



EMPLOYMENT TRIBUNALS

Claimant: Mr P Jeffries

Respondent: Stagecoach South East

Heard at: London South

On: 14th-17th February 2023
& 17th March 2003
(in chambers)

Before: Employment Judge Reed, Mr C Mardner and Ms E Thompson

Representation

Claimant: In person

Respondent: Mr O Kessack, Solicitor

RESERVED JUDGMENT

1. The Claimant's complaint that he was unfairly dismissed is well founded. The Respondent unfairly dismissed the Claimant.
2. The Claimant's complaint for breach of contract, specifically that he was dismissed without being given lawful notice is well founded. The Respondent wrongfully dismissed the Claimant.
3. The Claimant's complaints of disability discrimination are not well founded and are dismissed.
4. The Claimant's complaint for breach of contract, specifically underpaid wages in 2017 and 2018 is not well founded and is dismissed.
5. A remedies hearing will be listed to determine the appropriate compensation for the successful claims.

REASONS

Claims and issues

1. Mr Jeffries brings complaints of unfair dismissal, direct disability discrimination (s13 Equality Act 2010), discrimination arising from disability (s15 Equality Act), wrongful dismissal and breach of contract (in relation to an alleged underpayment of wages in 2017/18).
2. The issues were agreed at the preliminary hearing on 12th January 2022. At the beginning of the hearing the issues were discussed. Both parties confirmed their accuracy. In particular, there was a discussion of the disability discrimination claims. Mr Jeffries confirmed that these were set out correctly and represented the claims he wished to bring. He confirmed that he did not wish to bring any additional disability discrimination claim.
3. The respondent confirmed that they accepted that Mr Jeffries was disabled, within the meaning of the Equality Act 2010 at the relevant time.

Procedure, documents and evidence

4. On the morning of the first day there was a discussion of the readiness of the parties. This arose because of failures by both parties to comply with the case management orders.
5. In particular, the case management order following the preliminary hearing ordered that relevant documents be exchanged between the parties, an agreed file of documents produced and witness statements exchanged in good time before the hearing.
6. Nonetheless, the respondent had not sent their proposed bundle of documents to Mr Jeffries until 21.07 the evening before the hearing began and had not sent their witness statements until 7.47 on the morning of the first day.
7. Further, the order requires that all witnesses, including the claimant, would need to produce a witness statement, Mr Jeffries had not done so.
8. We therefore adjourned on the first day without hearing evidence, in order to give Mr Jeffries the opportunity to consider the bundle and to read the Respondent's witness statements. On the morning of the second day Mr Jeffries was able to confirm that, with a limited number of exceptions, the documents that he wished to rely on were contained in the file of documents. He had brought copies of these further documents and these were added.
9. There was therefore, by the second day, an agreed bundle of 321 pages. References to page numbers in this decision, unless otherwise indicated, are references to that bundle.
10. In relation to Mr Jeffries' evidence, although he had not produced a witness statement, his account of the relevant events was set out in a number of

documents within the bundle. We therefore agreed to treat those documents, collectively, as his witness evidence. These documents were as follows:

- a. The Claim form, p1-12
- b. Further and better particulars, p42-46
- c. 'Additional information to support case management', p48-50
- d. Letter to the Tribunal and Respondent, 12.5.2021, p58-61
- e. Statement written following case management discussion, 20.2.2022, p88-96

11. In addition, at the beginning of his evidence, the Tribunal asked a number of general questions of Mr Jeffries before he was cross examined.

12. The Tribunal heard evidence from the claimant, Mr Jeffries, and from the following witnesses on behalf of Stagecoach South East: Ms Katherine Jones, Ms Joanne Howe and Mr Mark Wallis.

Findings of fact

13. Based on the oral and documentary evidence the Tribunal made the following findings of fact. These findings are made on the civil standard of proof, which is the balance of probabilities. This means that we have concluded that these facts are more likely to be true than not.

14. Stagecoach East operates bus services in East Kent and East Sussex. Mr Jeffries was first employed by them as driver on 16th August 2016. From the 16th September 2019 his role was Supervisor of Special Services at the Herne Bay and Dover Depots. In early 2020, he was responsible for the Stagecoach Express Service on the M2 and the Park and Ride services operating from those depots.

Underpayment of wages

15. In August 2017 Mr Jeffries was employed as a driver by Stagecoach East Kent, operating out of the Dover depot. Mr Jeffries requested a transfer to the Rugby depot. Mr Jeffries' evidence was that this was arranged with the Managing Director of Stagecoach Midlands.

16. Mr Jeffries transferred to Rugby from 19th August 2017, but only remained there for a few weeks. This was because one of his family became ill and required support. Mr Jeffries therefore requested a transfer back to Stagecoach East Kent, but at the Herne Bay Depot, rather than Dover. His evidence was that he had numerous conversations with the Commercial Director at Stagecoach East Kent as well as the Managing Director to arrange this.

17. Mr Jeffries evidence was that there was a delay in effecting this decision. He did not begin driving from Herne Bay until 7th November 2017.

18. When he began driving from Herne Bay, Mr Jeffries was treated as a new employee, rather than retaining his seniority. This meant that he was on a lower rate of pay. He complained about this and, approximately six months later, his start date was changed to reflect his previous service.

19. There was little clarity, however, as to what, if any, agreement was reached between Mr Jeffries and Stagecoach in relation to the transfer. He refers to multiple conversations with the Commercial Director and Managing Director at Stagecoach East, but there is no detail as to what was agreed or when. Mr Jeffries also refers to the Operations Managers at Dover and Herne Bay lying and ignoring instructions, but it is unclear what Mr Jeffries alleges.
20. Stepping back, from the detail of the evidence there was clearly an agreement to transfer, which Mr Jeffries did, and the Tribunal was satisfied that a decision was ultimately made to pay him on the basis of his previous seniority.
21. The Tribunal could not identify, however, in Mr Jeffries evidence any clear agreement prior to the transfer to Herne Bay as to when it would start, what he would be paid or whether he would maintain any seniority. The Tribunal was also not taken to any written contract or policy that dealt with the issue of retaining seniority in the case of a transfer, either in this particular case or more generally.

Stagecoach East's Policies

22. Stagecoach East has a number of policies that are relevant to this claim. These are the:
 - a. Disciplinary Procedure, p147-150;
 - b. Policy on the use of Social Networking Sites, Personal Websites, Blogs and Microblogs, p151-154,
 - c. Equal Opportunities Policy, p158-162,
 - d. Policy Statement on Computer Software, Email, Communication Platforms and Internet Use, p163-168,
 - e. Code of Conduct, p169-193
23. The most important of these is the Policy on Social Networking Sites, Personal Websites, Blogs and Microblogs ("Social Networking Policy"). Among other matters this policy addresses employees' use of social media that might impact Stagecoach East.
24. It does so through seeking to restrict use of social media where 'another user might see a connection between the employee and Stagecoach'. If there is such a connection 'employees are expected to behave appropriately, in ways which are consistent with their duty of trust and confidence as an employee of a Stagecoach Group company and in accordance with Stagecoach Group's Code of Conduct and the principles of ethical behaviour set out in that Code.'
25. It is significant that the policy does not attempt to control an employee's social media use more generally. Its restrictions only apply where there is a link or connection between an employee's social media use and Stagecoach.
26. The policy gives a number of examples of how such a link might be made. It includes saying that the employee works for Stagecoach (for example in their profile or in the course of online discussions) or posting comments about Stagecoach.
27. The policy then goes on to define what is regarded as unacceptable behaviour. A list of examples is given, including:

- a. Conducting themselves in such a way that is detrimental to the company
- b. Engaging in activities on the internet that might bring the company into disrepute
- c. Posting defamatory, offensive or discriminatory remarks on the internet concerning the company, its affiliates, customers, business partners, suppliers, shareholders or other stakeholders
- d. Using the internet in any way to bully, attack or abuse the company, colleagues, customers or suppliers.

28. It is notable that the provisions forbidding defamatory, offensive or discriminatory remarks and to bullying or abuse refer only to a limited class of persons, not to the public as a whole. It is also significant that the policy does not seek to prevent an employee being involved in political discussion using a linked account.

Mr Jeffries' mental health

29. Mr Jeffries has a history of serious depression, which has caused him difficulty since he was a teenager. He takes medication to help him with this condition. In the past he has had suicidal thoughts and, on occasion, sought to take his own life. In 2011 he was hospitalised because of his illness.

