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EMPLOYMENT TRIBUNALS

Claimant		*Respondent*
Mr B Kuppala	**AND**	**HBOS Plc**

HELD AT: **London Central** **ON:** 2 - 5 July 2019

BEFORE: Employment Judge Brown
Members: Mr R Lucking
M G Gillman

Representation:
For Claimant: Ms A Thobarn, Union Representative
For Respondent: Ms E Wheeler, of Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. **The Claimant was a disabled person by reason of diabetes from August 2017.**

2. **The Respondent subjected the Claimant to discrimination arising from disability when it dismissed the Claimant.**

3. **The Respondent knew or reasonably ought to have known, when it dismissed the Claimant, that he was a disabled person.**

4. **The Claimant's contributory conduct in relation to the discriminatory dismissal was 60%.**

5. **The Respondent unfairly dismissed the Claimant.**

6. **The Respondent wrongfully dismissed the Claimant.**

7. **It is 10% likely that the Respondent would have dismissed the Claimant for the same conduct following a fair procedure.**

8. **The Claimant contributed to his dismissal in the order of 60% and compensation for unfair dismissal shall be reduced accordingly.**

REASONS

Preliminary

1. The Claimant brings complaints of unfair dismissal, wrongful dismissal and s.15 EqA 2010 discrimination arising from disability against the Respondent, his former employer. The issues in the claim were set out by Employment Judge Pearl at a preliminary hearing on 8 February 2019, in paragraphs 1-3 of Schedule A to that preliminary hearing record.

2. The issues were further clarified at the start of this final hearing. The Claimant relies on two disabilities in his claim: Type 2 diabetes and a stress related condition. The Respondent conceded that the Claimant was a disabled person by reason of his diabetes condition from the date on which he returned to his doctor in 2018 - that date was, in fact, 3 July 2018.

3. The Respondent contended that it did not know and could not reasonably been expected to know that the Claimant was a disabled person by reason of diabetes before that date. The Respondent disputed that the Claimant was a disabled person by reason of a stress condition at any relevant time.

4. Regarding the s.15 Equality Act 2010 discrimination arising from disability complaint, the "something arising in consequence of disability" relied on by the Claimant was the Claimant's impaired judgment and lack of concentration as a result of diabetes and stress, or as a result of diabetes exacerbated by stress. The legitimate aim relied on by the Respondent was ensuring security of its branch and the safety of customers and employees of the bank.

5. In the unfair dismissal claim, the Respondent relied on conduct as the potentially fair reason for dismissal. The conduct was three incidences of security policies not being adhered to, on three occasions, relating to closing up of the branch. These accumulatively were regarded as gross misconduct by the Respondent.

6. The Claimant contended that the dismissal was unfair because the Respondent had not conducted a reasonable investigation, in that no medical advice was sought, the decision was rushed, and the Respondent did not take into account the Claimant's previous good behaviour. He also contended that the appeal manager was not more senior, and was not trained, compared to the disciplinary hearing manager.

7. Furthermore, the Claimant contended that the dismissal was not a reasonable sanction. The Claimant contended that he was treated more harshly than other employees.

8. The Respondent relied on *Polkey* and contributory fault arguments. In doing so, it relied on the same facts of misconduct as the potentially fair reason for misconduct, so that it said that, if a fair investigation had been

undertaken, the Claimant would have been dismissed for the same act of misconduct. It said that the Claimant contributed to his dismissal by the acts of misconduct.

9. With regard to wrongful dismissal, the Claimant claimed contractual redundancy pay arising in the notice period.

10. The Tribunal heard evidence form the Claimant. It read the witness statement of Julie Anyia, a former colleague of the Claimant and assistant manager. The Respondent did not dispute her witness statement and did not seek to cross-examine her on it. Ms Anyia was unable to attend the Tribunal in any event. The Tribunal heard the evidence of Ms N Hicks, the disciplinary hearing officer and Mr E Idun, the appeal hearing officer. There was a bundle of documents. Both parties made oral submissions.

Findings of Fact

11. The Claimant started work for the Respondent on 5 January 2004. At all material times for the purposes of these complaints, the Claimant was employed as a Grade E bank manager, but was working as a Grade D bank manager at the Respondent's branch of Halifax in Oxford Circus, London.

Disability

12. The Claimant was diagnosed with diabetes type 2 on 21 August 2017.

13. In a report for the Tribunal dated 10 April 2019, the Claimant's GP said that the effects of diabetes are worsened by stress, poor upkeep of diet and irregular breaks. The GP said that it was important for a patient to avoid hypo or hyper effects of glucose and that, in the Claimant's case, due to work related stress, poor upkeep of diet, and the demands of the Claimant's job, his diabetes had deteriorated, page 498.

14. The GP notes produced by the Claimant recorded that, on 3 July 2018, the Claimant's GP told the Claimant that his treatment for diabetes would be lifelong and that the Claimant must not miss taking his tablets. The GP gave the Claimant lifestyle and diet counselling, page 493. On 9 July 2018, the Claimant's GP conducted an annual diabetic review on the Claimant and referred the Claimant to a diabetic education programme.

15. The Claimant told the Tribunal that his GP had given him Metformin tablets for his diabetes in August 2017, but that the Claimant had been under the impression that this would not be an ongoing problem and not a major issue. The prescription of the Metformin tablets was confirmed in the GP's report dated 10 April 2019.

16. The Claimant told the Tribunal that he did not raise his diabetes with his line managers because he felt that it would put him at risk during the Respondent's reorganisation exercise in 2018. The Claimant did not use any

formal mechanism to report his condition, for example the Respondent's work place adjustment form.

17. The Claimant also told the Tribunal that, when he visited his doctor on 3 July 2018, his GP told him that he would become seriously ill if he did not take measures to control his diabetes, including taking his tablets regularly.

18. The Tribunal concluded, from the evidence, that the Claimant had not been taking his diabetes medication regularly before July 2018. The Claimant's GP notes of 3 July 2018 recorded that the Claimant attended one year ago and that he had finished his tablets.

19. The Claimant told the Tribunal that he was made aware that his job was at risk in 2018. He told the Tribunal that this was in April 2018. He told the Tribunal that, during 2018, he was unable to take breaks due to increased customer demands and lack of staff at his branch. Both the Claimant and Julie Anyia told the Tribunal that other Halifax branches, in Oxford Street, Mayfair, Marble Arch and Tottenham Court Road closed in early 2018, causing footfall in the Claimant's branch to rise. Julie Anyia told the Tribunal that she stopped working with the Claimant at the end of March 2018.

20. The Claimant told the Tribunal that, as a result of stresses in his job and increased customer demand, he was unable to take breaks during 2018 and he was not controlling his diabetes. He said that, when he was not controlling his diabetes in 2018, he felt shaky, weak, hungry, lethargic and that he experienced symptoms of confusion. He told the Tribunal that he now understands that those symptoms are symptoms of low blood sugar levels and of stress.

21. The Tribunal concluded that the Claimant had a physical impairment, that is diabetes, from August 2017. The GP report told the Tribunal that the Claimant's condition deteriorated thereafter. On 3 July 2018 the Claimant was told that his condition would be lifelong and that he would need to take mediation regularly and control his diet, otherwise he would become seriously ill.

22. The Respondent conceded that the Claimant was a disabled person from the date that he returned to the doctor in 2018, that is, from July 2018. The question for the Tribunal was whether the Claimant became a disabled person by reason of his diabetes at any point before he returned to the doctor.

