



EMPLOYMENT TRIBUNALS

Claimant: Mr R Cardinale

Respondent: The Commissioner of Police for the Metropolis

Heard at: East London Hearing Centre (by CVP)

On: 8, 9 and 10 February 2023

Before: Employment Judge S Shore

Members: Mrs S Dengate
Mr C Williams

Appearances

For the claimant: Mr D Ibekwe, Volunteer, Brighton and Hove Race Project
For the respondent: Mr G Baker, Counsel

JUDGMENT ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's claim of unfair dismissal is dismissed upon withdrawal.
2. The claimant's claim of direct discrimination because of the protected characteristic of disability (contrary to section 13 of the Equality Act 2010) is dismissed upon withdrawal.
3. The claimant's claim of victimisation (contrary to section 27 of the Equality Act 2010) is dismissed upon withdrawal.
4. The claimant's claim of discrimination arising from disability (contrary to section 15 of the Equality Act 2010) fails.
5. The claimant's claim of harassment related to the protected characteristic of disability (contrary to section 26 of the Equality Act 2010) fails.
6. As all the claimant's claims have either been dismissed or withdrawn, the Tribunal is not required to consider remedy.
7. Any claim for costs by the respondent will be considered at a later date

REASONS

Introduction and History of Proceedings

1. The claimant is employed as a Police Community Support Officer (PCSO) by the respondent, the Commissioner of the Metropolitan Police Service (MPS). The claimant's employment began on 30 October 2006 and is continuing. He was dismissed on 3 December 2020, but reinstated on 30 June 2021 at an appeal hearing. The claimant started early conciliation with ACAS on 27 January 2021 and obtained a conciliation certificate on the same day. The claimant's ET1 was presented on 9 February 2021.
2. The central issue in this case is a disciplinary investigation, hearing and appeal that arose out of allegations that the claimant had breached a non-molestation order (NMO) dated 9 December 2016 made by the Romford County Court. The NMO was not produced in the bundle and we were not told what its full terms were. The alleged disciplinary offences took place on 27 January 2017, 17 February 2017 and 25 February 2017 (two separate allegations).
3. The claimant presented claims of:
 - 2.1. Unfair dismissal.
 - 2.2. Direct disability discrimination contrary to section 13 of the Equality Act 2010. The disabilities contended for were Post Traumatic Stress Disorder (PTSD) and Hypertension.
 - 2.3. Discrimination arising from disability contrary to section 15 of the Equality Act 2010.
 - 2.4. Harassment related to the protected characteristic of disability contrary to section 26 of the Equality Act 2010.
 - 2.5. Victimisation contrary to section 27 of the Equality Act 2010.
3. The claims were case managed on 27 September 2021 by Employment Judge Brewer, who made case management orders on the same date [46-55], and on 29 July 2022 by Employment Judge Fowell, who made case management orders on the same date [61-65].
4. Employment Judge Brewer produced a List of Issues [52-55]. When Employment Judge Fowell conducted the second preliminary hearing, he discussed the case with the parties' representatives and agreed a revised schedule of claims and List of Issues. The main changes in circumstances from the first preliminary hearing were:
 - 4.1. The claimant's claims were now all concerning his dismissal on 3 December 2020;

- 4.2. That change meant that there were no claims that were potentially out of time;
- 4.3. The claimant's claim of unfair dismissal was withdrawn. Neither party at this hearing could produce a Judgment dismissing that claim, so we have dismissed it in the Judgment above; and
- 4.4. The respondent conceded that, at the time of the claimant's dismissal on 3 December 2020, he met the definition of "disabled person" in section 6 of the Equality Act 2010 and that the respondent had knowledge of that disability at the time of dismissal. No mention of any concession relating to Hypertension was made in the case management order. We will return to the question of the claimant's Hypertension.
- 4.5. Employment Judge Fowell noted the remaining claims as follows:
 - 4.5.1. Direct disability discrimination under section 13 of the Equality Act 2010 – the act complained of was the claimant's dismissal on 3 December 2020.
 - 4.5.2. Discrimination arising from disability under section 15 of the Equality Act 2010. The unfavourable treatment was the act of dismissal. The "something" arising in consequence of the claimant's PTSD was the propensity to become anxious, disturbed, perplexed, confused or subdued. The respondent stated that its legitimate aim in dismissing the claimant was to ensure good discipline in police employees and maintaining public trust.
 - 4.5.3. Harassment related to the protected characteristic of disability under section 26 of the Equality Act 2010. The single act of alleged harassment was the act of dismissal.
 - 4.5.4. Victimisation under section 27 of the Equality Act 2010. The protected act was the claimant's grievance of 15 December 2017 and the single detriment that the claimant says he was subjected to was his dismissal.

