EMPLOYMENT TRIBUNALS

Claimant: Mr Andrew Weeks

Respondent: Department for Work and Pensions

Heard at: Manchester **On:** 10 – 13 November 2020
In Chambers Deliberations
14 December 2020

Before: Employment Judge A M Buchanan
Mr B Rowen
Mr W Haydock

REPRESENTATION:

Claimant: Ms Carol Jackson - Lay Representative
Respondent: Mr Tariq Sadiq of counsel

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The claim of disability discrimination by reason of a failure to make reasonable adjustments advanced pursuant to sections 20/21 of the Equality Act 2010 ("the 2010 Act") is not well founded and the claim is dismissed.

2. The claim of discrimination arising from disability advanced pursuant to section 15 of the 2010 Act is not well founded and the claim is dismissed.

3. The claim of unfair dismissal advanced pursuant to sections 94 – 98 of the Employment Rights Act 1996 ("the 1996 Act") is not well founded and the claim is dismissed.

REASONS

Preliminary Matters

1.The claimant instituted proceedings on 28 August 2019 supported by an early conciliation certificate on which day A was shown as 8 July 2019 and day B of 29 July

2019. A response was filed on 16 December 2019 after an extension of time had been granted and in which the respondent denied all liability to the claimant.

2. At a private Preliminary Hearing ("PH") before Employment Judge Ainscough on 2 January 2020 the various claims advanced and the issues arising for determination were discussed and Case Management Orders were made.

3. A public PH was scheduled to take place on 31 March 2020 to determine whether the claimant was a disabled person for the purpose of Section 6 of the 2010 Act at the material time and whether any claims should be struck out or made the subject of a deposit order. The claimant filed a Disability Impact Statement (pages 30-32) and his medical records in advance of that hearing.

4. On 27 February 2020, the respondent wrote to the Tribunal with a concession that the claimant "*is disabled on the basis that he has a condition called Hyde's disease".* It was suggested by the respondent that the public PH need not take place and as a result the Tribunal vacated that hearing.

5. On 20 July 2020, the claimant filed further and better particulars of claim. The respondent objected to those particulars given that no application to amend the claim had been made and as a result a public PH was listed to take place on 23 October 2020 to decide the question of the amendment. On 20 October 2020, the respondent wrote to the Tribunal to advise that it was no longer opposing the application to rely on the further and better particulars filed on 20 July 2020 and, as a result, the hearing scheduled for 3 October 2020 was vacated. This matter had been listed for final hearing at the private PH held on 2 January 2020 and came before this Tribunal as noted at the outset of this Judgment.

6. The hearing took place by Cloud Video Platform. The Employment Judge and Mr B Rowen attended the Tribunal office. Mr W Haydock attended remotely as did both parties, their representatives and their witnesses.

7. At the outset of the hearing a discussion took place as to the claims advanced and a list of issues was duly prepared by the Employment Judge and agreed by the parties before any evidence was called and the issues set out below are those agreed during that discussion. This step was taken in light of the fact that this case had not received case management attention from an Employment Judge since 2 January 2020 at which time the claims were not clear. At the conclusion of the hearing on the afternoon of 13 November 2020 the Tribunal reserved its decision to deliberate on another day. Those deliberations took place on 14 December 2020 and we now issue our judgment with full reasons in order to comply with the provisions of Rule 62(2) of Schedule I of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

The Claims

8. The claimant advances the following claims to the Tribunal:-

8.1 A claim of disability discrimination through a failure to make reasonable adjustments relying on the provisions of sections 20/21 and Schedule 8 of the 2010 Act.

8.2 A claim of discrimination arising from disability relying on the provisions of sections 6, 15 and 39(2)(c) and (d) of the 2010 Act.

8.3 A claim of ordinary unfair dismissal relying on the provisions of sections 94 and 98 of the1996 Act.

Issues

9. The issues in the various claims advanced to the Tribunal were clarified at the outset of the hearing as detailed above and are as follows:-

Claims of Disability Discrimination

9.1 Was the claimant a disabled person for the purposes of section 6 of the Equality Act 2010 ("the 2010 Act") at the material times? The claimant claims to have been a disabled person at all material times by reason of the conditions of asthma, eczema, boils, insomnia, anxiety and depression.

9.2 It is noted that the respondent accepts that the claimant was disabled by reason of Hyde's Disease (page 54G) and that that disease manifested itself in the impairment of boils. The respondent accepts the claimant was also disabled at the material time by the impairments of eczema and insomnia. No concession is made in respect of asthma, anxiety and/or depression.

9.3 It will be for the Tribunal to determine if the claimant was a disabled person by reason of asthma, anxiety and depression at the material times. Did the claimant suffer from those impairments at the material time? Did those impairments (individually or collectively) have a substantial and long-term adverse effect on the ability of the claimant to carry out normal day to day activities?

Claim of Failure to make Reasonable Adjustments: sections 20/21 Equality Act 2010

9.4 Which impairment/s is/are relied on by the claimant in support of this claim?

9.5 Did the respondent know or should the respondent reasonably have been expected to know that the claimant was disabled by reason of the impairments relied on by the claimant and that the claimant was likely to be placed at a substantial disadvantage at the material time?

9.6 Did the respondent apply a provision, criterion or practice (PCP) of requiring employees to adhere to a fixed start time of 8am for six months from February 2019 at the start of the next Employee Deal Rotation? It is noted that the respondent will say that adjustments enjoyed in respect of this PCP by the claimant from August 2018 were not withdrawn in February 2019 as the claimant alleges.

9.7 If so, did that PCP place a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

9.8 If so, did the respondent fail to make reasonable adjustments which would have removed that disadvantage for the claimant? The claimant will contend that

adjustments previously made by the respondent should have been continued and that they would have removed the substantial disadvantage to him.

9.9 Has any claim been advanced in time by reference to section 123 of the 2010 Act? When did the respondent fail to make the adjustments contended for? When did the period expire during which the respondent might reasonably have been expected to make the adjustments?

9.10 If the claim is out of time, is it just and equitable to allow a period greater than 3 months from that date to allow proceedings to be instituted?

Claim of Discrimination arising from Disability: section 15 Equality Act 2010

9.11 Did the respondent treat the claimant unfavourably by dismissing him on 27 April 2019?

9.12 Did the respondent treat the claimant unfavourably in the following ways prior to/subsequent to the dismissal:

9.12.1 by failing to believe his insomnia was as bad as the claimant contended?

9.12.2 by removing in February 2019 reasonable adjustments previously enjoyed by the claimant in relation to the above PCP or otherwise?

9.12.3 by denying knowledge of the claimant's skin condition when it was clearly known to certain members of the same team?

9.12.4 by failing to keep written records of conversations surrounding the claimant's health and treatment?

9.12.5 by failing in August 2018 to complete a workplace adjustment passport, stress risk assessment, stress reduction plan or wellness action plan?

9.12.6 by failing to refer the claimant to occupational health during the disciplinary process which led to his dismissal on 27 April 2019?

9.12.7 by referring to the claimant's training on unconscious bias as a reason to move to dismissal?

9.12.8 by failing to investigate complaints of disability discrimination made by the claimant against his Line Manager and the Decision Maker?

9.13 If so, was such treatment because of something arising in consequence of the claimant's disability?

9.14 What disability/ies is/are relied on in support of this claim?

9.15 What was the something arising in consequence of such disability?

9.16 If so, does the respondent show that any such treatment was a proportionate means of achieving a legitimate aim?

9.17 It is noted that the respondent will rely on the following aims:

9.17.1 the need to protect its customers from derogatory and offensive comments made by its employees (the equality argument)

9.17.2 to ensure disciplinary standards are maintained (the consistency argument).

9.18 Are such aims legitimate and does the Tribunal conclude the respondent acted proportionately to any one or more of such aims in acting as it did?

9.19 Did the respondent know or should the respondent reasonably have been expected to know that the claimant was disabled by reason of the impairment/s relied on at the material time?

9.20 Is any claim advanced in time by reference to section 123 of the 2010 Act?

9.21 If any claim is out of time, was there conduct extending over a period of time which can be treated as done at the end of that period? If not, is it just and equitable to allow a period greater than 3 months from the date the time limit expired to allow proceedings to be instituted?

Remedy

9.22 What remedy does the claimant seek for any act of proven discrimination?

9.23 What compensation should be awarded? Should there be an award for injury to feelings? Should any award to the claimant be adjusted by reference to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992?

Unfair Dismissal Claim: sections 94/98 Employment Rights Act 1996

9.24 Did the dismissing officer have a genuine belief that the claimant had used offensive language about a customer in a PIP Appeal response?

9.25 If so, were there reasonable grounds for that belief?

9.26 If so, did the respondent follow a reasonable procedure in moving to dismiss the claimant? Are any of the matters referred to at paragraph 9.12 above relevant to this question and that at paragraph 9.28 below?

