EMPLOYMENT TRIBUNALS

Claimant: **Mr Paul Scott**

Respondent: **Pinetree Health & Fitness Limited**

Heard at: **North Shields** **On:** **4,5,6 & 7 December 2018 & 29 January 2019 (Deliberations)**

Before: **(1) Employment Judge A.M.S. Green**
(2) Mrs C Hunter
(3) Mr D Cattell

Representation
Claimant: Mr R Owen (CAB)
Respondent: Mr J Anderson - Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's claims for discrimination arising from disability, failure to make reasonable adjustments and breach of contract (failure to pay notice pay) are dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a fitness trainer in their gym in Jesmond from 1 March 2016 until 1 February 2018. He also worked on a self-employed basis at the gym having signed a Licence to Occupy part of their premises [80-89]. The Respondent dismissed the Claimant on 1 February 2018 for reasons it says related to his gross misconduct. The Claimant disputes this and says that his dismissal was unfavourable treatment because of something arising in consequence of his disability and failure to make reasonable adjustments. He claims to suffer from anxiety and depression. The Respondent initially disputed that the Claimant was disabled as defined by Equality Act 2010, section 6 ("EqA 2010") but subsequently accepted that he was disabled because of a mental impairment. His disability is no longer in issue.

The Claims

2. The Claimant avers the following:

    a. At all material times he suffered from severe anxiety and had a history of self harm and suicidal tendencies. He had been treated since 2007 by doctors and therapists. His treatment is ongoing. The Respondent knew about his mental health problems.

    b. On 5 November 2017 he had a mental breakdown because of an emotionally abusive relationship with his girlfriend. He went to the Respondent's premises when he was drunk to get his diary. He told colleagues that he was going to kill himself. His friend called the police because he was worried about him. The Respondent supported the Claimant but three weeks later, it withdrew the support and said that his behaviour was unacceptable. He was suspended and subjected to disciplinary action which culminated in his summary dismissal.

    c. On 13 November 2017, the Respondent re-employed Danny Carter, another personal trainer. There were issues between the Claimant and Mr Carter because the Claimant believed that 18 months previously, Mr Carter had defrauded him of £175. The Respondent knew about the this but ignored it and did not mediate the dispute between the two men. There was an incident on 19 November 2017, when the Claimant spoke to Mr Carter politely about the money. Mr Carter escalated the matter and became aggressive and threatening towards the Claimant. Mr Carter told another employee that the Claimant should "top himself". Mr Carter knew about the Claimant's illness.

    d. On 20 November 2017, the Claimant met with James Ryan, Steve Trenholm and the club manager, Nicola Tune, to discuss the issues with Mr Carter. During the meeting, he claims he was pressurised to speak to Mr Carter. During a 10-minute break, he had a further encounter with Mr Carter and was accused of being aggressive towards him. Thereafter, the Respondent withdrew one-to-one support.

    e. The Claimant was suspended on 29 November 2017 and attended an investigatory meeting on 1 December 2017. He raised a grievance against the Respondent on 4 December 2017. His grievance was heard on 12 January 2018 and was dismissed. On 18 December 2018 he was invited to a disciplinary hearing which took place on 25 January 2018. He was dismissed without notice with effect from 1 February 2018. The reasons for his dismissal were set out in a letter dated 1 February 2018 [295-298].

f. The disciplinary investigation did not include a full medical history report, or an occupational health report suggested by his doctor. There was no mediation regarding the issue with Mr Carter. The Respondent failed to consider mitigating circumstances arising from his illness.

g. The Claimant unsuccessfully appealed the decision at a hearing on 26 February 2018.

h. In section 8.1 of the ET1, the Claimant ticked the box to indicate that he was owed notice pay. He has not said why he believes he is owed this money.

3. After a preliminary hearing, the Claimant set out further and better particulars of his claims. These are as follows:

Discrimination arising from disability (EqA 2010, section 15)

4. He believes that the Respondent treated him unfavourably by dismissing him arising in consequence of his disability as follows:

a. The "something arising" was the Claimant's use of alcohol as a coping mechanism and his tendency to talk excessively about his illness to others and his lack of appreciation of the impact of that.

b. The reason for the treatment was his alleged conduct during the discussion.

c. The Respondent's treatment was not proportionate.

Failure to make reasonable adjustments (EqA 2010, section 21)

5. The Respondent failed to make reasonable adjustments to the Claimant's work pattern so that he would not have to work with Mr Carter. This was ongoing from 19 November 2017 until the Claimant was dismissed. In particular:

a. The Provision, Criterion or Practice ("PCP") was the requirement to work a normal shift.

b. The disadvantage to the Claimant was the adverse effect on his mental health of working with Mr Carter because of the previous dispute between them of which the Respondent was aware.

c. Adjusting the Claimant's shifts was a reasonable adjustment which the Respondent could have made, and this would have removed or substantially reduced the disadvantage.

The Response

6. The Respondent contends that it dismissed the Claimant for his conduct relating to the incident on 5 November 2017 (coming to his workplace drunk) and the incidents with Mr Carter on 19 and 20 November 2017 and his

inappropriate behaviour with colleagues and customers. His dismissal had nothing to do with his mental illness. Furthermore, his condition could not be regarded as an impairment because he had a tendency to physical abuse.

7. The Respondent had a very small workforce of only six employees and in order to ensure that all its employees were properly looked after and safeguarded and because of the impact of the Claimant's behaviour on his colleagues, the Claimant's summary dismissal was proportionate and achieved the legitimate end of maintaining appropriate standards of conduct in the workplace. In making the decision to dismiss the Claimant the Respondent properly considered the Claimant's condition of anxiety and his employment as a fitness trainer and its own duties and responsibilities in the context of the size of its workforce and the impact of the Claimant's behavior on the workforce.

8. The Respondent denied that not obtaining an occupational health report amounted to unfavourable treatment. He was not dismissed because of ill-health. Not obtaining an occupational health report did not arise because of his disability. Had the Respondent delayed matters further to obtain a report, the Claimant would have criticised it for doing so. The Claimant wanted his grievance to be swiftly resolved.

9. His claim that one-to-one support was withdrawn was vague and it was unclear how this amounted to unfavourable treatment.

10. In relation to reasonable adjustments, the PCP did not place him at a substantial disadvantage because of his disability in comparison to a non-disabled person. It was not practicable to arrange for the Claimant and Mr Carter to work different shifts.

11. The Claimant was in repudiatiory breach of contract because he was guilty of gross misconduct. The Respondent was entitled to dismiss him without notice. He is not due notice pay as claimed.

