



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr D Bannister

v

DPD Group UK Ltd

Heard at: Watford

on: 12, 15 & 16 September 2022;
20 and 23 September 2022 (in Chambers)

Before: Employment Judge Bedeau
Mrs I Sood
Mrs J Hancock

Appearances

For the Claimant:

Mr K Ali, Counsel
Mrs S Nalias, British Sign Language Interpreter

For the Respondent:

Mr A McMillan, Counsel

RESERVED JUDGMENT

1. At all material times the claimant was suffering from the following disabilities, namely learning difficulties; severe bilateral hearing impairment; and severe dysarthria.
2. The claim of discrimination arising in consequence of disability is well-founded.
3. The claim of failure to make reasonable adjustments is well-founded.
4. The case is listed for a remedy hearing on **Friday 10 February 2023 at 10.00am, in person**, with a time estimate of 1 day, if not settled.

REASONS

1. In a claim form presented to the Tribunal on 27 May 2020, the claimant made claims of disability discrimination and unfair dismissal arising out of his employment with the respondent as a Driver.

2. In the response presented on 22 July 2020, it is averred by the respondent that the claimant did not have two years' continuous with the respondent and, as such, the Tribunal does not have jurisdiction to hear and determine his unfair dismissal claim.
3. In relation to the disability discrimination claim, it acknowledged that it was aware of the claimant's hearing difficulties. To ensure that he could understand what was being said, its managers ensured that they were facing the claimant when speaking to him as he could read their lips, and that they would speak slower than normal, and/or repeat what they have said, as appropriate. If required, things were written down for the claimant/or explained to him. This was in accordance with advice received from the respondent's occupational health provider.
4. The respondent further averred that the claimant was dismissed following an incident on 23 January 2020, when it was reported that a video of one of its drivers revealed that the driver was throwing delivery boxes from the back of his vehicle on to the ground, at Bicester Designer Village, Oxfordshire. The driver was the claimant. The matter was investigated, and the claimant was suspended on full pay. He attended a disciplinary hearing on 29 January 2020, after which, his employment was terminated on grounds of gross misconduct, and that he had brought the reputation of the respondent into disrepute. His dismissal was unrelated to his disability/disabilities.
5. In his Further and Better Particulars of claim dated 11 May 2021, the claimant withdrew his unfair dismissal claim acknowledging that he did not have two years' continuous service. He describes his disabilities as, learning difficulties; severe bilateral hearing impairment; and severe dysarthria, a speech disorder. He then gives an account of his treatment, the conduct of the investigation, disciplinary hearing, the dismissal and the appeal process. He states that his claims against the respondent are discrimination arising in consequence of disability, s.15 Equality Act 2010 and failure to make reasonable adjustments, s.21 EqA 2010 (pages 33-45 of the joint bundle).
6. On 19 May 2021, Employment Judge Gumbiti-Zimuto, dismissed the unfair dismissal claim based upon the claimant's withdrawal.
7. At the preliminary hearing held on 14 June 2021, Employment Judge Anstis, adopted as the claims and issues in the case what is contained in the claimant's Further and Better Particulars. An application to amend by the claimant was allowed. Leave to amend the response was granted. The Judge recorded that the respondent accepted that the claimant was at the material time a disabled person on account of his learning difficulties and severe bilateral hearing impairment but not dysarthria (47-52).

The issues

8. During submissions Mr McMillan informed the Tribunal that he and Mr Ali agreed the claims and list of issues in the case.

9. Mr Ali told us that the harassment claim was no longer being pursued by the claimant.
10. The agreed list of the legal and factual issues in dispute are set out below:

Disability

1. Was C legally disabled for the purposes of the Equality Act 2010?
2. In particular, at the relevant time did C have the following physical/mental impairments:
 - a. Learning difficulties;
 - b. Severe bilateral hearing impairment;
 - c. Severe dysarthria

And did any/all of these have substantial, adverse and long-term effects on C's daily activities?

If so, of which of these disabilities was R aware and when? C relies on correspondence from C's mother in 2017 and two OH reports and Feb and June 2017.

S15

3. If C is disabled, were the following "something arising" from C's disability?
 - a. Narrow vocabulary;
 - b. Being unable to understand comprehensive verbal/written language;
 - c. Being unable to communicate fluently;
 - d. Not always understanding management requests;
 - e. Becoming easily confused and frustrated; particularly under pressure
 - f. Saying things he does not mean when he does not understand or is confused by a situation;
 - g. Feeling pressured in the lead up to and during the events of 23 Jan 2020;
 - h. Throwing parcels out of his vehicle on 23 Jan 2020 in consideration of (g) above;
 - i. Feeling confused and having a lack of understanding when the investigation points were raised on 23 Jan 2020;

j. Appearing dismissive of the allegations in his initial statement of 23 Jan 2020

k. Appearing blasé and allegedly not showing remorse throughout the investigation and disciplinary processes.

4. Did C suffer the following treatment:

a. Being asked to undertake his duties on 23 Jan 2020;

b. Being suspended effective 23 Jan 2020;

c. Being subjected to disciplinary proceedings;

d. Being dismissed for gross misconduct.

5. Were the above instances of unfavourable treatment?

6. If so, was any/all of the unfavourable treatment because of ‘something arising’ as set out at para 4(a-k) above?

7. If s15 discrimination is made out, was it objectively justified by the pursuit of a legitimate aim (where R at para 29 of the Amended Grounds of Resistance on p60 of the bundle relies on the aim of protecting the business’s reputation in the face of extremely adverse publicity).

8. If the aim were legitimate, was the way this aim was pursued proportionate?

Ss20/21

9. Did R have the following generally-applicable PCPs:

a. Requiring employees to load vehicles alone;

b. Requiring employees to make deliveries to specific locations by deadlines specified by R;

c. Informing employees that deliveries had to be made “at any cost”;

d. Requiring employees to complete a form to report issues with their company vehicles;

e. Holding investigation meetings without prior notice;

f. Requesting a written statement at the start of an investigation meeting at short notice;

g. Suspending employees pending the outcome of disciplinary proceedings;

- h. Giving employees short notice of a disciplinary hearing taking place;
- i. Only allowing employees to be accompanied to disciplinary hearings by a colleague of TU representative;
- j. R choosing which colleague will represent an employee at a disciplinary hearing;
- k. Requiring grounds of appeal to be issued within 48 hours and subsequently within 5 days of dismissal being confirmed.

10. Further and/or in the alternative:

- a. Was there a broken ladder and no tailgate at the rear of C's delivery vehicle?
- b. If so, was this a physical feature putting C at a substantial disadvantage relative to other non-disabled one-man crew delivery and collection drivers?

11. Did the above physical feature(s) cause C substantial disadvantage? Specifically, did C:

- a. Fail to meet the deadlines imposed on him; and
- b. Feel considerable pressure in the run up to and on 23 Jan 2020?

12. Would the following have been reasonable adjustments:

- a. Reducing the number of deliveries on C's route/consulting about modifying C's route;
- b. Relaxing deadlines imposed on C;

13. With respect to the PCPs C relies on, would the following have been reasonable adjustments:

- a. Relaxing timescales of the disciplinary processes to ensure C had sufficient time and support to understand the allegations raised;
- b. Allowing C to be accompanied at the disciplinary hearing and appeal by Mr Nalias;
- c. Was it a reasonable adjustment by R to arrange for Mr Mount to sit directly opposite C during the disciplinary hearing to facilitate lip reading?

Remedy

14. If C suffered unlawful discrimination:

- a. What award for injury to feelings is appropriate?
- b. What financial compensation falls to be awarded to C?

- c. Should that award be adjusted?

The evidence

11. The Tribunal heard evidence from the claimant who did not call any witnesses. He was assisted by Ms Susan Nalias, British Deaf Association Sign Language Interpreter, and family friend. At the preliminary hearing held on 8 December 2021, EJ Postle, ordered the respondent to write out the questions to be put to the claimant in cross-examination and to send them to him in advance of the final hearing, as a reasonable adjustment.
12. On behalf of the respondent evidence was given by Mr Gareth Ashton, Shift Manager, and by Mr Stuart Mount, General Manager. In addition, Mr McMillan invited the Tribunal to read and to give whatever weight we considered appropriate to the written statement of Ms Paula Sheffield, People Business Partner.
13. The parties produced a joint bundle of documents comprising of 334 pages. References will be made to the documents as numbered in the joint bundle.