Furlough

30. Stagecoach did not produce a witness who was able to give direct evidence about decisions related to Mr Jeffries' furlough. Ms Howe was involved with some discussions about the closure of the Stagecoach Express service, but that closure was not in dispute. No respondent witness had been involved in the decision to furlough Mr Jeffries or with subsequent decisions about his furlough.

31. Ms Jones did give evidence about Stagecoach's general approach to furlough and the process that was applied at her depot. She acknowledged, however, that she had not had any involvement in Mr Jeffries' situation and that the approach to furlough varied between depots.

32. The Tribunal therefore primarily relied on Mr Jeffries' account of his furlough, along with the documents that had been produced. Mr Jeffries was the only witness with personal knowledge of these events. His factual account matched the documentary record and generally the Tribunal found him to be an honest witness on these points. There were occasions, however, when the Tribunal, while accepting Mr Jeffries' evidence as to what had happened, did not accept his interpretation of those events.

33. In the third week of March 2020, Mr Jeffries met with Joanna Howe, Operations Director and his immediate manager Krystian Kaczala. They discussed the imminent closure of the Stagecoach Express service, because the number of passengers was dwindling. This was at the beginning of the covid pandemic. The Prime Minister had announced on the 16th March that the public should stop non-essential contact and travel, but the lockdown had not yet come into effect. The pandemic was having a very serious impact on Stagecoach's operations.

34. The first covid lockdown was announced on 23rd March 2020 and came into effect on the 26th March 2020. Although Stagecoach services continued throughout lockdown, because they were part of the essential services, they were significantly reduced. Ms Jones described the total volume of service being reduced to 30% of its normal level by early April. Approximately 60% of the workforce was furloughed, either because they were clinically extremely vulnerable or because there was insufficient work to justify their attendance.
35. Mr Jeffries met with Mr Kaczala on the 27th March 2020. He was told that he was being placed on furlough, because his role was not needed. The Stagecoach Express service was to be permanently ended and the Park and Ride service was being suspended. There was some dispute at the hearing as to exactly when the Park and Ride service ended. It was suggested to Mr Jeffries that it had stopped at the point that he was placed on furlough. He said it had continued for a short period – perhaps a week. The Tribunal did not think there was any significant difference for our purposes – it was clear that the service had been suspended or was about to be.
36. The decision to place Mr Jeffries on furlough was confirmed by letter dated 30th March 2020, p311.
37. Ms Jones evidence was that, in her depot, identifying those who would be furloughed involved a series of steps. First, those who were clinically vulnerable and needed to shield were identified. Second, there was a call for volunteers. Third, where there were remaining excess staff, there were discussions with a view to agreeing who would be furloughed. She said that through this process she had been able to reach consensus and it was unnecessary to require anyone to go on furlough who was unwilling. She said that, in around the middle of June, the service began to increase again and some employees who had been furloughed returned. At that point, she said, employees were offered the option of rotation – shifting on and off furlough to maximise the number of employees could return to work for at least some of the time.
38. The Tribunal accepts Mr Jeffries' evidence that he did not go through a similar process to that described by Ms Jones. There was no discussion of whether he was clinically vulnerable and he was not asked to volunteer. Instead he was told that his role was not required and that he would therefore be placed on furlough.
39. Although Mr Jeffries had medical conditions – including asthma and diabetes – that might have led to him being identified as clinically vulnerable if they had been considered, that was not the basis on which he was placed on furlough. If it had been, Mr Kaczala would have discussed that with him at the time. The Tribunal accepts Mr Jeffries' evidence that the discussion was about his role, not his medical conditions.
40. It was suggested in cross-examination to Mr Jeffries that he was placed on furlough because of the reduction in work. He described this as 'half right' saying that he understood the reduction in service, but that with his qualifications, he could have worked in other roles, in particular, by returning as a driver. He said that although many other employees were placed on furlough, Stagecoach was still operating and, in certain roles, short of staff.

41. Focusing on the reason that Mr Jeffries was placed on furlough the Tribunal concludes that it was, as he says in his evidence, because of the reduction in work that arose from the closure of the Stagecoach Express and the suspension of the Park and Ride services.
42. Stagecoach East then sent a letter on 21st April 2020, indicating that Mr Jeffries furlough was scheduled to run until 31st May 2020, while noting that this might be subject to change.
43. The Tribunal accepts Mr Jeffries' evidence that lockdown had a serious negative affect on his mental health. He candidly accepts that the first few weeks were pleasant, but after that he found the experience isolating and distressing. His partner was able to return to work, so he spent a lot of time alone. His anti-depressant medication was increased. Mr Jeffries describes himself as extremely anxious and being 'in a very dark place'. His work had been something he took pride in and had been an important coping mechanism, which he was now cut off from. He felt that he had 'been slung on the scrapheap'. He describes difficult sleeping, disengagement from the tasks of day to day life, such as washing and dressing, and bouts of anger.
44. Mr Jeffries wrote an email to Mr Kaczala and a number of other managers on 12th May 2020, p317. He wrote that he had offered and agreed to go on furlough, but was concerned that at that time Rishi Sunak appeared to be considering extending furlough on the basis of a 60% payment, rather than the previous 85%. Mr Jeffries indicated that he would be unsatisfied with this, since he could not afford to be paid at that level (he pointed out that he could earn more as a driver). He indicated that he was offering his services and wanted to return to work as soon as possible.
45. On 24th May Mr Jeffries also messaged Joel Mitchell, the Managing Director of Stagecoach East, p318-321. He referred to his email asking to return to work and reiterated his desire to return to work once the current furlough expired. He also wrote that 'I also need to get back to work for my own sanity. Someone who severely suffered mental health issues needs to be at work'.
46. Mr Mitchell replied saying that, at the moment it appeared to be only drivers, engineers and cleaners who would be able to return. He said that most of the HQ staff would remain on furlough for the time being. Mr Jeffries responded that he understood, that he wanted to express his willingness to return to work, but understood if he needed to be furloughed into June.
47. On 27th May 2020 Mr Jeffries was sent a further letter, indicating that furlough would be extended until 4th June 2020. It was suggested to Mr Jeffries that this was a response to his 12th May email, which he did not accept. It appears to the Tribunal to be a generic letter, rather than something produced in reply to Mr Jeffries' email.
48. In his evidence to the tribunal Mr Jeffries describes his e-mail and his messages to Mr. Mitchell as a plea to be returned to work because of his mental health. This is not, however, a reasonable interpretation of how they would have been read at the time.

49. Nothing in Mr Jeffries e-mail suggests significant distress. Although he refers to “going stir crazy”, it is unlikely this would be understood as a reference to a mental health issue and certainly not a serious one. In context, it appears to be a reference to the sort of boredom and frustration that anyone might experience during lockdown. Mr Jeffries’ primary focus was on the possible financial consequences of a change to the furlough scheme. A reasonable reader of the e-mail would not have concluded from the email that Mr Jeffries was in serious mental health distress or that he was requesting to return to work on that basis.
50. Similarly Mr Jeffries’ messages to Mr Mitchell do not indicate serious mental health distress or a request to return to work on that basis. He does refer to his mental health and his wish to return to work, but the connection is expressed in general terms. When Mr Mitchell indicates that it unlikely that Mr Jeffries will be able to return, Mr Jeffries immediately indicated that he understood the situation and did not press the matter.
51. Although there was no correspondence confirming a further extension of furlough, there is no dispute that Mr Jeffries remained on furlough until his furlough was cancelled to facilitate his participation with the investigation.
52. The Tribunal did not accept that Stagecoach’s decision not to return Mr Jeffries to work was in any way connected either to his disability or something related to it. There does not appear to have been an active decision at all. Mr Jeffries remained on furlough because the circumstances that had led to the original decision to place him there still remained and nothing had occurred that caused Stagecoach to look again at the decision, beyond the general consideration of how all furlough would be applied to all staff.
53. Although Mr Jeffries’ perception is that he was pleading to be returned to work on the basis of his mental health, the evidence does not support this. Given the content of the two communications he relies upon, it is unlikely that anyone at Stagecoach applied their mind to the situation in a way that took any account of Mr Jeffries’ mental health. It was not raised in any way in the email and only obliquely in the messages to Mr Mitchell. Mr Mitchell’s response plainly considered Mr Jeffries’ situation by reference to the general rules about who would return.
54. This was not a situation in which the possibility that Mr Jeffries might return was under consideration, but rejected either because of his mental health or something related to it. Rather, it was a situation where there was no significant consideration of Mr Jeffries’ individual circumstances at all.