Issues

5. At EJ Fowell's hearing, it was agreed that there had been a change in circumstances that meant that the List of Issues should be amended. The parties agreed a List that remained in place to the date of this hearing, when one amendment was made. The final agreed list which was agreed on the first morning of this hearing was:

Direct discrimination on grounds of disability

1. *Did the Police Service, in dismissing Mr Cardinale, treat him less favourably than it treated or would have treated someone else in the same circumstances apart from his disability?*

Discrimination arising from disability

2. *This involves unfavourable treatment (in this case, his dismissal) because of something arising in consequence of Mr Cardinale's disability.*
3. *Can Mr Cardinale prove that the Police Service dismissed him because of "something arising" in consequence of his disability, namely the propensity to become overtly anxious, disturbed, perplexed, confused or subdued?*
4. *Can the Police Service show that this treatment was a proportionate means of achieving a legitimate aim? The Police Service say that the legitimate aim was to ensure good discipline in police employees and in maintaining public trust.*

Harassment on grounds of disability

5. *Was the dismissal unwanted conduct which related to his disability?*
6. *Did it have the purpose or effect of violating Mr Cardinale's dignity?*

Victimisation

7. *Did Mr Cardinale make a complaint at work about discrimination, or about a breach of the Equality Act? This is known as carrying out a "protected act"? He relies upon his grievance of 15 December 2017?*
8. *Alternatively, did the Police Service believe that he had?*
9. *If there was a protected act, did the Police Service dismiss him as a result?*

Remedies

10. *If Mr Cardinale wins his claim for discrimination he may be entitled to:*
 - a) *compensation for loss of earnings and/or*
 - b) *compensation for injury to feelings*
 - c) *an uplift in respect of the Police Service's alleged failure to follow the ACAS Code in relation to his grievance*
 - d) *interest and/or*
 - e) *a declaration or recommendation.*
6. At the start of his submissions, Mr Ibekwe, stated that the claimant no longer wished to pursue claims of direct disability discrimination or victimisation. After we checked with him, Mr Ibekwe confirmed that both claims could be dismissed upon withdrawal. We therefore did not consider any of the issues relating to these claims in our deliberations.

7. As we dismissed the two remaining claims, we did not have to consider remedy.

Law

8. We set out in this section, a summary of the law relating to the claims we had to decide. The statutory law relating to the claimant's claims of discrimination is contained in the Equality Act 2010 (EqA). The relevant sections of the EqA were sections 15 (discrimination arising from disability); section 26 (harassment) and 136 (burden of proof). The relevant provisions are set out here:

15. Discrimination arising from disability

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.*

The section does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

26. Prohibited conduct (Harassment)

A person (A) harasses another (B) if

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and*
- (b) the conduct has the purpose or effect of—*
 - (i) violating B's dignity, or*
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

In deciding whether conduct has the effect referred to, each of the following must be taken into account—

- (a) the perception of B;*
- (b) the other circumstances of the case;*
- (c) whether it is reasonable for the conduct to have that effect.*

136. Burden of proof

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal...

9. We were also referred to a number of cases by both parties, which we considered. These were:

9.1. **Owen and Briggs v James** [1982] IRLR 502;

9.2. **Rihal v London Borough of Ealing** [2004] IRLR 642;

9.3. **Carlos Enrique Ruiz Conejero v Ferroservicios Auxiliares SA** Case C-270/16;

9.4. **Asociația Accept v Consiliul Național Pentru Combaterea Discriminării** Case C-81/12;

9.5. **Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV** Case no. C-54/07;

9.6. **Dobson v North Cumbria Integrated Care NHS Foundation Trust & Anor** [2021] UKEAT/0220/19/LA; and

9.7. **East of England Ambulance Service NHS Trust v Sanders** UKEAT/0217/14/RN.

Housekeeping

10. The parties produced a joint bundle of 657 pages. If we refer to pages in the bundle, the page number(s) will be in square brackets (e.g. [43]). We considered all the documents in the bundle before making our decision.

