EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Hegedus	**v**	**F P Hertings & Sons Plc**

Heard at: Cambridge Employment Tribunal

On: 10-12th May 2022 & 15th June 2022

Before: Employment Judge King

Members: Ms Bray & Ms Morgan

Appearances

For the Claimant: In person

For the Respondent: Ms Peckham (solicitor)

JUDGMENT

1. The claimant was not unfairly dismissed and his complaint for unfair dismissal is not upheld.

2. The claims for disability discrimination under s15 Equality Act 2010 are not well founded and are dismissed.

3. The claims for failure to make reasonable adjustments are not well founded and are dismissed.

REASONS

1. The hearing was listed to take place via CVP. The Tribunal was provided with an electronic bundle and statements. The claimant was unrepresented and the Respondent was represented by Ms Peckham (solicitor).

2. We heard evidence from the claimant and he provided a witness statement from Mr Garelick but he did not appear before us to give

evidence. The two statements provided by the claimant did not contain detailed evidence or a statement of truth but we took them as his statements for the purposes of evidence as a starting point. We asked the claimant additional questions about the issues to ensure we understood his case and that he had given all the evidence he wanted the Tribunal to hear. Given the claimant was a litigant in person the respondent did not object to this course of action.

3. We heard evidence from Mrs Cheryl Francis, Mr Mark Washington and Mr Andrew Potter on behalf of the Respondent. The claimant and respondent exchanged their witness statements in advance and prepared an agreed bundle of documents which ran from page 7 to page 403.

4. At the outset the claims were identified as unfair dismissal and disability discrimination. The matter had been listed for an urgent preliminary hearing on 26th April 2022 before Employment Judge Warren as the parties had been unable to agree a list of issues and the matter was listed for a final hearing. We notified the parties that we intended to deal solely with liability within the hearing listing given the current limited time to hear the case.

5. Employment Judge Warren spent time with the claimant clarifying the claims. The previous preliminary case management hearing in May 2021 ordered further and better particulars and medical evidence but the claims had been left to be identified by the parties and the claimant found this process unmanageable. We are grateful to our judicial colleague for having identified the issues in the case to enable the matter to be determined at this hearing.

6. The claimant relies on his disabilities as anxiety, depression and obsessive-compulsive disorder (OCD). The respondent has conceded that the claimant was disabled at the relevant time. Knowledge was however in dispute.

7. The case was originally listed for 4 days but on one of those listed days a compulsory judicial training event took place due to a listing error which meant that the case had to be heard in three days with us reserving our decision and sitting on another occasion to deliberate. We were able to conclude all the evidence and submissions within the timescale but had to reserve our decision so that the panel could deliberate at the earliest opportunity to reach its decision. This panel deliberation day took place via CVP without the parties present.

The issues

8. As set out above we confirmed with the parties that the issues remained those identified by Employment Judge Warren the month before. We added one additional issue relating to time raised by the respondent and then the issues were as follows:

Unfair dismissal

9. What was the principal reason for dismissal and was it a potentially fair one in accordance with s.98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to Mr Hegedus' conduct, namely his conduct towards Mr P Hertings on 16 March 2020 and toward Ms S Luckett on the same date.

10. If so, was the dismissal fair or unfair in accordance with ERA s.98(4) and, in particular, did the respondent in all respects act within the so-called, "band of reasonable responses"? Mr Hegedus will say that the decision to dismiss was outside the range of reasonable responses because the respondent should have taken into account what led to his outburst, that his outburst was caused by his disability and that in the circumstances, a lesser sanction would have been appropriate.

Discrimination arising from disability – s15 EqA

11. After Mr Hegedus provided a fit-note from his GP on 22 July 2019, did his line manager, (Ms Sue Dhami) grill him about his condition and ask him to disclose sensitive medical information in front of others? If so, did such amount to unfavourable treatment and was such unfavourable treatment caused by the fit note, (the something arising) and if so, did the fit note arise in consequence of his disability?

12. Did the respondent's letter to Mr Hegedus dated 5 September 2019 detailing his poor timekeeping over a period of six months and threatening him with disciplinary action amount to unfavourable treatment? If so, was that letter because of his poor timekeeping, (the something arising) and if so, did his poor timekeeping arise in consequence of his disability, in that it was as a result of high stress levels heightening his OCD, meaning that he would have difficulty in leaving home because he had to check so many things, (for example that the iron was off or the front door properly closed) and that his depression caused him to lack motivation?

13. Did the respondent treat Mr Hegedus unfavourably as follows:

    a. Cheryl Francis not responding to his email of 18 September 2019;
    b. Cheryl Francis not replying to Mr Hegedus' request for an acknowledgement of his paternity leave request form on 23 September 2019;
    c. Mark Washington ignoring his complaint that he had not received an acknowledgement of his paternity leave request;
    d. Cheryl Francis obfuscating and stating erroneous facts in a meeting with Mr Hegedus to discuss his pay whilst on paternity leave, (Mr Hegedus was unable to give me the date of this meeting, but Mrs Packham was confident the respondent would have no difficulty in identifying it), and

e. Ms Sandie Kedhial not responding to Mr Hegedus' frequent requests for clarification as to whether he had been placed on furlough or was suspended?

14. If so, was such treatment because of communications from Mr Hegedus, (the something arising) and were such communications a consequence of his anxiety, depression and OCD?

15. Dismissing Mr Hegedus was plainly unfavourable treatment. Did the respondent dismiss Mr Hegedus' because of his outburst to Mr P Hertings and Ms S Luckett on 16 March 2020? If so, was his outburst a consequence of his disability?

16. Insofar as any of the above allegations of disability related discrimination may be upheld, has the respondent shown that the unfavourable treatment in question was a proportionate means of achieving a legitimate aim?

17. Alternatively, has the respondent shown that it did not know and could not reasonably have been expected to know, that Mr Hegedus had the disability?

Failure to make reasonable adjustments s22/23EqA

18. Did the respondent know and could it not reasonably have been expected to know that the claimant was a disabled person?

19. PCP1: Did the respondent have a Provision, Criterion or Practice, (PCP) of warning employees about poor timekeeping and threatening disciplinary action?:

    a. If so, did any such PCP put Mr Hegedus at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that a person with anxiety, depression and OCD would be less likely to comply with the respondent's timekeeping requirements?

    b. If so, did the respondent know or could it reasonably have been expected to know that Mr Hegedus was likely to be placed at any such disadvantage?

    c. If so, were there steps that were not taken that could have been taken by the respondent to avoid such disadvantage? Mr Hegedus will argue that such a reasonable adjustment would have been to have afforded him greater latitude and not to have warned him.

20. PCP2: Did the Respondent have a PCP of hand delivering documents in relation to disciplinary process' during lockdown?:

a. If so, did such PCP put Mr Hegedus at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that the hand delivery of documents would heighten the symptoms of a person with anxiety, depression and OCD, particularly during a time when the country was in lockdown?

b. If so, did the respondent know or could it reasonably have been expected to know that Mr Hegedus was likely to be placed at any such disadvantage?

c. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The reasonable adjustment contended for by Mr Hegedus is that the respondent should have arranged for such documents to be delivered either by the Post Office or a courier and not by his manager, Cheryl Francis.

21. PCP3: Did the respondent have a PCP of dismissing employees for inappropriate conduct such as that alleged against Mr Hegedus?:

a. If so, did any such PCP put Mr Hegedus at a substantial disadvantage in relation to any relevant matter in comparison with persons who are not disabled at any relevant time in that a person with anxiety, depression and OCD is more likely to behave inappropriately, particular in the circumstances which led to Mr Hegedus' outburst?

b. If so, were the steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The reasonable adjustment contended for is that the decision to dismiss not be made.

c. Insofar as any of the above PCPs are found to have existed, such disadvantage established and such adjustment found to be possible, would it have been reasonable for the respondent to have made those adjustments?

Time limits/Limitation

22. There was no issue with the time limits for the unfair dismissal claim but depending on our findings there could potentially be issues with the discrimination complaints.

a. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or

failures; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.

Remedy (set out here for completeness)

23. If the claimant was unfairly dismissed, the remedy is compensation for financial loss:

    a. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed anyway?

    b. Would it be just and equitable to reduce the amount of any of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

    c. Did the claimant, by blameworthy or culpable actions, cause or contribute to his dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

24. If the complaints of discrimination succeed, in addition to the question of compensation for financial loss, there will be the issue of what award should be made in respect of injury to feelings.

The Law

Unfair dismissal

25. Dismissal under s95 Employment Rights Act 1996 not being in dispute, the claimant has the right not to be unfairly dismissed by the respondent under s94 Employment Rights Act 1996.

26. S98 Employment Rights Act 1996 states that:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

27. The respondent argues contributory conduct in respect of the unfair dismissal so in respect of the ordinary unfair dismissal claim s123 (6) Employment Rights Act 1996 concerning the compensatory award and s122(2) ERA 1996 in respect of the basic award are relevant.

28. S122(2) Employment Rights Act 1996 states:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

29. S123 (6) Employment Rights Act 1996 states:

"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

30. Regard must also be had to the ACAS Code of Practice on Discipline and Grievance (COP1).

<u>Disability discrimination</u>

31. Section 15 Equality Act 2010 (Discrimination arising from disability):

"**15 Discrimination arising from disability**

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

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

32. S.20 of the Equality Act 2010 states as follows:

"Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column."