Twitter post

55. On 11th June 2020 Mr Jeffries became involved in a twitter conversation. LBC (a talk radio company) had announced, in a tweet, that Nigel Farage would be stepping down from LBC with immediate effect.
56. Dr Shola Mos-Shogbamimu had responded to this tweet, writing:

*Nigel Farage is out of LBC? Couldn't have happened to a nicer person.
We thank him for nothing.*

57. Dr Mos-Shogbamimu is a black woman. Her twitter biography describes her as a lawyer and a Political / Women's Rights Activist. She is the author of Why I Resist: Don't define my Black identity. Her twitter account has approximately 150,000 followers. For the purposes of this case it is sufficient to note that she is a prominent activist / campaigner on race and sex issues.

58. Mr Jeffries replied to this tweet, writing:

You talk so much bollocks .. i watches that on @GMB and @Nigel_Farage was spot on. Black people (some) have a massive chip on their shoulders and a few are trying to change history. No this is the UK, don't like it, find a country to suit your likes !!!! #getiverit

59. Stagecoach East learnt of the tweet when two twitter accounts responded, tagging Stagecoach South East's official twitter account into their tweets. One asked Stagecoach East 'This guy apparently works for you, is he setting a good example?'. The tweet included a link to Mr Jeffries' Facebook account.

60. The other commented 'I don't think it's OK that people who are associated with your business display this kind of racist attitude, quite openly and without any level of shame.'

61. As a result there was a telephone investigation meeting conducted by Krystian Kaczala, an Operations Manager on 15th June 2020. Mr Kaczala took a note of the meeting, p233-234. The Tribunal accepted that it is a broadly accurate account of what occurred.

62. Mr Jeffries was told that there had been complaints about his tweet and that Stagecoach East would be investigating. Mr Jeffries confirmed that the twitter account was his and that he had posted the tweet. He disagreed that the tweet suggested a racist attitude and said that he had no intention of being racist or discriminatory to anyone. He said that the tweet was a statement of his beliefs and that he had the freedom of speech to share his thoughts.

63. Mr Jeffries also said that his twitter account did not state that he worked for Stagecoach. He drew a comparison with a number of managers who did explicitly refer to their employment with Stagecoach on twitter and said that no action was taken against them.

64. Mr Jeffries also made reference to his mental health, saying that he was not in the right frame of mind and that lockdown had had a very negative impact on him.

65. At the end of the meeting Mr Kaczala suspended Mr Jeffries and recommended a disciplinary meeting to consider possible breach of Stagecoach East's Social Networking Policy.

66. In the course of his investigation Mr Kaczala examined Mr Jeffries' twitter and Facebook accounts to consider whether they contained a link to Stagecoach. A screen shot of Mr Jeffries' Facebook bio refers to his role as Special Services Supervisor, p242. Although the screenshot is truncated and does not show a reference to Stagecoach there is no dispute that it was apparent from Mr Jeffries Facebook profile that he worked for Stagecoach.

67. Mr Kaczala identified a number of relevant tweets:

- a. 15th February 2020: Mr Jeffries replies to a member of the public who has requested a Stagecoach goodie bag, writing 'Come to Chatham Bus Station travel office, I'm there representing Stagecoach, I'll put one by.', p241
- b. 28th March 2020: Mr Jeffries had replied to a tweet from the office Stagecoach South East account about the last day of the Express M2 coach service. He wrote 'A very emotional day, working on this project from the very beginning, setting up, running moving forward to make it better. Proud and I'm sure it will be back.', p239-240
- c. 28th March 2020: Mr Jeffries retweeted a tweet from the official Stagecoach South East account requesting that members of the public use their central information hub, since the route planners had not been fully updated, p240.

Disciplinary hearing

68. Mr Jeffries attended a disciplinary hearing on 23rd June 2020. It was conducted by Ms Katherine Jones, an Operations Manager at Stagecoach East. Given the ongoing covid lockdown at the time it took place by telephone. Mr Jeffries attended alone.

69. On 19th June 2020 Ms Jones sent Mr Jeffries a letter notifying him of the disciplinary hearing. That set out the subject of the hearing as 'Breach of the social networking policy, bringing the company into disrepute, conduct themselves in such a way that is detrimental to the company, post defamatory, offensive or discriminatory remarks on the internet concerning the company, its affiliates, customers, business partners and suppliers, shareholders or other stakeholders, use the internet in any way to bully, attack or abuse the company, colleagues, customers or suppliers'

70. Mr Jeffries was also provided in advance with the written material generated during the investigation, p229-242. This included the tweet that was the subject of the complaint, notes from his investigation meeting, a copy of the Social Networking policy, copies of other tweets from his account that might suggest a link to Stagecoach and his Facebook profile.

71. There was a notetaker at the meeting and his notes had been produced, p103-107. We accept that these are a broadly accurate account of the meeting.

72. Early in the meeting Mr Jeffries described the allegations as 'utter nonsense' and, at Ms Jones' invitation explained why this was his view. He made a number of different points, which can be summarised as follows:

- a. That he was entitled to his opinion and had a right to express it. He refers to freedom of speech and democracy in support of this.
- b. He denies being racist. He says that he has been advised by a solicitor that his tweet has no racial content. He says that he does believe that black people have a chip on their shoulder and that this comment is a fact. He says that he could have said a lot worse, but decided not to.

- c. He refers on a number of occasions to his mental health. He says that he has been on furlough since 17th March 2020 and is not himself. Later he says that he is depressed and is on medication. He says that, recently, he has been very upset and become a different person. He says that he is in a terrible place. He refers to a number of suicide attempts, approximately a decade ago. He agrees that the tweet was sent in anger.
 - d. He expressed his commitment to the company and his pride in his work. He refers to having done a great job recently on the M2 route.
 - e. Mr Jeffries also says that, following the incident, he has deleted his Facebook and Twitter accounts.
73. The meeting was then adjourned at 10.45 and resumed at 11.15. Ms Jones begins by referring to Mr Jeffries' mental health and saying that she hopes his doctor will be of help. Mr Jeffries replies that he has off days and just wants to get back to work. He says that he is down and lonely, which he describes as 'a shit state of affairs'.
74. There is further discussion of the tweet and the Stagecoach policies. Mr Jeffries continues to deny that the tweet was racist or that he was racist. He also says that he is sorry and that the tweet was out of character. When Ms Jones pursues this point he says that he does regret sending the tweet, but also cannot admit guilt as he is not himself. He says that he apologises for the situation, but that he is also entitled to make such comments in a democratic country.
75. In cross-examination, Ms Jones was asked why, given Mr Jeffries' reference to his mental health, she did not consider a referral to occupational health. She said that, at the time, because Mr Jeffries had mentioned mental health, it had been taken into account, but at the time there was no medical evidence. She said that, because he had not gone into detail about his mental health, a referral was not made.
76. In response to questions from the Tribunal Ms Jones said that she did believe that Mr Jeffries had depression and was on medication. She said that she would accept someone's account on such things unless she had reasons to doubt it. She said that she was aware, since Mr Jeffries had referred to them, of previous suicide attempts, but did not think that his condition in 2020 was of a similar seriousness.
77. The Tribunal asked Ms Jones how Mr Jeffries' mental health factored into her decisions, to which she said that it was definitely factored in, but could not clearly articulate how she did so. She went on to say that she had not understood, at the time, that Mr Jeffries meant to say that his tweet was out of character.
78. The meeting was adjourned again at 11.55 and recommenced at 12.30. Ms Jones explained that she had decided that the tweet amounted to an act of misconduct, because it was in breach of the social media policy. As a result, she had decided to dismiss Mr Jeffries without notice.
79. The Tribunal concluded that Ms Jones genuinely concluded that the tweet Mr Jeffries had posted on 11th June 2020 was racist and in breach of Stagecoach's

Social Media policy. She had considered whether Mr Jeffries's twitter account was linked to Stagecoach, for the purposes of the policy and concluded that it was. She had considered that it was sufficiently serious that Mr Jeffries should be dismissed.