9.27 Did the respondent fail to follow any of the provisions of the ACAS Code of Conduct on Disciplinary and Grievance Procedures 2015 (“the ACAS Code”)?

9.28 If so, did the penalty of gross misconduct fall within the band of a reasonable response?

9.29 If the dismissal of the claimant was unfair, did the claimant contribute to his dismissal by any culpable or blameworthy conduct on his part? If so, to what extent?

9.30 If the dismissal of the claimant was unreasonable and unfair, has such unfairness made any difference to the outcome. If so, to what extent?

Remedy

9.31 What remedy does the claimant seek for any unfair dismissal?

9.32 Does the claimant wish to have the benefit of an order of re-instatement or reengagement?

9.33 If so, is it practicable for the respondent to comply with any such order?

9.34 Is the claimant entitled to compensation for unfair dismissal? If so, in what amount?

9.35 Should any award to the claimant be adjusted by reference to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992?

Witnesses

10. In the course of the hearing the Tribunal heard from the following witnesses.

Claimant

10.1The claimant

10.2 Barry Jackson – a former work colleague of the claimant who supported the claimant through the disciplinary proceedings which led to his dismissal.

Respondent

For the respondent, evidence was heard from:

10.3 Andrew Richmond, HEO Team Leader who became the Dismissing Officer. This witness was based in Glasgow at all relevant times.

10.4 Linda Spencer, Operations Manager at the respondent who was the Appeal Officer. This witness was based in Blackpool at all relevant times.

10.5 Iain Ellis who was the Line Manager of the claimant.

Documents

11. We had an agreed bundle of documents before us running to 604 pages. During the course of the hearing the medical records which had been filed by the claimant in readiness for the above mentioned public Preliminary Hearing were copied and added to the bundle in a separate section at the rear of Volume 3. They were not page numbered. Any reference to a page number in this judgment is a reference to the corresponding page in the agreed trial bundle.

Findings of Fact

12. Having considered all the evidence, both oral and documentary placed before us and in particular the way the evidence was given, we make the following findings of fact on the balance of probabilities.

12.1 The claimant was born on 6 June 1969 and began working for the Civil Service on 1 May 1993. At the material time he was employed by the respondent as an Executive Officer responsible for writing appeals for submission to the First Tier Tribunal in respect of claimants for state benefits who were appealing against a decision made in relation to a claim for benefit made by them. The claimant worked at Warbreck House in Blackpool and his line manager was Iain Ellis. In his teenage years the claimant was diagnosed with severe acne and subsequently developed eczema. Over the years that condition progressed and increased in severity and it became resistant to the usual drugs and treatments. The impairment is described by the claimant as a "*constant torturous irritation"* and he tries to distract himself to stop scratching the areas of his skin affected by eczema. As a result of that condition the claimant would always wear long sleeved clothing and fingerless gloves whilst at work. The claimant never wore clothing which revealed his arms or legs. The claimant began to suffer from insomnia because of the constant itching caused by the eczema condition. As a result, the claimant has no social life or relationships with any other person and has suffered periods of depression although there was no formal diagnosis of that condition. Insomnia began to affect the claimant in 2016 and he could go occasionally two or three days without sleep. That has a detrimental effect on his ability to concentrate and his memory is affected.

12.2 The respondent accepted that at all material times the claimant was disabled by reason of the impairments of eczema and of insomnia and of Hyde's Disease which is a disease which leads to boils on the skin and is frequently associated with severe eczema.

12.3 The claimant alleged that he was also disabled by reason of an impairment of asthma. In fact, no evidence was given to the Tribunal about that condition at all.

12.4 The claimant also asserted that he was disabled at the material time by the conditions of anxiety and depression. Medical records produced to us by the claimant have little, if any, information in respect of anxiety and depression. The claimant was prescribed anti-depressant medication in mid-2018 but that was discontinued in January 2019 when the claimant was to undertake more intense treatment for eczema which was not tolerant to anti-depressant medication.

12.5 The respondent has a policy document entitled: "*Mental Health – A Guide for Managers"* issued in April 2018 (pages 78 – 95) to which the officers involved with the claimant's dismissal did not refer. The respondent has a policy entitled "Appeal Manager's Guide" dated 24 January 2019 (page 112 – 128). It was alleged by the claimant that the Appeal Officer in this case did not comply with the provisions of that guidance document.

12.6 The claimant had been referred to Occupational Health ("OH") at various times during his employment with the respondent. On 29 January 2018 (pages 275 - 6) a referral was made in relation to the claimant's low back pain. A further referral was made on 15 August 2018 (page 296) in relation to the claimant's insomnia and that resulted in a recommendation which reads:-

"I would like to recommend if operationally feasible that Andy is able to work flexible hours to help him at this time until his situation has improved."

12.7 In fact, the claimant had been working flexible hours for some time prior to 15 August 2018 because of his insomnia and other conditions. The claimant's line manager prior to Iain Ellis was Joanne Jones and Ms Jones had carried out a stress risk assessment with the claimant in 2018 (pages 262-268) which had not revealed any particular causes for concern and had not resulted in a formal stress reduction plan. In the self-assessment part of the stress risk assessment, the claimant referred to his "*chronic sleep problem"* and an occasional lack of concentration due to that problem.

12.8 The claimant had fallen into the habit of taking certain of his holidays in individual days when he found it difficult to go into work having overslept because of his insomnia. In the period 22 August 2018 until 19 March 2019 the claimant took 12 single or half days of annual leave. During that same period, he also took two periods of leave of five days each. The claimant's sickness record for the same period reveals an absence of one day on 24/25 January 2018 for musculo-skeletal reasons, an absence of one day on 1 May 2018 for vomiting/sickness, an absence for one day on 13 June 2018 and a further absence on 29 June 2018 for what is described as "*mental health – other"* and of those absences, two dates follow a period of annual leave taken by the claimant shortly before each absence. The two single absences in June 2018 were in fact related to insomnia.

12.9 In common with most of his colleagues, the claimant had signed up to the "Employee Deal" offered by the respondent in 2018 under which employees were offered a new contract under which they had access to a better rate of pay and quicker promotion prospects in return for agreeing certain times on each day when they would be present in the office. The purpose in bringing forward that scheme was to ensure that better customer service could be provided and that the office opening hours could be extended. The times on each day on which an employee agreed to be present in the workplace were known as "*tent poles*". The tent poles were set for each employee twice per annum and a new so-called "*rotation*" had been agreed with all employees, including the claimant, to begin on 11 March 2019 and the next rotation after that was due to begin in September 2019.

12.10 For a period in excess of 12 months before March 2019, the claimant had had adjustments agreed to his working pattern so that, despite having signed up to tent-poles in a particular rotation, he was allowed to telephone his line manager and say that he would not be able to work at the times of his agreed tent poles on a particular day if he found that he was suffering from the effects of insomnia or his other health related conditions. In addition, the claimant was allowed to telephone his line manager to request annual leave at short notice if he felt unable to work at all on a particular day for that same reason. The claimant had also been allowed to take regular breaks away from his workstation when at work.

12.11 A conversation took place between the claimant and his line manager informally in late February or early March 2019 in which Mr Ellis told the claimant that the adjustments which the claimant had been enjoying for some time would need to be reviewed at the time of the next rotation. At the time of that conversation, the new six-monthly rotation was due to begin on 11 March 2019 but the tent poles of each employee, including the claimant, had been settled some months prior to the date of that conversation. When Mr Ellis referred to the necessity to review the adjustments, he was referring to the September 2019 rotation, but we find that the claimant did

misunderstand that and thought Mr Ellis was referring to the cycle due to begin on 11 March 2019. In any event, we accept the evidence of Mr Ellis that this was an informal conversation in which he indicated that the matter would have to be reviewed and nothing more, and by review, he meant just that and did not mean and did not indicate withdrawal of the adjustments. In addition, we find it was Mr Ellis' understanding that adjustments, such as those enjoyed by the claimant, could not have been removed without a further referral to OH.

12.12 The claimant worked flexitime and we find that on Tuesday 5 March 2019 (page 303A) the claimant began work at 11.20 am until 1:30 pm and resumed at 2pm and worked until 6.35 pm, a total of 6 hours and 45 minutes. On that day it is clear that the claimant was utilising his agreed adjustment as his tent pole for the day was 8 am whereas the claimant did not in fact begin work until 11.20 am.

12.13 Whilst working on an appeal referral on 5 March 2019, the claimant referred in writing on two occasions in that appeal referral to a benefit claimant as a *"lying bitch".* Those words appeared on page N of the appeal referral (page 317A) as follows:-

"In this lying bitch's case she is receiving the middle rate carer's allowance component for providing day-time supervision to another disabled person. The Tribunal may wish to explore this further".

12.14 That appeal submission was sent out to the benefit claimant in question and also to the First Tier Tribunal in early March 2019.