33. Section 39 Equality Act 2010:

"**39 Employees and applicants**

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

(6) …

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8) Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms."

34. S.123 of the Equality Act 2010 states as follows:

"Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(c) when P does an act inconsistent with doing it, or

(d) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

35. We have had regard to the EHRC Code of Practice of Employment. The solicitor for the respondent also made reference to a number of authorities in her skeleton argument to which we have had regard as follows:

Abernethy v Mott, Hay and Anderson [1974] ICR 323, [1974] IRLR 213
Turner v East Midlands Trains Limited [2013] ICR 525
British Home Stores v Burchell [1980] ICR 303
Burdis v Dorset County Council (2018) UKEAT/0084/18/JOJ
Iceland Frozen Foods v Jones [1983] ICR 17, British Leyland v Swift [1981] IRLR 91 CA
Royal Surrey County NHS Foundation Trust v Drzymala (UKEAT/0063/17/BA)
Post Office v Foley [2000] IRLR 827' Whitbread v Hall [2001] IRLR 275
Sainbury's Supermarkets Ltd v Hitt [2003] ICR 111
London Ambulance Service NHS Trust v Small [2009] IRLR 563
Hollier v Plysu [1983] IRLR 260 (paragraph 18)
Secretary of State for Justice & Anor v Dunn EAT (0234/16)
Basildon & Thurrock NHS Trust v Weerasinghe [2016] ICR 305 EAT
Pnaiser v NHS England & Others [2016] IRLR 170 EAT
Secretary of State for Justice & Anor v Dunn EAT 0234/16
Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893
Cruickshank v VAW Motorcast Ltd [2002] ICR 729 EAT
City of York Council v Grosset [2018] EWCA Civ 1105
Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640
Eastern & Coastal Kent Primary Care Trust v Grey UKEAT/0454/08: [2009] IRLR 429)

Findings of fact

36. The claimant was employed by the respondent from 18th April 2017 as a customer service advisor until his dismissal for gross misconduct by letter dated 22nd May 2020.

37. The respondent is a company with a multi-million pound turnover. The respondent's customers include major house building companies and subcontractors as they supplied building products, ironmongery and fixings to the building and construction trade. The order level could be 800-1000 orders a day prior to the pandemic before it dropped significantly.

38. The respondent employs approximately 160 staff primarily based at one site where the claimant worked although they did have hubs at Warrington and Leeds mainly for the drivers. The company had a HR assistant newly appointed within the business Sandy Khedel and Ms Cheryl Francis was the H & S and HR Manager.

39. Although the respondent is a Plc it was privately owned company by one family who all worked within the business and constituted the board. The business is run by the parents and their two sons, one of those sons, Paul Herting was involved in the issue which led to the claimant's dismissal.

40. The claimant worked in the office and reported to Ms Dhami. The CEO Mark Washington ran the Company and reported to the father on the board of directors. Part of the site where the claimant worked was warehousing and the claimant worked within the office function on that site.

41. The claimant's employment history was unremarkable until 2019 when the incidents which are subject of this claim are said to have occurred.

42. The claimant made a flexible working request in October 2018 to adjust his work and childcare balance and help with his lower back pain. The respondent granted the request to take effect in the first week of January 2019 but the claimant decided not to take this offer for financial reasons so remained in the business full time.

43. The claimant had a number of medical conditions. For the purposes of this claim he relied on his disabilities of depression, anxiety and OCD. The respondent conceded prior to the hearing that the claimant was disabled within the meaning of s6 Equality Act 2010 for the purposes of these claims but knowledge remained in dispute.

44. The claimant's evidence was that he suffered from these conditions for sometime and had received treatment in the form of therapy, CBT and

antidepressants. He was first diagnosed in or around 2001 but in September 2019 his mental health condition deteriorated due to housing issues and he was referred to the Ealing IAPTs and the Ealing Crisis and Assessment and Treatment Team.

45. The claimant sought medical advice in July 2019. The claimant's evidence was that the doctor suggested signing him off work as unfit for work but the claimant had financial concerns and instead the doctor wrote a fit note dated 22nd July 2019 concerning the claimant being fit to work with adjustments – with flexibility to attend health care appointments.

46. The claimant did not hand this fit note to his manager. The claimant's evidence which was accepted was that he approached his manager in the following days to discuss his health issues without handing in the fit note. There was a dispute between the parties as to whether Ms Dhami grilled the claimant about this in an open plan office in line with the allegations made. We did not have the benefit of hearing from Ms Dhami about this allegation but a statement was taken from her as part of the grievance process when the claimant first raised these matters after his suspension.

47. The respondent's position is that Ms Dhami asked the claimant to meet with her and Ms Perveen Jan the following day to discuss this but the claimant preferred to meet her alone. An informal meeting was arranged for the next day. When the claimant attended work the following day, he told Mrs Dhami a meeting was no longer required and he was fine. No meeting informal or otherwise took place at this stage.

48. On the balance of probabilities, we prefer the respondent's position in this matter. It is clear the claimant did not submit that fit note to be grilled about that is an agreed fact. Very little detail was given by the claimant about his conditions at that stage and he had agreed to meet Ms Dhami the next day but subsequently changed his mind. The claimant did not dispute this course of events. If anything we find the respondent's approach to the claimant's health issues too light touch and do not accept that he was grilled at this stage about the matter as the claimant asserts. There was no fit note submitted to be grilled about and the claimant accepted he decided not to meet Ms Dhami the next day.

49. Ms Dhami's evidence for the grievance process also raised other conduct and behaviours at work which had not been dealt with by the respondent or put to the claimant during his employment but which caused Ms Dhami concern as to his presentation within the office and the language and tone used such that she mentioned this to Ms Francis and Ms Khedel. We heard evidence from Ms Francis about this. The fact these were not raised with the claimant further supports that he was not grilled on this occasion either.

50. On 5th September 2019 the claimant was issued with a letter raising concerns about his timekeeping as he had been late 17 times in a six month period. This warned the claimant that he needed to make an improvement as to time keeping or the disciplinary procedure may be invoked and disciplinary action taken. The evidence that formed the basis of this letter of concern was that the claimant had been late 5 times in August 2019 including not arriving at work by 9am but arriving at work at 9.14am, 9.19am, 9.20am and twice at 2pm. In June 2019 the claimant had been late 4 times arriving at 9.17am, 9.25am and 9.30am twice. In May 2019 this happened 3 times with him arriving at 9.15, 9.17 and 10.20am. There were a further 4 instances logged for April 2019 and further examples going back to January 2019 and he was 5 minutes late on the day the letter was issued.

51. After that letter there are further instances of lateness. On 4th October 2019 he arrived at 9.05, at 9.15 on 25th November 2019, at 9.57am on 2nd December 2019, at 9.15am on 3rd February 2020, 5th February 2020 and 24th February 2020. This was a significant improvement on his time keeping prior to the letter but nevertheless there were still instances of lateness. The claimant was however not subject to disciplinary action for these further instances of lateness.

52. The claimant emailed Ms Francis on the 18th September 2019 (forwarding an email of 17th September 2019) and notified her that he had had "*severe depression and anxiety recently and have been seeing the GP/medical services in relation to this. I did have a form from my GP some weeks back regarding adjustments at work and did not want to submit it at the time. I am happy to discuss this with you and provide documentation but just wanted to let you know before I speak to you."*

53. The claimant complains that Ms Francis did not formally reply in writing to that email. Ms Francis evidence was that she spoke to the claimant and asked for a copy of the note. The claimant was unsure about this and was confused and was unable to remember whether that conversation happened or whether it was with Ms Francis or Ms Khedel.

54. On the balance of probabilities, we find that Ms Francis did discuss the email with the claimant. This is evident from the subsequent email correspondence below. His housing situation was worrying him and he was clear about not wanting to hand the fit note in. We are surprised that an organisation the size and resources of the respondent at no point followed this up in writing to confirm that a discussion had taken place or to formally enquire about any adjustments the claimant may require or to make an occupational health or wellbeing referral. There was no follow up at all after the conversation in writing and Ms Francis with overall HR responsibility made no notes or record of those discussions.

55. The claimant submitted a screen shot of his paternity leave application on 23rd September 2019 to Ms Francis and asked for her to confirm receipt. No written acknowledgement of this was sent to the claimant. The

claimant however conceded during evidence that there were discussions about the email after it was received. There were discussions between him and Ms Francis or Ms Khedel about the matter. Again, it is surprising that for an organisation of that size with those resources that no formal process was followed with what must be a routine application. There was no formal acknowledgement in writing or what the claimant needed to do by when. This caused the claimant anxiety as his financial situation was dire and he was uncertain if he was going to be permitted time off with his new baby.

56. On 3rd October 2019 the claimant sent an email stating he cannot "fined (sic) the original" and "will a doctor's note suffice" which is evidence that a discussion must have taken place after the email of 23rd September 2019 about his paternity leave application.

