



EMPLOYMENT TRIBUNALS

Claimant: Mr A Pieri

Respondent: Royal Mail Group Ltd

Heard at: Reading **On:** 22-25 January 2024

Before: Employment Judge Anstis
Ms H T Edwards
Mrs A Brown

Representation

Claimant: Mr D Robson (solicitor)

Respondent: Mr R Chaudry (solicitor)

REASONS

INTRODUCTION

1. These are the tribunal's written reasons for the judgment of 25 January 2024. They are prepared at the request of the claimant.
2. The claimant worked for the respondent as an "Operational Postal Grade" employee. He was a HGV driver. By the time of his dismissal he had worked for the respondent for over twenty years, most recently based at Greenford Mail Centre.
3. He brings claims of unfair dismissal and disability discrimination.
4. The respondent accepts that at all material times the claimant was disabled by reason of diabetes and depression and anxiety.
5. The disability discrimination claims are of discrimination arising from disability (in relation to his dismissal), direct disability discrimination, disability-related harassment and of a failure to make reasonable adjustments.
6. The claims of a failure to make reasonable adjustments were withdrawn during the hearing and are dismissed on withdrawal.
7. The claims of direct disability discrimination and disability-related harassment relate to the same alleged act by Adam Hinckley (his second line manager) –

that is, “*in the summer of 2021 ... instruct[ing] the claimant not to mention his diabetes when completing his driver’s declaration of the same year*”.

8. It was clear in the hearing that the claimant was in some difficulty with the claims of direct disability discrimination and disability-related harassment. They were not withdrawn, but they were also not mentioned by Mr Robson in his closing submissions. We can deal with them briefly in the following way: (i) the claimant gave no evidence as to what this instruction was, when it occurred and how it came about, (ii) the claims were plainly out of time and the claimant gave no indication as to why they were brought out of time, and (iii) Mr Hinckley gave compelling evidence that he had not said it, and explained in some detail why he would not say such a thing given (a) his responsibilities as licence holder for the respondent’s vehicle operations in West London, and (b) previous experience with a very difficult health and safety investigation following a fatal accident on the respondent’s premises. Accordingly we find that (i) the alleged act of direct discrimination or harassment did not happen and, (ii) in any event it is not within the jurisdiction of the tribunal as it was brought outside the necessary time limit and there is no basis on which we are asked to or could extend time on a just and equitable basis.

ISSUES

9. What remains are the claims in relation to the claimant’s dismissal: unfair dismissal and discrimination arising from a disability.
10. A list of issues was prepared by EJ Chudleigh in her order of 1 June 2023, although as can be seen from the above, there was some movement in the issues during the hearing.
11. It is accepted by the claimant that he was dismissed for a reason related to his conduct and thus the respondent had dismissed him for a potentially fair reason.
12. In his cross-examination Mr Robson touched on a number of matters that may be relevant to the fairness of the dismissal, including whether Mr Hinckley was the appropriate person to make the decision on dismissal and the scope of the investigation undertaken. However, by the time of closing submissions Mr Robson was essentially relying on the matters set out at para 7 of his skeleton argument, that is:

“C’s unfair dismissal claim rests on dismissal not being within the range of reasonable responses open to R because:

- (a) *R failed to account for the effect C’s disability had on his misconduct,*

- (b) *Set against C's almost entirely unblemished record over 23 years of service, [C]'s falsification in his report of the incident should not have been treated as sufficient reason for dismissal.*
- (c) *There was clearly no immediate concern about [C] remaining in work, as he was not preliminarily suspended but was transferred to alternate duties.*
- (d) *Reasonable responses would have been suspended dismissal with compulsory transfer"*

13. As regards the claim of discrimination arising from disability, Mr Robson put it in this way:

"C's discrimination arising from disability claim hinges on his inability to concentrate, and his dismissal by R:

- (a) *C was dismissed for misconduct including failing to follow the SSOW for use of a tail lift and driving the vehicle without taking due care and attention.*
- (b) *This misconduct happened because of C's inability to concentrate, which was something arising from his disability.*
- (c) *Dismissal is self-evidently less favourable treatment.*
- (d) *Dismissal was not a proportionate means of achieving R's potentially legitimate aims, as these could have been achieved by transferring C to non-driving duties.*

14. It is clear that the discrimination arising from disability and unfair dismissal claims are very closely related. It having been conceded by the respondent that the claimant was disabled, the issues for determination become:

- (a) Did the claimant's misconduct arise from the anxiety and depression (the claimant contending that this occurred on the basis that a lack of concentration was a symptom of his anxiety and depression and that this lack of concentration caused the misconduct in question)?
- (b) Was the dismissal of the claimant a proportionate means of achieving a legitimate aim?
- (c) Has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant had the disability of anxiety and depression?
- (d) Taking that into account, was dismissal within the range of reasonable responses open to the respondent?