23. The GP had given the Claimant Metformin tablets in 2017 to control the symptoms of the Claimant's diabetes. The Claimant described his symptoms deteriorating when he was unable to take breaks due to customer demand and lack of staff. The Tribunal found, on Ms Anyia's and the Claimant's evidence, by April 2018, the Claimant was experiencing symptoms that he described as shaking, lack of concentration and lethargy. The Tribunal concluded that those symptoms amounted to more than minor adverse effect of the Claimant's ability to carry out normal day to day activities, such as attending work and concentrating.

24. At the start of July 2018, only 3 months later, the Claimant was told that his diabetes condition was lifelong and that he would become seriously ill if he did not control his diet and take his medication. The Tribunal found that, from April 2018, it was likely, in the sense that it "could well happen" that the Claimant's diabetes would have substantial adverse effects on his ability to carry out normal day to day activities, which would be lifelong.

25. Indeed, as the Tribunal has found, in 2017 the GP had given the Claimant tablets to treat his diabetes. The Tribunal concluded that it was a reasonable inference that the GP considered, at that point, that the Claimant's condition needed to be controlled by medication. In other words, the Claimant's blood sugar levels needed to be controlled by medication from that date. The Tribunal is required to assess the Claimant's condition without treatment by medication. Without treatment of medication, the Tribunal concluded that the Claimant's blood sugar levels would be uncontrolled. The Tribunal concluded that, in those circumstances, the Claimant would experience symptoms of confusion, lethargy and shaking, just as the Claimant did experience when he was not taking regular breaks.

26. The Tribunal concluded that, without medication, from August 2017 the Claimant was likely to be affected by lethargy, shaking and lack of concentration. Given that the GP prescribed the tablets for the Claimant, who had diabetes, the Tribunal concluded that it was likely, in the sense that it "could well happen" in August 2017, that the Claimant's symptoms would be continuing and lifelong.

27. Accordingly, the Tribunal concluded that, from August 2017, the Claimant was disabled by reason of his diabetes condition.

28. The Claimant also relied on his stress condition in contending that he was a disabled person. The GP report dated 10 April 2019 stated that, on 13 July 2015, the Claimant had presented at the GP with "stress at work". The GP said that the Claimant had looked depressed and was referred to a mental health clinic. On 12 August 2015 the Claimant was seen in a mental health clinic and was given anti-depressant medication. The Claimant's GP report did not give any further details of the Claimant's treatment for stress or depression, or the effects of the stress and depression on the Claimant, page 498.

29. On 9 July 2018, the Claimant's GP notes recorded (page 493), ".. currently depressed, has been given talking therapy leaflet, advised to contact them. Patient was advised to rebook an appointment if medication is required for depression".

30. The Claimant told the Tribunal that he had informed his Manager, Nadia Baker, that he was taking tablets for depression. He did not tell the Tribunal when he had informed Ms Baker of this. From the medical records the Claimant was not consistently on medication for depression or stress. The GP report of April 2019 said that the Claimant was prescribed medication on 14 January 2016. Nevertheless, it was clear from the GP notes that the

Claimant was not taking such medication in July 2018; the GP notes said that, if he needed medication, he should return to the GP.

31. The Claimant told the Tribunal that he was very stressed in 2018. Nevertheless, even when the Claimant returned to the GP in July 2018, the GP did not give him medication for his depression or stress.

32. The Claimant was given detailed treatment and advice by his GP in July 2018 in relation to his diabetes condition, and not to his depression condition.

33. The Tribunal concluded that the Claimant had a stress or depression related condition at times in 2015-2016 and in 2018. This was controlled by medication in August 2015 and January 2016.

34. The Claimant told the Tribunal that the stress affected his concentration and that he had been confused and lethargic as a result. However, on the evidence, the Tribunal was not able to conclude that the Claimant's stress and depression, on its own, had had a substantial adverse effect for 12 months or more, or was likely to have such an effect for twelve months or more, at any time during the Claimant's employment. The effects of his stress and depression appeared to have been intermittent. There was no indication, from 2016, that the condition was likely to recur, in that it "could well happen" again.

35. The Tribunal however accepted, as the GP report stated, that the Claimant's stress could, and did, exacerbate his symptoms of diabetes.

36. The Tribunal did not find that the Claimant's stress and depression, on its own, amounted to a disability.

Events Leading to Dismissal

37. In 2018 the Halifax underwent a major restructure. Branches were closed and staff were considered for appointment to remaining posts. Julie Anyia, the Assistant Manager at the Halifax Oxford Circus Branch, worked there until March 2018.

38. The Claimant told the Tribunal that, due to closure of 3 nearby branches, footfall at his branch significantly increased. The Claimant and Julie Anyia told the Tribunal that, for example, the deposit machine which used to take £5,000 to £6,000 started taking £30,000 to £35,000 per day. Julie Anyia told the Tribunal that the same number of staff at the Oxford Circus Branch were required to serve 2 times the number of customers, which put a lot of pressure on the staff.

39. The Respondent's witnesses told the Tribunal that an increase in deposits did not necessarily represent an increase in customers requiring counter service, because the deposit machine was automated. Ms Hicks said that other figures would be available for branch transactions, which would show the level of counter transactions at the Oxford Circus Branch. The Respondent did not bring those other figures to the Employment Tribunal. The

Respondent could have done so. Ms Hicks confirmed that those figures would have been available to every Area Manager. Miss Anyia's witness statement was not challenged by the Respondent. The Respondent did not challenge the Claimant, or Ms Anyia's, assertion that machine deposits increased by extent that the Claimant and Miss Anyia said. The Tribunal decided that it was logical that a very significant increase in customer use of cash deposit machines would also reflect some increase in demand for counter services.

40. On all the evidence, the Tribunal accepted the Claimant and Ms Anyia's evidence that the same number of staff were expected to serve 2 times the numbers of customers and that this put a lot of pressure on the team at the Oxford Circus Branch.

41. It was not in dispute that Ms Anyia then moved to another branch at the end of March 2018. The Claimant told the Tribunal, and the Tribunal accepted, that this put even more pressure on him. The Claimant was then told, on 27 April 2018, that he had not been given a role in the Respondent's new staff structure following the reorganisation. The Claimant was therefore aware that he could be at risk of redundancy that year, albeit, on the facts, he was not formally put at risk of redundancy until 5 June 2018.

42. Conchita Espinoza-Fiz started working at the Oxford Circus Branch as Assistant Manager from 23 April 2018. No Assistant Manager had been available during April at the branch until then. The Tribunal accepted the Claimant's evidence that, on occasion, because of increased pressure, he was unable to take regular breaks and to have lunch breaks.

43. On 20 May 2018 a customer was inadvertently locked in the Halifax Oxford Circus Branch after the branch closed at 5pm, for 3 hours.

44. James Whittaker, Control Assessment Manager, was appointed to investigate the incident. He met with the Claimant at an investigatory interview on 24 May 2018, page 233. In the meeting, the Claimant told Mr Whittaker that the Claimant had been recently diagnosed as diabetic and that he needed to eat regularly and on time. He said that, in the last 2 months, with branch closures, he had had to skip lunches. The Claimant said that there had not been enough staff to support the branch. He said he that he was not getting the support that he needed. The Claimant said that he was fit to be at work and that he had not told his new manager, Matt Beresford, about his condition, page 325.

45. The Claimant acknowledged that the Respondent's Code of Responsibility required him to act in a way which is responsible to colleagues, customers and to himself, page 325. The Claimant told Mr Whittaker that, on 10 May 2018, he had had to leave the branch at 5pm sharp, to attend an emergency appointment. When the Claimant was preparing to lock the front door, he had noticed that a customer, Mr Miller, had come in and was talking to the Claimant's colleague Rajni. Rajni took Mr Miller to her room and waited outside while the Claimant locked the front door. The Claimant then gave the

key to colleagues, so that the Claimant could leave on time. The Claimant said that he did not complete the checks of the bank that day to ensure that all customers had left, because he was leaving at 5pm. He also said that he did not mention to Conchita, the Assistant Manager, that there was a customer still in a room, page 329.