The Issues

12. There was an agreed list of issues as follows:

Disability

13. In respect of any of the claims made, is the Claimant deemed not disabled by reason of Equality Act 2010 (Disability) Regulations 2010, regulation 4(1)(c) (the "2010 Regulations")?

Discrimination arising from disability (EqA 2010, section 15)

Dismissal

14. It is accepted that dismissal is capable of amounting to unfavourable treatment.

15. Did the Claimant's use of alcohol, excessive talking about his illness and his lack of appreciation of the impact on others arise in consequence of his disability?

16. Was the reason for the Claimant's dismissal his conduct being on work premises when under the influence of alcohol and behaving inappropriately towards work colleagues and gym members?

17. If so, was it a proportionate means of achieving a legitimate end to dismiss the Claimant? The legitimate end being:

    a. The maintenance of appropriate standards of conduct in the workplace and/or

    b. Safeguarding the workforce/gym membership of the Respondent and/or

    c. The impact of the Claimant's behaviour on the workforce/gym membership?

Occupational health

18. Did the Respondent refuse to obtain further medical evidence in respect of the Claimant's mental health condition and did Sally Black make the comments alleged? If the Respondent did refuse to obtain further medical evidence, did it treat him unfavourably in doing so?

19. Did the refusal arise in consequence of his disability and did the Respondent make an assumption that the Claimant's illness was not linked to his conduct?

20. If so, was it a proportionate means of achieving a legitimate end, namely:

    a. To ensure that the grievance hearing was not delayed any further, taking into account the medical information already obtained?

    b. To seek to ameliorate any possible disadvantage or reduce any distress that the Claimant advised may be caused by the internal processes?

One-to-one support

21. Did the Claimant have in place one-to-one support and did the Respondent remove the Claimant's one-to-one support on 19 November 2017 and if it did so, did it treat him unfavourably?

22. Was the Claimant's conduct related to his disability and was this the reason for his treatment?

23. If so, was the treatment a proportionate means of achieving a legitimate end, namely:

    a. Complying with the wish of the Claimant to be contacted by email only? and/or

b. The proper use of disciplinary processes? and/or

c. The maintenance of appropriate standards of conduct? and/or

d. Safeguarding the workforce of the Respondent?

Reasonable adjustments (EqA 2010, section 21)

24. In respect of a reasonable adjustment claim:

a. Between 19 November 2017 until the Claimant's dismissal, did the Respondent have in place a PCP that the Clamant was required to work a normal shift?

b. If so, did the PCP place the Claimant at a substantial disadvantage in comparison to persons not disabled in respect of the adverse effect on the Claimant's mental health of working with Danny Carter due to the previous dispute between them?

c. If so, would it have been a reasonable adjustment to adjust the Claimant's shifts to that he did not work at the same time as Danny Carter and if so, did the Respondent fail to make such an adjustment?

Documentation and hearing – witness cast list

25. The parties filed and served a paginated and indexed joint hearing bundle in advance of the hearing. Additional documentation, including case authorities and Mr Jamieson's outline written submissions, were tendered and accepted at the hearing.

26. At the beginning of the hearing, Mr Owen informed the Tribunal that the Claimant was very anxious. He told us that the Claimant had brought a friend for support. He was confident about giving evidence and the procedure, but he asked that the Claimant be permitted to take short extra breaks. Mr Jamieson agreed with this.

27. This was a liability hearing. We agreed that if the question of remedy arose, it would be dealt with at a separate hearing.

28. The following people adopted their witness statements and gave their evidence:

a. The Claimant

b. Rachel Marr – an apprentice hairdresser at Cre8 hair studio which is in the Respondent's premises.

c. Nicola Tune – The Respondent's Club Manager at their Jesmond premises – Ms Tune carried out the disciplinary investigation and chaired the Claimant's grievance hearing.

d. Sally Black – the director and owner of Sally Black and Associates (UK) Limited – Ms Black chaired the Claimant's disciplinary hearing.

e. Chloe Watts – an employee of the Respondent.

f. Lindsey Burnett – a fitness instructor at the Respondent's club.

g. Hamish Moore – Senior Partner of Drummond and Company HR Specialists Limited – Mr Moore chaired the Claimant's disciplinary appeal hearing.

29. The representatives made closing submissions.

Basis of decision

30. In reaching our decision, we have carefully considered the oral and documentary evidence, the written and oral submissions, the case authorities and our record of proceedings. The fact that we have not referred to every document in the evidence bundle in our decision should not be taken to mean that we have not considered it.

Findings of fact

31. By way of general observation, we had no concerns with the witnesses. They answered the questions that they were asked, and they were not evasive. We considered them reliable.

The Respondent - background

32. There was no dispute that the Respondent is a small, independent club with a gym in Jesmond. It has six employees and does not have any specialist HR resources. It has a hairdresser tenant in the same premises.

The Claimant's mental health

33. Although there is no dispute that the Claimant is disabled, we think it is important to make findings on his mental health as this is material to the question as to whether there is a causal link with his behaviour that culminated in his dismissal.

34. The Claimant frequently spoke about his mental health problems with colleagues and club members. For example, he told Ms Burnett that he had self-harmed on 29 occasions with "military precision" and had tried to show her his scars when she was on reception.

35. The Claimant provided supporting medical evidence which was supplemented into the bundle. There is a letter dated 8 October 2012 from Neil Sedgwick, a Primary Care Mental Health Worker with South Tyneside NHS Foundation Trust. Mr Sedgwick noted that the Claimant:

a. Uses alcohol and drugs to obliterate negative feelings.

b. Uses self harm.

c. Comments or actions from others can trigger his sense of worthlessness and critical rejection.

d. He can go on alcohol binges lasting between 24-48 hours.

e. He has used cocaine.

f. He has been able to tolerate feelings sufficiently and has not become drunk and used self harm.

g. He feels acutely distressed when he feels let down, criticised or misjudged.

The Respondent has not challenged this, and although the letter is six years old, it provides important insight into the Claimant's condition and behaviour arising from it, the length of time he has suffered his condition. We have given it weight.

36. Mr Sedgwick wrote another letter on 30 September 2013. He noted:

a. The Claimant's problems were less severe.

b. Self harm is the main risk factor.

c. At time of writing, he was not currently suffering significant symptoms of anxiety or depression.

d. His conscious self-awareness continued to develop and his decision making and his ability to deal with negative situations and said that he was feeling good at the moment.

e. Alcohol is a significant risk factor.

The Respondent did not challenge this evidence and although the letter is five years old, it has some evidential value and shows that the Claimant can improve and control his condition. He had a new understanding and coping strategy in place.

