Case Number: 3328232/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Wilson	v	Sky In-Home Service Limited

Heard at: Watford

On: 11-15 October, 16 November and (in private) 17 November 2021

Before: Employment Judge Hyams

Members: Mr T Maclean
Mr S Woodward

Representation:

For the claimant: Mr Theo Lester, of counsel
For the respondent: Ms Bianca Balmelli, of counsel

UNANIMOUS RESERVED JUDGMENT

1. The claimant's dismissal was not unfair.

2. The respondent did not discriminate against the claimant within the meaning of section 15 of the Equality Act 2010 ("EqA 2010").

3. The respondent did not fail to make any reasonable adjustments within the meaning of section 20 of the EqA 2010.

REASONS

The claims and their procedural history

1 In these proceedings, the claimant originally claimed that he had been dismissed unfairly and that the respondent had failed to make reasonable adjustments for his disability of a mental health condition in the form of depression and anxiety

(although reference was made in the details of the claim also to a road traffic accident which he claimed had caused "permanent damage to his arm"). The claim form was presented on 4 October 2017. The claimant was dismissed on 9 June 2017. The ACAS early conciliation certificate was issued on 26 August 2017, and ACAS was contacted on 26 July 2017. Accordingly, the claim was in time in respect of the claimant's dismissal, but out of time in respect of any event occurring before 5 June 2017.

2 On 20 September 2018, Employment Judge ("EJ") Bedeau conducted a case management hearing at which both parties were represented by counsel. EJ Bedeau listed for determination at a preliminary hearing the issue of whether or not the claimant was "a disabled person in accordance with s.6, schedule 1 Equality Act 2010, at all material times, because of anxiety, depression and permanent damage to his arm following an injury at work". That listing was recorded in the case management summary which EJ Bedeau signed on 9 October 2018 and which was sent to the parties on 31 October 2018. That case management summary was at pages 48.3-48.6, i.e. pages 48.3-48.6 of the hearing bundle (any reference below to a page is, unless otherwise stated, a reference to a page of that bundle).

3 On 28 May 2019, as recorded in the case management summary at pages 48.8-48.13, at page 48.9, EJ Bedeau conducted a further preliminary hearing at which both parties were represented. In paragraph 5 on page 48.9, EJ Bedeau recorded this:

> "In an email dated 10 April 2019, the respondent conceded that the claimant was, at all material times, a disabled person under section 6, Equality Act 2010, suffering from depression. Accordingly, the preliminary hearing listed on 26 April 2019 was vacated."

4 During that hearing, EJ Bedeau also granted an application (which was unopposed) to add a claim of a breach of section 15 of the Equality Act 2010 ("EqA 2010"). That case management summary was signed by EJ Bedeau on 13 June 2019 and was sent to the parties on 20 June 2019.

5 In that case management summary, EJ Bedeau listed the issues as they stood at that time after the granting of that application. He did so at pages 48.9-48.12. The claimant was suspended on 29 March 2017 and the claim as stated in that list included a number of claims of a failure to make a reasonable adjustment before that suspension commenced and after then but before 5 June 2017.

6 EJ Bedeau listed the hearing of the claim to take place on 1-5 July 2019. That hearing was postponed on the application of the respondent because the timetable for preparation was too tight, and on 1 September 2019, notice was given (page 47) of the re-listing of the hearing, to take place on 27 April to 1 May 2020 inclusive, at Watford. The Covid-19 pandemic lockdown then made that

hearing impossible in practice, and the case was the subject of a further preliminary hearing. This time the hearing was a telephone hearing, and it was conducted by EJ R Lewis. Ms Balmelli was present on behalf of the respondent, and the claimant was represented by Ms N Rai, a solicitor. The record of the hearing was at pages 48.14-48.17, and in paragraph 3 of the case management summary, at page 48.15, EJ Lewis recorded this:

> "The parties agreed that the list of issues defined on by EJ Bedeau remains final and definitive, and the totality of the issues. They have agreed that subject to updating of the pleadings, the bundle is finalised."

7 EJ Lewis then relisted the hearing, to take place on 11-15 October 2021. We conducted that hearing. At its start, EJ Hyams asked the parties about the issues, and commented that the case was in substance about the claimant's dismissal. Mr Lester thought that EJ Hyams had said that the case was all about the issue of unfair dismissal, and EJ Hyams emphasised that he had meant that the case was brought because of the claimant's dismissal, and because it seemed to him, without having had a discussion with his colleagues about the matter, that (a) the claim had been brought because and only because the claimant had been dismissed, and (b) the real issues in the case related to the claimant's dismissal.

8 We then read the parties' witness statements and such of the documents in the bundle as we had time to read before starting to hear oral evidence. We started to hear oral evidence from the respondent's witnesses in the afternoon of 11 October 2021, and Mr Lester agreed to focus on the issues arising in the claim of disability discrimination overnight and to put before us in the morning a list of those issues showing the case as he intended to advance it on behalf of the claimant.

9 At the start of the next hearing day, Tuesday 12 October 2021, Mr Lester put before us a list of issues on the disability discrimination claim (headed "Claimant's list of issues: disability-related claims") which, according to Ms Balmelli, constituted an expansion of the claim as it had previously been pleaded, further particularised and then finalised by EJ Bedeau as stated in paragraph 5 above. We then spent the morning going through those issues and discussing them with the parties. Mr Lester did not press an application to amend the claim form. EJ Hyams reiterated what he had said the day before about the case being centred on the fact that the claimant was dismissed and said that as far as the claim of disability discrimination was concerned, he understood that the claim was that (1) there had been a failure to make a reasonable adjustment in the form of not dismissing the claimant (the substance of the claim of a breach of section 20, read with section 39, of the EqA 2010) and/or (2) dismissing the claimant was not a proportionate means of achieving a legitimate aim, namely of ensuring the claimant's own safety and possibly avoiding a prosecution for a breach of health and safety legislation (the claim of

a breach of section 15 read with section 39 of that Act). EJ Hyams pointed out that if either of those claims succeeded then the claimant would receive compensation for injury to feelings as well as for financial loss resulting from the dismissal, and that it was unlikely that any compensation for injury to feelings would be increased by the success of any claim in relation to the events which preceded the claimant's dismissal. That was because the pre-dismissal conduct in issue was all related to and was apparently claimed to have led to the claimant's dismissal. In addition, and in any event, the claim was probably out of time in regard to the pre-dismissal conduct of the respondent. Mr Lester then said that he now understood why EJ Hyams had said on the day before that he saw the claim as being in reality all about the claimant's dismissal.

10 As a result, we considered whether we should revise the issues so that they were more appropriately worded, but in the event we concluded that we and the parties should work on the basis that the issues were as stated (albeit in some respects in our view slightly less than satisfactorily) by EJ Bedeau and refined by Mr Lester, and that we would do our best with them by finding the facts and applying the law to the facts, bearing in mind the manner in which the claims had been advanced. We, through EJ Hyams, emphasised that the fact that the claimant's witness statement had nothing in it about the reason or reasons why he had not made a claim in respect of the claimed failures to make reasonable adjustments before he did, meant that the claim in that regard was going to have to be found by us to be for the most part out of time unless the claimant put before us some evidence from which we could lawfully conclude that it was just and equitable to extend time for the making of the claim.

11 We then continued to hear oral evidence. It took until the end of the morning of Friday 15 October 2021 to do so. We had on the day before that, i.e. 14 October 2021, through EJ Hyams invited the parties to put written submissions before us so that we could at least start our deliberations in the afternoon of Friday, but they both wanted to amend and finalise their written submissions after the close of oral evidence. In the end, the written submissions were exchanged and read only quite late in the afternoon of Friday 15 October 2021. The parties came back into the hearing room only at 4:14pm.

12 The claimant's written submissions contained this paragraph:

> "Discrimination arising from disability: (v) proportionate means of achieving a legitimate aim
>
> 29. The Claimant understand[s] the Respondent does not submit the presence of a legitimate aim, should the other elements of this claim be established."

13 Mr Lester said nothing in his written submissions about the issue of whether or not it was claimed that it would have been a reasonable adjustment not to

dismiss the claimant. Nor, oddly, did Ms Balmelli. Nor did she say anything about the issue of whether it was a proportionate means of achieving a legitimate aim to dismiss the claimant.

14 Before the parties came into the hearing room at 4:14pm, we discussed those factors and concluded that we had to raise them with the parties. EJ Hyams' discussion with both counsel and the reasons why we adjourned were recorded in the case management summary which was sent to the parties on 29 October 2021, and we do not repeat it here. That discussion continued past 4.30pm. We looked at the possibility of the parties simply addressing us in writing both in reply to the other side's written submissions and on the issues which EJ Hyams had discussed with the parties. EJ Hyams then referred those present to paragraph PI[860] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*"), where this was said:

> "In complex and important cases, however, the Court of Appeal has stated that tribunals ought to avoid relying solely on written submissions if at all possible, as it 'does not give the tribunal the opportunity to question and test the case of each side in the light of the evidence and to clarify submissions which are or appear to be inconsistent or unclear' (*Pimlico Plumbers Ltd v Mullins* [2017] EWCA Civ 51, [2017] IRLR 323, at [119], per Sir Terence Etherton MR)."