57. On 8th October 2019 he chased Mark Washington saying he had not had any formal acknowledgement and asking for confirmation it had been received. Again, no formal response in writing was sent to the claimant. Mr Washington's evidence which we accept was that he passed this onto HR to be dealt with. Mr Washington accepts that he did not respond to the claimant about the matter as the Managing Director of the company he would not get involved in such matters but would refer it to HR.

58. On 31st October 2019 the claimant provided the matb1 form by email to Ms Francis referencing "as discussed". Mark Washington is copied into that email and it is evident that some discussion must have taken place even if the claimant never received formal confirmation of his leave and entitlements in writing as he should really have done.

59. The baby was due on 25th December 2019 but did not arrive until the New Year when he took his period of paternity leave in January 2020. On 23rd January 2020 the claimant requested (by email to Ms Francis) a breakdown of his paternity pay. The claimant was erroneously under the impression he would receive 90% of his normal pay not SPP from his discussions with Ms Khedel. Again, this confusion could have been avoided by the respondent formally confirming paternity leave and entitlements in writing.

60. There was then a discussion with the claimant and Ms Francis after the email about paternity pay and the sums the claimant had received for statutory paternity pay. Neither party could be certain of the date of this meeting but that it was in January or February 2020 close to the time the paternity leave was taken. Ms Francis referred him to the form which stated "*Ordinary Statutory Paternity Pay (OSPP) – at least part of your wages will be paid for two weeks. You will get the weekly rate of OSPP current at the time of your paternity leave, or 90% of your average weekly earnings whatever is less*" and told him about the payroll not recognising a rolling week and this had caused some additional complications with the payments. Even then the respondent did not follow this up in writing

or confirm in advance the exact amount of statutory paternity pay he would receive in advance or retrospectively to clarify matters.

61. The claimant's evidence was that had the communications been in writing this would have assisted him with clarity and understanding. When they spoke he felt Ms Francis was not clear and that he was left confused in this meeting in January/February 2020. This difficulty arose by the respondent not putting matters in writing and making it clear what he was entitled to. Even at the Tribunal hearing the claimant could not be certain he had been paid the correct amount but he did not bring a complaint about this to the Employment Tribunal. The respondent set out the calculations later as part of the grievance process but the claimant felt that the communication around this was poor and we agree. We do not find that Cheryl Francis obfuscated or stated erroneous facts but we do accept that the communication around this was poor and it should have been in writing for all employees.

62. During early 2020 the Coronavirus pandemic started to take hold. Cases were rising and there was a level of concern prior to the Prime Minister announcing on 23rd March 2020 that the UK would go into its first lockdown. The claimant at this time was very anxious and had a lot of concerns. There were housing issues, a new baby in addition to his existing young child who was unwell, he was travelling to work using public transport and he had his own health issues of OCD, anxiety and depression.

63. On 16th March 2020 there was an incident at work which would later be the reason for the claimant's dismissal. The claimant had attended work but he was anxious as his daughter had had a cough since January and he had called in last week himself with a temperature. The claimant had to use public transport and was keen to know whether the Company would be making provisions for staff to work from home. That morning he had these discussions with another member of staff SL and then met Mr Herting in the corridor.

64. The claimant in evidence could not recall what he said exactly except that he did swear and raise his voice and he accepted he didn't handle it well. The claimant did not accept he was waving his hands or was aggressive. We heard no evidence from Mr Herting but we did see his statement. His statement and two additional statements of SL and KH later formed part of the disciplinary investigation.

65. The claimant raised with Mr Herting whether it would be possible to work from home. Mr Herting was dismissive and adamant that it was not happening saying "No, that's not going to happen, we won't be able to do that" which was confirmed by SL in her statement taken for the disciplinary hearing.

66. The claimant accepted he did respond but could not recall exactly what he said. Evidence from the respondent was that swearing was common

place in the workplace and the claimant accepted he swore. The statement of SL refers to the claimant swearing and that the claimant accused Mr Herting of talking to him "like I'm a bit of a shit" and then the claimant saying "yeah you were you f****** c***. The claimant accepts he raised his voice and in addition KL says that she heard him shouting and described him as agitated and that she told him calm down. The claimant's evidence was that he was agitated because of the way he had been treated and that the outburst was an culmination of how he had been treated by the respondent. The claimant then walked out. We find that the claimant did so swear at Paul Herting and raised his voice. We find that he was agitated and walked out.

67. On the 16th March 2020 the claimant was suspended by letter of the same date. The claimant was informed that he was suspended because there were "allegations of potential gross misconduct" in that "it is alleged that on the morning of 16th March 2020 you acted and behaved physically and verbally aggressive towards Paul Herting". The claimant was informed that the matter would be investigated. As set out above we accept the claimant was verbally aggressive towards Paul Herting.

68. By email dated 10.47 on 16th March 2020 the claimant raised a grievance stating that this was "for being summarily constructive dismissal by Paul Herting just now without following due process". By letter dated 16th March 2020 the respondent acknowledged the grievance and informed the claimant that the investigation would be suspended until his grievance had been resolved. The claimant was invited to a meeting on 20th March 2020 in person with Cheryl Francis on 20th March 2020 and given the option that the meeting take place via video.

69. By email dated 18th March 2020 the claimant provided more detail about his grievance and advised that his union representative was unable to attend that date as he was isolating and that the claimant did not have broadband or a laptop to conduct the meeting virtually. In this additional detail the claimant provided additional complaints about the incident on 16th March 2020, getting a letter for lateness, the lack of performance management, docking his pay for lateness, bullying and discrimination on grounds of mental health, inadequate coronavirus response and issues over his paternity pay.

70. By email on 19th March 2020 the claimant again provided additional detail to his grievance and said that this should be looked at against a background of an intolerable working environment, issues over health and safety compliance, set out details as to his financial situation and further information about the incident on 16th March 2020.

71. By letter dated 20th March 2020 the respondent acknowledged his request to postpone the meeting so his union representative could attend and this was rearranged for 30th March 2020.

72. A letter dated 26th March 2020 was sent to the claimant placing him on furlough. At that time the claimant was suspended and we heard evidence that the furlough letter was sent to all staff and this included the claimant in error. This did cause some confusion and the claimant made a number of requests for clarification as to whether he was furloughed or suspended at the end of March and into early April 2020. It is clear that the letter should not have gone to him as at the time he was suspended.

73. The claimant remotely attended a grievance meeting with Steve Foster on 30th March 2020. The claimant was accompanied by his GMB union representative Steve Garelick. During the course of this meeting, the claimant made reference to having mental health issues at the outset in passing but provided no further details. The claimant raised a number of issues during this meeting a lot of which do not form the basis of this claim but more about his general gripes with his employer. We had the benefit of sight of the 10 pages of grievance notes which were circulated after the meeting and agreed by the claimant as set out below.

74. Initially copies of the notes from the grievance meeting were sent by Royal Mail but not delivered on 7th April 2020. On 8th April 2020 the respondent tried to call the claimant three times and emailed him about the transcript. Having had no response Cheryl Francis hand delivered the notes to the claimant's home address on 8th April 2020. She wore gloves and a mask and had no direct contact with claimant when she delivered the envelope through his door. The notes were therefore hand delivered. The respondent needed to communicate with him somehow. Given the situation with postal deliveries and that the claimant did not sign for the recorded delivery we do not consider unreasonable that the letter was hand delivered.

75. By e-mail dated 14th April 2020 the claimant accepted the notes of the meeting as accurate.

76. By letter dated 14th of April 2020 the respondent upheld the claimant's grievance in part. The respondent upheld the claimant's complaint about his paternity pay and that in future the details should be included in the employee company handbook and better communicated. The claimant's grievance about company documentation and having to pay if they lose the documents to get another copy was considered heavy-handed and the claimant was advised that this would be withdrawn from the company policy and that in future documents would be issued in both electronic format and paper copies. The grievance also upheld the claimant's complaint about office furniture and if he had a proven back complaint they would look at alternative desks and seating to alleviate any discomfort. The rest of the grievance around lateness, salary, bullying, coronavirus measures and dismissal were all dismissed and the letter made no reference to mental health issues at all.

77. By letter dated 15th April 2020 the claimant was invited to attend an investigation meeting on 16th April 2020 concerning the allegation from

16th March 2020 that the claimant acted and behaved physically and verbally aggressively towards Paul Herting.

78. The claimant attended remotely the meeting on 16th April 2020 without a companion and the meeting was recorded with agreement between the parties. The meeting was held with Dave Thomas and again we had the benefit of a transcript from this meeting which was short at 4 pages. At the outset of the call when asked about the incident on 16th March 2020 the claimant advised that he was "very sort of anxious" but other than this one reference, during this investigation meeting the claimant made no reference to any mental health issues. The claimant was sent a transcript of the meeting on 17th April 2020.

79. As part of the Investigation the respondent took statements from three witnesses Paul Herting and SL and KH. All three were present in whole or part for the incident under investigation which took place on the 16th March 2020. These statements were subsequently sent to the claimant with his invitation to a disciplinary hearing.

80. SL's statement described the claimant as swearing at Paul Herting and the claimant's manner becoming aggressive and he was waving his arms. She describes KH coming out of the office and telling the claimant to calm down but instead the claimant became even more aggressive in his body language and continued to swear at Paul Herting. She describes having also told him to calm down but that he also swore at her.