46. Mr Whittaker than showed the Claimant CCTV stills, which showed that, when the Claimant had closed the branch on 10 May 2018, he had left a set of keys in the door, unattended. The Claimant agreed that they were his keys and said he could have been distracted. Mr Whittaker then showed CCTV stills of the Claimant letting a customer into the branch after closing time and, again, leaving the keys unattended. The Claimant said that he had made an error in leaving the keys in the door, page 339.

47. The Claimant said that he could have got into a bad habit of leaving keys hanging in the front door, page 331.

48. Mr Whittaker then told the Claimant that he had reviewed CCTV footage for two randomly selected days, 30 April 2018 and 2 May 2018. He said that, on 30 April 2018, the Claimant had been the final colleague to leave the branch, but that the Claimant had not completed the required end of day checks, checking all interview rooms before securing the branch. The Claimant said that he normally did do those checks and did not know why he had not on that day. Mr Whittaker put to the Claimant that he had not undertaken the end of day checks again on 2 May 2018. The Claimant said that normally he did walk around, with the lights on, to make sure that no customers were left and no packages had been left. Mr Whittaker asked the Claimant how he could see into interview rooms if doors were not open and the glass was frosted. The Claimant said that he could have done checks more thoroughly than he had done, page 337.

49. Mr Whittaker also showed the Claimant CCTV evidence that, on 2 May 2018, the Claimant and his colleague Jarvis, who were the last colleagues to leave the branch, had left the branch and walked away together. Mr Whittaker said that one of them should have gone to an assembly point to be joined by the second colleague later. The Claimant agreed that it was a mistake and that one person should have stayed in the branch and locked the door.

50. The Claimant said that he could be highly pressurised and that he had been skipping lunch breaks. He said that for the past month and a half the Claimant had not had lunch breaks and was completely drained at the end of the day. The Claimant said that he had made mistakes, page 339.

51. Mr Whittaker also interviewed the Claimant's colleagues about the events of 30 April, 2 May and 10 May. He interviewed: Anisah Akram, pages 260-269; Rajni Duggal pages, 270-282; Jarvis Williams, pages 283-294; and Conchita Espinoza-Fiz, pages 302-315.

52. Mr Whittaker produced an investigation report. He said that the Claimant had breached the Respondent's following security policies:

(1) Closing the Branch to Customers
(2) Leaving the Branch – Last Colleague to Leave
(3) Keys and Combinations, page 341

He recommended that formal action be taken against the Claimant for gross misconduct in respect of each incident, page 348. In his report, Mr Whittaker said that the Claimant had been recently diagnosed as diabetic and needed to eat regularly and on time, which had been difficult to maintain with reduced resources, page 347. Mr Whittaker did not recommend that the Claimant was suspended, or temporarily removed from his role. He said, in his report, "Colleague is not considered to be a significant risk to the business by remaining in role". Page 349.

53. On 14 June 2018 Nina Hicks invited the Claimant to a disciplinary hearing to consider allegations of gross misconduct. The allegations against the Claimant were as follows, page 356.

" 1. Despite having the required knowledge and understanding of the Group's branch security procedures, and specifically branch closing procedures, you have demonstrated on three separate dates serious negligence and serious breaches in these procedures in that you have failed to
– secure Halifax Oxford Circus Branch correctly while closing the branch to customers
– compete the final closure procedure correctly with your colleague Jarvis Williams
– ensure that the last customer had left despite knowing of his presence, before leaving your Assistant Branch manager Conchita Espinoza-Fiz to complete the final branch closure procedure and leave the premises.

Specifically:

– on 30 April and 2 May 2018 as the last colleague to leave Halifax Oxford Circus Branch you failed to complete the required checks of the premises to ensure no colleagues or staff remained on the premises whilst completing the "Leaving the Branch – Last Colleague to Leave" procedure.

– on 2 May 2018 at 5:06pm, as the last colleague to leave the branch, you failed to correctly complete branch closure procedures by locking the branch whilst your colleague Jarvis Williams remained at the door with you rather than proceeding to the agreed assembly point to observe you doing so from a safe distance

– on 2 May and 10 May 2018, whilst completing the procedure to close the branch to customers (which was your specific responsibility on those days) you left the branch door keys in the lock

– on 10 May 2018 as the colleague responsible for closing the branch to customers, you failed to confirm that no customers remained on the premises, despite knowing that our customer Mr Millar was in the interview room, having

assumed that your colleague Rajni Duggal would escort him from the premises once the branch was closed

– you also assumed on 10 May 2018 that your Assistant Branch Manager Conchita Esponiza-Fiz would check the premises when leaving the branch, however she did not do so and this resulted in the branch being locked while Mr Millar remained on the premises for three hours, fully visible to the public. As the Branch Manager, a degree of responsibility lies with you, given your knowledge that the customer was on the premises.

The actual and potential risks and impact that your negligence actions may have caused are:

- potential significant distress, embarrassment, fear and inconvenience to Mr Miller

- that a customer has been put in a vulnerable position and could have been seriously hurt or killed in the event of a raid or fire

- that the group has needed to make a Distress and Inconvenience payment of £250 to Mr Miller

- the risk of reputational damage on the basis that Mr Miller was in full view of the passers-by

- a reduced ability to demonstrate that the group takes it responsibilities to customers and staff seriously and does everything possible to keep customers and colleagues and its resources safe

- that a critical procedure put in place to protect colleagues, customers and the reputation of the group has been breached."

54. Ms Hicks said that the policy/procedures allegedly breached were as follows:

a. **Leaving the Branch – Last Colleague to Leave Halifax and BOS**, which states that "All colleagues except one must leave the branch by the main door and at least one colleague must walk, remaining vigilant of activity in the branch exit area, to the agreed assembly point, unless it is not possible and a Local Director authorised exception is in place (page 107). "Once at the assembly point they should observe the final colleague leaving and locking/securing the branch but must not make contact with them, until they reach the assembly point", page 107. "After allowing enough time for the colleague to reach the agreed assembly point, the final colleague should set the intruder alarm and lock/secure the branch as normal and join the colleague at the agreed assembly point", page 108.

b. **Keys, Fobs, Codes and Combinations – General Responsibilities for all Colleagues**, which states that colleagues must "Never leave keys unattended at any time or in locks or drawers". Page 101.

c. **Closing the Branch to Customers**, which states that colleagues must, "Confirm to all colleagues involved in the exit process that all customers have left the branch". Pages 103 and 104.

55. Ms Hicks told the Claimant, in her letter, that, if the charges were upheld and found to be gross misconduct, the Claimant could be dismissed with, or without, notice, page 539.

56. The Claimant attended a disciplinary hearing on 22 June 2018, page 363. He was represented by his trade union representative. The Claimant made a statement at the start of the meeting. He said that he sincerely apologised. He said that, since the incident, he had reread all policies, conducted one-to-ones with all his staff and ensured that everyone was adhering to policies by the letter. The Claimant said he had been under a lot of pressure, that cash deposits had shot up and that he had been diagnosed with diabetes and had to have regular diet. He said that he now realised that, at 4 - 5pm, he was low on sugar and sometimes that affected his concentration. He said that he had been told that his role was at risk and that that had added to his stress.

57. Ms Hicks told the Tribunal that she had queried the Claimant's statement that there had been greater footfall, or additional transactions at the counter. She said that there would have been other figures available to the Claimant to show the level of counter transactions, but that the Claimant just talked about deposit levels and did not record the level of complaints on the Respondent's system.

