



EMPLOYMENT TRIBUNALS

Claimant: Mr D Ghelani
Respondent: The Secretary of State for Work and Pensions

Heard at: Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
On: 6, 7, 8 January 2020
13 February 2020 (Tribunal's deliberations in private)

Before: Employment Judge Adkinson sitting with members
Mr K Libetta
Ms S J Higgins

Appearances

For the claimant: Ms K Hosking, Counsel
For the respondent: Mr R Talalay, Counsel

JUDGMENT

1. The claimant's claim for a failure to make reasonable adjustments is dismissed because the claimant has withdrawn it.
2. The claimant's claim for victimisation is dismissed because the claimant has withdrawn it.
3. The claimants claim for unfair dismissal succeeds. There are to be no reductions to compensation:
 - 3.1. to reflect the prospect he would have been dismissed in any event had a fair procedure been followed, nor
 - 3.2. for culpable or blameworthy conduct.
4. The claimant's claim for unfavourable treatment because of something arising as a consequence of his disability is dismissed.

REASONS

Introduction

1. The claimant Mr Ghelani pursues 2 claims before the tribunal: that he was unfairly dismissed and that he was treated unfavourably because of something arising as a consequence of his disability.
2. He also pursued a claim for a failure to make reasonable adjustments that he withdrew at the start of the hearing. Finally, after hearing the evidence but before closing representations, he withdrew his claim for victimisation. They are dismissed on withdrawal.
3. In short, the respondent Secretary of State for Work and Pensions (“DWP”) dismissed the claimant for gross misconduct.
4. In simple terms the case is this:
 - 4.1. Mr Ghelani took taxis to and from work under the DWP’s in-house access to work scheme.
 - 4.2. He claimed the fares as expenses. The DWP paid him money for the taxi bills he incurred. However, he failed to settle the account with the taxi firm. He says he had depression that meant he lost control of his finances.
 - 4.3. The DWP commenced an investigation. It resulted in a disciplinary process.
 - 4.4. The DWP at a disciplinary hearing dismissed him for gross misconduct.
 - 4.5. The DWP dismissed his appeal against dismissal.
5. The claimant says all of this arose because his depression meant that he was unable to manage his finances. He says the result was that the dismissal and rejection of his appeal amount to unfavourable treatment. He says that this amounts to discrimination arising from a disability.
6. He also says that his dismissal was unfair because there was a failure to investigate issues in relation to his mental health before deciding to dismiss him for gross misconduct, that the sanction was disproportionate and that the conduct was not gross misconduct in any event.
7. The DWP says that it was concerned about the claimant’s honesty – because he had claimed money but not handed it over to the taxi firm – and integrity – because he had not reported the issue. The DWP also believed that there was potential reputation damage to it in that the taxi firm might think it did not treat disabled employees fairly.
8. The DWP says the claimant is guilty of gross misconduct, the investigation was reasonable and the sanction was within the range of reasonable responses available to them. As for discrimination they concede that the treatment was unfavourable but say (a) he has failed to prove either that he was unable to manage his finances that led to his dismissal or rejection of his appeal, or (b) in any case there is no basis to conclude it arose from his

disabilities. Alternatively, in the circumstances the unfavourable treatment was a proportionate means of achieving a legitimate aim.

9. There is no claim for breach of contract.

The hearing

10. Ms K Hosking, a barrister, represented Mr Ghelani.
11. Mr R Talalay, a barrister, represented the DWP.
12. Mr Talalay had prepared an opening note and Ms Hosking prepared a closing note.
13. We are grateful to each barrister for their written notes and for their submissions which we have considered. We are also grateful to them their assistance generally.
14. Mr Ghelani is severely visually impaired, to use his own description. Mr Ghelani required regular breaks every hour. We therefore took those breaks.
15. Mr Ghelani also indicated through his solicitor that he may require the use of a magnifier. Unfortunately for reasons that have not been explained his solicitor did not tell the Tribunal until 18:05 the working day before by email. Thankfully the DWP had such a device in a nearby office and brought it over to the Tribunal. In the end, Mr Ghelani did not need to use it.
16. Mr Ghelani was not able to read his statement or the bundle. Therefore, the judge read his statement out to him and he confirmed that what the judge read to him was true. When Mr Ghelani had to refer to the bundle, the representatives or judge read out the relevant passages.
17. Mr Ghelani's visual impairment meant that he had to leave at about 15:30 each day because of the loss of sunlight. Therefore, the Tribunal stopped at that time on the first and second day.
18. Mr G Bee, a witness for the DWP also required breaks every 40 minutes or so because of his disability. He asked if during the hearing he might come and go as he wished so he could take breaks but ensure minimal disruption to the Tribunal proceedings. We agreed and this is what happened. During his evidence we took breaks as he required.
19. The case took the 3 days allocated just to hear the evidence. Unfortunately, we did not get to Mr Ghelani's opportunity to make representations until shortly before 15:30. Mr Ghelani agreed that he was content for Ms Hosking to make those representations in his absence. We are grateful for his agreement to this because it meant the case did not have to go part heard and both parties had a fair opportunity to present their arguments to the Tribunal. Mr Ghelani therefore left at about 15:30 on the last day but we continued to sit until later to hear those representations on his behalf.
20. We heard oral evidence from Mr Ghelani on his own behalf and from Mr G Bee (Mr Ghelani's line manager), Mr G Dobson (the investigator), Ms J Blacow (the dismissing officer) and Mr T Farrell (the appeal officer) on behalf of the DWP. Each had prepared a written statement that they adopted as their evidence-in-chief, and each was cross-examined. Each

witness also answered the Tribunal's questions. We have taken all of this oral evidence into account.

21. There was also an agreed bundle and we were referred to many pages within it. We have considered those pages to which the parties referred us.

Issues

22. In the note of preliminary hearing on 14 May 2019, Employment Judge Faulkner identified the issues at paragraphs 10-13.

23. At the beginning of the hearing the parties agreed that they still represented the issues for the Tribunal to determine.

24. In light of the claimant's withdrawals, we do not have to determine those issues that relate to the withdrawn claims. Otherwise we agree that the list of issues prepared at the preliminary hearing still represents the issues that we must decide.

25. Therefore, the issues for us to decide are as follows:

25.1. What was the principal reason for dismissal and was it a potentially fair one in accordance with the **Employment Rights Act 1996 section 98**?

25.2. If so, was the dismissal fair or unfair in accordance with **section 98(4)** of that Act, and, in particular, did the DWP in all respects act within the so-called 'band of reasonable responses'?

25.3. If Mr Ghelani was unfairly dismissed and a potential remedy is compensation:

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

25.3.2. would it be just and equitable to reduce the amount of Mr Ghelani's basic award because of any blameworthy or culpable conduct before the dismissal and if so to what extent?

25.3.3. Did Mr Ghelani, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award and if so to what extent?

25.4. Did the following thing(s) arise in consequence of Mr Ghelani's disability of depression:

25.4.1. Mr Ghelani's failure to pay settle his taxi account?

Clearly there was unfavourable treatment because the DWP dismissed Mr Ghelani and dismissed his appeal too.

- 25.5. If so, has the DWP shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The DWP relied on the following as its legitimate aim(s):
- 25.5.1. not allowing employees to use money given to them by the DWP for one purpose to be used for another, unauthorised purpose;
 - 25.5.2. ensuring its workforce behaves in accordance with professional standards and the Civil Service Code; and
 - 25.5.3. maintaining the integrity of, and public confidence in, the DWP as a public body.
- 25.6. Alternatively, has the DWP shown that it did not know, and could not reasonably have been expected to know, that Mr Ghelani had the disability?

Findings of fact

26. We make the following findings of fact that we believe are necessary to answer those issues.
27. Mr Ghelani is disabled because he is severely visually impaired. His vision impairment means that he is completely blind in his left eye and has very limited ability to see in his right eye. Because of his vision impairment, if he wants to go anywhere, he depends on taxis to provide transport.
28. Mr Ghelani was employed by the DWP from 27 September 1993. At that time, he was living and working in Southend on Sea.
29. In about 2012, he moved from Southend to Leicester. He continued to work for the DWP and transferred office.
30. As an employee he is subject to the DWP's various policies and the Civil Service code.
31. The DWP's disciplinary policy at relevant times provides it is serious misconduct to:
- “[make] serious misuse of departmental assets, such as 'phones and photocopiers and [to] abuse of sick leave provisions.”
32. The policy suggests that the possible outcome for these sorts of misconduct would be final written warnings where the misconduct has shown serious consequences for the Department but does not amount to gross misconduct. Otherwise, it might be a first written warning.
33. On gross misconduct, the only paragraph that the DWP relies on is that of certain instances of bringing the DWP into disrepute. It gives the examples of posting defamatory comments or unauthorised information about the Department, colleagues, customers, Ministers on social media sites.
34. Though not relied on the policy also says that bribery, theft or fraud would be gross misconduct resulting summary dismissal.
35. The DWP's staff must abide by the Civil Service Code that emphasises honesty and integrity.

