

Neutral Citation Number: [2025] EAT 141

Case No: EA-2023-000172-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 September 2025

Before:

HIS HONOUR JUDGE JAMES TAYLER

Between:

MR P KIRBY

Appellant

- and -

ROYAL MAIL GROUP LIMITED

Respondent

Mr A Effiong Tribunal Advocate for the **Appellant**
Mr R Chaudhry Solicitor for the **Respondent**

Hearing date: 11 September 2025

JUDGMENT

SUMMARY

The Employment Tribunal did not err in law in rejecting complaints of discrimination because of something arising in consequence of disability and unfair dismissal.

HIS HONOUR JUDGE JAMES TAYLER

1. This is an appeal against a judgment of the Employment Tribunal after a hearing by CVP at Newcastle on 23 and 24 June 2022 and 31 October to 2 November 2023, before Employment Judge Johnson, sitting with lay members. The claimant's complaints were dismissed in a judgment that was sent to the parties on 19 December 2022.
2. I take the facts from the findings of the Employment Tribunal.
3. The claimant was employed by the respondent as a postman from 7 June 2004. He had a delivery route in Billingham, Teesside. He reported for work at the Stockton Delivery Office. At the time of his complaint he worked 30 hours per week.
4. From about May 2012, the claimant suffered from stress, anxiety and depression to such an extent that it constituted a mental health impairment, which was accepted by the respondent to meet the definition of "disability" in section 6 of the **Equality Act 2010**.
5. The Employment Tribunal made findings about three incidents that occurred in October 2019. The first was on the morning of Saturday, 5 October 2019:

On the morning of Saturday 5 October 2019, the claimant reported to the Stockton delivery office, where he was due to commence his delivery round at 8.30am. Instead of going into the office to collect his bag for delivery, the claimant stood at the gate outside the office and refused to commence his delivery round. His manager Anne Williams was reluctant to confront the claimant because she was anxious about how he may react. She therefore reported the matter to the resource manager in the office, Mr Ben Todd. Mr Todd described Miss Williams as "visibly upset and crying when she came to see me. She said that he had become abusive towards her and that he was refusing to go out on delivery and was standing on the gate." Mr Todd went outside to speak to the claimant and told him that Anne Williams had complained that he had sworn at her and that he was refusing to go on his delivery round. Mr Todd asked the claimant to come into the office to discuss the issues. The claimant refused to do so. The claimant told Mr Todd that he had been to visit a colleague Mr Robbie Ayre, who was then in hospital suffering from alcoholism. The claimant expressed concern about the way Royal Mail had treated Mr Ayre. The claimant then went on to complain that he was being treated in the same way and that he and his partner were not receiving any help or support from the respondent. The claimant refused to go into the office, refused to undertake his duties and insisted that the operations manager Mr Jamie Walton should come out to see him. Mr Todd explained that it was Mr Walton's day off and therefore he was not available to speak to the claimant. The claimant then asked for his trade

union area representative Mr Paul Leigh to come to speak to him. Mr Todd explained that Mr Leigh wasn't available either as it was also his day off. The claimant then said that both of those gentlemen should have been in work if he (the claimant) was at work. Mr Todd suggested that the claimant wait until the Monday morning to speak to either of those two, but the claimant refused to do that. Mr Todd sensed that the claimant was becoming agitated and aggressive, so he told the claimant that he was going back to the office to speak to another trade union representative, Mr Steve Spencer. As Mr Todd walked away from the claimant, the claimant shouted that the way he felt he felt like killing himself. Mr Todd's response was to say that if the claimant continued to make such threats then he would have to call the police.

Mr Todd contacted Mr Paul Leigh, who in turn spoke to the claimant and told him to calm down and to undertake his delivery and that any issues could be addressed on the Monday morning. The claimant continued to refuse to undertake his duties and in the opinion of Mr Todd, was becoming more aggressive in his refusal to undertake his work. Mr Todd then instructed the claimant to go home to cool off, but the claimant refused to do so and continued to stand at the gate. Eventually the claimant left the premises and returned home.