58. Ms Hicks' challenging the Claimant's assertion that there was greater foot fall and greater deposit transactions was not reflected in the notes of the meeting at all, page 365 and 369. Where the notes recorded the Claimant mentioning extra footfall, the Claimant was either unchallenged in the notes, or his evidence was accepted by Ms Hicks. For example, "NH wanted to clarify that in the run up to the incident three out of four branches in the cluster had closed … BK confirmed that this was the case and said that foot fall had increased as a result". Page 366. Furthermore, at page 369, "NH mentioned increased footfall as being part of the Claimant's mitigation."

59. Ms Hicks told the Tribunal that the notes were not complete, but a summary.

60. On the balance of evidence, the Tribunal did not accept that Ms Hicks challenged the Claimant's figures, or asked him for more figures on counter transactions. The contemporary notes of the disciplinary hearing did not reflect such a challenge at all.

61. Ms Hicks did not research the transaction figures for the Oxford Circus Branch herself.

62. The Claimant told Ms Hicks that he had evidence of actions that he had undertaken at the branch previously to improve security and procedures and that he would send these to Ms Hicks. He did so on 28 June 2018, page 378.

63. The disciplinary hearing was held on Thursday 22 June 2018. Ms Hicks produced a rationale for her decision and the sanction in a document on 25 June 2018. This document was sent to an HR Consultant who was advising, page 372.

64. In her rationale, Ms Hicks said that the Claimant had admitted failing to follow procedures on 2 May 2018, in that the second colleague did not leave the branch, first, to go to a meeting point. The two colleagues, instead, left together. She said that the Claimant had admitted leaving keys hanging in the lock on 2 May and 10 May, which was a serious breach of procedure. She also said that CCTV on 30 April 2018 and 2 May confirmed that the Claimant was the last colleague to leave and that the Claimant did not conduct a thorough search of offices to ensure that no customers remained on the premises. She said that the Claimant had admitted that he should have done a more thorough check. Ms Hicks further stated that on 30 April 2018 and 2 May the Claimant had admitted that on 10 May he knew that a customer was on the premises when he locked the door, but that he had failed to communicate this with to anyone, or everyone, including Conchita, the Assistant Manager. She said that the Claimant had important information which he failed to communicate and, therefore, that he had some responsibility for the customer being locked in the branch.

65. Ms Hicks said that the appropriate outcome was dismissal. She said that the Claimant had admitted the allegations and was an experienced Grade E Upper Branch Manager. Ms Hicks said that there were 3 instances, on the 3 days sampled, where the Claimant had not followed basic security procedures. She said that the final exit policy was a well known and established procedure and that the potential risks to colleagues, customers and to the Respondent were substantial. Ms Hicks stated said that the Claimant was already running a smaller branch and demotion would not be a suitable option. She said that, because of the level of disregard for procedures, on three occasions, she had concluded that it was likely that there were more occasions on which the Claimant had disregarded policy, page 377.

66. In the disciplinary meeting, Ms Hicks had stated that the Claimant's main mitigating circumstances were his diagnosis of diabetes, increased footfall in the branch and his role being put at risk. Ms Hicks did not mention those matters in her outcome and rationale document, at all.

67. The Claimant contended that Ms Hicks ought to have sought Occupational Health Advice about the Claimant's diabetes condition. Ms Hicks told the Tribunal that, on the date of all the incidents, there was an Assistant Manager working in the branch and that, therefore, the branch was not understaffed as the Claimant had alleged. She decided not to obtain an Occupational Health report because she decided that the branch was adequately staffed on the days in question and that the Claimant ought to have been able to take breaks. She told the Tribunal that the Claimant himself did not understand the impact of his diabetes.

68. The Claimant contended that the decision was rushed because a rationale was produced on 25 June, before the Claimant had had the opportunity to send the list of actions that he had taken while in post at the Oxford Circus Branch which showed risk awareness and reduction on his part. Ms Hicks told the Tribunal that she had had a 4 hour train journey after the disciplinary hearing to reflect on matters and that she had had conversations with a Mr Beresford and Mr Whittaker to clarify points after the meeting. She also told the Tribunal that she had conducted disciplinary hearings for Conchita Espinoza-Fiz and Jarvis Williams on 22 June, so had an overall picture of events. She said that her rationale was provisional and was intended to be discussed with Human Resources. She said that she had received the Claimant's additional evidence on 28 June, when she retained the discretion to change her outcome, but did not do so because she did not believe that the additional evidence changed the outcome. Ms Hicks said that, when she had not changed her decision on 28 June, her decision had become final.

69. On 2 July 2018 Ms Hicks wrote to the Claimant, dismissing him, page 379. She said that she had upheld all the allegations of gross misconduct, page 381. She found that, on 3 occasions sampled, the Claimant had shown serious disregard for well-documented and established procedures, despite recently completing training which covered exit procedures. Ms Hicks said that, while the Claimant had stated that health and increase foot fall of the premises were contributing factors, she could not see how this would impact on the Claimant fulfilling security procedures which would be completed several times a week. She did not understand how a habit of following procedures correctly could be broken. Ms Hicks said that all the issues were serious breaches of procedure and showed a total disregard for security and safety of colleagues, customers and business, on at least 3 occasions. She said that the Claimant's actions could put colleagues and customers at serious risk, page 382.

70. Ms Hicks also said, page 383, "Before deciding on a suitable sanction I have taken into account your 13 years' service and your previous good conduct. I have also considered the mitigating circumstances around your health, pressure around the recent restructure announcement and significant increase in customer demand due to three branch closures close by. However, I could not ignore the unacceptable level of risk that has been presented to the branch, our colleagues and our customer as a result of your

failure to follow critical procedures". Ms Hicks said that the decision was to dismiss the Claimant for gross misconduct without notice.

71. The Claimant had continued to work as manager at the Oxford Circus Branch throughout the disciplinary procedure until his dismissal. Ms Hicks told the Tribunal that she had spoken to Mr Whittaker about why the Claimant had not been suspended during the disciplinary process. He had explained that he considered that the Claimant and all colleagues at the branch were now acutely aware of the exit procedures and, collectively, they would not allow any further breaches to occur.

72. The Claimant contended that his dismissal was too harsh a sanction and that Ms Hicks had, in reality, disregarded his mitigation. Ms Hicks said that she did not consider that a final written warning was appropriate; she felt that she could not leave the Claimant in charge of a branch. She said that branch managers needed to be compliant with all policies and these were serious policies and the Claimant's actions had put colleagues and customers at risk. Ms Hicks also told the Tribunal that, regarding demotion, company guidance was that there could only be one grade of demotion below the current existing grade. She had checked with Mr Beresford, who was an area manager, that there were no vacancies available into which the Claimant could be demoted.

73. Ms Hicks told the Tribunal that she issued Conchita with a final written warning. Compared to the Claimant, Conchita was a grade B assistant branch manager and had fully accepted her culpability. Ms Hicks further told the Tribunal that she had issued Jarvis Williams with a written warning. The allegation against him had been failing to follow the Last Colleague to Leave procedure and was one of misconduct, not gross misconduct.

74. The Claimant gave evidence about two other managers who had been disciplined, but not dismissed, when customers were locked in their branches. On both occasions, however, those managers were not present in the branch, but were nevertheless disciplined for lapses in policy, page 440.

75. The Claimant appealed against his dismissal on 9 July 2018, page 399. In his appeal, he said that Ms Hicks had failed to take into account his mitigation and that he had been harshly treated compared to others in the same circumstances. He said that the hearing manager had failed to take into account the extra stress on the Claimant caused by a threefold increase in footfall, low staffing and not having a break; or how this affected his health and diabetes and the impact on the Claimant's alertness and emotional and mental state.