36. As part of the background to this case, it is relevant to understand how Mr Ghelani got to work in Leicester.
37. As we have already explained, Mr Ghelani relied on taxis to get him to and from places. The in-house access to work scheme means that the DWP can pay to Mr Ghelani money equal to the taxi fares he incurs getting to and from work and without Mr Ghelani incurring a consequent tax or national insurance liability and therefore without him being out of pocket.
38. As part of these arrangements the DWP has a Taxi Fares policy that provides a scheme for reimbursement of taxi costs.
39. Though the policy sets out what can and cannot be claimed it is relevant to note what the policy does not do. It does not:
 - 39.1. set out how quickly any employee must remit expenses that the DWP paid to them to cover taxi fares to the taxi firm itself where the taxi firm charges for fares by, as happened here, a monthly invoice;
 - 39.2. state that the money paid to the employee can be used only for discharging the taxi fares; or
 - 39.3. state that the employee holds the money on a trust-type arrangement for the taxi firm thus prohibiting the deployment of funds to any other use.
40. The arrangements for Mr Ghelani to use taxis seems to have been put in place in about early 2013 though the exact date does not matter.
41. Initially, the scheme began with Mr Ghelani paying for each taxi journey as and when he used the service. However, the multitude of receipts that he ended up having to submit to reclaim his expenses on an item by item basis became far too much of an administrative burden for him.
42. Therefore, he and the taxi firm that he used agreed that he would pay on invoice at the end of each month. The DWP were content with such an arrangement too. Effectively he had an account to which his journeys were charged. At the end of each charging period, the taxi firm would provide him with an invoice for the journeys that he had undertaken in connection with getting to and from work. He would then use that invoice as evidence of the journeys and fares incurred to submit a claim for expenses. The money would be paid by the DWP to Mr Ghelani and then he would pay it on to the taxi firm.
43. In relation to this scheme it is common ground that:
 - 43.1. Mr Ghelani made claims only for the taxi journeys that he had taken to and from work and he did not seek to claim from the DWP for any other journeys;
 - 43.2. he submitted sufficient documentation to support his claims; and
 - 43.3. the DWP only paid to him the money to which he was entitled in accordance with the taxi fares policy and the in-house access to work scheme. He was not overpaid or otherwise paid money to which he was not entitled.

44. The scheme and arrangement appears to have functioned well for some time.
45. After his move to Leicester it seems that employment relations took a downturn.
46. There were employment tribunal proceedings between the parties in December 2015. There were further employment tribunal proceedings between the parties in 2018. The DWP provided us with the reserved judgment from those later proceedings and pointed out, as is clearly right, that the decision and reasoning of that Tribunal cannot be called into question by us.
47. The facts of that particular case therefore provide useful background content. We know from those previous proceedings that:
 - 47.1. in October 2014 Mr Ghelani moved to the Child Maintenance Support Group where he worked until the end of his employment;
 - 47.2. within that team, each member of staff had their own health or disability issues and that Mr Bee (his line manager) was also disabled. The evidence before us confirmed that that continued to remain the case; and
 - 47.3. on 28 September 2015, there was an occupational health report that focused specifically on Mr Ghelani's stress and anxiety and recommended, amongst other things, that he undergo counselling;
 - 47.4. The DWP referred Mr Ghelani for a second occupational health assessment. The report was prepared on 5 January 2016. It reported that Mr Ghelani was continuing to suffer with anxiety and stress. It said that the occupational health adviser had referred Mr Ghelani to the DWP's counselling service for further support.
 - 47.5. On 17 February 2016, Mr Ghelani had a third occupational health referral. The contents of that report were similar to the previous reports. It noted he continued to suffer from stress and anxiety.
48. We know from the previous proceedings that Mr Ghelani has raised at least 5 previous grievances during his employment in Leicester.
49. Mr Ghelani fell sick on 25 April 2016. It resulted in Dr Alan Scott producing another occupational health report. The report again talked about Mr Ghelani's psychological issues and suggested that they were linked to a completely dysfunctional relationship between the team's management and Mr Ghelani.
50. On 21 February 2016, the DWP received a further occupational health report about Mr Ghelani. The report said so far as relevant:

"Outlook

"Stress is a rather imprecise term that is not a medical diagnosis. We commonly use it to describe the sensation of physical or mental symptoms that develop as a response to being exposed to excessive pressure. Some

levels of stress are a natural component of living, but when stress goes beyond a manageable level it can impact on daily life. At work if an individual is feeling stressed it may affect performance impacting on frequent short spells of sickness absence, poor concentration, forgetfulness, and missed deadlines. Behaviour may be out of character and decision-making is sometimes affected.

“It is clear from the consultation that his current stressors are mainly associated with non-medical issues.

“I note that a Stress Reduction Plan is in place and targets have been reduced accordingly but unfortunately due to time constraints I was unable to discuss this fully with him, as to whether he was finding this beneficial.

“I recommend that this should continue to be reviewed on a weekly basis and the action plan adjusted accordingly. This process should continue for as long as both parties feel it would be beneficial.”

51. On 22 September 2016 Mr Ghelani went with his manager (Mr Bee) to see his general practitioner (“GP”):

52. The tenor of Mr Ghelani’s evidence was that he was forced to attend his GP by Mr Bee in the most humiliating way possible. He said that Mr Bee sat in on the consultation and so violated his privacy. Mr Bee’s evidence is the opposite. He said he went with Mr Ghelani at Mr Ghelani’s request to support him. He said he was concerned for Mr Ghelani’s well-being. He said he did not sit in on the consultation.

53. The GP notes record the following (sic.):

“History: came with Manager of work . DWP . Working there for four years . tells he is being bullied and they want to get rid of him from job . they think he is mental and he may kill some body at work . Manager told me that he may gets nervous breakdown and may need Psychotherapy to which patient agrees . under Eye specialist . using drops for Glaucoma and under eye specialist . will go to eye clinic as he is worried about his eyes.

“Examination: Gc fair . anxious . casually dressed . good eye contact no dark thoughts . phq gp score of 21 severe depression and taking sertraline 100 ml one daily and helping.”

54. The Tribunal concludes that Mr Bee’s version of events is correct. Firstly, Mr Bee’s evidence came across as that of a manager genuinely concerned for Mr Ghelani and for the staff in his team generally and this is supported by the enquiries he made on Mr Ghelani’s behalf. Secondly, Mr Ghelani’s evidence is unreliable in many ways. For example, though he withdrew the claim for victimisation we did hear all the evidence that Mr Ghelani said supported that case. The Tribunal could not detect from what we heard anything that even hinted at a claim for victimisation. We are sure Mr Ghelani honestly believed the allegation. However objectively there is nothing of any kind to support it. Thirdly the GP’s note tends to support Mr Bee’s version rather than Mr Ghelani’s version. While we appreciate the GP would not be recording data for use in Tribunal proceedings, they would be concerned to make a proper note to assist with future consultations or if they thought something untoward had occurred that suggested abuse of a

vulnerability. If Mr Bee therefore had behaved like Mr Ghelani had described, we would expect such behaviour to be detectable in the GP's notes. Instead it matches better what Mr Bee told us. This is one factor that suggested to us that Mr Ghelani is not a reliable historian.

