no its clearly u", suggesting he has in the meantime finished similar exchanges with the other people he messaged. One of those exchanges, with AM, involved a whole page of text. I consider it likely that the text conversation with TA lasted at least 10-15 minutes, so the final message advising TA to "hide ur bike" and "lock ur box", would have been sent at least 10-15 minutes after the discovery of his lunch. It is of course possible it was sent much later that day.

30. The Claimant's evidence is that his ADHD has the effect of him saying something impulsively, along with intense experience of emotions and high levels of frustration in certain situations. He said at the time he was so impulsive he did not stop to think about the consequences of the messages to TA.

31. The following day Mr Marvell spoke to everyone on the early shift and asked what anyone knew about what had happened with the Claimant's lunch. No-one owned up, but some of the staff mentioned that the Claimant had been sending abusive messages. Photos were taken of the messages on TA's and AM's phones.

32. Mr Sealey told Mr Marvell he had a video of the Claimant, but he was reluctant to share it.

33. When the Claimant attended work on 12 July he says he found the previous shift in the tea room. He asked them all again if anyone wanted to own up and apologise. They all denied it. The Claimant then went to start work. TA came out into the workshop and the Claimant apologised to him for blaming him and about the bike tyres message.

34. Mr Marvell reported the issue with the messages to Mr Brady and to HR. He emailed as follows:

> "Hi Paul,
>
> Reference our conversation yesterday, I have spoken to the early shift regarding Brooklyn Hayes's sandwiches having a hole pushed through them.
>
> When I raised this with the shift, Martyn and Simon M were present, I got an array of comments from members of staff informing me that Brooklyn had got very abusive over this, this was backed up by them showing me the messages that Brooklyn sent via social media.
>
> The photos attached in the black background are from [TA] as Brooklyn blamed [TA] for this and threatened him over messages.
>
> The phone with the White background has come from [AM], which in this message Brooklyn threatens [TA] again.
>
> Max Sealey also said that Brooklyn was getting very aggressive/threatening yesterday and blaming Max and [TA]. Max also has a video of this but does not want to show me as he is afraid of getting further repercussions from Brooklyn, as Max claims this has been going on for a while. I have asked him to write these incidents down and give them to us so we can deal with accordingly.
>
> When Brooklyn arrived for his shift today, it was brought to my attention by Paul Tomes that Brooklyn decided to approach the shift sat down in the canteen with an aggressive manner, I walked in and Brooklyn was raising his voice and arguing asking who had done this to his sandwiches and Brooklyn said "Its always this shift" directing at [SG] and [CF].
>
> Could you please advise where we can go with this, as I feel this is going to manifest into bigger issues. It would be beneficial to obtain this video from Max, however is there any way forward I can persuade him to release this evidence?
>
> Feel free to give me a call if you need any further info. We will speak to the late shift this afternoon to see if anyone will own up to the original complaint."

35. Gurpreet Virk, People Business Partner, advised that the Claimant needed to be suspended. She wrote: "As disappointing as it is that someone has done this the lunch, we cannot condone threatening behaviour and based on what I have read he is a threat to our employees and potentially himself if this escalated further."

36. The same afternoon the Claimant was called into a meeting with Mr Marvell, Mr Perry and another manager, Mr Mardle. The Claimant was suspended.

37. The following day, 13 July, Mr Sealey provided Mr Marvell with the video footage. Mr Marvell's evidence was that he watched the footage. He forwarded it to Mr Brady, Mr Perry, Ms Virk and Mr Mardle.

38. Mr Perry was asked to conduct an investigation into the issue regarding the messages sent by the Claimant. His evidence as to whether he watched the video was unclear. He first said he didn't, but later said that his investigation report referred to something from the video.

39. The Claimant was invited to an investigatory meeting on 18 July. In the meantime the Claimant's mother had contacted HR and mentioned the Claimant's ADHD, asking if it was on his file. As a result Ms Virk had a conversation with the Claimant's mother over the phone in which the Claimant's mother suggested that the Claimant's ADHD could have been a factor in his conduct. Ms Virk advised Mr Perry to seek the Claimant's consent for an OH referral.

40. Mr Perry conducted the investigatory meeting on 18 July. Mr Marvell also attended as note taker.

41. The Claimant handed Mr Perry a statement, which described his reaction to finding his lunch as follows:

> "My first reaction was to message everyone on the early shift those that were on facebook messenger and 2 others on snapchat ([TA] and [AM]) as changeover had just happened and all my shift had been in the workshop as far as I was aware, so I assumed it was one of the early shift taking a joke to far that had tampered with my food. As a few minor practical jokes had been played between a few of us recently and some banter which I have seen on facebook this was a bit more and upsetting I assumed it was [TA] or [AM] to which I messaged on snapchat as I do not have him on my facebook, I cannot fully remember the message word for word but as I told Kieran in the heat of the moment "I would let his bike tyres down if it was him" nothing violent or seriously threating just as I was extremely upset at the time."