15 That statement appeared to us to be particularly apt here, but as EJ Hyams pointed out, he had by then alerted both parties to the possible inconsistencies of their positions. Ms Balmelli then suggested that the parties should simply be permitted to advance their oral submissions in reply to the current closing submissions of the other party, and we agreed to that, on the basis that she said that she needed only 5 minutes to do so. By 4.50pm it was clear that she needed more time, and it was clear that the hearing would go on well past 5pm if we were to hear oral submissions from both parties, and even then we would not have had clarification from them about their respective positions on the claim that the claimant's dismissal was a breach of section 39 of the EqA 2010.

16 We were in any event going to have to adjourn the hearing to a further two days for deliberation, and we therefore at that point said that we were going to adjourn the hearing for that purpose. We had already identified 16 and 17 November 2021 as the earliest dates when we could resume and conclude the hearing and co-incidentally and fortunately, both counsel and the parties could attend on the first of those two days. We decided to resume the hearing via CVP only, and to order that the parties file final written submissions, i.e. further written submissions, on the issues which we had discussed as mentioned above and in response to the other side's written submissions.

17 The parties both filed amended written closing submissions on 15 November 2021, and we read those before resuming the hearing via CVP shortly after

11.00am on 16 November 2021. We then heard oral submissions until 3:40pm on that day. Having heard those submissions, we determined that the issues which required determination by us were best stated in the manner set out immediately below, where we refer to some of the applicable statutory provisions and case law. We refer to further aspects of the relevant case law after stating our findings of fact, which we do after stating the issues. We state our conclusions on the claims after we have referred to those further relevant aspects of the case law.

The issues

Unfair dismissal

Issue 1: the reason for the dismissal

18 What was the reason for the claimant's dismissal? It was the respondent's position that it was the claimant's conduct.

Issue 2: was the procedure followed in deciding that the claimant should be dismissed one which it was within the range of reasonable responses of a reasonable employer to follow?

19 In a claim of unfair dismissal where the tribunal concludes that the reason for the dismissal was the claimant's conduct, the question which needs to be determined in deciding whether the procedure followed in deciding that the claimant should be dismissed was fair is (applying the decision of the Court of Appeal in *J Sainsbury plc v Hitt* [2003] ICR 111) whether the employer, before concluding that the employee had done that for which he or she was dismissed, carried out an investigation which it was within the range of reasonable responses of a reasonable employer to conduct.

Issue 3: were there reasonable grounds for concluding that the claimant had committed the conduct for which he was dismissed?

20 The following statement of the applicable principles in *British Home Stores v Burchell* [1978] IRLR 379 shows why that third issue arises, and how it has to be determined.

> "What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which

to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

Issue 4: was it outside the range of reasonable responses of a reasonable employer to dismiss the claimant?

21 The final question which will then need to be answered is whether the dismissal of the claimant for the conduct for which he was in fact dismissed was outside the range of reasonable responses of a reasonable employer.

Disability discrimination

22 The claimant's claims of breaches of the EqA 2010 were made under sections 15 and 20, read with section 39(2) of that Act. Section 15 provides this:

"(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."

23 Section 20 provides so far as relevant:

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

(2) The duty comprises the following three requirements.

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

The claim of a breach of section 15 of the EqA 2010

24 It was claimed that

24.1 subjecting the claimant to an investigation and then disciplining the claimant for "alleged misconduct said to have been committed on 29 March 2017" and

24.2 dismissing the claimant

was a breach of section 15 of the EqA 2010.

25 Whether the respondent knew at the time of his dismissal and the dismissal of his appeal against his dismissal that the claimant was disabled was in issue: it was the respondent's case that it did not have such knowledge. By the time of the hearing before us, the parties agreed that the claimant was disabled at the time of his dismissal by reason of depression and anxiety, but not by reason of an injury to his arm. It was the respondent's case that at all material times the respondent did not know, and could not reasonably be expected to know, that the claimant was disabled.

26 In addition, the question whether the claimant's conduct in the form of what the respondent claimed to be the use by the claimant on 29 March 2017 of a highly unsafe procedure arose in consequence of the claimant's disability needed to be determined by us. That is because it was the respondent's case that that conduct did not arise in consequence of the claimant's disability of depression and anxiety.

27 Finally, the questions whether (1) the claimant's dismissal was for a legitimate aim (it was by the time of closing submissions the respondent's case that that aim was "(i) protecting employees and customers; and (ii) protecting itself from legal ramifications of a failure to have in place and maintain proper health and safety") and, if so, (2) the claimant's dismissal was a proportionate means of achieving that aim, arose.

<u>The claim of a failure to make a reasonable adjustment within the meaning of section 20 of the EqA 2010</u>

28 It was the claimant's case that the respondent had not done the following things, which it was the claimant's case (as advanced at the end of the hearing before us) involved a failure to make the following adjustments within the meaning of section 20 of the EqA 2010.

28.1 Adhering to the recommendations of Occupational health in relation to the claimant's working hours and workload after he returned to work in April 2016.

28.2 Monitoring the claimant's health following his phased return to work up to the time of his dismissal.

28.3 Reducing the claimant's workload when the claimant complained that it was too much for him.

28.4 Delivering the outcome of the disciplinary process in writing once the respondent had given adequate time to consider all of the evidence, instead of delivering it in-person on the day of the disciplinary hearing.

28.5 Taking into account medical evidence during the disciplinary hearing which led to the claimant's dismissal.

28.6 Dismissing the claimant.

29 Applying the decision of the Court of Appeal in *Matuszowicz v Kingston Upon Hull City Council* [2009] EWCA Civ 22, [2009] IRLR 288, the claim was out of time in respect of the first three of those claimed reasonable adjustments if the time by which the adjustment might reasonably have been expected to be done if it was to be done occurred before (see paragraph 1 above) 5 June 2017. The above claimed adjustments resulted from a recasting by Mr Lester of the adjustments which it was originally claimed on behalf of the claimant should have been made, not least so that they were stated in such a way that they were said to be adjustments for which there was an ongoing need.

30 In any event, as indicated in paragraph 10 above, the claimant had to satisfy us that there was before us factual material on the basis of which we could lawfully conclude that it was just and equitable to extend time for making the claim in regard to the claimed failures to make reasonable adjustments which were otherwise out of time. Only if it was so just and equitable would we need to determine those claims.

31 If and to the extent that we did need to determine those claims, we first had to decide whether there was a provision, criterion or practice ("PCP") within the meaning of section 20(3) of the EqA 2010 which put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. In doing so we needed to apply the analysis of the Court of Appeal in *Ishola v Transport for London* [2020] EWCA Civ 112, [2020] ICR 1204, the headnote of which helpfully says this:

> 'the words "provision, criterion or practice" in section 20(3) of the Equality Act 2010 were not terms of art, but were ordinary English words, broad and overlapping and, in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application; but that, however widely and purposively the concept was to be interpreted, it did not apply to every act of unfair treatment of a particular employee, as that was not the mischief

which the concept of indirect discrimination and the duty to make reasonable adjustments was intended to address; that, in context, all three words carried the connotation of a state of affairs indicating how similar cases were generally treated or how a similar case would be treated if it occurred again; that, therefore, a one-off decision or act could be a practice, but it was not necessarily one; and that the employment tribunal had been entitled to find that the particular timing and circumstances of the claimant's grievance explained why it had not been investigated before his dismissal and that, therefore, it was a one-off decision in the course of dealings with that particular employee'.

32 The claimant's claimed PCPs (as stated in Mr Lester's final written submissions, dated 15 November 2021) were these:

32.1 "The failure to take his phased return in April 2016 seriously by not adhering to the recommendations of occupational health in relation to working hours and workload;"

32.2 "The expectation for employees to work long hours;"

32.3 "The failure to monitor employees' health following a phased return to the point of dismissal;"

32.4 "The practice of advising the outcome of the disciplinary hearing on the day;"

32.5 "The failure to consider medical evidence during the disciplinary hearing."

33 If we decided that the respondent had applied a PCP within the meaning of section 20(3) of the EqA 2010, then we needed to decide whether there were any steps which it was reasonable to take to avoid the disadvantage to which the claimant was put as a result of the application of that PCP.

34 It was the respondent's case that it did not know and could not reasonably be expected to know (that being the test in paragraph 20 of Schedule 8 to the EqA 2010) by or at the time of the claimant's dismissal (a) that the clamant was disabled and (b) that he was likely by reason of his disability of depression and anxiety to be placed at a substantial disadvantage (within the meaning of section 212(1) of that Act, i.e. a more than minor or trivial disadvantage) by the application of any of the claimed PCPs.

The evidence which we heard

35 We heard oral evidence from the claimant on his own behalf and, on behalf of the respondent, from

35.1 Mr Russell Carless, who was at the time of giving evidence employed by the respondent as a Department Performance Manager and who at the material time was a Team Manager;

35.2 Mr Michael Denny, who was at the time of giving evidence and at all material times employed by the respondent as a Team Manager employed in the respondent's South Region;

35.3 Mr Lynton Bayley, who was at the time of giving evidence and at all material times employed by the respondent as a Team Manager; and

35.4 Mr Barry Sullivan, who was at the material time employed by the respondent as the respondent's Regional Manager of its South 9 Region.

36 We had before us a bundle of 858 pages, including its index. We read the pages of that bundle to which we were referred by the parties.

