THE INDUSTRIAL TRIBUNALS

CASE REF: 5749/18

CLAIMANT: **Danny Loughran**

RESPONDENT: **Concentrix CVG Intelligent Contact Limited**

DECISION

The unanimous decision of the tribunal is that the claimant was fairly dismissed on grounds of gross misconduct. The claimant was not discriminated against contrary to the Disability Discrimination Act 1995 and his claims of unfair dismissal and disability discrimination are therefore dismissed.

Constitution of Tribunal:

Employment Judge: **Employment Judge Gamble**

Members: **Mr I O'Hea**
Mr D Walls

Appearances:

The claimant represented himself and was accompanied by his wife.

The respondent was represented by Mr N Phillips, Barrister-at-Law, instructed by Carson McDowell Solicitors.

BACKGROUND

1. The claimant presented a claim to the industrial tribunal on 29 April 2018, claiming unfair dismissal and disability discrimination. In its response dated 22 June 2018 the respondent resisted the claimant's claims and set out its grounds of resistance.

2. The claimant commenced work for the respondent, then known as Convergys on 31 October 2005. During his career with the respondent, the claimant was promoted to the role of Senior Team Manager and ultimately to the role of Operations Manager. It was not disputed that the claimant was a hard working

employee, whose work ethic and performance was recognised within the respondent company.

3. The claimant was summarily dismissed from his employment with the respondent on 1 February 2018 on grounds of gross misconduct. This outcome was communicated to him orally, following a disciplinary meeting which was held on 1 February 2018, and confirmed to him by letter dated 2 February 2018. At the time of his dismissal, the claimant had two other live disciplinary sanctions on his file. However, the decision to dismiss was based solely upon the final act of misconduct which is detailed below, and was not a dismissal based upon the cumulative effects of the warnings, or in which account was taken of the other live warnings.

4. The disciplinary allegations for which the claimant was dismissed arose from the claimant having sent a text message to his line manager, the Site Director, on 5 November 2017. This text message contained shocking, foul and abusive language and on a plain construction of it, contained a threat to "bring the … house down" when he attended a disciplinary meeting which had been scheduled to take place on 7 November 2017. The text referenced other matters, before stating, amongst other things, *"Am I blackmailing you? Yes."*

5. It was accepted by the claimant that he had sent the message and that it was in claimant's own words "absolutely scandalous". He accepted that it was completely inappropriate. The claimant said he could not justify or rationalise the sending of such a text message.

6. At the time this message was sent, the claimant had been suspended from work, pending the scheduled disciplinary hearing, which was to take place on 7 November 2017, to answer a charge of *"misappropriation of company funds due to negligence".* The disciplinary panel issued its findings, in respect of these disciplinary proceedings, on 2 January 2018. It found that there were no grounds for a disciplinary sanction on this charge, but gave a final written warning on alternative grounds of *"major breach in company procedure".* There was no finding of dishonesty against the claimant.

7. In his claim form, the claimant asserted that he was disabled for the purposes of the Disability Discrimination Act 1995 by reason of his hyperactive thyroid gland and associated complications, including anxiety and depression. During the course of the hearing, the tribunal understood the claimant's case to be that the anxiety and depression were both a consequence of his thyroid condition and amounted to a freestanding disability, in their own right.

8. The claimant contended that his dismissal was unfair and that he had been subject to unlawful disability discrimination by reason of a failure to make reasonable adjustments.

ISSUES

9. The parties prepared an agreed statement of legal and factual issues for determination by the tribunal. These were as follows:

"Unfair Dismissal

1. Did the respondent unfairly dismiss the claimant contrary to Article 126 of the Employment Rights (Northern Ireland) Order 1996 ("the ERO")? Specifically:

    a. Was the dismissal for a fair reason under Article 130 of the ERO?

    b. Did the respondent, in the circumstances, act reasonably in treating the reason identified above as a sufficient reason for dismissing the claimant?

    c. Did the respondent follow fair dismissal procedure in accordance with article 130A of the ERO?

    d. If the tribunal determined that the claimant's dismissal was procedurally unfair, what, if any reduction in compensation shall be awarded on account of the decision in **Polkey v AE Dayton Services Ltd [1987] ICR 142***?*

    e. Should there be any reduction the compensation awarded on the basis of contributory fault?