11. We were also provided with the following documents:

11.1. Bundle Index;

11.2. Witness Statement Index;

11.3. Respondent's Opening Statement;

- 11.4. Respondent's Chronology;
 - 11.5. Respondent's Cast List; and
 - 11.6. Claimant's Opening Statement and reading list.
12. The hearing was conducted by remote video link with the consent of the parties. A few participants experienced difficulty logging into the hearing. Some had difficulty in remaining logged in. However, we were able to complete the hearing and we are grateful for the co-operation of the parties and their witnesses and observers and for their patience and good humour in the face of intermittent IT issues.
 13. The hearing timetable had listed the case for 5 days to include remedy. The first two hours of the first day was set aside for preliminary matters and Tribunal reading time. On the first morning of the hearing, we received an application for strike out from the respondent. At the start of the hearing, Mr Baker advised that the respondent wished to withdraw the application for strike out. This was agreed by consent.
 14. Having read the papers, we asked the parties to consider whether anonymity orders ought to be made in respect of two individuals who were involved in the factual nexus of the case. Mr Ibekwe agreed that an order was appropriate and Mr Baker did not object. We have prepared a separate anonymity order that will be sent out with the Judgment.
 15. Mr Ibekwe confirmed that the claimant was not presenting his disability discrimination claims on the basis of his being a disabled person because of the physical impairment of Hypertension. He relied solely on PTSD. That concession removed any ambiguity caused by the fact that EJ Fowell's case management order had only mentioned PTSD as a disability contended for by the claimant.
 16. In the light of the respondent's concession that the claimant met the definition of "disabled person" because of PTSD and the concession that it had knowledge of the disability at the date of dismissal, it was agreed that paragraph 24 of EJ Fowell's case management order of 29 July 2022, which was part of the List of Issues [64], could be deleted, as it concerned knowledge of disability, which was now not in dispute. This was held to be a material change in circumstances. The paragraph does not appear in our List of Issues above.
 17. The claimant's witness statement made reference to the circumstances of a separate claim against the respondent under claim number 3205023/2022. We discussed the matter with the representatives and it was agreed that the evidence about another claim would not be considered and that the Tribunal would avoid making findings of fact other than those required to determine this case.
 18. The bundle had been prepared in relation the first claim only, as had the respondent's witness statements.
 19. The claimant gave evidence in person and produced a witness statement dated 6 January 2023 that consisted of 27 paragraphs over 21 pages.

20. Lee Campbell gave evidence in support of the claimant. Mr Campbell is a PCSO for the respondent. He is a PCS Union representative. His witness statement was undated and consisted of two pages.
21. Evidence was given in person on behalf of the respondent by:
 - 21.1. Gary Taylor, a former Superintendent Deputy Borough Commander of Roads and Transport for the respondent. He was the officer who chaired the panel that dismissed the claimant. His witness statement was dated 4 December 2022 and consisted of 66 paragraphs over 19 pages.
 - 21.2. Kyle Gordon, a Police Commander for the respondent. He was the officer who chaired the panel that reinstated the claimant. His witness statement was dated 25 January 2023 and consisted of 31 paragraphs over 9 pages.
22. All the witnesses gave evidence on affirmation. The claimant and Mr Campbell were asked very few questions by Mr Baker. Messrs Taylor and Gordon were asked a few more questions by Mr Ibekwe. The panel asked very few questions of the witnesses. Both representatives were given the opportunity to ask re-examination questions at the end of their witnesses' evidence.
23. We completed the claimant's evidential case by the close of the first day. We completed the respondent's evidential case by lunchtime on the second day. We heard oral submissions from Mr Ibekwe and Mr Baker after lunch and met in virtual chambers as a panel to make our decision.
24. We asked the parties to return on the morning of the third day to hear our oral Judgment and Reasons. We had anticipated being able to give an oral Judgment and Reasons at 11:00, but had to put the start time back to 12:00. After delivering our Judgment and Reasons, Mr Ibekwe exercised the claimant's right to request written reasons.
25. Mr Baker then indicated that the respondent wished to seek a costs order against the claimant. A costs schedule and costs bundle had been prepared in support of the application, but had not been served or filed. Those instructing Mr Baker were asked to send the schedule and bundle to the Tribunal office and Mr Ibekwe. We asked the parties to rejoin the video hearing at 14:00pm in order to give us time to read the documents.
26. The respondent's schedule was broken down into four separate schedules that reflected different periods of the proceedings that started and ended by the service of consecutive costs warnings on the claimant. The combined total costs order sought (including counsel's fees) was £75,608.90 exclusive of VAT.
27. The Tribunal convened at 14:00. We could see who was waiting to be admitted to the hearing. Mr Cardinale was not on the list. We waited until 14:15, by which time, Mr Cardinale had not appeared, and decided to open the virtual hearing room.
28. Mr Ibekwe advised that Mr Cardinale was not present because he was too distressed to attend. Mr Ibekwe went on to say that it may not be possible to have

a proper conversation with the claimant because he had taken medication that made him drowsy. Mr Ibekwe requested an adjournment.