4. The claimant thereafter posted comments on Facebook:

The claimant's evidence to the Tribunal was that thereafter he went to the local off licence and bought a small bottle of whisky, which he then drank. The claimant then posted two comments on Facebook about his colleagues' treatment of Mr Ayre, in the following terms: -

"How about let's not say a prayer and go and fucking see him. All Royal Mail staff in Stockton hang your heads in shame you c[****]."

"I'll tell them all tomorrow when I go in, I don't care, fucking sick to my back teeth of after thoughts and oh I don't know what to say, put it this way if Rob was not in hospital and it was one of us in there, I'd put my mortgage on him going to see any of us. Really fucking upsets me it does."

Those posts were seen by a number of the claimant's colleagues at the Stockton delivery office. Anne Williams in particular stated in her evidence, "These made me feel sick as it was completely unacceptable to say such things."

5. The claimant returned to work on 7 October 2019. The Employment Tribunal made findings about the events that then occurred at paragraph 15:

When the claimant reported for work on Monday 7 October, he was invited into the office to meet with Mr Ben Todd. The claimant was accompanied by his trade union representative Mr Steve Spencer. Mr Todd informed the claimant that he was being suspended due to the nature of the comments he had made on Facebook. The claimant's response was to start shaking his head and swearing under his breath. The evidence of both Mr Todd and Mr Spencer in this regard was entirely consistent. The claimant as he left the office, stood in the doorway and began to

point his finger at Mr Todd in an aggressive manner which Mr Spencer described as “not acceptable”. Mr Spencer described how the claimant stood in the doorway to prevent anyone from leaving to the extent that Mr Spencer felt trapped, unable to leave the room and vulnerable as the claimant could become violent at the slightest provocation. Mr Spencer and Mr Todd allowed the claimant to finish what he was saying before he left the office.

6. The claimant was suspended. An investigation was undertaken by Mr Todd, who concluded that there was a disciplinary case to answer; described as arising out of two matters: abusive behaviour towards “a” manager and a serious breach of the communications policy. It is clear from the investigation document that while it refers to “a” manager, both the events of Saturday 5 October and Monday 7 October 2019, which involved more than one manager, were considered.

7. The disciplinary hearing was held by Mr Carver. He obtained additional evidence. After an initial meeting was postponed, the full conduct meeting took place on 12 February 2020. Mr Carver decided to dismiss the claimant. Mr Carver wrote a dismissal letter and a document that set out his deliberations and conclusions.

8. Mr Carver considered various matters, including the conduct on 5 October 2019, the Facebook posts and the conduct on 7 October 2019, within the body of his findings:

On the night of Saturday 5th October Mr Kirby posted comments on Facebook. The first comment was on the back of someone else’s comment that had been uploaded. This comment read ‘how about let’s not say a prayer and go and fucking see him. All Royal Mail staff in Stockton hang your head is shame you cunts’ This post was uploaded through Mr Kirby’s wife’s account who also responded on Facebook saying that it was Paul who uploaded that. Mr Kirby responded to his wife’s post by posting another comment saying ‘I’ll tell them all tomorrow when I go in I don’t care, fucking sick to the back teeth of after thoughts and of I don’t know what to say, put it this way if Rob was not in hospital and it was one of us in there, I’d put my mortgage on him going to see one of us, really fucking upsets me it does.

As I questioned Mr Kirby about this I knew he had already confirmed it was him who uploaded these but given the nature of the comments which is completely against Royal Mail policies I wanted to give him the opportunity to explain why. From the interview notes reading them back I can’t see any mitigation that justifies his actions. Mr Kirby does state in his own words that the comments were disgraceful but no rationale or no context around his behaviours. The notes of interview clearly show that all MR Kirby wanted to tell me was about other people’s actions to try and defend what he did and what he said. When questioned Mr Kirby told me he wasn’t aware of Royal Mail’s social media policy although all staff were sent out in booklet format roles and responsibilities. Mr Kirby’s representative Mr Benadalow told me he may not have seen this. Roles and responsibilities and the