Disability discrimination

2. Was the claimant disabled as specified under the Disability Discrimination Act as amended ("DDA")?

3. Was the claimant disabled at the relevant times?

4. Subject to point 3 above, was the claimant treated less favourably on the grounds of his disability, when compared to others who do not have that particular disability, contrary to Section 3A DDA?

    a. If the answer to (4) above is yes, to whom does the claimant compare himself?

5. With regard to any claim that the respondent failed to comply with its duty to make reasonable adjustments:

    a. What was the provision, criterion or practice applied by the respondent?

    b. What was the nature and extent of the substantial disadvantage suffered by the claimant?

c. To the extent that the respondent was under a duty to make reasonable adjustments, did it take such steps as are reasonable in order to prevent the provision, criterion or practice identified at "a" above, from having the effect of placing the claimant at a substantial disadvantage?

d. Are all of the claimant's claims in time, particularly those which relate to the disciplinary investigation that took place in November 2017?

Factual issues

1. Did the respondent refuse to allow the claimant to be accompanied at the disciplinary meeting on 22 December?

2. Did the claimant decline the offer of accompaniment on 2 November 2017?

3. On 22 December 2017, did the claimant state he did not wish anyone else to attend a meeting with him?

4. During the disciplinary hearing on 1 February 2018 did the claimant say he "could not excuse" the text message?

5. During the disciplinary hearing on 1 February 2018 and the subsequent appeal hearing, did the claimant admit that he was intoxicated when he sent the message?

6. From what date was the respondent aware of the claimant's alleged disability?

7. If the claimant is deemed disabled and the respondent would reasonably have been expected to have known about the disability, was it reasonable for the respondent to proceed with disciplinary and grievance meetings?"

At the commencement of the Hearing, a further issue was raised by the respondent's representative. Following the events which gave rise to the claimant's dismissal, it was the claimant's case that he had commenced working for another company (Concentrix), which in due course, following a TUPE transfer upon the acquisition of his former employer (Convergys), became the respondent. As a result, the respondent held documentation pertaining to the claimant's new full time employment, which, unbeknownst to the respondent at that time, commenced before the dismissal. The claimant objected to the provision of these documents, but these documents were admitted in evidence as their existence and content was known to both parties and they were clearly relevant to the issues in the case, including loss, and ought properly to have been discovered by the claimant. The tribunal also notes that the claimant had provided accurate information about commencing employment with his new employer on 29 January 2018, in his replies to the claimant's Notice dated 4 October 2018, at page 49 of the bundle. In these

circumstances a further factual issue arose for determination by the tribunal, namely:

8. Whether the claimant was dismissed at all or whether his employment had already terminated before his purported dismissal, by means of his accepting and commencing full time employment with another employer?

CASE MANAGEMENT

9. The history of the management of the claimant's claims is summarised in paragraphs 3 to 21 of a Decision on Review dated 6 March 2019. The Decision of the tribunal on Review was that it was in the interests of justice to set aside its Order of 19 December 2018, dismissing the claimant's claim of disability discrimination. At the Case Management Discussion on 16 January 2019, the claimant was signposted to sources of information and advice which could assist him in the preparation of his claim.

10. Following the Decision on Review the claim was subject to further Case Management before the Vice President on 7 May 2019. At this Case Management Discussion, the claimant was specifically informed of the need to provide medical evidence (part of which would be GP Notes and Records) in support of his claim that he was a disabled person, given that the existence of a disability was not conceded by the respondent. The claimant was asked whether he was under the care of any Consultant and was asked about the provision of reports. The claimant stated that he was under the care of a consultant and that he had already provided the medical information to the respondent's solicitor. Directions were issued to the parties regarding the completion of the interlocutory process, witness statements and bundles. Information was provided to the claimant regarding the preparation of his witness statements, and the need for him to set out all of the evidence he wished to give.

THE HEARING

11. At the commencement of the hearing, notwithstanding that no application had been pursued for reasonable adjustments/special arrangements by the claimant when he was invited to do so during case management, the tribunal explored with the claimant whether any specific measures would be required. Following this discussion, regular breaks were given to the claimant and the tribunal rose early on one occasion to assist the claimant. At the commencement of the hearing, the claimant was also asked to clarify precisely the provision, criterion or practice (PCP(s)) he was alleging placed him at a substantial disadvantage for the purposes of his disability discrimination claim, and the nature of the substantial disadvantage. The tribunal rose to afford the claimant an opportunity to consider this issue carefully and to seek information from the Labour Relations Agency.