The facts

37 Having heard and read that evidence, we made the following findings of fact.

The respondent's business and the manner in which the claimant came to be employed by the respondent

38 The respondent is a major provider of television subscription services, broadband services and telephone services. The claimant started to be employed by the respondent on 26 October 2013. Before then, he was employed by a contractor, which provided services to the respondent. That contractor was AVC. The claimant's role was "Sky in Home Engineer". On 26 October 2013, the claimant's contract of employment transferred from AVC to the respondent, under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

Mr Denny's role

39 Mr Denny was not the claimant's line manager at the time of that transfer, but he, Mr Denny, was employed by AVC also, and his contract of employment also transferred to the respondent under TUPE on 26 October 2013. Mr Denny was the claimant's line manager while the claimant worked for the respondent until the time of the claimant's dismissal.

The way in which work was at the material times allocated to Sky in Home Engineers, including the claimant

40 The respondent had a central team which planned the work for its engineers, such as the claimant. The team would try to plan work for employees such as the claimant to be done in the area in which, or as close to the area in which, the employees lived. The understandable aim of the respondent was to minimise travelling time for employees such as the claimant. The respondent had a system of employing some engineers to work as what it called "sweepers", who would be allocated jobs which would be expected to be completed during the morning, and would be expected in the afternoon to help engineers who were struggling to complete that day's tasks, or whose jobs were turning out to be particularly difficult. In addition, if an engineer finished his (or her; but we heard of no women engineers employed by the respondent, so for the sake of simplicity in what follows we assume that all of the engineers were male) work relatively early, then his Team Leader would ask him to assist by for example taking a job off another engineer who was struggling to finish his allocated jobs for the day. While at the time when the claimant was dismissed the respondent did not pay overtime to engineers if they worked late, it was Mr Denny's oral evidence (which we accepted) that it was his (Mr Denny's) responsibility to stay on duty until the last engineer had gone home. That was said in this passage of his evidence (as noted by EJ Hyams but tidied up for present purposes), which we accepted:

> "We work as a team; we have homesafe. I do not switch off until an engineer is home. So I do not want to be out late and would try to reduce the work. I am not saying I was always able to do it; if a person goes off sick the work is still there and so we have to distribute the work where we can making sure we try to please the customers for the day. And it is seasonal; at Christmas it is very busy, for example."

The circumstances which led to the claimant suffering from anxiety and depression and the evidence before the respondent at the time of the claimant's dismissal about the claimant's mental health

41 The claimant described, in paragraphs 3-6 of his witness statement, a sequence of events about which we did not (except as stated in paragraph 96 below) need to make any findings of fact but which formed the background to the events about which complaint was made by the claimant in these proceedings. It was not in dispute that the claimant was suspended on 21 July 2015, as recorded in the letter on page 222 for allegedly "[being] in breach of company H&S procedures and failing to follow a reasonable request". The claimant said in paragraph 7 of his witness statement that he was "signed off ... work with anxiety and depression" in September 2015, while he was so suspended. However, the fitness certificates (such a certificate being a "Statement of Fitness for Work For Social Security or Statutory Sick Pay") which were issued at that time (the first was dated 29 September 2015 and was at page 777; the second was dated 26 October 2015 and was at page 779; the third was at page 274 and was dated 4 January 2016) stated merely "Low mood". There was an occupational health

report dated 22 December 2015 in the bundle at pages 271-273 and it recorded (on page 271) so far as relevant merely this about the claimant's "health background":

> "Anthony reports a 2 year history of gradually worsening low mood and heightened emotions due to perceived work related stressors. More specifically he reports a perception that allocation of workload has been unreasonable at times. As you are aware Anthony reports that his symptoms became acutely worse around 3 - 4 months ago when he became subject to a disciplinary process. Again I am aware that it is Anthony's perception that the disciplinary process is unjustified and he has raised a formal grievance in relation to this.
>
> Anthony first sought the opinion of his GP around the time of his absence from work commencing in September 2015. At that time he was commenced on appropriate treatment for his symptoms and referred for face to face counselling. Unfortunately the treatment prescribed by the GP provided no perceived benefit so has since been discontinued. However, after a difficult first few sessions Anthony reports that he is starting to gain some perceived benefit from the face to face counselling which he is currently receiving on a weekly basis.
>
> Anthony reports no other underlying medical issues."

42 The claimant was (as we would have expected) aware of the content of that report: that was clear from paragraph 9 of his witness statement. The report had four recommendations, stated in the bullet points on page 272. The final three were relevant, and were as follows:

> "• I would recommend that Anthony continue to comply fully with the advice and treatment being provided to him by his GP and counselor. [sic] He should also be aware of the support that is available through Sky Support Services and consider using this service as deemed necessary.
>
> • Upon or just prior to a return to work I would recommend open discussion between management and Anthony to fully identify his perceived longer term work related stressors. This will allow management the opportunity to address these as deemed appropriate.
>
> • Given the length of his current absence I would recommend that Anthony will require the allocation of some time to catch up with any changes to products or processes which may have altered during his absence. Thereafter he is likely to benefit from a graduated return to his normal workload. More specifically I would recommend that he complete 2 weeks as part of a 2 man team, followed by 2 weeks doing 50%

workload, and a further 2 weeks doing 75% workload prior to returning to his normal workload if coping adequately."

43 Mr Denny had a return to work meeting with the claimant on 2 April 2016, and recorded in the record of that meeting (at page 285) that the reason for the claimant's absence was "Stress/ Anxiety/ Depression (work related)", and that "Anthony was suspended for suspected breach of H&S. Upon waiting a hearing he became ill with stress and anxiety".

The treatment that the claimant was initially given for that anxiety and depression

44 The claimant's witness statement was imprecise about the treatment that he received for his anxiety and depression: he referred at the end of paragraph 5 of his witness statement to "7 months of medication and counselling", but it was not clear from that statement when that medication and counselling was given to him. In oral evidence, he said that he had counselling for about 18 months, with a break, he thought. When referred to the letter from South London Counselling Services ("SLCS") at page 799, dated 26 January 2016, in which it was said that the claimant first attended for an assessment on 16 September 2015, the claimant agreed that that was the first date when he was seen by SLCS. He also said that he thought that he was receiving counselling in April 2016, when he returned to work. He also recalled, when prompted, that he received counselling up to about April 2017, when he stopped receiving counselling because he by then felt stronger, so that by 29 March 2017, when the incident for which he was dismissed occurred, he felt "back together and stronger".

The outcome of the investigation which followed the claimant's suspension on 21 July 2015

45 On 18 January 2016, the claimant was sent the letter at pages 277-278, which was a final written warning. The material part of the letter was this:

> "I confirm that you have been issued with a **Final Written Warning** given as a result of your conduct. In particular:
>
> - JN 124338443 Failure to follow safe system of work, securing the ladder to a drain pipe
> - JN 124302677 Failure to follow safe system of work, when installing an S-Pole
> - JN 124348546 Failure to follow safe system of work, not using an eyebolt to secure the ladder
> - JN 124413078 Failure to follow safe system of work, by securing the ladder to the dish bracket

During the meeting we also discussed **JN 124171384** and the allegation was assisting in breach of health and safety by allowing a colleague to climb an unsecured ladder. Taking into consideration the mitigating evidence you brought to the meeting I decided to not uphold this allegation.

During the conversation it was established that there was a clear pattern of failing to escalate a non-standard way of securing a ratchet strap when accessing the dish, this occurrence was over four separate visits, clearly this practice cannot continue as you were putting yourself at risk by not escalating these non-standard methods of securing your ladders. From what you described about each of these allegations it would suggest that ultimately you were safe.

You agreed in the meeting that you understood the escalation procedure if standard methods could not be applied.

...

This letter will be placed in your personal file and will be disregarded after a period of 12 months. Further recurrence of unacceptable conduct could result in further action being taken under the Conduct Policy."

The manner in which the claimant returned to work in 2016 and returned to his usual duties

46 The claimant's return to work in 2016 was plainly phased. That was the oral evidence of Mr Denny, and he proved a document in the bundle which showed the claimant's rota during the period from 27 June 2015 to 1 July 2016. It was at page 143 and (1) Mr Denny gave oral evidence about it and (2) its accuracy was not challenged by Mr Lester. In addition, there was this passage in Mr Denny's witness statement, which we accepted.

'15. In order to offer support in line with the recommendations by OH Anthony was partnered with Grant (page 304) and the feedback I received was positive stating "Anthony is clearly a experienced and capable engineer" however he spent too long speaking with customers and could potential save an hour a day if he corrected this. Anthony was also partnered up with David Pendry in July 2016 for coaching which is on page 298 to 303 of the bundle during this he was provided with feedback that the iKnow2 was not used on this visit and Anthony was told of the importance of keeping this open on every visit so that he could keep up to date with the latest processes and that this was a live feed that could change. He was also provided feedback in relation to his time management skills.

16. The two-week work tracker on page 643 of the bundle shows what work he received during this period and what work he completed and what work he received help on. This was in order to determine how many minutes he was spending on work.

17. The absence meeting notes dated 24 June 2016 are located on pages 293 to 297 of the bundle. During the absence meeting a phased return was discussed where I confirmed that Anthony was on a 2 manned team for the first 4 weeks then a 2 weeks at 50% work load and 2 weeks at 75% workload. During the meeting Anthony confirmed that these were the agreed recommendations in the OH report and felt "fairly confident in his recovery" and continued return to work. During the meeting Anthony informed me that he was looking after his mental and physical wellbeing. Anthony mentioned that he was worried about going back to full work and I advised him that he would be on 75% workload that following week but this would be monitored and if he was struggling we could make use of the sweeper (engineers who are able to assist other engineers in completing their workload).'