55. On 21 December 2016, Mr Ghelani went to see his GP. His GP noticed that Mr Ghelani was reporting that his health felt affected by his current accommodation. Mr Ghelani told his GP that his vision impairment made it difficult for him to get into and out of his accommodation and that he was continually being disturbed by the noise from the people who lived upstairs from him. He explained that he was looking for new accommodation through social housing. The GP noted that Mr Ghelani had anxiety and prescribed Sertraline.
56. On 8 May 2017, Mr Ghelani went to visit his GP again. The GP noted that Mr Ghelani was suffering from stress at work and was currently involved in court proceedings. The GP wrote that Mr Ghelani
"can't cope, lives alone, and his mum lives in Southend".
57. His GP also noted that Mr Ghelani was seeking an extension for "the hearing" (presumably the Tribunal hearing); that there was no self-harm and that he was on anti-depressants. He diagnosed a low mood.
58. On 16 May 2017, Mr Ghelani went to see his GP again who noted that Mr Ghelani was reporting that he was not happy with his accommodation and wanted a letter from his doctor to assist with re-housing. He said that it was making him depressed. He told his GP that he had missed his appointment with the psychiatrist a few months ago and was referred to it by another GP. There was then a discussion about onward referral to a psychiatrist.
59. Those medical notes from 2016 and 2017 show a pattern of anxiety and depression and that tallies with Mr Ghelani's own evidence that in 2017, his depression became more pronounced.
60. Mr Ghelani also alleges that his depression led to him being unable to manage his finances. He told us that he was no longer being paid regularly. He said that he was having to take time off work and therefore his salary was reduced. He explained that this only exacerbated his financial difficulties. He says that the money that was being paid to him was being eaten by overdraft charges by the bank and other expenses before he had even had a chance to pay the taxi bills. He also said that there were significant deductions being made by the DWP towards a previous debt.
61. After careful and thorough consideration, we do not accept his evidence that he had difficulty managing his finances because of his depression. Our key reasons are as follows:
 - 61.1. We acknowledge that it is plausible a person who has depression may not be able to manage their finances. However, we do not accept that it is inevitable or so obvious that one can accept it as inherently true. We are aware that on issues of mental health there is always a danger that relying on "common sense" can lead to erroneous assumptions. We do not have expertise to take judicial notice of the fact that depression means

the person with that condition cannot manage their finances or is more unlikely to be able to do so.

- 61.2. We also acknowledge that he had not paid the taxi firm. We do not believe however the failure to pay an account alone is evidence of general financial difficulties or that the issue arose from depression.
- 61.3. We also acknowledge below that on 24 July 2017 he told Mr Bee he had financial difficulties and that the taxi firm had suspended his account. We acknowledge he raised the issue again in other meetings after that date. However, it is just an assertion. It lacks objective details to measure it against. It is, in reality, only him saying the same thing he told us. We remind ourselves that repetition does not make something more plausible.
- 61.4. We noted also that the tenor of his complaint to the DWP becomes more detailed as time progresses. It starts off being described as a private difficulty but by the time of the disciplinary hearing it has become far more significant. We recognise that people can play down effects because of embarrassment, which may be particularly acute when depressed. We also realise that people can unintentionally and innocently exaggerate them later on. Because Mr Ghelani is an unreliable historian we cannot discern where his assertion falls on this spectrum.
- 61.5. We also acknowledge that Mr Ghelani cleared the debt to the taxi firm after he was allocated and started to work with a support worker. However, we do not know the reason that made a difference and there could be several explanations.
- 61.6. We have noted his unreliability as a historian. There are other factors that add to this impression. Mr Ghelani's evidence is often contradicted by other objective evidence. His pay was not reduced during the relevant period as alleged or at all. Indeed, at the start of the case the parties agreed that Mr Ghelani was paid his full wage, notwithstanding the fact that he was absent from work.
- 61.7. He alleged he was at risk of being evicted for not paying the rent. However, we have seen no documents to confirm he was in rent arrears or that he was at risk of eviction. We note also that in consultations with his GP he does talk about problems with his housing but the financial situation is never mentioned as a factor whereas others were.
- 61.8. We have no documents from Mr Ghelani, whether it be by way of pay statements, bank statements, invoices (even from the taxi firm) or bills to show he was having the financial problems he alleged. He would be able to procure at least copies of some of these documents (e.g. bank statements) to support what he was saying. We find their absence striking.
- 61.9. Furthermore, the GP's notes record evidence of depression but show no mention of financial difficulties being a problem.

61.10. He alleged that the DWP made things worse by delaying paying his expense and because he could not access the system. Mr Bee accepted that he helped Mr Ghelani to process some expenses. Claims for reimbursement of taxi fares were processed by the DWP very quickly upon submission. In some cases, from the schedule that has been produced, they were processed within the space of about 21 days. Once the submissions had become more regular, they were being processed within a period of about 10 days.

The most striking thing from the document is the delay between the invoices and Mr Ghelani submitting them.

For example, in relation to expenses from 11 to 14 April 2017, he did not submit them until 11 July 2017; a delay of 88 days. For expenses between 18 April to 21 April, he did not submit those until 20 June; a delay of 60 days. Similar patterns can be seen in relation to other expenses claims.

It can also be seen from studying the schedule that there is no chronological order in which the expenses claims were submitted and we were given no explanation to explain why for example expenses from 6 to 9 June 2017 were submitted on the 9 June but the expenses relating to 11 to 14 April were not submitted until over a month later, on 11 July.

However, in our mind it does not follow that the fact he delayed means that he therefore had financial difficulties or that the delays arose from depression.

61.11. As for the deductions, we established from the evidence of Mr Ghelani that they were in relation to a non-payment of Council Tax to the local council and that it was being deducted from his wages pursuant to an attachment of earnings order. We do take note of the fact that the court procedures at least provide the opportunity for a payer to have their means considered when setting the rate of deduction and the court must take into account earnings when setting the rate, often done by proper officers of the court using a formula. We do not accept therefore that the DWP was deducting (a) anything more that the law obliged it to do and (b) anything like the sum that would cause severe financial difficulty.

61.12. He gave evidence that he had spent a lot of money in pursuit of prior claims against the DWP. However, he accepted in evidence that it was his household insurer who had funded the litigation.

61.13. He was clearly seeing his GP and being referred to other healthcare practitioners. It seemed to us it would not have been unreasonable for one of those to have written a report (or even a letter) at Mr Ghelani's request to explain (a) if they were aware that he had financial problems and (b) if in their opinion in his case those problems were (or would have been) consistent with the depressive episode.

62. Whatever the cause, during period between the beginning of 2017 and 18 July 2017, Mr Ghelani was ran up a debt to the taxi firm for £594.19.
63. The taxi firm then refused to transport Mr Ghelani for payment on account. However, they did continue to provide transport from home to work (and indeed from home to other locations) but on condition he paid for the services there and then. This is what Mr Ghelani did. He continued to use the firm and paid for journeys as he went. The taxi firm never started any proceedings to recover the money from him.
64. On 24 July 2017, shortly after the taxi firm had frozen Mr Ghelani's account, Mr Ghelani contacted Mr Bee asking to take 25 July 2017 as "a network day". This is a day where an employee can take time off to deal with things like, for example, the plumber coming around, boiler problems and so forth. They are not sick days nor are they holidays. He explained that he wished to take time off due to personal confidential issues and issues with his health and his stomach in particular. He suggested they may be caused by stress but they were not work related. He also said that there were financial issues with the taxi firm that had put his account on hold so he might have issues getting into work. Mr Bee said that Mr Ghelani can no longer have any network days because he had already had his quota and that was in line with the advice he had been given by his superior.
65. On 27 July 2017, Mr Bee rang Mr Ghelani to ask how he was. Mr Ghelani reported that everything was still worrying him at that moment. There followed a significant number of further communications concerning Mr Ghelani we set out the crucial ones below. However, we considered all the communications recorded in the logs and concluded that, so far as they concern Mr Bee, we could detect nothing but genuine concern from him towards Mr Ghelani or concern about how Mr Ghelani's issues could be balanced with the needs of the DWP. We think no criticism of Mr Bee was justified.
66. On 10 August 2017, Mr Ghelani had a consultation with Ms Ferhana Girach, who was a trainee psychological wellbeing practitioner at the Open Mind Scheme in Leicester. Open Mind is a service provided by the Leicester City Clinical Commissioning Group to people within the City of Leicester who are suffering from mental health issues. One can be referred by one's doctor or make a self-referral.
67. Ms Girach conducted a questionnaire with Mr Ghelani and recorded that his PHQ9 score (which measures symptoms of depression) was 24 and that his GAD7 score (which measures symptoms of anxiety) was 21. These were high scores and the Open Mind Service concluded that Mr Ghelani required more specialist support than they could offer. Mr Ghelani provided this letter to the DWP at the time of the disciplinary proceedings which resulted in his dismissal.
68. On 14 September, Mr Bee spoke to Ms Mary Chadwick, who is a Human Resources Business Partner about Mr Ghelani's occupational health report. He discussed with Ms Chadwick that there were current absences and difficulties of supporting the absences. Ms Chadwick advised that there were too many legal risks at the early stage of absence. She advised Mr

Ghelani needed an appropriate amount of time to arrange for counselling after any change of medication to set in. Ms Chadwick noted that the DWP needed to consider Mr Ghelani's mental state and the occupational health advice of re-referring him in 4 weeks' time. Her advice would be to reconsider whether the business can support the absence around the second month once the second occupational health referral had been completed.