12.15 On 15 March 2019 (page 327) the respondent received a complaint from the representative of the benefit claimant in respect of being referred to as a "*lying bitch*". The benefit claimant expressed being astounded and hurt at the assertion that she was lying about her care and mobility needs and her distress at being referred to as a "*bitch".* The letter of complaint continued:

"I was devastated by Mr Week's comments as I am struggling to deal with various physical and mental health conditions. Mr Week's comments made me feel even more negative about my conditions. He has displayed a bias and appears incapable of acting in an impartial manner as he has concluded that I am a "lying bitch". His egregious comments demonstrate an implicit bias and highlight how some employees of DWP view disabled people such as myself".

12.16 As soon as the respondent received that complaint urgent action to investigate was taken. The matter became public knowledge and was subject to comment on social media and also an article appeared in "The Guardian" newspaper (page 332W). It was asserted that there was a "*culture of contempt"* for benefit claimants within the respondent. The matter received attention from the higher echelons of management in the respondent department and a report had to be sent to 10 Downing Street to enable the matter to be briefed to the Prime Minister for Prime Minister's Questions.

12.17 The respondent discovered without difficulty that the author of the appeal referral in question was the claimant because his reference was to be found on it. Therefore, on 25 March 2019, an investigation began and Natalia Casserley was appointed as the investigating officer. She saw the claimant on that day and

suspended him pending the investigation. A letter was sent to the claimant (page 333) confirming the suspension and that an investigation was taking place.

12.18 The claimant was invited to an investigation meeting by letter of 26 March 2019 (page 335) and that meeting took place on 2 April 2019. The investigation meeting was minuted (pages 340 – 342). The claimant attended with Barry Jackson as his colleague in support. During the meeting, the claimant stated that he could only imagine that what he did was a moment of madness or psychosis and that he was shocked, mortified and embarrassed about what he had done. He produced a statement (pages 343 – 344) in which he fully accepted that he had written the words which had caused severe distress to the benefit claimant and embarrassment to himself, his colleagues, his managers and the department as a whole. He had not intended to write the words or to cause any distress or embarrassment. The claimant referred to the fact that colleagues sitting close to him had around that time been discussing a different benefit claimant and that those colleagues had referred to that particular benefit claimant in similar terms to the phrase that he had subsequently used in the appeal document he was writing. The claimant referred to having suffered from chronic insomnia and severe eczema over two years and that he had been placed on anti-depressant medication in late 2018 which he had had to come off in early 2019 because of different treatment he was to receive for eczema. He also referred to the fact that he had been told shortly before the incident by his line manager that the reasonable adjustments which he had been enjoying for some time in respect of flexible working were to be removed from him as the adjustments were time limited. The claimant included words of explanation for his actions: *"I must have moved on in the case and thought I had removed the comment. When looking at the printed product at the end of my action I failed to notice the short amendment I had made. I truly believe that if my mental health was not affected, I would have not made such a catastrophic and out of character error of judgment".*

12.19 An independent manager was sought to deal with the disciplinary hearing which was determined to be necessary after review of the investigation meeting minutes and Andrew Richmond ("AR") of the Glasgow office was appointed. On 8 April 2019 AR wrote to the claimant inviting him to a disciplinary hearing on 18 April 2019. A copy of the investigation report prepared by Natalia Casserley was included in the invitation. In advance of the meeting, AR sought advice from HR Casework (page 370). That advice included a suggestion that AR could contact "Pam Assist" (an OH advice line) where he could access advice as to whether the health conditions of the claimant would have affected the ability of the claimant to have control over what he had written.

12.20 The disciplinary meeting took place on 18 April 2019 at which AR was accompanied by Scott Humphrey as minute taker and the claimant was accompanied by Barry Jackson as before. The meeting was minuted (page 374 – 376) and lasted for one hour. The claimant stated that in January 2019 he had been fast tracked onto anti-depressants but had then had to phase them out because of new treatment for his eczema. The claimant stated he was waiting to receive cognitive behavioural therapy for his insomnia. The claimant said that he had no intention to send out the appeal submission with the offending phrase included and that he had intended to delete it. The claimant thought that his mental health was compromised by his skin condition and the discussion on his section, which had been on-going whilst he was writing the submission, had sub-consciously put the offending phrase in his mind. The

claimant said that he had made an horrendous error and was shocked and angry with himself and was aware of the reputational damage. The words he had used did not reflect his attitude towards benefit claimants.

12.21 AR considered the matter and took further advice (pages 377-378) from Civil Service HR Casework. AR discussed the fact that he had obtained advice from Civil Service Occupational Health Advice Line in relation to the association between eczema and insomnia and that he had been told that there is an association in that eczema can cause sleep-deprivation and low mood and sleep-deprivation can lead to errors and poor judgment. AR discussed with the Civil Service HR that he had decided notwithstanding that potential link to dismiss without notice. AR completed a decision maker's template (pages 379-383) in which he concluded that, whilst on balance a colleague with the claimant's conditions could suffer sleep-deprivation which could lead to irrationality, low mood and anxiety, the gravity of the offence in referring to a customer as a "*lying bitch"* meant that the reputational damage simply outweighed any mitigation offered.

12.22 On 23 April 2019, AR wrote to the claimant (pages 384-386) and noted that the claimant accepted having included the offending words in an appeal submission which had been sent out to the benefit claimant and set out his decision which was that the claimant should be summarily dismissed notwithstanding the mitigation offered. AR stated that he did not consider that the health conditions referred to by the claimant were sufficient mitigation, nor the fact that there had been an indication that his reasonable adjustments were going to be at least reviewed, if not removed. AR stated that he had considered alternatives to dismissal including re-training and transfer to another role but had concluded that those alternatives were not appropriate given the gravity of what the claimant had done. The claimant was advised of his right to appeal.

12.23 On 27 April 2019 the claimant wrote a letter of appeal (pages 411-413) in which he set out various events which had occurred since his dismissal and then set out his grounds of appeal at page 412. First, the claimant contended that the decision to dismiss him had been pre-empted and that unconscious bias was natural and unintended. He complained that his work colleagues had been made aware of his dismissal before he was aware of it himself and before he had had any opportunity to consider an appeal. He commented that his line manager Ian Ellis had approached Barry Jackson and told him to tell the claimant to deny that he had inserted the derogatory words into the appeal submission. Secondly, that the mitigating circumstances advanced were related to his health and that AR had not made a reference of the claimant to the occupational health department for a report: he indicated that he considered himself disabled for the purposes of the 2010 Act by reason of his mental health. Thirdly, that the decision was made without consultation with the claimant's line manager who would have confirmed that his behaviour was completely out of character. Fourthly, that he had been discriminated against as both his line manager and AR had failed to acknowledge his mental health condition and the negative impact it was having on his life and work at the time of the incident. Fifthly, that the media involvement had put pressure on AR to dismiss him before conducting a thorough investigation. Sixthly, that he had behaved uncharacteristically and had worked for the department for 26 years and had an unblemished record.

12.24 Senior managers within the respondent were involved, at the same time as the disciplinary proceedings were ongoing, in deciding how best to deal with media

interest in the case, in handling the appeal from the benefit claimant which was ongoing in the First-Tier Tribunal and in corresponding with the benefit claimant in respect of the complaint which she had raised in relation to the offending comment.

12.25 An independent appeal officer was sought from officers of the relevant grade and Linda Spencer ("LS") volunteered to become that officer. On 13 May 2019 the claimant was invited to an appeal meeting on 21 May 2019 with LS and that meeting duly took place and was minuted (page 435 – 440). At that meeting and for the first time the claimant advanced as mitigation that he had included the words "*lying bitch"* on page D of the appeal submission and also on page N (page 317A) and that he had removed the entry on page D (page 307) when checking the submission but had forgotten to do so on page N and he thought that the entry on page N had been populated automatically when he had made the entry on page D. He said he was shocked and had made every effort to remove the words but knew that did not excuse him. The claimant complained that there had been no referral to occupational health to consider whether or not there was a link between his behaviour and the conditions from which he was suffering.

12.26 At the hearing before this Tribunal, the claimant confirmed in cross examination that the explanation given by him at the appeal hearing in relation to the automatic population of the document was not true and had been made up in order to try and explain away his behaviour.

12.27 Having heard what the claimant and his representative had to say, LS took various actions. She first spoke to the dismissing officer AR to clarify what he had taken into account in reaching his decision. AR confirmed that he had known about the reasonable adjustments which had been offered to the claimant in respect of working to his "*tent poles"* and had noted that the claimant had begun working to his "*tent poles"* prior to the incident on 5 March 2019 and did not see, as a mitigating factor, the fact that the claimant had understood those adjustments were to be withdrawn. AR confirmed that he had considered the withdrawal effects of the anti-depressant medications which the claimant was taking prior to his dismissal but he had concluded any such effects were not severe enough to mitigate the actions of the claimant in writing what he did in the appeal submission about the benefit claimant. AR confirmed that he had not taken account of the fact that adjustments had been removed by Iain Ellis ("IE") without occupational health advice. He had not been aware of the use by the claimant of single day holidays as a coping method for the insomnia from which he suffered.