76. The Respondent's disciplinary procedure provides, page 66, that appeals are to be held by someone suitably independent and senior and by a manager who has not previously been involved. Ms Hicks was a dedicated hearing manager, grade F. Because she had a specialist role in this regard, she was particularly experienced in conducting disciplinary hearings. Ms Hicks tried to secure a grade G officer to hear the Claimant's appeal. She found one suitably qualified officer on the Respondent's database, but that

person, having initially agreed to undertake the appeal, unfortunately went off work on 6 weeks' sick leave. Ms Hicks was advised by HR to look for similarly qualified grade F managers to hear the appeal. She identified Mr E Idun, Senior Bank Manager.

77. Mr Idun told the Tribunal, and the Tribunal accepted, that he had completed the Respondent's electronic disciplinary and appeal training within the 12 months before the appeal hearing. He had also refreshed modules relating to disciplinary and appeal hearings just before the Claimant's appeal hearing. Mr Idun told the Tribunal that he had previous experience of hearing appeals, but not of hearing an appeal specifically against dismissal as a sanction.

78. The Claimant attended the appeal hearing with Mr Idun on 8 August 2019, page 414. At the appeal hearing, the Claimant's union representative said that the Claimant was not saying that he had not done anything, but that there were mitigating circumstances in Claimant's case, namely his health. She said that the Claimant had 13 years' service, but had been under work-related stress. She said that, by dismissing the Claimant, the Respondent would not be paying his redundancy pay. The Claimant told Mr Idun that he was struggling to manage his diabetes, which was worsened by branch closures, as these prevented him from having breaks, which would have helped his concentration and focus, page 418. He said he had not disclosed his diabetes to the bank, page 420. The Claimant brought print outs from the internet about the effects of diabetes. His union representative said that the Claimant had not been operating at his best at the time and he had not been aware of the health effects of his diabetes. Regarding the 2 May 2018 failure to leave separately from another colleague and meet at an assembly point, the Claimant said that he was suffering from low blood sugar that day and had left to get food at a sandwich shop across the road, page 421.

79. The Claimant said, at the appeal, that he had missed the customer and had left the keys in the door normally, page 420.

80. Mr Idun summarised the Claimant's mitigation at the end of the hearing as being: The impact of the Claimant's health and diabetes on his functioning having not been considered at the disciplinary hearing; that the Claimant had acknowledged errors; that the outcome was harsh for the Claimant; and that the Claimant had been left in his role during the disciplinary process and, therefore, not considered to be a risk to the business page 424.

81. On 13 September 2018 Mr Idun wrote to the Claimant, dismissing the appeal, page 480. Mr Idun said that the disciplinary hearing manager had not ignored mitigation, including the facts that an apology had been given, that the Claimant had shown remorse, the adverse effect of local footfall on the Claimant's mental state and health and wellbeing and the impact of the onset of his diabetes on his alertness, emotional state and mental health. Mr Idun said that these things were given an appropriate level of consideration, but that the hearing manager had found correctly that they did not offer mitigation in the way that the Claimant presented. Mr Idun said that he had not heard

any compelling reason about why increased footfall during the day would have an impact on closing, or exit procedures. He said that the Claimant had not disclosed his health condition and, therefore, the Respondent could not have been aware of it. He also said that the disciplinary hearing manager did not think that those issues should reasonably affect closing procedures - and Mr Idun could not disagree with that conclusion. Regarding the 2 May 2018 failure to meet at the assembly point, Mr Idun said that the sandwich shop was in the same direction as the assembly point generally and, therefore, it did not provide a rationale for the breach, page 481.

82. Mr Idun said that there was not a lower grade role available into which the Claimant could be placed, either during the notice period, or at all.

83. The Claimant told the Tribunal in his witness statement that, looking back, he realised on the days in question he had felt particularly stressed and that the days had been difficult. He said that he believed that the reason for behaving out of character was the effect of his uncontrolled diabetes and stress brought on by shortages of staff and recent branch closures, which made it difficult to have breaks for food and affected his concentration and decision-making. He said that he believed that there was no other explanation for why he would not have correctly followed a familiar task. He said he could not remember the incidents in question.

84. The Claimant told the Tribunal that he had been missing meals and lunch because of increased pressure. Julie Anyia also told the Tribunal in her witness statement that, in her experience, the Claimant had been missing lunches.

85. On Ms Hicks' evidence, the Claimant had undergone a security audit at the Oxford Circus Branch in about 2018, including an opening procedure audit of which the Claimant would not have been aware. The branch passed this audit without problems.

86. The Claimant had previously, during his service for the Respondent, been given awards, although the last of these was in 2010, page 532.

87. The Claimant had undertaken a number of measures while at the Oxford Circus Branch to improve procedures and security there, page 378.

Relevant Law

88. By *s39(2)(c) & (d) EqA 2010*, an employer must not discriminate against their employee by dismissing the employee or subjecting the employee to a detriment.

89. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

Disability

90. By *s6 Equality Act 2010*, a person (P) has a disability if -

a. P has a physical or mental impairment, and
b. The impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

91. The burden of proof is on the Claimant to show that he or she satisfies this definition.

92. *Sch 1 para 12 EqA 2010* provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to be taken into account in this case is *Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability* (2011), brought into effect on 1 May 2011.

93. Whether there is an impairment which has a substantial effect on normal day to day activities is to be assessed at the date of the alleged discriminatory act, *Cruickshanks v VAW Motorcrest Limited* [2002] ICR 729, EAT.

94. *Goodwin v Post Office* [1999] ICR 302 established that the words of the *s1 DDA 1995,* which reflect the words of *s6 EqA,* require the ET to look at the evidence regarding disability by reference to 4 different conditions:

a. Did the Claimant have a mental or physical impairment (the impairment condition)?
b. Did the impairment affect the Claimant's ability to carry out normal day to day activities? (the adverse effect condition)
c. Was the adverse effect substantial? (the substantial condition)
d. Was the adverse effect long term? (the long term condition).

Adverse Effect on Normal Day to Day Activities

95. Section D of the *2011 Guidance* gives guidance on adverse effects on normal day to day activities.

96. D3 states that day-to-day activities are things people do on a regular basis, examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food.., travelling by various forms of transport.

97. Normal day to day activities encompass activities both at home and activities relevant to participation in work, *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706; *Paterson v Metropolitan Police Commissioner* [2007] IRLR 763.

98. D22 states that an impairment may not directly **prevent** someone from carrying out one or more normal day to day activities, but it may still have a substantial adverse long term effect on how he carries out those activities, for example because of the pain or fatigue suffered.

99. The Tribunal should focus on what an individual *cannot do, or can only do with difficulty*, rather than on the things that he or she is able to do – Guidance para B9. In G*oodwin v Patent Office* 1999 ICR 302, EAT stated that, even though the Claimant may be able to perform many activities, the impairment may still have a substantial adverse effect on other activities, so that the Claimant is properly to be regarded as a disabled person.

100. If an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect - *para 5(1), Sch 1 EqA.* This is so even where the measures taken result in the effects of the impairment being completely under control or not at all apparent - para B13 Guidance.

Substantial

101. A substantial effect is one which is more than minor or trivial*, s 212(1) EqA 2010*. Section B of the Guidance addresses "substantial" adverse effect.

102. Account should be taken of how far a person can **reasonably** be expected to modify their behaviour, for example by use of a coping or avoidance strategy, to reduce the effects of the impairment on normal day to day activities. Such a strategy might alter the effects of the impairment so that the person does not meet the definition of disability, *Guidance para B7*.