The informal performance plan of January 2017

47 In January 2017, the claimant was put on an "informal performance plan". The plan was at pages 305-306 and was written by Mr Denny. The reason stated for the plan was "Not reaching the required performance for NPS". Mr Denny said that such a plan was created for each employee whose performance scores, i.e. as measured by the respondent, were in the bottom 10%. Mr Bayley described it as being "like a focus area for engineers struggling on multiple areas of performance", and he said that the "focus is on improving them but no engineer has been dismissed for that", i.e. being put on a "capability plan". We accepted that evidence of Mr Denny and Mr Bayley.

The claimant's performance and safety on 10 March 2017

48 On 10 March 2017, Mr Mark Fitchet assessed the claimant's performance on behalf of the respondent when the claimant was on site. Mr Fitchet's record of the assessment was at pages 453-458. The final three rows on page 456 showed that the claimant was working safely. By way of illustration, the final box on the page contained this passage:

> "On this visit the engineer showed they were able to demonstrate and following the SSOW [i.e. Safe Systems Of Work] (pg 11, 12, 13, 14, 15, 16, 17, 8,19,20,21,22,23, 24) process and also the use of ladder Hierarchy and their understanding of the it. [sic] This is covered off in Health and safety manual, pages 67, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68.
> Combi ladder is covered in separate manual
> SAT/ DAT working is also covered off in separate manual.

Should they have any question about working at height it should always be escalated they are to ask his TM."

49 The reference to "SAT/DAT working" was to "Specialist Access Team" and "Difficult Access Team" awareness. For example, abseiling might in some circumstances be necessary, but could be done only by a 2-man team. Awareness of the SAT and DAT teams was awareness of the existence of those teams and that where they were required, a single engineer (called by the respondent a DTH or "Direct to Home" engineer) should not carry out the work in question.

The installation that led to the claimant's dismissal

50 On 29 March 2017, Mr Denny carried out a spot check on a job that the claimant had done earlier that day and, having found what Mr Denny regarded as an indication of an unsafe procedure, had a discussion with the claimant about it afterwards, i.e. on the same day. The document recording that check and the discussion which followed it was in several places in the bundle, but there was a complete one at pages 335-341, and we therefore refer to that one. The document was called by Mr Denny in paragraph 20 of his witness statement an IDD, or Informal Documented Discussion. The document was in the form of a table, the main part of which was in two columns. The third row of the table on page 337 had in the box on the left the words "Reason for ROD". The acronym "ROD" was short for "Record Of Discussion". The box on the right, next to the words "Reason for ROD" had in it: "No sign of eyebolt on post check."

51 Those words were a reference to one of the main safety measures required by the respondent of engineers when using a ladder in the course of their work for the respondent. An eyebolt has a sturdy "eye" to which a strap can be attached, and the bolt is screwed into a plug in the wall. A hole needs to be drilled in the wall, and a plug is then inserted into it. The bolt is then screwed into that plug. The plug is commonly called a rawlplug, after the brand "Rawlplug", which gave its name to the kind of plug which is now usually plastic and is in such a form that a bolt which is screwed into it is secure. The strap which is attached to the bolt is then attached to the ladder which the engineer is using and the ladder is as a result far less likely to move when the engineer is using it.

52 The respondent required also the use of what it called a Microlight, which was a contraption which was put at the top of the ladder, and minimised the chance of the ladder moving sideways. In addition, the respondent required, when there was scope to do so, the use of what it called a Laddermate at the foot of the ladder, which also maximised the chances of the ladder being stable when the engineer was on it.

53 We understood that the claimant accepted that it was vital from the point of view of safety to use an eyebolt, not least because his case was (as we describe below) eventually that he had used an eyebolt at the house in question.

54 We say "eventually", because the claimant's first explanation, given to Mr Denny and recorded by the latter in the IDD document at page 337, was to the effect that he had not used an eyebolt. The record of the discussion was as follows, the letters "TM" being short for "Team Manager", and the reference to "Engineer" being to the claimant.

TM	Anthony can you explain how you completed this job the ladder set up. Pictures shown to Anthony.
Engineer	Basically because of the out building the custom[er] slid the Perspex roof panel out because there was nowhere else to put an eyebolt so my ladders were set up on a work unit. And was secured at the top. My laddermate was set up on the work unit.
TM	Did you have a Microlite on this?
Engineer	No it couldn't fit through the opening.
TM	So explain the setup again
Engineer	It was my combi ladders set up on the work bench, laddermate was on. There was nowhere to eyebolt for the middle. Strapped the top of the ladder to the bracket.
TM	This was a new dish setup [a]s [t]he original was not accessible on the roof.
Engineer	That's correct. I felt safe
TM	Your risk assessment states a double section but you say you used combis. What do you believe you should have done in this circumstance?
Engineer	I used a double section at the front for tacking. As for what I should have done. I did initially tell the customer I couldn't do the job but with his persistence I obliged as it wasn't that high and I felt safe.
TM	What about the escalation process?
Engineer	Yes I should have escalated this.
TM	Did you have your harness on and we are using PPE and rope.

Engineer	Yes I did

55 That record, as with all of the other records of Mr Denny's interviews of the claimant to which we refer below, was signed by the claimant.

56 On the next day, 30 March 2017, Mr Denny suspended the claimant. He recorded that suspension in the letter of 30 March 2017 at page 466.

57 At pages 357-365 there was a record of Mr Denny's "Post Check" of the claimant's work done at the relevant premises on 29 March 2017. The check was recorded on page 357 to have been conducted at 15:32 on that day and the record was recorded at the bottom of that page as having been completed at 14:16 on 31 March 2017. On page 360, next to the box with the question "Is there evidence of H&S?", the answer given was "No" and by that answer there was this passage:

> "There is no evidence of an eyebolt. Customer told me that he took the roof panel off of the conservatory for the engineer to erect his ladders. When speaking to the customer about H&S as he brought the subject up I told the customer what our policy was reference three points of contact and he said well you can see that that didn't happen here."

58 At the bottom of the page, i.e. page 360, by the box with "Record of Findings", there was this sentence:

> "No visible sign of an eyebolt to secure the ladders where the dish had been erected."

59 On 5 April 2017, Mr Denny had another meeting with the claimant. There was a record of the meeting at pages 343-354. The second page and the first part of the third page of that document contained the record that we have set out in paragraph 54 above. The discussion which took place on 5 April 2017 was recorded in the table on pages 343, 345-347 and 353-354. The key things that were recorded there as having been said by the claimant were these.

59.1 The claimant acknowledged on page 346 that when using the ladder in "single section" mode, i.e. as a straight ladder (rather than as a stepladder), "It would require a ladder mate, Microlite & eyebolt."

59.2 The claimant then said this in answer to Mr Denny's next question:

> "I could not use a microlite as it would not fit through the opening. I used ladder mate and a high level eyebolt."

59.3 Mr Denny said this (as recorded at the bottom of page 346):

> "The top eyebolt you used. You stated was the dish bracket, however the dish hadn't been installed until you fixed the bracket. Can you explain what the process is for securing to a another [sic] part of the building or dish brackets. What should you have done."

59.4 The claimant then said (as recorded at the top of page 347):

> "Up where the dish is there is a whole with a raul plug in it of which I used. This is around where I mounted the dish bracket."

59.5 The claimant then (on the same page) explained why he had used the customer's (as the claimant called it) "work bench", namely that it was

> "Solid & fixed to the wall. From the picture you can see a microwave. This had been cleared and the ladders were set up approx. a foot back from where the microwave is and ladder mate put on."

59.6 When Mr Denny asked how the job should have been done safely and whether there were any alternatives, the claimant said (page 347) this:

> "I cannot think of another way that this could have been done. As there was no access to the back from the sides only through the house. You could not get a single section through the house this is why I used the combination ladders."

59.7 Mr Denny then asked (page 347):

> "Can I just confirm how you secured the top of the ladders as initially you stated that you used the dish bracket but today you said that there was an existing hole with a raul plug in it. Are you saying that you put your eyebolt in this?"

59.8 The claimant then said: "Yes that's right."

59.9 After being taken through extracts from the respondent's standard safety procedures, on page 354 there was this exchange recorded:

> "[Claimant]: Yes I am aware that this is the escalation process.
>
> [Mr Denny]: So why did you not on this occasion when this clearly needed to be?
>
> [Claimant]: I just don't know."

60 Mr Denny then went back to the customer's house on (he said when giving oral evidence only, i.e. it was not in his witness statement) 10 April 2017, and had a

further meeting with the claimant on 11 April 2017. The record of that meeting was at pages 355-356. Almost all of that record was material. The material part is this.