42. Regarding his ADHD he wrote:

> "I have contacted HR to see if my condition of ADHD which is a recognised disability to ascertain if this is on my records as Andy Ledbury and previous managers knew about it, I thought HR would know about but they do not until now to which they are looking into it after

several phone calls to them. I have also given in this interview some important information I feel needs to be taken into account which explains some of the symptoms I suffer with on a daily basis one of which is as follows.

Impulsiveness. Acting or speaking on the spur of the moment without thinking through the consequences. Difficulty controlling emotions.

I find this hard to deal with at times and have suffered many years at school with ADHD to which I keep this to myself as much as a can to try and fit in and hopefully this will help to understand my reactions at times and as Scania have a Equal Opportunities policy and is committed to unlawful discrimination I would like this to be fully noted on this occasion as all employees have a reasonability to a positive work environment."

43. In the investigation meeting the Claimant said:

"BFH [Claimant] – after I found my sandwiches and I was not happy; I walked in to get a drink and found my lunchbox full of split tea bags. And sandwiches destroyed, I was upset and asked everyone on message if it was them, I took it out on [TA] a bit. I wasn't actually going to do anything like that as I was encouraged by James to report the issue. The heat of the moment got to me and you've got the pictures here of what I said
MP – on the back of that do you think what you did was an appropriate reaction
BFH – no I don't agree with what I did, more than anything I wanted an apology, but everyone denied it and made sarcastic comments to me, just like being in school really, it was a heat of the moment reaction, I didn't do anything to his bike or his toolbox."

44. The following discussion took place about the Claimant's ADHD:

"MP – Has come to light ref ADHD, did you mention that to anyone here
BFH – Adrian knew about it, Andy Ledbury knew about it too, I wanted to know if it was on my HR file, which I don't think it was
MP – do you have to do anything to manage your ADHD on a daily basis?
BFH – No, sometimes I say things without thinking about it, My ADHD is there but its not prominent, I just live with it
MP- Scania want to make an OH referral for you as people have only just been made aware of your ADHD, are you ok with this?
BFH - what does it entail?
MP- you talk to a professional and gives you advice and have a chat with you and document what you feel and what you are up against
BFH – yes that will be fine with me
MP – it could also highlight any issues you may have at your workplace that affect a reaction from you
BFH – Yes, I never really mentioned anything about my ADHD before as it's a bit of a touchy subject, its not like a massive deal, in certain situations no one will know but small things can trigger it

> MP – that's fully understandable, this will give you someone to listen to you which is a Bonus"

45. Mr Perry's evidence was that TA was also interviewed by Ms Virk, and he was also present. A document entitled "[TA]'s statement" is in the bundle, but it is not clear when this was produced. Mr Perry said he did not see it at the time. It is not in dispute that it was not given to the Claimant or to the disciplinary manager.

46. The statement includes the following:

> "How did you feel when you received those messages on snap chat from BH?
> It pissed me off, because I was being accused of doing something that I didn't do.
> I do feel safe working with Brooklyn, he wouldn't put me in harm.
> How did you feel when he threatened your property?
> Not sure he would follow through on the threat. I don't know.
> How does he treat you?
> It's always verbal, nothing physical. I have never done anything to him. Never shouted or shown any aggression.
> He seems to pick on yeah 1 apprentices.
> How does he pick on you?
> It's the way he talks to me. He talks down to me. [TA] does an impersonation of BH talking down to him, exaggerated and slowed down.
> Is this regular?
> Yes it is."

47. Mr Perry concluded that the matter should proceed to a disciplinary hearing. His report noted as people interviewed: "Brooklyn; [TA]".

48. The Claimant was invited to a disciplinary hearing on 20 July and Craig Sutton, branch manager at Heathrow, was appointed as the disciplinary manager. Mr Perry's report and the notes of the investigation meeting with the Claimant, together with the photos of the messages, were sent to Mr Sutton.

49. On 19 July the Claimant had a telephone appointment with Occupational Health ("OH").

50. The OH referral had been made by Ms Virk. This involves completing an online form. Under reason for referral, Ms Virk ticked the box for "Specific Management Concern". She wrote: "It has only just been brought to our attention that Brooklyn has ADHD as he is currently going through a disciplinary procedure at work".

51. Under specific questions, Ms Virk ticked boxes for:
    - Is there a specific medical/ health condition affecting the employee?
    - How does the employee's condition impact on their ability to carry out their job?
    - If the employee's condition is likely to be long term are there reasonable adjustments the company could consider to accommodate a return to work?