15. The legitimate aim relied upon was “ensuring the safety of the claimant, his colleagues and customers, as well as the confidence of its customers”. In principle the claimant accepts that this is a legitimate aim. The respondent further says that:

“The proportionate means of achieving this aim, is:

- a. that the respondent prescribes safe working practices and standards when employees are responsible for Royal Mail vehicles/equipment which must be adhered to , and has in place a Conduct Policy via which it may take disciplinary action, up to and including dismissal, against employees who negligently disregard safe working practices and where it is satisfied that those practices and standards cannot be maintained in future; and*
- b. requires its employees to maintain standards of honesty and integrity, which if not maintained may be addressed with disciplinary action via its Conduct Policy.”*

16. The claimant’s position was not that he had not committed misconduct nor that he should have remained in post as a driver. His argument was that instead of dismissal he could and should have been transferred to non-driving duties. Mr Chaudry accept that, in principle, this was an option available to the respondent as a response to the claimant’s misconduct. However, it was the respondent’s case that dismissal was a proportionate means of meeting its legitimate aims. The respondent pointed out that there was more to the misconduct than failures in driving standards. There was also the question of the claimant’s honesty in explaining the accident.

THE FACTS

The first incident

17. In February 2022 the claimant had been subject to the disciplinary sanction of “dismissal suspended for two (2) years”. As with his later disciplinary incident the manager responsible for imposing this sanction was Mr Hinkley. The allegation against the claimant was:

“A customer complaint ... of abuse and threatening behaviour and also urinating outside against equipment ...

- (1) Using threatening and abusive behaviour towards a member of the public whilst on duty.*
- (2) Urinating in public whilst on duty.*
- (3) Being rude to members of the public on duty.”*

18. Mr Hinckley upheld the first and third disciplinary issues, but not the second, apparently on the basis that the second issue was a consequence of the claimant's diabetes.
19. It might be thought that this suspended dismissal was significant given the claimant's later misconduct, which occurred well within the two year suspension period, but the respondent did not rely on this earlier suspended dismissal as justifying the claimant's eventual dismissal, and the only significance of this earlier disciplinary incident was (from the claimant's point of view) a reference in the notes of the conduct meeting to the claimant's personal difficulties and his "*mind [being] all over the place*". This is said to be one of the things that put the respondent on notice of the claimant's disability of depression and anxiety.
20. It is not in dispute that the claimant has had longstanding personal difficulties, which we do not need to set out in a judgment that may be a matter of public record.

The second incident

21. The claimant was involved in a vehicle accident in April 2022, but no disciplinary action flowed from it. As with the first incident the parties suggest that the significance of this (if any) for the case is on the question of knowledge of disability. The respondent points out that following this, during a period of retraining, the claimant did not declare any disability that would affect his driving. He did not ever formally declare any health conditions that may affect his driving to the respondent or the DVLA.

The third incident

22. The claimant worked overnight on 8/9 May 2022. He was driving a 7.5t lorry between various of the respondent's sites in London. Around 22:00 he loaded his lorry at the Ruislip Delivery Office. He was working on his own. Another worker who may have assisted him had left work. At the time the claimant was awaiting some urgent messages from his lawyer. He had his personal phone with him in the cab of his vehicle. A couple of messages had arrived while he was driving to Ruislip. As he was about to leave Ruislip another message arrived and he checked his messages on his phone. It was not good news. He drove away from the loading bay at the site. The tail lift on his vehicle was down when he drove off, and it struck another of the respondent's vehicles as he exited the loading bay, causing considerable damage.
23. There was some argument at the hearing about the extent to which the claimant was aware of formal policies and procedures in relation to tail lifts. The claimant also suggested that the accident would not have happened if his colleague had remained at work, but we do not think it has ever been in dispute that the tail lift is the responsibility of the driver and that departing with the tail lift still down was an inherently dangerous act.