12. Upon his return, the claimant confirmed to the tribunal that other members of staff had enjoyed the benefit of return to work interviews, risk assessments, well-being meetings and were referred to Occupational Health or had their medical records reviewed before decisions were made. He also asserted that in June 2017 when he was moved to have responsibility for an underperforming account, there should have been a risk assessment carried out.

13. The claimant further asserted that before, during and after the period in which he sent the text message he was seriously unwell and that the respondent's failure to access or consider his medical information placed him at a substantial disadvantage.

14. The tribunal heard evidence from the claimant and Gerard McComb on behalf of the claimant. The claimant was cross examined, however, the respondent's representative did not cross examine Mr McComb, contending that his statement should be disregarded on grounds of not being relevant to the issues before the tribunal.

15. The tribunal also heard evidence from the following witnesses on behalf of the respondent: (i) Gary Skinner, an Associate Director in People Solutions within the respondent organisation. Mr Skinner undertook a well-being meeting with the claimant, at the claimant's request on 20 December 2017, prior to his dismissal; (ii) Eric Shaver, who was at the relevant time the Director of Operations for the respondent's Derry/Londonderry site. Mr Shaver conducted the disciplinary hearing on 1 February 2018 and made the decision to dismiss the claimant; (iii) Laura McMahon-Smith, an HR Business Partner, with responsibility for oversight of the respondent's Newcastle and Manchester CIT sites. Ms McMahon-Smith investigated the claimant's grievance dated 7 January 2018; and (iv) Lyndsey Mulley who is the People Solutions Director for the UK and Ireland in the respondent company. Ms Mulley heard the claimant's appeal against dismissal.

16. The respondent's witnesses were cross examined by the claimant. During the course of the hearing, the tribunal made such enquiries of witnesses as it considered appropriate for the clarification of the issues, and to ensure that the parties were on an equal footing, so far as was practicable, in accordance with the overriding objective.

17. The tribunal has also considered all of the documents which were provided to the panel in advance of the hearing, as well as a small number of additional documents which were produced and admitted as evidence during the course of the hearing.

18. During the claimant's cross examination of the respondent's witnesses, the respondent's representative contended that lines of questioning by the claimant appeared to propound grounds which had not been pleaded by the claimant in his claim or replies and which were not disclosed in his witness statement and for which no evidence was before the tribunal. The claimant

was informed of his right to pursue an application to amend his claim to include these additional matters and/or to adduce additional evidence, and given time on each occasion to consider his position and to seek advice in light of the potential consequences. He did not pursue any application to amend his claim.

19. At the conclusion of the hearing, the respondent's representative gave oral submissions. The claimant had prepared a written submission, referred to below as his initial closing submission. The claimant was offered and then afforded time to formulate a further written reply, which was provided to the tribunal on 16 September 2019. The tribunal is grateful to the parties for their written and oral submissions which have been considered by the tribunal in arriving at its decision.

THE STRUCTURE OF THIS DECISION

20. This decision sets out the relevant case law in respect of the unfair dismissal claim followed by the relevant findings of fact in respect of that claim. It then sets out the relevant case law in respect of whether the claimant was disabled for the purposes of the 1995 Act and in respect of the claimant's claim of disability discrimination followed by the respective relevant findings of fact.

RELEVANT LAW

UNFAIR DISMISSAL

Was the claimant dismissed or had he already terminated the contract of employment prior to his dismissal?

21. The respondent's representative referred the tribunal to a discussion set out in Harvey on Industrial Relations and Employment Law at Division DI Unfair Dismissal, Part 2. Termination by the Employer, Section D. Dismissals and other forms of termination contrasted, Subsection (3) Employee repudiation and the concept of 'self-dismissal', part (a) paragraphs 291 onwards. In this section, Harvey, following a review of **Gannon v J C Firth Ltd [1976] IRLR 415** and **Kallinos v London Electric Wire [1980] IRLR 11 and Western Excavating (ECC) Ltd v Sharp [1978] QB 761, [1978] 1 All ER 713, CA,** submits, that in accepting a repudiatory breach, it is the party who is accepting the breach that terminates the contract. Consequently, when the employer accepts a fundamental breach by the employee, it is the employer who is thereby choosing to terminate the contract for the purposes of the Employment Rights (Northern Ireland) Order 1996.