52. Under "Other Information", she wrote:

> "I would like to understand whether Brooklyn does have ADHD? If he has ADHD how does this effect his personality? Is he able to understand that making threats to people is unacceptable? Is he able to understand that making threats a persons personal belongings is unacceptable? Is he able to understand that causing anyone physical harm is unacceptable? Does he understand that shouting at people is unacceptable?"

53. An OH report was produced on 19 July 2023 and sent to both the Claimant and the Respondent. It was forwarded to Mr Sutton, who considered it at the disciplinary hearing. It states, so far as relevant:

> "**Consent**: Mr. Hayes observed that he was unaware of the details of his referral to Clarity. I explained my role and the nature of the report that will be generated, and the areas of concern outlined in your referral. Following this explanation, he confirmed that he is content to undergo assessment. He is aware that independent and impartial medical advice will be provided to both employee and employer with the aim of sustaining healthy employment.
>
> …
>
> **Prognosis**: ADHD is characterised by an impaired ability to sustain concentration on complex or repetitive tasks (distractibility) and / or impaired ability to be physically still (hyperactivity) and / or impaired ability to 'stop and think before acting' (impulsivity). This can impair communications and social interactions and problem solving of complex issues. Autistic traits can manifest as an over regard for structure, order and rules. Both conditions exist on a spectrum (we all have such traits) and exact symptoms, and their severity, are variable between individuals. It is not possible for me to make a diagnosis on the basis of a single short conversation; however, my observations today would support the existing diagnosis of ADHD with autistic traits. Neither of these conditions will impair the ability to know 'right' from 'wrong' and will not excuse the individual from legal liability for their actions.
>
> **Recommendations**: Mr. Hayes is recommended to monitor his ongoing behaviours and, should they begin to impair his employment, personal relationships or life opportunities, seek advice on the risks / benefits of re-starting medication.
>
> Scania GB would be recommended to consider the possibility of Mr. Hayes having interpersonal communications deficits as a contributing / mitigating factor in the present disciplinary process."

54. The disciplinary hearing took place on 20 July. The Claimant was accompanied by a family friend, Mr Tree.

55. The Claimant accepted sending the messages and agreed that it was not acceptable. He said “It wasn’t out of the blue. There was a cause to it.” Mr Sutton said, “That is a separate matter that is being investigated”.

56. The Claimant asked Mr Sutton if he had seen the statement he gave to Mr Perry. Mr Sutton said he had not, so asked the Claimant to read it out. The Claimant did so. The statement included the Claimant’s account of having apologised to TA on 12 July.

57. Mr Sutton said afterwards, “As I said before that is still being investigated. The issue we have got here it’s not just one threat it’s 2. Cut your tyre valve and your toolbox is fucked”. Mr Tree then raised an issue with the wording of the investigation report, saying that it implied a threat to TA himself, rather than his belongings. Mr Sutton said: “A threat to harm his belongings may have meant that [TA] may not want to come into work”.

58. As for the ADHD, the following discussion took place:

> “ST: Have you taken into consideration that Brooklyn has ADHD. He is impulsive.
> CS: We have an OH report that does state that you stopped taking medication for your ADHD when you were 15 and that you do know the difference between right and wrong.
> BFH: It was a heat of the moment thing which is an impulsive act. I have apologised the next day so I do know the difference between right and wrong. I didn’t cut his tyres or harm his tool box. I just said it in the heat of the moment. I had no intention of doing it.
> CS: The person you messaged had no idea that you didn’t attend to do it.
> CS: You have sent several messages
> BFH: It was to one person. It was impulsive, literally done straight away”

59. Mr Sutton adjourned the meeting and decided to dismiss the Claimant for gross misconduct. When the meeting was reconvened he said:

> “The messages that you have sent does compromise the core values which are respect of the individual and dignity at work. You have compromised our social media policy by sending these messages via snap chat.
> …
> Based on everything I have heard and taking into consideration what you believe are procedural errors and Brooklyn having ADHD. For me this is a serious act of gross misconduct whereby there is zero tolerance to any kind of threats being made to any employees, and therefore I am going to dismiss you.”

60. Mr Sutton said the following in his witness statement:

> “11. Brooklyn stated that he didn’t make the threats “out of the blue”, I believe referring to the fact that is lunch had been tampered with. I believed that this issue was still being investigated at the time. I felt that, no matter what the outcome was of any such investigation, I would still

have made the decision to dismiss Brooklyn due to the way he reacted and behaved. The outcome of any investigation into who had tampered with Brooklyn's lunch would not have changed my decision about the severity of what Brooklyn had done.