Findings of fact

14. The respondent is a parcel delivery business that provides services to customers in over 30 countries. One of its depots is in Bicester, Oxfordshire.
15. We find that the respondent worked to a tight schedule each day. Each delivery has a time and location taking into account the number of parcels, distance and location. The respondent also offers some of its customers an enhanced service that guarantees a set deadline for delivery. Such customers are referred to as premium customers. If the respondent fails to deliver the goods to the premium customer within the agreed timescale, it has to reimburse that customer.
16. The claimant worked as a Delivery Driver on his own from 1 December 2015 to 19 July 2018. During that time he drove a 3.5 ton truck and was required to deliver smaller, lighter, but a large number of parcels, to around 80 stops.
17. On 12 June 2018, he received his first written warning from Mr Gareth Ashton, Shift Manager, for damage caused to a company vehicle. The warning was to last 12 months. (208)
18. On or around 13 July 2018, he tendered his resignation giving two weeks' notice because he was due to start a new job on 16 July 2018. He thanked the respondent for giving him time to work for at least two years and that he had a great experience with staff and friends. (209)
19. The claimant sustained an accident while at work.

20. Katalin Jambor, Principal Clinical Psychologist, examined the claimant on 23 June 1986, at the request of his doctor and his solicitors. A report was prepared and under “General comments”, it stated the following:

“David’s speech shows a moderate to severe degree of dysarthria, and sometimes it is not fully intelligible even within the context of the topic of conversation, and often it is only the context that makes it intelligible (eg “Mrs Shatter” for Mrs Thatcher). Similarly, he is apt to mishear or misinterpret words spoken to him (eg “Coke” for coat), and he has a tendency to guess and answer the question he thinks had been asked. Sometimes this leads to an obviously disjointed and nonsensical “conversation”, but at other times his guess is a near enough approximation to be mistakenly passed at the intended correct reply.”

21. Under, “Opinion”,

“There is no doubt whatsoever that David does not have the mental capacity to present his case to the CICB [Criminal Injuries Compensation Board] by himself. He would not be capable of fully understanding the verbal exchanges, the situation, or the implications of it. Nor would he be capable of expressing himself adequately and clearly.” [84-85]

22. In a letter dated 17 January 2017, Ms Esther Bannister, the claimant’s mother, wrote to the Bicester depot, “To whom it may concern”, with reference to the claimant, stating the following:

“As your company will be aware, David has some learning difficulty and hearing loss. Because of this he has asked me if I could write to you on his behalf.

My understanding from David is that he is to receive a phone call from one of the senior staff of DPD in respect of his hearing, and is concerned as to the reason for this. It may help if I explain how his hearing is affected. He has partial hearing, and if someone is talking quietly he has difficulty hearing them. The other aspect of his hearing loss is that he does not hear soft sounds in words. So coat and coal can sound the same, and he has to guess, which can cause misunderstanding on some occasions. I have no difficulty talking to him on the phone and face to face. Words need to be simple, clear and to the point. He also has a reduced vocabulary, but he has found ways to compensate for this. He is not stupid and in some aspects his IQ is above normal. It is only his verbal IQ that is affected. The cause of this was being born 3 months prematurely and sight and hearing problems not being diagnosed and treated. It was a 5 year battle before he got treatment and surgery to put this right. The delay leaving him with the disability he has now.....” (188)

23. In early 2017, Mr Alan Shaw, Depot Manager, made a referral to the respondent’s occupational health providers, Maitland Medical. They saw the claimant on 3 February 2017, who was examined by Dr A Edet, Consultant Occupational Physician, who submitted a report dated 3 February 2017. The doctor stated that the reasons for the referral was that the claimant had a hearing impairment and that the purpose of the referral was to assess his hearing and identify if there was a need for the respondent to take any supportive actions. Dr Edet wrote in relation to: “2. Additional questions to be addressed”, the following:

“In addition to having a hearing impairment, David also has a mild learning difficulty related to a poor verbal IQ. I understand that he was born three months premature.

Unfortunately, his hearing impairment was not diagnosed until he was five years old. This had an impact on his learning development. His mother, who accompanied him to the appointment, explained that he is able to follow a simple conversation and read simple words. He struggles with complex written and verbal communication due to his limited vocabulary.”

24. In relation to, “4. opinion and recommendations to include any adjustments”, Dr Edet stated:

“An audiometry was done which shows that he has severe bilateral hearing impairment (result attached). He is not getting on with his hearing aid and I have suggested that he asks to be referred back to his ENT/audiology team. I gather he hasn’t seen them for about seven years. Nevertheless, he appears to have adapted well to his hearing impairment and I would still consider him fit for work.

I would recommend that a risk assessment is done at work to ensure that all aspects of his role are assessed and that control measures put in place where necessary. Access to work may be able to assist if specific equipment is required.” (67-69)

25. There was a further referral to the respondent’s occupational health advisors, by Mr Andrew Lee, in or around June 2017. In the report it is noted that the reasons for referral was that:

“David has brought it to our attention that he has learning difficulties. As such he finds it particularly difficult to understand some requests from his managers and he find himself getting frustrated and upset. We are not specialists and we are keen to understand more about his condition so we can support and assist him in his role.”

26. The claimant attended the appointment with Maitland Medical in the company of his mother who helped to clarify some of the concerns about his work. She stated that he was born prematurely and that may have had an impact on some of his development. His hearing impairment was not diagnosed until he was about five years old, and this set back his verbal development and general learning. He did not speak until he was eight years old. He attended a special school. He was currently being assessed by the Audiology Team. The report stated that his vocabulary was narrow, and his comprehension of verbal and written language was impaired. The use of simple words in communication was helpful. He would, “struggle to cope with changing priorities and work routines but would benefit from a fairly routine structure and delivery in the areas he is familiar with”.

27. Under the sub-heading, “Additional questions to be addressed”, Dr Edet wrote on 9 June 2017:

“David has learning difficulties which is a lifelong condition. You will also be aware that he has a hearing impairment for which he is currently undergoing assessment at the John Radcliffe Hospital in Oxford. When he was last referred, a request was made to undertake a hearing test and a report was provided following the assessment. You may wish to make reference to that report which is dated 3 February 2017. He is due to return to see the Audiology Team at the John Radcliffe Hospital on 26 June.

David cannot comprehend complex information whether in written or verbal format. He can follow a conversation if simple words are used but struggles with complex words.

Furthermore, he finds it a challenge to cope with multiple short notice changes to his work routine. He would cope better with structure and familiar routines. His ability to communicate fluently is also affected and this may have an impact on his response to requests made by his managers. He has said that he has sometimes felt confused and frustrated at work and he has also expressed concern about the change to his start time from 6am to 8am.

It would be helpful for his employer to meet with him to discuss measures that can be implemented to support him to work effectively. I would suggest that his mother attends with him to facilitate communication. From what I gather, there are no concerns with his driving per se and he feels that he discharges his duties effectively when he is working in areas that are familiar. Some of the familiar areas he mentioned includes Bicester, Witney and Aylesbury. In the previous report dated 3 February 2017, I suggested that it may be helpful to contact Access to Work who can conduct a workplace assessment and suggest further adjustments that may be necessary.

Due to the combination of his learning difficulties and hearing impairment, it is essential that his managers and colleagues are aware of the importance of communicating with him in a manner that he would be able to comprehend.”