MD	I wanted to continue our discussion from 05/04/2017. As during my investigation this left some unanswered question and I want to provide a more detailed account of the visit after gathering some more information.
AW	OK
MD	I have revisited the property and from the pictures of the dish location I cannot see any eyebolt hole?
AW	There is one there.
MD	Can you be honest with me?
AW MD AW	There is a hole above the panel, there is more than one hole. You originally told me it was just under the dish I can't recall exactly every step. The panel needs to be removed to see the existing holes.
MD	So you are saying there is an eyebolt?
AW	There is existing holes as he has changed the roof panels. He has put a different roof up with different fixings.
MD	So are you saying you used one of these fixings?
AW	Yes. But basically where the roof meets the wall there is a cross member and the old cross member left holes.
MD	So these were 10mm holes?
AW MD AW	Yes standard as it was only a lean too so non weight bearing. It is difficult to believe that these holes would be 10mm and deep enough to put an eyebolt in and have an existing raw plug? It was not a professional job just a DIY job by the customer.
MD	I don't believe there is an eyebolt there as originally you told me it was below the dish but now as you can see from the pictures there is no hole in the vicinity? What do you say to this?
AW	There is an eyebolt in that vicinity.
MD	On speaking to the customer he said that he did not see you strap the ladders in anywhere?
AW	He doesn't know what I am doing.

MD	Ok we will leave this at the moment. Going on to the ladder set up from the bench. I have looked at the bench and feel that this is not a sturdy structure and want to know your thoughts? (Pictures shown to Anthony)
AW	I inspected the bench and felt that it was safe. I don't think there was any chance of it collapsing.
MD	The customer told me he put the plank of wood on the end to give it more support and also held the ladders at the bottom for you
AW	He didn't put this in while I was there it must have been there already
MD	It was a loose piece of wood and not fixed so looked like a temporary measure to me.
AW	I did mention the integrity of the structure but he assured me that it was safe and I tested the bench.
MD	How did you test it?
AW	Just put physical weight on it and it wasn't going anywhere.
MD	How much did the customer get involved when footing the ladders?
AW	No he had no influence. He may have mentioned something but I would have told him No and why he could not get involved.
MD	I just asked the customer how things were done and this is what he told me. Why do you think he told me this?
AW	He was in the vicinity and chatting but as far as I know he did not touch the ladders as if I dropped any equipment he could have been injured.
MD	If you were chatting whilst on the ladder where was the customer?
AW	He was in the outbuilding within talking distance but not at the bottom of the ladder.
MD	What is the company policy for 3rd party whilst working at height?
AW	I think it is 5 feet. Unless the area is coned off it is virtually impossible to inforce that in somebody's property.
MD	It is 5 Meters. Your duty of care is to make sure the customer is not in this vicinity whilst you are working.
AW	ok

MD	I refer back to the escalation process for the job and find it very worrying that this was not escalated for any of the mentioned issues. In my mind this was a dangerous way to have completed the job and was not highlighted to anyone?
AW	Everything I said was done. I.E. ladders set up on a stable surface. Ladder mate & eyebolt. In regards to the customer telling you that he held the ladders I think that customers may think that they are doing me a favour by telling my manager this.

61 What Mr Denny did not say in his witness statement, but did say in oral evidence, was that after the claimant had said those things, Mr Denny telephoned the customer in question and tried to make a further appointment to see the back of the house, but the customer refused to permit Mr Denny to visit the house for a third time.

62 Similarly, Mr Denny did not say in his witness statement, but he did say during cross-examination, that if a flat surface other than the ground was to be used as a base for a ladder, then there would have to be "no drop off within 2 metres of the working areas". Plainly, the "work bench" on which the claimant had placed his ladder on the day in question did not satisfy that requirement: there were many photographs of the surface, and it was a kitchen work top of a standard sort and therefore well less than a metre from front to back.

63 When asked by Mr Lester why he did not, when he was at the customer's premises on 10 April 2017, ask the customer to slide back the part of the roof at the back of the house through which the claimant had gained access to the place where he had put the satellite dish, Mr Denny said that it was because the claimant had said only that "there was an eyebolt under the dish". Only on the next day did the claimant say, for the first time, that there had been an existing hole which was behind the perspex roof, which he, the claimant, had used. In fact, as shown by the record of the meeting of 11 April 2017, which we have set out in paragraph 60 above, that hole was said by the claimant at the time to have been a "DIY" hole, which Mr Denny found it hard to believe would have been sufficiently deep to enable the use in it of an eyebolt of the sort that the respondent required engineers to use in order to be safe. Thus, he said when giving oral evidence (as noted by EJ Hyams):

> "I did not think I needed to press the resident as I thought it was fabricated. I did attempt to contact the customer but he was unhappy with me doing so."

64 When it was put to Mr Denny that by 11 April 2017, he thought that the claimant was making up his story about the use of an eyebolt, he agreed and said that he did not believe that the claimant had used an eyebolt. That was because it was only in the third investigation meeting that he had with the claimant that the

claimant said that he had used an existing hole with a plastic Rawlplug-type plug in it which was hidden behind the perspex roof. He said that he could not understand why, if that was the case, the claimant had not told him so on the first day that he spoke to him about the matter, which was the day when the claimant did the work in question.

65 Mr Denny then produced the report at pages 473-475. It was dated 5 May 2017. Mr Denny could not explain the delay from 11 April to 5 May, but he said that it was possibly the result of there having been a holiday during that period, meaning, we presumed, that he might have been on holiday during that period.

66 On page 474 there was this passage in the report:

> "On my second visit to the customers property on 10/04/2017 after Anthony had confirmed there was an eyebolt used, the customer said that the engineer did not secure the ladders to the wall and that he helped the engineer by holding the ladders at the bottom although the customer is not willing to support this in writing. Customer confirmed he removed the roof panel and confirmed that the ladders where [sic] set up on the bench and not secured to a bracket he did confirm that there was a contraption on the bottom of the ladders which I believe was the ladder mate but the customer confirmed that he footed the ladders."

The disciplinary hearing conducted by Mr Bayley

67 Mr Denny's conclusion (stated in paragraph 31 of his witness statement) was that the things which he had seen and heard "merited escalation to a formal conduct meeting because they amounted to clear breaches of Sky's policies on health and safety". We accepted that evidence of Mr Denny; indeed, we accepted all of Mr Denny's evidence, both because we found him to be an honest witness, doing his best to tell the truth, and because it was consistent with the contemporaneous documents which he had created.

68 Mr Bayley conducted that formal "conduct meeting". He did so on 9 June 2017 (and not, as stated in paragraph 11 of his witness statement, 9 July 2017: he corrected that in oral evidence). His witness statement contained, in paragraphs 14-30, a careful and thorough description and analysis of what the claimant said at that meeting. Mr Bayley had by then (as he said in paragraph 7 of his witness statement) read Mr Denny's investigation summary at pages 473-475, to which we refer in paragraph 65 above, and the documentary evidence enclosed with it, to which we refer in paragraphs 54-63 above. We accepted all of Mr Bayley's evidence, as we found him too to be an honest witness, doing his best to tell us the truth and because what he said in his witness statement (apart from the date error mentioned at the start of this paragraph) was both consistent with the contemporaneous documents and, as far as the analysis was concerned, coherent. The salient parts of Mr Bayley's analysis were, in our view, these.

68.1 “I asked Anthony about his early comment about his work load being high and he mentioned he had 8 or 9 jobs, I advised him that he only had 6 jobs in total that day. This seemed a very manageable amount from looking at our work system for that day Anthony appeared to be making very good time and would have likely finished his work quite early on.” (Paragraph 27.)

68.2 “Anthony maintained the position that the customer did not hold the ladder and there was no plank of wood added for more stability to the work bench and believed the customer thought they were helping him out by saying this. Anthony maintained that the work bench was supported on 4 sides and the piece of wood was already there and not put in by the customer. I advised him that the wood looked like a loose piece and Anthony replied that it did not move and he felt safe.” (Paragraph 22.)

68.3 ‘Anthony told me that he had never put a ladder on a work surface before in any of his visits but did not escalate on this visit but felt the issue was not putting the ladder on a work surface but making sure the ladder was setup on a stable surface. He repeated that Sky’s Health and Safety processes were not “the be all and end all” and on the day he made the decision on what he thought was best for his safety. This demonstrated to me that Anthony made the conscious decision to deviate from the trained processes of how to safely secure a ladder and use the correct equipment required by Sky. I was somewhat taken back by his negative comments regarding our safety practices and procedures not being the “be all and end all”, it sounded very much like he didn’t agree with and knew better.’ (Paragraph 24.)

68.4 “Anthony claimed that from the pictures he was provided during the investigation he felt Michael had not looked hard enough and that he could not see anything wrong apart from his ladder being on a work surface. I confirmed that Michael had revisited the property and taken the pictures but Anthony still believed Michael had not investigated enough. In my opinion the investigation and pictures from Michael were sufficient, I believe he went back to the property to follow up as part of the investigation and given that Anthony was now saying there was an eyebolt; something that Michael said was not present and that he had completely neglected to mention previously, this did not seem true.” (Paragraph 26.)

68.5 “Anthony believed everything he did was correct and that all he did was fail to escalate.” (Paragraph 15.)

69 Mr Bayley concluded that the claimant should be dismissed. He did so for the reasons given to the claimant in person on 9 June 2017, which he set out in the letter dated 12 June 2017 at pages 481-482. The reasons for dismissing the claimant were these (and these only):

> "• A breach of Health and Safety process and procedure for safe ladder working whilst on a triple section combination ladder on job number 131153297, specifically by setting up and using your triple section combination ladder on top of a work bench.
>
> • A breach of Health and Safety Process and procedure for safe ladder working whilst on a Combi section ladder on job number 131153297, specifically by failing to use an eyebolt and microlight."