12. Mr Tree asked if Brooklyn's ADHD had been taken into consideration, stating that Brooklyn was impulsive. I explained that I had reviewed the OH report which confirmed that Brooklyn did know the difference between right and wrong. … I did also consider OHs view that there was a possibility that Brooklyn had "interpersonal communication deficits" as a contributing/mitigating factor. However, I did not feel that this was sufficient mitigation to warrant a lesser sanction. Brooklyn stated that it was "impulsive" and that he'd "literally" sent the messages "right away", however, this wasn't just one flippant message. It was repeated messages to more than one person.

13. Brooklyn confirmed that he had apologised to [TA] and I did also take this into consideration, however, as above, I did not consider this was sufficient to warrant a lesser sanction. I could not feel confident that Brooklyn wouldn't react in a similar way in the future."

61. The outcome of summary dismissal was confirmed in a letter dated 28 July 2023. The key parts of the letter state as follows:

"In your defence, you raised two key points. Firstly, you argued that there were procedural errors, specifically that the investigation meeting minutes were erroneously titled as 'disciplinary,' despite all prior documents clearly stating it was an investigation meeting. After thorough consideration, it was acknowledged that this discrepancy was likely due to human error and did not impact the outcome of the investigation in any biased manner.

Secondly, you contested the wording of the investigation report, particularly Martyn's statement that you through the use of social media threatened to cause harm to another apprentice. You admitted to threatening the apprentice's belongings and not their physical well-being. However, whilst you did not threaten to cause his body any harm this could still have negative effects on the individual, both mentally and financially. The meeting unequivocally established that any form of threat made to employees, regardless of its nature, cannot and will not be tolerated within our organization.

Furthermore, during the meeting, you disclosed that you have ADHD, which had not been previously known to the team due to changes in management at Swindon. An Occupational Health (OH) referral was made, and according to the report, you stated that you have not taken any medication for ADHD since the age of 15 and that you have it under control. You emphasised that your ADHD does not impact how you think about things, and you are fully aware of the difference between right and wrong. It was considered that ADHD may influence your ability to remain calm in certain situations, and it was acknowledged that the Snapchat conversation might have been an instant reaction. However, it was noted

> that your persistence in pursuing the issue (your lunch being damaged) from the previous day into the
> following day, indicates that your threat to the apprentice on Snapchat was not merely a reactive response to the situation you were in.
>
> While we listened to your representations, the organisation was not able to find any mitigating factors for a lesser sanction. I regret to inform you that the decision has been made to terminate your employment with Scania Great Britain LTD based on the grounds of gross misconduct. This letter therefore gives formal notification of the summary termination of your employment.
>
> The use of aggressive, threatening, and abusive language towards a fellow employee, even if directed towards their belongings, is wholly unacceptable and violates our company's values and policies. We prioritise creating a safe and respectful working environment for all employees, and such behaviour cannot be tolerated."

62. Mr Sutton was cross-examined about the reference in the letter to the Claimant having pursued the issue "into the following day". He said that referred to the messages, and he possibly believed at the time that the messages continued into the following day. He said that whether it was over one or two days, however, his decision would still have been the same. He said he did not believe it was impulsive because there were multiple messages.

63. The Claimant appealed against his dismissal. The Claimant has not made any allegations of discrimination relating to the appeal process or outcome and given my conclusions as to the dismissal, the appeal is not relevant to the unfair dismissal complaint either. It suffices to say that the appeal hearing was conducted by Steve James, Regional Director – South East. A hearing took place on 7 September 2023. Following this some further investigation took place, including interviews with three members of staff on the early shift. Mr James also enquired about the Claimant's employment record because the Claimant had said in his grounds of appeal "Besides a small matter when I first started at Scania in 2020, I have not had any conduct issues", which was not correct. The Claimant was then invited to a further appeal hearing on 11 October 2023. It was said the purpose of the hearing was to give him an opportunity to present any medical or other evidence that his ADHD caused him to act in the ways that led to his dismissal. The hearing took place, but the Claimant did not present any further evidence. The appeal was dismissed by letter dated 16 October 2023.

THE LAW

64. Pursuant to section 98 of the Employment Rights Act 1996 ("ERA") it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons or "some other substantial reason". A reason relating to the conduct of an employee is a fair reason within section 98(2). According to section 98(4) the determination of the question whether the dismissal is fair or unfair "depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing

the employee" and "shall be determined in accordance with equity and the substantial merits of the case."

65. In misconduct cases the Tribunal should apply a three stage test, set out in British Home Stores Ltd v Burchell [1980] ICR 303, to the question of reasonableness. An employer will have acted reasonably in this context if:-

    65.1. It had a genuine belief in the employee's guilt;

    65.2. based on reasonable grounds

    65.3. and following a reasonable investigation.