12.28 LS concluded that it would have been best had an occupational health referral been made in respect of the claimant to opine on the potential effect of the withdrawal of the anti-depressant medication on the claimant and she tried to obtain a referral to OH for that purpose. However, she was unsuccessful because the system would not permit the referral of a person who (like the claimant) was no longer an employee of the respondent.

12.29 As a result, LS decided to seek advice from occupational health informally. LS telephoned the OH Advice Line and explained that she wished to have information as to whether or not the drugs from which the claimant was withdrawing (mirtazapine and zopiclone) coupled with the withdrawal of reasonable adjustments could have had an impact on the claimant's judgment such as to cause him to write what he had written

about the benefit claimant in the appeal submission. LS was advised, prior to a call with an appropriate specialist which was arranged by her, to research the drugs in question and the effect of the withdrawal of them and this she did by consulting the internet and printing off various pages (page 451 – 461). On 23 May 2019, LS had a conversation with a specialist doctor, whose name she did not record but who was a mental health specialist, in which she was told that the withdrawal of the medications could result in headaches, anxiety, panic attacks, irritability, fatigue and insomnia and that some people would find more severe effects than others. Her note (page 450) concluded "*I discussed the fact that Andrew had removed a derogatory reference but failed to notice another. The fact that he had the presence of mind to remove one comment was enough to suggest that his thought process was not sufficiently disturbed enough to render him unable to control his actions and unaware of the insertion of the wording".*

12.30 LS also spoke to Carley Eastwood, Operational Manager, about the circumstances in which the claimant's team had been made aware of his dismissal and she also spoke to IE, the line manager of the claimant, to ascertain his version of events both before and at the time of the claimant's suspension. IE stated that he had not told the claimant's representative that the claimant should deny entering the offending words into the appeal submission and that any conversation had been misunderstood. IE confirmed that the claimant had not made him aware of the withdrawal of any medication and that he had not withdrawn any adjustments from the claimant but had merely flagged up that the adjustments would need to be reviewed before the next Employee Deal rotation due to begin in September 2019. On reflection IE confirmed that the number of single days being taken by the claimant before his dismissal was excessive and was enough to have warranted a referral to OH on that point.

12.31 Having taken those steps, the appeal officer completed the template (pages 462-467) for her decision in which she considered all relevant matters and decided that the appeal should be upheld because of the gravity of the complaint.

12.32 By letter dated 29 May 2019 (pages 468–470) LS upheld the decision to dismiss the claimant and explained her rationale for doing so. LS set out the steps she had taken to investigate whether the withdrawal from medication would have caused "*such a serious reaction as to provide mitigation for your actions"* and went on "*I raised in this discussion that you had inserted the wording "lying bitch" in the ART and had removed it from page D but had failed to identify its appearance at page N. However, the fact that you had the presence of mind to acknowledge the inclusion, to the point of removing it from page D, leads me to conclude that your presence of mind was such that you were fully aware of your actions. I therefore do not consider the withdrawal from your medication is mitigation for your actions as the evidence leads me to conclude you were aware of the inclusion and that it was wholly inappropriate".* LS went on to consider the question of the reasonable adjustments and again concluded that the claimant's understanding of the withdrawal of reasonable adjustments and his use of annual leave to support his attendance were not mitigation for the inclusion of the derogatory comment. LS concluded her letter: "*You have asked me to consider whether the fact that the case made the national press resulted in a much harsher decision that if it had not made the papers. DWP employees are expected to adhere to the Standards of Behaviour. We are public servants and we are required to give the*

best service to the customer at all times. To talk about our customers in any derogatory fashion is simply unacceptable and against the Standards of Behaviour we expect of DWP employees. The fact that on this occasion the comment appeared in the national press is not a factor of relevance. It is the fact that you, as a DWP employee, referred to one of our customers in such a way that is relevant. It is gross misconduct and has resulted in a penalty of dismissal. A penalty I am upholding".

12.33 On 28 August 2019, the claimant instituted proceedings before this Tribunal.

Submissions

Claimant

13.The claimant made written submissions which are held on the Tribunal file and which are briefly summarised:

13.1 IE accepted knowledge of the disabilities of the claimant before the incident on 5 March 2019. Both AR and LS were aware of the claimant's mental health issues and knew he had been taking medication for depression. They accepted they knew this was due to the claimant's long-standing issues with insomnia caused by Hyde's Disease.

13.2 Any policy of the respondent is a good place to start to check if reasonable adjustments have been made. The claimant relies on all the asserted impairments as amounting to disabilities individually and collectively. The respondent had full knowledge of the disability of insomnia by reason of the various OH reports received. Through IE the respondent knew that the impairments were collectively causing substantial and long-term detrimental impact on the claimant's ability to carry out normal day to day activities.

13.3 The claimant had begun to embark on a normal working hours pattern to see how he coped with returning to normal working hours and that is wholly inconsistent with the evidence that the adjustments had not been withdrawn and goes to the credibility of the respondent's witnesses generally.

13.4 The test of whether an adjustment is reasonable is an objective one and ultimately it is for the Tribunal to judge what is reasonable. The Tribunal must be concerned with the outcome not whether the outcome has been reached by a reasonable process. It is not for the claimant to prove that a suggested adjustment will remove the substantial disadvantage. The claimant contends that the adjustments previously made by the respondent should have been continued and that they would have removed the substantial disadvantage. The respondent should have obtained another OH report on the claimant before removing the adjustments – **Southampton College -v- Randell UKEAT/0372/05**.

13.5 The Code of Practice on Employment refers at paragraph 6.28 to the practicability of taking a step which is said to be a reasonable adjustment.

13.6 The Tribunal was referred to the Judgment of Simler P in **Pnaiser -v- NHS England** (below) in relation to the claim relying on section 15 of the 2010 Act. The Tribunal was referred to the authority of **Homer -v- Chief Constable of West Yorkshire Police** (below) on the question of justification. In moving to dismiss the claimant the respondent did not act proportionately by rejecting the claimant's mitigation. It is for the respondent to establish that it acted proportionately to a legitimate aim.

13.7 The respondent has to prove the reason for the dismissal of the claimant. If it dismissed the claimant to make him a scapegoat without ever considering or fully investigating his mitigation the dismissal will be unfair. The Tribunal must not slip into what is called the "substitution mindset".

13.8 The Tribunal was referred in particular to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and in particular the necessity to make the employee aware of the basis of the problem and give him an opportunity to put his case before any decision is made. The investigation undertaken by Talia Casserley was somewhat limited and her absence as a witness is curious at least. The appeal undertaken by LS was limited. Neither the investigation nor the appeal was reasonable. The Tribunal was reminded that the claimant had worked for the respondent for 27 years and had an unblemished disciplinary record. What he did was entirely out of character and this was not given due regard. The dismissal was unfair.

Respondent

14. For the respondent Mr Sadiq made oral submissions which are briefly summarised.

14.1 There is no causal link between the disabilities which are accepted, and the comment made by the claimant and several reasons were advanced for that position. There is no medical evidence before the Tribunal to establish a link between the impairment of insomnia and the fact that the claimant referred to the benefit appellant as a "*lying bitch".* The claimant could have sought to produce medical evidence, but he has not done so. The claimant accepted at the appeal hearing that there was no excuse or justification for what he did (page 460). The dismissing officer obtained advice from OH and based on that advice (page 381) he concluded reasonably that the symptoms of the impairment were not an adequate explanation for the claimant's conduct. The claimant has not given a consistent account of the events in question and in fact has lied. The claimant said that he had deleted the comment from one place in his submission but not from the second place. The claimant now says that was a lie, but the respondent is entitled to consider the evidence before it at the time it dismissed and dealt with the appeal from dismissal. The claimant accepted that insomnia was not an adequate explanation for the comments. The claimant did not alert the respondent to any mental health problems before 5 March 2019. In contrast to the decision in **Grosset** (below), there is no medical evidence in this case to establish the required causal link.

14.2 The dismissal was justified in any event. The claimant accepted referring to the benefit appellant as a "*lying bitch"* which is highly derogatory and gross misconduct. The claimant gave an inadequate, inconsistent and dishonest account of the incident. First, he said he was distracted, secondly, he changed his account of what led him to

act as he did and thirdly, he was even dishonest accepting, as he did, before the Tribunal that the other team members had not referred to any benefit appellant as a "*lying bitch"* and that he had not deleted the offending remark from one place in the appeal submission and not another. The respondent found there was mitigation but that it was not sufficient to avoid dismissal and it did consider if alternative employment was a possibility.

14.3 In this case the reasonable adjustments put in place by the respondent for the claimant were still in place and had not been removed.

14.4 The respondent does not accept that anxiety and depression in this case amounted to a disability and in any event had no knowledge of them if they did. The burden lies on the claimant to prove disability. The medical records produced do not show any diagnosis of anxiety or depression. There is no adequate evidence of substantial adverse impairments arising from those impairments at any stage in this process.