81. KH's statement is shorter and hand written but describes that she could hear raised voices outside the office door coming from the corridor and that one voice got louder and more angry and aggressive which was said to be the claimant. She described him as agitated and shouting and swearing before leaving the building.

82. Paul Herting's statement described the claimant as aggressive with his attitude and verbally abusive. He stated that the claimant's body language became threatening towards him as he was waving his arms around suggesting he wanted a fight. All three witnesses described the same language being used towards Paul Herting and considered him threatening.

83. By e-mail dated 17th April 2020 the claimant appealed the grievance outcome. The claimant stated that "the central point of the grievance was that I was discriminated against on the grounds of mental health and this point has been neglected completely in the response. It adds insult to injury that you have deemed fit this discriminatory practise." Given the fleeting mention to mental health in the last meeting it is not surprising the respondent overlooked this point as this is the first time the claimant refers to discrimination and his mental health in writing as part of that process since the mention in the 18th September 2019.

84. By letter dated 21st April 2020 the respondent acknowledged the claimant's appeal against his grievance and invited him to a meeting on 23rd April 2020. By e-mail on the day of the scheduled meeting the claimant informed the respondent that his union representative was unable to make the meeting. By letter dated 24th April 2020 the grievance appeal hearing was rearranged to 30th April 2020. Again to be held via zoom rather than in person.

85. By letter dated 28th April 2020 the claimant was invited to attend a disciplinary hearing on 4th May 2020 by Zoom. The meeting was with Andy Potter, the Regional Sales Manager and the claimant was informed of his right to be accompanied. It was with this letter that the claimant was provided with the three statements taken referred to above.

86. By e-mail dated 1st May 2020 the claimant advised that his union representative was unable to attend the disciplinary hearing on 4th May 2020. He requested the matter be postponed until the national lockdown was lifted. This request was refused by letter dated 4th May 2020 and the claimant was invited to a reconvened disciplinary hearing on 7th May 2020 via Zoom.

87. In the meantime, the claimant attended remotely the grievance appeal meeting with Luke Grout, Operations Director on 30th April 2020. The meeting was once again recorded and subsequently transcribed. We had the benefit of the transcript in the bundle which run to 11 pages to enable us to see what the claimant had said at the time about his mental health issues. On this occasion the claimant made more reference to his mental health. The claimant set out that he was having serious mental health issues at the time the incident happened. He was seeing the IAPT mental health team and had also been referred to the mental health crisis team in order to give the respondent the measure of the severity of the issue. He made reference to being stressed and his housing issues and that he wrote to Cheryl Francis copying in Mark Washington and had no response.

88. The claimant expressed but he was unable to satisfactorily discuss his doctor's note and to take up the conversation around mental health with his employer. Later in the meeting the claimant discussed the incident which was the subject of the disciplinary matter and stated that he had some mental health issues a lot of it being focused around OCD and how any member of staff in the environment at that time was going to be hugely worrying when you don't get a response. Subsequently when discussing the time management point he made reference to his e-mail to management around his "mental health issues at the moment for which I had been seeing the crisis team" and that the e-mail was ignored. His union representative when discussing the time management point explained but the claimant was suffering from money issues at the time and that the claimant didn't have the money for his bus fare and often had to borrow funds in order to be able to travel to work.

89. By e-mail dated 6th May 2020 the claimant's union representative requested a postponement of the disciplinary hearing taking place the next day as documentation had not been received in a timely fashion and he considered it inappropriate to proceed. By letter dated 7th May 2020 the respondent agreed to a further postponement and the disciplinary hearing was rescheduled to the 13th May 2020. The letter stated 15th May 2020 in error.

90. The disciplinary hearing commenced via Zoom on 13th May 2020 at 10.38am. The meeting was recorded and once again the tribunal had the benefit of a transcript from the meeting in the hearing bundle. When asked about the incident on 16th March 2020 the claimant advised that he had a heightened state of anxiety not the sort of usual anxiety that he might have on a normal Monday. The claimant told Andy Potter that at the time when he was served with notice from his landlord he "had depression and heightened anxiety and severe OCD" for which he was "accessing Ealing IAPT mental health service and also the crisis team" and he explained that this "was quite a serious level of intervention in terms of mental health". The claimant outlined that on the day in question his "anxiety was heightened" because the respondent "didn't pay any sick pay" and then if he was late his pay would be docked. The claimant accepted that he raised his voice and probably had a tone of voice that wasn't agreeable. This will "simply out of frustration" and he didn't have "any intention to be threatening" and "didn't see how it could have been threatening". He accepted the conversation had got a bit heated. The claimant also expressed that his reaction was "a bit out of character" and "a bit of heightened anxiety and frustration to usual" and that his behaviour was not ideal and he regretted not his actions but his tone which with the benefit of hindsight should have been calmer.

91. The meeting had to be adjourned at 12 noon as the claimant's union representative had another meeting to attend. It is not clear why given the allegation was gross misconduct the union representative was not available for a sufficient period to discuss the issues. It was agreed that the meeting would be postponed until the following day at 12:30 pm.

92. The meeting reconvened on the 14th May 2020 but there was an issue with the respondent using free video software and the call failed to approximately 1:00 PM. Again a transcript was provided though for the part of the call which took place. The parties on the claimant's side attempted to re-join unsuccessfully but then the claimant's union representative had alternative meetings that afternoon so was then unavailable. The claimant was told to join without his union representative at 2.30pm instead and both he and his union representative refused. The claimant was emailed at 3pm and told he had until 5pm to submit a written statement.

93. By letter dated 13th May 2020 Luke Grout dismissed the claimant's grievance appeal. The respondent enclosed a statement which was not sent to the claimant beforehand for his comments from his line manager

Ms Dhami. The letter confirmed that the claimant emailed Cheryl Francis on 16th of September 2019 about his mental health and that she had a conversation with the claimant as to why he had not submitted the GP form some weeks back and stressed the importance of submitting documents to the company so they had a better understanding. The letter confirmed that the GP form had still not been submitted to date.

94. The letter also confirmed that the HR department and the claimant's line manager Sue Dhami both noticed a change in the claimant's demeanour. The letter confirmed that she tried to meet with the claimant with a colleague being present but the claimant declined on the subsequent day. The claimant confirmed that he was OK and that meeting did not take place. The statement provided to the claimant run to two pages outlining other incidents where the claimant raised his voice and swore such that his line manager had concerns about his well-being as well as conversations about his general lateness. Ms Dhami did not give any evidence or provide a formal witness statement for the Tribunal but Cheryl Francis did give evidence of the conversation referred to in the letter with her and that Ms Dhami had expressed some concerns about the claimant's conduct with her and it was agreed that Ms Dhami would meet with him.

95. On 18th May 2020 the claimant asked for a copy of the recording of the disciplinary hearing via a USB memory stick. On 21st May 2020 Andy Potter attended the claimant's address and posted the USB memory stick and notes from the disciplinary into his letter box at his house. The claimant opened the door and engaged in conversation with him from a distance. The claimant makes no complaint about this matter.

96. By letter dated 22nd May 2020 the respondent delivered the outcome of the disciplinary hearing to the claimant. Andy Potter found the claimant's explanations "unsatisfactory because it is not acceptable that you conducted yourself and acted in the manner you did." Andy Potter concluded that the claimant contradicted himself on some occasions during the disciplinary hearing citing examples. He concluded that "ultimately on the balance of probabilities, I believe that you did use extremely unprofessional language towards a company director and acted in a manner that was offensive and could be construed as threatening even though you did not resort to physical violence. This was done in front of other members of staff and showed a complete lack of respect for Paul Herting and for the colleagues present at the time."

97. In dealing with the points the claimant raised as to his mental health he explained "I have taken in to account the following mitigating circumstances; we discussed your mental health and the steps you are taking in that regard and we discussed the difficult personal circumstances. I absolutely commend you for addressing those matters and I can empathise with your current difficult circumstances. I have also taken into account your length of service and disciplinary record to date.

98. He went on to conclude “Having reflected on the matter, reviewed the witnesses statements and taking all relevant matters on board, I have concluded that FP Herting cannot accept such volatile/aggressive behaviour within the workplace. I believe that the behaviour displayed on that day was threatening and your lack of respect towards a Director of the business and towards members of staff present was totally unacceptable. I am concerned that during this disciplinary process you could not recall the details of the events and nor did you express remorse or regret your actions. I am concerned that you have not taken on board the seriousness of the matter and you have not taken full responsibility for your behaviour and for the way you made your colleagues feel. I feel I cannot guarantee that this type of behaviour would not occur again, and this is not something we can risk happening again in the future. As a business we have a duty of care towards our staff and your behaviour is jeopardising out (sic) ability to protect our workforce appropriately. The behaviour displayed towards the director of the business was completely unacceptable and cannot be tolerated.”

“I consider your actions to be gross misconduct/gross breach of trust, resulting in the company losing faith in your integrity in your role of telesales operator. As a consequence, I have decided you have been summarily dismissed i.e. without notice or notice pay, from today's date.”