103. However, it would not be reasonable to expect a disabled person to give up normal day to day activities which exacerbate their symptoms, *Guidance B8.*

Progressive Conditions

104. Where P has a progressive condition and the condition has (or has had) an effect on P's ability to carry out normal day-to-day activities, but the effect is (or was) not substantial, "P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment," *Para 8, Sch 1, EqA.*

105. "Likely" means, "could well happen", *Guidance* para C3.

Long Term

106. The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.

107. Where an impairment ceases to have an effect but that effect is likely to recur, it is to be treated as continuing, *Sch 1 para 2, EqA 2010.* "Likely" means, "could well happen".

108. In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything occurring after that time is not relevant in assessing likelihood,

Guidance para C4 and R*ichmond Adult Community College v McDougall* [2008] ICR 431, CA.

Discrimination Arising from Disability

109. *s 15 EqA 2010* provides:
"(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".

110. Simler P in *Pnaiser v NHS England* [2016] IRLR 170*, EAT*, at [31], gave the following guidance as to the correct approach to a claim under *EqA 2010 s 15*:
'(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…
(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
(g) There is a difference between the two stages – the “because of” stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the “something arising in consequence” stage involving consideration of whether (as a matter of fact rather than belief) the “something” was a consequence of the disability.
(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the “something” leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.
(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of “something arising in consequence of the claimant's disability”. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to “something” that caused the unfavourable treatment."

111. The *Code of Practice on Employment*, issued by the EHRC (which came into force on 6 April 2011) states, at paragraph 5.6, that under *EqA 2010 s 15* there is no need for a comparator, merely to show that the unfavourable treatment is because of something arising in consequence of the disability.

112. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

113. *s136 EqA* provides for a shifting burden of proof. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgement.

Discrimination - Contributory Conduct

114. A reduction in compensation can be made in an award of compensation for discrimination on the basis of contributory negligence: *Way v Crouch* [2005] IRLR 603, [2005] ICR 1362*, EAT.* This is because statute deems the wrong which unlawful discrimination comprises, to be compensated as though it were a tort, and in tortious claims, a deduction for contributory negligence on the part of the claimant (pursuer) is permitted under the *Law Reform (Contributory Negligence) Act 1945*.

Discrimination - Polkey

115. Tribunals should not ignore the possibility that the discriminatory act was not the only causative factor. The EAT confirmed, in *Abbey National plc and Hopkins v Chagger* [2009] IRLR 86 (upheld on this point by the CA, [2009] EWCA Civ 1202), that the general rule in assessing compensation is that damages are to place the claimant into the position they would have been in if the wrong had not been sustained. In the context of discriminatory dismissals, if there was a chance of a non-discriminatory dismissal, this must be taken into account. Underhill J said , '.. the claimant [ought not to make a] 'windfall' 100% recovery in circumstances where he was likely to be dismissed in any event, simply because his employer had – it may be subconsciously and only to a small extent – allowed himself to be influenced by discriminatory considerations. There is nothing in the statute to suggest that discrimination is to be treated as a specially heinous wrong to which special rules of compensation should apply'. Underhill J went on to note, however, that this is subject to one qualification; as stated in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, a different approach is justified in cases where the damage is done maliciously and/or knowingly.

Unfair Dismissal

116. By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer

117. *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (“SOSR”). Conduct is a potentially fair reason for dismissal.

118. Cairns LJ said in *Abernethy v Mott Hay and Anderson* [1974] ICR 323, [1974] IRLR 213,''A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to

dismiss the employee'. 'These words were approved by the House of Lords in *W Devis & Sons Ltd v* Atkins [1977] AC 931.

119. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, the Employment Tribunal goes on to consider whether the dismissal was, in fact, fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

120. In considering whether a conduct dismissal is fair, the Employment Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.

121. Under *Burchell* the Employment Tribunal must consider whether or not the employer had an honest belief in the guilt of the employee of misconduct at the time of dismissal. Second, the Employment Tribunal considers whether the employer, had in its mind, reasonable grounds upon which to sustain that belief. Third, the Employment Tribunal considers whether the employer, at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

122. The Employment Tribunal also considers whether the employer's decision to dismiss was within a range of reasonable responses.

123. In applying each of these tests the Employment Tribunal allows a broad band of reasonable responses to the employer, *Iceland Frozen Foods v Jones* [1982] IRLR 439.

124. The band of reasonable responses test applies as much to the Respondent's investigation as it does to the decision to dismiss: *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23, LJ Mummery, giving the judgment of the Court, para 30.

125. It is not for the Employment Tribunal to substitute its own view for that of the employer, but to consider the employer's decision and whether the employer acted reasonably, *Morgan v Electrolux Ltd* [1991] IRLR 89, CA, *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA.

Unfair Dismissal - Polkey

126. If the Tribunal determines that the dismissal is unfair, the Tribunal may go on to consider the percentage chance that the employer would have fairly dismissed the employee, *Polkey v AE Dayton Services Limited* [1988] ICR 142.

127. In *Gover v Propertycare Limited* [2006] ICR 1073, the Court of Appeal held that the *Polkey* principle does not only apply to cases where the employer has a valid reason for dismissal, but has acted unfairly in its mode of

reliance on that reason, so that any fair dismissal would have to be for exactly the same reason. Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred, or at some later date. In making an assessment, Tribunals should apply the principles set out in *Software 2000 Limited v Andrews* [2007] ICR 825.

Unfair Dismissal - Contributory Fault

128. By *s122(2) ERA*, where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the Tribunal shall make such a reduction. By *s123(6) ERA,* 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. *Optikinetics Limited v Whooley* [1999] ICR 984: it is obligatory to reduce the compensatory award where there is a finding of contributory fault. The reduction may be 100% - *W Devis & Sons Limited v Atkins* [1977] ICR 662.

129. In *Nelson v BBC (No 2)* [1980] ICR 110, the Court of Appeal said that three factors must be satisfied if the Tribunal is to find contributory conduct:

a. The relevant action must be culpable and blameworthy;
b. It must actually have caused or contributed to the dismissal;
c. It must be just and equitable to reduce the award by the proportion specified.

130. It is open to a Tribunal to make deductions both for *Polkey* and contributory fault. The proper approach of tribunals in these circumstances is first to assess the loss sustained by the employee in accordance with *s123(1) ERA 1996*, which will include any percentage deduction to reflect the chance that he would have been dismissed in any event. The tribunal should then make the deduction for contributory fault, *Rao v Civil Aviation Authority* [1994] ICR 495. However, in deciding the extent of the employee's contributory conduct and the amount by which it would be just and equitable to reduce the award for that reason under *s123(6)*, the tribunal should bear in mind that it has already made a deduction under *s123(1) ERA 1996.*

Wrongful Dismissal

131. Where an employee has committed a repudiatory breach of contract, the employer can accept the repudiation, resulting in summary dismissal.

132. The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the Tribunal to decide. In *Briscoe v Lubrizol Ltd* [2002] IRLR 607, the Court of Appeal approved the test set out in *Neary v Dean of Westminster* [1999] IRLR 288, ECJ, where the Special Commissioner held that the conduct, "must so undermine the trust and confidence which is inherent in the particular contract

of employment that the employer should no longer be required to retain the employee in his employment."

Discussion and Decision

133. The Tribunal decided that the Claimant was a disabled person by reason of his disability from August 2017.

134. The Tribunal went on to consider, under *s.15 Equality Act 2010,* whether the Respondent dismissed the Claimant because of something arising in consequence of disability.

135. The Tribunal found that the Respondent dismissed the Claimant because of his failures to follow exit procedures on 30 April, 2 May and 10 May 2018.