37. Dr Bloxham, the Claimant's GP wrote a "to whom it may concern" letter on 1 December 2014. She confirms that the Claimant had been cared for by the surgery for his mental health since 2007 and continued to attend for mental health issues and other health problems. Dr Bloxham wrote another letter dated 26 January 2018. She confirmed that the Claimant has been receiving mental health treatment for over 10 years. He is treated with medication, psychology and talking therapies. He complies with medical advice, attends appointments and takes his medication. His problem is predominately with anxiety with occasional symptoms of depression and was under regular review at the surgery. Although he had been progressing well, the recent stress at work had been been a setback exacerbating his anxiety. We give this letter weight because it was written at the the time when he was subject to the disciplinary action which lead to his dismissal. We also note that the Claimant was attending Gateshead Talking Therapy

in a letter dated 23 February 2018 for ongoing treatment including CBT and Cognitive Analytical Therapy.

38. In summary, the medical evidence shows that the Clamant suffers from ongoing anxiety and occasional depression. He has suffered from this for at least 10 years. The principal risk factors are self harm and alcohol (binge drinking) and self medicating (drugs – e.g. cocaine). The medical evidence could also suggest that the Claimant's illness triggered his speaking inappropriately or excessively about his condition to colleagues and members. However, it does not suggest that his condition would lead him to physical abuse and threatening behaviour to others. On the contrary, the main risk posed by his illness is the harm that he causes or could cause to himself. He is prone to self harm and periods of introspection and self-loathing combined with feelings of worthlessness. He has engaged in episodes in self harm and has injuries to show that.

Antecedent issues between the Claimant and Mr Carter

39. The Claimant and Mr Carter were colleagues. They were both personal trainers and had worked together at the club. Mr Carter had left to pursue other opportunities. There was an issue between them concerning a dispute over £175. The Claimant believed Mr Carter had defrauded him of this money. According to Ms Burnett's evidence, this was well known within the club because the Claimant made it his business to tell everyone about it. The Respondent decided to re-employ Mr Carter. When the Claimant found out about this, he was very unhappy and raised his concerns at a meeting with Ms Tune and Ben Young in October 2017. He did not want to work with Mr Carter. Ms Tune said that she could not guarantee not re-employing Mr Carter. Mr Carter was re-engaged and started working at the club on 13 November 2017.

The incident on 5 November 2017 and its aftermath

40. On 4-5 November 2017, the Claimant got very drunk. He went to the Respondent's premises on 5 November 2017. He was not scheduled to work that day and he accepts that he should not have done that. He came into work to check his diary which was in his locker. He wanted to know which customers were coming in the following day. He went to the reception area. Under cross examination, it was clear that he said that at the time he was having a mental breakdown and felt suicidal. His relationship with his girlfriend had broken down in May 2017 and he was struggling to cope with that. He had been in an emotionally abusive relationship with her which made his anxiety worse. Colleagues had seen this over the year and were concerned about him. F0r example, He regularly spoke to Ms Burnett about it and how it made him feel. As a measure of his mental health, he told Ms Watts that he had been "sectioned" before coming to the Club's premises and had been standing on the Armstrong Bridge in Newcastle. From this, Ms Watts inferred that he was contemplating suicide and she was scared about what he might do to himself. His behaviour was very erratic when he came into the Club. However, he did not threaten Ms Watts.

41. Ms Tune, the club's manager, was on holiday and heard about the incident on 5 November 2017 when her colleague, Ann Grenfell, telephoned her at about 5pm on the same day and told her that the Claimant was drunk and

had staggered into work and had threatened suicide and self harm and that he was to be hospitalised (i.e. "sectioned"). Ms Tune was very worried about this and called him immediately, but the Claimant did not answer. She decided that if the Claimant did not call her, she would go to his house. Another colleague, Steve Trenholm, called Ms Tune to tell her that he had texted the Claimant and he was okay, was safe and was with a friend.

42. On 6 November 2017, the Claimant told Ms Tune that he had been on a drinking session from the previous Saturday, that he had self-harmed and was not in a good place. She suggested that they should meet on 7 November 2017 to discuss this further.

43. On 7 November 2017, the Claimant met Ms Tune and a colleague, James Ryan, at a nearby coffee shop. Notes of the meeting were taken [133-134]. The Claimant was candid about what had happened on 5 November 2017. Ms Tune wanted the meeting to show support for the Claimant. She noticed that the Claimant was feeling very low which she attributed to the accumulation of the previous couple of months and splitting up with his girlfriend. He was not embarrassed but was apprehensive about returning to work. She accompanied the Claimant back to the club so that he could feel comfortable with his colleagues. When he sat down in the reception area, he was much calmer and less apprehensive.

44. Thus far, the matter was dealt with informally and Ms Tune had no thoughts of suspending the Claimant after the indecent on 5 November 2017 because she knew that his parents (on whom he relied for support) were away and she knew that he was struggling with the split from his girlfriend. She wanted to be supportive, so she did not mention disciplinary action at that stage because he was not in a fit state to discuss that. She feared that if she did, this could push him over the edge, and she was worried that he would self-harm.

45. The Claimant continued to work the rest of the week and completed his shifts. He apologised to the staff and bought them flowers and tokens. Ms Watts accepted his apology.

46. Ms Tune returned to work on 13 November 2017 and spoke to the Claimant daily about what had happened on 5 November 2017. He told her that he felt very low but because colleagues had supported him this made him feel better.

The incident between the Claimant and Mr Carter on 19 November 2017

47. On 19 November 2017, there was an incident between the Claimant and Mr Carter. According to Ms Burnett's statement, the Claimant started it. She was starting her shift at about 8.50 am. Ms Grenfell was also present. He told her that he was going to speak to Mr Carter about the money. Under cross examination she said that he smirked at her. She heard raised voices in the staff room. This went on for a couple of minutes. It was so loud that Ms Burnett and Ms Grenfell felt that they had to raise their voices to drown them out. Ms Burnett described Ms Grenfell as quite a loud and motherly woman and she tried to settle the two men down after they came out of the staff room. Mr Carter watched a Body Pump video on his phone whilst the Claimant got a coffee and stared at Mr Carter in a strange way for a few

minutes. To onlookers it was intimidating, and the Claimant said to Ms Burnett that he would smash Mr Carter's face in [140]. He said this in a calm manner which Ms Burnett found scarier than if he said it irrationally. She remembered that both men were making comments to each other. She remembered telling the Claimant it was not worth losing his job over. However, she regarded his behaviour to be out of character, but she knew there was a longstanding issue between the Clamant and Mr Carter. The incident made her feel extremely uncomfortable because it was very aggressive, and she was concerned that she might have to break up a fight between the Claimant and Mr Carter.