99. The claimant was given the right of appeal within five working days. By e-mail dated 26th May 2020 the claimant appealed against the disciplinary outcome. No grounds were given at that stage. By reply of e-mail Cheryl Francis requested that the claimant outline his grounds for appeal so that the hearing could be arranged. The claimant replied on the 29th May 2020 stating that he did not agree that he had contradicted himself and he disputed he was threatening to Paul Herting in anyway and that he felt Paul Herting was aggressive in his body language to him. He also queried discrepancies in his pay between the suspension rate and the furlough rate.

100. By letter dated 29th May 2020 the claimant was invited to attended an appeal hearing on 4th June 2020 via zoom with Mark Washington, CEO. By letter dated 1st June 2020 the respondent rescheduled the appeal hearing to 5th June at 10:30am due to unforeseen circumstances concerning the chair’s availability. The claimant then subsequently requested a postponement on 4th June 2020 so that he could be accompanied by his union representative. By letter dated 4th June 2020 the respondent confirmed that the disciplinary appeal meeting was rearranged to 8th June 2020. On all occasions the claimant was given the right to be accompanied.

101. The claimant attended the hearing of his appeal against disciplinary on 8th June 2020 that was once again accompanied by a GMB union representative albeit a different representative on this occasion. Again, the meeting was recorded and the tribunal had the benefit of a transcript of the meeting in the bundle which ran to 17 pages.

102. During the course of the appeal meeting the claimant made reference to "being in a very heightened state of anxiety during the coronavirus, as I mentioned in the hearing one of my children had to go to A&E with breathing issues shortly before this event. I was quite stressed about that and stressed about adequate protections being taken within that context." He mentioned that he had these mental health issues which he reported the company. Mark Washington confirmed he had no knowledge that the claimant was suffering from depression or mental health issues. The claimant explained that cleanliness heightened one's anxiety. The claimant also explained in that meeting that he had sent Cheryl an official e-mail stating had these issues and he was getting medical support which was not acknowledged. His union representative intervened to raise reasonable adjustments and that there had been a failure to make reasonable adjustments in breach of the Equality Act.

103. By letter dated 12th June 2020 Mark Washington dismissed the claimant's appeal. He provided a detailed four page letter explaining his rationale and also responding to the additional points concerning the company raised as part of the appeal meeting not directly relevant to the incident in question. Mark Washington concluded that on the balance of probabilities the claimant did act in an entirely unsatisfactory and unprofessional manner. He also noted that the claimant was equally abusive to a second manager SL when leaving the building. He addressed the medical condition the claimant had spoken about and indicated that the claimant was spoken to by HR but never came forward with the information from his GP and failed to raise this as an ongoing problem. As such, the company had not been aware of it and thus unable to offer help or changing working practises accordingly. The decision was final and the claimant had exhausted the respondent's appeal procedures.

104. The claimant commenced ACAS early conciliation on 30th June 2020 and the ACAS EC certificate was issued on 8th July 2020. The claimant submitted his claim to the employment tribunal for unfair dismissal and disability discrimination on 29th August 2020.

Conclusions

Knowledge of disability

105. There was no evidence that the claimant had at any time during employment prior to 18th September 2019 informed the respondent that he had anxiety, depression or OCD which are relied on in this case as disabilities. Whilst he had a fit note detailing his issues this was never submitted to the respondent. In the email of 18th September 2019 he informed the respondent for the first time that he had severe depression and anxiety. There was no reference to OCD, the first time this is mentioned is the grievance appeal meeting on 30th April 2020. It was this occasion when the claimant first went into sufficient detail about his

mental health issues of anxiety and depression and that he had been seeking treatment and was having significant mental health issues.

106. We remind ourselves that the respondent had to either know about the disability or it could reasonably be expected to know (constructive knowledge) that the claimant was disabled at the relevant time, not whether it could have done more. The latter certainly being apparent in a case like this but that is not the test.

107. In order for the respondent to have constructive knowledge it must have knowledge of all three elements of disability. It must know about the mental impairment and that it is substantial and has a long term adverse effect on the claimant's ability to carry out normal day to day activities. We find that it had knowledge of a mental impairment back in September 2019 when the claimant sent the email on 18th September 2019 but not that it was substantial and long term. However, it is clear that by 30th April 2020 the respondent ought to have known from the information it had that the claimant was disabled and thus knew by the time of the claimant's subsequent dismissal on 22nd May 2020.

108. It knew that the claimant had severe depression and anxiety since September 2019 and had this had it for at least 8 months and given the severity that it was unlikely to change overnight. It was therefore likely to have lasted (even if it had not actually done so by that time) for 12 months or more. It knew reasonable adjustments were recommended by the GP even if it never knew the detail of those as it did not make any further enquiries. It knew that the claimant was receiving treatment and had even been referred to the crisis team. It had concerns about the claimant's behaviours exhibited at work and this had been flagged by his line manager but nothing further done about it. It had in our view constructive knowledge of all of the elements required for disability by 30th April 2020 but we find that prior to this the respondent did not have actual or constructive knowledge.

Unfair dismissal

109. Turning to the other issues in the case our conclusions are as set out below:

What was the principal reason for dismissal and was it a potentially fair one in accordance with s.98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to Mr Hegedus' conduct, namely his conduct towards Mr P Hertings on 16 March 2020 and toward Ms S Luckett on the same date.

110. The respondent dismissed the claimant for his conduct on 16th March 2020. It did not allege that part of the reason for the dismissal was the claimant's conduct towards Ms S Luckett on that day at the time and this allegation was not part of the disciplinary process.

111. We do however accept the respondent's assertion that the reason for dismissal was the claimant's conduct. The claimant has not advanced an alternative reason for his dismissal just that he considers it to be unfair as set out below. It is clear to us that the reason the claimant was dismissed was for conduct reasons namely because of the incident on the 16th March 2020 for which he was subsequently subject to a disciplinary process.

112. The claimant excepted he did swear at Paul Herting and respondents had evidence to conclude on the balance of probabilities but the claimant was verbally aggressive towards the director. We are satisfied that conduct was the reason for the dismissal.

<u>If so, was the dismissal fair or unfair in accordance with ERA s.98(4) and, in particular, did the respondent in all respects act within the so-called, "band of reasonable responses"? Mr Hegedus will say that the decision to dismiss was outside the range of reasonable responses because the respondent should have taken into account what led to his outburst, that his outburst was caused by his disability and that in the circumstances, a lesser sanction would have been appropriate.</u>

113. We remind ourselves that the tribunal must not substitute its view for that of the respondent. We are not here to establish the guilt or otherwise of the claimant. That is not the legal test. The test is as set out in *BHS v Burchell [1980]* which requires a three stage test. The respondent has to genuinely believe that the claimant was guilty of misconduct and have reasonable grounds for that belief which is based on a reasonable investigation. Additionally, the tribunal must consider whether dismissal was within the range of reasonable responses open to a reasonable employer in accordance with *Iceland Frozen Foods v Jones [1982].*

114. Taking each step in turn, there was evidence from which the respondent could conclude that the claimant was guilty of misconduct. There were contemporaneous witnesses to the incident and three witness statements taken in addition to speaking to the claimant himself about the matter. The claimant has accepted that his behaviour was both unacceptable and he swore. We therefore find that the respondent did hold a genuine belief that the claimant was guilty of misconduct.

115. We have considered the investigation. At the time the claimant did not raise as part of his investigation he considered his behaviour was linked to his mental health condition. As set out above, the claimant did not raise this sufficiently as part of the disciplinary process as a whole. This was considered and discounted before the decision to dismiss was taken but no occupational health guidance was sought. Had the claimant expressly raised this as part of the process from an early stage we may have concluded that this point was not sufficiently investigated without medical guidance.

116. The respondent took witness statements from witnesses and held an investigation meeting with the claimant. The investigation has to be considered within a range of reasonable responses and the Burchell test requires adequacy of the investigation. The conduct itself not being in dispute in this case, just the seriousness and the reasons for it. We conclude that the respondent had reasonable grounds for that belief based on reasonable investigation.

117. We are conscious that where an employee's apparent ill- health may be contributing to behaviour that the employer considers amounts to gross misconduct, the failure to investigate that ill-health before dismissing the employee may render the dismissal unfair. Here, the claimant alleges that the decision to dismiss was outside the range of reasonable responses because the respondent should have taken into account what led to his outburst, that his outburst was caused by his disability and therefore lesser sanction was appropriate.

118. The claimant raised limited matters concerning his mental health during the disciplinary process, the majority of which was raised during the grievance process. There is passing reference in the disciplinary process to the claimant having heightened anxiety on the day in question. Andy Potter considered the claimant's explanations as part of mitigation but nevertheless discounted this is sufficient explanation for the behaviour for which the claimant was dismissed. Had the respondent failed to consider this at all, we would have considered dismissal to be unfair.

119. We have considered whether a reasonable employer in this position would have requested occupational health reports before making the decision to dismiss and we are satisfied having reviewed all the evidence in particular the minutes of the meetings that despite having union representation the claimant did not sufficiently link his mental health issues as the reason for the conduct. It mentioned more in passing. When considering whether dismissal falls within the range of reasonable responses it matters not that this tribunal would have sought occupational health advice before dismissing the claimant for which certainly the respondent could be criticised but we cannot say no reasonable employer would fail to get that occupational health advice when considering matters a whole.