80. In relation to Mr Jeffries' reference to his mental health, we accepted Ms Jones's evidence that she believed that Mr Jeffries had depression and felt a sense of sympathy. This, however, was not a significant factor in her consideration of the misconduct. Overall, we find that she understood Mr Jeffries' reference to his mental health to be a plea for sympathy and clemency. She saw it as Mr Jeffries requesting leniency, because he was going through a difficult time. Given her perception of the seriousness of the event, she did not think there was much weight in this argument – hence her lack of investigation or discussion on this point.
81. Ms Jones did not, in reaching her decision, consider the possibility that Mr Jeffries mental health had contributed to his actions in writing the tweet and therefore might be a form of mitigation.
82. It was not suggested to Ms Jones in cross-examination that she was prejudiced against Mr Jeffries because of his disability or that she was influenced negatively in her decision as a result of his symptoms of depression. The thrust of Mr Jeffries' challenges to her was that she had not taken enough notice of his disability and that he should have been referred to Occupational Health.
83. For completeness, the Tribunal concluded that Ms Jones was not adversely influenced in her decision by anything connected with Mr Jeffries disability.
84. The meeting was followed by a letter of dismissal, dated 23rd June 2020, p108.

First Appeal

85. Mr Jeffries appealed the dismissal and there was an appeal meeting on 6th July 2020. The appeal was conducted by Ms Joanne Howe. It was attended by Mr Jeffries and Mr McDonald, a colleague.
86. Prior to the meeting Mr Jeffries had submitted a written statement, setting out the basis for his appeal, p244-250.
87. In his statement Mr Jeffries made a number of points, in particular:
 - a. That he had been shielding since 17th March. This meant he was not working and remaining at home. Lockdown had negatively effected his mental health, especially since his partner was working meaning Mr Jeffries was often alone.
 - b. That social media was a heated, volatile place. Mr Jeffries writes that he had been guilty of being drawn into a debate and expressing his personal opinion. He says that his comments were not racist, but that he had acted in a way that was out of character for him, because he had felt threatened and offended due to his current mindset.
 - c. He argues that the decision to dismiss had been disproportionate, because he had not brought Stagecoach into disrepute and the negative responses to his tweet were very small.

88. In his statement Mr Jeffries also says that, after the decision to dismiss, his mental health was very seriously impacted. He described having made a suicide attempt and having been saved by his neighbour. He also says that he had been assessed by his Mental Health team and diagnosed with 'Freeze Trauma' and PTSD.
89. In the appeal meeting Mr Jeffries expanded on his statement to emphasise that the tweet had only been published for a few hours before he had deleted it and to emphasise his mental health condition.
90. Ms Howe then adjourned the meeting to consider. Ms Howe also asked Mr Jeffries for any supplementary information regarding his mental health diagnosis and treatment. In response, Mr Jeffries provided a letter from his Community Mental Health Team summarising their initial assessment (p268-269) and a letter confirming a referral for Cognitive Behaviour Therapy (p273).
91. On 9th July 2020 Ms Howe wrote to Mr Jeffries, communicating her decision to uphold the decision to dismiss, p125-130.
92. The panel gave careful consideration to how Ms Howe approached the question of Mr Jeffries' mental health. Different parts of the evidence point in different directions and panel did not reach a single view on this point. It is therefore necessary to deal with the evidence in some detail.
93. In the letter refusing the appeal Ms Howe describes her approach as follows:

You also made reference to your state of mind at the time of posting, your previous mental health problems and the impact that being on furlough has on you. Since our meeting I have considered what you said and contacted you to ask for your supplementary information regarding your diagnosis and treatment. You have been assessed by a mental health nurse who told you that you may have PTSD and / or Freeze trauma and some initial CBT sessions have been planned for to help you.

Whilst I am sympathetic to the situation you are in and the uncertainty of being on furlough you involved yourself in an online debate with comments that are unacceptable to the company code of conduct and social media policy which could be linked back to Stagecoach. You did not have to become involved in this. You were a willing participant in commenting on this and whilst you have referred to mental health issues, I do not think that this is a reason for me to excuse your actions or sufficient mitigation for me to alter the decision made at disciplinary stage.

94. In her witness statement, Ms Howe describes her approach as follows:

I then address Paul's state of mind at the time of posting the tweet, his previous mental health problems, and the impact that furlough had on him. I confirmed that whilst I was sympathetic to his situation, in particular due to the unavoidable uncertainty of furlough and the covid-19 pandemic, this did not detract from the fact that Paul proactively engaged himself in an online debate and publicly posted to an undeterminably wide audience comments

that were in breach of the Respondent's policy on social media use and not in line with its values as per the Code of Conduct.

Paul was a willing participant in this debate and whilst, as previously stated, I was sympathetic to Paul's mental health issues, I reasonably believed that I did not consider this to be a reason for or an excuse to the detriment and disrepute caused for the Respondent; and

I therefore confirmed that this did not sufficiently mitigate Paul's actions in order to alter the decision made at the disciplinary stage.

95. In cross-examination, Ms Howe was taken to a section of her notes, which ask "Should I consider his mental health mitigation. Are we obliged to? Concern that it will be seen as get out of jail free card" She said that this was part of her brainstorming before seeking legal advice on the correct approach to her decision. Her evidence was that, having taken advice, she recognised that she should take mental health issues into account and did so.
96. She said that she did consider whether Mr Jeffries was seeking to use his mental health issues as an excuse, but concluded that he was not. She did, however, go on to conclude that considering all the circumstances, including Mr Jeffries' mental health, dismissal was the correct outcome.
97. It was suggested to Ms Howe that the reference to a 'get out of jail card' suggested that she did not consider it as potential mitigation and assumed that Mr Jeffries' reliance on his mental health was not genuine. Ms Howe denied this. She went on to say that she thought Mr Jeffries' tweet was unacceptable, notwithstanding his mental health difficulties.
98. In response to questions from the Tribunal about her approach Ms Howe said that she had asked herself whether Mr Jeffries was able to understand what he was doing and that what he was doing was wrong. She concluded that he was able to understand what he was saying and the way that it might draw Stagecoach into disrepute. She said that, if he had not been able to understand the issue, she might have considered a reduced sanction, but that she was satisfied that he did understand.
99. The Tribunal concluded that there was some disparity between the account given in Ms Howe's appeal letter and that given in evidence to the Tribunal.
100. In the letter, Ms Howe says that she does not consider that Mr Jeffries' mental health condition is a reason to excuse his actions or offers sufficient mitigation. This suggests that she accepts that his mental health did contribute to his actions and that this is a factor she should consider in mitigation of the misconduct. But, having considered it, she concluded that it was not sufficient mitigation to change the decision to dismiss.
101. Ms Howe's evidence in the Tribunal suggests a somewhat different approach, because it suggests she might have focused more narrowly on the issue of whether Mr Jeffries was able to understand his actions, rather than the possibility that his behaviour had been affected by his depression.

102. Members of the panel have reached different conclusions in relation to Ms Howe's approach. The majority of the panel, including the Employment Judge, concluded that Ms Howe considered Mr Jeffries' mental health in general and considered its affect on his actions. She accepted that Mr Jeffries had serious mental health conditions broadly as he described. She regarded them as mitigation for his misconduct in sending the tweet. She also, however, concluded that, given the seriousness of the misconduct in sending the tweet, this mitigation was not enough to overturn the dismissal.
103. She did not seek to investigate further, because having accepted Mr Jeffries' account of his mental state, but also concluded that it was insufficient mitigation to overturn the dismissal, it was not necessary or appropriate to go further. A formal diagnosis, in her view, would not have made any difference to her decision. And, since she had already accepted Mr Jeffries' account of his circumstances, it was unnecessary to gather further evidence to establish that.
104. In reaching this conclusion, the majority placed particular reliance on what Ms Howe wrote in her letter setting out her decision and reasoning. This is a contemporaneous document, prepared at the time that Ms Howe made her decision. If Ms Howe had focussed on whether Mr Jeffries could understand his actions, but concluded that he could, it is likely that she would have said so in her letter. The letter instead refers to considering the mental health conditions as potential mitigation.
105. The majority concluded that the contemporaneous letter is more likely to be reliable than Ms Howe's recollection at the hearing some years later. It was also prepared before Mr Wallis' decision. As discussed below, Mr Wallis did approach the question of Mr Jeffries' mental health from the perspective of considering whether he had the capacity to understand his actions. In preparing for this hearing, Ms Howe will have reviewed that material and it is possible that her memory of her own decision has been influenced by that.
106. The minority concluded that Ms Howe did approach the issue of Mr Jeffries' mental health more narrowly, by considering only his capacity to understand his actions. The minority concluded that Ms Howe's oral evidence on this point was likely to be more accurate than her letter. This was because Ms Howe was likely to express herself with more care and precision in the context of tribunal proceedings. Also, that the process of questioning involved in these proceedings was more likely to fully elicit her thought processes.
107. Except for the suggestion that Ms Howe had regarded his reference to mental health as a 'get out of jail free card' Mr Jeffries did not suggest to her that she had been influenced negatively by his mental health or symptoms of depression. As with Ms Jones, the main thrust of Mr Jeffries' criticism of Ms Howe's approach was that she had not taken sufficient account of his mental health or referred him to Occupational Health.
108. For completeness, the Tribunal concluded that Ms Howe was not adversely influenced in her decision by anything connected with Mr Jeffries' disability. As set out above, the Tribunal found that she had taken it into account as potential mitigation (although the Majority and Minority found that she did so in significantly different ways).