behaviours expected in a workplace is to ensure all staff are treated with dignity and respect which I firmly believe in. The very fact that Royal Mail posted these out to all home employees addresses demonstrated how serious this is taken. If Mr Kirby chooses not to read this that's up to him but to then claim he isn't aware of Royal Mail social media policy is just another example of his attitude and behaviour. I was keen to understand more detail around the 'I'll tell them all tomorrow comment.' MR Kirby explained to me that he wasn't going to tell anyone anything. It was because he wasn't happy about Rob Ayre. In my opinion I believe these comments were uploaded because Mr Kirby was angry. Mr Kirby tells me he was upset. The comments uploaded to Facebook don't read like someone is upset. When I questioned MR Kirby around using aggressive language on Facebook the only mitigation he put forward it was a cry for help and if he was thinking straight he wouldn't have uploaded it. Within a Facebook comment you have the opportunity to think. You think about what you are typing and read the message before you upload it. This didn't happen just once but twice. I do not accept I wasn't thinking straight. If you're not thinking straight then don't comment!

When Mr Kirby attended for work on Monday 7th October. Mr Kirby was brought into the office with his union rep by Mr Todd and when questioned about the Facebook comments he got aggressive. Mr Kirby stood in the doorway as he was leaving pointing his finger at Mr Todd, aggressively shouting abusive language. This was when Mr Todd sent Mr Kirby home for a further 24 hour cooling off period because of the Facebook comments. To this point we have had abandonment of service on the morning of Saturday 5th October, which Mr Kirby claims he felt too ill to work even though he attended for work, then later that day foul and abusive language towards a manager. Within the fact-finding meeting Mr Kirby states in his own words on Saturday 5th and Monday 7th October when Mr Todd mentioned MR Kirby's wife his temper flared and again admits to saying things that are bang out of order. The fact that this attitude is spread across two separate working days confirms to me that Mr Kirby has no control over his emotions or behaviours and based upon this is unmanageable.

9. He set out his conclusions at paragraph 4 of the dismissal letter:

1.1 I believe there is a consistent pattern with behavioural issues across Saturday 5th and Monday 7th October.

1.2 It is clear that Mr Kirby does suffer with mental health but the level of support offered by the business has been substantial.

1.3 Mr Kirby does suffer with mental health and instead of trying to control his condition he decides to drink excessive amount of alcohol.

1.4 The Facebook comments have never been denied by Mr Kirby and this action is a serious breach of Royal Mail policy.

1.5 On Monday 7th October the abusive and aggressive behaviour continued towards a Royal Mail manager.

1.6 OH advice has been received and acted upon so I do not accept that Royal Mail have failed to support Mr Kirby.

1.7 The charge of a serious breach to communications policy and abusive behaviour toward a manager is upheld.

I need to decide on the appropriate penalty.

In his favour Mr Kirby has 15 years' service within the business and has no conduct on his record. Due to this I have considered a lesser penalty of suspended dismissal. The behaviours of Royal mail staff is what underpins us as a business. The upload of derogatory comments to any social media site carries to gross misconduct penalty. Then taking into consideration the aggressive behaviour towards a manger on more than one occasion also carries the penalty of gross misconduct. Based on the evidence within the case and the time I have taken to consider all facts I firmly believe that I have come to the correct decision.

The appropriate penalty is summary dismissal.

10. The claimant appealed against the decision to dismiss him. The appeal was conducted by Ms Worfell on 22 April 2020. She interviewed Mr Todd, Mr Walton, Mr Carver, Mr Spencer and Ms Williams. She also referred the claimant to Occupational Health again, to understand whether his actions may have resulted from his mental health condition. She did not specifically refer to the fact that in the first incident, on 5 October 2019, the claimant had said that he felt like killing himself. Occupational Health provided a report on 2 June 2020, providing an opinion that the claimant's medical condition did not explain his conduct. The appeal against dismissal was rejected.