Finding of facts as to termination and application of the law

22. In the present case, the claimant had commenced full time employment with another employer on 28 January 2018. In cross examination, the claimant admitted that he had had to arrange to take a day off to attend the disciplinary interview with Mr Shaver. Clearly, the claimant was no longer available to perform his contractual obligations to the respondent, in that he was no longer

available to work. The claimant was at this point in breach of his contract of employment with the respondent. However, as the respondent was not aware of this breach, which went to the heart of the contract, it could neither accept it nor waive it. The claimant did not suggest that it was possible to hold down two full time jobs at the same time. The panel notes that in the claimant's written Appeal Submission at page 389 of the bundle he reproduced an email from 4 November 2017 to Mr Skinner which stated: *"Please note that on the back of seeking professional guidance I may opt to resign in advance of the disciplinary. In terms of clarifying my thought process please be assured that this will not, in any way, be an admission of guilt but the first step in a claim for Constructive Dismissal which will run alongside a detailed letter of grievance around how, after 12 years' service, I have been treated over the course of the last year."* It does not appear that the claimant ever communicated his resignation to the respondent, and he did not in the event pursue a claim of constructive unfair dismissal. The claimant's oral evidence given during cross examination was that he was effectively hedging his bets, and that if he had not been dismissed by the respondent, it was his intention to leave his new employer and return to the respondent. The tribunal agrees with the claimant's submission that in attending the disciplinary hearing, his actions evinced a desire to continue his contract of employment with the respondent. In these circumstances, whilst the claimant's course of action in being a full time employee in two posts was not viable in the longer term, and whilst accepting a second full time post would have amounted to a repudiatory breach of contract, there was no notice of it to, and hence no acceptance of it by, the respondent. Accordingly, in the absence of such acceptance, there was no termination by the employee. This finding is entirely consistent with the reasoning in **Western Excavating**. The tribunal has therefore proceeded to consider the fairness of the dismissal.

FAIRNESS OF THE DISMISSAL

23. **PART XI UNFAIR DISMISSAL**

CHAPTER I RIGHT NOT TO BE UNFAIRLY DISMISSED

The right

126.—(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Paragraph (1) has effect subject to the following provisions of this Part (in particular Articles 140 to 144).

…

Fairness

General

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

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

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

(2) A reason falls within this paragraph if it—

…

(c) relates to the conduct of the employee,

…

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

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

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

…

(6) Paragraph (4) is subject to Articles 130A to 139

…

Procedural fairness

130A.—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) one of the procedures set out in Part I of Schedule 1 to the Employment (Northern Ireland) Order 2003 (dismissal and disciplinary procedures) applies in relation to the dismissal,

(b) the procedure has not been completed, and

(c) the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements.

(2) Subject to paragraph (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of Article 130(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure.

…

Basic award reductions

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…

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

…

Compensatory Award

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(1) Subject to the provisions of this Article and Articles 158, 158A, 160 and 161, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

…

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

24. The Court of Appeal in **Rogan v South Eastern Health & Social Care Trust [2009] NICA 47** approved the earlier decision of Court in **Dobbin v Citybus Ltd [2008] NICA 42** where the Court held:-

> *"(49) The correct approach to [equivalent GB legislation] was settled in two principal cases – **British Home Stores v Burchell [1980] ICR 303** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17** and explained and refined, principally in the judgements of Mummery LJ, in two further cases **Foley v Post Office** and **HSBC Bank PLC (formerly Midland Bank) –v- Madden reported at [2000] ICR 1283** (two appeals heard together) and **J Sainsbury v Hitt [2003] ICR 111**.*
>
> *(50) In **Iceland Frozen Foods**, Browne-Wilkinson J offered the following guidance:-*
>
> *"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by [equivalent GB legislation] is as follows:-*
>
> *(1) the starting point should always be the words of [equivalent GB legislation] themselves;*
>
> *(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;*
>
> *(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
>
> *(4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another;*
>
> *(5) the function of an industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band*

the dismissal is fair; if the dismissal falls outside the band it is unfair. "

(51) To that may be added the remarks of Arnold J in ***British Home Stores*** *where in the context of a misconduct case he stated:-*

> *"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, it must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or, to use the more old fashioned term such as to put the matter beyond reasonable doubt. The test, and the test all the way through is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion. "*

25. In **Rice v Dignity Funerals [2018] NICA 41** the Northern Ireland Court of Appeal endorsed the summary of the legal principles relating to Article 130 of the 1996 Order set out in the minority judgment of Gillen LJ in **Connolly v Western Health and Social Care Trust [2017] NICA 61**. These are as follows:

> *"[28] …*

(i) The starting point is the words of Article 130(4) of the 1996 Order.