66. The Tribunal must then consider whether it was reasonable for the employer to treat the misconduct as a sufficient reason for dismissal. In respect of each aspect of the employer's conduct the Tribunal must not substitute its view for that of the employer but must instead ask itself whether the employer's actions fell within a range of reasonable responses (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439

67. The Equality Act 2010 ("EqA") provides, so far as relevant:

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

…

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

…

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

39 Employees and applicants

…
(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment

136 Burden of proof
(1) This section applies to any proceedings relating to a contravention of this Act.

(2) 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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

68. Pursuant to s.212(1) EqA, definition of detriment (s.39) does not include conduct which amounts to harassment.

Discrimination arising from disability

69. The correct approach to causation under s.15 was confirmed by Simler J in Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT:

> "On causation, the approach to S.15… is now well established... In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

70. As to the second issue, a broad approach applies when establishing whether there is a causal connection, but there must still be a connection of some kind. Simler J held on the facts of the case that the critical question was whether, on the objective facts, the claimant's refusal to return to her existing role arose in 'consequence of' (rather than being caused by) her disability. This is a looser connection that might involve more than one link in the chain of consequences.

71. In order to determine whether any unfavourable treatment is justified under s.15(1)(b), the tribunal will consider:

71.1. Did the employer have one or more legitimate aim(s)?

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

71.3. Could something less discriminatory have been done instead?

71.4. How should the needs of the Claimant and the Respondent be balanced?

72. As to the standard of scrutiny to be applied, a critical evaluation of the evidence is required, weighing of the needs of the employer against the discriminatory impact on the employee. The tribunal must carry out its own assessment on this matter, as opposed to simply asking what might fall within the band of reasonable responses of the reasonable employer (see Gray v University of Portsmouth (EAT 0242/20) and Hardy & Hansons plc v Lax 2005 ICR 1565, CA.

Reasonable adjustments

73. Pursuant to section 20 EqA, where an employer has a provision, criterion or practice ("PCP") that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not apply if the employer does not know, and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage referred to (paragraph 20 of Schedule 8 EqA).

74. Section 21 provides that an employer discriminates against a disabled person if it fails to comply with a section 20 duty in relation to that person.

75. As to the "reasonableness" of a particular adjustment, this is a question of fact for the Tribunal to be determined on objective grounds (see, e.g., Smith v Churchills Stairlifts [2006] ICR 524, paragraph 45 per Maurice Kay LJ). The EHRC Statutory Code of Practice provides guidance on the type of factors to be considered. The factors listed (at paragraph 6.28) are:

75.1. Whether taking any particular steps would be effective in preventing the substantial disadvantage;

75.2. The practicability of the step;

75.3. The financial and other costs of making the adjustment and the extent of any disruption caused;

75.4. The extent of the employer's financial or other resources;

75.5. The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

75.6. The type and size of the employer.

CONCLUSIONS

76. I will deal with the s.15 EqA complaint first because it lies at the heart of the claim and, if the Claimant's conduct arose from his disability, a higher standard

of scrutiny is required than for considering the reasonableness of the decision to dismiss under s.98 ERA.

77. The unfavourable treatment relied upon by the Claimant is the suspension, the commencement of the disciplinary investigation, holding the disciplinary hearing and the dismissal. There is no dispute that that treatment took place, or that it was because of the Claimant sending threatening messages to TA and AM. The "something" was the Claimant sending the messages. Applying the approach outlined by Simler J in Sheikholeslami, the next question is whether that something arose in consequence of the Claimant's ADHD.

78. The Respondent argues that the Claimant has not established the sending of the messages arose in consequence of his ADHD. It is not disputed that impulsivity is a typical feature of ADHD, and this is confirmed in the OH report. Mr Wayman argues, however, that the Claimant has not established that sending the messages was an impulsive act. He says they cannot be treated as a "heat of the moment" reaction because there were a series of messages which necessarily took place over a period of time.

79. I have found that the messages must have taken place over a longer period of time than the Claimant claims, but that does not necessarily mean they were not impulsive or that they did not arise in consequence of his ADHD. The Claimant was undoubtedly upset and angered by what had happened to his lunch. He started sending messages to people on the early shift straight away, as seen in the video footage. What the Claimant is heard saying on the video, and what he said in series of messages to TA all express the same sentiment, that the Claimant believed it must have been TA who was responsible and the Claimant would retaliate by "fucking up" everything in TA's toolbox and cutting off the tyre valves on his bicycle. The Claimant has not produced any medical evidence directly on the question of whether this conduct arose in consequence of his ADHD, and the OH report does not address that question. Indeed there is no evidence that the Occupational Health practitioner knew what conduct had led to the disciplinary proceedings.