14.5 Reference was made to **Sullivan** (below) and the requirements for knowledge set out at paragraph 51 of that decision. The August 2018 OH report is insufficient to fasten the respondent with knowledge and, in any event, that is less than 12 months before the dismissal.

14.6 Both key decision makers obtained advice from OH advice lines that the offensive comment was not linked to the claimant's impairments. Reference was made to pages 377 and 385 in particular. The appeal officer made considerable investigations of her own and in any event, it was always open to the claimant to produce his own medical evidence at any stage and he has not done so – even before the Tribunal.

14.7 Even if a referral had been made to OH to seek advice on the question of linkage, on balance the outcome would have been that there was no such link. There are various reasons for this not least that the medical evidence which does exist points to no such link.

14.8 The penalty of summary dismissal was within the band of a reasonable response. The claimant lied before the Tribunal and this undermines his credibility further. The lying is relevant to contributory fault and, if the dismissal is unfair, there should be 100% contribution. The decision to dismiss was well within the band of a reasonable response. The claimant had every opportunity to put forward his mitigation and, if he had chosen so to do, his own medical evidence. The process was not too quick. There is nothing to suggest that either outcome was pre-ordained. The dismissal was fair.

14.9 The asserted PCP was not applied to the claimant. The tent poles were not to come into place until 11 March 2019 and these events took place on 5 March 2019. If the claimant was working to the tent poles, that was voluntary on his part and a voluntary decision on the part of the claimant cannot amount to a PCP imposed by the respondent. The Tribunal was referred in particular to the decision in **Ishola** (below) and in particular paragraphs 36-39 inclusive. However, page 303A clearly demonstrates that as of 5 March 2019 the claimant was not adhering to the tent poles in any event. There is no substantial disadvantage as the adjustments had not been withdrawn and the claimant was working flexibly.

14.10 The non-dismissal related allegations of unfavourable treatment have not been proved. The matters referred to at items 12.2, 12.3, 12.4, 12.5 and 12.8 do not appear in the claimant's witness statement at all. There is no evidence. The item at 12.2 was not removed. The item at 12.6 was not considered necessary and, in any event, does not arise from something arising from disability. All acts or omissions must consciously or subconsciously be influenced by the disability or something arising from it and that is simply not the case. Reference was made to the case of **Dunn -v- Secretary of State for Justice** (below).

14.11 Anything which occurred before 9 April 2019 is out of time. There is no continuing act. It would not be just and equitable to extend time. The claimant has proffered no explanation for any delay. He has had help from a colleague throughout this matter. There is prejudice to the respondent in respect of any remedy which might result from a reasonable adjustment claim.

14.12 Reference was made to various authorities as follows:

Nottingham City Transport -v- Harvey 2013 All ER 267

Carphone Warehouse -v- Martin UKEAT/0371/12

Ishola -v- Transport for London 2020 IRLR 368

City of York Council -v- Grossett 2018 IRLR 746

Dunn -v- Secretary of State for Justice 2019 IRLR 298

A Limited -v- Z 2019 IRLR 952

Sullivan -v- Bury Street Capital Limited UKEAT/0317/19

The Law

The meaning of Disability within section 6 of the 2010 Act

15.1 The Tribunal reminded itself of the meaning of disability and in particular Section 6 of the 2010 Act which provides:

(1) 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.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability--

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section) --

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

15.2 We have also referred to Schedule I to the 2010 Act and in particular the following paragraph 2:

2. Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

15.3 The Tribunal has reminded itself of the decision in **Goodwin –v- The Patent Office 1999 ICR 302 EAT** and the guidance in that decision to the effect that in answering the question whether a person is disabled for the purposes of what is now section 6 of the 2010 Act, a Tribunal should consider the evidence by reference to four questions namely:

1. did the claimant have a mental and/or physical impairment?

2. did the impairment adversely affect the claimant's ability to carry out normal day to day activities?

3. was the adverse effect substantial?

4. was the adverse effect long term?

We note that the four questions should be posed sequentially and not cumulatively. We note it is for us to assess such medical and other evidence as we have before us and then to conclude for ourselves whether the claimant was a disabled person at the relevant time.

15.4 The Tribunal reminded itself that the meaning of the word "likely" referred to at paragraph 8.2 above is "could well happen" as determined by Lady Hale in **SCA Packaging Limited –v- Boyle 2009 ICR 1056**.

15.5 We have reminded ourselves of the decision in **College of Ripon and York St John -v- Hobbs 2002 185** and note there is no statutory definition of "impairment" and that the 2010 Act contemplates that an impairment can be something that results from an illness as opposed to itself being the illness. It can thus be cause or effect. We have noted also the decision in **Urso -v- DWP UKEAT/0045/2016** and the necessity for an employer to consider the symptoms and effect of an employee's disability and that there may be cases where the specific cause of the disability is not known or has not been identified at the material time. What is important is that the employer considers the symptoms and effect of the impairment. We note that stress and anxiety can occur and then be separated by periods of stress free good mental health but that is no barrier to establishing that anxiety or stress is a disability provided a claimant can show that the impairment has a substantial adverse long-term effect on the ability to carry out normal day-to-day activities.

Failure to make Reasonable Adjustment Claim: sections 20/21 of the 2010 Act

15.6 The Tribunal has reminded itself of the relevant provisions of section 20 and 21 and Schedule 8 of the 2010 Act which read:

Section 20:

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

(2) The duty comprises the following three requirements,

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

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

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

Section 21

(1) A failure to comply with the first second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purposes of establishing whether A has contravened this Act by virtue of subsection (2): a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

15.7 The Tribunal has had regard to the relevant provisions of Schedule 8 of the 2010 Act and in particular paragraph 20 which reads: *(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know... (b)….that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement*".

15.8 The Tribunal reminded itself of the authority of **The Environment Agency v Rowan [2008] IRLR20** and the words of Judge Serota QC, namely:

"An Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the 1995 Act by failure to comply with section 4A duty must identify –

(a) the provision, criterion or practice applied by or on behalf of an employer;

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate);

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the "provision, criterion or practice applied by and on behalf of an employer" and the 'physical feature of the premises', so it would be necessary to look at the overall picture. In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice or feature placing the disabled person concerned at a substantial disadvantage".

The Tribunal notes this guidance was delivered in the context of the 1995 Act but considers it equally applicable to the provisions of the 2010 Act.

15.9 The Tribunal has reminded itself of the guidance in respect of the burden of proof in claims relating to an alleged breach of the duty to make reasonable adjustments in the decision in **Project Management Institute -v- Latif 2007 IRLR 579**.

Discrimination arising from disability – section 15 of the 2010 Act.

15.10 The Tribunal has reminded itself of the provisions of section 15 of the 2010 Act which read:

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arises in consequences of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

15.11 We remind ourselves that in considering a claim pursuant to section 15 of the 2010 Act, we need to consider what breach of section 39 of the 2010 Act is established, whether there was unfavourable treatment of the claimant, whether there is something arising in consequence of the disability and finally whether the unfavourable treatment was because of the something arising from the disability.

15.12 We have reminded ourselves of the guidance of Simler J in **Pnaiser –v- NHS England 2016 IRLR 170** in respect of the proper approach to adopt in cases involving section 15 of the 2010 Act.

15.13 We have reminded ourselves of the decision of the CA in **City of York Council -v- Grossett 2018 EWCA Civ 746** and the words of Sales LJ:

"The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something". In this case, it is clear that the respondent dismissed the claimant because he showed the film. That is the relevant "something" for the purposes of analysis. This is to be contrasted with a case like Charlesworth v Dransfields Engineering Services Ltd, EAT (Simler J), UKEAT/0197/16/JOJ, unrep., judgment of 12 January 2017, in which the reason the claimant was dismissed was redundancy, so that no liability arose under section 15 EqA, even though the redundancy of the claimant's job happened to be brought into focus by the ability of the defendant employer to carry on its business in periods when he was absent from work due to a disability. In that case, therefore, the relevant "something" relied upon by the claimant was the claimant's absence from work due to sickness, but he was not dismissed because of that but because his post was redundant.

The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something". In this case, on the findings of the ET there was such a causal link. The claimant showed the film as a result of the exceptionally

high stress he was subject to, which arose from the effect of his disability when new and increased demands were made of him at work in the autumn term of 2013.

In my view, contrary to Mr Bowers' argument, it is not possible to spell out of section 15(1)(a) a further requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability (i.e. that A should himself be aware of the objective causation referred to in issue (ii) above)".