69. On 9 October 2017, there was an occupational health report which concluded that Mr Ghelani's mood was extremely low and he was also experiencing debilitating physical symptoms and that therefore he was not fit for work.
70. At a meeting on 27 October 2017 with Mr Ghelani at his brother's house, Mr Bee asked Mr Ghelani what he had done with the money for the taxi fares that the DWP had paid to him. Mr Ghelani explained that the taxi firm he had used had frozen his account as he owed them approximately £700. He said that this had happened because his money had been coming into his account in dribs and drabs and that he had insufficient funds due to his financial issues but it was all sorted now.
71. They also discussed an issue about Mr Ghelani obtaining sick notes. His GP had insisted that Mr Ghelani had to go to the GP to collect them which was proving difficult. However, the discussion then turned to the issues of stress and anxiety. Mr Bee noted that Mr Ghelani had stated that the stress and anxiety that he was feeling was not work-related, but it was related to current private financial issues, the potential of losing his house and current health issues. Mr Ghelani said he was still waiting for a psychiatric appointment to be arranged and that he was talking to a counsellor.
72. After the meeting Mr Bee asked his own line manager if the DWP could pay the taxi firm direct. His manager had replied that while it was possible, payments to the taxi firm would be slow and that the taxi firm required their money quickly.
73. Mr Bee sent an email on 30 October 2017 to Ms Blacow summarising a meeting he had had on 27 October 2017 at Mr Ghelani's brother's house with Mr Ghelani.
74. On 9 November 2017, there was an attendance review meeting with Mr Ghelani and Ms Blacow. The meeting was about whether Mr Ghelani's absences were such that he should be dismissed. In her decision letter of 3 December 2017, she noted that Mr Ghelani had said he had been suffering anxiety and stress and that he had had stomach problems. She noted that as he had returned to work on 27 November, she had decided not to dismiss him at this stage but that he was still subject to the attendance management procedures.
75. On 14 November 2017, Judi Blacow emailed Ms Heather Luckman copying in Mr Bee enclosing notes from a decision-making meeting on 9 November 2017. In the email she said:

"I have to call HR tomorrow as I have to get their advice prior to making my decision (sadly its part of the process). You know what I intend to do but I have a horrid feeling that the note he has now sent may leave this too

unsafe – He did say he wanted to come back at that meeting but I glossed over it. I will explain to HR that I can't see how he is now miraculously better and that bringing him back will only delay the inevitable but I just wanted you to be aware.”

76. We conclude at this point that Ms Blacow was at best highly cynical of Mr Ghelani's position and at worst simply did not believe him. Her reference to “I have to get their advice prior to making my decision (sadly its part of the process). You know what I intend to do but I have a horrid feeling that the note he has now sent may leave this too unsafe” can only sensibly mean she wanted to sack Mr Ghelani but was frustrated that the advice might counsel against such an approach.
77. On 16 November 2017, Mr Bee sought advice from the human resources case work team. Ms Joanne Angus replied. Mr Bee's query was that Mr Ghelani had been paid to use taxis to commute to work but he had not paid the taxi firm and that Mr Bee wanted to know whether disciplinary action should be taken.
78. Ms Angus advised:

“From the information provided I advised it would be a matter between the employee and the taxi firm. You also wanted to know if the Department could pay the taxi firm directly in future to avoid non-payment and I advised you to speak with your Finance Business Partner.”
79. After this meeting in late November Mr Bee again sought advice about paying the taxi firm directly. This culminated in Ms Chadwick advising him that in fact the matter should be referred to the DWP's Internal Fraud investigation team (“Internal Fraud”). Mr Bee did this because that was the advice that he was given as to what to do.
80. Internal Fraud opened an investigation on 8 January 2018. Mr Dobson was appointed as the investigator. As part of his investigation, Mr Dobson spoke to the office manager at the taxi firm who confirmed that the account was suspended on 18 July 2017 with a balance at that time of £594.90. He also confirmed that the account had been cancelled but that Mr Ghelani had discharged the balance by the end of February 2018. He also confirmed that Mr Ghelani continued to use the taxi firm for his home to work journeys but he paid by cash or made card payments on a day by day basis.
81. As part of his investigation, Mr Dobson spoke to Mr Ghelani in an interview that took place on 26 March 2018. Mr Ghelani was accompanied by his union representative. During that meeting, Mr Ghelani explained that he had had difficulty claiming expenses because the software had not displayed properly on his computer terminal when zoomed in to accommodate for his visual impairment.
82. He also explained to Mr Dobson that he had been diagnosed with heavy depression and he has severe concerns about a loss of short-term memory.
83. He explained that he was at that time in a terrible state and that the early part of 2017 had been a highly traumatic time for him and that because of his depression he had suffered an inability to manage his finances. He explained his depression was why he had not paid the taxi firm's bills

because the depression had caused his inability to manage his finances. In particular he said:

“... because once the nightmare started er, erm; because I couldn’t cope, everything else erm, it had an impact on everything else, and then the, er my whole life king of deteriorated. And money, erm and money was something that I couldn’t, was one of many things I couldn’t keep control of. Even taking medication.”

84. Later on:

“Erm so the money was getting paid to me and I had the responsibility of paying the [the taxi firm], but I couldn’t manage my affairs full stop.”

85. And later:

“... once you fall behind in some things, and then you er get overdrawn, and then you get, incur charges, and I getting terrible amount of charges, I mean one, one, one time I had £400 worth of charges, but I didn’t, I couldn’t manage it, I, I didn’t know what was going on, I didn’t have any idea of any of this, all I knew is I didn’t have any money.”

86. He agreed that he should of course have paid the taxi firm.

87. Mr Dobson prepared his investigation report on 18 April 2018. As part of that report he set out his findings and his conclusions. In relation to his findings, he said as follows at paragraph 16:

“16. The reason he gave for not settling his account with [the taxi firm] was he had “financial issues”.

88. He went on to say:

“the claims were not always paid altogether and when they got paid, I had issues because I couldn’t manage my own affairs in any shape or form, so my finances went astray and a lot of time everything was getting chewed up”.

89. Under conclusions, Mr Dobson said at paragraphs 18 and 19:

90. “18.This was a case of a member of staff who has claimed taxi fares through the Access to Work Scheme enabling him to attend the office on a daily basis. The expenses were paid into the member of staff’s bank account but the member of staff failed to pay the money to the taxi firm.

“19. It is the view of [Internal Fraud] that, on the balance of probabilities, this officer has a disciplinary case to answer. The investigation established breaches of the Department’s Standards of Behaviour and the Civil Service Code. ...”

91. At paragraph 26, Mr Dobson identified that no losses had been identified.

92. In cross-examination, Mr Dobson was asked about why he carried out no investigation into Mr Ghelani’s state of health and in particular into his depression and the alleged consequent difficulty of managing his finances. Mr Dobson evidence was clear and frank. He explained that as far as he was concerned, he was interested purely and simply in whether or not there had been a potential fraud. Beyond that, he was not interested any further. His focus was purely on establishing whether or not something untoward

had happened. He said it was entirely up to other people as to decide whether or not a disciplinary process should follow and what the outcome of that process should be and how it should be conducted. He had no involvement at all or interest in what anyone did with the report that he produced. It was entirely up to them.

93. We accept that Mr Dobson's sole interest was establishing whether or there had potentially been a fraud and thus potentially a breach of either the disciplinary policy or the Civil Service Code and that he had no interest whatsoever in what anyone did with his report. We accept it was left to others to carry out any further appropriate investigation.

94. On 8 May 2018, Judi Blacow invited Mr Ghelani to a disciplinary decision meeting. The letter says:

"The formal meeting will consider the allegation that you claimed taxi fares through the Access to Work scheme to attend your place of work but not you failed to pass these on to the taxi firm. Your failure resulted in the taxi firm suspending your account in July 2017, when the outstanding balance stood at £594.90.

"I am considering this allegation as gross misconduct."

95. She enclosed a copy of the report that had been prepared by Mr Dobson. She explained that the purpose of the meeting was to discuss these findings and to consider whether disciplinary action should be taken based on a totality of the evidence available.