24. During the course of his subsequent disciplinary hearing the claimant said:

"I don't understand why I just didn't put the tail lift up and then go to the cab ... I ... put my key in and [drove] off, and realised when I got outside the yard that the tail lift was still down ... It wasn't until I had left the yard that I realised the tail lift was down I got out and put it up and saw the damaged that had been done to the [other vehicle]."

25. The claimant notified his manager of the accident but in doing so omitted the crucial detail that his tail lift had been down at the time and this is what had struck the other vehicle. In his disciplinary meeting the claimant said:

"I lied to him because I was embarrassed. I knew there was a camera [at the site] but I still lied I didn't know what to do. I was embarrassed to say I had driven off with the tail lift down. I thought I could get away with it, thought I could cover it up, the deeper I dug the deeper I went in. I know it shouldn't be that way. I thought that driving with a tail lift down is more serious than just an RTC."

26. On the instruction of his manager he returned to the site to take pictures of the damage.

27. Around 24:00 he reported the accident to the respondent's insurers, again omitting the fact that his tail lift had been down. The claimant said this in his disciplinary meeting:

"I called them [the insurers] when I returned from the office around 24:00. She asked but I said the back end of truck caught the van. I didn't tell her about the tail lift being down. I was digging a deeper hole."

28. Around 07:00 the following morning the claimant managed to speak to his trade union representative, and shortly after that he phoned his manager to give a proper account of the accident. In his disciplinary hearing he said:

"I phoned [the union representative] at 04:00 to tell him but he didn't answer his phone as he was driving. [He] called me back when I was at home around 07:00. [He] told me they know what had happened and that there was a camera. I knew there was a camera. [He] told me to phone [the manager] and tell him what happened. I called [the manager] at 07:00 said what really happened. I told the truth I didn't want to dig more holes. I went in that night and made a statement."

29. Various investigations and reports followed from this collision. The claimant was placed on non-driving duties. An investigation meeting was held by a manager, following which the matter was referred on to Mr Hinckley on the basis that it may require a more serious sanction than could be dealt with at a lower level of manager. Mr Hinckley convened a "formal conduct meeting" "to consider the conduct notification(s) listed below":

- “- *Failure to follow the SSOW for the use of a tail lift despite knowing how to.*
- *Failure to fulfil your legal duties ... by deliberately falsifying your statement during the safety investigation ...*
- *Driving your truck without taking due care and attention.”*

30. There have thus always been two core points in the allegations, spread across three individual disciplinary charges. The first and third charge relate to the fact of the accident having happened (and happening because he left his tail lift down). The second relates to the failure to properly report the accident. The second has been described (without objection from the claimant) as lying about the accident. He accepts that his initial reports were false.
31. The claimant has been accompanied by a trade union representative in every relevant meeting and has received proper notification of those meetings. We do not think any criticism can properly be made of the procedure followed by the respondent.

The disciplinary hearing and dismissal

32. By the time of the disciplinary meeting the claimant had, effectively, admitted the disciplinary offences in full. At times Mr Robson seemed to suggest a failure to properly investigate the incident by, for instance, not obtaining the CCTV footage of the incident. This met with the response from Mr Hinckley that there was no need for this in circumstances where the claimant admitted the misconduct in full. We agree.
33. Prior to the disciplinary hearing the claimant had been scheduled to have an occupational health appointment on 24 May 2022. This was cancelled but the circumstances in which it was cancelled are not clear.
34. The claimant mentioned his health several times during the disciplinary hearing, including saying “*my head was all over the place and I have depression*” and “*I was diagnosed last week for depression, panic attacks. Medication started last week ... new medication is causing ... issues.*”
35. The OH referral was resumed, and the claimant had an occupational health consultation by telephone on 13 June 2022.
36. In the resulting report, under “Description of relevant social and psychological issues” the occupational health advisor records:

“During today’s assessment Mr Pieri reported symptoms that are commonly associated with anxiety and depression, including poor sleep patterns, low mood, constant worrying, feeling restless and agitated.

He stated his symptoms of anxiety and depression began around 2018 and have significantly increased over the past 4 months.