11. The claimant brought a number of complaints in the Employment Tribunal. So far as is relevant to this appeal, they included complaints of unfair dismissal and discrimination because of something arising in consequence of disability.

12. The appeal was initially considered at the sift stage by HHJ Beard, who was of the opinion that there were no reasonable grounds for bringing the appeal. The matter then went forward to a Rule 3(10) hearing before HHJ Auerbach, at which limited grounds of appeal were permitted to proceed. In Judge Auerbach's order, he provided at paragraph 6 that if any party wished to rely on what was said in oral evidence by a witness at the Employment Tribunal hearing they were required to seek to agree a note of the evidence, failing which an application should be made for the

Employment Judge's notes of evidence. Judge Auerbach also referred to the possibility of obtaining notes of evidence in his reasons:

Grounds Permitted to Proceed:

The claimant's case is that the tribunal should have found that (a) Mr Carver only relied upon the Facebook entries and the Monday incident, in deciding to dismiss, not the Saturday incident; (b) Ms Worfell reintroduced the Saturday incident, and deliberately omitted, when commissioning the PH report, the fact that during the Saturday incident the claimant had mentioned killing himself; and that these together should have led the tribunal to uphold the unfair dismissal and section 15 claims.

These challenges face a number of obstacles, in particular the tribunal's findings at [22] that Mr Carver considered the Saturday incident and the reasons for the claimant's behaviour that day, and its findings at [43] that, as well as the conduct not arising in consequence of disability, suspension and dismissal were in any event justified. There is also a perversity element to these challenges, which faces a high bar. There is also the point, made by the sift judge, that the claimant was interviewed by the author of the final OH report, so had the opportunity to give them his account of the Saturday incident.

That said, I did not have all of the relevant documents before me and considered whether to direct a PH at which further information (including notes of evidence) could be considered. However, I decided it better to let these grounds proceed to a full appeal hearing. If it can be shown that the tribunal erred factually as alleged above, then it is arguable that it erred in not concluding that the Saturday incident was unfairly relied upon; that the OH report on causation could not safely be relied upon; and hence that the conclusion on justification would also need to be reopened.

13. The grounds of appeal that were permitted to proceed relate to the Employment Tribunal's rejection of the contention that the claimant's actions were something arising in consequence of disability and challenge the unfair dismissal decision on the basis that the Employment Tribunal should have concluded that the claimant's actions resulted from his disability and/or that it was unfair that Mr Carver based his decision on the Facebook posts and the conduct on 7 October 2019, with the conduct of 5 October 2019 only being brought into consideration during the appeal.

14. Section 15 of the Equality Act provides:

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.

15. The correct approach to a complaint of discrimination because of something arising in consequence of disability was considered by the Employment Appeal Tribunal, Mrs Justice Simler (as she then was) in **Pnaiser v NHS England** [2016] IRLR 170 at paragraph 31:

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is “something arising in consequence of B’s disability”. That expression ‘arising in consequence of’ could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

16. When determining a complaint of unfair dismissal, the Employment Tribunal considers both the dismissal and appeal to determine whether overall the process was fair: **Taylor v OCS Group** [2016] ICR 1602.

17. An appeal to the EAT lies only on a question of law: section 21 **Employment Tribunals Act 1996**. In **British Telecommunications Plc v Sheridan** [1990] IRLR 27, the Master of the Rolls held:

Any court with the experience of the members of the Employment Appeal Tribunal, and in particular that of the industrial members, will in the nature of things from time to time find themselves disagreeing with or having grave doubts about the decisions of Industrial Tribunals. When that happens, they should proceed with great care. To start with, they do not have the benefit of seeing and hearing the witnesses, but, quite apart from that, Parliament has given the Employment Appeal Tribunal only a limited role. Its jurisdiction is limited to a consideration of questions of law.