96. She included the definition of internal fraud in her letter, which in the Civil Service is defined as follows:

"Dishonest or fraudulent conduct, in the course of employment in the Civil Service, with a view to gain for the employee or another person;

"For employees of DWP only, this includes dishonest or fraudulent conduct relating to benefits, even if not connected with employment."

97. On 9 May 2018, there was a further occupational health report prepared for Mr Bee by Ms Catherine Lloyd-Squires who is a registered nurse who has a diploma in occupational health. She noted in her opinion that Mr Ghelani had a complex physical history and from his description appeared to be experiencing significant psychological health issues. She said that they particularly appeared to be impacting on his motivation and general functioning; that his concentration appeared poor throughout the consultation and that he had lost his train of thought at times. She described Mr Ghelani as being unfit for work.

98. The disciplinary hearing took place on 17 May 2018 before Ms Blacow. Mr Ghelani was accompanied by his trade union representative. The notes are a detailed but not verbatim record. The relevant parts are as follows:

"[Ms Blacow] advised that his case had been thoroughly investigated and that the facts established by the investigating officer led to the conclusion that there was a case to answer and that the allegation against [Mr Ghelani] has been proven. [Mr Ghelani] then accepted that he had not paid the money he received from DWP for the purposes of paying the taxi firm ..."

99. The notes then record:

“Throughout the meeting [Mr Ghelani] repeatedly told [Ms Blacow] that his Line Manager was aware of this fact from the outset. He said that [Mr Bee] had not dealt with him correctly and should have taken [Mr Ghelani’s] financial and mental health problems into account as a mitigating factor. [Mr Ghelani] said he was mentally impaired and could not take responsibility for his actions. He had expected more support from [Mr Bee] as his Line Manager and believed that [Mr Bee] should have personally contacted [Mr Ghelani’s] GP to gain a better understanding and explanation as to [Mr Ghelani] acted the way he did.

“[Ms Blacow] said that [Mr Bee] was aware that [Mr Ghelani] had financial problems but he wasn’t aware that [Mr Ghelani] was not paying the taxi firm. The non-payment to the taxi firm had come to light through the proper processes being followed by the Line Management chain. [Mr Ghelani] had accepted that the non-payment to the taxi firm had occurred and had carried on for some time. The fact remained that [Mr Ghelani] had taken money from the Department. This money was paid so that the taxi firm could provide [Mr Ghelani] with a service. His actions may have caused reputational damage to the Department. She asked him what he had spent the money on.”

“ ...

“[Mr Ghelani] repeated that he had told [Mr Bee] about how badly his financial circumstances were and how his mental state was affecting him. He eventually sought help from the medical profession and now has a mental health support worker who is helping him to address his financial issues. He has since repaid the money in full to the taxi firm.

“[Ms Blacow] asked him not to veer off the questions about why he’d not paid the taxi firm and how he’s spent the money. [Mr Ghelani] was talking about events that had happened in January 18 but the taxi firm suspended his account with them earlier in July 17. It was an individual’s responsibility to seek help for their health issues and not a Line manager’s. They were there to provide a supportive role and were not medically trained to deal with such issues.”

100. Later, the notes record:

101. “[Mr Ghelani] said it was a combination of factors including overwork; a poor performance appraisal rating from [Mr Bee] and domestic issues outside of work. He had experienced suicidal thoughts and informed [Mr Bee] of this. His taxi fares were £11.60 a day/£58 a week. He said his mental state at the time had made it difficult for him to cope with his life. He commented that had he not mentioned business of the unpaid taxi fares to his manager to his Line Manager then DWP wouldn’t have had a clue about this.

“Mr Ghelani’s trade union representative then added that he considered Mr Ghelani had put forward mitigating factors of mental incapacity as a reason for this happening; that Mr Ghelani had been compliant with the investigation and made a full admission. His repayment to the taxi firm has shown goodwill on his part.”

102. Ms Blacow sent her decision to Mr Ghelani on 22 May 2018. She dismissed him for gross misconduct. She said:

“We discussed your alleged behaviour in relation to the allegation that you claimed taxi fares through the Access to Work scheme to attend your place of work but that you failed to pass these on to the taxi firm. Your failure resulted in the taxi firm suspending your account in July 2017, when the outstanding balance stood at £594.90.

“In response to the allegation you accept that you did fail to pay the taxi firm but that you have since made good, repaying the outstanding debt in February 2018.

“After considering all the relevant factors, it has been decided that your employment with [the DWP] has been terminated. This will take effect immediately, without notice and without pay in lieu of notice. Therefore your last day of service is 23 May 2018.

“Please see attached record which explains the rationale behind my decision.”

103. Her letter then explained how to make an appeal.

104. In the accompanying record of decision, Ms Blacow set out that Mr Ghelani had understood why the meeting had taken place; that he had accepted that he had not paid the taxi bill and that Mr Ghelani had confirmed he had been paid his taxi fares up until July 2017 before going off work on long-term sick. She then said that the case had been proven and that she went on to consider mitigation. She said:

“We talked about the allegation and [Mr Ghelani] was unable to explain to me why he had failed to pay [the taxi firm] and what he had used the money for when he had claimed funds from the Department specifically to cover his fares. I note that the investigator reported that [Mr Ghelani] told them he was suffering severe financial hardship at the time and has used the money to pay other bills.”

“ ...

“[Mr Ghelani] stated that he had ‘severe psychological disturbances’ which he said meant that he could not be accountable for his actions.

“I note that up until July 2017, [Mr Ghelani] was attending work and gave no indication that he had any particular psychological issues at that time. His Line Manager confirmed he was aware of his financial difficulties in relation to a potential eviction but had no indication or medical evidence to show [Mr Ghelani] had any current psychological problems. [Mr Ghelani] had been absent a year earlier due to stress/anxiety, again financial/housing difficulties appear to have been prevalent at that time also.”

105. In relation to her decision, she said as follows:

“In considering the penalty for this offence, I had regard to the degree of misconduct and the impact on the Department. The offence is in clear breach of the Civil Service Code and the Departments Standards of Behaviour. I have also considered culpability and intent. My findings are

that whilst [Mr Ghelani] may not have set out to fraudulently claim fares to enable him to attend work, his failure to pay these to the taxi firm resulted in him receiving taxpayer's money under false pretences and using it for reasons other than why they were claimed. Financial impropriety is a very serious matter and I consider that his actions are serious enough to destroy the working relationship and any trust that existed between [Mr Ghelani] and the Department.

"I have listened carefully to the reasons, including [Mr Ghelani's] mental incapacity/ill health, which [Mr Ghelani] has put forward to explain his actions but I do not accept these as mitigation. It is clear to me that [Mr Ghelani] finds it difficult to accept responsibility for his own actions and I cannot see that this is likely to change. I have decided that the penalty in this case is dismissal."

106. Expanding on that in his evidence-in-chief, Ms Blacow said:

"I considered the fact that at no point leading up to July 2017 had the Claimant stated that he was having difficulty managing his financial affairs. From January 2017 to July 2017, when the incident took place, the Claimant was largely attending work, being paid in full, and not reporting to be under any form of mental anxiety, stress or depression. During our meeting, the Claimant seemed alert. I therefore did not consider that there was a link between his sight impairment, alleged depression and his failure to pay the taxi firm. In addition, as I went to his sister's house to carry out the disciplinary hearing, I had seen first-hand that it was clear to me that he had a strong support network around him."

107. Ms Blacow does not have any qualification that enables her to discern the true state of a person's mental health generally, nor to determine the effectiveness of a support network. Ms Blacow does not have any qualification or relevant experience that enables her to infer whether a person had depression or how that depression affected them in the past based purely on how they behave at a subsequent given point in time many months later. Therefore she is not qualified to infer properly that, because Mr Ghelani came to work or because he appeared to have a family support network at the time of his disciplinary hearing, it followed he was not depressed or having difficulty managing his finances up to July 2017, nor that the support network was sufficient during that time.

108. She never enquired into the support available during the relevant time.

109. She never considered the copious occupational health reports available to her or the Open Mind letter setting out his severe symptoms of depression and anxiety. We come to that conclusion because the tenor of her conclusion and of her conduct during the disciplinary hearing is to sweep aside any reference to mental health, and furthermore she made no mention or reference to them at all in her conclusion.

110. We note that Mr Ghelani's explanations to Ms Blacow do seem somewhat confused and scattered in their approach. That was reflected in the manner that Mr Ghelani gave evidence to us.

111. However, it is quite clear that Mr Ghelani was highlighting that he believed that his mental health was an obvious and significant issue, that he was

really struggling with his finances at the time and that it was the source of his failure to pay the taxi firm's bill.