During the assessment, Mr Pieri indicated that he has struggled at work due to a combination of personal and work issues.”

37. The report continues:

“Current Health Status / Functional Work Impairment

In my opinion Mr Pieri is currently fit for work on adjusted indoor duties only and is not currently fit to operate/drive work vehicles. Given his level of symptoms Mr Pieri may have times in the workplace that are more difficult to manage than others and I suggest that if management become aware of any difficulties then these maybe alleviated by offering practical support. Which can take many forms e.g. reduction in volume of work, additional breaks etc.

I am unable to advise on his fitness to resume back to work with regards the physical symptoms he is experiencing. For further advice on work capabilities and driving duty regarding his physical health and current medication, you may wish to refer him for an OHA assessment.

Today he completed a recognised symptom assessment questionnaire, which looks at symptoms commonly associated with anxiety and depression and scored at the severe levels for anxiety and severe for depression.

Mr Pieri stated he has been commenced on medication for the treatment of his condition. It is too soon for there to be any noticeable benefit to the anti-depressant medication. It generally takes 4-6 weeks before there is any noticeable reduction in symptoms and, even then, it may be very slow and gradual.

Timescale for Return to Work including Return to Work Plan (if appropriate)

In my opinion, disregarding the effect of treatment, Mr Pieri would be considered as disabled under the Equality Act. The conditions this relates to are: Anxiety and depression.”

38. Thus at least at the time of the OH consultation the OH advisor considered that the claimant was a disabled person. His reported symptoms were “*poor sleep patterns, low mood, constant worrying, feeling restless and agitated*”.
39. Having received the OH report, Mr Hinckley invited the claimant to a “decision meeting” to take place on 30 June 2022. In the follow up letter (dated 5 July 2022) Mr Hinckley records the following:

“Following your meeting with me on 07/06/2022 to consider the formal notification:

- 1) Failure to follow the SSOW for the use of a tail lift despite knowing how to.*
- 2) Failure to fulfil your legal duties as part your safety obligations by deliberately falsifying your statement during the safety investigation leading to a loss of confidence and trust in you as an employee.*
- 3) Driving your truck without taking due care and attention.*

I have now carefully considered all the circumstances of your case and my decision is detailed below;

Decision:

My decision is that I am upholding notification 1, you confirmed during the investigation that you failed to follow the SSOW for the use of a tail lift. I believe your mitigation during the investigation does not outweigh the seriousness of your actions.

My decision is that I am upholding notification 2, you confirmed during the investigation that you deliberately falsified and lied during the initial safety investigation in an attempt to lessen any resultant formal action that may have been taken due to your action. I believe your mitigation during the investigation does not outweigh the seriousness of your actions.

My decision is that I am upholding notification 3, you confirmed during the investigation that you were concentrating on your non urgent emails and not on being in full control of your vehicle as you drove away from the loading bank. I believe your mitigation during the investigation does not outweigh the seriousness of your actions.

Decision Result: Dismissal without statutory notice (summary dismissal)”

40. The letter included a section “Deliberations” recording the following:

“Deliberations

- I considered the following points raised during the meeting and identified during the investigation:*
- I considered [the claimant’s personal difficulties]. However the seriousness of Mr Pieri’s actions on Sunday 8th May 2022 outweigh this mitigation offered by Mr Pieri and his rep. I had also previously given Mr Pieri the benefit of doubt when I considered*

this same mitigation in February 2022 when he was awarded a two year suspended dismissal.