80. I am prepared to accept, however, that even if the messages took place over a period of 10-15 minutes or more, they can properly be described as impulsive because they were prompted by the Claimant's anger at what had happened to his lunch. The Claimant consistently said during the disciplinary process that the messages were an impulsive reaction. Since impulsive behaviour is a common feature of ADHD, I am also prepared to accept that the Claimant has satisfied the loose causation test under s.15, i.e. the messages arose in consequence of his ADHD. Another way of putting it is that the Claimant's ADHD had *something to do with* him sending the messages. That is not the same as saying his ADHD *caused* him to send the messages. This is not a case where the "something" was an inevitable consequence of the disability, such as where a person is unable to attend work because their disability has made them unfit to work. Here, there was a connection, but it was something less than standard causation. The closeness of the connection is, in my judgement, a relevant matter when considering whether the unfavourable treatment was a proportionate means of achieving a legitimate aim.

81. The aim of protecting staff from aggressive, threatening and abusive language is obviously a legitimate aim. The question is whether the treatment was proportionate.

82. In this regard the Claimant relies on largely the same matters as for his unfair dismissal claim. First, he relies heavily on the fact that the Respondent did not properly investigate the lunchbox incident. It is argued that finding out who was responsible for the incident had a bearing on the seriousness of the Claimant's conduct.

83. While it is undoubtedly correct that the Respondent could have done more to investigate who had tampered with the Claimant's lunch, for example by interviewing everyone on the early shift individually, it is difficult to see how this is relevant to the Respondent's approach to the Claimant's conduct. The fact that someone had tampered with the Claimant's lunch was never in doubt. The Respondent acknowledged this was unacceptable. Ms Virk, when deciding to suspend the Claimant, for example, said "As disappointing as it is that someone has done this [to] the lunch, we cannot condone threatening behaviour…".

84. The Claimant went so far as to suggest in closing submissions that if it had been established TA was the culprit, that would have made the Claimant's conduct less serious. That cannot be right. The question of who was responsible was reasonably considered irrelevant when investigating the Claimant's conduct. Even if TA had been the culprit, that does not justify threatening to damage his property or lessen the seriousness of the Claimant's conduct. Tampering with a colleague's lunch is obviously taking things too far, but so is making threats to damage their property.

85. There were some suggestions by the Claimant that the incident with his lunch was part of a campaign of bullying or goading him, but I have heard no evidence to support that and nor was there evidence of that before the Respondent during the disciplinary investigation. As I have noted, it is not in dispute that there was a culture of pranks and joking around. The Claimant appears to have participated in that, indeed he said so in the statement he produced for the disciplinary process. Further, Mr Sealey is heard to say in the video, "you do anyway" when the Claimant says he will mess up TA's toolbox. Clearly the Claimant was provoked by what happened to his lunch, but that was never in question.

86. The Claimant did not pursue an argument that it was disproportionate to commence a disciplinary investigation or hold a disciplinary hearing. Once the Respondent found out about the messages it had to investigate the matter, and on any view the messages could amount to gross misconduct so it was reasonable and proportionate to hold a disciplinary hearing.

87. As to the decision to suspend the Claimant, Ms Virk's reasoning was that the Claimant was a threat to other employees and potentially himself if this escalated further. That was an entirely justified view. Clearly if the Respondent had known who had tampered with the Claimant's lunch, that person ought to have been suspended as well, but they did not know. There was no doubt, having seen the messages on TA's and AM's phones, that the Claimant had threatened TA. Suspending the Claimant pending the investigation was a

proportionate response and necessary to achieve the aim of protecting employees. Further, the Respondent did not know at this stage that the Claimant would say the conduct arose from his ADHD. Nor did the Respondent know that the Claimant had apologised to TA (if indeed he had by the time this decision was made).

88. The question of whether the Claimant's dismissal was a proportionate means of achieving the aim of protecting staff is much more difficult. After very careful thought I have concluded that it was.

89. There is no doubt that the impact on the Claimant of the dismissal was hugely significant. He was nearing the end of his apprenticeship, and although as it happens he has been able to complete his apprenticeship elsewhere, that was not guaranteed. The Claimant had always wanted to work for the Respondent and had aspirations to become a Scania Master Technician. His dismissal has seriously dented, if not ended, that ambition.

90. On the other hand, the Claimant had made serious threats to another employee. The Claimant argues that TA was not in fact particularly affected by it. The statement in the bundle says TA said "It pissed me off" but he felt safe working with the Claimant and said he was "not sure" he would follow through on the threat. What is more relevant when assessing the seriousness of the conduct, however, is the Claimant's intention. There is nothing in the messages to indicate that the Claimant meant the threats as a joke or that he would not follow through on them. He went as far as to say TA should lock his toolbox and hide his bike. Even if these were empty threats, he was seeking to retaliate for what happened to his lunch. He was lashing out at TA. Objectively viewed, regardless of how they were in fact received, they were serious threats that were intended to, and were likely to, alarm the recipient.