136. The Tribunal has accepted that the Claimant's symptoms of disability, when suffering from uncontrolled diabetes, included lethargy, lack of concentration and shakiness.

137. The Claimant told the Tribunal that his concentration at the relevant times was affected by his uncontrolled diabetes. The disciplinary and appeal managers both said that the procedures were well known and carried out daily and they could not see how such procedures could be affected by diabetes. The burden of proof is on the Claimant to show that the actions for which he was dismissed arose, at least partly, because of his disability.

138. The Claimant admitted, during the investigation interviews, that leaving keys in the door might have been a bad habit and he admitted, when it was put to him, that he could not see into interview rooms when the doors were closed. He admitted that his checks could have been more thorough.

139. Nevertheless the Tribunal found that, at the relevant times, the Claimant's diabetes was uncontrolled, in that he was not taking medication which was required to control his blood sugar levels. On the GP's evidence, the Claimant was not eating regularly as required in order to control his symptoms. The Tribunal accepted that there was a significant increase in footfall at the Claimant's branch and that the Claimant and his team were under significant pressure at the relevant times. The Tribunal also accepted the Claimant and Julie Anyia's evidence that the Claimant was missing lunches as a result.

140. The Tribunal concluded, on the balance of probabilities, that from at least early April 2018, the Claimant was suffering from low blood sugar levels at the end of the day and that this made him lose concentration and feel lethargic and unwell. The Tribunal concluded and that this would have inevitably had a detrimental effect on the Claimant's performance in work.

141. On the balance of probabilities, the Tribunal accepted that, on 2 May 2018, the Claimant was feeling unwell due to low blood sugar levels at the

end of the day, and did not follow procedures because he wanted to get food urgently from the nearby sandwich shop. He prioritised his need for food above other matters.

142. On 30 April 2018, the Claimant did not carry out appropriate checks on rooms when closing the bank at the end of the day. He conceded that his checks could have been more thorough. On 2 May and 10 May the Claimant left keys in the door and he conceded that that could have been a bad habit.

143. However, on the balance of probabilities, given that the Claimant had uncontrolled diabetes, was under stress and was not eating regularly at the relevant time, the Tribunal concluded that the Claimant was suffering from the effects of lethargy, lack of concentration and that this affected the Claimant's performance and judgment detrimentally. The Tribunal found that the Claimant's failure to follow procedures was caused, at least in part, by his uncontrolled diabetes and low blood sugar levels. The Tribunal accepted that the Claimant's functioning, subject to uncontrolled diabetes, was not reflective of his functioning over his previous 13 years of work. It found, on the evidence, that the Claimant had undertaken a number of measures to improve security and procedures at the Oxford Circus Branch in 2017-2018. This indicated that he had hitherto taken security and procedures seriously. Furthermore, during a previous audit, which included an opening procedure audit of which the Claimant would not have been aware, the Claimant passed the required standards. That indicated that the Claimant did, in other circumstances, comply with security procedures.

144. Accordingly, on all the facts, the Tribunal concluded that the Claimant's judgement and conduct were affected by his disability on the relevant days. However, it also concluded that the disability was not a complete explanation for all the occasions on which the Claimant failed to follow procedure. On each of the 3 occasions when he was observed by the investigating officer, he failed to follow procedures. If his failure to follow procedures was wholly explained by the effects of his disability, the Tribunal considered that his functioning would have been so significantly impaired by his disability that it would have been difficult for him to have been performing his job duties at all. Yet the Claimant was working full time throughout the period and did not become seriously unwell due to his uncontrolled blood sugar levels.

145. In conclusion, the Tribunal concluded that the Claimant's disability was an effective cause of his failure to follow procedures on each day. When he was dismissed for failure to follow procedure, he was dismissed because of something arising in consequence of disability.

146. The burden of proof therefore shifted to the Respondent to show that dismissal was a proportionate means of achieving a legitimate aim. The legitimate aim on which the Respondent relied was ensuring the security of the branch and the safety of customers and employees of the branch. The Respondent contended that the Claimant's conduct was very serious and put customers and colleagues at risk.

147. It was clear from the facts that the Respondent did subject others to disciplinary penalties, even for single breaches of closing procedures.

148. The Tribunal accepted that breaches of closing procedures was a very serious matter and could expose colleagues and customers to risk of assault and robbery and the bank to risk of loss and reputational damage. The Claimant was a manager, he was a senior employee and he was responsible for other people in the branch. It was reasonable to expect him to comply with policies at all times and to demonstrate good practice to his subordinates.

149. On the other hand, the Respondent had evidence of the Claimant's previous compliance with policies and his desire to minimise risk. Furthermore, the Claimant was suffering from disability exacerbated by stress, which did affect his judgement and behaviour. The Claimant told the Respondent that he had diabetes. The Respondent did not investigate the effects of the disability. Even when it did not investigate the effects of disability, the Respondent judged that the Claimant did not present a risk following the incidents. It did not suspend him, but permitted him to continue to work as a bank manager until it dismissed him. This was the case, even when there was CCTV evidence of the Claimant's breaches of procedure and when the Claimant had admitted his actions in this regard. Nevertheless, the Claimant continued to work as a branch manager, responsible for the branch and colleagues throughout the disciplinary process, for over a month, from 24 May until 2 July 2018. The Tribunal concluded that this demonstrated that the Respondent did not view the Claimant's actions to be as so serious, or dangerous, as to require the Claimant to be removed from his position.

150. The Tribunal concluded that, without the mitigating circumstances of the Claimant's disability, dismissal would have been an appropriate means of ensuring the security of the branch and the safety of customers and employees. However, in this case, where the Claimant's diabetes could have been treated and controlled and his relevant functioning improved, and where the Respondent was itself satisfied that the Claimant was not an ongoing risk, even without his diabetes being treated, and where the Claimant's culpability was significantly lower because of the effects of his diabetes, the Tribunal concluded that the Respondent had not shown that dismissal of a long-serving disabled employee was a proportionate means of achieving its legitimate aim. The Respondent did not show that less discriminatory measures, for example, a final written warning with training and a referral to Occupation Health, to ensure proper management of the Claimant's diabetes in future, would have been insufficient to achieve its legitimate aim.

151. The Tribunal needed to decide whether the Respondent knew, or could reasonably have been expected to know, that the Claimant was a disabled person at the relevant time. The Tribunal found that the Respondent's investigating officer, dismissing officer and appeal officer all knew that the Claimant had diabetes. They also knew that the Claimant was saying that his diabetes was affecting his functioning. The Respondent was therefore on notice that the Claimant had a condition which he said was affecting his ability

to carry out normal day-to-day activities at his work. Nevertheless, the Respondent's officers failed to refer the Claimant to Occupation Health.

152. The Tribunal concluded that it would have been reasonable for the Respondent to refer the Claimant to Occupational Health. If it had done so, at the time of the disciplinary hearing on 22 June 2018, it would have been highly likely to have been told by an Occupational Health adviser, either through the Claimant's GP, or from the OH adviser's own knowledge, that the Claimant had diabetes, which was a lifelong condition and needed to be managed by medication. It would have been likely to be told that the symptoms of uncontrolled diabetes would include impairment of concentration, mood and the Claimant's ability to function in the workplace. The Claimant was told this by his GP shortly afterwards.

153. The Tribunal therefore concluded that the Respondent had been put on notice of the Claimant's diabetes condition and could reasonably have been inspected to know, through making the appropriate enquiries, that the Claimant's condition was lifelong and, uncontrolled by medication, would have a more than minor effect on his ability to undertake day to day activities – that is, that the Claimant was a disabled person by reason of his diabetes.