48. Ms Tune found out about the 19 November 2017 incident the following day as soon as she arrived at work. She had not been working on 19 November 2017. James Ryan told her what had happened and she decided to have an informal and supportive chat with the Claimant. The meeting took place at 12 noon. Mr Ryan also attended. The Claimant was very agitated and said that he could no longer work with Mr Carter. As a short-term solution, Ms Tune agreed to change his shift pattern the following day as both men were due to work with each their the following day. She understood why the Claimant did not want to work with Mr Carter. However, she wanted both men to sort out their differences with her and she suggested they could do this at another meeting.

49. As Mr Ryan had to teach a class on 20 November 2017, Ms Tune decided to wait until 22 November 2017 to broach the topic again with the Claimant.

50. After the meeting, Ms Tune spoke to all the employees regarding what had happened on 5 and 19 November 2017. She also asked Steve Trenholm to accompany the Claimant at the meeting on 22 November 2017 because he is a long-term colleague of the Claimant and she believed he could play a supportive role.

Ms Tune's investigations after 5 November 2017

51. It seemed to Ms Tune that when the Claimant came to the club's premises drunk on 5 November 2017, he had created a bad impression on both the staff and members. She noted that Ms Watts had felt very uncomfortable by his behaviour. His behaviour had raised health and safety issues. She was also concerned for the Claimant's welfare.

52. Ms Tune accepted that although the Claimant had apologised, the staff felt differently about him because of his behaviour. They did not want to voice their concerns and upset him. Ms Watts was very uncomfortable with the situation having to handle a drunk 41-year-old man.

The incident on 22 November 2017 and its aftermath

53. Ms Tune arranged another meeting with the Claimant. Mr Ryan and Mr Trenholm also attended. She wanted it to be an informal chat, but she decided to record it so that she and Mr Ryan could focus their attention on the Claimant without having to take notes. She suggested to the Claimant that he and Mr Carter should meet in a room and sort out their differences. The Claimant did not want to do that and was annoyed because of this suggestion. He could not work the same shifts as Mr Carter.

54. During a break in the meeting, the Claimant left the room and went downstairs. He and Mr Carter had another altercation in the reception area of the club. There was a phone call from reception. Mr Ryan took the call and went downstairs and called up to Ms Tune telling her to come down as a matter of urgency. Ms Watts, Ms Marr and Mr Carter gave their versions of what had happened. They all thought that the Claimant might be violent to Mr Carter. The girls were crying. Mr Carter was in shock and was quite upset. There was conflicting evidence as to whether the Claimant had been seen with clenched fists as part of the altercation.

55. Ms Tune wanted to calm the Claimant down. Ms Tune told him that the staff were frightened of him, but she did not want him to leave on his own because she thought that he was very vulnerable and would go home and commit suicide. She asked Mr Trenholm to accompany the Claimant home to make sure that he was okay.

56. Later that day, Ms Tune called the Claimant to check if he was okay. He called her back. He said that he was dealing with the situation as best as he could. He seemed anxious but calm.

57. Ms Tune was shocked by the Claimant's potential violence and threatening behaviour. This was a novel experience for her despite having been the club's manager for 25 years. She did not know what to do.

58. On 23 November 2017, Ms Tune contacted the Claimant's GP and explained her serious concerns about the Claimant's mental health [164]. She met the Claimant on 24 November 2017 at a local coffee shop. Her niece, Lianne Truscott, attended the meeting with the Claimant's permission. Ms Truscott is a Human Resources Officer in the NHS and had previously worked at the Club and was familiar with the support that could be provided to the Claimant. The meeting lasted 20 minutes. Ms Tune asked how the Claimant was.

59. Ms Tune contacted the Claimant on 27 November 2017 to organise a meeting with him on 29 November 2017. The Claimant was suspended with pay at the meeting on 29 November 2017. Notes were taken [178-179]. It was at this meeting that the Claimant was first told that he would be investigated. Ms Tune offered to train the Claimant's clients whilst he was suspended. Alternatively, other employees could train them. This was offered to support the Claimant. Ms Tune offered the Claimant the opportunity to borrow equipment from the club so that he could personally train his private clients at their homes.

60. On 30 November 2017, the Claimant emailed Ms Tune requesting that all further correspondence was to be by email and not through 'phone calls [183]. Ms Tune acknowledged the email and conceded to his request [183].

The formal investigation into the Claimant's behaviour

61. The Claimant attended an investigatory meeting with Ms Tune, Mr Ryan and Mr Trenholm on 1 December 2017. The meeting was minuted [185-187]. The Claimant produced an annotated version of the minutes to correct them [188-198]. He admitted that he had come to work drunk on 5

November 2017. He felt annoyed about the first half of the meeting on 22 November 2017. He said that he did not want to hurt or upset people and he regretted his behaviour. He talked about his mental health, self-harming and issues with Mr Carter to club members. He had texted Ben Young on 5 November 2017 saying that he was sectioned and was "fucked up" and not to tell management. He texted Mr Ryan to say that his voice had stopped him from knocking Mr Carter out. He had also implied that he was standing on the Armstrong Bridge contemplating suicide. The Claimant's recollection on the incident with Mr Carter on 19 November 2017 differed from other employees but he agreed that he had come into conflict with him. Having heard this, Ms Tune concluded that employees should not come into work and deal with this type of behaviour. His behaviour was inappropriate.

62. Ms Tune investigated the 22 November 2017 incident by interviewing affected employees and during these discussions she also discovered that the Claimant had behaved inappropriately and had gone into detail about his self-harming, even when asked not to by his colleagues because it was too upsetting for them. He had sent text messages to colleagues about being sectioned and committing suicide and that he might harm Mr Carter. He had also behaved inappropriately towards club members Trevor Massey and Ken Robson [149-177] about his conflict with Mr Carter and spoke openly to Tom Shanks about self-harming [135] in the Club's reception area. The Respondent had a hairdresser tenant at the club and they had also mentioned to Ms Tune that it was not a safe environment for their own employees because of the Claimant's behaviour [156-159].

63. Having concluded her investigation, Ms Tune was very concerned about the welfare of the club's employees. The situation had become stressful and difficult to manage. She was also very worried about the Claimant and felt responsible for his own safety and well-being.

Implementing the Disciplinary and Grievance Procedure

64. The Claimant raised formal grievances on 4 December 2017 [199] and 15 December 2017. Essentially, he was complaining about having to work alongside Mr Carter and the impact that his suspension was having on him. There was disagreement over the venue for the grievance hearing, but it was eventually agreed that it would be heard at the club on 15 December 2017. Prior to that, Ms Tune, and with the Claimant's permission, wrote to the Claimant's GP, Dr Bloxham, attaching a medical questionnaire [213-216]. She wanted to ascertain if the Claimant was fit to attend the grievance hearing as the Claimant believed that he would be at a disadvantage because of his mental health.