- I considered the fact that Mr Pieri had tried to hide the root cause of the damage he caused to the delivery van at Ruislip as he fully understood that this was more serious than an ordinary collision between two vehicles. This was a deliberate act to try and avoid the consequences of his actions. The seriousness of Mr Pieri falsifying information and lying during the safety investigation has led me to lose confidence in his truthfulness.*
- I also considered the fact that Mr Pieri had failed to follow the SSOW for the use of a tail lift and the risks associated with this. My confidence in Mr Pieri following Health and Safety rules in the future has been lost, especially as Mr Pieri had already had a recent suspended dismissal penalty to remind him of his responsibilities to follow the rules.*
- I considered the fact that Mr Pieri drove away from the loading dock without taking the due care and attention required as a professional driver of a 7.5t truck, but instead was focused on his non urgent information emails.*
- I considered Mr Pieri's 23 year of employment with Royal Mail, however I believe that Mr Pieri's actions were so severe this length of service does not mitigate them.*
- I considered the fact that Mr Pieri has been taking medication, however his diagnosis and new medication are recent, and since the events of Sunday 8 May 2022*
- I considered the two year suspended dismissal that is on Mr Pieri's record and believe this is relevant. The mitigation used by Mr Pieri and his CWU Rep at the time in February 2022 during the conduct code interview was the same as for this case. I had given Mr Pieri the benefit of the doubt and took in to account his plea, circumstances and promises when reaching my decision. However just a few months later Mr Pieri has been unable to meet his commitment to the business, and in this case he has been unable to assure me he is capable of meeting the standards that Royal Mail expects from all of its employees.*
- I considered other penalties, however Mr Pieri had already received a two year suspended dismissal and yet he was still unable to meet the standards that Royal Mail expect of all employees. I did not have confidence that he would be now be able to do so following an award of any other penalty.*

- *I have lost trust and confidence in Mr Pieri's integrity and honesty, something that Royal Mail and its customers expect."*

Appeal

41. The claimant appealed against this decision and his appeal was heard by Steve Potter on 28 July 2022. Following the appeal meeting Mr Potter conducted some further enquiries (including asking questions of Mr Hinckley).
42. On 30 August 2022 Mr Potter wrote to the claimant dismissing his appeal, and enclosing a lengthy "conduct appeal decision document", which concluded:

"In believing the notifications to be proven, I have considered the appropriate penalty. In doing so I recognise the fact Anastasi has service of 23 years. Anastasi does not have a clear conduct record and was serving a suspended dismissal at the time of the incident, but I have not relied on this live conduct penalty in coming to my decision in this case.

Anastasi's main mitigation has been around his mental health and how it affected his decision making on the night. From Anastasi's evidence, it is clear that the message from his Barrister was a routine update that was, for some reason usually sent around 10pm. Anastasi said the message did not have any actions for him to take and there have never been any actions for him to take. Therefore, it would appear this night was the same as any other night, yet Anastasi did not raise the tail lift of his vehicle, despite knowing that he had to. Following the incident, Anastasi admits to immediately recognising the seriousness of his actions, yet decided to lie about what happened, hoping that he would get away with it.

I have considered all penalties available to me under the conduct agreement. I believe for the seriousness of Anastasi's actions and behaviours; the appropriate penalty is dismissal. Royal Mail has lost all trust in Anastasi and his ability to comply with policies and procedures."

43. It can be seen from this that whereas Mr Hinckley does seem to place reliance on the previous suspended dismissal, Mr Potter expressly disavows any reliance on the previous suspended dismissal.

THE LAW

Unfair dismissal

44. Given that it is accepted by the claimant that his dismissal was for a potentially fair reason,

"the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

- (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- (b) *shall be determined in accordance with equity and the substantial merits of the case."*

(s98(4) Employment Rights Act 1996)

Discrimination arising from disability

45. Section 15 of the Equality Act 2010 is as follows:

- "(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."*

46. This breaks down into the following questions:

- Was there unfavourable treatment because of something arising in consequence of the claimant's disability? In this case the alleged unfavourable treatment is dismissal. It cannot be in dispute that dismissal is unfavourable treatment, so the question becomes whether the dismissal was because of something arising in consequence of the disability. The claimant's accepts the respondent's ostensible conduct-related reason for dismissal, so the question further develops into whether the claimant's misconduct was *"something arising in consequence of [his] disability"*.
- If so, was that unfavourable treatment (dismissal) a proportionate means of achieving a legitimate aim. The claimant accepts that there is a legitimate aim pursued by the respondent in this case so the question becomes whether his dismissal was a proportionate means of meeting that aim.
- Has the respondent shown that it *"did not know, and could not reasonably have been expected to know, that B had the disability."*

47. The necessary link between the disability and the misconduct was explored by the parties in their closing submissions. This has been described as

requiring only a “*loose connection*” (Risby v LB Waltham Forest EAT 0318/15). What is required is that it was an “*effective cause*”. Mr Robson suggested that this meant “*more than trivial*” and he is correct in this. In Pnaiser v NHS England [2016] IRLR 170 Simler J said “*just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s15 case. 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 so amount to an effective reason for or cause of it.*”

48. We also accept Mr Robson’s submission that this causative link between the disability and the misconduct is something that is to be proven in the same way as any other matter of fact. This may be by expert evidence or a medical report, but it does not have to be.
49. As for the question of justification, for a measure to be a proportionate means of meeting a legitimate aim it must be an “appropriate and necessary” means of meeting that aim. This is a matter to be demonstrated by the respondent, and requires the tribunal to reach its own conclusion as to whether the measure is justified. There is no “range of reasonable responses” in assessing proportionality.