28. In the opinion and recommendations part of the report, Dr Edet wrote that the provisions in the Equality Act 2010 in relation to disability apply to the claimant due to his hearing impairment and learning difficulties which placed a duty on the respondent to consider and implement reasonable adjustments to assist the claimant in the discharge of his duties. (75-77)
29. Mrs Susan Nalias is the sister of the claimant's wife. Her husband is Stephen Nalias. The claimant's wife is profoundly deaf. Mrs Nalias has known the claimant for over 20 years and is proficient in British Sign Language. She prepared a Disability Impact Statement on the claimant's behalf. She stated that the claimant has problems communicating verbally. He could only express and understand complex verbal information with considerable help from someone who is trained and experienced in helping people to communicate. He needs prompting from another person to read or understand complex written documentation and will often agree with what is being said to him but when asked to confirm what he has been told, it would be clear that he did not fully understand. He also shows emotional immaturity and is unable to articulate or express himself effectively. Learning disability is lifelong. He avoids social situations to minimise confrontation from others who do not understand his disability. He has been ostracised by some members of his family who have not taken the time to understand his disabilities. He receives Personal Independence Payment due to his disabilities. His disabilities have an impact on normal day to day activities, namely he would need communication support to be able to express or understand complex verbal information. In relation to reading and understanding signs, symbols and words, would need prompting to be able to understand. As regards making budgeting decisions, he would need prompting or assistance to be able to make those decisions.
30. Mrs Nalias further wrote that outside of the workplace he struggles on a day-to-day basis with simple tasks, such as dealing with cold calls. He would agree to terms and conditions for which he has no understanding. He needs

constant assistance in the management of his financial affairs. He is unable to realise that he needs help because in his mind he has understood the situation. An example is given by Mrs Nalias of the claimant being persuaded to have a 21-year-old car with 150,000 miles on the clock that needed to be resprayed at a cost of £950.00. He was led to believe that he would be able to sell it for a profit but that was not the case. He needs help when booking and arranging appointments. His disability makes him vulnerable to maltreatment and exploitation. He has been known to say the complete opposite of what he actually meant. Speaking slowly and explaining the situation to him in simple words, would help him to understand more easily. When shouting, he becomes confused and stressed. He would often bury his head in the sand to avoid dealing with a difficult situation. [78-81]

31. We were in a position to observe the claimant when giving evidence. The medical evidence already referred to, including the Disability Impact Statement, are all consistent with what we have observed of the claimant. Certain questions put to him had to be restructured in simple terms by Mrs Nalias in a way the claimant was able to understand. She knew that certain words used by counsel for the respondent in cross-examination, the claimant would be unable to understand, therefore, she had to phrase the questions in simple terms.
32. The Tribunal asked the claimant how long he knew Mr Nalias, his brother-in-law. His reply was six years, when he got married. It was clear to Mrs Nalias that he had misunderstood or misinterpreted the question focusing on the date of his marriage to his wife. Mrs Nalias made several attempts at trying to explain the question, but he was unable to understand and gave answers inconsistent with the point of the question.
33. Bicester Outlet Village is a ten-minute drive from the respondent's depot.
34. On Thursday 23 January 2020, the claimant started work at the depot at 7.50 in the morning. He had to load 133 parcels onto his 7.5-ton truck. He told the Tribunal that he needed assistance in loading them because of the high number involved, and approached Neil, Staff Manager. He asked Neil whether one of the three loaders, who were helping another driver, could assist him in loading his truck. Neil's response was to say that he, the claimant, should ask them. When the claimant did ask, the loaders refused. He told the tribunal that he was scared of Mr Gareth Ashton, Shift Manager, and was frightened to ask him because he would shout at him. He then had to load his vehicle by himself which took two hours. 80% of the parcels were due to be delivered to one of the respondent's premier customers, Hunter Boots, at Bicester Village. They sell designer wellington boots. The boxes were heavy, containing several pairs of boots, weighing between 5-10kgs. The truck did not have a tailgate, which meant that the claimant had to climb on to it, to start loading from the front, making his way to the rear. He told us that the floor of the truck came up to his chest when he stood on the ground. While loading, he hurt his back and shoulder, and became hot and sweaty. He left the depot at 9.50 in the morning. In respect of the broken ladder, he told the tribunal, and we accepted his evidence, that there

was a defects form he had to complete but because of his disabilities he was unable to do so. He approached Neil, and someone by the name of Magda, as well as Ms Emma Lammert, at different times, but the form was never completed. Ms Lammert agreed to complete it but did not do so.

35. The drive took ten minutes from the depot to Bicester Village. When he arrived and parked within the compound, he began to unload the packages. He did that by throwing the boxes from the vehicle on to the ground. This was recorded by someone at Bicester Village. The video was uploaded on to Facebook and they tagged the respondent.
36. The claimant completed his delivery at the village by scanning the last parcel at 10.07am. The respondent had a contract with Hunter Boots requiring it to complete its delivery on or before 10.30am.
37. After leaving Bicester Village, the claimant had either four or five deliveries to make at different premises before he returned to the depot at or around 11.20am.
38. He then made further deliveries during the day, finally returning to the depot between 5.30 and 6.00pm.

The investigation

39. When he arrived, Mr Regwan Hussain, Staff Manager, said that Mr Stuart Mount, General Manager, wanted to see him. He did not say why but said to the claimant that he was going to get a “bollocking”. They both entered Mr Mount’s office, where Mr Mount asked the claimant whether he had seen the video, to which the claimant replied “no”. At that point Mr Mount said that he was going to show him the video. While playing it, the claimant asked why they were videoing him. Mr Mount then instructed Mr Hussain to give the claimant a blank witness statement and instructed the claimant to write his statement on it. Mr Hussain completed the top part of the statement, being the claimant’s name, job title, the alleged incident, and the date. He also, at the bottom of the statement, wrote his name and signature as well as the claimant’s name. The claimant’s signature was also at the bottom of the statement. He wanted Mr Hussain to help him with the spelling of certain words, such as, “Bicester Village”, “nothing wrong” and “damage”. The claimant wrote,

“This morning to Bicester Village out the box during my drive on there be for 10.30 am. I got nothing wrong? No box damaged.” (239)

40. After writing his statement, Mr Hussain handed it to Mr Mount who instructed the claimant to take off his badge and leave. The meeting lasted between 10 to 15 minutes.
41. After the meeting and with Mr Mount’s assistance, Mr Hussain completed a disciplinary investigation report dated 23 January 2020, referring to the claimant throwing parcels on to the ground and that someone at Bicester Village had recorded what he was doing and posted it on Facebook. He

was suspended pending an investigation. Mr Hussain's recommendation was that the matter should proceed to a disciplinary. (237-238)

42. We find that the claimant was suspended on full pay.

Disciplinary hearing

43. In a letter dated 24 January 2020, Mr Mount wrote to the claimant inviting him to attend a disciplinary hearing scheduled to take place on Wednesday 29 January 2020 at 9.30 in the morning. The allegations being "Mishandling of customer and/or company property; bringing the company to disrepute." He attached copies of the claimant's witness statement; the picture of a 7.5-ton truck parked at Bicester Village; as well as the video evidence of the claimant mishandling parcels at the Village. He was informed of his right to be represented by either trade union representative or a work colleague, and was warned that one possible outcome may be his dismissal (241).
44. On 27 January 2020, he wrote to Mr Mount informing him that his bother-in-law, Mr Steve Nalias, would be representing him at the disciplinary hearing and that he, Mr Nalias, would be calling Mr Mount on Tuesday 28 January at 12 o'clock to speak on his behalf. (242)
45. Mr Nalias wrote to Mr Mount, by email, on 27 January, stating the following:

"Stuart,

I have spoken to David today and provided him with a letter (copy attached) advising you that I am his representative. I have asked him to sign and hand deliver it to you in the morning.

As you will see on the letter I have told David that I will call you in the morning.

Kind regards" (243)

46. Mr Mount had a conversation with Mr Nalias regarding representing the claimant at the hearing, during which Mr Nalias confirmed that he was not a union representative. Mr Mount explained that due to him being neither an employee of the respondent, nor a union representative, he would not be the claimant's companion at the disciplinary hearing. We find that Mr Nalias did discuss with Mr Mount the claimant's disability as that was the reason why the claimant required him as a representative at the hearing.
47. At the hearing which went ahead on 29 January 2020, present were Mr Mount, Ms April Hawtin, note-taker, the claimant and Mr Tony Dolton, who accompanied the claimant. Mr Nalias was not present. Although notes were taken, they were not verbatim but a summary of what was said. The claimant presented a statement that had been drafted by Mr Nalias and Mrs Suzy Nalias. In it they wrote:

"Firstly, I would like to apologise to both my employers, DPD, and their customers who I have let down by my inappropriate handling of their

consignment. Whilst I am not trying to make any excuses I felt I was working to a very tight deadline which I was fully focussed on meeting.

My day started at 7.50am by loading the van, a 7.5 ton with no tailgate, with approximately 140 sizeable items. I then left for Bicester Village at 9.50am where I delivered all the items which were unloaded separately and taken by hand on a hand trolley in approximately 36 separate journeys to the individual delivery points, which were a fair way from the van. This was a big job but all items were delivered within their time limits.