65. The GP completed the questionnaire and returned it to Ms Tune [217]. She concluded the following:

    a. The Claimant was fit for work; he had not been certified as unfit.

    b. He was well enough to attend the grievance hearing.

    c. He was not covered by the Disability Discrimination Act and there were no reasonable adjustments that needed to be made regarding the grievance hearing.

d. He noted that GPs are not qualified occupational health doctors and if an employer had any doubt about an employee's fitness to work, she suggested that they arrange an occupational health medical with a suitably qualified physician.

66. Having reviewed the GP's comments, Ms Tune concluded that the Claimant could do his job, teach classes and could do personal training. She did not think that she needed to instruct an occupational health report. She recognised that the Claimant had found the break up with his girlfriend very stressful and he was very annoyed with Mr Carter and his anxiety and mental health had not been helping him at the time.

67. The grievance hearing eventually took place on 12 January 2018. Notes were taken [225-228]. Ms Tune did not uphold his grievance and notified him by letter dated 2 February 2018 [299]. She concluded that the business had the right to hire whom it deemed to be the right candidate for the position and the Claimant could not decide who the Respondent could or could not employ. We also note than when questioned by the Tribunal, the Claimant accepted, on reflection, that it would not have been feasible for the shift roster to be changed so that both men would not work together.

68. Mr Carter was separately disciplined after a hearing on 23 January 2018. He was given a final written warning [267].

69. The Claimant's disciplinary hearing was on 25 January 2018. The Claimant and his union representative attended. The hearing was chaired by Ms Black. Ms Tune and Mr Ryan attended.

70. Ms Black was brought in to chair the disciplinary hearing. She is an independent consultant who had no prior involvement with the parties. She was aware of the Claimant's grievances and the fact that Ms Tune had contacted the Claimant's GP to determine his fitness the attend the grievance hearing. Ms Black did not think there had not been undue delay in the disciplinary process given the need to obtain a medical report from his GP.

71. We also noted in her oral evidence that when Ms Black worked for the NHS, she had formal training in mental health in the workplace as part of her cycle of statutory training. The last training, she received in this cycle was three years ago. She had attended training provided by Mind when she worked for a substance abuse charity in Bradford. It was generic and dealt with how mental health can impact on a person's job and how to assess discussions relating to return to work. She had used Mind's Wellness Action Plan. The training was primarily about work related stress and only touched on mental health in very general terms.

72. The disciplinary hearing was minuted [281-287]. Ms Black heard representations from the Claimant and concluded that the Claimant's conduct was linked to his drinking binge on 4 & 5 November 2017 and his his dislike of Mr Carter. She did not believe that it was the consequence of disability. His behaviour towards Mr Carter and how this impacted on his colleagues was attributable to personal conflict between himself and Mr Carter and was not a manifestation of any health difficulties. This behaviour

was contrary to club's code of conduct and the requirement of the club to maintain its public image and preserve a positive relationship with its members.

73. Under cross examination, it was clear from Ms Black that the Claimant was open about his mental health. He had spoken about his relationship breakdown and that he was receiving counselling. His relationship breakdown had led him to binge drinking. He said that he had started going to Alcoholics Anonymous. He told her that he was angry with Mr Carter about the money and with Ms Tune for trying to resolve the dispute. However, she did not think that his mental health was the driver for his behaviour and relied on the GP's answers and comments on the questionnaire. She said that she had no reason to dispute it and saw no reason to instruct an occupational health report. However, she said under cross examination that she knew that the Claimant had been drunk, had suicidal thoughts and said that he had been sectioned. She knew this because it was explored at the disciplinary hearing but she did not think his mental health was a significant factor. She thought that his mental health had been affected by his relationship breakdown. However, this was a conduct matter and in this regard she thought it relevant that he continued to work and saw private clients. She did not change her opinion of the Claimant's behaviour despite reviewing several personal references in support of the Claimant.

74. Ms Black concluded that the Claimant was guilty of gross misconduct and should be dismissed. She set out her reasons in a letter to the Claimant dated 1 February 2018 [295-298]. She did not consider any sanctions other than dismissal because it was very clear to her that his relationship with the Respondent had broken down. Even though his colleagues had supported him, his behaviour was the last straw to break the camel's back. She saw no alternative to finding gross misconduct given that he had departed from the Respondent's Code of Conduct. She did not see any mitigating circumstances. Ms Black clearly regarded this to be a conduct and not a capability issue. The Claimant had not shown any insight into his behaviour and had caused psychological harm to others.

Appeal

75. The Claimant appealed the decision by letter dated 2 February 2018 [300]. The appeal was heard on 26 February 2018 by Mr Moore, an independent consultant. Prior to the hearing, Mr Moore had no relationship with the Claimant. He received an appeal pack from the Respondent to help him prepare [373]. He had seen the GP report and the grievance hearing notes.

76. He acknowledged that considering the Claimant's mental health was part of the appeal process. Having seen the GP's report, he concluded that the Claimant was fit to attend the appeal hearing. He also asked the Claimant and his union representative if he was fit to attend the appeal. He also knew about the Claimant's unresolved conflict with Mr Carter. The issues for the appeal were the Claimant's drunkenness, his affect on other people (colleagues and customers). The incidents with Mr Carter impacted on the Claimant's colleagues and customers. His conduct was in issue. He reviewed the references in support of the Claimant.

77. Mr Moore noted that the Respondent has provided the Claimant with support throughout the process until the Claimant had requested there should be no more phone contact. He noted that the Claimant only wanted to communicate with the Respondent by email. He also noted the Claimant's concern that the Respondent had not instructed an occupational health report. He did not think this was necessary because the issue was the Claimant's conduct and not the state of his health. He knew that the Claimant could perform his duties. His conduct related to his drunkenness and his altercation with Mr Carter which had made other staff fearful. He was also making inappropriate disclosures about his problems to customers. However, he also acknowledged that the Claimant's representative had referred to his mental health affecting his conduct. Mr Moore asked the Claimant what resolution he was looking for. He told Mr Moore he wanted Mr Carter to be dismissed or for him never to be in contact with him. He then contradicted himself by telling Mr Moore that he only wanted compensation and did not want his job back. He noted that the Respondent had unsuccessfully tried to get the Claimant to speak to Mr Carter to sort out their differences. The Claimant had rejected this overture. He also knew that Mr Carter was being re-employed and the Claimant had been concerned about that, but it was a private matter that the two men had to sort out. He did think that the Claimant had the right to dictate who the Respondent could or could not employ. The Claimant was adamant that he would not meet Mr Carter.