DISCUSSION AND CONCLUSIONS

Introduction

50. If there was not the question of the claimant’s disability, we do not see that in the circumstances of such admitted misconduct it can realistically be argued that dismissal was not within the range of reasonable responses. A simple traffic accident would not necessarily justify dismissal even if the employee was at fault – but in this case we have the fact of the accident compounded by it being caused by a significant health and safety failure by the claimant (departing with his tail lift down) and an attempt to cover up his actions by giving a false report, with the claimant accepting that he had lied because he was embarrassed about the incident, realised he was in trouble and “*thought I could get away with it*”.
51. The only thing in this case that might mean that dismissal was not within the range of reasonable responses was if the misconduct was caused by the claimant’s disability and the respondent’s actions in dismissing him amounted to unlawful discrimination arising from a disability.

Discrimination arising from disability

Did the misconduct arise in consequence of the disability?

52. The claimant’s misconduct had two aspects. The first was driving off with his tail lift down. The second is falsifying his subsequent report.

53. The claimant's position as set out in Mr Robson's closing submissions and the list of issues prepared by EJ Chudleigh is that lack of concentration is a symptom of his depression and anxiety, and that this lack of concentration had at least a "*more than trivial*" effect on the subsequent misconduct.
54. As we discussed during the hearing, there are some possible problems with this.
55. The first is that while a lack of concentration may explain the accident, a lack of concentration does not explain the subsequent false report. Once the accident had happened, the claimant was never in any doubt about the cause of the accident or that his tail lift had been down. It cannot have been a lack of concentration that caused him to make the false report of the accident.
56. Mr Robson developed the claimant's position somewhat on this, particularly when looking at the question of the respondent's knowledge of disability. At times he suggested that the false report was so obviously hopeless and bound to be found out (due to the nature of the damage and the fact that the area was covered by CCTV) that it could only have been made by someone who was not in their right mind at the time. We do not accept that. The claimant is clear in the disciplinary hearings that he misrepresented the accident in the hope that he would get away with it. Many people, disabled or not disabled, may pursue hopeless denials. There is nothing in the falsification of his reports that had anything to do with his disability.
57. The second problem is what evidence we have that lack of concentration was a matter arising from his disability. Mr Chaudry pointed out that the best evidence we have of the claimant's symptoms was his self-reporting of them to occupational health. Lack of concentration is not mentioned there. The most we have is "*poor sleep patterns, low mood, constant worrying, feeling restless and agitated*". We asked Mr Robson to take us in his closing submissions to points in the claimant's evidence where he says that lack of concentration was a matter arising from his disability. Perhaps the best we have is at para 11 of the claimant's disability impact statement where he says "*on this occasion his health was affecting his concentration and reaction*".
58. Looking at the question of the accident itself, it is clear that this was caused by a lack of concentration. However, the lack of concentration that the claimant says caused the accident was him being distracted by the messages and bad news from his lawyer. This was not a moment of abstract absent-mindedness. The cause of the accident was his distraction dealing with his lawyer's messages.
59. We are not looking for a direct link, or for the matter arising from the disability to be the sole cause of the misconduct. We only need a "*loose connection*" and a "*more than trivial*" contribution as a cause of the misconduct. However, the claimant must demonstrate that link if his claim is to succeed.

60. There is the evidence in the impact statement that his health was affecting his concentration. The primary cause of the accident was the claimant getting distracted by his emails, but given this evidence we have concluded, not without some hesitation, that a lack of concentration arising in consequence of his disability had a small but more than trivial effect on this.
61. Thus the consequences of the disability were a small but effective cause of the accident, although they were not any cause of the claimant's subsequent mis-reporting.