15.14 We have reminded ourselves that in considering so called justification, that we must consider an objective balance between the discriminatory effect of the act of dismissal and other matters (in this case) and the reasonable needs of the party who applies it. We remind ourselves that the burden of proving the dismissal was proportionate to the legitimate aims advanced lies with the respondent. We have noted the words of Pill LJ in **Hardys and Hanson -v- Lax 2005.** This was a decision of the Court of Appeal taken in the context of a claim of indirect sex discrimination, but this test was applied to claims advanced under section 15 of the 2010 Act by the EAT in **Hensman –v- Ministry of Defence UKEAT/0067/14/DM**.

"Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby and in Cadman, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in Allonby and in Cadman, the respect due to the conclusions of the fact-finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the

employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification".

Burden of Proof and other relevant provisions of the 2010 Act.

15.15 The Tribunal has reminded itself of the relevant provisions of section 136 of the 2010 Act which read:

"(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 sub-Section (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……..."

15.16 The Tribunal has reminded itself of the relevant provisions of section 39 of the 2010 Act and in particular:

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

…

(c) by dismissing B

(d) by subjecting B to any other detriment……

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

(7) In subsections (2)(c)… the reference to dismissing B includes a reference to the termination of B's employment-…

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice".

15.17 We have reminded ourselves of the provisions of section 123 of the 2010 Act in respect of the time limit for the advancement of a claim.

Ordinary Unfair Dismissal Claim – Section 98 Employment Rights Act 1996 (the 1996 Act)

15.18 We have reminded ourselves of the provisions of section 98 of the 1996 Act which read:

"98(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show –

(a) the reason (or if more than one the principal reason) for the dismissal, and

(b) that it is either a reason falling in subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) The reason falls within this subsection if it –

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

(b) relates to the conduct of the employee …

(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –

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

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

15.19 We have noted the decision in **British Home Stores Limited v Burchell [1978] IRLR379** and reminded ourselves that it is for the respondent to establish that it had a genuine belief in the misconduct of the claimant at the time of the dismissal. In answering this question, we note that the burden of proof lies with the respondent to establish that belief on the balance of probabilities. We remind ourselves that the other two limbs of the Burchell test, namely reasonable grounds on which to sustain that belief and the necessity for as much investigation into the matter as was reasonable in all the circumstances of the case at the stage at which the belief was formed, go to the question of reasonableness under section 98(4) of the 1996 Act and in relation to section 98(4) matters, the burden of proof is neutral. In considering the provisions of section 98(4), we must not substitute our own views for those of the respondent but must judge those matters by reference to the objective standards of the hypothetical reasonable employer.

15.20 We have reminded ourselves of the decision of **Taylor v OCS Group Limited [2006] IRLR613** and particularly noted the words of Smith L.J. at paragraph 47:

"The error is avoided if ETs realise that their task is to apply the statutory test. In doing that they should consider the fairness of the whole of the disciplinary process. If they found that at an early stage, the process was defective and unfair in some way they

will want to examine any subsequent proceedings with particular care. Their purpose in so doing will not be to determine whether it amounted to a re-hearing or a review but to determine whether due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision maker the overall process was fair, notwithstanding any deficiencies at the early stage".

15.21 We reminded ourselves of the provisions of Section 123 of the 1996 Act.

Discussion and Conclusions

16.1 We approach our conclusions in this matter by dealing first with the claim of failure to make reasonable adjustments, then the allegation of discrimination arising from disability and finally, with the claim of unfair dismissal.

16.2 We worked through the issues as set out above and as agreed between the parties at the outset of the hearing.

Disability

16.3 Before moving on to deal with the claims advanced pursuant to the 2010 Act, we must consider the impairments advanced by the claimant as disabilities in this case. The respondent accepted at the outset of the hearing that the claimant was at all material times a disabled person for the purposes of section 6 of the 2010 Act by reason of the impairments of Hyde's disease which manifests itself by the presence of boils on the body and is closely linked to eczema. In addition, the respondent accepted at the outset that the claimant was disabled by reason of the impairments of eczema and insomnia.

16.4 We have considered whether the claimant suffered from the impairment of asthma and whether that condition amounted to a disability. We had no evidence given to us by the claimant in relation to the impairment of asthma and no evidence as to how that alleged impairment affected his normal day to day activities. We were referred to the medical records of the claimant which had been filed with the Tribunal at an earlier stage when a preliminary hearing on the question of disability had been envisaged. The records reveal several entries in relation to asthma beginning in September 1986 through into 2013 where we see several entries for *"asthma monitor*" which we take to be a review of the condition. We note the claimant is said to have stopped smoking in March 2014. In August 2014 there is an entry which speaks of asthma causing daytime symptoms 1 to 2 times per month, but we have no evidence from any source as to what those symptoms were. That entry is repeated in March 2017 and then in August 2019 the claimant had an annual review for asthma. On 1 August 2019 there is an entry which reads "*asthma never causes daytime symptoms*". We note that the claimant's current medication includes a Ventolin evohaler which is much used to treat asthma patients. We conclude that the claimant did suffer from the impairment of asthma at all material times.

16.5 We had no evidence from the claimant as to the effect of that condition on his day-to-day activities. The disability impact statement produced by the claimant (pages 30-32) includes no reference to asthma. In those circumstances, being without any evidence of the effect of the impairment of asthma on the claimant, we conclude that

the claimant was not disabled by reason of the condition of asthma at the material time.

16.6 We have considered whether the claimant was disabled by reason of the impairments of anxiety and depression at the material time. The only evidence before us related to the claimant's GP medical records which indicated that he had at one point been prescribed anti-depressant medication (mirtazapine) but the claimant told us that this medication was discontinued in early 2019 by reason of the claimant taking other medication for the condition of eczema. The claimant did not give us any evidence as to the effect on his normal day-to-day activities of the alleged impairments of anxiety and depression. We conclude that the evidence before us is not sufficient to establish that the claimant suffered from anxiety and depression or that if he did, it amounted to a disability at the material time given the lack of evidence on those matters.

16.7 Accordingly, we conclude that the claimant was a disabled person at the material time by reason of the conditions of eczema, Hyde's disease (skin boils) and insomnia as conceded by the respondent.

Evidence

17. The claimant candidly accepted in cross examination that he had adduced no evidence to confirm any link between the offensive comment he had included in the appeal submission and the impairments relied on to constitute disability. We have thoroughly reviewed such medical evidence as was before us and agree with that statement from the claimant.

18. The claimant also accepted in cross examination that he could not remember anything about the day on which he had written the appeal submission, which led ultimately to his dismissal, and he confirmed he did not seek to rely on the fact that he had been distracted when writing the submission. In his witness statement for this Tribunal, the claimant told, at paragraph 42, that another case was being discussed by colleagues in his office when he was writing the offending submission and of the claimant in that case being referred to by a colleague as a "lying bitch". This was the first time the claimant had advanced that evidence and in cross examination he accepted that he had made up the story of being distracted and that the statement contained in his witness statement about words used by a colleague was not true. The claimant asserted that he had made up explanations as he had been under pressure at every stage to come up with something.

19. The claimant confirmed that he was not on anti-depressant medication on 5 March 2019 as he had recently stopped taking mirtazapine. The claimant accepted that there was no medical evidence to support one of his mitigation arguments that he had written the offending submission during a moment of psychosis.

20. The claimant also candidly accepted that the explanation advanced at the appeal hearing to the effect that he had deleted the offending comments at section D of the appeal submission but not at section N was not true and in cross examination he stated: *"It is true I fabricated the details because I felt under pressure to provide an explanation. In fact, I have no memory of the event".*

21. We accept that the claimant felt under pressure at every stage of the enquiry, and indeed before this Tribunal, to explain what he had done even though he had no recollection of having written the offending words in the appeal submission. Whilst we could accept that the claimant might at any stage seek to offer potential explanations, we cannot accept that the claimant should present those explanations in evidence before us as fact when what he was actually doing was speculating as to the reason why he had acted as he did. It is not acceptable to present explanations to us as evidence when in fact the claimant knew the explanation advanced was not true. We conclude that the claimant's evidence was simply not reliable and where conflict exists between the evidence of the claimant and the evidence of the witnesses for the respondent, we prefer the evidence from the respondent. That said, there are few areas of evidential conflict in this matter.

Claim of failure to make reasonable adjustments

22. The respondent accepts that it knew of the disabilities of the claimant at the material time and of the disadvantage to the claimant at the material time.

23. We conclude that the respondent did apply a PCP in the claimant's workplace of requiring employees to adhere to fixed start times for work as part of the so-called "Employee Deal" if employees had signed up to that deal, which we accept that the claimant had. We accept that the arrangements made in relation to that PCP were reviewed every six months and that each six-month period was called a "rotation" and that there was to be a new rotation beginning on 11 March 2019 and that the rotation in play on 5 March 2019 was that which had begun in September 2018. In that rotation beginning in September 2018, the claimant had agreed early start times for his daily shifts.

24. We accept that the PCP, as applied, did place the disabled at a substantial disadvantage as disabled employees were more likely not to be able to meet the requirements of the Employee Deal and in particular the fixed tent poles requirement. This was clearly the case with a person, such as the claimant, disabled by reason of eczema, insomnia and Hyde's disease, who would find it more difficult to comply with the so-called tent poles than would a non-disabled person.