29. He then went on to make a number of other points. The first was that this claim: 320488/2021 had been consolidated with claim 3205023/2022. Mr Baker shook his head when he heard this submission and advised that he had not seen any such order consolidating the cases. We confirmed we had not seen a consolidation order either.
30. Mr Ibekwe said that he had a copy of the order dated 19 October 2022 signed by Acting REJ Burgher.
31. Mr Ibekwe's second submission was that the Tribunal could not make a costs order until the whole of the consolidated case had been heard. He stated that he had made an application on 7 February 2022 that had not been heard. That application had been in response to the respondent's application for strike out. We had not seen that email.
32. At Mr Baker's request, we took a short break for him to take instructions and for the Tribunal to request a copy of the consolidation order from the office. We asked Mr Baker to ask his instructing solicitor how the respondent wished the costs application to be dealt with, as the amount sought was more than £20,000, so Rule 78(1)(b) applied. Were we minded to make an order in excess of the £20,000 maximum open to us under Rule 78(1)(a), we would either have to send the matter for detailed assessment by the County Court in accordance with the CPR, or to a designated Costs Employment Judge.
33. During the short break, the Tribunal office sent us a copy of the consolidation order that Mr Ibekwe had referred to. For the avoidance of doubt, we confirm that Acting REJ Burgher consolidated claims 3200488 and 3205023/2022 on 19 July 2022. We checked and confirmed that the consolidation order was not in the agreed bundle.
34. On the resumption, Mr Baker confirmed that the respondent would be seeking an order for costs capped at £20,000. The claimant was not present, so Mr Baker submitted that it would not be just and fair to proceed in his absence. He proposed that the issue of costs could be dealt with by a written application by the respondent and a written response by the claimant. The matter could then be dealt with on the papers by this Tribunal.
35. Mr Baker submitted that the question of the Second Claim had been addressed by the Tribunal on the first morning of the hearing and that the claimant had consented to proceeding with claim number 320488/2021 only.
36. Mr Ibekwe argued that the claims had been consolidated and silence was not consent. We reminded Mr Ibekwe of the Reasons that we had given a few hours earlier, which had included (at paragraph 17 above):

“17. The claimant's witness statement made reference to the circumstances of a separate claim against the respondent under claim number 3205023/2022. We discussed the matter with the representatives and it

was agreed that the evidence about another claim would not be considered and that the Tribunal would avoid making findings of fact other than those required to determine this case.”

[Note – Paragraph 17 is exactly as it was read to the parties on the third morning and has not been amended in any way – EJ Shore]

37. The claimant’s agreement to proceeding with claim 320488/2021 *only* had been express and not silent. We asked Mr Ibekwe if he was suggesting that the whole of the hearing that we had concluded should be regarded as a nullity. He replied in the negative.
38. Mr Ibekwe continued by stating that this Tribunal itself could not dispense with the consolidation order. He added that he and the claimant had been aware that the respondent had not included documents relating the claim 3205023/2022 in the bundle for this trial.
39. Mr Ibekwe stated that he had thought that the first claim would be heard, deliberated on and concluded and then the Tribunal would go on to hear, deliberate on and conclude the second hearing.
40. He repeated the submission that no costs order could be made until both parts of the consolidated case had been heard.
41. Mr Ibekwe submitted that he had made an application on 7 February 2023 that had not been determined. We had not (and still have not) seen the application and Mr Ibekwe had neither brought the application or our failure to hear it to our attention at any time during this hearing.
42. We find that:
 - 42.1. The overriding objective requires the Tribunal to deal with cases justly and fairly. That includes, as far as is practicable, avoiding delay, so far as is compatible with proper consideration of the issues, dealing with matters proportionately , and saving expense. The expense to be saved is that of the parties and the public purse;
 - 42.2. The overriding objective is best served by dealing with the Second Claim in a separate final hearing so as not to waste time and expense by rehearing the claims raised in case number 3200488/2021 again when we have already made a determination;
 - 42.3. The overriding objective requires the parties and their representatives to assist the Tribunal to further its aims and, in particular, co-operate with one another;
 - 42.4. The claimant did not raise with us, when he had ample opportunity to do so, the issue of the Second Claim;
 - 42.5. The claimant agreed at the start of the final hearing that it would only deal with the original claim; and