Justification

62. Broadly speaking, the respondent accepted that if this had just been about the claimant's driving, and if his driving had been affected by his disability, it would have been possible and acceptable to redeploy him at least temporarily to non-driving duties.
63. Mr Hinckley's position was, however, that the falsification of the claimant's initial reports was a matter that required dismissal irrespective of any disability. This is the second aspect of the respondent's explanation of proportionality: the respondent "*requires its employees to maintain standards of honesty and integrity*".
64. We accept this and there is really no answer to it from the claimant. The respondent requires its employees to be trustworthy regardless of whether they are driving or working inside a delivery office. The claimant's misreporting is not something that can be addressed by redeployment to a non-driving job or by anything other than dismissal.
65. What is the position where the claimant is dismissed for two reasons, one of which is justified and the other is not? Our view is that the decision has to be taken as a whole. The discrimination complained of is the dismissal. The false reporting alone was sufficient to justify the dismissal of the claimant. The decision to dismiss is justified even if part of the reason for dismissal is not.

Knowledge

66. Has the respondent shown that it "*did not know, and could not reasonably have been expected to know, that [the claimant] had the disability*".
67. There are two things that may have alerted the respondent to the claimant's disability. The first is his behaviour and things he said before the incident in question and the second is the OH report.
68. On the first point – behaviour and what the claimant said – the claimant has given mixed messages over time. On the whole he has tended to emphasize his medical difficulties when in trouble and downplay them when not in trouble. We were, for instance, somewhat alarmed at the claimant's ready acceptance that he had not considered himself fit to drive on the night in question but had

nevertheless gone on to do so so as to avoid needing to be put on sick leave. He also appeared to lack awareness of his own personal responsibility to report possible medical issues to the DVLA.

69. The claimant wanted to continue driving and so avoided reporting either his diabetes treatment or anxiety and depression as matters that may affect his driving. The respondent had a broad understanding of the claimant's personal difficulties, but having personal difficulties does not of itself suggest that an individual may be suffering from a mental health disability. There was nothing prior to the accident that should have alerted the respondent to the claimant having a mental health disability.
70. Looking at the OH report, it expressly states that the claimant is a disabled person. By the time the OH report was received the respondent knew that the claimant was a disabled person. This was prior to his dismissal. At the time of the alleged discrimination (that is, the dismissal) the respondent knew that the claimant was disabled by reason of depression and anxiety.
71. On the face of it that is sufficient to dispose of the s15(2) defence – at the time of the discrimination the respondent actually knew that the claimant was disabled. However, the respondent argued the point on the basis that the s15(2) defence applied at the time of the incident in question. It says that the disability only arose in between the incident and the OH report, and relies on matters such as the OH report talking of his symptoms having “*significantly increased over the past 4 months*” and the claimant only recently having started on medication.
72. There is something to that, but it falls short of the obligation on the respondent to show that it “*could not be expected to know*” that the claimant had a disability. At the time of dismissal the respondent was on notice that the claimant had a disability. It appears that no steps were taken to actually enquire of OH when the disability developed, and it is now accepted that the claimant was disabled at the time of the incident. In those circumstances the respondent has not demonstrated that it could not be expected to know that the claimant was disabled either at the time of the incident or the time of the discrimination, and the s15(2) defence does not apply.

Summary – discrimination arising from a disability

73. The respondent has not shown that it could not be expected to know that the claimant was a disabled person.
74. Matters arising from the claimant's disability were a small but effective cause of his failure to comply with a safe system of work and his failure to drive without due care and attention. They were not a cause of his failure to fulfil his legal duties as part of his safety obligations by deliberately falsifying statements.

75. The claimant’s dismissal was an act of less favourable treatment but was justified as a proportionate means of meeting the respondent’s legitimate aim of “*ensuring the safety of the claimant, his colleagues and customers, as well as the confidence of its customers*” – in particular “*requiring its employees to maintain standards of honesty and integrity*”.

Unfair dismissal

76. Unfair dismissal is an entirely separate concept from disability discrimination, but in this case we find that the only way in which the claimant’s dismissal could be unfair is if it was also an act of disability discrimination. It is not and no separate point of unfair dismissal arises.

CONCLUSION

77. The claimant’s claims are dismissed.

Employment Judge Anstis
Date: 7 February 2024

REASONS SENT TO THE PARTIES ON
14 February 2024

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FOR THE TRIBUNAL OFFICE