Final appeal meeting

109. Mr Jeffries appealed this outcome and, in accordance with Stagecoach's disciplinary process a Final appeal meeting was convened. This was heard by Mr Mark Wallis, Engineering Director. It took place on 14th July 2020.
110. In the course of his evidence, Mr Wallis was challenged about the status of his notes of the meeting and the production of the outcome letter that was produced. The notes that have been disclosed, p134-135, refer only to Mr Wallis' explanation of the outcome of the meeting, rather than any of the earlier discussion. Mr Jeffries also criticised the outcome letter, p136-139. He said that it was unprofessional, contained spelling / grammatical errors and did not use the correct font. At one stage Mr Jeffries referred to the letter as being 'fake', because it was not signed. Mr Wallis' evidence was that the letter would have been produced from his notes, which would have been typed by one of the secretarial staff and then confirmed by him.
111. The Tribunal did not accept that there was anything untoward about the production of the outcome letter. Mr Jeffries did not allege that it misrepresented what was said at the appeal meeting or gave any different outcome than Mr Wallis had expressed orally.
112. At the appeal meeting Mr Jeffries again raised his mental health and argued that, in the circumstances, dismissal had been too harsh an action. There was also discussion of whether Mr Jeffries' twitter account was linked to Stagecoach.
113. Mr Wallis asked Mr Jeffries if he was sorry about the tweet. Mr Jeffries said that he was sorry that the tweet had led him to this position, but that he felt had had not been treated fairly. He repeated his view that the tweet was not a breach of the social media policy.
114. Mr Wallis then adjourned the meeting in order to refer Mr Jeffries to occupational health. In his evidence Mr Wallis said that he decided to do so on the basis of the conversation during the meeting. He said that Mr Jeffries was emotional, but would swing between expressing very strong views and then being quite passive. He said that he felt that it was important to make sure that Mr Jeffries understood the policy and was able to participate in the appeal process.
115. Mr Jeffries was assessed on 23rd July 2020 by Dr Frixos Kopsacheilis. The assessment was conducted by telephone. Dr Kopsachelis produced a report, p131-132.
116. Although the instructions to Dr Kopsacheilis have not been produced, the specific questions asked by Mr Wallis are referred to in that report. They were:
- a. How Mr Jeffries' condition affects his ability to adhere to the company's policies and procedures and what the prognosis might be?
 - b. Whether Mr Jeffries has a disability for the purposes of the Equality Act?

117. These questions are significant for the insight that they give into Mr Wallis' thinking about the relevance of Mr Jeffries' mental health. He was plainly concerned that Mr Jeffries might not be able to understand or comply with the social media policy.
118. During cross-examination Mr Wallis said that his final decision was "based on whether you [Mr Jeffries] had breached the policy, whether you'd brought the company into dispute and the mitigation you'd put forward – whether you were able to understand what you'd done".
119. In response to questions from the Tribunal Mr Wallis said that he wanted to make sure that Mr Jeffries was able to understand the policy. If he could not, he suggested, that would have been an important factor in his decision.
120. All of this indicates that Mr Wallis took a relatively narrow approach to the relevance of Mr Jeffries mental health. He was focussed on whether the mental health issues were so serious that Mr Jeffries lacked the ability to understand the policy or his own actions.
121. At one point when questioned by the Tribunal Mr Wallis said that he understood that Mr Jeffries was suggesting that his mental health should be considered as mitigation, but that he didn't agree that it had had any impact on him sending the tweet. That, Mr Wallis said, was why his focus was on making sure that he understood the policy. If this evidence was accepted, it would suggest that Mr Wallis took a wider view of the relevance of Mr Jeffries mental health than the other evidence suggests.
122. On balance, however, the Tribunal concluded that this was not the case. In the majority of his evidence Mr Wallis indicated that his focus was on whether Mr Jeffries was able to understand the policy. Also, it seems unlikely that Mr Wallis would have concluded that Mr Jeffries' mental health did not contribute to his actions in sending the tweet, while also being uncertain whether the same condition rendered him unable to understand the social media policy.
123. Dr Kopsacheilis' report summarised Mr Jeffries' mental health history. It concluded that he had had depression for many years and it was likely to amount to a disability under the Equality Act. In relation to Mr Jeffries' ability to understand the social media policy, it suggested that he was, particularly given that his mental health was improving.
124. The appeal meeting was reconvened on 6th August 2020. Mr Wallis said that he was upholding the decision to dismiss on the basis of gross misconduct. He said that he had concluded that Mr Jeffries had breached the social media policy and brought Stagecoach into disrepute. Dr Kopsacheilis' report had indicated that Mr Jeffries was able to understand the policy and Mr Wallis accepted that conclusion. He said that he was therefore upholding the decision to dismiss.
125. Mr Wallis' letter confirming this decision was sent on 26th August 2020, p136-139.

The law

Direct discrimination

126. Following s13 and s39 of the Equality Act 2010, we must determine whether the respondent, by subjecting the claimant to a detriment, discriminated against him by treating him less favourably than it treated or would have treated someone else, because of a protected characteristic.
127. In this case the protected characteristic relied upon by the claimant is his disability.
128. A detriment is anything that a reasonable person in the claimant's place would or might consider to their disadvantage. It does not require that there be physical or economic consequences for the claimant – but an unjustified sense of grievance is not a detriment, see *Shammon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.
129. Consideration of direct discrimination is an inherently comparative exercise. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator was or would be. The comparator may be an 'actual comparator', that is someone in materially the same circumstances of the claimant. The tribunal may also need to consider how a 'hypothetical comparator' would have been treated. In some cases, identifying a suitable hypothetical comparator may be difficult and it may be appropriate to focus on considering why a claimant was treated in a particular way, using any evidence as to how other people are treated to inform that view, even if they are in materially different circumstances.
130. Direct discrimination is not necessarily conscious or deliberate. The tribunal must decide 'what, consciously or unconsciously, was the reason for the treatment', see *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48. For there to be direct discrimination it is sufficient that the protected characteristic be a material influence on the reason for the treatment.
131. In relation to all of this, the burden of proof is on the claimant initially to establish facts from which the tribunal could decide, in the absence of any other explanation, that the respondent discriminated. This requires more than a difference in treatment combined with a difference in protected characteristic, see *Madarassy v Nomura International PLC* [2007] ICR 867. There must be something further from which it could be concluded that the protected characteristic influenced the decision. If this is established it is for the respondent to show that they did not discriminate.
132. If, however, a tribunal is able to make positive findings on the evidence it is not necessary to apply the burden of proof provisions mechanistically. In such a case a Tribunal may proceed directly to considering the reason for the treatment, see *Hewage v Grampian Health Board* [2012] UKSC 37.

Discrimination arising in consequence of disability

133. s15 Equality Act 2015 defines discrimination arising from disability. This occurs if a person treats someone unfavourably because of something arising in consequence of that person's disability.
134. This requires a tribunal dealing with a s15 complaint to consider:
- a. Whether the claimant has been treated unfavourably;
 - b. The reason for that treatment;
 - c. Whether the reason is something arising in consequence of the employee's disability;
 - d. Whether the employer knew, or could reasonably have been expected to know about the disability; and
 - e. Whether the treatment can be justified by the employer (i.e. whether the employer can show that it was a proportionate means of achieving a legitimate aim.
135. Whether something arises in consequence of a disability must be considered on an objective basis. A respondent's belief as to whether it did or not is irrelevant, see *Pnaiser v NHS England* [2016] IRLR 170.
136. The reason for the treatment, however, requires consideration of the reason in the mind of the person who allegedly discriminated. In the same way as direct discrimination, the reason may be conscious or unconscious. It is also sufficient for something to have a material impact on the unfavourable treatment.
137. The burden of proof provisions apply to s15 in the same way as they do to direct discrimination. Similarly, where a tribunal is able to make positive findings these do not have to be applied mechanistically.