78. Under cross examination, Mr Moore also noted that if the Claimant had a serious mental breakdown, he would have expected this to have been documented and evidence provided to him from the Claimant's doctor. He questioned how the Claimant could have returned to work 72 hours after the 5 November incident if he had suffered a serious mental breakdown. It seemed strange to him that there was no doctor or hospital notes. He believed that the Claimant had broken up with his long-term girlfriend, had gone to a party and had got drunk. If he had a mental health problem, he would have avoided alcohol. Although the Claimant had mentioned being sectioned, had had suicidal thoughts and that talked of jumping off the Armstrong Bridge, Mr Moore did not see any evidence of the Claimant being sectioned or being admitted to hospital.

79. Mr Moore considered mitigating circumstances. If there had been a singular event, he might have looked at things differently. However, the subsequent incidents were sufficiently serious to find the Claimant guilty of gross misconduct. A written warning would not have been appropriate. He had to consider the cumulative effect of the Claimant's behaviour on the Respondent's business, its employees and its members. He considered that summary dismissal was proportionate. Even though the Claimant's record prior to this had been good, it could not mitigate the severity of his actions. He had asked the Claimant's representative what reasonable adjustments could have been made but she had not provided him with anything tangible to consider. If she had, he would have considered it.

80. Mr Moore also considered alternatives to dismissal such as whether the matter could be resolved through mediation or medical suspension to enable the Claimant to have time to recover before coming back to work. The Claimant did not have insight into his behaviour, and he could see that he could change. He gave the Claimant an opportunity to say what he

wanted. The Claimant did not propose anything. He asked him how his behaviour impacted on others to which he replied that it was only their perception. Mr Moore thought this showed lack of insight. Mr Moore upheld the decision to dismiss the Claimant.

Applicable Law

Other conditions not to be treated as impairments – a tendency to physical abuse of other persons

81. The Respondent has claimed that the Claimant's behaviour towards Mr Carter engages the 2010 Regulations regulation 4 provides:

> *(1) For the purposes of the Act the following conditions are to be treated as not amounting to impairments:*
>
> *…*
>
> *(c) A tendency to physical or sexual abuse of other persons*

82. The meaning of 'physical or sexual abuse was considered in **P v Governing Body of a Primary School 2013 UKUT 154, Upper Tribunal (Administrative Appeals Chamber)**, an education discrimination case. Y, a child with Asperger syndrome and attention deficit hyperactivity disorder, was excluded from a primary school after repeatedly physically attacking staff and threatening other children. Y's parents (P) claimed that the exclusion discriminated against Y on the ground of disability contrary to section 85 EqA 2010, and one of the issues the Upper Tribunal had to consider was whether Y's violent behaviour amounted to a tendency to physical abuse for the purpose of Reg 4(1)(c) of the 2010 Regulations. P argued that the word 'abuse' connoted conduct involving the intention of inflicting pain, but the Upper Tribunal considered that the words had not been 'chosen to import any formal or specific meaning' but should be interpreted as ordinary words. On the evidence, Y's actions were capable of being 'physical abuse' and their extent could properly be described as showing a tendency to physical abuse, regardless of any finding or assumption that the only reason why Y engaged in those activities was the effect of Y's disabilities.

83. Mr Jamieson referred us to the decision in **Wood v Durham County Council [2018] UKEAT/0099/00** which concerned regulation 4(1)(b) of 2010 Regulations (a tendency to steal being an excluded condition). Our first observation as this relates to a different excluded condition and of course should be distinguished from this case because of that. We do, however, accept Mr Jamieson's submission relating to what is meant by a tendency. A tendency would require at least two incidents.

84. Neither the 2010 Regulations nor the Equality and Human Rights Commission Employment Statutory Code of Practice (the "EHRC Code") define what is meant by "physical abuse". One must, therefore, seek to give the expression its natural meaning and, in doing, so dictionaries and other sources such as Wikipedia provide guidance. According to the definition in Wikipedia[1], physical abuse can be defined:

[1] https://encyclopedia.thefreedictionary.com/physical+abuse

as any intentional act causing injury or trauma to another person by way of bodily contact.

85. Another definition is:

Physical abuse is an act of another party involving contact intended to cause feelings of physical pain, injury, or other physical suffering or bodily harm[2].

86. The UK Government's guidance on domestic abuse addresses the concept of physical abuse in the following way:

Physical Abuse[3]

The person abusing you may hurt you in a number of ways.

Does your partner ever:

- *slap, hit or punch you?*
- *push or shove you?*
- *bite or kick you?*
- *burn you?*
- *choke you or hold you down?*
- *throw things?*

87. What these different definitions have in common is the requirement for physical contact between the perpetrator and victim. In the absence of this, it follows that it cannot be said that the behaviour amounts to physical abuse. Of course, it might be said that such behaviour could be abusive in the sense that it is aggressive, threatening or intimidating but without the essential element of actual physical contact, there cannot be said to be physical abuse.

The duty to make reasonable adjustments

88. The EqA 2010 imposes a duty on employers to make reasonable adjustments to help disabled employees and former employees in certain circumstances. The duty can arise where a disabled person is placed at a substantial disadvantage by:

a. An employer's PCP

b. A physical feature of the employer's premises.

c. An employer's failure to provide an auxiliary aid.

[2] https://www.definitions.net/definition/PHYSICAL%20ABUSE[
[3] https://www.gov.uk/guidance/domestic-abuse-how-to-get-help

89. However, an employer will not be obliged to make reasonable adjustments unless it knows or ought reasonably to know that the individual in question is disabled and likely to be placed at a substantial disadvantage because of their disability.

90. The EHRC Code, which the Tribunal must consider, if it appears relevant, contains a non-exhaustive list of potential adjustments that employers might be required to make.

91. It is for the Tribunal to objectively determine whether a particular adjustment would have been reasonable to make in the circumstances. It will consider matters such as whether the adjustment would have ameliorated the disabled person's disadvantage, the cost of the adjustment in the light of the employer's financial resources, and the disruption that the adjustment would have had on the employer's activities.

Discrimination arising from disability

92. EqA 2010 section 15(1) provides that 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.

93. EqA 2010 section 15(1) goes on to state that section 15(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.

94. In establishing unfavourable treatment, there is no requirement to have a comparator.

95. EqA 2010 Section 136 essentially provides that once the Claimant has proved facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to the Respondent to prove a non-discriminatory explanation. In the context of a claim of discrimination arising from discrimination, in order to prove a prima facie case of discrimination and shift the burden to the Respondent to disprove his or her case, the Claimant will need to show:

    a. that he has been subjected to unfavourable treatment;

    b. that he is disabled and that the employer had actual or constructive knowledge of this

    c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment

    d. some evidence from which it could be inferred that the 'something' was the reason for the treatment.