The appeal hearing conducted by Mr Sullivan, and Mr Sullivan's further investigations

70 The claimant appealed against that decision. He did so via the letter dated 12 June 2017 at pages 483-485. In that letter, he challenged both of the reasons for his dismissal. The first reason was challenged in this way (page 483):

> 'In Sky "Ladder Working Introduction" & *Ladder Hierarchy*, guidelines, it does **not** state that it is a H&S breach in the setup of a combi ladder on a work bench.
> *Sky Reference guide **combi ladder (CCH1/2 21/03/2012)**
> Work Bench Definition; **"A workbench is a sturdy table at which manual work is done"**
> *The main function of a work bench is to;*
> - **Support Weight**
> - **Provide a Flat & stable work surface.**'

71 The claimant's appeal in respect of the second reason for dismissing him was advanced on this basis (stated at the top of page 484):

> "TM Michael Denny has repeatedly refused to carry out a full investigation in regards to me using a eyebolt on the job, in fact he has expressed to me that I am lying and can't be bothered, which I find demeaning & offensive.
>
> I also find it disturbing & suspicious that these allegations of me committing H&S breaches, which are the fundamental basis leading to my dismissal, can be upheld by sky due to word of a Manager who could not be bother to fully and thoughly [sic] investigate such a serious allegation, more disturbing a company who are happy in the dismal of a engineers on the "evidence" of photos taken from the back of the customer's garden, expecting to see "evidence" of a 10mm hole in the wall, instead of locating the eyebolt hole in

the manner of the install, by sliding the plastic roof to confirm the use of a EYEBOLT as stated in the unfounded allegations.

I have told Michael Denny & Lynton Bayley whereabouts of the eyebolt location, which is visible from the inside of the lean too plastic roof, which can easily slid back to see the eyebolt location from the ground. Their non-action to fully investigate the allegation against me has denied me the opportunity to prove of me using the required H&S whilst using a combi ladder."

72 In the rest of the letter at pages 483-485, the claimant expanded on those grounds. In our view the most significant additional point was the following allegation on page 485:

"Conflicting or conflicting guidelines in the use of combi ladders (guidelines have been amended whilst on suspension)".

73 The evidence of Mr Denny and Mr Bayley was that there had been no amendment to that policy while the claimant was suspended, and we accepted that evidence.

74 Mr Sullivan was given the claimant's letter of appeal only on 30 June 2017 (probably because, as Mr Sullivan said in paragraph 13 of his witness statement, which we accepted, the claimant had sent the appeal to "the wrong Sky office and it should have been addressed to Nick Pamphilon (Regional Manager) as per his outcome letter").

75 On 19 July 2017, in the letter at pages 541-542, Mr Sullivan invited the claimant to an appeal hearing on 24 July 2017. In that letter, Mr Sullivan summarised the claimant's grounds of appeal in the following manner:

"• You disagree that you breached H&S process & procedure in safe ladder working on job No 131153297, by accessing a lean too plastic roof opening, using a triple section combi ladder set up on a work bench, and that you also failed to use an eyebolt and microlight.

• The dismissal was based on the word of a Manager who you say did not fully and thoroughly investigate such serious allegation against you.

• That you refute the evidence of photos taken from the back of the customer's garden, expecting of a 10mm hole in the wall".

76 Mr Sullivan asked Mr Carless in advance of the hearing for a view on the things said in the claimant's letter of appeal. Mr Carless responded in the email dated 18 July 2017 at pages 535-539. Mr Sullivan did not take his lead from Mr Carless' analysis, but wanted a second view, on a provisional basis because (as

Mr Sullivan said in paragraph 11 of his witness statement, which we accepted) he "had not come across a breach like this before" and Mr Carless was "a senior Team Manager that was fully immersed in the role and dealt with health and safety every day". The rest of that paragraph was in these terms:

> "As a General Manager I cover many areas of the business and I felt that asking Russell (who dealt with health and safety everyday) would support me and possibly Anthony [i.e. the claimant]. I was aware that Russell Carless' views were his own views as a team manager, and I went into the appeal meeting with an open mind and impartial view. I was interested in hearing Anthony's reason for doing what he did as I could not visualise what he had done from the narrative, this was the reason I asked him to draw on a flip chart exactly how he set up his ladders. Prior to the meeting, I had it in my mind that the table Anthony set up his ladders on was a sturdy professionally built work bench, when Anthony sketched the diagram I was quite shocked that it was an actually homemade kitchen table, with a Formica top and not a stable surface."

77 In paragraphs 14 and 15 of his witness statement (which we accepted), Mr Sullivan said this:

> "14. Anthony clarified that the reason he felt the allegation was not fair was because he had used all the required health and safety and the work bench was sturdy and safe to use and that he saw no reason why he would need to escalate. He claimed that the Sky policy stated that ladders should be placed on a flat surface and that a work bench would be a flat surface.
>
> 15. I disagree with Anthony's claim, I believe that Sky's policies mean the ground/ floor. In my view, if the flat surface was the ground then that would be fine (providing all Ladder hierarchy policies were adhered to) but a homemade kitchen bench with a Formica top seemed incredibly dangerous. If Anthony had escalated the situation to a manager or even another engineer for a second opinion, I believe a common sense approach would prevail, and the response would be that it would be too dangerous to set up the ladder on this."

78 Mr Sullivan heard the claimant's appeal points and then adjourned to investigate them. In the course of doing so, on 28 July 2017 he asked Mr Denny to respond to them by email (the email was at pages 565-566). Mr Denny replied on the same day (pages 567–568), and Mr Sullivan responded 11 minutes later (page 581): "Cheers young Michael".

79 Mr Sullivan then himself sought to gain access to the customer's house, as he said in paragraph 35 of his witness statement, the material part of which was in these terms:

> "I made several attempts to contact the customer and gain access to the customers house to view the workbench and the inspect the lean-to but was unable to gain access. To best of my recollection, I believe that I said to Anthony that I would 'go and see the customer'. I drove to the customers house and knocked on the door on two occasions but there was no one home."

80 We accepted also that evidence of Mr Sullivan. We also accepted the rest of that paragraph of his witness statement, and the following one. They stated what we found were the substantive reasons of Mr Sullivan for rejecting the claimant's appeal, which he did. The rest of paragraph 35 and paragraph 36 were as follows:

> "35 ... The way that Anthony described the table he had used to put the ladder on and the pictures taken of them, in my opinion were enough for me to conclude that this was an unsafe process. I believed that Michael Denny had given an honest view of what he saw in relation to the table and the visit to the customers house was just a follow up.
>
> 36. Judging by the pictures (pages 590-598) I was of the view that the work bench was a poorly constructed breakfast bar and an experienced team manager had stated on more than one occasion that there was no eyebolt hole visible and I had no reason to doubt this."

81 Mr Sullivan's reasons for dismissing the claimant's appeal were set out in the letter dated 9 August 2017 at pages 616-618. When giving oral evidence, Mr Sullivan said that if the only allegation against the claimant had been of using a workbench of the sort in question as a base for his ladder, then he would have "upheld the decision [to dismiss the claimant] and accepted that the investigation was correct and the decision [to dismiss the claimant] was correct". We accepted that evidence of Mr Sullivan.

The photographs put before us of which there were copies at pages 97-99

82 There were at pages 97-99 copies of some photographs to which the claimant referred in paragraph 28 of his witness statement in the following manner:

> "Pages 98 - 99 of the Tribunal Bundle show the photographs taken by Mr [name given], the customer at the property of the alleged offences. These photographs clearly show an eyebolt above the roof line, which is in total contrast to Mr Denny's version of accounts that he reported to the Respondent."

83 The photographs were evidence that there was a hole, with a plastic plug filling it, just above a piece of wood at the top of the lean-to and below a waste pipe on

the outside of the wall. The copies of the photographs in the bundle were not very clear, but they appeared to have discrepancies. We asked for the originals to be sent to us if at all possible, and they were: the originals were (as is now the norm) in digital form. The originals confirmed our view that there were some unexplained discrepancies in that there was in one photograph a hole very clearly shown in the piece of wood to which we refer in the first sentence of this paragraph but in the other photograph of the same area, no such hole was shown. In any event, the claimant had not himself procured the photographs: rather, he said, his solicitor had done so. However, there was no statement from either the occupant of the house or the solicitor, even in the form of a letter, about the photographs.

84 In those circumstances, we found the photographs to carry evidentially at best only very little weight.

The claimant's fitness certificates in the possession of the respondent in June 2017

85 At page 780, there was a copy of a fitness certificate dated 16 June 2017. It stated that the claimant was not fit for work and the reason for that unfitness was stated simply to be: "Depression". In the claimant's GP's notes at pages 667-674 (which had to be read backwards, as the earliest entry was on page 674), there were references to the claimant's mental state. We return to those references in paragraphs 98 and 99 below, when stating our conclusions on the respondent's constructive knowledge of the claimant's disability.

The relevant parts of the respondent's disciplinary procedure

86 At pages 66-70 there was what the hearing bundle index described as the respondent's "Conduct Policy". At page 69, under the heading "Gross misconduct", this was said:

> "Gross misconduct is a very serious type of offence which is likely to lead to dismissal and we've given you some examples below:
> - Serious breach of the terms and conditions of your employment and/or Sky rules and policies
> - Any action that puts your or anyone else's health and safety at risk."