- 42.6. Following the judgment of the EAT in **Liverpool NHS v Poullis** [2022] EAT 9, we find that there was a material change in circumstances between the preliminary hearing of EJ Fowell and the final hearing (namely, the concession on disability knowledge by the respondent), which required the List of Issues to be revisited and, at that time, no representations were received from either party about the Second Claim.
43. We therefore confirm the Judgment and Reasons given to the parties, as amended by our re-reading and refining the notes we had made in order to produce these written reasons.
44. During our delivery of the oral Judgment and Reasons, Mr Cardinale stated at one point that we had got something wrong. We did not pause at the time to ask what it was. One of the panel made a note of the point at which Mr Cardinale made his objection. It was at the point when we deal with at paragraph 39.21 below concerning the sanctions imposed by the respondent for the two matters of misconduct that the claimant was found to have committed at the disciplinary hearing chaired by Mr Taylor.
45. We accept that our oral reasons incorrectly stated that the penalty for the fourth allegation was a *final* written warning. We accept that the actual penalty was a **first** written warning. We have reconsidered that part of the Reasons of our own motion and have varied them accordingly. The reconsideration does not change our decision on liability in respect of the claims of discrimination arising from disability or harassment related to the protected characteristic of disability. We apologise for our error.
46. We have made case management orders for a preliminary hearing to consider how the Second claim is to be dealt with, which will be sent separately. Those case management orders also include the arrangements for the issue of costs to be determined.

Findings of Fact

Preliminary Comments

47. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, or call more evidence, so we have dealt with the case on the basis of the documents and evidence produced to us and the claim as set out in the list of issues.
48. The factual nexus of the individual elements of this case are closely interwoven. That means that, in dealing with the claims on an individual basis, we have to disclose findings that are more relevant to other claims.

Undisputed Facts

49. We should record as a preliminary finding that a number of relevant facts were not disputed, not challenged or actually agreed by the parties. The dispute between the parties was more about the interpretation that we put on the facts, rather than the facts themselves These were:
 - 49.1. The respondent is the legal entity against whom actions are taken against the MPS. He employs more than 55,000 people.
 - 49.2. The claimant has been and remains employed as PCSO by the respondent since 30 October 2006. The claimant started early conciliation with ACAS on 27 January 2021 and obtained a conciliation certificate on the same date. The claimant's ET1 was presented on 9 February 2021.
 - 49.3. It was agreed by the respondent that the claimant met the definition of disabled person at the time of his dismissal in 3 December 2020 by reason of the mental impairment of PTSD. The respondent also conceded that it had knowledge of the disability at the time of dismissal. As noted above, the claimant placed no reliance of the physical impairment of Hypertension, so we did not consider it.
 - 49.4. Mr Ibekwe submitted that we ought to make findings as to whether the respondent had constructive knowledge of the claimant's disability before the time of dismissal. We rejected the submission because the act complained of was the act of dismissal and knowledge had been conceded. The claimant had abandoned claims of disability discrimination that predated his dismissal, so it would be against the overriding objective to spend time and cost making findings that would not assist us to make our decision. The case management order of EJ Foxwell [62 §6] made it clear that "The question of whether [the claimant] ought to have been referred to Occupational Health [before his dismissal], and to what extent his disability ought to have been taken into account are part of the background to that decision, not separate acts of discrimination."
 - 49.5. This case is almost entirely about the claimant's dismissal on 3 December 2020. However, there is a history that leads to the dismissal about which we find we ought to make brief findings.
 - 49.6. The claimant's lengthy witness statement is entirely silent on his medical history before 27 January 2017, and the document bundle contains no medical records or reports concerning the claimant's mental health prior to 27 January 2017.
 - 49.7. In a complaint against 2 colleagues that alleged that they had perverted the course of justice [212-213], the claimant mentioned that he had a long period off sick before returning to work on 2 December 2016 for stress and anxiety.