112. We accept that Ms Blacow honestly believed that Mr Ghelani was guilty of misconduct. We come to this conclusion because she was clear and consistent in her evidence that that is how she perceived Mr Ghelani's conduct. She felt he was dishonest. None of what we are about to refer to undermines our conclusion that this is what she honestly believed. We saw no document or other evidence that suggested otherwise.
113. However, in the circumstances we conclude that Ms Blacow had decided before the meeting began that Mr Ghelani was dishonest and was going to be dismissed summarily for what she honestly believed was gross misconduct.
114. In the circumstances we conclude she wilfully refused to engage with or contemplate his mitigation or alternative outcome.
115. We rely on our findings of fact above. However, in summary this is because:
- 115.1. of what she said to human resources in the earlier attendance management process. She was clearly very cynical of Mr Ghelani;
 - 115.2. her failure to look at even the occupational health reports;
 - 115.3. her failure to engage in a significant and obvious element of mitigation;
 - 115.4. the clear and obvious lack of qualification to draw the conclusions she did about Mr Ghelani's mental health and to base those conclusions on what we find is the flimsiest of evidence.
116. There was plenty of opportunity to consider his mitigation and investigate it further. She positively refused to do so. We conclude this is a wilful refusal on her part to engage with the mitigation Mr Ghelani advanced and supports the proposition her mind was made up.
117. We have also been fortified in this conclusion by the fact that we do not actually understand why she has dismissed Mr Ghelani.
118. As we noted in the letter of 8 May 2018 inviting Mr Ghelani to a meeting, it suggests that he claimed taxi fares but did not pass it on to the taxi firm and that was considered in and of itself an act of gross misconduct.
119. When we get to the decision to dismiss, we have the curious phrase that he
"may not have set out to fraudulently claim fares to enable him to attend work"
but that
"he was receiving taxpayer's money under false pretences and using it for reasons other than why they were claimed".
120. The lack of clear wording led us to conclude Ms Blacow was looking a reason to justify the decision she had already made. The simple fact is that

he was not, on any reasonable interpretation of what the DWP understood the facts to be (and which Mr Ghelani admitted) receiving taxpayer's money under false pretences.

121. In the DWP's opening note, the DWP phrased it in paragraph 27 as "he was dismissed because of a want of integrity by misusing access to work funds designed to enable him as a disabled employee to get to and from work."
- Even on the most generous interpretation this is not the reason the DWP gave to Mr Ghelani when dismissing him.
122. During evidence she suggested that his actions risked bringing the DWP into disrepute because the taxi firm may think that the DWP treated disabled employees badly because (a) Mr Ghelani was disabled, (b) employed by the DWP, (c) entitled to payment for the taxi fares from the DWP under its access to work scheme, (d) and had not paid his bill, and (e) and that was probably because the DWP had not paid him.
123. We note the DWP had no evidence that the taxi firm ever thought this. Indeed, the only evidence that supported the conclusion that the taxi firm might have had occasion to think this was because Mr Dobson contacted them on the DWP's behalf in relation to the unpaid bills.
124. We conclude neither explanation was ever in the contemplation of the DWP. It is not referred to in the decision letter or appeal. It is so far-fetched that it is inherently implausible. In any case, it ignores the fact that the taxi firm were perfectly happy to continue to provide Mr Ghelani with services to transport him to and from work on condition that he paid as he went. We do not believe any reasonable employer would think this because they would also weigh up the real chance of the potential damage materialising.
125. In cross-examination Ms Blacow stated with conviction that in her opinion Mr Ghelani was being dishonest and yet again it was suggested that the real reason for dismissal. At the risk of repetition, we cannot understand how any reasonable employer could conclude that Mr Ghelani was dishonest.
126. From all of this moreover is clear inconsistency and confusion from the DWP – even at trial – about why it dismissed Mr Ghelani. It only goes in our mind to support our conclusion the outcome was pre-determined before the meeting began and the search was for a reason to justify the decision already taken.
127. We are also fortified in that conclusion by the fact that we believe no reasonable employer could consider Mr Ghelani was fraudulent or dishonest. He claimed and received only what he was entitled to under the policy. We also do not accept Mr Ghelani could reasonably be described as acting without integrity.
128. Further we are reassured in our conclusion because the only element of the disciplinary policy that relates to gross misconduct that the DWP cites in evidence as relevant is reputational harm. We have made our conclusions on that clear. It is striking that the DWP did not rely on the category of

“bribery, theft or fraud” which seems to fit better with Ms Blacow’s honest belief.

129. Finally we note that Ms Blacow in questions from the Tribunal was somewhat surprised to see in the DWP’s policy that abuse of sickness provisions is serious misconduct but not necessarily gross misconduct and that ordinarily such abuse would not result in summary dismissal. She commented that she thought it would be gross misconduct because it is, in short, defrauding the DWP of unearned wages. We see the logic of her reasoning but the DWP has clearly thought otherwise. This surprise and the fact that in our minds abusing a sickness policy on any reasonable view is more serious than what Mr Ghelani did leads us to conclude she never took the step back to consider where Mr Ghelani’s conduct fell within the policy. If she genuinely approached it with an open mind she would have done so. It also supports how Mr Ghelani’s failure to pay his taxi firm’s bill is not nearly as serious as the DWP now allege.
130. Mr Ghelani lodged an appeal against the decision to dismiss him.
131. On Thursday 2 August 2018, Mr Farrell heard that appeal. Mr Ghelani was accompanied at that meeting by his trade union representative.
132. In that meeting, Mr Ghelani confirmed that he was entitled to claim taxi fares; that he did claim the taxi fares but he failed to pass the money onto the taxi firm. He explained this was because he was:
“extremely unwell mentally”.
133. He went on to explain that:
134. “... he had severe stress. During the time he was going through the Attendance Management process he was accused of wanting to both kill management and himself”. Mr Ghelani went on to explain when asked why the invoices were not being paid, that his “financial difficulties were at the height of his mental health. ... [Mr Bee] had organised counselling for him”. He also later when asked again why he had not paid the bill, said that “he didn’t have a clue, he couldn’t cope with life at that time. His financial situation was in such a mess any monies paid in to his account were simply swallowed up by other bills and charges. ...he had started to rectify himself when he was given support to work, he straightened finances out, that was until three months ago when had no salary.”
135. Mr Ghelani’s trade union representative emphasised that
 - 135.1. Mr Ghelani had put forward mitigating factors of mental incapacity with Ms Blacow;
 - 135.2. he had been complying with the investigation and made full admission;
 - 135.3. Mr Ghelani had sought medical advice;
 - 135.4. he was receiving support for his condition and, with the aid of a support worker, he had now repaid the taxi firm in full; and,
 - 135.5. Mr Ghelani simply could not handle his own financial affairs during that period.

136. Mr Ghelani's trade union representative then summarised that the mitigating circumstances had not been considered fully by Ms Blacow.
137. On 9 August 2018, Mr Farrell dismissed Mr Ghelani's appeal. The letter that Mr Farrell is somewhat brief. It says that:
"... I have decided to refuse your Appeal.
"The reasons for my decision are that:
"• At the time that you failed to settle invoices for [the taxi firm] in respect of journeys taken to/from work under the Access to Work policy, you were in work and not reporting to be under any form of mental anxiety or stress. I have not seen any (medical) evidence that you were unwell during the period your account was not settled.
"• The fact that you continued to claim for Taxi fares from the Department during the period that you failed to settle your account with [the taxi firm] indicates that you were aware of your entitlement and responsibilities under the Access to Work Policy.
"• During interview you have repeatedly set out that your poor financial status was the primary reason that led to your account with [the taxi firm] not being paid. As such any monies claimed and paid were used to fulfil other financial commitments you had at that time."
138. Mr Farrell then attached a copy of the minutes of the meeting and said the internal appeal process had come to an end.
139. Because Mr Farrell had not seen any medical evidence he had not seen, for example, any of the occupational health reports, the letter from the Open Mind showing the high scores on the GAD7 or PHQ9. He confirmed in oral evidence this was the case.
140. Mr Farrell accepted that he had not conducted his own investigation at all into any of the issues raised.
141. He explained in evidence that he had not considered a lesser sanction because he did not accept the mitigating factors. He pointed out that the Claimant had been at work and discharging his duties.
142. We conclude that Mr Farrell approached the appeal as a mere "rubber-stamping" of Mr Ghelani's appeal for the following reasons:
- 142.1. Mr Ghelani again raised his mental health as mitigation and further that Ms Blacow had not considered it;
- 142.2. there were on Mr Ghelani's file there are occupational health reports indicating some mental health difficulties and in addition the letter from Open Mind;
- 142.3. Mr Farrell's lack of awareness of these documents led us to conclude his preparation was the most cursory in the extreme. It cannot really have gone beyond reading the appeal letter, Ms Blacow's decision and if we are generous the notes of the disciplinary hearing and Mr Dobson's report;
- 142.4. Mr Farrell clearly did not engage with the mental health issue being put forward as mitigation. The clear opportunity was there

to do so. We can conclude his non-engagement was a deliberate choice on his part not to do so.