25. The matter therefore comes down to the question of reasonable adjustments to the PCP. There is a factual issue as to what the claimant was told by his line manager IE in February 2019. We have assessed the witnesses and we prefer the evidence of IE over that of the claimant. We found IE to be a witness who gave his evidence in a straight-forward and credible manner and his evidence was not damaged in cross examination – in contrast to the position with the claimant's evidence.

26. We conclude that there was a conversation between the claimant and IE in February 2019 in which the question of the adjustments to the PCP, which the claimant had been enjoying, was raised but we conclude that the claimant was not told that those adjustments would be removed, but rather that they would need to be reviewed. We do not accept that the claimant had been told by IE that the adjustments enjoyed by him were to be removed. We accept that adjustments had been afforded to the claimant as we set out at paragraph 12.10 and we accept that the adjustments to the PCP which the claimant had enjoyed were reasonable adjustments.

27. We reach this factual conclusion by reference to documents at pages 299-303A inclusive. These records show the claimant's hours of work in the period from 14 May 2018 through to 8 March 2019 and take in 5 March 2019 which is the day on which the claimant wrote the appeal submission which eventually led to his dismissal. Those records show the claimant beginning work at varying times each day in accordance with the adjustments in place. In some weeks, such as week commencing 14 May 2018, the claimant begins work consistently before 8am but in other weeks, such as week commencing 9 July 2018, the claimant begins work at times varying from 8.10am through to 9.50am and even as late as 11.50am. Even at the time when the claimant says he had been told that the adjustments were to be removed and he was working to his agreed tentpoles, there is no consistent pattern of timely starts (in terms of the agreed tent poles) and indeed on 5 March 2019 itself the claimant did not begin work until 11.20 working through to 13.30, when he took a break until 14:00, and worked through until 18:35.

28. We conclude that reasonable adjustments were in place to the PCP engaged in this claim from at least sometime in 2018 and that the respondent had not withdrawn those adjustments and the claimant had the benefit of the adjustments on 5 March 2019 and beyond until the date of his suspension. We do not accept the claimant's contention that the adjustments had been removed or that he had been threatened with their removal. Reasonable adjustments had been made to the PCP and remained in place.

29. In those circumstances, the claim of disability discrimination by failure to make reasonable adjustments fails and is dismissed. There is no need for us to consider the time issues which arose in respect of this claim.

Claim of disability discrimination arising from disability

30. We have first considered the various allegations of less favourable treatment which number nine matters. The principal allegation in this claim (paragraph 9.11 above) relates to the dismissal of the claimant. We accept that the dismissal was unfavourable treatment of the claimant by the respondent.

31. In relation to the other eight allegations of unfavourable treatment, we received very little, if any, evidence. Turning to the matters set out at paragraphs 9.12.1 -9.12.2 above, we do not accept that the claimant has proved that the respondent, through IE or otherwise, failed to believe that his impairment of insomnia was as bad as the claimant contended or that the reasonable adjustments in place since at least 2018 were removed in February 2019. On the first allegation, we had no meaningful evidence at all and in respect of the second allegation, we do not accept that the adjustments were withdrawn as we have explained above. We conclude that the respondent put in place and maintained in place the reasonable adjustments which clearly evidences that the respondent did believe that the insomnia of the claimant was severe enough to require those adjustments.

32. We did not have evidence before us that the respondent denied knowledge of the claimant's skin condition or that there had been a failure to keep written records of conversations surrounding the claimant's health and treatment as set out at paragraphs 9.12.3 and 9.12.4 above. Those allegations of unfavourable treatment are rejected. Even if that conclusion should be wrong, no causal link between the alleged

unfavourable treatment and the "something" arising from disability was attempted - let alone proved.

33. We had no evidence before us of any failure by the respondent in August 2018 to complete the documentation set out in the allegation at paragraph 9.12.5. We do not accept that those matters have been established by the claimant. In any event no causal link between such matters and the something arising from the disability of the claimant was attempted – let alone proved.

34. We accept that the claimant was not referred to occupational health during the disciplinary process leading to his dismissal and we consider this allegation below. We accept that that failure was unfavourable treatment of the claimant by the respondent. We accept also that the dismissing officer AR did refer to the fact that the claimant had undertaken unconscious bias training during the disciplinary process as alleged at 9.12.7 above, but we do not accept that that amounted to unfavourable treatment of the claimant by the respondent. That was simply a statement of fact by the dismissing officer and the claimant did not deny he had received such training.

35. We do not accept that the claimant advanced any complaints of disability discrimination against his line manager or the decision maker. A mere reference to the 2010 Act in the grounds of appeal is a long way from the making of a complaint which the respondent then failed to investigate. The claimant did not raise any grievance against any officer of the respondent alleging discrimination and he did not ask the appeal officer LS to investigate allegations of discrimination. We do not accept that that allegation of unfavourable treatment is established on the evidence.

36. Accordingly we accept that the claimant was treated unfavourably by the respondent in being dismissed and in not being referred to occupational health during the disciplinary process and we move on to consider those matters in the context of section 15 of the 2010 Act.

37. Doing the best we can to understand the case advanced by the claimant under section 15 of the 2010 Act, it was that because of his established disabilities, he came to work tired and suffering from the effects of severe eczema and therefore had poor judgment and that is what led him to write the offending words in the appeal submission on 5 March 2019.

38. The claimant was dismissed by the respondent for writing the offending words in the appeal submission: that is the relevant "something". Has the required link between that "something" and the claimant's accepted disabilities of eczema, Hyde's disease and insomnia been established? We conclude that it has not. We have no evidence from which we can conclude or infer that a person suffering from the disabilities of the claimant would act in the way the claimant did. It has not been established that someone suffering from the disabilities of the claimant would be so affected as to write the words used by the claimant in the appeal submission that he wrote on 5 March 2019. If the claimant had been dismissed, for example, because of poor productivity or inaccuracies contained in a submission, then the required causal link would have been much easier to establish but in this case, the actions of the claimant are far removed from matters which could be said to arise naturally from the disabilities in

question. We accept the cogent submissions made by Mr Sadiq on behalf of the respondent that, absent any medical evidence, the required causal link has not been established in this case. It is simply not established that the writing of the offending words by the claimant arose from the disabilities from which he suffered. The required causal link is not established and the claim under section 15 of the 2010 Act in respect of the dismissal of the claimant fails and is dismissed.

39. We have considered the failure to refer the claimant to occupational health during the disciplinary process. We have considered whether that failure to refer was because of the "something" arising from the dismissal of the claimant – namely the use of the offending words in the appeal submission. We conclude that this allegation does not work in terms of a claim under section 15 of the 2010 Act. First, we are not satisfied that the claimant has established even a prima facie case that the decision not to refer him to occupational health was because he used the offending words in the appeal submission. The decision of AR in this regard was because he did not consider such a step necessary as he had obtained advice elsewhere on the matter. Whether that was a reasonable thing to do is a factor which goes to the fairness or otherwise of the dismissal, which we shall consider below under the unfair dismissal claim, but there is no evidence that that failure was because the claimant had used the offending words. Even if that conclusion is wrong, then, for the reasons set out above, there is no evidence that the "something" relied on by the claimant arose in consequence of his accepted disabilities. Accordingly, this claim advanced pursuant to section 15 of the 2010 Act also fails and is dismissed.

40. In case those conclusions should be wrong, then we have considered the defence of "justification" advanced by the respondent pursuant to section 15(1)(b) of the 2010 Act. We have noted the two aims relied on by the respondent. We are satisfied that both aims are legitimate aims for the purposes of section 15 of the 2010 Act. It is legitimate for the respondent both to wish to protect its customers from derogatory and offensive comments and for it to ensure that its disciplinary standards are maintained.

41. We have considered whether the respondent acted proportionately to those aims in moving to dismiss the claimant after over 25 years' service without notice. In making this assessment, we must, and we do, put aside procedural questions and look at whether the decision to dismiss was objectively justified notwithstanding its discriminatory effect on the claimant (if we had found any such effect to be present – which we do not). Clearly it was open to the respondent to impose a penalty on the claimant other than dismissal – such as a final written warning or a transfer to another, even less senior, role. Any such outcome would have removed the discriminatory effect on the claimant of being dismissed. We must balance that against the reasonable needs of the respondent's business. In this case, the actions of the claimant caused severe reputational damage to the respondent. Critical articles appeared in national newspapers and online and the respondent was required to account for itself at the highest levels of Government. The respondent had to deal with entirely justified complaints from the customer who had been maligned by the claimant and furthermore, we are satisfied from the evidence produced, the respondent paid compensation to that benefit claimant. The adverse effect on the respondent's business was grave - as the claimant himself accepted. We accept that the respondent cannot have members of its staff describing its customers in the terms used by the claimant in the name of the respondent and clearly that message needs to be known

to its very numerous employees. Having carried out the balancing required by us, we conclude that the actions of the respondent in moving to dismiss the claimant summarily, notwithstanding the mitigation advanced by him, was proportionate to the two legitimate aims relied on.