154. Accordingly, the Tribunal found that the Respondent did subject the Claimant to discrimination arising from disability under *s15 EqA 2010* when it dismissed him.

Contributory Conduct

155. The Tribunal nevertheless needed to consider the extent of the Claimant's contributory conduct. The Tribunal has already found that the breaches were serious, with potentially serious consequences - and actual consequences for the customer locked in the branch. The Claimant was a senior, experienced employee and he had not made management aware of his disability. He was not managing his own condition; he was not taking medication as recommended by the doctor.

156. The Tribunal concluded that the Claimant's conduct was a major contributing factor to his dismissal, but it was not the whole reason for dismissal. The disability was also a significant factor, exacerbated as it was by the circumstances of stress in which the Claimant found himself.

157. The Tribunal found, on all the facts, that the Claimant's contributory conduct was a slightly more significant factor in relation to culpability for the dismissal than the effects of the disability.

158. The Tribunal assessed the measure of contributory conduct at 60%.

Unfair Dismissal

159. The Tribunal concluded that the Respondent had shown that the principal reason for dismissal in this case was conduct, in the Claimant failing to follow closing procedures on three occasions. That was the conduct which was investigated and was the reason for dismissal in the minds of the dismissing officer and the appeal officer. The Tribunal has found that that conduct was the predominant reason for the dismissal.

160. The Tribunal considered whether the Respondent acted fairly, within a broad band of reasonable responses, in dismissing the Claimant. The Claimant said that the decision was rushed and that the Respondent did not take into account his mitigation, or investigate his disability appropriately.

161. The Tribunal concluded that it was beyond the band of reasonable responses for the Respondent not to refer the Claimant to Occupational Health for advice on the effects of his diabetes before dismissing him. The Respondent is a large organisation with considerable resources available to it. The Claimant was working for the Respondent during the investigation process, giving good service, and there would have been no loss caused to the Respondent by a short delay while Occupational Health advice was sought. The Claimant made clear, throughout the investigation process, that his diabetes was a significant explanation for his behaviour. The Respondent, acting reasonably, should have sought, not only evidence which was inculpatory, but also evidence which would be exculpatory.

162. Ms Hicks failed to refer the Claimant to Occupational Health. Further, on her evidence to the Tribunal, she apparently dismissed the Claimant's evidence regarding additional footfall, but failed to take any investigation herself into transactions at the bank. On her evidence to the Tribunal, she simply concluded that disability could not have effected closing procedures.

163. The Tribunal concluded that, as indicated by Ms Hicks' original rationale document, Ms Hicks disregarded the Claimant's mitigation in relation to his disability and footfall at the bank. While she mentioned those matters in her letter of dismissal, the Tribunal did not accept her evidence that Ms Hicks had, in reality, taken those into account when making the decision to dismiss. Ms Hicks had made her complete decision, both in terms of culpability and penalty on 25 June. On that date, from the words of her own rationale document, she had not taken into account the Claimant's mitigation.

164. The Tribunal concluded that Ms Hicks failed to carry out a reasonable investigation when she failed to take the basic step of obtaining an Occupational Health report, or other medical advice, on the effects of the Claimant's disability. She therefore did not have reasonable evidence when she made her decision to dismiss, because she had no evidence about the true effect of disability on the Claimant's functioning at the time. The appeal did not cure this defect. There was still no Occupational Health referral.

165. Regarding the Claimant's other contentions, the Tribunal found that Ms Hicks took into account the Claimant's previous risk management actions. She did not discount those, but considered that his previous risk management

activities did not change her outcome, p378. The Tribunal accepted Ms Hicks' evidence that she considered that the Claimant's conduct on three occasions was so serious as to warrant dismissal, whatever previous actions he had undertaken.

166. The Tribunal did not find that there was any unfairness because of lack of consistency with other sanctions. The Tribunal found that the Claimant's colleagues were not in truly similar circumstances to the Claimant. He was a more senior employee and had been guilty of more breaches. Other branch managers relied on as comparators were guilty of conduct which was less culpable than the Claimant's. They were not in the same circumstances because their conduct related to single incidents of customers being locked in the branches when the manages in question were not even present at the time.

167. The Tribunal was satisfied that Mr Idun was an appropriate person to conduct the appeal. It was not unfair to appoint him. He was properly trained and sufficiently senior. He was at least as senior as Ms Hicks and was competent to carry out the appeal. The Respondent acted within the range of reasonable responses in this regard.

168. Nevertheless, the Tribunal has found that the dismissal was unfair because the procedure adopted - that is the failure to investigate the Claimant's mitigation relating to disability and increased footfall, in the circumstances that Ms Hicks was not convinced by the Claimant's evidence of increased footfall. These failures were such that the Respondent acted outside the range of reasonable responses of a reasonable employer in the investigation it undertook before making the decision to dismiss.

Unfair Dismissal - Polkey

169. The Tribunal went on to consider whether this Respondent would have dismissed the Claimant fairly, following a reasonable procedure. The Tribunal concluded that, if the Respondent had obtained Occupational Health advice it would have been told that the Claimant was a disabled person and that the disability was uncontrolled and likely to have had an effect on his concentration and his tiredness by reason of low blood sugar levels.

170. That being the case, the Tribunal concluded that the Respondent would not have been likely to dismiss the Claimant. The Respondent had continued to deploy the Claimant as a bank manager during the investigation process because it was satisfied that he was not an ongoing risk. The Tribunal considered that it was very unlikely, in those circumstances, that the Respondent would have dismissed an employee who it then discovered to be disabled and whose disability was likely to have detrimentally affected his functioning – but which could, in future, be treated by medication and diet.

171. Because of the seriousness of the breaches of closing procedures, the Tribunal accepted that there was some likelihood that the Claimant would have been dismissed fairly in any event. It assessed the likelihood at 10%.

Unfair Dismissal – Contributory Fault

172. The Tribunal went on to consider the question of contributory fault in relation to unfair dismissal. The test to be applied was not the same as for contributory conduct in disability discrimination. Applying the test for unfair dismissal, the Tribunal considered that the Claimant's conduct, in failing to follow closing procedures, was culpable and blameworthy, in the same way as the Tribunal had found it be culpable in the discrimination findings. It found that the conduct did contribute to the dismissal - the number and seriousness of the incidents contributed to the decision to dismiss. The disability did not provide a complete explanation for the conduct.

173. The Tribunal considered that it was just and equitable to reduce the basic and contributory awards by 60% to reflect the Claimant's contributory fault. The Tribunal took into account that it had already concluded that it was 10% likely that the Claimant would have been dismissed following a fair procedure. Nevertheless 60% was the appropriate level at which to assess contribution. It was not just and equitable to reduce the percentage contribution given the seriousness of the contributory conduct.

Wrongful Dismissal

174. The Claimant's conduct did not so undermine the trust and confidence inherent in the particular contract of employment that the employer should no longer be required to retain the employee. The Respondent continued to allow the Claimant to operate in his manager's role even after matters were discovered and the Claimant admitted them. That demonstrated that the Respondent did have ongoing trust and confidence in the Claimant to work in the role. The Claimant had previously complied with procedures and there was no live disciplinary sanction on his file. His conduct was partially explained by his disability. The Tribunal concluded that the Claimant's conduct, in failing to comply with procedures on these occasions, was not wilful, or deliberate, or seriously negligent.

175. The Tribunal concluded that the Claimant's conduct was not so serious as to justify the Respondent dismissing the Claimant without notice.

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Employment Judge Brown

Dated: ……02/08/2019

Judgment and Reasons sent to the parties on:

05/08/2019

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For the Tribunal Office