Law

143. This is our understanding of the relevant law

Unfair dismissal

144. The **Employment Rights Act 1996 section 111** entitles a person who has been employed for a sufficient period to bring a claim for unfair dismissal

145. **Employment Rights Act 1996 section 98** provides (so far as relevant):

“(1) In determining ... whether the dismissal of an employee is fair or unfair, it is for the employer to show—

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

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

“(2) A reason falls within this subsection if it—

“ ...

“(b) relates to the conduct of the employee,

“ ...

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

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

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

“ ... ”

146. The employer bears the burden of proving on the balance of probabilities that the claimant was dismissed for misconduct. If the employer fails to persuade the tribunal that had a genuine belief in the employee's misconduct, then the dismissal is unfair.

147. While an employer can rely upon more than one reason, they should be specifically pleaded and argued before the employment tribunal (**Murphy v Epsom College [1983] IRLR 395 EAT confirmed [1984] IRLR 271 CA**). If he relies only upon one reason and that fails, it follows that the dismissal will be unfair even if another reason might successfully have been argued **Robinson v Combat Stress UKEAT/0310/14 EAT**.

148. When it comes to reasonableness the burden of proof is neutral. The tribunal should consider all the circumstances including the employer's size and administrative resources.

149. The tribunal has had regard to **British Home Stores Ltd v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Ltd v Jones [1993] ICR 17 EAT; Foley v Post Office [2000] IRLR 82 CA** and **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA**.
150. The tribunal understands of the effect of these cases is as follows:
- 150.1. Was there a reasonable basis for the respondent's belief?
- 150.2. Was that based upon a reasonable investigation?
- 150.3. Was the procedure that the employer followed within the "range of reasonable responses" open to the employer?
- 150.4. Was the decision to dismiss summarily within the "range of reasonable responses" open to the employer?
151. The Tribunal is not entitled to substitute its own view for that of the employer.
152. The Tribunal is entitled to consider and measure the employer's conduct and decision against the employer's own disciplinary or conduct codes.
153. The **ACAS Code of Practice on Disciplinary and Grievance Procedures** sets out the basic requirements for fairness applicable in most conduct cases.
154. The code identifies the following key steps in any disciplinary procedure:
- 154.1. carry out an investigation to establish the facts of each case;
- 154.2. inform the employee of the problem;
- 154.3. hold a meeting with the employee to discuss the problem;
- 154.4. allow the employee to be accompanied at the meeting;
- 154.5. decide on appropriate action; and
- 154.6. provide employees with an opportunity to appeal.
155. The **Trade Union and Labour Relations (Consolidation) Act 1992 section 207A** requires a Tribunal to have regard to the code for reasons explored below.
156. Despite the code of practice and guidelines in the cases, ultimately each case must turn on its own facts and be broadly assessed in accordance with the equity and substantial merits: **Jefferson (Commercial) LLP v Westgate UKEAT/0128/12 EAT; Bailey v BP Oil Kent Refinery [1980] ICR 642 CA**.
157. When considering some other substantial reason, there is no reason why the principles that apply to misconduct should not apply to some other substantial reason: **Perkin v St George's Healthcare NHS Trust [2006] ICR 617 CA at [65]**. We conclude that must be so where the dismissal and circumstances (if not misconduct) are akin to it.
158. The Tribunal awards compensation by reference to a basic award and compensatory award.

159. The **Employment Tribunals Act 1996 section 119** sets out how to calculate the basic award.
160. The **Employment Rights Act 1996 section 123** empowers a Tribunal to award compensation that is “just and equitable” in the circumstances.
161. The awards are to be calculated later, but we have indicated to the parties we will consider potential reductions as part of the liability stage.
162. The rule in **Polkey** requires a Tribunal to consider the prospect that an employee might have been dismissed in any event.
163. The approach to the assessment is set out in **Software 2000 Ltd v Andrews [2007] IRLR 568 EAT**:
“The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed.”
164. Furthermore, in **Hill v Governing Body of Great Tey Primary School [2013] ICR 691 EAT**, the Tribunal said
“[24] A ‘Polkey deduction’ has these particular features. “First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. ... [The] tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly, though it did not do so beforehand.”
165. The assessment may be that a dismissal would have occurred by a fixed date or that there was a percentage chance it may have happened at some point.
166. The **Employment Rights Act 1996 section 126(3)** compels the Tribunal to consider the issue of contributory fault in any case where it was possible that there was blameworthy conduct on the part of the employee relating to the unfair dismissal. This is so regardless of whether the issue was raised by the parties: **Swallow Security Services Ltd v Millicent UKEAT/0297/08 EAT**.
167. The focus can be only on the employee’s conduct before dismissal and not that of others: **Parker Foundry Ltd v Slack 1992 ICR 302, CA; Mullinger v Department for Work and Pensions 2007 EWCA Civ 1334, CA**.
168. Before any reduction can be made, the Tribunal must be satisfied that the relevant conduct is “culpable and blameworthy”: **Nelson v BBC (No2)**

[1980] ICR 110 CA. It includes foolish or “bloody minded” conduct (as described in **Nelson**) as much as conduct that is properly described as tortious or misconduct warranting a disciplinary sanction.

169. It is not necessarily the case the employee should know the conduct is culpable or blameworthy. The Tribunal can also consider the employee ought to have known it was culpable or blameworthy: **Allen v Hammett [1982] ICR 227 EAT; Department for Work and Pensions v Coulson UKEAT/0572/12 EAT.**
170. There should only be a reduction if it is just and equitable to reduce compensation because of the relevant conduct.
171. The basic award and compensatory award can be reduced by different amounts, but normally it should be the same amount: **G McFall and Co Ltd v Curran [1981] IRLR 455 NICA.**

Discrimination arising from a disability

172. The **Equality Act 2010 section 15** says
- “(1) A person (A) discriminates against a disabled person (B) if—*
- “(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
- “(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
- “(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”*
173. The **Equality Act 2010 part 5** prohibits such discrimination by an employer towards an employee.
174. The **Equality Act 2006 section 15** requires us to consider the **Employment Code** issued by the Equalities and Human Rights commission. So far as relevant the code says
- “[5.8] The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.*
- “[5.9] The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.*
- “[5.10] So long as the unfavourable treatment is because of something arising in consequence of the disability, it will be unlawful unless it can be objectively justified, or unless the employer did not know or could not reasonably have been expected to know that the person was disabled (see paragraph 5.13).”*
175. The approach we must take is set out in **York City Council v Grosset [2018] ICR 1492 CA:**

- 175.1. has the employer treated the claimant unfavourably because of an identified “something”? If so,
- 175.2. has that something arisen in consequence of the claimant’s disability?
176. Whilst the employer needs to know or least ought to have known that the employee was disabled, the employer does not have to know that the something which causes the unfavourable treatment arose from the disability.
177. The code identifies that justification is the same as for indirect discrimination (see paragraph 5.11).
178. Paragraph of the code 4.28 says:
“The concept of ‘legitimate aim’ is taken from European Union (EU) law and relevant decisions of the Court of Justice of the European Union (CJEU) – formerly the European Court of Justice (ECJ). However, it is not defined by the Act. The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence.”
179. A tribunal cannot reject a justification defence because it thinks an employer should have pursued a different aim that would have had a less discriminatory effect: **Chief Constable of West Midlands Police and ors v Harrod and ors 2017 ICR 869, CA**
180. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, is justified objectively notwithstanding its discriminatory effect: **Hardy and Hansons plc v Lax 2005 ICR 1565, CA.**
181. The EHRC Employment code provides at paragraph 4.30-4.31 sets out guidance on proportionality that has been summarised in **Chief Constable of West Yorkshire Police and anor v Homer 2012 ICR 704 UKSC**. The Supreme Court approved a 3-stage test:
- 181.1. is the objective sufficiently important to justify limiting a fundamental right?
- 181.2. is the measure rationally connected to the objective?
- 181.3. are the means chosen no more than is necessary to accomplish the objective?”
182. It is for the Tribunal, not the employer, to make that assessment: **Hardy & Hansons plc v Lax [2005] ICR 1565 CA.**
183. The **Equality Act 2010 section 136** sets out the manner in which the burden of proof operates in a discrimination case. Similar provisions have been analysed in **Igen Ltd aors v Wong aors [2005] IRLR 258 CA** and **Hewage v Grampian Health Board [2012] ICR 1054 UKSC(Sc)**:
- 183.1. has the claimant proven facts on a balance of probabilities from which we could conclude, in the absence of an adequate

explanation from the respondent, that the respondent committed an act of unlawful discrimination? If so,