Unfair dismissal

138. The general approach to determining whether a dismissal is fair is set out in s98 Employment Rights Act 1996. s98(1) requires the employer to establish the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(2). In this case the reason relied upon is conduct. The reason for dismissal is the factor or factors operating on the mind of the person who made the decision to dismiss.
139. If an employer succeeds in showing that the reason for the dismissal is potentially fair, the Tribunal must consider whether the dismissal was fair. S98(4) requires that, in doing so, it consider whether in all the circumstances (including the size and administrative resources of the employer) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. The fairness of the dismissal must also be determined in accordance with the equity and substantial merits of the case. Neither the employer nor the employee bears the burden of proof on the question of fairness, which is to be approached neutrally.
140. A fundamental element of considering fairness properly, in the context of a claim for unfair dismissal, is that a tribunal must not substitute its own view

for that of the employer. Instead, the Tribunal's role is to consider the employer's actions and decide whether they were within the range of possible options open to a reasonable employer in the circumstances. This is often known as the 'range of reasonable responses'. See in particular *BHS Ltd v Burchell* [1980] ICR 303 and *Iceland Frozen Food v Jones* [1983] ICR 17.

141. This means that the tribunal must not 'stand in the shoes' of the employer and decide whether they would have reached the same decision. That would, inherently, involve the Tribunal replacing the employer's decision with their own. The Tribunal must focus on assessing the employer's decision, by reference to the range of reasonable responses. At the same time, that range is not infinitely wide and a finding that dismissal fell outside the range should not inevitably suggest that a Tribunal has substituted its own view for that of the employer, see *Newbound v Thames Water Utilities Ltd* [2015] IRLR 734.

142. In the context of a conduct dismissal it is appropriate to analyse an employer's decision to dismiss by applying the Burchill test – drawn from the case of *BHS Ltd v Burchell* [1980] ICR 303, although it has been further developed by subsequent case-law. This requires consideration of:

- a. Did the Respondent have an honest belief in the allegations?
- b. Did the Respondent have reasonable grounds to support that belief?
- c. Did the Respondent carry out a reasonable investigation into the allegations?
- d. Given all the circumstances, were the allegations sufficiently serious that dismissal fell within the range of reasonable responses open to a reasonable employer?

143. This is a case where consideration of the claimant's human rights, as laid down in the European Convention on Human Rights and the Human Rights Act 1998, are relevant.

144. In particular, Mr Jeffries has placed particular reliance on Article 10: Freedom of expression. This provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

145. Although neither party expressly referred to it, the Tribunal concluded that Article 8: Right to respect for private and family life was also relevant.
146. It is well established that proper resolution of an unfair dismissal complaint may involve consideration of the convention rights, see *X v Y* [2004] IRLR 625.
147. In doing so a tribunal will need to consider whether the circumstances of dismissal engage a relevant convention right. If they do so, the tribunal will need to consider the convention rights as part of its decision. Where a tribunal is considering s98 and the range of reasonable responses test, that assessment is sufficiently robust, flexible and objective to provide the necessary scrutiny, see *Turner v East Midlands Trains Ltd* [2013] IRLR 107. This is, in part, because the European authorities recognise a similar balancing exercise between the rights on an employee and the managerial prerogative of an employer, including the ability to dismiss.
148. This means that the appropriate course is for the tribunal to apply the ordinary test, while bearing in mind the importance of the convention rights and the extent that they may have been infringed either by the decision to dismiss or the process of considering the dismissal. These factors are highly relevant to whether a dismissal falls within the range of reasonable responses.
149. Mr Jeffries referred us to the Court of Appeal's decision in *R (on the application of Miller) v College of Policing* [2021] EWCA Civ 1926. This relates to the application of Hate Crime Operational Guidance, rather than the employment context. It is therefore of limited direct relevance to this case, but provides an important reminder of the significance of the right to freedom of speech.
150. If a Tribunal finds that a dismissal was unfair, but concludes that a fair procedure would or might have led to the employee being fairly dismissed at some future point, the Tribunal will need to determine when that fair dismissal would have taken place (or, alternatively, what the chance of a fair dismissal taking place was).

Breach of contract / Wrongful dismissal

151. The claimant was dismissed summarily, which would only be lawful if he had committed an act of gross misconduct. In determining whether gross misconduct has occurred it is for the tribunal to decide whether the contract was fundamentally breached by an act of serious misconduct. This type of claim is therefore approached quite differently to a complaint of unfair dismissal, where a tribunal is required to focus on the reasonableness of an employer's beliefs and actions.
152. An act of gross misconduct is something more serious than mere misconduct. It must be sufficiently serious and damaging to the relationship to justify summary dismissal. A deliberate refusal to obey a lawful order, significant dishonesty, theft and violence in the workplace are all likely to amount to gross misconduct.

Conclusions

153. The Tribunal reached the following conclusions. They are set out by reference to the agreed list of issues.

Time Limits

154. Given our findings below, it is not necessary to consider the potential time limit issues. They are only relevant to the discrimination complaints, which have been dismissed on other grounds.

Unfair dismissal

Was the claimant dismissed?

155. Yes. It was not in dispute that Mr Jeffries was dismissed by Ms Jones at the end of the disciplinary meeting on the 23rd June 2020.

What was the reason or principal reason for dismissal?

156. The reason for the dismissal was conduct, specifically Mr Jeffries's tweet on 11th June 2020.

Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

157. It did not and the dismissal was therefore unfair.

158. In most respects the Stagecoach managers acted honestly and reasonably. All genuinely believed that Mr Jeffries had committed an act of misconduct which breached Stagecoach's social media policy. A fair procedure was followed: Mr Jeffries received information about the allegations against him and was invited to a series of meetings in which he had an opportunity to respond.

159. The Tribunal has concluded, however, that the respondent failed to consider Mr Jeffries' mental health reasonably. Details of this, together with other important points of dispute are dealt with in more detail below.

Did the respondent have reasonable grounds for its conclusions?

160. In relation to the primary facts of Mr Jeffries' conduct (principally the tweet itself) it is clear that the respondent had reasonable grounds for its conclusions. Indeed, at no stage was there any dispute that Mr Jeffries had posted the relevant tweet.

161. Mr Jeffries does, however, argue that the respondent did not have reasonable grounds to conclude that his twitter account was linked to Stagecoach in the way provided for by the Social Media policy.

162. We do not agree. All the managers involved in the disciplinary process concluded that Mr Jeffries' account was linked to Stagecoach. This conclusion

was reasonable, indeed inevitable, given Mr Jeffries' references to having worked on the Express M2 coach service and from his reference to representing Stagecoach that he is working for the company.

163. Although Mr Jeffries correctly points out that he never explicitly identifies himself as an employee of Stagecoach such an explicit statement is not required to create the necessary link. Any reasonable member of the public, reading his tweets, would conclude that he was closely connected with Stagecoach in some way and almost certainly an employee.

Did the respondent carry out a reasonable investigation in relation to the primary facts of potential misconduct?

164. In terms of the investigation of the primary facts of Mr Jeffries' conduct we have concluded that Stagecoach East's investigation was reasonable. It was a relatively brief and contained investigation, but that reflected the nature of the conduct and the position taken by Mr Jeffries during the process. The tweet and its context was available and was considered by all the managers involved in the process of dismissal. Mr Jeffries accepted that he had posted it. This was not a situation in which the relevant primary facts were in dispute. The investigation reflected that.

165. Mr Jeffries criticises the investigation for not extending to consideration of the motives of the people who complained about his tweets. Essentially, he argues that the complaints were not made in good faith and that he was being trolled or set up.

166. We accept that there are circumstances in which an employer will need to give careful thought to the possible motives of people raising a complaint about an employee. Most obviously, where the primary facts of an allegation are disputed a complaint might be fabricated, exaggerated or the complainant's view might be influenced by bias. Such issues would need to be appropriately investigated.