96. If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either:

    a. that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of the Claimant's disability, or

    b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

97. We are reminded that in **Secretary of State for Justice and anor v Dunn EAT 0234/16** four elements must be made out for the Claimant to succeed:

    a. There must be unfavourable treatment;

    b. There must be something that arises in consequence of the claimant's disability;

    c. The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and

    d. The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate end.

98. Unfavourable treatment is what the alleged discriminator does or says, or omits to do or say, which then puts the disabled person at a disadvantage. Dismissal can amount to unfavourable treatment.

99. The discriminatory treatment must be something arising in consequence of the Claimant's disability not the Claimant's disability itself. There must be something that led to the unfavourable treatment and this "something" must have a connection to the Claimant's disability. In **Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT** Mr Justice Langstaff, the then President of the EAT, explained that there is a need to identify two separate causative steps in order for a claim under section 15 EqA 2010 to be made out. The first is that the disability had the consequence of 'something'; the second is that the claimant was treated unfavourably because of that 'something'. According to Langstaff P, it does not matter in which order the tribunal approaches these two steps: 'It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability'.

100. In **Dunn** Simler J stated '[Counsel for the claimant asserts] that motive is irrelevant. Moreover, he submits that the claimant did not have to prove the reason for the unfavourable treatment but simply that disability was a significant influence in the minds of the decision-makers. We agree with him that motive is irrelevant. Nonetheless, the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of

something arising in consequence of disability… [I]t need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary'. The enquiry into such thought processes is required to ascertain whether the 'something' that is identified as having arisen as a consequence of that claimant's disability formed any part of the reason why the unfavourable treatment was meted out.

101. We are also reminded that in **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893, EAT**, the EAT clarified that a claimant needs only to establish some kind of connection between the claimant's disability and the unfavourable treatment. A section 15 claim could succeed where the disability had a significant influence on, or was an effective cause of, the unfavourable treatment. The EAT's approach in **Hall** clearly required an influence or cause that operates on the mind of a putative discriminator, whether consciously or subconsciously, to a significant extent and so amounts to an effective cause. Anything less would be insufficient.

102. In **City of York Council v Grosset 2018 ICR 1492, CA**, the question arose whether, where an employer dismisses a disabled employee for misconduct caused by his or her disability, the dismissal can amount to discrimination under section 15 EqA 2010 even if the employer did not know that the disability caused the misconduct. The Court of Appeal held that it can. The facts of the case were that G, a teacher who suffered from cystic fibrosis, showed an 18-rated film to a class of 15-year-olds without the school's approval or parents' consent. During the consequent disciplinary proceedings, he accepted that his conduct was inappropriate but maintained it was an error of judgement arising from stress. He pointed out that reasonable adjustments that had been put in place for him had been overlooked and that he had been subjected to an increased workload. The school did not accept this explanation and dismissed G for gross misconduct. An employment tribunal upheld G's claim. Although the school was unaware at the time it decided to dismiss that G's misconduct was linked to his disability, the tribunal was satisfied - on the basis of medical evidence that had not been available to the school - that there was such a link. The EAT upheld the tribunal's decision and the school appealed unsuccessfully to the Court of Appeal. Lord Justice Sales, giving the leading judgment, noted that the question of whether the 'something' for section 15 EqA 2010 purposes arises in consequence of the employee's disability is an objective matter. In Sales LJ's view, it is not possible to read into section 15 EqA 2010 a further requirement that the employer must have been aware of the link when choosing to subject the employee to the unfavourable treatment in question. The Court also upheld the tribunal's decision that the dismissal was not objectively justified. The tribunal was entitled to take into account, among other things, that if the school had made reasonable adjustments by reducing the work pressure on G, he would not have been subjected to the same level of stress and the incident would have been unlikely to occur.

103. Turning to the question of objective justification, we are reminded that the EHRC Code sets out guidance on objective justification that largely reflects existing case law in this area. In short, the aim pursued should be legal, should not be discriminatory in itself and must represent a real,

objective consideration. Although business needs and economic efficiency may be legitimate aims, the EHRC Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29). As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

104. In **Hensman v Ministry of Defence EAT 0067/14**: H, who was employed by the MoD, was convicted of a public indecency offence after having covertly photographed and videoed a fellow employee in various stages of undress. In sentencing H to a three-year community order, the judge commented that, owing to H's various mental disorders, which included Asperger syndrome, he was not to blame for his actions. Following H's criminal conviction, the MoD initiated disciplinary proceedings and subsequently dismissed him for gross misconduct. An employment tribunal upheld his claim of discrimination under section15 EqA 2010, holding that, while the MoD had the legitimate aim of maintaining workplace standards, dismissal was not a proportionate means of achieving that aim. In reaching that conclusion it took account of the fact that the MoD's policy stated that a finding of gross misconduct may not be appropriate where there is 'diminished mental competence' and that the criminal judge had expressly acknowledged that due to H's mental disorder he was not to blame for the offence. On appeal, the EAT held that the tribunal had failed to have regard to the business considerations of the employer — in particular, the employer's business needs — when assessing proportionality. These considerations were not simply confined to the fact of H having a criminal conviction but related in particular to questions of breach of trust and covert conduct. In failing to refer to, let alone analyse, the employer's business needs, the tribunal had erred in law. The case was remitted to a differently constituted tribunal to decide afresh the issue of proportionality

Application of the law to the facts

105. We do not accept that the Claimant has an excluded condition for the purposes the 2010 Regulations. There was no evidence of physical contact which is an essential requirement to engage the 2010 Regulations. There is no doubt that the Claimant's behaviour on 19 and 22 November 2017 towards Mr Carter was aggressive and threatening but the two men did not come to blows. There was no physical contact. Consequently, the Claimant's condition is not excluded from the definition of disability under EqA 2010.

106. We accept that the Claimant's mental condition deteriorated because of his relationship breaking down with his girlfriend. The medical evidence supports the fact that some of his behaviour relating to the aftermath of the relationship ending was connected to his anxiety and depression. His illness makes him feel acutely distressed when he feels let down such as when a personal relationship fails. His illness pre-disposes him to binge drinking. These two elements explain why the Claimant went on a binge drinking session on 4-5 November 2017. There was a causal link between his condition and his drinking behaviour which led him to go to the club on

5 November 2017. His illness also means that he has a tendency to speak to colleagues and club members in candid and inappropriate way, lacking in insight about boundaries.