120. We have also taken into account the ACAS Code of Practice on discipline and grievance procedures (the Code) which applies to misconduct cases. The Code requires that before dismissing employee for misconduct an employer should investigate the issues, inform the employee of the issues in writing, conduct a disciplinary hearing or meeting with the employee, inform the employee of the decision in writing and give the employee a right of appeal. We are satisfied that all of these stages and thus the Code have been complied with by the respondent.

121. There were two matters that caused the tribunal some concern and these were the decision of the respondent to proceed with the reconvened disciplinary hearing on 14th May 2020 when there was a technology failure (and this was the respondent's error) and the remainder of the meeting was held in the claimant's absence. The second issue was that the witness statement from the claimant's line manager was not provided to him in advance for his comments. We considered these matters and how they could have impacted on the fairness in this case.

122. We are conscious that the video technology was relatively new in May 2020 but more critically that there had been a meeting on 13th May and a shorter meeting on 14th May before a decision was reached. The claimant was given the opportunity of putting additional points in writing and was represented by his union throughout.

123. We are satisfied that in connection with the conduct of the disciplinary hearing when considering the Code the respondent had sufficient time to explain the complaints against the claimant and go through the evidence that had been gathered and secondly that the claimant had had a reasonable opportunity to ask questions, present evidence and call any relevant witnesses.

124. With regard to the witness statement, this was not directly relevant to the allegations which the claimant accepted in part but more the subject matter of his grievance and indeed was a critical piece of evidence in our determinations given that it was contemporaneous evidence of the claimant at the time. We do not find that the case against the claimant turned on that statement for the purpose of the disciplinary hearing and therefore its absence did not render the process unfair.

125. The tribunal has to consider any procedural flaws that could affect fairness in context, in light of the whole facts and circumstances and ask whether the claimant was unduly prejudiced. We do not consider this to be the case in this matter as the faults did not have an impact on the respondent's decision to dismiss directly and therefore are unlikely to affect the reasonableness of the procedure followed.

126. Also, when considering whether dismissal fell within the range of reasonable responses it is clear from the disciplinary outcome letter and oral evidence in this case that alternatives to dismissal were considered by the respondent. In addition, the respondent considered the claimant's length of service and his prior disciplinary record, the mitigating factors he did raise and that whilst he accepted the offence, he had not shown sufficient remorse. Whilst this tribunal may not have dismissed the claimant for the allegations (the panel having split views on this), we cannot in any event substitute our view and we cannot say that no reasonable employer would have done so. Therefore, dismissal was within the range of reasonable responses open to the respondent in this case.

127. Given all of the above we do not consider that the claimant was unfairly dismissed. We consider that given all the circumstances of this case including the size and administrative resources of the respondent, the respondent acted reasonably in treating the claimant's misconduct as sufficient reason for dismissing him and as such the claimant's claim for unfair dismissal is not well founded and is dismissed.

Discrimination arising from disability – s15 Equality Act 2010

128. As set out above it is conceded by the respondent that the claimant was disabled at the relevant time. We have however found that the respondent did not have knowledge that the claimant was so disabled until 30th April 2020 or it ought to have done. Knowledge is required for a s15 complaint as a respondent cannot be liable for discrimination arising from disability under section 15 of the Equality Act 2010 and less it knew (or ought to have known) about the claimant's disability.

129. As set out above, we have found that the respondent has shown that it did not know or could not reasonably be expected to know that the claimant had a disability until 30th April 2020 in respect of anxiety/depression but not OCD. Much of the incidents the claimant relies upon for his section 15 complaint predate this date as to the finding about knowledge so the respondent cannot be liable for discrimination arising from disability as a result. We have however set out below each allegation in turn as to whether we accept they occurred as a matter of fact, whether the respondent had knowledge at the relevant time and then whether such treatment was because of the something the claimant relies upon before finally considering whether any unfavourable treatment was a proportionate means of achieving a legitimate aim.

After Mr Hegedus provided a fit-note from his GP on 22 July 2019, did his line manager, (Ms Sue Dhami) grill him about his condition and ask him to disclose sensitive medical information in front of others? If so, did such amount to unfavourable treatment and was such unfavourable treatment caused by the fit note, (the something arising) and if so, did the fit note arise in consequence of his disability?

130. As set out in our findings of fact, we did not find as a matter of fact that the claimant's line manager grilled him about his condition or asked him to disclose sensitive medical information in front of others. Further, the claimant never provided the fit note to the respondent on 22nd July 2019 or indeed at any time prior to his dismissal. As a matter of fact, this allegation did not occur and therefore cannot be relied on by the claimant in this case. Further, the date of this incident predates the respondent's constructive knowledge of disability and had the claim not failed as a matter of fact, it would have failed on the issue of knowledge of disability.

Did the respondent's letter to Mr Hegedus dated 5 September 2019 detailing his poor timekeeping over a period of six months and threatening him with disciplinary action amount to unfavourable treatment? If so, was that letter

because of his poor timekeeping, (the something arising) and if so, did his poor timekeeping arise in consequence of his disability, in that it was as a result of high stress levels heightening his OCD, meaning that he would have difficulty in leaving home because he had to check so many things, (for example that the iron was off or the front door properly closed) and that his depression caused him to lack motivation?

131. The claimant did receive a letter about his poor timekeeping and this is not in dispute. However, at the time of the letter the respondent did not have knowledge actual or constructive of the claimant's disabilities. At the time the letter was sent the claimant had never made reference to having OCD or depression. As such the complaint of discrimination arising from disability in respect of the time keeping letter must fail.

132. In any event, there was little evidence from the claimant or indeed medical evidence that the claimant's lateness was caused by his lack of motivation from his depression or indeed having to double check things before leaving the house in line with the examples given. Indeed, there was evidence that they claimant's lateness arose from his personal circumstances such as at times his inability to meet the fare to attend work or because he had housing appointments or felt generally unwell. There was no evidence the feeling unwell was related to any of his disabilities.

Did the respondent treat Mr Hegedus unfavourably as follows:

a. Cheryl Francis not responding to his email of 18 September 2019;

133. As set out in our findings of fact, we did not find as a matter of fact that Cheryl Francis did not respond to his email of 18th September 2019. She did not respond in writing but we have found that a discussion did take place. As a matter of fact, this allegation is not made out and therefore cannot be relied on by the claimant in this case. Further, the date of this incident predates the respondent's constructive knowledge of disability and had the claim not failed as a matter of fact, it would have failed on the issue of knowledge of disability.

b. Cheryl Francis not replying to Mr Hegedus' request for an acknowledgement of his paternity leave request form on 23 September 2019;

134. As set out in our findings of fact, we did not find as a matter of fact that Cheryl Francis did not reply to the claimant's request for an acknowledgement of his paternity leave request form on 21st September 2019 as discussions did take place and the claimant replied to those discussions in writing. As a matter of fact, this allegation is not made out and therefore cannot be relied on by the claimant in this case. Further,

the date of this incident predates the respondent's constructive knowledge of disability and had the claim not failed as a matter of fact, it would have failed on the issue of knowledge of disability.

c. Mark Washington ignoring his complaint that he had not received an acknowledgement of his paternity leave request;

135. As set out in our findings of fact, we did not find as a matter of fact that Mark Washington ignored the claimant's complaint that had not received an acknowledgement of his paternity leave request. We accepted Mark Washington's evidence that he did not ignore it, he passed it on to HR and indeed that discussions took place about the matter thereafter between the claimant and HR as a result. As a matter of fact, this allegation is not made out and therefore cannot be relied on by the claimant in this case. Further, the date of this incident predates the respondent's constructive knowledge of disability and had the claim not failed as a matter of fact, it would have failed on the issue of knowledge of disability.

d. Cheryl Francis obfuscating and stating erroneous facts in a meeting with Mr Hegedus to discuss his pay whilst on paternity leave, (Mr Hegedus was unable to give me the date of this meeting, but Mrs Packham was confident the respondent would have no difficulty in identifying it), and

136. As set out in our findings of fact, we did not find as a matter of fact that Cheryl Francis obfuscated and stated erroneous facts in the meeting with the claimant to discuss his pay whilst on paternity leave. The date of this meeting was found to be in January or February 2020. We did not find that Cheryl Francis obfuscated or stated erroneous facts in that meeting but did accept that the communication around paternity leave and entitlements were poor and it should have been in writing for all employees. As a matter of fact, this allegation is not made out and therefore cannot be relied on by the claimant in this case. Further, the date of this incident predates the respondent's constructive knowledge of disability and had the claim not failed as a matter of fact, it would have failed on the issue of knowledge of disability.

e. Ms Sandie Kedhial not responding to Mr Hegedus' frequent requests for clarification as to whether he had been placed on furlough or was suspended?

137. As set out in our findings of fact, it was accepted that the claimant was erroneously told that he was on furlough and that did cause confusion. He raised this by email at the end of March and he requested payslips in April 2020. The correspondence from the respondent at the time makes reference to both suspension and furlough on occasion. We do not accept from the evidence that the claimant made frequent requests for clarification as to whether he had been placed on furlough or was suspended as alleged. As a matter of fact, this allegation is not made out

and therefore cannot be relied on by the claimant in this case. Further, the date of this incident predates the respondent's constructive knowledge of disability and had the claim not failed as a matter of fact, it would have failed on the issue of knowledge of disability.