42. Given our above findings in respect of the failure to refer the claimant to OH, there is no need for us to consider whether that action was justified.

43. For all those reasons, the claims advanced pursuant to section 15 of the 2010 Act fail and are dismissed.

The claim of ordinary unfair dismissal

44. We are satisfied that the dismissing officer AR had a genuine belief that the claimant had used offensive language about a customer in an appeal submission written by him on 5 March 2019 and that that was the reason AR dismissed the claimant. That reason relates to the conduct of the claimant and falls within section 98(2)(b) of the 1996 Act. The respondent has discharged the burden of proof which lies on it to prove the reason for dismissal on the balance of probabilities.

45. We have next considered whether there were reasonable grounds for the belief of the dismissing officer. We are satisfied that there were. The claimant accepted that he had written the words in question and advanced mitigation. Once that admission was received from the claimant, there was little for the respondent to investigate about the facts of the matter. It remained only to consider the mitigation advanced by the claimant.

46. We turn to the question whether the respondent acted reasonably in treating the reason as sufficient to dismiss the claimant bearing in mind the size and administrative resources of the respondent and questions of equity and the substantial merits of the case. We remind ourselves that in answering this question we are judging the respondent's actions from the objective standpoint of the reasonable employer. We must not consider what we would have done but rather whether what the respondent did fell within the band of a reasonable response to the situation with which it was presented. There is no burden of proof on either party in this regard.

47. We have given particular consideration to the matters which LS considered relevant in a note she prepared as she dealt with the appeal process which we find at page 249 and which featured prominently at the hearing before us. We have considered the other matters raised by the claimant – in particular the speed at which the disciplinary process was dealt with, whether the outcome of the process was pre-ordained, whether there was any breach of the ACAS Code, whether the claimant was dismissed to make a scapegoat of him without giving proper consideration to the mitigation advanced and in particular whether the claimant should have been referred to OH during the disciplinary process.

48. We have considered the report produced by LS at page 249. This document highlighted various allegations made by the claimant during the appeal process and which LS thought it right should be looked into. We conclude that it is not a report setting out matters which LS actually found had occurred during the disciplinary process. We heard from IE whose evidence we found reliable. We do not accept that

IE had encouraged the claimant to lie during the disciplinary process but rather we accept that he had told the claimant that an explanation, for having written what he had, would certainly be required. Allegations were also made in respect of the manner in which the claimant's dismissal was communicated to his former colleagues. We are satisfied that, whilst the timing could have been better, what occurred in that regard was not outside the band of reasonableness.

49. LS raised issues about whether reasonable adjustments enjoyed by the claimant had been removed. We have investigated that matter during the course of these proceedings and find that they had not been removed and so the fact that no referral of the claimant had been made to OH in that regard does not arise. We have noted that LS concluded, as did IE, that in hindsight the fact that the claimant was using single day holidays as a coping mechanism should have been flagged and investigated whilst that was occurring. We agree that that step should properly have been investigated although we note the claimant had never raised any concerns about it himself. Even so, we do not consider that that matter is of direct relevance to the decision to dismiss and it certainly does not of itself render the decision to dismiss unreasonable.

50. We have considered the speed at which the disciplinary process was handled. We note that matters came to light on 15 March 2019. Given the gravity of the matters raised, it was understandable that an investigation should proceed without delay. The respondent was under pressure from the national media and its political masters wished to have a detailed report. The investigation led easily to the claimant given his name was on the offending appeal submission and he was suspended on full pay on 25 March 2019. An investigation meeting followed quickly on 2 April 2019 and we accept the claimant's point that he was not afforded the 5 clear days' notice of that meeting as the respondent's own policy requires. We note the claimant did not raise this matter at the time. Having been interviewed by Natalia Casserley (from whom we did not hear), the claimant was invited to a disciplinary hearing on 18 April 2019 (almost one month after his suspension) and received his letter of dismissal on 25 April 2019. He appealed and the appeal hearing took place on 21 May 2019 and the outcome of the appeal was communicated by letter dated 29 May 2019. The whole process therefore took some two months.

51. We conclude that the short notice of the investigation meeting, whilst regrettable, is not sufficient to render the dismissal procedure followed unreasonable. Adequate notice was given, and the claimant did not advance any argument of prejudice to himself because of the short notice. The remainder of the process followed at a reasonable pace. The ACAS Code requires that matters are dealt with promptly especially when an employee is suspended from duty and we conclude there is nothing unreasonable in the time that the process took to complete. We note that the process was made all the easier because the claimant accepted he had written the offending submission and there was little to investigate except the mitigation advanced by the claimant. We conclude that that mitigation was reasonably investigated by the respondent. We conclude there was no breach of the ACAS Code in the way the respondent dealt with this matter.

52. We have given close consideration to the failure by the respondent either through AR or LS to obtain an OH report on the claimant in light of the matters raised by him in respect of the impairments which we conclude amounted to disabilities. Whilst a

referral to OH could have been made by the dismissing officer, we accept that there was a reasonable explanation why LS could not make that referral namely that the claimant was no longer an employee. The dismissing officer AR did not see the necessity to make a formal referral but did investigate the matters raised by the claimant by taking advice both from Civil Service HR Casework and from the Civil Service Occupational Health advice line and we are satisfied that AR did reasonably raise and discuss the matters which the claimant had raised and reached a conclusion that, even if the claimant's poor judgment arose from his disabilities, the gravity of what the claimant had done went far beyond poor judgment. We conclude that that conclusion by AR fell within the band or a reasonable conclusion in the circumstances of this case. What AR did was not perfect but we conclude it was within the band of reasonableness for a reasonable employer.

53. We conclude that LS took reasonable steps herself to investigate the matters raised by the claimant and that the decision she reached fell within the band of a reasonable response to the evidence with which she was presented, which included the fact that the claimant had advanced, for the first time, mitigation that he had remembered to remove the offending entry from page D but not from page N. LS concluded that that made matters worse not better. She was entitled to rely on what the claimant told her and the fact that the claimant now says he lied about that is not relevant to our assessment of whether or not her conclusion was reasonable which we conclude it was. If there was any failure to investigate the effect of the withdrawal of anti-depressant medication by AR that matter was fully corrected by LS at the appeal stage.

54. The strongest mitigation advanced by the claimant was his long unblemished service with the respondent. That was cogent mitigation and we are satisfied that both AR and LS took that service into account but both reached the conclusions that, despite that strong mitigation, the gravity of what the claimant had done simply outweighed it. We have considered that matter and conclude that whilst some employers might have taken a different approach, we cannot conclude that what the respondent did fell outside the band of a reasonable response. The claimant had caused very great embarrassment to his employer, considerable reputational damage and had caused his employer to have to compensate the benefit claimant who had been maligned by him. Those were very serious matters and we conclude that, in spite of the cogent mitigation to which we have referred, the decision to summarily dismiss fell within the band of a reasonable response.

55. We have considered whether the decision of AR or LS was pre-ordained from on high and whether they were following a direction to dismiss. We heard from both witnesses. They were both asked whether they had been pressurised to make a decision to dismiss. They both denied it. We have assessed their evidence and accept what they both said. The dismissal was not pre-ordained and we had no evidence that the claimant was made a scapegoat. The fact remains that the claimant had used entirely inappropriate and offensive language towards a customer of the respondent and had accepted doing so and thus the question of being made a scapegoat for the actions of others really does not arise. We have concluded that the respondent did not commit any acts of disability discrimination in the period leading up to the claimant's dismissal or by reason of the dismissal itself.

56. Having considered carefully, and at length, all the matters raised by the claimant, we conclude that the decision to dismiss summarily fell within the band of a reasonable response by the respondent. In those circumstances and for those reasons, the claim of unfair dismissal fails and is dismissed.

57. In case that decision should be wrong, then we have briefly considered whether the claimant contributed to his dismissal by culpable or blameworthy conduct. We had no evidence placed before us that the claimant did not know what he was doing or that his actions were somehow affected by his disabilities. The claimant presented as someone who had cast around at every stage of the enquiry for an explanation or excuse for his conduct and accepted that he had lied to the respondent in the course of the various hearings. We would have concluded that the claimant contributed to a very considerable degree to his dismissal by reason of his culpable and blameworthy conduct and we would have made a deduction from any remedy of at least 75%.

58. We have given this matter detailed consideration. We have investigated all the matters raised by the claimant and have concluded that the arguments raised by him do not succeed. That said, we are entirely satisfied that there were aspects of this matter which needed to be investigated. The claimant was right to raise them.

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Employment Judge A M Buchanan.
1 February 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
4 February 2021

FOR THE TRIBUNAL OFFICE

[JE]