87 Those were the first two of 25 bullet points. On pages 448-452, there was a copy of a document entitled "How Do I Guide", which the claimant signed on 26 May 2016. On the first page, after the "Introduction" box, there was a box with this opening section in it:

> "**Health & Safety**
>
> At Sky we take the Health and Safety of our employees very seriously.

We are committed to:

- Providing employees with the equipment and training they need to carry out their roles safely
- Ensuring that everyone knows what to do when they are faced with a situation that is a bit different to the norm.

When an employee chooses not to use their equipment and / or follow Health and Safety procedures, this can lead to injury and in the worst case scenario, death. This is why we must take action if an employee is seen or believed to have been working unsafely."

88 On the next page, after a short section about the role of the engineer and the role of the engineer's manager, there was this section:

"**Working at Height**

The Safe Systems of Work manual details what equipment must be used when working on a ladder. In some situations it may be difficult to use all the equipment, for example due to the layout of the property or specific requests from the customer. If this is the case the Ladder Hierarchy should be checked for guidance. If after reviewing this, you are still unable to complete the job within the guidelines, you **must** call your Team Manager or Duty Team Manager to discuss the job and the options available to you.

Failure to follow the guidance within the manuals without **escalating** and agreeing a safe way of working will always result in an investigation being carried out, even if this has only happened once.

The Investigating Manager may carry out post checks of previous jobs completed by you as part of their investigation: this will not always be necessary and will be assessed on a case by case basis. Post checks let the Investigating Manager know if you have worked unsafely on more than one occasion. If the post checks show that there may have been breaches of Health & Safety, these will be discussed with you during the investigation.

If you have failed to follow the safe systems of wok and this could result in you falling to the ground from any height, you will be suspended from work whilst the investigation is completed. We will consider this breach of Health and Safety as gross misconduct. This means that during the Conduct Meeting the decision may be made to dismiss you."

Further relevant case law

89 In the notes in *Harvey* to section 15 of the EqA 2010 (at Q[1468]), this was said:

> "Where the unfavourable treatment consists of dismissal and the claimant runs both an action under this section and one for unfair dismissal, it is likely to be the case that the defence of justification/proportionality in the former and the range of reasonable responses test for the latter will align: *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145, [2017] IRLR 547, [2017] ICR 737. However, that is not a rule of law and there may be cases where on the facts the decisions on the two diverge: *City of York Council v Grosset* [2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492; *Scott v Kenton Schools Academy Trust* UKEAT/0031/19 (30 September 2019, unreported); *Department for Work and Pensions v Boyers* UKEAT/0282/19 (24 June 2020, unreported); *Iceland Foods Ltd v Stevenson* UKEAT/0309/19 (13 February 2020, unreported)."

90 Having referred to those reports of those cases, we found that passage to be a helpful and accurate summary of the cases. They showed that when deciding whether it was a proportionate means of achieving a legitimate aim to treat an employee unfavourably because of something arising from a disability, the fact that the employer did not have the disability in mind will not be determinative (or, in some cases, relevant). We saw that Wood J, on behalf of the Employment Appeal Tribunal ("EAT") in *Cobb v Secretary of State for Employment* [1989] ICR 506, at 516H-517A said in relation to the issue of proving justification for an indirectly discriminatory practice that if an employer ought reasonably to have considered and adopted an alternative course of action "then in carrying out the balancing exercise the tribunal might find that the defence [of justification] is not proved". However, as he also said, whether or not that defence is proved is an issue of fact "lying peculiarly within the province of the [employment] tribunal". In considering whether or not the defence was proved here, we took into account also the decision of the European Court of Justice ("ECJ") in *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110, to which Mr Lester referred us, and the following helpful summary of the applicable principles in paragraph L[377.01] of *Harvey*:

> "The EAT in *Hensman v Ministry of Defence* UKEAT/0067/14/DM, [2014] EqLR 670 applied the justification test as described in *Hardy and Hansons Plc v Lax* [2005] EWCA Civ 846, [2005] IRLR 726, [2005] ICR 1565 to a claim of discrimination under EqA 2010 s 15. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. (Applied *Monmouthshire County Council v Harris* UKEAT/0010/15 (23 October 2015, unreported)). As stated expressly in the EAT judgment in *City of York Council v Grosset* UKEAT/0015/16 (1 November 2016, unreported), the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a

different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset* ([2018] EWCA Civ 1105, [2018] IRLR 746) upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'."

91 Paragraph 31 of the judgment of the EAT in *Pnaiser v NHS England* [2016] IRLR 170 provided very helpful guidance to us on the application of section 15, and we applied that guidance.

Our conclusions on the claims

The claim of unfair dismissal

The reason for the claimant's dismissal

92 We found that the real reason for the claimant's dismissal was his conduct in the form of what he did at the relevant customer's house on 29 March 2017.

The reasonableness of the investigation followed before deciding that the claimant should be dismissed

93 In the circumstances that

93.1 we accepted (see paragraphs 61 and 67 above) Mr Denny's evidence that he had sought to go back to that house after the claimant first said that he had in fact used an existing hole in the wall which was behind the perspex roof and which could be seen only when the roof was slid down, and the customer refused to slide the roof down,

93.2 we accepted (see paragraphs 79 and 80 above) Mr Sullivan's evidence that he had sought to gain access to the house but had been unable to do so, and

93.3 the claimant's account of what he had done in the course of putting the satellite dish on the wall of that house had changed twice, so that there were three versions of it (see paragraphs 54, 59 and 60 above),

we concluded that the investigation which the respondent had carried out (about which no other complaint was, or could reasonably, be made) was within the range of reasonable responses of a reasonable employer.

Were there reasonable grounds for the decision that the claimant had committed the misconduct for which he was dismissed?

94 In our judgment there were indeed reasonable grounds for concluding that the claimant did the conduct for which he was dismissed, including not using an eyebolt at the relevant customer's house on 29 March 2017. There was no doubt that the claimant had not "escalated" that situation as required by the respondent, and there was no doubt that the claimant had used a kitchen work top as a base surface for his ladder, albeit that there were not (we concluded) reasonable grounds for concluding that that work top was not sufficiently supported by at least the cupboard on which it sat for it to be secure. We concluded that there were also reasonable grounds (namely what emerged in Mr Denny's conversation with the customer in question) for concluding that the claimant had asked the customer to hold the ladder to minimise the risk of it moving while the claimant was on it. In addition, in the circumstances that the claimant

94.1 said initially that he did not use an eyebolt (see the boxes on the right of the second and sixth rows in the table set out in paragraph 54 above),

94.2 also said at that time (see the box on the right of the sixth row in the same paragraph) that "There was nowhere to eyebolt for the middle",

94.3 then said (see paragraph 59.4 above) that he used an existing hole in the wall "Up where the dish [was]", and then, when Mr Denny was unable to see such a hole (because there was not one there),

94.4 said that he had used an existing hole which was hidden behind the perspex roof material (see the sixth to the fourteenth boxes in the table set out in paragraph 60 above), which was where the middle of the ladder would have been,

we were of the clear view that there were reasonable grounds for concluding that the claimant had not used an eyebolt when putting up the satellite dish on the back wall of the relevant customer's house.

<u>Was the claimant's dismissal within the range of reasonable responses of a reasonable employer?</u>

95 The claimant's dismissal was in our judgment well within the range of reasonable responses of a reasonable employer, not least (but by no means only) because of the passages from the respondent's documents set out in paragraphs 86-88 above. For the avoidance of doubt, for the reasons stated in paragraph 76 above and despite the somewhat cheery email from Mr Sullivan to Mr Denny set out at the end of paragraph 78 above, we concluded that Mr Sullivan's conclusions were not predetermined. Rather, we concluded (having heard and seen him give evidence, including by being cross-examined carefully on this point), he approached the matter with an open mind and arrived at his conclusion that the

appeal should be dismissed only after hearing from the claimant and considering carefully what he had said.

96 Also for the avoidance of doubt, although the allegation in the grounds of the claim of, in effect, unfair targeting of the claimant as a former employee of AVC was not pursued in Mr Lester's closing submissions, we record here that we had no doubt at all that Mr Denny's investigation was not the result of a propensity on the part of the respondent to pick fault with former employees of AVC. Accordingly, Mr Lester's failure to press that allegation was in our view apt.

The claims of breaches of the Equality Act 2010

97 One issue which was common to the claims made under sections 15 and 20 of the EqA 2010 was the respondent's knowledge (whether actual or constructive) of the claimant's disability. We therefore consider that issue first.

Knowledge of the claimant's disability

98 While we saw that the claimant did not tell his GP that the reason for his absence from work in 2015-16 and 2017 was that he had been suspended, the entries in his GP's notes at (1) the bottom of page 673, (2) the top of that page, (3) the bottom of page 672, and (4) the bottom of page 667 (starting "Depressed again 6 months bad 3 months") showed in our view that the respondent could reasonably have been expected to know that the claimant was depressed at least by the start of June 2017.

99 If it had been necessary to do so (which, in the event, it was not) to decide whether the respondent could reasonably have been expected to know that the claimant was disabled by reason of anxiety and depression in 2015, then we would have concluded that it could have done so by 22 September 2015. That was because of the final line on page 672 which (corrected for spelling errors) was in these terms:

> "I think he is unwilling [to take antidepressants] (does not like medication)".