107. However, we do not accept that the Claimant has established a causal link between his condition and his altercations with Mr Carter. His behaviour on 19 and 22 November 2017 cannot be explained by reference to his condition. The medical evidence does not support this. He had an ongoing disagreement with Mr Carter about £175. It was not resolved to his satisfaction. He did not want to work with Mr Carter. He felt angry and frustrated about the money. He felt angry and frustrated with the Respondent when it re-employed Mr Carter and he did not want to resolve the matter on 22 November 2017 as per Ms Tune's suggestion. This triggered his angry outbursts which were witnessed in the club and which frightened some of his other colleagues. The disagreement with Mr Carter was a private matter. The Claimant behaved inappropriately, and the Respondent was entitled to regard his behaviour as misconduct.

108. Turning to his claim for discrimination arising from disability we find that the Claimant's use of alcohol, excessive talking about his illness and his lack of appreciation of the impact that this had on others arose as a consequence of his disability.

109. Alcohol was the reason why the Claimant was on work premises on 5 November 2017. He drank because of his anxiety and depression. When he arrived at the club, he spoke inappropriately because he was drunk. There is a clear causal link between his condition and his behaviour. His behaviour adversely affected colleagues and members.

110. Dismissing the Claimant was a proportionate means for achieving a legitimate aim. The Respondent was entitled to maintain appropropriate standards of conduct in its workplace. The Claimant behaved inappropriately. The Respondent had a duty to ensure the safety of its employees and others affected by the Claimant's behaviour. Dismissal was the only option. Despite the Claimant's suggestion that he might have mediated with Mr Carter, the reality was that he simply did not want to work with him. Indeed, he told Mr Moore that he only wanted compensation and wanted to leave. Given the size of the workforce (i.e. 6 employees), arranging different shift patterns for both men was not feasible in the long term. Ms Tune re-arranged a shift in the immediate aftermath of the 19 November incident to safeguard the Claimant but this could not be a permanent arrangement. The Claimant also accepted that re-arranging shifts was not feasible.

111. Much was made by the Claimant about the Respondent's failure to instruct an occupational health report before taking further action against him. He maintains that failing to do so amounted to unfavourable treatment. We disagree. First, the Respondent was entitled to deal with the Claimant's behaviour regarding Mr Carter as a conduct issue. This was the operative reason for dismissal. Furthermore, the Respondent was entitled to rely on the GP's report [217] which clearly indicated that the Claimant was fit to work, and the Disability Discrimination Act was not engaged. Prior to being suspended, the Claimant had worked. His suspension was not made on medical grounds but to facilitate Ms Tune's investigation and subsequent

disciplinary action. Whilst the GP flagged up the possibility for obtaining an occupational health report it was no more than an option if the Respondent harboured doubts about the Claimant's fitness to work.

112. The Respondent took medical advice about the Claimant. Ms Tune also contacted the Claimant's GP after the 5 November 2017 incident. Refusing to obtain an occupational health report did not arise as a consequence of the Claimant's disability. It flowed from what Dr Bloxham had said: he was fit to work. It cannot be said that the Respondent simply assumed that the Claimant's illness was not linked to his conduct regarding Mr Carter. It was an informed decision.

113. The Respondent did not want to delay the grievance hearing. There was no need to because of the GP's report. Even if his conduct was connected to his illness, if the Respondent had instructed an occupational health report, this would have delayed the process to the Claimant's detriment. At the grievance hearing on 12 January 2018, the Claimant's representative said that the Claimant wanted a swift resolution of his grievance. Ms Tune had instructed the GP's report because she was worried that the Claimant would be placed at a disadvantage at the grievance hearing because of his mental health. The GP's report indicated that the Claimant was fit to attend the grievance hearing. Not instructing an occupational health report was a proportionate means for achieving a legitimate aim, the expeditious disposal of the Claimant's grievance. The Claimant fully participated in the grievance hearing and had trade union representation. He was not placed at a disadvantage.

114. There is no doubt that the Claimant enjoyed working in a supportive environment. He argues that when this support was withdrawn after 29 November 2017 this was something arising from his disability and he was treated unfavourably. Ms Tune was very supportive after the 5 November 2017 incident. Her modus operandi was a combination of face-to-face meetings, telephone calls and emails. She knew that the Claimant was getting professional help for his condition. She encouraged him to see his GP. She had a good working relationship with the Claimant. She was very worried about the Claimant's welfare after the 5 November 2017 incident and, at the stage, she had no thoughts of suspending him. He was in no fit state to discuss disciplinary action. That was supportive and altruistic.

115. Ms Tune continued to support the Claimant. She suspended him on 29 November 2017. However, she had to stop telephoning him because the Claimant asked her to do so on 30 November 2017. From then on, he only wanted email contact. The Claimant instigated that change; not the Respondent. Consequently, it cannot be said that this amounted to unfavourable treatment on the part of the Respondent. The Respondent complied with the Claimant's request. Furthermore, it was appropriate to handle the matter differently (through email) given that the Claimant was a subject to investigation and disciplinary action. This maintained standards and objectivity. He was suspended because of his conduct and this was an appropriate response for safeguarding the workplace. Even if the Respondent treated the Claimant unfavourably by withdrawing support, it was a proportionate means of achieving a legitimate aim: safeguarding the workplace.

116. Turning to the duty to make reasonable adjustments, between 19 November 2017 and the Claimant's dismissal, the Respondent had a PCP in place. This was the requirement that the Claimant had to work alongside Mr Carter on normal shifts. The Claimant's dispute with Mr Carter was a private matter and his aggressive behaviour towards Mr Carter was not connected to his mental health but his conduct. He was responsible for his own actions and his conduct warranted disciplinary action and we do not think that a non-disabled person would have been treated differently. It may be said that Mr Carter was treated more favourably because he was not disabled. However, that ignores the fact that the Claimant showed a lack of remorse or insight into his behaviour. Even if the Claimant was placed at a substantial disadvantage in comparison to persons who were not disabled in respect of the adverse effect on the Claimant's mental health by having to work the same shifts as Mr Carter it would have been unreasonable to expect the Respondent to roster its shifts. The Respondent is a small employer. Rostering the shifts to enable the Claimant and Mr Carter to work separately was not practicable. Furthermore, the Claimant conceded this when he was giving his oral evidence. He accepted that when he reflected on the matter, it would not have been feasible.

117. Regarding his notice pay claim, the Claimant's conduct both cumulative and individually was sufficiently serious to go to the root of the employment relationship amounting to a repudiatory breach of contract. He came to the workplace whilst drunk. He behaved in an inappropriate and aggressive manner towards Mr Carter. He frightened colleagues and spoke inappropriately to them and to members about his health. Not all of this behaviour was health driven but was simply culpable conduct. The Respondent was justified in accepting the Claimant's repudiatory breach of contact and dismissing him without notice. Consequently, he is not entitled to notice pay.

_____

Employment Judge A.M.S. Green

_____

Date 4 February 2019