91. Further, the fact that the conduct arose in consequence of the Claimant's ADHD has no bearing on the effect it would have on the recipient of the threat, and therefore the legitimate aim of protecting other employees still applies.

92. I have already noted that the connection between the disability and the "something" is not as close as in some cases. That affects the proportionality assessment for the following reasons.

93. First, it does not follow from the fact that the conduct had something to do with the Claimant's ADHD that he bears no responsibility for his actions. Indeed the Claimant he does not seek to argue that it does. The *extent* of his culpability is a very difficult matter to assess, but it is reasonable to conclude that he bears some responsibility. The Claimant is aware that impulsivity is a feature of his ADHD. Having decided to self-manage the condition, it is up to him to find ways to ensure that his impulsivity does not result in unacceptable behaviour that impacts on his colleagues. Of course he was provoked by what had happened to his lunch, and if this was part of the culture of pranks, it went too far. It should never have happened. But adult, professional behaviour involves being able to manage conflict at work, including unacceptable or unfair treatment, without resorting to violence or threats to others or their property.

94. Mr Williams put to several of the Respondent's witnesses that it was wrong for the Respondent to focus on whether the Claimant knew right from wrong, or whether he knew it was unacceptable to threaten colleagues. While I agree that the key point being made by the Claimant was to do with impulsivity, rather than knowing right from wrong, it is overly simplistic to say that they are entirely separate matters. The Claimant may have acted impulsively, but the fact that he knows that threatening colleagues is unacceptable is relevant to his culpability.

95. I conclude it was legitimate for the Respondent to take the view that the Claimant's ADHD did not excuse his conduct given that he sent a series of messages over a period of time, and to more than one person. Although I have accepted the ADHD was a factor in his conduct, the number of messages and the fact that it must have taken place over at least 10-15 minutes weakens the argument that it was a "heat of the moment" reaction. Clearly it would have been less serious if it had been a single message sent in the heat of the moment.

96. Mr Sutton was not aware of the Claimant's final written warning in 2021, but looking at the matter objectively, it is significant that the Claimant was effectively given a second chance following conduct that would normally have led to dismissal. He was on notice that reacting impulsively, taking out his anger on colleagues, was likely to lead to dismissal.

97. The most important factor, however, is that the Respondent had a duty to protect its staff. It is possible that the Respondent ought not to have allowed the pranks and banter to persist given that it was likely, if not bound, to get out of hand. I have not heard enough evidence about what had been going on to make any finding about that. Even if that was the case, once the Respondent became aware of serious threatening messages sent to another member of staff, it had a duty to take appropriate action. That is so even though the Claimant had apologised to TA, and even though the conduct arose from the Claimant's ADHD. The Respondent was entitled to take the view that there was a risk of a similar reaction by the Claimant to something happening the future. It was also entitled to consider that dismissal was necessary to demonstrate how seriously it regards this type of conduct. Dismissal was in line with the disciplinary policy and the Claimant's contract.

98. For all those reasons, I find that a final written warning would not have achieved the aim of protecting other staff in the circumstances, and it was therefore proportionate to dismiss the Claimant. The s.15 complaint therefore fails and is dismissed.

<u>Unfair dismissal</u>

99. It is not disputed that the Respondent, i.e. Mr Sutton, held a genuine belief on reasonable grounds that the Claimant committed the misconduct. The Claimant admitted the conduct.

100. The Claimant takes issue with the adequacy of the investigation, and the reasonableness of the sanction.

101. I have already rejected the argument that failure to investigate the lunchbox incident rendered the investigation into the Claimant's conduct unfair. There was no need to establish who was responsible for tampering with the Claimant's lunch in order to assess the seriousness of his own misconduct. The Claimant did not know who was responsible and he lashed out at TA. Whether TA turned out to be the culprit does not affect the seriousness of the Claimant's behaviour. For similar reasons, the failure to provide the note of the interview with TA to Mr Sutton or the Claimant did not affect the fairness of the process or the decision to dismiss. How TA took the messages was much less important than what the Claimant intended by them.

102. Further, the failure to provide Mr Sealey's video to Mr Sutton or to the Claimant did not affect the fairness or the outcome. Mr Sutton proceeded on the basis that someone had tampered with the Claimant's lunch. Whether or not the fact that Ms Sealey videoed the incident could have been relevant to discovering the culprit is neither here nor there, given that the identity of the culprit was not relevant. Mr Sutton also did not doubt the Claimant's account that he sent the messages immediately after discovering his lunch. His decision was based on the fact that there had been multiple messages over a period of time, which the video could not help with.

103. There was no need to interview any other witnesses, given that the Claimant had admitted to sending the messages. It is true to say that it might have been possible to establish with more certainty <u>when</u> the messages were sent, but Mr Sutton's decision did not depend on the exact timing of the messages.