Did the respondent apply one or more PCPs within the meaning of section 20(3) of the EqA 2010?

100 The claimed PCPs were as set out in paragraph 32 above. Taking them in turn, our conclusions on the question whether or not they were in fact PCPs within the meaning of section 20(3) of the EqA 2010 were as follows.

"The failure to take his phased return in April 2016 seriously by not adhering to the recommendations of occupational health in relation to working hours and workload"

101 There was no evidence before us of a practice of not adhering to the recommendations of occupational health practitioners. This claimed PCP was in our judgment in any event a complaint about a particular instance of conduct. In any event, the occupational health practitioner's advice was actually followed: see paragraphs 42 and 46 above.

"The expectation for employees to work long hours"

102 It was claimed in paragraph 56 of Mr Lester's closing submissions that "the impact" of an expectation that an employee would work "long hours" was "self-evident". We saw two problems with this claimed PCP: (1) that the claimed expectation to work "long hours" was imprecise, and (2) it was not at all self-evident that such expectation as the respondent in fact had (which was described in the passage of Mr Denny's evidence which we have set out at the end of paragraph 40 above) put the claimant at a substantial disadvantage as compared with persons who are not disabled. We suspected that Mr Lester said that the "impact" of the claimed PCP was "self-evident" because the claimant did not give evidence that working the hours that he did in fact work was to his disadvantage. Rather, the claimant said that he had been a bit of a (his word) "workaholic", when he said this (when giving oral evidence in chief with our permission):

> "I did not know I was ill. I thought I was a workaholic; but it obviously was masking a lot of medical problems until I was diagnosed."

103 In those circumstances, we concluded that the second claimed PCP was not in fact a PCP within the meaning of section 20(3) of the EqA 2010 in that we were not persuaded on the balance of probabilities that it put the claimant at a substantial disadvantage except and unless it meant that as a result of working what the claimant described as "long hours" he was more likely to take risks than if he had worked shorter hours. We had no, or at least in our judgment insufficient, evidence that that was so before us. Thus, in our judgment the second claimed PCP was not a PCP within the meaning of section 20(3) of the EqA 2010 on the facts here. We record here, however, that if it had been such a PCP then the only reasonable step that the claimant could have asked for here was not to be dismissed and in the future not to be required to work beyond a particular time in the evening.

"The failure to monitor employees' health following a phased return to the point of dismissal"

104 We did not see any evidence that the respondent had a practice of not monitoring employees' health following a phased return to work, although we could see that an employer might reasonably in practice leave it to employees to decide when to seek medical assistance. What was of most importance here, though, was that (1) the first of the occupational health recommendations which

we have set out in paragraph 42 above showed that the claimant was "aware of the support that is available through Sky Support Services" and (2) we concluded from Mr Denny's evidence to which we refer in paragraph 46 above that the second of the bullet points set out in paragraph 42 above was given effect in that (a) the claimant had an opportunity to "identify [to Mr Denny] his perceived longer term work related stressors" and (b) the claimant himself said that he had spoken to Mr Denny about his (the claimant's) mental state when sitting in Mr Denny's car. In those circumstances, we concluded that the claimed PCP set out in the heading to this paragraph was not made out, both because we were not persuaded on the balance of probabilities that there was a practice of the claimed sort, and because if there was one, it did not in our judgment on the facts put the claimant at a disadvantage as compared with persons who are not disabled.

"The practice of advising the outcome of the disciplinary hearing on the day"

105 We accepted that the respondent had a practice of informing employees of the outcome of a disciplinary hearing on the day of the hearing, but we saw no evidence that doing that put the claimant at a disadvantage as compared with persons who are not disabled. That was not least because the only alternative was making the employee wait longer, which, even if it was in more congenial surroundings, might be even more stressful for the employee. Thus, we concluded that this claimed PCP was not a PCP within the meaning of section 20(3) of the EqA 2010.

"The failure to consider medical evidence during the disciplinary hearing"

106 There was no evidence before us that the respondent had a practice of failing to consider medical evidence during disciplinary hearings. We asked ourselves whether we could infer that the respondent had such a practice, but we concluded on the balance of probabilities that if the claimant had put some medical evidence before the respondent during his disciplinary hearings, then the respondent would have considered it. Thus, this claimed PCP also was not a PCP within the meaning of section 20(3).

Was the claimant's dismissal a breach of sections 20 and 39 of the EqA 2010?

107 While it was claimed that the claimant's dismissal was a breach of sections 20 and 39 of the EqA 2010, that claim could not succeed in the light of our above conclusions on the claimed PCPs within the meaning of section 20(3). It could have succeeded only if the claimant had acknowledged that his mental state was such that he was put at a disadvantage by reason of that mental state by the respondent's requirement that he acted safely, and then asserted that there was a PCP to that effect. We did not understand the claimant to have done that. If, however, he had done that, or if we had concluded that the requirement to work what the claimant classified as "long hours" had led to an increased propensity to

take risks so that it could have been said to be a reasonable adjustment to reduce the claimant's working hours and not dismiss him, then we would have concluded that it was not a reasonable adjustment not to dismiss the claimant. That is essentially for the reasons, to which we now turn, that we concluded that it was not a breach of section 15 of the EqA 2010 to dismiss him.

The claimants' claim of a breach of sections 15 and 39 of the EqA 2010

108 We did not think that the claim that subjecting the claimant to a disciplinary investigation was discrimination within the meaning of section 15 of the EqA 2010 added anything to the claim that his dismissal was discrimination within the meaning of that section. We were prepared to conclude that the claimant's judgment was impaired by his disability in the form of his mental state of anxiety and depression when he felt under pressure, which he did not least because he had been subjected to the performance improvement plan to which we refer in paragraph 47 above, so that

108.1 his failure to escalate to Mr Denny (or another team leader if Mr Denny was unavailable) the situation at the relevant house on 29 March 2017, and

108.2 his use of what he called a workbench as a footing for his ladder

were errors of judgment which constituted something arising from that disability within the meaning of section 15(1) of the EqA 2010.

109 However, we concluded that not only were there reasonable grounds for concluding that the claimant had failed to use an eyebolt on that occasion, but in fact (i.e. on the balance of probabilities) he did not do so. We did so because of the factors which we have set out in paragraph 94 above in the circumstance that we also found that we could attach at best only very little evidential weight to the photographs at pages 97-99 to which we refer in paragraphs 82-84 above. That conclusion, especially when the claimant's full knowledge at the relevant time of the respondent's health and safety requirements (see paragraph 48 above) was borne in mind, made it difficult to conclude that the claimant's failure to use an eyebolt was the result of an error of judgment arising from his disability.

110 However, even if we gave the claimant the benefit of any doubt in that regard and concluded that all of things that the claimant did which were unsafe on 29 March 2017 were the result of him taking risks which he might not have taken if he had not been suffering from anxiety and depression, we came to the clear conclusion (after very careful consideration) that the claimant's dismissal was a proportionate means of achieving a legitimate aim. That was for the following reasons.

110.1 The claimant had (see paragraph 45 above) done things which were contrary to the respondent's health and safety requirements on four separate jobs during 2015.

110.2 He had then been given (see the same paragraph) a final written warning, which was "live" for a year. That warning was given, and the claimant was not dismissed, we concluded, because, as it was recorded in the letter set out in paragraph 45 above, "From what you described about each of these allegations it would suggest that ultimately you were safe."

110.3 Approximately two and a half months after the expiry of that warning, at a time when (see paragraph 44 above) the claimant felt "back together and stronger", and at a time when (see paragraph 68.1 above) he was not overloaded, the claimant did something which he admitted, namely using what he called a "workbench" as a base for his ladder, and which in our judgment, looking at the matter objectively, was plainly unsafe in itself.

110.4 If he had used an eyebolt then that would have meant that using the workbench was not as unsafe as it was without using an eyebolt. However, the claimant had previously (see paragraph 45 above) not used an eyebolt on at least one occasion and well knew how important it was to use one but yet, as we say in the first sentence of paragraph 109 above, we concluded that he did not use one at the relevant customer's house on 29 March 2017.

110.5 In addition, the claimant's stated belief in his disciplinary hearing before Mr Bayley and in his appeal hearing before Mr Sullivan was that what he had done was not unsafe (see paragraphs 68.2, 68.3, 68.5 and 77 above).

111 Those factors pointed strongly towards the conclusion (which we reached) that the respondent's decision that the risk to the claimant himself and the respondent from the respondent continuing to employ the claimant in his role of Engineer was sufficiently great that his employment could not be continued, was objectively justified. There was here a real need within the meaning of the decision of the ECJ in *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110 to dismiss the claimant.

112 For those reasons, we concluded that the claimant's dismissal was a proportionate means of achieving the legitimate aim to which we refer in paragraph 27 above, namely "(i) protecting [the respondent's] employees and customers; and (ii) protecting [the respondent] from legal ramifications of a failure to have in place and maintain proper health and safety", i.e. safe systems of working.

In conclusion

113 In conclusion, none of the claimant's claims succeeded.

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Employment Judge Hyams

Date: 22 November 2021

SENT TO THE PARTIES ON

26/11/2021

N Gotecha

FOR THE TRIBUNAL OFFICE