(ii) The Tribunal has to decide whether the employer who discharged the employee on grounds of misconduct entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct.

(iii) Therefore there must in the first place be established a belief on the part of the employer.

(iv) The employer must show that he or she had reasonable grounds for so believing.

(v) The employer, at the stage he/she formed the belief, must have carried out as much investigation into the matter as was reasonable. It is important that an employer takes seriously the responsibility to conduct a fair investigation.

(vi) The Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider that the dismissal to be fair.

(vii) In judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(viii) In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another, quite reasonably, take another.

(ix) The function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.

(x) A Tribunal however must ensure that it does not require such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the relevant legislation.

(xi) Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee. The disobedience must at least have the quality that it is wilful. It connotes a deliberate flouting of the essential contractual conditions.

(xii) *More will be expected of a reasonable employer where the allegations of misconduct and the consequences to the employee if they are proven are particularly serious.*

(xiii) *In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the employer's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses that an employer could reasonably make in the circumstances. The fact that other employers might reasonably have been more lenient is irrelevant (see the decision of the Court of Appeal in* ***British Leyland (UK) Ltd v Swift [1981] IRLR 91****,* ***Gair v Bevan Harris Limited [1983] IRLR 368*** *and Harvey on Industrial Relations and Employment Law at [975].*

(xiv) *The conduct must be capable of amounting to gross misconduct.*

(xv) *The employer must have a reasonable belief that the employee has committed such misconduct.*

(xvi) *The character of the misconduct should not be determined solely by the employer's own analysis subject only to reasonableness. What is gross misconduct is a mixed question of law and fact. That will be so when the question falls to be considered in the context of the reasonableness of the sanction."*

26. In **Connolly v Western Health and Social Care Trust** Deeny LJ stated at paragraph [41]:

> *"But Article 130(4)(b) is also a protection to the employer. It conveys that even if an employer is guilty of one or more errors in procedure nevertheless that should not be equated with unfair dismissal unless those errors have indeed led to unfairness to the dismissed employee which would render it inequitable or contrary to the substantial merits of the case to dismiss them".*

27. The House of Lords in **W Devis & Sons Ltd v Atkins [1977] 2 All ER 321, CA, [1977] 3 All ER 40, HL, [1977] IRLR 314, [1977] ICR 662** Viscount Dilhome *stated:*

> *"'[Article 157] requires the tribunal to consider whether a dismissal was "to any extent" caused by the action of the employee. It does not preclude the tribunal from coming to the conclusion that the dismissal was wholly caused by his conduct and, in the light of that conclusion, thinking it just and equitable to reduce the compensation it otherwise would have awarded to a nominal or nil amount … I do not see that there is any inconsistency in finding that there was in the terms of the Act unfair dismissal, and in awarding no compensation".*

THE CLAIMANT'S CASE

28. The claimant advanced a case that there was procedural unfairness in the circumstances of his dismissal, and that a reasonable employer would have carried out further enquiries to fully establish whether his actions were as a result of his medical condition, and that the respondent failed to do so. In his written submission, the claimant further stated:

> *"I simply asked my employer of 12 years and now the tribunal panel to consider mitigating factors leading to my totally irrational actions on that night. I was accused of being a thief by a childhood friend while suffering from both an ongoing debilitating illness and under additional pressures on my personal life … However, in my mental capacity at that time, I reacted in a way that was directly linked to my illness."*

29. The claimant also made a complaint that he was denied the right to be accompanied in the disciplinary investigation meeting which took place on 2 November 2017.

30. The claimant also advanced a case that Mr Shaver had read the disciplinary outcome from a prepared document, which was not produced on discovery or in advance of his appeal. The claimant also directed the tribunal's attention to email contact (only disclosed by the respondent during the course of the hearing) between his line manager (the recipient of the text message from the claimant which led to the claimant's dismissal) and Ms Mulley who was a very senior human resources employee within the respondent organisation, and who ultimately heard his appeal, along with another manager (whom Ms Mulley gave evidence had not had sight of the email correspondence). The claimant asserted that this was an attempt by his line manager to influence the outcome of the disciplinary charges against him, as well as raise a smear against him, by seeking to connect him with uninvestigated and unproven allegations from the claimant's line manager which allegedly occurred outside work. The claimant also relied upon Ms Mulley's response to his line manager, which made reference to wishing to *"close down the employment issues", "closure of the matter"* and wanting to bring *"this one to come to a close".*