- 49.8. The record of the claimant's sickness absences [590] was undisputed and records that the claimant was absent from work between 7 July 2016 and 2 December 2016 for "Psychological Disorders – Nerves / Depression/ Anxiety.
- 49.9. In an OH report dated 10 May 2017 [176-178] Dr Mervi Pitkanen confirmed that the claimant's GP had prescribed him Sertraline in 2016. An OH report dated 23 January 2018 [637-638] stated that the claimant had been prescribed Sertraline since September 2016.
- 49.10. It is not disputed that a non-molestation order (NMO) was made against the claimant by the County Court at Romford on an ex parte basis on 9 December 2016.
- 49.11. It was agreed evidence that the NMO required the claimant not to go to Property J or approach within 100 meters of it. The claimant confirmed in an answer to a question from the Tribunal that the NMO had a power of arrest attached to it.
- 49.12. The facts surrounding the matters that became the subject of the disciplinary proceedings are not agreed, so we will deal with them below.
- 49.13. The claimant was suspended following the instigation of disciplinary proceedings from 15 March 2017 to 14 November 2017. He appears to have been on sickness absence since 15 November 2017.
- 49.14. It was undisputed evidence that the claimant was diagnosed with "symptoms of PTSD" by the OH specialist, Dr Pitkanen in a report dated 10 May 2017 [276-277]. The report gives no indication of when the claimant's PTSD had started.
- 49.15. The claimant was charged with three criminal offences arising out of the same incidents that were the subject of the disciplinary hearing. All the charges were subsequently dropped by the CPS. We find that the fact that the charges were dropped is not determinative of the claims we have to decide because the standard of proof in the Magistrates' and Crown Courts in Criminal matters is that of "beyond all reasonable doubt", whereas the standard of proof in the Employment Tribunals is the balance of probabilities.
- 49.16. The chronology of the disciplinary process is undisputed. The process was delayed for a considerable time by the claimant's ill health.
- 49.17. It was agreed that the claimant was subject to the College of Policing's Code of Ethics [66].
- 49.18. We are not required to make a finding on the fairness of the disciplinary process, because there is no unfair dismissal claim before us.
- 49.19. The claimant faced 4 disciplinary charges (we have removed the names of individuals and replaced them with random letters):
 - 49.19.1. Acting unreasonably by attending Property J on 27 January 2017;
 - 49.19.2. Threatening, intimidating or harassing KQC on 17 February 2017;

- 49.19.3. Acting unreasonably in communication with KQC on 25 February 2017; and
- 49.19.4. Being “extremely rude and obstructive to officers” who had attended Property J.
- 49.20. The claimant was dismissed on 3 December 2020 by a panel chaired by Gary Taylor, which found that the first and fourth matters were proven, but that the second and third matters were not.
- 49.21. The claimant was dismissed for the first allegation, which was found to amount to gross misconduct [397-401] and 557-558], and given a first written warning for the fourth allegation, which was found to be misconduct [395].
- 49.22. The claimant appealed the dismissal (but not the first written warning) [560-562] and his appeal was heard by a panel chaired by Commander Gordon on 20 May and 30 June 2021. The appeal hearing found [537-538] that the claimant had committed an act of gross misconduct in relation to the first allegation, but commuted the sanction from dismissal to a Final Reprimand that was to remain in place for 5 years.

Points of Dispute

Discrimination arising from disability

- 50. We should make it clear that the disability that the claimant says is the basis for this claim is PTSD. We should also state the obvious that a claim for disability discrimination cannot be successful unless the claimant meets the definition of “disabled person” at the relevant time. The relevant time in this case is the date of the claimant’s dismissal – 3 December 2020.
- 51. It therefore follows that the question of whether the claimant’s actions in attending Property J on 27 January 2017 in breach of a NMO was because of his PTSD is entirely irrelevant to his claim. The Tribunal’s task, as clearly indicated in the List of Issues [64 §§23, 25 and 26] is to determine:
 - 51.1. Was the dismissal unfavourable treatment? (Mr Baker correctly conceded that it had to be and we find that it was);
 - 51.2. Was the dismissal because of something arising in consequence of PTSD, namely the propensity to become overtly anxious, disturbed, perplexed, confused or subdued? and
 - 51.3. If the dismissal was because of something arising in consequence of PTSD, could the respondent show that the treatment was a proportionate means of achieving a legitimate aim.
- 52. The claimant’s claim concerns the act of dismissal, not the act for which he was disciplined.