167. We do not agree, however, that such circumstances existed in this case. As noted above, the primary facts were not in dispute. The context and content of the tweet were clear in its face. Although on occasion they refer to the views of those complaints to support their conclusions, the relevant managers could, and did, form their own view on its nature and seriousness. A reasonable investigation did not require further investigation of the complainants' motives.

Did the respondent carry out a reasonable investigation in relation to Mr Jeffries' mental health and its affect?

168. All three managers gave some consideration to Mr Jeffries' mental health, but did so in different ways. It is appropriate, therefore, to deal with them in turn.

169. Before doing so, it is useful to consider what a reasonable investigation into an employee's mental health required in a case of this nature.

170. A mental health condition may be relevant to a conduct dismissal in a number of different ways. In particular, someone experiencing mental health

problems may behave in ways that are out of character or that are regarded as misconduct by an employer. This may be because their condition has reached the point where they lack the ability to understand or control their actions – for example in the most serious cases of psychosis or mania. But a mental health condition does not have to reach this point to be relevant to a disciplinary decision. In many cases there will be no suggestion that an employee has diminished capacity in the legal sense – but their mental health will nonetheless be relevant to their actions. It may go some way to explain why they have acted as they did and it may be significant potential mitigation for their behaviour which should be considered.

171. This does not mean that an employee with a mental health condition cannot be disciplined or dismissed by their employer. But the nature of their condition and the extent of any impact of mental health on misconduct is a relevant factor that must be reasonably investigated.

Disciplinary hearing

172. We find that Ms Jones, at the disciplinary hearing, did not carry out a reasonable investigation into Mr Jeffries mental health and its affect, if any, on his actions. She accepted that Mr Jeffries was depressed and felt a sense of sympathy. She did not, however, follow up his references to his mental health or appreciate that they might be relevant as potential mitigation for this misconduct.

173. This was not done out of any ill will towards Mr Jeffries, but Ms Jones was on notice of a potentially serious mental health issue, which might have contributed to Mr Jeffries' behaviour and been relevant to consideration of the allegations. She could have asked him about the severity of his condition, asked for medical evidence to support him (which might also have shed light on the nature / extent of his symptoms) or made a referral to occupational health. She did not do so.

174. Overall, the Tribunal concluded that Ms Jones did not think sufficiently clearly about how Mr Jeffries mental health might be relevant to the decision that she had to take. She saw it, essentially, as a request that she exercise leniency because Mr Jeffries was in difficult life circumstances. This was not its only, or indeed main, relevance.

First appeal

175. In relation to the first appeal, there was a difference of view among the panel, arising from the difference in their factual findings set out above. The majority concluded that Ms Howe carried out a reasonable investigation into Mr Jeffries' mental health. She had accepted Mr Jeffries' account and recognised that the mental health problems he was describing were relevant to her consideration as mitigation. Although she did not refer Ms Jeffries to occupational health, this was an approach reasonably open to her. She had access to some medical evidence and, more importantly, accepted Mr Jeffries' account of his conditions. In all the circumstances, it was not necessary to seek further medical evidence.

176. The minority concluded that Ms Howe had not carried out a fair investigation, because she had unreasonably restricted her consideration of Mr Jeffries' mental health condition to the question of capacity. She had not therefore considered it as potential mitigation.

Second appeal

177. In relation to the second appeal, the Tribunal concluded that Mr Wallis had not carried out a fair investigation. He had restricted his consideration of Mr Jeffries' mental health to the question of whether he was able to understand his actions. In doing so, he did not consider the possibility that it might be relevant as mitigation for his misconduct. That was a potentially relevant fact, which needed to be considered.

Consideration of Mr Jeffries mental health overall

178. Stepping back to consider, the fairness of the investigation overall and taking the disciplinary procedure as whole, the Tribunal concluded that the investigation was not fair. The minority concluded that none of the disciplining managers had properly considered Mr Jeffries' mental health condition and that it was a key matter that required proper investigation. This failure was therefore sufficient to mean there had not been a reasonable investigation and made the dismissal unfair.

179. The majority concluded that, although Ms Howe had properly considered Mr Jeffries' mental health, Ms Jones and Mr Wallis had not. It was necessary to consider the process and approach as a whole. This could not be approached mechanically – for example by concluding that since only one third of the disciplinary managers approached the question reasonably the dismissal was therefore unfair. The majority considered the disciplinary process as a whole.

180. The majority bore in mind that, had Stagecoach's disciplinary process involved only one appeal, it is likely that the majority would have concluded that the dismissal was fair – because the errors made at the disciplinary stage had been corrected on appeal. Nonetheless, the majority concluded that where there was a second appeal it represented as important a part of the process as any other and an employer must be held to similar standards of fairness throughout the process. The majority found that, overall, Stagecoach's investigation of Mr Jeffries' mental health fell short of a reasonable investigation. This means that the dismissal was unfair.

181. The Tribunal were therefore unanimous in concluding that the investigation was not reasonable and the dismissal was therefore unfair.

Was dismissal within the range of reasonable responses?

182. Although our conclusion that there was not a reasonable investigation is sufficient to determine the unfair dismissal complaint, it is appropriate to set out our conclusions on whether dismissal in these circumstances was a reasonable sanction. We have heard evidence on these points and they have been fully argued. They may also be relevant to our consideration of remedy in due course, particularly in relation to a possible Polkey reduction.

183. The Tribunal concluded that the sanction of dismissal was within the range of reasonable responses.
184. As noted above, it was reasonable for the managers who dealt with the disciplinary procedure to conclude that Mr Jeffries had linked his twitter account with Stagecoach for the purposes of the social media policy.
185. We must therefore consider whether Mr Jeffries' actions amounted to a breach of that policy and, if it did so, whether it was sufficiently serious to justify dismissal.
186. This requires some consideration of the tweet itself, as well as other relevant factors.
187. In relation to the tweet itself, the Tribunal concluded that the first part of the tweet was unobjectionable. Mr Jeffries was entitled to have a view about Mr Farage and to express it – just as Dr Mos-Shogbaimu was.
188. The second part of the tweet is less neutral. In particular, the suggestion that black people had a chip on their shoulder, in this context, carried the implication that a black person raising issues of racism was doing so out of a emotional sense of grievance that was likely to be illegitimate. The phrase 'chip on their shoulder' also has the connotation of referring to someone of perceived lower status who is acting out towards someone of perceived higher status. This, in the context of a discussion of race and racism, is likely to imply that the black critic was a second-class citizen. It was likely to be perceived as insulting and at least potentially prejudiced.
189. The final part of the tweet and in particular its reference to finding another country if someone did not like the UK goes further and crossed an important line. It would inevitably be read by any reasonable member of the public as suggesting that a black person critical of some element of life in the UK should not have the right to remain here.
190. That expressly suggests that a black people are not full members of the community of the UK, because it suggests that their right to remain here is or should be conditional. It would inevitably be read as forming part of a long history of similar statements, rooted in the idea that someone not white could not be an authentic part of the 'real' United Kingdom. It was likely be perceived as an offensive and racist statement.
191. Taking all of this together it was reasonable for the respondent managers to conclude that the tweet was a racist and inflammatory statement. Given the link between Mr Jeffries and the respondent, which was apparent from his twitter posts, there was a clear possibility of reputational damage.
192. Mr Jeffries suggested that he did not intend a racist meaning and that, in particular, his reference to leaving the UK referred to his own personal history of spending time abroad, which he had valued. In our view, however, this was not relevant, because the respondent was entitled to form a different view of the tweet, provided it was a reasonable one.