At around 11.20 I returned to the depot and immediately loaded the van, had a break at around 12 o'clock, and then left to deliver at considerable number of smaller items.

I take great pride in working for DPD and try at all times to meet my targets, thereby helping the depot to achieve its objectives.

I can only repeat that I am sorry for my actions as I would never intentionally bring the company into disrepute." (244)

48. He was asked by Mr Mount why he felt it was acceptable to handle the parcels in the manner in which he did. His response was to say that he felt like he was having a bad day and was under pressure when it came to doing the delivery at Bicester Village. He also explained that he was not given sufficient help in the morning in loading his truck. This in turn caused him to have a problem with his shoulder which caused him pain. He further stated that the ladder gets stuck at the back of the truck, and this resulted in him having to manually offload the parcels from the back. He was asked whether he had reported the fault to which his response was, "No".
49. In referring to his initial statement taken with the assistance of Mr Hussain, he felt that he had not done anything wrong. Mr Mount then made reference to the video evidence which was posted on social media. He asked the claimant why he had handled the parcels in the way he did and that some comments on social media gave the impression that it was not the first time. The claimant replied saying that he did not deliver the parcels in the past in that manner and was apologetic for his actions on the day. He felt very ashamed. Mr Mount then looked at the claimant's route on his computer to try to understand why the claimant felt pressured to do his delivery. The timings according to the route and Saturn, its software programme, showed that it had taken the claimant two hours to load 133 parcels to which the claimant did not receive any help in loading. The delivery was made at 10.07am, with 23 minutes to complete his 10.30 target. The claimant said that he did sometimes receive help from customers when unloading the parcels and that at this particular time no help was given.
50. Mr Mount having looked at the claimant's route and his movements on the day, was of the opinion that time was not a factor to the mishandling of customer/company property. He had taken into account that the claimant had admitted to mishandling the parcels during his delivery.

51. The claimant said that he was happy and proud to be working for the respondent and that it would not happen again if he was given a second chance.
52. At that point the meeting was adjourned for Mr Mount to consider his decision and was reconvened at 10.15am. The claimant said that his actions were caused by a bad day, and he was sincerely apologetic. He did not dispute that he had mishandled the parcels in an inappropriate manner. Mr Mount said that he believed that previous occasions suggested no change in the claimant's behaviour and that things may only have changed for a short while then revert back. This will increase the risk of gross misconduct recurring. He took the decision to dismiss the claimant by giving him one week's notice. He was advised of his right of appeal to Mr Simon Golding within five days. (245)
53. In evidence Mr Mount said that he treated the incident as serious as it not only involved the mishandling of property belonging to other people, but it had been publicised on Facebook where people could see and comment adversely on what had happened. As a business, the respondent needed customers to trust it otherwise they would not use its services. If customers take the view that the respondent would not look after their parcels, that will impact on its business. He said that he had previously discussed the claimant's handling of customer's parcels which were informal conversations conducted on the floor of the warehouse in line with his way of managing drivers on a day-to-day basis. Although the claimant's in-depot conduct improved, his on-road conduct meant that he had not improved his behaviour. In his mind the claimant clearly understood what was expected of him as he stopped doing it in the depot where he could be seen by management. He took the view that were a warning to be issued in respect of the Bicester Village incident, it would not have effected change in the claimant's behaviour.
54. In relation to Mr Tony Dolton, when the claimant arrived for the hearing, he was unaccompanied, and he, Mr Mount, felt that the claimant needed someone to accompany him and recommended Mr Dolton who had performed such a role on a number of previous occasions. He also suggested that the claimant should find one of his colleagues to accompany him. We, however, find that it was Mr Mount who invited Mr Dolton to the hearing. The claimant did not speak to any of his work colleagues asking whether they should accompany him.
55. We further find that Mr Dolton did not have a prior, in depth, discussion with the claimant about the case. During the adjournment he suggested to the claimant that he should say to Mr Mount that he was having problems with his marriage, but the claimant responded by saying that he did not have any issues in his marriage.
56. During the adjournment Mr Mount said that he spoke to Ms Paula Sheffield, HR Business Partner.

57. Mr Mount confirmed and we do find as fact, that the respondent did not have anyone proficient in sign language to translate for the claimant. He said that the claimant had no difficulty lip reading if you look him face to face. He worked with the claimant for many years and did not get the impression that the claimant was unable to understand his question and gave robust answers. Nothing gave him reason to believe that his hearing was an issue. He was, however, unaware that the claimant had learning difficulties.
58. In answer to question put to the claimant by the tribunal in relation to where Mr Mount was sitting when he was questioning him, the claimant said and we accepted his evidence, that Mr Mount was sitting four metres away and was not directly in front of him but had his head down. Mr Mount was talking so fast that he had difficulty understanding half of what he was saying. Mr Dolton did not ask any questions during the meeting and did not know him prior to meeting him at the disciplinary hearing.
59. We find that Mr Dolton did not have an understanding of the claimant's conditions and how to communicate with him. He did not, in a meaningful way, assist him during the hearing.
60. We bear in mind that in the Occupational Health Report it stated that because of the claimant's learning difficulties and hearing impairment, it was essential that his managers and colleagues were aware of the importance of communicating with him in a manner he would be able to comprehend. In addition, it was suggested that his mother should attend to discuss measures to be implemented to support him and for him to work effectively. Further, it recommended that the respondent should undertake a risk assessment to demonstrate that all aspects of the claimant's role were assessed and that controlled measures were put in place where necessary. To assist the respondent, it recommended contact with Access to Work.
61. After the disciplinary hearing, the claimant called Mrs Nalias and explained that he thought that the hearing had gone well. However, on 30 January, the following day, he was handed his disciplinary outcome letter. He did not understand it until Mrs Nalias explained the decision had been taken to terminate his employment.
62. In Mr Mount dismissal letter, he wrote:

“Dear David,

Re Dismissal

I am writing to confirm the content and outcome of the disciplinary hearing conducted on Thursday 29th January 2020. Also present at the meeting April Hawtin, and at which you were represented by Tony Dolton.

The hearing was called following your suspension from work and an investigation into the allegation of gross misconduct of mishandling customer and/or company property and bringing the company into disrepute.

Present at the meeting was David Bannister, his representative Tony Dolton, management witness April Hawtin and Stuart Mount conducting the hearing.

The evidence used was as follows:

- Document 1 – Witness statement from David Bannister
- Document 2 – Picture 7.5 ton truck parked at Bicester Village
- Video evidence of mishandling parcels whilst unloading the vehicle at Bicester Village.

You were invited to respond to the allegation and the evidence presented.

You stated that the act of gross misconduct of the handling of customer and/or company property was due to a time issue, where you felt pressured to deliver on time. Upon review of your route by Stuart, it is unclear that this was the reason for mishandling parcels and by investigation that it is believed that your actions will not change.

I considered carefully all the evidence and your response and due to the seriousness of the offence I made the decision to terminate your contract of employment with one week's notice. In accordance with the Company Disciplinary Procedure, you will receive payment in lieu of notice and any untaken holiday pay.

You have the right to appeal against the decision to Simon Golding, Regional Manager based at DPD Dunstable Woodside Industrial Estate.... Within 48 hours of receiving this letter. Your appeal should be made in writing and must state clearly the grounds for your appeal.” (246-247)

63. According to the respondent the effective date of termination was 5 February 2020. (248-249)
64. In a letter dated 3 February 2020, Mr Nalias wrote to Mr Golding on behalf of the claimant enclosing a signed letter authorising him to deal with respondent on his behalf. He stated that the claimant was a registered disabled person whose hearing was severely impaired and had difficulty communicating both verbally and in writing and in following normal conversations in meetings involving multiple participants. His writing skills were very limited and would find it difficult reading and understanding words. Those were the reasons why he asked Mr Nalias to attend the disciplinary hearing. Mr Nalias further asserted that he believed that due to the claimant's disability he was entitled to be represented by someone who was trained or experienced in helping him to fully understand what was being discussed and for him, Mr Nalias, to explain what was happening. He asked Mr Mount to allow him to attend as the claimant's representative, but the request was denied. He also asked whether Mr Dolton was qualified to act on the claimant's behalf and whether he had previously represented anyone with similar disabilities, and, if so, when? He requested a copy of the minutes of the meeting and wrote that the claimant wished to appeal the decision to terminate his employment. He asked that certain information relevant to how the claimant conducted his work, be disclosed. (252-255)

65. Mr Golding replied on 10 February 2020, by email apologising for the delay as he was away from the business most of the time. He stated that his secretary would respond within 24 hours. (257)

66. On 11 February 2020, he wrote to the claimant acknowledging his grounds of appeal and inviting him to attend the appeal hearing on Friday 28 February 2020 at 11am, at the Bicester Depot. He then wrote:

“You are entitled, if you wish, to be accompanied by either a work colleague or a trained trade union official only.