104. The Claimant argues that the OH referral process was flawed and unfair. I do not accept that. It would have been better if the OH referral had specifically asked for comment on the Claimant's argument that his conduct was an impulsive response which arose from his ADHD. As already explained, however, there is no clear line between the "impulsivity" issue and the "knowing right from wrong" issue. Further, the Claimant could have (and may have) explained the full circumstances during the telephone appointment. The OH practitioner did, in any event, address the impulsivity issue in the report. Mr Sutton acknowledged the ADHD as a possible mitigating factor and considered what was said in the OH report.

105. There was no obligation to provide the Claimant with a copy of the OH referral, as opposed to the report, and the failure to provide it to the Claimant until after his dismissal did not affect the fairness of the process.

106. The Claimant has not pursued the argument that the Respondent failed to obtain his approval regarding the OH report before using it at the disciplinary hearing. The "consent" section of the report makes it clear that the Claimant was aware the report would be provided to the Respondent and he did not object at the time.

107. In terms of the reasonableness of the sanction, I have already concluded that dismissal was, objectively, a proportionate means of achieving a legitimate aim. The same considerations apply to considering whether dismissal fell within the range of reasonable responses. The Respondent was entitled to take the

view that notwithstanding the Claimant's ADHD this was unacceptable behaviour and dismissal was necessary to protect its employees.

108. There is one further matter that could be relevant to reasonableness under s.98(4) ERA. The part of the dismissal letter that refers to the Claimant's "persistence in pursuing the issue…into the following day" is difficult to understand. It is possible that the letter was drafted in consultation with HR and this was intended to reflect the concern that had been raised at the time of the Claimant's suspension that he had challenged the early shift when he arrived for work the following day. But that was not something that Mr Sutton was aware of or considered. His evidence was that he wrote the letter. He said it may have reflected an incorrect belief that the messages had continued into the following day. He said, however, that whether the messages were over one or two days, his decision would have been the same. I accept that evidence. It is clear from the notes of the disciplinary hearing that his concern at the time was the number of messages, sent to more than one person. This led him to reject the argument that it was an instant reaction excused by the Claimant's ADHD. That was a reasonable conclusion in the circumstances. No unfairness arises, therefore, from any misunderstanding about the timing of the messages.

109. As for consistency of treatment, I have nowhere near enough evidence about the case involving AM to conclude that there was inconsistency to the extent that it could affect the fairness of the Claimant's dismissal.

110. The complaint of unfair dismissal fails and is dismissed.

Harassment and direct disability discrimination

111. The Claimant has not proved facts from which I could conclude that any of the conduct complained of was because of his disability, or that it was unwanted conduct related to his disability.

112. The allegation that the video was "circulated" was not pursued.

113. It was put to Mr Sealey that he tampered with the Claimant's lunch, or he knew someone else had done, in order to get a rise out of the Claimant, and therefore the tampering and/or the taking of the video was related to his disability. There is simply no evidence on which I could make such a finding. As already explained, the fact that Mr Sealey videoed the Claimant on its own is not sufficient. The Claimant does not know who tampered with his lunch and has not proved facts from which I could conclude that it had anything to do with his ADHD. I have already noted that the Claimant accepted participating in the culture of pranks. In that context there is no basis to find this was anything other than a poorly judged prank.

114. The criticisms of the investigation have been rejected. There was no less favourable treatment or harassment arising from the investigation itself. As for the dismissal, there is no basis on which I could find that the Claimant was treated less favourably because of his ADHD. The ADHD was treated as a possible mitigating factor. It must follow that someone without ADHD who had behaved in the same way would certainly also have been dismissed.

Failure to make reasonable adjustments

115. The PCP refers to a “zero tolerance” policy to any form of perceived abuse. What the Claimant in reality argues is that the Respondent had a policy of dismissing any employee following perceived abuse, whatever the circumstances.

116. The Claimant has not established that such a policy existed. Mr Sutton explained what he meant by zero tolerance was that the Respondent would never tolerate threatening behaviour. The sanction, however, was a matter for the relevant manager. The fact that the Claimant was given a final written warning in 2021 following physically violent behaviour undermines the argument that there was a blanket policy of dismissal. Mr Sutton also clearly gave thought to what the appropriate sanction was in the Claimant’s case.

117. The PCP is not made out and the complaint fails.

Wrongful dismissal

118. I am satisfied that the Claimant’s conduct amounted to gross misconduct under the Respondent’s disciplinary policy, and that the Respondent was entitled to dismiss the Claimant without notice. This complaint also therefore fails.

Approved by:

Employment Judge Ferguson

Date: 1 April 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON

4 April 2025

Jade Lobb
FOR THE TRIBUNAL OFFICE

Notes

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

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