193. The requirement on a Stagecoach employee with a linked account is to 'behave appropriately, in ways that are consistent with their duty of trust and confidence as an employee of a Stagecoach Group company and in accordance with Stagecoach Group's Code of Conduct and the principles of ethical behaviour set out in that code'.
194. The Code of Conduct includes clear statements in relation to inclusion and equal opportunities. It requires that 'All people should be treated fairly and with respect' and states 'We do not tolerate discrimination or harassment of any kind based on disability, gender, gender re-assignment, sexual orientation, religion, belief, age, nationality, race or ethnic origin'.
195. Stagecoach sought to rely on two further aspects of the Social Media policy as supporting their submission that dismissal was within the range of reasonable responses. First, they relied upon the provision in the job offer for Mr Jeffries' post of Special Services Supervisor that he 'promote the Company's public image by personal example to the staff by personal appearance and conduct at all time'. The Tribunal concluded that this had no relevance to online behaviour outside the workplace. In context, it is plainly a reference to appearance and conduct at work.
196. Second, the Respondent relies on the references within the Social Media policy that employees must not:
- a. Post defamatory, offensive or discriminatory remarks on the internet concerning the company, its affiliates, customers, business partners, suppliers, shareholders or other stakeholders
 - b. Use the internet in any way to bully, attack or abuse the company, colleagues, customers or suppliers.
197. These provisions, however, are of limited assistance, because they expressly apply to a limited group of persons. Dr Mos-Shogbamimu did not fall within these categories. The provisions are of some assistance in interpreting the policy's more general references to employees conducting themselves in such a way that is detrimental to the company or engaging in activities on the internet that might bring the company into disrepute. They reinforce the natural reading of those provisions, which is that expressions of racism are detrimental and bring the company into disrepute. But they go no further than that.
198. The social media policy must also be considered alongside the rights to free speech and the right to privacy / family life. Both rights were engaged by the restrictions imposed by the social media policy. The policy plainly sought to curtail an employee's free speech in a number of ways. Further, by applying Stagecoach's scrutiny to actions outside the workplace it restricted the employee's private life.
199. These important rights must be considered as part of our consideration of whether dismissal was a reasonable sanction.
200. In this context, the scope of the Social Media policy is of particular importance. The wider the scope the more onerous the policy and the greater the interference with Article 8 and Article 10. This is an important factor in

considering the reasonableness of the policy and therefore the reasonableness of dismissal for any breach.

201. In this context it is significant that the policy here only sought to restrict an employee's social media activity if their account could be linked to Stagecoach. In effect, the employee had a choice: if their account was linked to Stagecoach, they would have to comply with the Social Media policy restrictions. If it was not, the policy did not seek to restrict their social media use outside the restrictions on sharing confidential information and similar.

202. The policy was also limited in the nature of the restrictions it sought to apply. It did not seek to prevent an employee with a linked social media account from commenting on politics or matters of public controversy. If Mr Jeffries' post had simply expressed support for Mr Farage or disagreement with Dr Mos-Shogbamimu it would not have infringed the policy.

203. The Tribunal concluded that it was reasonable for the social media policy to seek to restrict its employees behaving online in a way that contradicted its code of conduct on matters such as race. This was particularly so in the context of the Stagecoach's operations – it provided a public service to a wide demographic. It was likely that, if employees publicly associated with Stagecoach expressed views that were perceived as racist, Stagecoach would be seen as implicated in that racism. That would inevitable lead to difficulties in the running of the business.

204. The restriction could not be too great, bearing in mind both Article 8 and 10. A complete ban on expressing a politically view or a matter of public controversy would fall outside the options open to a reasonable employer and dismissal on such a basis would be unfair.

205. Stagecoach was, however, entitled to require that – on a social media account linked with them – that an employee not express a view that was racially offensive. Such a policy was open to a reasonable employer and an employee could be fairly dismissed on that basis.

206. Stepping back to consider all of these matters in the round, the Tribunal considered that dismissal was a sanction that a reasonable employer might apply.

Wrongful dismissal / Notice pay

207. The sole issue for the Tribunal with regard to these claims is whether Mr Jeffries was guilty of gross misconduct.

208. The Tribunal has concluded that he was not and that he was therefore wrongfully dismissed.

209. The Tribunal concluded that Mr Jeffries was guilty of misconduct, in that his tweet did breach the social media policy. The Tribunal concluded that Mr Jeffries' twitter account was connected to Stagecoach. There were clear references to Mr Jeffries' work for them. The tweet was a breach of that policy. It did expres a racist view in an offensive way and would be read in that way by

a reasonable member of the public. It was therefore likely to bring the respondent into disrepute and have a detrimental effect on them.

210. Taking all the circumstances into account, however, the Tribunal concluded that the misconduct was not sufficiently serious to amount to gross misconduct. The Tribunal had regard in particular to the following:

- a. Mr Jeffries did not intend to breach the policy. There was no element of deliberate disobedience or insubordination in his actions.
- b. The incident was a single act of misconduct.
- c. The misconduct took place outside the workplace.
- d. Although the tweet breached the policy, it was in the context of a robust political debate and had to be read in that context.
- e. The Tribunal accepted that Mr Jeffries' actions were affected by his mental health and by his depression at the time. He expressed himself in an angry and disinhibited way, that he would not have done but for his depression. This did not excuse his tweet, but was a significant mitigating factor.

211. Taking all of these factors together, the Tribunal concluded that, although Mr Jeffries' tweet was close to the line of gross misconduct, it did not reach it.

Disability

Did the claimant have a disability?

212. Yes, the respondent now accepts that Mr Jeffries was disabled at the relevant times, as a result of his depression.

Direct discrimination

213. Mr Jeffries alleges that Stagecoach did the following:

- a. Pursued disciplinary action against him rather than suspending it on the basis of the OH advice as to his disability;
- b. Failed to accept the medical advice presented to it;
- c. Dismissed him;

214. In relation to the disciplinary action and dismissal, Stagecoach plainly did do those things as alleged. In relation to the medical evidence, the Tribunal found that both Ms Howe and Mr Wallis considered the medical evidence before them and accepted what it said. Neither proceeded on the basis that Mr Jeffries was fabricating his mental health condition or that it was not essentially as he and the medical material before them described it.

215. The Tribunal concluded that this was a case where it was appropriate to proceed directly to the question of why Stagecoach pursued disciplinary action and ultimately dismissed Mr Jeffries.

216. The Tribunal found that in both cases the reason was that the Stagecoach managers involved were concerned about Mr Jeffries' tweet and regarded it as an act of misconduct. Mr Jeffries would have been treated no

differently had he not been disabled. He was not disciplined or dismissed because of his disability, but because of his tweet. His disability had no negative impact on any of the decisions made by Stagecoach managers.

Discrimination arising from disability

217. Mr Jeffries alleges that Stagecoach treated him unfavourably by:
- a. Placing him on furlough leave from 17th March 2020 onwards;
 - b. Ignoring his repeated emails and texts requesting to return to work;
 - c. Pursuing and continuing with disciplinary action, rather than suspending the process on the basis of OH advice as to his disability;
 - d. Dismissing him
218. In relation to placing him on furlough, proceeding with disciplinary action and dismissing Mr Jeffries the Tribunal concluded that Stagecoach did treat Mr Jeffries in this way and it did amount to unfavourable treatment.
219. In relation to not returning Mr Jeffries to work, the Tribunal found that Mr Jeffries' formulation of what had happened was unfair. Stagecoach had not ignored repeated email and texts. Mr Jeffries' perception that, at the time, he was pleading to be returned to work is simply inaccurate.
220. At the same time, the Tribunal did not think that it was appropriate to approach the allegation in a narrow or technical way. The core of Mr Jeffries' complaint was that Stagecoach kept him on furlough rather than returning him to work. That did happen and, given the low threshold involved, was plainly unfavourable treatment.
221. In the agreed list of issues, Mr Jeffries' complaint in relation to what arose in consequence of his disability is described as 'mood swings on a daily basis'. The Tribunal accepted that at the relevant time, he was experiencing mood swings and that this arose in consequence of his disability.
222. The Tribunal concluded that this was a case where it was appropriate to proceed directly to the question of why Stagecoach had acted as set out above. The Tribunal concluded that these actions were unrelated to Mr Jeffries' mood swings or any other symptoms of depression.
223. Mr Jeffries was placed on furlough because of the closure of the services that he was responsible for, in the context of the covid pandemic and lockdown. He remained on furlough because this circumstance persisted.
224. In relation to the disciplinary action and the dismissal, this was because of Mr Jeffries' actions in sending the 11th June tweet. None of the managers were influenced to treat him unfavourably by anything connected to his mood swings or any other symptom of his depression.
225. Although, as set out above, the Tribunal concluded that the Stagecoach managers did not take sufficient account of Mr Jeffries' mental health when considering the decision to dismiss, this did not give rise to a complaint under s15.

Breach of contract

226. The Tribunal concluded that Mr Jeffries had not established that he had a contractual right to work at the Herne Bay Depot prior to 7th November 2017 or that he was entitled to be paid based on his previous seniority. He had not demonstrated that that he had reached a contractually binding agreement with Stagecoach to that effect.

227. Since the burden of proof was on Mr Jeffries to prove his case in relation to the breach of contract, the Tribunal concluded that it could not be satisfied that there had been any underpayment of wages.

Employment Judge Reed
Date: 25 May 2023