Please note that this is an internal process and therefore no external parties are permitted to attend.

Please contact me to notify if you are unable to attend this hearing for any reason.” (259)

67. A formal response to Mr Nalias’ request to be the claimant’s representative, was written by Mr Golding but sent by Ms Heather Elliott, Regional Secretary, on 11 February 2020, in which he wrote:

“Dear Mr Nalias,

I have now had the opportunity to review your letter. Firstly, I can corroborate that the company policy is indeed 48 hours appeal timeframe, which applies for all employees consistently across our appeals processes and policies. However, given your email, I confirm acceptance of Mr Bannister’s appeal to his outcome of dismissal.

I need to clarify that this is an internal process, there is no formal right for you to act on behalf of Mr Bannister. Mr Bannister has a contract of employment direct with DPD, he has worked for us across a number of years without assigned professional assistance with his day to day training and communication both with management and customers.

Therefore, Mr Bannister is required to speak on his own behalf as our employee and as the individual who is involved in this incident. He can have a representative with him for support, and measures are taken at the meeting to ensure he has the opportunity to put his points across with confirmation of understanding. In addition, I am happy for you to advise and support him outside of any formal meeting in submitting any written statements if you feel this would be helpful.

I am unable to share confidential company information with you. Many of the questions you request information for are not relevant to the case in hand, and you have not specified how it relates to the grounds of Mr Bannister’s appeal.

I shall write to arrange a hearing date with Mr Bannister in due course.” (260)

68. On 23 February 2020, Mr Nalias wrote to Mr Dwain McDonald, Chief Executive Officer, complaining about the claimant’s treatment as a disabled person; the incident which led to his dismissal; his concerns about the disciplinary process; and the negative response to his request to assist the claimant. (261-263)

69. On 24 February 2020, Ms Paula Sheffield, People Business Partner, responded to Mr Nalias' letter on behalf Mr McDonald. She acknowledged the claimant's disability and the requirements to support him which had been done throughout his employment. In relation to the claimant's ability to communicate within a group with multiple participants, she stated that there was no reason for the meeting to involve multiple participants. The appeal hearing would be conducted between Mr Golding and the claimant only. A management witness would simply be a witness and the representative would be present for support only to the employee. This would keep the conversation clear between the claimant and one other person.
70. With regard to complex texts and reading written information, she wrote that the only reading material was the investigation pack or letters sent in advance of any meetings. The claimant would have time to seek help in digesting and understating the information. There would be no reading material presented at any of the meetings that will be new for David to read. The main evidence being video based.
71. In relation to complex verbal communication, the nature of the discussion, she wrote, at the meeting would be of a similar nature to what the claimant would be/had been asked in his working role by managers or debrief clerks on a daily basis to explain any actions he carried out in his role. The respondent will facilitate Mr Golding sitting directly opposite the claimant over a small meeting table for the claimant could lip read adequately and repeat as necessary to check for understanding.
72. Ms Sheffield asked Mr Nalias to clarify his references to being "experienced" and "trained" in supporting the claimant's disability and what this involved over and above the adjustments the respondent would be making. She also asked whether or not his involvement would include sign language. (267-268)
73. On 27 February 2020, Mr Nalias responded to Ms Sheffield's email. He stated:

"I note your comments and the adjustments you are prepared to take. However, I believe that you have underestimated the situation.

I am assuming from the minutes of the hearing that, as Stuart Mount adjourned the hearing and returned at 10.15 after speaking to you, Stuart was given the go ahead to dismiss David.

As I have stated previously, both to Dwain McDonald and Simon Golding, David left the hearing not knowing that he had been dismissed. After receiving his letter of dismissal the following day David was still unaware that he had been dismissed, only finding out when my wife explained the letter to him later that evening. I would add here that when he was told this he became distraught.

This flies in the face of Stuart Mount's comments to me on 28 January 2020 when he told me that if, previously, he had difficulty getting David to understand what he was saying then he would repeat himself, five times on some occasions. I would like to know how many times he repeated himself at the hearing.

This situation from the hearing occurred solely because David didn't have the support he needed, and was entitled to due to his disability, which he was denied by you.

We consider your actions to be unlawful discrimination in breach of the Equality Act 2010. Accordingly, David had decided to cancel his appeal and is considering taking his grievance to an employment tribunal.

I look forward to hearing from you.”

74. Mr Nalias then provided further information to his email, of the following:

“David's wife, who is profoundly deaf, is my wife's sister and I have known her for over 35 years. I have known David for over 20 years. I have interacted and communicated with them over this time. I have helped them deal with their day to day official communications, both verbal and written to HMRC, various utility and insurance companies, and general other dealings ie with retailers, car repairers and other similar entities.

My wife has supported David's wife throughout her life. She has also supported David since they got together and married., My wife has British Deaf Association Sign Language qualifications.

As you will see, my wife is fully qualified but, whilst I do not have formal qualifications, I am fully qualified by experience.” (266-267)

75. Ms Sheffield responded later the same day thanking Mr Nalias for his response and explanation in support of his request. She then wrote:

“Based on this, I confirm that we are willing to permit your attendance at the appeal hearing tomorrow, as a reasonable adjustment.

Simon and I shall meet with David and yourself as scheduled at 12pm at the DPD Bicester Deport. “(265)

76. We bear in mind the permission given to Mr Nalias to attend in the company of the claimant was at 6.55 in the evening of 27 February 2020, when the appeal hearing was the following day at 12noon, This did not, in the tribunal's view, give Mr Nalias sufficient time to take detailed instructions from the claimant and to properly prepare for the hearing if the claimant wished to pursue his appeal.

77. The response from Mr Nalias was over 2 hours 30 minutes later, in which he wrote:

“Thank you for your response and I am happy that you now consider me a suitable person to represent David.

However, I think that you may have misread my email in that David has decided to cancel his appeal and is considering taking his grievance to an employment tribunal. Accordingly, we will not be meeting with you tomorrow.” (264-265)

78. In cross-examination the claimant said that he had told Simon and Emma when he transferred from Interlink, his previous employer, to the respondent that his speech was not very good.
79. In cross-examination Mr Mount accepted that the claimant was unable to understand comprehensive verbal and written language. He further stated that in relation to reputational damage, the respondent did not know of the significant reputational damage that had been to the respondent. He also said:
- “Had I been aware of the claimant’s learning disability, we would have looked to amend his job completely. We would not have got to the point of a disciplinary, we would have not had him on his own delivering parcels, we would have offered something less stressful.”
80. He admitted that the investigation was “a little woolly if I’m 100% honest. It was not a great investigation.” He further stated that refusing a family member to assist the claimant at the appeal stage, would not leave “much faith in the appeal process”.
81. The claimant was asked the question, “You went to make deliveries to Bicester every day and you didn’t throw boxes on the other days?” His reply was “Other days I didn’t throw the boxes. Too many boxes, I got stressed. Nobody helping just me. I was sweating. My shoulder, my back hurting. I was stressed and I cried in the lorry to myself.” We accepted his evidence and further find that his vehicle did have a broken ladder and did not have a tailgate. Opening the side doors would be difficult as the boxes were packed against them.

Dysarthria

82. In the Third Edition of the Oxford Concise Medical Dictionary, Dysarthria is defined as:
- “A speech disorder in which the pronunciation is unclear although the language content and meaning are normal.”
83. It is clear that in the psychologist report in 1986, it was noted that the claimant showed moderate to severe degree of dysarthria and “sometimes it is not fully intelligible even within the context of the topic of conversation, and often it is only the context that makes it intelligible”, in relation to his speech, Katalin Jambor.
84. In Dr A Edet’s, Consultant Occupational Physician, report dated 3 February 2017, it states that the claimant had mild learning difficulty related to a poor verbal IQ.
85. In a further report dated 15 June 2017, Dr Edet also noted that the claimant could not comprehend complex information whether in written or verbal form. He was able to follow conversations if simple words were used and struggled with complex words. His ability to communicate fluently was also affected and may have an impact on his requests made by his managers.