138. Further, we do not accept did not responding to any request was because of communications from the claimant (the something arising) there is no medical evidence to suggest that the claimant needed to send communications as a consequence of his anxiety depression or OCD. There was no pay differential between being furloughed or suspended as at that time the respondent had furloughed staff on full pay not at 80% pay. This therefore made no material difference to the claimant, either way he was not required to attend work and he was paid the same regardless.

<u>If so, was such because of communications from Mr Hegedus, (the something arising) and were such communications a consequence of his anxiety, depression and OCD?</u>

139. As set out above the claimant has failed to establish this in any event.

<u>Dismissing Mr Hegedus was plainly unfavourable treatment. Did the respondent dismiss Mr Hegedus' because of his outburst to Mr P Hertings and Ms S Luckett on 16 March 2020? If so, was his outburst a consequence of his disability?</u>

140. It is not in dispute that the claimant was dismissed, the claimant was dismissed by letter dated 22nd May 2020. Dismissal is clearly unfavourable treatment and at the time of the dismissal the respondent had knowledge of the claimant's disability. As set out above, we accept that the claimant was dismissed because of his outburst to Mr Hertings on 16th March 2020. This was the reason for his dismissal. The issue for the tribunal in this case was whether his outburst was as a consequence of his disability.

141. The claimant did not provide any medical evidence to support the assertion that his outburst was as a consequence of his anxiety, depression or OCD. The claimant's evidence at the time was that he suffered from heightened anxiety at the time. At no point during the disciplinary proceedings did he say that his reaction/outburst was as a consequence of his disability. The only contemporaneous reference was to anxiety and that he was anxious at the time.

142. The context in which the incident occurred has to be considered. It was early on in the pandemic when the UK population at large was anxious about the threat. Cases were rising and both the consequences of getting the illness and how it transmitted were not entirely clear. Many people without a disability equally were anxious about the situation particularly those using public transport to travel to work or those with an underlying medical condition that could have made them more at risk.

143. Here we are not dealing with the most common example of treatment because of something arising consequences disability which relates to unfavourable treatment because of a period of disability related absence. The situation is more nuanced. The EHRC Code sets out that the consequences of a disability including anything which is the result, effect or outcome of a disabled person's disability. The EHRC Code gives the example of a woman who is disciplined for losing her temper at work, whose behaviour is out of character as a result of severe pain caused by cancer of which her employer is aware. The Code states that the disciplinary action would be unfavourable treatment because it is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the something, that is the loss of temper that led to the treatment and her disability (paragraph 5.9 EHRC Code).

144. This case is not dissimilar as the claimant was disciplined for his outburst (which could be said to be losing his temper at work) and we have evidence that this behaviour is out of character to a degree. The evidence of the claimant's line manager points to other instances where he has ranted and raved at work. Indeed, during the course of the disciplinary process when HR tried to go through the claimant's comment on the minutes of the meeting the claimant lost his temper and hung up. The claimant did have a clean disciplinary record until this issue arose.

145. The tribunal does not however have any medical evidence to establish the causal link between the disability and the outburst. The only evidence comes from the claimant himself as part of his oral evidence. At the time prior to dismissal the claimant did not consider that his outburst was as a consequence of his disability as he did not raise it despite being represented. It is difficult for the tribunal to assess the change in the way the case is put now and whether this is with the benefit of hindsight and passage of time or in order to make his case. We have in mind the case of Hall v Chief Constable of West Yorkshire Police [2015] which clarified the approach that applies as there only has to be a loose connection between the something and the underlining disability. There must however be a loose connection and the tribunal is not convinced that there was a link between the outburst and the disability and this would have been assisted by some form of medical evidence. If the claimant had raised this at the time prior to dismissal that there was a causal connection then we may have accepted this and considered that the onus would have been on the respondent to explore this before dismissal by way of occupational health referral or other medical report but he did not do so despite being represented throughout by the union.

146. There is nothing additional to shift the burden of proof. The panel was split as to whether there was a sufficient link between the claimant's

anxiety, his outburst and his employer's actions towards him. Had he not been anxious and suffering from OCD then he may not have been angered by the decision not to work from home. On balance, we find that the claimant has failed to establish the causal link between the outburst and his disability but the majority felt that there was insufficient evidence to make the link.

Insofar as any of the above allegations of disability related discrimination may be upheld, has the respondent shown that the unfavourable treatment in question was a proportionate means of achieving a legitimate aim?

147. For the tribunal, the question of whether the dismissal amounted to discrimination arising from disability was so finely balanced that we have gone onto consider in any event whether the respondent has shown that the unfavourable treatment of dismissal was a proportionate means of achieving a legitimate aim for completeness.

148. Here the respondent set out its legitimate aim in its response to the claim as being the legitimate aim of its legal duty to safeguard the health and welfare of its staff and protect them from the actions of the claimant which amounted to threatening and intimidating conduct. We consider this health and safety related aim to be a legitimate aim worthy of recognition of such.

149. To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so. It is for the tribunal to balance the reasonable needs of the business against the discriminatory effect of the employer's actions on the employee. The tribunal must undertake a fair and detailed assessment of the employer's business needs and working practices. Here there is the additional consideration of the other employees. We are balancing the discriminatory effect of the actions against the needs of the respondent and the other staff.

150. When determining whether or not a measure is proportionate we can consider whether or not a lesser measure could have achieved the employer's legitimate aim. We should consider whether the measure taken was proportionate at the time the unfavourable treatment was applied. We are not sure what other measures the respondent could have adopted to achieve that aim. Action short of dismissal would have left the respondent with the risk of further outbursts. We know that the claimant was receiving treatment and had been for some time at the time of the incident in question so whilst not advanced by the claimant, there is no evidence to suggest a period of time and treatment would have removed that risk. There was evidence that this was not an isolated outburst. Indeed, the claimant lost his temper when he was at home with HR and hung up the phone during the disciplinary process. There was evidence there had been ranting at work previously.

151. A final writing warning is a lesser sanction but it would have not met the legitimate aim of protecting the staff as the claimant would still have been at work. Dismissal was not the only option open to the respondent and it did consider other sanctions but expressly declined them on the grounds of the need to protect other employees. It set out that the claimant had not convinced the respondent that it would not reoccur and the fact it was not acknowledged as to the seriousness or that the claimant was not sufficiently remorseful were all factors in why the respondent felt the risk was too great.

152. The burden of establishing a legitimate aim is on the respondent and it is not a case of a margin of discretion or range of reasonable responses test and we are satisfied that that has been met given the evidence in this case. The decision was contemporaneously set out in detail with the rationale for the decision taken and why alternatives were not taken. It was a proportionate as the aim is legitimate and there was no other less discriminatory way that the respondent could meet that aim with any certainty other than dismissal. We have considered whether there were other options even if these were not expressly raised by the claimant other than that a lesser sanction would have been appropriate. We do not agree for the reasons stated.

Alternatively, has the respondent shown that it did not know and could not reasonably have been expected to know, that Mr Hegedus had the disability?

153. We have dealt with the issue of knowledge already.

Failure to make reasonable adjustments s22/23 Equality Act 2010

Did the respondent know and could it not reasonably have been expected to know that the claimant was a disabled person?

154. As set out above we concluded that the respondent knew or ought to have known that the claimant was a disabled person by 30th April 2020. A respondent cannot be liable for a failure to make reasonable adjustments if it did not know or could not be reasonably expected to know that the claimant was a disabled person. Further, in reasonable adjustment cases the respondent also has to have knowledge of the disadvantage suffered. Where this is relevant to the issues below we have outlined our conclusions on the knowledge of disadvantage suffered below.

PCP1: Did the respondent have a Provision, Criterion or Practice, (PCP) of warning employees about poor timekeeping and threatening disciplinary action?:

155. The letter sent to the claimant concerning his time keeping was sent on 5th September 2019. This was before the respondent had knowledge of the claimant's disability and therefore the duty to make reasonable adjustments did not arise. Had knowledge not being an issue then we

would have accepted the claimant did have such a PCP as warning an employee about timekeeping is a standard practice where there is an issue.

a. If so, did any such PCP put Mr Hegedus at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that a person with anxiety, depression and OCD would be less likely to comply with the respondent's timekeeping requirements?

156. If we had gone onto consider this element of the issues, again this would have been more difficult for the tribunal to assess as there was no medical evidence to support the suggestion that those with anxiety, depression or OCD are less likely to be able to attend work on time. Indeed, we have found that the claimant's lateness was often for reasons unconnected with his disability and as such any employee without a disability with this record of lateness would have received a warning letter. Indeed, the claimant was late on subsequent occasions but no disciplinary action was taken against him. Without any evidence to support the assertion that those with anxiety, depression and OCD would find it more difficult to comply with timekeeping the claimant would in any event have failed to establish his case.

b. If so, did the respondent know or could it reasonably have been expected to know that Mr Hegedus was likely to be placed at any such disadvantage?