On all questions of fact, the Industrial Tribunal is the final and only judge, and to that extent it is like an industrial jury. The Employment Appeal Tribunal can indeed interfere if it is satisfied that the Tribunal has misdirected itself as to the applicable law, or if there is no evidence to support a particular finding of fact, since the absence of evidence to support a finding of fact has always been regarded as a pure question of law. It can also interfere if the decision is perverse, in the sense explained by Lord Justice May in *Neale v Hereford & Worcester County Council* [1986] I.C.R. 471 at 483.

18. The limited role of the EAT in considering factual matters on appeal was emphasised by the Court of Appeal in **DPP Law Limited v Greenberg** [2021] IRLR 1016.

19. It was stated in **Pnaiser** that the question of whether something arises in consequence of disability is a question of fact to be assessed robustly in each case by the Employment Tribunal.

20. The claimant asserts that he had a “meltdown” or, as it was put in the claimant’s skeleton argument, he was not “compos mentis” when the events occurred on 5 and 7 October 2019. It is asserted that what he said, and the Tweets he posted, must necessarily have been something that arose in consequence of his disability. It is further asserted that because the referral to Occupational Health did not refer to the fact that the claimant said that he “felt like killing himself” on 5 October 2019, that meant that the report was fundamentally undermined and could not be relied upon as evidence to assist in determining the question of whether what the claimant did was something that arose in consequence of disability. The determination of whether the claimant’s actions were something arising in consequence of disability was a matter of fact for the Employment Tribunal. The claimant had the primary responsibility to provide evidence upon which the Employment Tribunal could reach a conclusion on that issues. The claimant did not provide medical evidence himself. The

Employment Tribunal was entitled to consider the only medical evidence, the report obtained from Occupational Health by the respondent.

21. I can see no error of law in the decision reached by the Tribunal on the basis of the evidence before it. While no reference was made in the referral to Occupational Health to the fact that the claimant had referred to “feeling like killing himself” on 5 October 2019, I do not consider that undermines the report that was produced. A referral for an Occupational Health report is not required to set out everything that has occurred. A referral sets out the scope of the inquiry that is to be undertaken by the Occupational Health specialist, but it is generally for the person attending the assessment to explain any detail of what has occurred that is missing from the referral and to describe their symptoms. The Occupational Health specialist should ask about matters that they consider are important to the assessment.

22. In addition to the Employment Tribunal concluding that the conduct of the claimant was not something arising in consequence of disability, the Employment Tribunal also concluded that the dismissal was a proportionate means of achieving a legitimate objective, a decision which has not been challenged in the appeal. Accordingly, the complaint would have failed in any event.

23. I reject the challenge to the dismissal of the Section 15 complaint.

24. Accordingly, there is no basis to challenge the unfair dismissal conclusion on the basis that the dismissal was because of something arising in consequence of disability.

25. The respondent, in its response, appears to concede that Mr Carver specifically relied only on the Facebook postings and the incident on 7 October 2019. Unfortunately, despite the fact that the order putting this matter through to a full hearing specifically referred to the possibility of obtaining notes of evidence, both in the order and in the reasons of Judge Auerbach, no application was made for notes of evidence so it is difficult for me to know precisely what was said at the hearing. It may well be that Mr Carver accepted that the key issues in his mind were the Facebook posts and the

claimant's actions on 7 October 2019; and that those matters were fundamental in his decision to dismiss. The respondent suggests that he may have accepted that if only the incident on 5 October 2019 had occurred he would not have dismissed. That, however, is different from saying that the incident on 5 October 2019 was not taken into account in the decision to dismiss. Indeed, it is clear from the rationale provided for the dismissal that the incident on 5 October 2019 was taken into account. Accordingly, I do not consider that there was an error of law in the Employment Tribunal concluding that Mr Carver had relied on all three matters.

26. Furthermore, all three matters were relied on at the appeal stage. Having regard to **Taylor v OSC**, the Employment Tribunal was entitled to look at the fairness of the process overall. Furthermore, even if one disregarded the first event, the two more serious events clearly provided an adequate basis for the respondent to dismiss. Accordingly, I dismiss the appeal in respect of the findings that the dismissal of the claimant was not unfair.