“Due to the combination of his learning difficulties and hearing impairment, it is essential that his managers and colleagues are aware of the importance of communicating with him in a manner that he would be able to comprehend.”

86. Further, it was likely that the provisions of the Equality Act in relation to disability covered his hearing impairment and learning difficulties.
87. The claimant was born three months premature and, as a result, had a hearing impairment, a learning disability and moderate to severe degree of dysarthria. The question is how did his dysarthria impact on his normal day-to-day activities?
88. We find that in regard to the disability impact statement and having observed the claimant give evidence in-chief, under cross-examination and in answer to the tribunal's questions, he has difficulty communicating verbally. He could only express and understand complex verbal information with help from someone who was trained or experienced in helping people to communicate. He needs prompting from another person to read or understand complex written documents. He received monthly a Personal Independence Payment as a result of his disabilities. We find he needs communication support to be able to express or understand complex verbal information.
89. In relation to reading and understanding signs, symbols and words, he needs prompting to read and understand. He would need prompting and/or assistance to be able to understand and make complex budgeting decisions.
90. Outside of the workplace we find that he struggles on a day-to-day basis with simple tasks, such as, dealing with cold calls and agreeing to terms and conditions to which he has no understanding. He needs assistance in managing his financial affairs and sometimes would not realise he needs help because in his mind he has understood the situation. This was exemplified in relation to the 21-year-old vehicle with over 100,000 miles on the clock. He requires help when booking and arranging appointments. He would sometimes say the complete opposite of what he actually meant. What he thinks he hears is not always correct. He would often bury his head in the sand to avoid dealing with difficult situations. He also avoids social situations to minimise confrontation from others who do not understand his disability, and would, therefore, socially isolate himself. He avoids confrontation by trying to please people all the time.
91. Dysarthria is a lifelong condition. The claimant did not speak until he was 8 years old. The substantial adverse effects are long lasting.
92. In relation to knowledge, we find that the Occupational Health Report dated 10 February 2017, which was requested following a referral by Mr Alan Shaw because of the claimant's hearing impairment, recommended an assessment of his hearing to identify if there was any need for the respondent to take any supportive actions. What came back was a report that not only referred to the claimant's hearing, but to learning difficulties due to his poor verbal IQ. It stated that the claimant struggled with complex

written and verbal communication due to his limited vocabulary. This information was in the possession of the respondent.

93. In relation to the Occupational Health Report dated 15 June 2017, a referral was made by Mr Andrew Lee, Human Resources Business Partner. The reason for the referral, as stated by Mr Lee, was that the claimant had brought it to the respondent's attention that he has learning difficulties.

“As such he finds it particularly difficult to understand some requests from his managers and he finds himself getting frustrated and upset. We are not specialist and we are keen to understand more about his condition so we can support and assist him in his role.”

94. Clearly, there was an understanding at that time the claimant had learning difficulties. The respondent wanted to know what adjustments could be made in respect of that impairment. The report referred to his ability to communicate fluently being affected by his inability to comprehend complex information whether in written or verbal format. It was suggested that it would be helpful for the respondent to meet with him to discuss measures which could be implemented to support him to work more effectively. The combination of his learning difficulties and hearing impairment meant that it was essential that his managers and colleagues were and are aware of the importance of communicating with him in a manner that he would be able to understand. He found it a challenge to cope with multiple short notice changes to his work routine and would cope better with structure and familiar routines.
95. Ms Ester Bannister, the claimant's mother, wrote to the respondent on 17 January 2017 stating that he also had a reduced vocabulary and that his verbal IQ that was affected.
96. In cross-examination the claimant was asked, “Did you tell anyone at DPD you were registered disabled?” He replied, “Yes, Simon, top boss, Emma and Alan”.
97. Simon is a reference to Simon Golding, Regional Manager. Emma was the reference to Ms Lammert, Transport Vehicle Manager.
98. We further find that Mr Ashton and Mr Mount knew that the claimant had speech difficulties but linked those to his hearing impairment as they said that often you have people with speech difficulties who cannot hear very well.
99. In cross-examination Mr Mount was asked whether he was aware of the claimant's limited vocabulary. His response was, “My impression was that his verbal communication issues were down to his hearing impairment. He could understand and communicate with me.”

Submissions

100. The tribunal heard oral submission from Mr McMillan, Counsel on behalf of the respondent. Mr Ali, Counsel on behalf of the claimant, invited the tribunal

to read his detailed written submissions covering 15 pages. In addition, he made a brief reply to Mr McMillan's oral submissions.

101. We have also taken into account the authorities counsel have referred us to.

The law

102. In relation to discrimination arising in consequence of disability, section 15 provides,

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

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

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

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

103. In paragraph 5.7, Equality and Human Rights Commission Code of Practice on Employment (2011), unfavourable treatment means being put at a disadvantage. This will include, for example, having been refused a job; denied a work opportunity; and dismissal from employment, paragraph 5.7.

104. In paragraph 4.9 it states the following,

“ ‘Disadvantage’ is not defined by the Act. It could include denial of an opportunity of choice, deterrence, rejection or exclusion. The courts have found that ‘detriment’, a similar concept, was something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker could reasonably say that they would have preferred to be treated differently.”

105. In the case of Pnaiser v NHS England [2016] IRLR 170, the EAT, Mrs Justice Simler DBE, held that the “something” that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant or more than trivial, influence on the unfavourable treatment and amount to an effective reason for or cause of it. A tribunal should not fall into the trap of substituting motive for causation in deciding whether the burden has shifted. A tribunal must, first, identify whether there was unfavourable treatment and by whom in the respects relied on by the claimant. Secondly, the tribunal must determine what caused the treatment or what was the reason for it. An examination of the conscious and unconscious thought processes of the alleged discriminator will be required. Thirdly, motive is irrelevant as the focus is on the reason or cause of the treatment of the claimant. Fourthly, whether the reason or cause of it was something arising in consequence of the claimant's disability. The causation test is an objective question and does not depend on the thought

processes of the alleged discriminator. Fifthly, the knowledge required in section 15(2) is of the disability.

106. A similar approach was taken in the earlier case of Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893 it was held that:

“It is sufficient for disability to be “a significant influence or cause which is not the main or sole cause, but is nonetheless an effective cause of the unfavourable treatment.”

107. In determining justification, an Employment Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of working practices and business considerations involved, a discriminatory practice was reasonably necessary and not apply a range of reasonable responses approach, Hardy & Hansons plc v Lax [2005] ICR 1565.

108. In the case of Seldon v Clarkson Wright & Jakes [2012] ICR 716, a judgment of the Supreme Court, Lady Hale held that,

“The measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so..., paragraph 50 (5).

The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen..., paragraph 50 (6)

55. It seems, therefore, that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) they are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it.”

109. Section 20, EqA on the duty to make reasonable adjustments, provides:

“(1) Where this Act imposes a duty to make reasonable adjustments on the person, this section, sections 21 and 22 and the applicable Schedule apply; 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 is reasonable to have taken to avoid disadvantage.”

110. Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20, a judgment of the EAT. An employment tribunal considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment must identify:

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

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

(3) the identity of a non-disabled comparator (where appropriate), and

(4) the identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

A tribunal deciding whether an employer is in breach of its duty under section 4A, now section 20 Equality Act 2010, must identify with some particularity what “step” it is that the employer is said to have failed to take.

111. The employer’s process of reasoning is not a “step”. In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the “steps” an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. In order to decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

112. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift;

“...it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.”, Elias J (President).

113. Paragraph 6.10 of the Code 2011 provides:

"The phrase ‘provision, criterion or practice’ is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

114. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

“The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person’s.”

115. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.
116. In the case of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, a judgment of the Court of Appeal, Elias LJ gave the leading judgment. In that case the claimant, an administrative officer, was employed by the Secretary of State for Work and Pensions. She started to experience symptoms of a disability identified as viral fatigue and fibromyalgia. She was absent for 62 days for a disability related sickness. After her return to work her employer held an attendance review meeting. Its attendance management policy provided that it would consider a formal action against an employee if their absence reached an unsatisfactory level known as “the consideration point”. “The consideration point” was 8 days per year but could be increased as a reasonable adjustment for disabled employees. The employer decided not to extend the consideration point in relation to the claimant and gave her a written improvement notice which was the first formal stage for regular absences under the policy. She raised a grievance contending that the employer was required to make two reasonable adjustments in relation to her disability, firstly, that the 62 days disability related absence should be disregarded under the policy and the notice be withdrawn. Secondly, that in future “the consideration point” be extended by adding 12 days to the eight days already conferred upon all employees. Her employer rejected her grievance and proposals.
117. Before the Employment Tribunal the claimant argued that her employer failed to make the adjustments and was in breach of the section 20 EqA 2010, the duty to make reasonable adjustments. It was conceded that she was disabled within the meaning of the Act. The tribunal, by a majority, found that the section 20 duty was not engaged as the provision, criterion or practice, namely the requirement to attend work at a certain level in order to avoid receiving warnings and possible dismissal, applied equally to all employees. The Employment Appeal Tribunal dismissed the claimant’s appeal upholding the tribunal’s findings and adding that the proposed adjustments did not fall within the concept of “steps”. It further held that the comparison should be with those who but for the disability are in like circumstances as the claimant.
118. The Court of Appeal held that the section 20 duty to make reasonable adjustments had been engaged as the attendance management policy had put the claimant at a substantial disadvantage but that the proposed adjustments had not been steps which the employer could reasonably have been expected to take. The appropriate formulation of the relevant pcp in a

case of this kind is that the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. Once the relevant pcp was formulated in that way, it was clear that a disabled employee's disability increased the likelihood of absence from work on ill health grounds and that employee was disadvantaged in more than a minor or trivial way. Whilst it was no doubt true that both disabled and able-bodied alike would, to a greater or lesser extent, suffer stress and anxiety if they were ill in circumstances which might lead to disciplinary sanctions, the risk of this occurring was obviously greater for that group of disabled workers whose disability resulted in more frequent, and perhaps longer, absences. They would find it more difficult to comply with the requirements relating to absenteeism and would be disadvantaged by it.

119. The nature of the comparison exercise under section 20 is to ask whether the pcp puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally, and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the pcp bites harder on the disabled, or a category of them, than it does on the able-bodied. If the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability but if the disability leads to disability related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by the category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, in order to remove a disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant. The Employment Tribunal and the Employment Appeal Tribunal were wrong to hold that the section 20 was not engaged simply because the attendance management policy applied equally to everyone.
120. There is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of section 20(3). Any modification of or qualification to, the pcp in question which would or might remove a substantial disadvantage caused by the pcp is in principle capable of amounting to a relevant step. Whether the proposed steps were reasonable is a matter for the Employment Tribunal and has to be determined objectively.
121. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised so as to accommodate those who cannot fit into existing arrangements.
122. The test under is an objective test. The employer must take "such steps as...is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

123. Section 136 EqA is the burden of proof provision. It provides:

- "(1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

Conclusion

124. We have come to the conclusion, having regard to our findings in paragraphs 82-99, that the that the claimant's dysarthria was, at all material times when employed by the respondent, a disability. He currently has that disability.

125. In relation to the respondent's knowledge of it, we have concluded that it had constructive knowledge of it based on the claimant's speech difficulties from the various reports, his mother's communication, and from the managers' observation of the claimant's interaction with them.

126. All three disabilities, severe bilateral hearing impairment; moderate severe dysarthria and learning difficulties, are lifelong conditions and present similar challenges in the claimant's daily life. They all have substantial, adverse and long-term effects on his day-to-day activities. Accordingly, the claimant's moderate to severe degree of dysarthria was at all material times a disability in accordance with s.6, schedule 1, Equality Act 2010, and that the respondent had constructive knowledge of that disability.

Discrimination arising in consequence of disability

127. Mr Ali submitted that several matters arose in consequence of the claimant's disabilities. We agree with his submissions. They were: "1. Having a narrow vocabulary"; "2. Being unable to understand comprehensive verbal or written language"; "3. Being unable to communicate fluently"; "4. Not always understanding management request."; "5. Becoming easily confused and frustrated, particularly in pressurised situations"; "6. Saying things he does not mean when he does not understand or is confused by a situation"; "7. Feeling pressured in the lead up to and during the events, of 23 January 2020"; "8. Throwing the parcels out of his vehicle on 23 January 2020 in consideration of (point 7)"; (9. Feeling confused and having a lack of understanding when the investigation points were raised on 23 January 2020"; "10. Appearing dismissive of the allegations in his initial statement of 23 January 2020"; and "11. Appearing 'blasé' and allegedly not showing remorse throughout the investigation and disciplinary processes".

128. He asserts that the claimant had been treated unfavourably because of the above matters arising in consequence of his disabilities. The acts of unfavourable treatment were:

102.1. being suspended with effect from 23 January 2020;

- 102.2. being subjected to disciplinary proceedings; and
- 102.3. being dismissed for gross misconduct.
129. The disability need only be a significant influence or cause, not necessarily the sole or main cause of the unfavourable treatment, Hall v Chief Constable of West Yorkshire Police.
130. In the morning of 23 January 2020, the claimant had 133 parcels weighing between 5 to 10kgs each to load on his 7.5-ton vehicle. One of his deliveries was to Hunter Boots in Bicester Village. They were one of the respondent's premier customers. The claimant had 89 parcels to deliver to them. He asked Neil, Staff Manager, for help, in that, he wanted Neil to ask one of the three loaders helping the other driver, to help load his vehicle. At that point Neil refused the claimant's suggestion and told him to speak to the three helpers directly. Upon doing so they all refused to assist the claimant. He stated that he was too scared to ask Mr Gareth Ashton, Shift Manager, who would have shouted at him.
131. We find that the claimant was under a great deal of pressure, and this caused him to become frustrated and to behave in the way he did. The ladder was broken making it difficult for him to get into the truck. The truck also did not have a tailgate to raise and lower the parcels. He told us that it took him 1 hour 15 minutes to load his vehicle by himself. The other driver had taken only 30 minutes with the assistance of the three loaders. In loading his vehicle, he was hot and sweaty and told the tribunal that his back and shoulder were hurting. When he arrived at Bicester Village, he had to make sure that he delivered the 89 parcels to Hunter Boots prior to the 10.30 deadline. He could not use the side doors to his truck as the boxes were stacked against them. The customer did not offer him any assistance in unloading the truck. He said and we found that he was crying inside of his truck. He became confused and frustrated as it was a pressurised situation and behaved in the way he did by throwing the boxes from the truck on to the ground.
132. As a result of his actions he was suspended, subjected to disciplinary proceedings, and was eventually dismissed for gross misconduct.
133. Applying the judgment in the case of Hall v Chief Constable of West Yorkshire Police, we find that the something arising, his strange behaviour that morning of throwing the boxes on to the ground, was occasioned by his hearing, speech and learning difficulties as he becomes confused and frustrated in pressurised and stressful situations. His disabilities significantly influenced the unfavourable treatment, namely his suspension; invoking disciplinary proceedings; subjecting him to those proceedings and dismissing him. Accordingly, the claimant has satisfied the essential requirements of this claim. The respondent has the burden of establishing justification.