157. If we had gone onto consider this element of the issues, then knowledge would have been an issue. The claimant never raised any disadvantage with the respondent. The respondent was unaware of the claimant's disability and this would have included any issues with attending work on time. The claimant did not at any point in the reasons for his lateness state that he was late because he had a lack of motivation from his depression or that his OCD required him to check things multiple times and he missed the bus as a result. The respondent did not know he was disabled but also did not know about the disadvantage and therefore the duty to make reasonable adjustments would not have arisen in any event.

c. If so, were there steps that were not taken that could have been taken by the respondent to avoid such disadvantage? Mr Hegedus will argue that such a reasonable adjustment would have been to have afforded him greater latitude and not to have warned him.

158. If we had gone onto consider this element of the issues we would have concluded that the adjustment sought was not reasonable. The claimant was already given a large latitude and was only warned about improving his lateness by letter. He was not disciplined for being late persistently as the respondent could well have done given the number of occasions.

In our view, the respondent already afforded him great latitude and it would not have been reasonable to not warn him and allow his timekeeping to go on unchecked. Sending a letter was a simple step which served as a reminder. We may have taken a different view had they commenced disciplinary proceedings against him before giving that warning if the other elements of the test were satisfied.

PCP2: Did the Respondent have a PCP of hand delivering documents in relation to disciplinary process' during lockdown?:

159. This PCP relates to the hand delivery of documents by Cheryl Francis on 8th April 2020. The claimant confirmed that he made no complaint in relation to the hand delivery of documents by Andy Potter later in the process on 21st May 2020. The respondent did have a PCP of delivering documents in relation to the disciplinary process during lockdown as the respondent did so on two occasions. This was only when alternatives failed. At the time of the allegation relied on by the claimant (which is only the incident on 8th April 2020) the respondent had no knowledge of the claimant's disability and therefore the duty to make reasonable adjustments did not arise.

a. If so, did such PCP put Mr Hegedus at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that the hand delivery of documents would heighten the symptoms of a person with anxiety, depression and OCD, particularly during a time when the country was in lockdown?

160. If we had gone onto consider this issue, it is hard to understand why the claimant only suffered a substantial disadvantage when Cheryl Francis carried out the delivery. If the manner of the delivery itself was the issue rather than the person carrying it out (as claimant confirmed in evidence) then the substantial disadvantage would have applied on each occasion as on both occasions, documents were hand delivered through the letterbox. If it was the method of delivery itself in the time of the pandemic then both occasions would have been an issue for the claimant. The claimant did not open the door to Cheryl Francis and had no interaction with her. She did not attempt to engage with him simply posting the documents through the letterbox. The claimant would have been more disadvantaged in the process if he had not received the documents than simply receiving them through his letterbox. The fact that Cheryl Francis hand delivered the letters was more of the issue than the PCP itself, it was the nature of the personalities. The claimant had raised a grievance about her and there was thus a personality conflict which was not connected with his disability.

b. If so, did the respondent know or could it reasonably have been expected to know that Mr Hegedus was likely to be placed at any such disadvantage?

161. The respondent required knowledge of the substantial disadvantage at the relevant time but this is not something the claimant ever made the respondent aware of. Even if they had had knowledge of the disability at the time of the delivery in April 2020 the respondent would not have known that hand delivering documents would cause a substantial disadvantage particularly in circumstances where it is not clear even after hearing the evidence what substantial disadvantage the claimant relies on other than heightening his symptoms.

    c. <u>If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The reasonable adjustment contended for by Mr Hegedus is that the respondent should have arranged for such documents to be delivered either by the Post Office or a courier and not by his manager, Cheryl Francis.</u>

162. If we had gone to consider this issue, the difficulty for the claimant is that the respondent did try to have the documents delivered by the post office but they were not accepted by him on more than one occasion. The claimant confirmed he neither had a laptop nor printer at home. In the circumstances of a pandemic when there has been a postal delivery failure it is not clear what else the respondent could have done in this situation. It was entirely reasonable having taken safety precautions and not attempted to engage in discussions or ring the doorbell that the respondent should hand deliver the documents to ensure that the claimant had what he needed in a timely manner.

<u>PCP3: Did the respondent have a PCP of dismissing employees for inappropriate conduct such as that alleged against Mr Hegedus?:</u>

163. This fell within the period when the respondent had knowledge of the claimant's disability and thus the duty to make reasonable adjustments arose. We considered this matter and whether the dismissal of the claimant as a one-off decision could amount to a PCP. There is no practice, policy or provision that provides that the claimant must be dismissed. It is not the case that all one off decisions made by employers during the course of dealings with a particular employee amount to PCP's.

164. We have exercised some caution as the PCP was formulated late and by a litigant in person (even if this was with judicial assistance) but there was no evidence that any other employees had been or would be dismissed for inappropriate conduct as the claimant was. A PCP can include a one off management decision however case law is clear that a one-off act in relation to a particular employee may amount to a PCP it will not do so unless there is some form of continuum in the sense of how things generally are or will be done by the employer. No PCP will be established in relation to a one off act in an individual case where there is no indication that the decision would apply in future.

165. As this relates to the treatment of the claimant specifically we conclude that this is not capable of amounting to a PCP in this case and therefore the claim in respect of this PCP must fail.

a. If so, did any such PCP put Mr Hegedus at a substantial disadvantage in relation to any relevant matter in comparison with persons who are not disabled at any relevant time in that a person with anxiety, depression and OCD is more likely to behave inappropriately, particular in the circumstances which led to Mr Hegedus' outburst?

166. If we had gone to consider this issue, the same issue as with regards the section 15 complaint would arise and that the claimant has not established that a person with anxiety depression and/or OCD is more likely to be dismissed for behaving appropriately. There's no evidence to support this and thus to make an effective comparison with. Plenty of people in work have such conditions and do not have outbursts and there is no evidence to suggest that those that have those conditions are more likely to behave inappropriately. As such the claim could not succeed.

b. If so, did the respondent know or could it reasonably have been expected to know that Mr Hegedus was likely to be placed at any such disadvantage?

167. The respondent would have to have knowledge of the disadvantage and had the claimant provided this as part of the disciplinary process (which again he did not) then we may have concluded that the respondent ought to have known that. If we do not have any evidence of the disadvantage before us even at the hearing stage then the respondent equally did not have that knowledge before it.

c. If so, were the steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The reasonable adjustment contended for is that the decision to dismiss not be made.

168. If we had gone on to consider this issue, we would have to be satisfied that the decision to dismiss should not have been made as a reasonable adjustment. If the claimant had established both the PCP and the substantial disadvantage (and he has not done so) it is clear that not dismissing him would have avoided the disadvantage of being dismissed. So this was a step that could have been taken to avoid the disadvantage.

Insofar as any of the above PCPs are found to have existed, such disadvantage established and such adjustment found to be possible, would it have been reasonable for the respondent to have made those adjustments?

169. For completeness when considering reasonableness in respect of the above alleged PCP's if the case had been established then we would

have concluded as follows based on the general principles of reasonableness in these cases. The EHRC Code has a list of factors which the Tribunal may take into account when considering reasonableness but the reasonableness of any step an employer may have to take is an objective one and will depend on the circumstances of the case. The adjustment would have to be effective to avoid the disadvantage.

170. We have already considered that giving the claimant more latitude as to timekeeping would not have prevented a warning being given. There was no disadvantage as no formal proceedings were taken against him and a great deal of latitude was already given to him. Removing any start time from the claimant or being more flexible would have disrupted the employer's business activities as there would be no guarantee when or if the claimant would arrive at work. We do not consider that to be a reasonable adjustment.

171. We have already considered that the respondent did attempt to use other delivery methods before choosing to hand deliver a letter to the claimant's home. It could have deployed another individual to do the delivery but the claimant had not made them aware of the disadvantage. We also heard evidence that there was a skeleton workforce at work at that time as the majority had been furloughed so there was a limited pool to select from. Given the findings and conclusions it would not have been reasonable for the letter to be delivered any other way when the respondent had already tried unsuccessfully to do so before choosing to deliver in person.

172. With regards to not dismissing, had this been a PCP with knowledge of the disadvantage then it may have been reasonable to give the claimant a second chance with sufficient support. This very much feeds into the unfair dismissal claim as there were other options open to the respondent but in an unfair dismissal claim we cannot substitute our view whereas with reasonableness it is objective. We do however consider the same points the respondent raised for the s15 claim and consider these as part of reasonableness. Is it reasonable to make that adjustment in circumstances where to do so could breach their legal duty to others or put others at risk? We would have concluded that this would not have been reasonable as this is not the only time the claimant had raised his voice from the evidence and this makes the risk too great. On balance even if this adjustment had met all the thresholds of the legal test we would not have considered it reasonable to make that adjustment for these reasons.

Time limits/Limitation

173. There was no issue with the time limits for the unfair dismissal claim but depending on our findings there could potentially be issues with the discrimination complaints.

Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.

174. Given that none of the claimant's complaints have succeeded we do not need to give further consideration to time limits.

175. The decision of this employment tribunal is therefore that the claimant was not unfairly dismissed, the claimant did not suffer from discrimination arising from disability and the respondent did not fail to make reasonable adjustments for the reasons set out above.

176. The matter was provisionally listed for a remedy hearing which is now vacated and the claims are dismissed.

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Employment Judge King

Date: 12/09/2022

Sent to the parties on:

14 September 2022

For the Tribunal Office