- 183.2. has the respondent proven on the balance of probabilities that it did not commit the alleged discriminatory act? The question is whether it is non-discriminatory the reasonableness or sense of the act is irrelevant. If the respondent fails to show did not commit the alleged discriminatory act, then the claimant succeeds at this stage.
- 183.3. It is for the respondent to prove on the balance of probabilities any legitimate aim and that it acted proportionately in pursuit of that legitimate aim.
184. So far as knowledge of disability is concerned, the Tribunal must be satisfied that it knew or ought to have known at the time of the unfavourable treatment that the claimant was disabled: **Baldeh v Churches Housing Association of Dudley and District Ltd EAT 0290/18**.
185. The code gives an example of reasonable enquiries that an employer might be expected to make at paragraph 5.15.
186. The code points out that knowledge held by an agent or employee would usually be imputed to an employer: paragraph 5.17.
187. Deciding the employer should have asked about disability is not enough: The Tribunal must ask what the employer might reasonably have been expected to know had it made such an enquiry: **A Ltd v Z [2020] ICR 199 EAT**.

Conclusions

188. Based on the findings of fact and applying the law as we understand it to be, these are our conclusions.

Unfair dismissal

What was the reason for the dismissal?

189. While the respondent argues in its opening note at paragraph 16 that the reason for dismissal could be either “conduct” or “some other substantial reason”, it is quite apparent from the DWP’s grounds of resistance and reasons given for dismissal that the DWP relies only on misconduct and not on some other substantial reason.
190. We are satisfied that the reason for dismissal was misconduct.
191. Even if we were wrong and it were some other substantial reason, we would still measure the fairness against the same process since the dismissal resulted from alleged misconduct.

Was there an honest belief in that reason?

192. Yes. Ms Blacow honestly believed Mr Ghelani was guilty of gross misconduct.

Was there a reasonable investigation on which to found a reasonable belief that Mr Ghelani was guilty of misconduct?

193. So far as Mr Dobson's investigation was concerned, we are quite satisfied that what he did was reasonable.
194. We understand Mr Ghelani's suggestion that Mr Dobson himself should have carried out an investigation into Mr Ghelani's mental health. However, Mr Dobson's assigned task was simply to establish facts and any potential case to answer. The questions as to the relevance of mental health, mitigation and so forth could adequately have been dealt with at the subsequent stages.
195. We accept that Mr Dobson could have asked more questions of the taxi firm but we remind ourselves that it was not a criminal trial or criminal investigation. We also remind ourselves that the measure is reasonableness not perfection. We think that he did all that could be reasonably expected of him.
196. However, we see no reason why the investigation procedure has to end just there. If issues, especially significant issues, are raised during a disciplinary process, then it seems to us that that must in turn form part of the investigation generally into the establishment of the facts – and facts relevant to mitigation – if it is reasonable to do so. We recognise the ACAS code (and case law guidelines) distinguish investigation from the disciplinary hearing and again from the appeal hearing, but we believe that in an appropriate case there may be an overlap. If an employers' process does not accommodate investigation of relevant mitigation at the first stage, a reasonable procedure would accommodate it at a later stage.
197. In relation to Mr Ghelani's mitigation there was clearly no reasonable investigation. The issue of Mr Ghelani's mental health was plainly a significant potentially mitigating factor throughout the process. Even if we make allowances for the fact that Mr Ghelani appears to be a somewhat difficult witness to follow, it was still plain and obvious what he was raising. The DWP had material on its file that showed it was a potential issue. Any reasonable employer would have at least considered its own occupational health reports.
198. However, the DWP has a significant number of employees and significant resources. In its situation, at the very least consideration of a further report was a clearly reasonable step to help the decision-maker understand what Mr Ghelani's mental health had been like and how it impacted on him.
199. We conclude no reasonable employer in the DWP's position would refuse to pursue that line of investigation and rely only on the decision-maker's own opinion as to mental health in the manner that happened here. They had insufficient evidence, experience and qualifications to do so.
200. The matter still required investigation at the appeal stage. The reasonable employer with the DWP's size and resources would have at least read the medical material available at the appeal and made the considerations we describe above. Likewise, he would not have substituted their own view on mental health like Mr Farrell did because he had insufficient evidence, experience and qualifications too.

Was there a reasonable belief?

201. Because of our conclusions advanced and our findings of fact, there cannot have been a reasonable belief he should be dismissed.
202. Moreover, we do not accept any reasonable employer could conclude that Mr Ghelani was dishonest or lacked integrity in the circumstances of this case. He submitted claims in accordance with the taxi fares policy for the amounts that he was entitled to – no more and no less – supported by the appropriate documentation as required by the policy. He was paid no more and no less than that to which he was entitled. The policy does not prescribe how the money must be used or prescribe any sort of deadline for payment or trust-type arrangement. As Ms Angus noted – and we agree – it was a matter between him and the taxi firm. Nor would a reasonable employer think there was a real risk of reputational damage, yet alone such damage that would justify dismissal.

Other factors as to whether it was in accordance with the equity and substantial merits of the case

203. Based on our findings of fact we believe there are other factors that point to an unfair dismissal:
- 203.1. The matter was pre-determined before the disciplinary hearing began. That is not fair nor the act of a reasonable employer.
- 203.2. The appeal was a mere “rubber-stamping” of the decision to dismiss.
- 203.3. The alleged misconduct when measured against the DWP’s own disciplinary policy and examples of seriousness does not justify dismissal yet alone summary dismissal, nor does it justify a conclusion Mr Ghelani was guilty of gross misconduct. That is the situation before one considers the question of mitigation.
204. Even if this were a case of some other substantial reason, the failures which we have described above mean that the dismissal cannot be fair.

Reductions to reflect the case Mr Ghelani would have been dismissed in any event (“Polkey”)

205. We are not satisfied with sufficient confidence that, even if a fair procedure had been followed, that there was a chance that Mr Ghelani would have been dismissed. We therefore make no reduction.
206. We simply do not know what the result would have been of the proper and reasonable enquiries into his mental health and we do not know how that would have impacted on the decision.
207. More fundamentally however even if we assume the potential mitigation did not assist Mr Ghelani, we cannot see how the DWP on the facts of this case would have concluded that Mr Ghelani should have been dismissed. It is not fraud or dishonesty and the potential reputational damage is not something that could be seen as a reasonable belief. Dismissal appears to be contrary to the DWP’s own disciplinary policy. Again we remark no reasonable employer would think there was a lack of integrity either.

Reductions for contributory fault

208. We do not believe there was any culpable or blameworthy conduct on Mr Ghelani’s part that makes it just and equitable to make a reduction. He has claimed no more and no less than that which he was due to claim and the difficulties between him and the taxi firm are just that, between him and the taxi firm – as Ms Angus observed on 16 November 2017 in her advice to Mr Bee.

Disability discrimination (Equality Act 2010 section 15)

Was there something that led to unfavourable treatment?

209. The “something” is the failure to pay the taxi firm’s bill.

Did that something arise from his depression?

210. As set out in our findings of fact and for the reasons given there we are not satisfied on the evidence that we have seen that we could properly conclude that it did.

211. In summary this is because although he asserts it did, he is an unreliable historian. His evidence is either not supported by and in some cases contradicted by the objective evidence we have seen.

212. We would have expected to see some evidence showing the difficulties and perhaps even a report or letter from a medical practitioner. He is clearly in a position to provide such documents but he has not done so. That is significant.

213. We conclude that there is insufficient evidence from which a Tribunal could properly conclude that this step is made out. Therefore because of that missing link, the claim under section 15 fails.

Other factors under section 15

214. We do not need to go on to consider the other issues that would otherwise arise because the claim cannot succeed.

Employment Judge Adkinson

Date: 5 March 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

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