134. Mr McMillan submitted that the legitimate aim was that it was necessary to protect the respondent's reputation and relationships with priority customers. In so doing, it was proportionate to terminate the claimant's employment.
135. Having read Mr Ali's response to the justification defence, we adopt his submissions. He submitted that the respondent's actions were not a proportionate means of achieving the legitimate aim which was in itself unclear. There was no evidence adduced of the respondent becoming subjected to "extremely unfavourable publicity". That matter was not explored or considered at the investigation or disciplinary stage, and Mr Mount did not look into this. The online video was likely to have been on the respondent's Facebook for a matter of hours because it became aware of it on the same day and took it down. There was no evidence given on how many people had viewed the footage. No complaints from customers had come in and there was no evidence of any loss of business.
136. Further, Mr Ali submitted that when Mr Mount was cross-examined in relation to the alleged "significant" reputational damage, his answer was "I don't know".
137. Mr Ali further submitted that if the respondent was protecting itself from the risk of the claimant acting in a similar way again, it was unlikely that his behaviour would be covertly recorded and posted online. The only reasonable and proportionate conclusion for any employer to reach was that the incident was a one-off which was unlikely to recur bearing what the claimant experienced early in the morning. There was no evidence that it had happened before. The claimant was remorseful and promised it would not happen again. In the past he had heeded a disciplinary warning.
138. Moreover, in his evidence, Mr Mount accepted that he should have seen the Occupational Health Reports before undertaking the disciplinary hearing. He stated that, "Had I been aware of (David's) learning disability we would have looked to amend his job completely... We would not have got to the point of a disciplinary, we would have not had him on his own delivering parcels... we would have offered something less stressful".
139. We do agree with Mr Ali's submissions that Mr Mount effectively conceded the point that rather than suspending the claimant and subjecting him to a disciplinary, it was proportionate when dealing with the incident, to sit down and assess the work the claimant was capable of doing as a disabled employee and to assist him in avoiding a similar situation. He referred to the February 2017 Occupational Health Report which recommended a risk assessment to be undertaken to ensure that all aspects of the claimant's role be assessed and that measures put in place.
140. He further submitted that the actions of the respondent were not proportionate because the processes followed were unfair and unreasonable. We agree. The claimant's personnel files were not considered; he was given insufficient notice of the investigation and disciplinary hearing; he was denied a suitable representative at the hearing; no relevant witnesses, such as managers, were spoken to; the investigation

process was rushed, minimal and had no basis for its conclusion; the problem with the ladder on the vehicle was not properly investigated; there was no exploration of whether there had been any reputational damage to the respondent; and Mr Mount said in evidence, “The investigation was a little woolly if I’m 100% honest... It was not a great investigation”. He also acknowledged that the failure to allow a family representative knowledgeable on the claimant’s disabilities, “I would agree it would not leave you with much faith in the appeal process.”

141. We have come to the conclusion that there were other proportionate means of achieving the legitimate aim which were reasonable and necessary, other than the claimant’s dismissal. He had been remorseful, and it was a one-off incident. In the past he had complied with warnings. Mr Mount agreed that he would have given the claimant another role other than driving. This was not considered by the respondent. Accordingly, the justification defence does not succeed. The claimant’s claim of discrimination arising in consequence of disability is well-founded.

Failure to make reasonable adjustments

142. It is not disputed by the respondent that the following were provisions, criteria or practices:

- 142.1 The practice of requiring employees to load vehicles.
- 142.2 Practice of requiring employees to make deliveries to specific locations by deadlines specified by the respondent.
- 142.3 The practice of requiring employees to complete a form to report issues with their company vehicles.
- 142.4 The practice of holding an investigation meeting without prior notice.
- 142.5 The practice of requesting a written statement at the investigation stage at short notice.
- 142.6 The practice of suspending employees pending the outcome of the disciplinary proceedings.
- 142.7 The practice of giving employees short notice of a disciplinary hearing taking place.
- 142.8 The practice of only allowing employees to be accompanied at a disciplinary and appeal hearings by a work colleague or trade union representative.
- 142.9 The practice of requiring grounds of appeal to be issued within 48 hours and subsequently within five days of dismissal being confirmed.

- 143 There are two alleged pcps which the respondent submitted are not pcps. Firstly, the practice of informing employees that deliveries must be made “at

any cost". Secondly, the practice of the respondent choosing which work colleague will accompany an employee at a disciplinary hearing.

- 144 We agree with the respondent that the practice, as alleged of informing employees that deliveries must be made "at any cost", was not a pcp. Although the evidence suggests that deliveries particularly to premier customers were time-limited there was no evidence that deliveries had to be made "at any cost".
- 145 In relation to choosing who can accompany an employee at a disciplinary hearing, the respondent's disciplinary policy provides for either a work colleague or a trade union representative. The choice is at the employee's choosing. On the occasion in question Mr Tony Dolton, was approached by Mr Mount to accompany the claimant at the disciplinary hearing. This was a one-off event which did not represent normal practice, nor suggestive of future conduct. It was, therefore, not a pcp.
- 146 In relation to the physical feature of the workplace, the ladder provided for the claimant's use was broken. There was a form that he had to complete but because of his disabilities he was unable to do so. He therefore approached Neil, someone by the name of Magda, and Emma Lammert, at different times but the form was never completed. Although Ms Lammert agreed to complete the form she failed to do so. The claimant needed a ladder to use at the rear of the truck to enable him to climb up and climb down. Not having the form completed in relation to the defective ladder, placed him at a substantial disadvantage in loading and unloading his vehicle.
- 147 He made reference to lack of a tailgate at the rear of his vehicle. There was no evidence that other vehicles of a similar description had a tailgate. He had been using his vehicle without a tailgate for some time. It did not put him at a substantial disadvantage when compared with non-disabled drivers, or those without his disabilities. He had been using his vehicle, as we have already stated, without the benefit of a tailgate and he had not raised the absence of a tailgate had placed him at a substantial disadvantage.
- 148 We would agree with Mr Ali's submissions on the substantial disadvantages to the claimant in relation to the pcps. Firstly, the claimant seriously struggles with hearing, reading, writing, understanding, and speech. He could only lip read if simple words are being used as he struggles to understand what is being said. This is all the more so in stressful environments, such as a disciplinary hearing. He struggles with processing and responding to things during the wider disciplinary processes, such as, his failure to understand that he had been dismissed.
- 149 Secondly, without support from a family member experienced in assisting him, and without sufficient periods of time being given to him to process and understand what was going on, and to be able to prepare himself for questions and to give his version of events, he was put at a substantial disadvantage.

- 150 Thirdly, when he is unable to understand or is confused by a situation, he might say the complete opposite to what he means. The medical report noted that he had a tendency to guess and answer the question he thinks he has been asked.
- 151 Fourthly, at the investigation and disciplinary hearings, although he could explain that he was feeling under pressure, he could not fully explain why this was the case and how his disabilities impacted on him.
- 152 Fifthly, in the respondent's grounds of resistance, paragraph 15, it states that following the investigation process, the matter only progressed to a disciplinary, in view of" the claimant's attitude and his failure to acknowledge a problem with his conduct. The respondent had considered that the claimant was "extremely blasé" and "adamant that he had done nothing wrong" and that he had shown very little remorse. Such views were at odds with what the claimant said in his statement presented at the disciplinary hearing. What these statements by the respondent reveal was that the claimant was significantly disadvantaged by false impression of him.
- 153 The reasonable steps the respondent could have taken were:
- 153.1 Reducing the number of deliveries on his route or modifying his route following consultation with him.
- 153.2 Relaxing the deadlines imposed.
- 154 These were reasonable steps having regard to the size and resources of the respondent's undertaking which is a global company. The Bicester drop-off was only 10 minutes' drive away from the depot. The claimant was treated like any other driver and there were no adjustments made in his case.
- 155 Of note, Mr Mount said in evidence that, with the benefit of hindsight, he would have offered something less stressful to the claimant and the whole disciplinary process would have been avoided.
- 156 In relation to the disciplinary process, the reasonable steps the respondent could have taken were:
- 156.1 Relaxing the timescales of the processes, to ensure that the claimant had sufficient time and support to understand the allegations raised.
- 156.2 Allowing the claimant to be accompanied at the disciplinary and appeal hearing by Mr Nalias as the respondent did not have anyone with the knowledge, skills and experience to communicate effectively with the claimant. Mr Mount accepted that taking these reasonable steps would have caused no practical or financial difficulties for the respondent. With a family member present to assist the claimant, it would have been a benefit to him, according to Mr Mount as he would have been able to communicate effectively with the claimant and what he had to say.

157. We, therefore, have come to the conclusion that there was a duty on the respondent to make reasonable adjustments in the claimant's case because of his disabilities, and it had failed to do so. Accordingly, the claim of failure to make reasonable adjustments is well-founded.
158. The case was listed for a remedy hearing not on Friday 6 January 2023, as agreed at the conclusion of the liability hearing, but as the Judge is not available on that day, it is now listed for a remedy hearing on **Friday 10 February 2023 at 10.00am, in person**, with a time estimate of 1 day, if not settled.

Employment Judge Bedeau

Date: 24 November 2022

Sent to the parties on: 25 November 22

For the Tribunal Office