53. Mr Ibekwe suggested that the respondent had never produced a legitimate aim in the pleadings. That submission was comprehensively and successfully rebutted by Mr Baker.
54. We find that there was no evidence, other than the claimant's assertions, that the dismissal was because of something arising in consequence of PTSD, namely the propensity to become overtly anxious, disturbed, perplexed, confused or subdued. We make that finding because:
 - 54.1. There was no medical evidence corroborating the claimant's assertion that PTSD had caused him to behave the way he did by attending Property J on 27 January 2017.
 - 54.2. We cannot take any note of the various internet articles produced by the claimant about PTSD because they are not evidence. They do not meet the requirements to be allowed as matters of judicial notice using the test in **Dobson**. The evidence that the claimant wants us to accept is neither "so notorious" as to be obvious or matters noted after enquiry and neither is it a matter noted by statute or precedent. The Tribunal cannot simply jump to a connection between cause and effect on an assertion by a witness.
 - 54.3. The claimant and his representative appear to have completely missed the vital point that there was no evidence put before the dismissing officer that PTSD was the reason that the claimant attended Property J.
 - 54.4. We therefore find the evidence from Mr Taylor that he gave no consideration to the claimant's PTSD when deciding to dismiss was entirely understandable and reasonable, as it was not suggested to his panel that there was any connection between PTSD and the events of 27 January 2017.
 - 54.5. We find that the connection between PTSD and the events of 27 January 2017 have been made by the claimant himself with no credible corroborative evidence to back up the link.
 - 54.6. We find that it was perfectly reasonable for Mr Taylor's panel to conclude that it should give no weight from the claimant's subsequent diagnosis of PTSD to the question of liability for the attendance on 27 January 2017 or the disciplinary sanction imposed.
 - 54.7. We find fact that the claimant had an episode of mental ill health that started in 2016 was not something that related to PTSD because there was no evidence that there was a connection. The claimant's claims that he had PTSD at the time were mere assertion.
 - 54.8. We find that the claimant does not achieve a transfer of the burden of proof to the respondent because there were no facts from which we could decide, in the absence of any other explanation, that the dismissal was in contravention of section 15 of the EqA.

- 54.9. We find that the whole premise of the claimant's claim was based on weak foundations. The claimant's case is that the "something arising" in consequence of his disability was the propensity to become overtly anxious, disturbed, perplexed, confused or subdued. We saw no evidence that these were "somethings" arising from the claimant's PTSD, or any other mental health issue other than his assertions.
- 54.10. Further, we heard no evidence other than the claimant's assertions that the respondent took these "somethings" into account when deciding to dismiss the claimant. On the contrary, Mr Taylor's cogent and credible evidence was that his panel had not considered the claimant's mental health when deciding to dismiss.
- 54.11. There was no medical report before us stating that the claimant was experiencing symptoms of becoming overtly anxious, disturbed, perplexed, confused or subdued on 27 January 2017. We only had the claimant's assertions. The claimant had the assistance of his trade union throughout the disciplinary process and the assistance of representatives during this process. He has had time and opportunity to obtain the evidence to corroborate his assertions and has failed to do so.
- 54.12. The claimant's witness statement (§23.2) asserts that the essential factors of his PTSD are "vivid flashbacks; intrusive thoughts/images; nightmares; intense distress at real or symbolic reminders of the trauma; and physical sensation such as pain, sweating, nausea and trembling. None of the "somethings" listed in the List of Issues are in the claimant's list of "somethings" in his witness statement.
- 54.13. We find that Mr Ibekwe's criticism of Mr Taylor for failing to consider the claimant's PTSD rather undermines his other argument that the dismissal was, at least in part, because of the claimant's PTSD.
- 54.14. It was not put to Mr Taylor in the disciplinary hearing that the claimant acted as he did on 27 January 2017 because of PTSD.
- 54.15. In those circumstances, we find that on the balance of probabilities, the original disciplinary panel did not dismiss the claimant because of something arising from PTSD (or any other mental health condition), whether in part or for the sole reason of the somethings arising.

Harassment

55. We repeat our findings on the section 15 claim above.
56. We find that the act of dismissal was unwanted conduct. Mr Baker accepted as much.
57. We find that if the dismissal was not arising from something arising to PTSD, then it cannot possibly be related to PTSD on the same findings as set out in paragraph 46 above.

Was the claim entirely without merit?

58. Mr Baker asked us to consider making a declaration that the claim was entirely without merit. We find that the claims do not meet that high bar.

Employment Judge Shore

27 February 2023