FINDINGS OF FACT - UNFAIR DISMISSAL

31. During cross examination, the claimant accepted that he had sent the impugned text message to his line manager, who was the most senior member of staff at the site where the claimant was based, with management responsibility for between 700 and 800 staff. The claimant's uncontroverted evidence was that his line manager had been a friend of his since childhood. He further accepted that his actions in sending the text amounted to a clear breach of the respondent's disciplinary policy in three respects, as set out by the respondent in the disciplinary correspondence. He agreed that in each of the three respects his actions were correctly designated as and amounted to gross misconduct, which would place an employee at risk of summary dismissal. He further accepted that he had been dismissed for sending this text and that any employer would have considered dismissing an employee

who had sent this text message. In his final written submission dated 16 September 2019, the claimant made the following acknowledgement: *"In hindsight and armed with the knowledge of the legalities of unfair dismissal I accept that the respondent's decision to dismiss me was within the boundaries of a reasonable response."* The submission went on to criticise the respondent for assuming that he was in control of his actions.

32. The tribunal finds that the content of the text message was an affront to the employment relationship. It was an extraordinary and truly shocking message, whose content and tenor were completely unacceptable. In the experience of the tribunal, acting as an industrial jury, it lay far outside the boundaries of acceptable communication between an employee and his manager, in any circumstances. The claimant's misconduct in sending the text message was aggravated by both the seniority of the claimant and his line manager. In reality, there could be no return from the sending of this text message, which was sent in the context of the claimant's suspension and impending disciplinary action. It was reasonable for Mr Shaver to connect these two issues and conclude it was an attempt by the claimant to influence the outcome of the disciplinary investigation, both from the plain construction of the content of the message and the proximity of these events. The tribunal finds that the sending of the text was a shocking and intemperate attempt to influence the outcome of the impending disciplinary proceedings by threatening the most senior employee on the Belfast site. The sending of this text message was a repudiation of the employment contract. The dismissal was a reasonable response to this misconduct. The various matters raised by the claimant in his claim do not disturb this finding.

33. The claimant complains that the respondent did not obtain or consider evidence that the sending of the text message was caused by *a "mental breakdown"* during and connected with a thyroid storm. In his written closing submission, the claimant stated *"in my mental capacity at that time, I reacted in a way that was directly linked to my illness"* and referenced pages 200 to 203 of the bundle to support this submission. However, even taking into account the content of pages 200-203 of the bundle, the tribunal was not possessed of any medical evidence or expert opinion which would have supported the claimant's submission that his misconduct was directly linked to his condition, or his suggestion that he was not in control of his actions. The tribunal agrees with the respondent's representative's submission that the claimant never obtained any evidence whatsoever from a doctor or any other health professional to support the suggestion that a medical condition caused or contributed to his sending of the text message. Given that the claimant was on notice that he was at risk of summary dismissal, it is surprising that at neither the hearing stage, nor the appeal stage, did the claimant take the initiative and furnish the respondent with the requisite medical evidence. Further, no such evidence or expert medical opinion was placed before the tribunal by the claimant.

34. At the hearing, the claimant relied upon his blood test results. These blood test results showed that his free thyroxine levels were *"High"* on 10 November 2017, some five days after the sending of the text message. However, the results had been even higher on 7 August 2017, at which time the claimant was at work. The tribunal has not the requisite medical qualifications to interpret these blood results, and there was no specialist opinion to support any finding on the balance of probabilities that the claimant was not responsible for his actions in composing and sending the text message as a consequence of either his condition of hyperthyroidism, or his free thyroxine levels in or around that time. The provision of these blood test results were not sufficient in and of themselves to support a conclusion by the tribunal that the claimant's actions were due to his medical condition. The claimant did provide information from a google search on "thyroid madness symptoms" at page 199 of the bundle. However, the claimant clarified that these symptoms were not relevant to him, as they related to *hypo*thyroidism, whereas the claimant suffered from *hyper*thyroidism. At pages 200 to 203 of the bundle the claimant had provided symptoms of hyperthyroidism. This list of symptoms did not include not being in control of one's actions, or any information that would demonstrate a direct linkage between the claimant's condition and his actions.

35. The claimant did attend with his GP on 14 November 2017, as is recorded in the GP notes and records. The entry records "thyrotoxicosis" but confirms the claimant was given the *"usual advice, encouraged some time off work".* He was also referred to his Endocrinologist. He was not referred for counselling until 18 December 2017, which he ultimately did not attend, leading to his discharge. This did not corroborate the claimant's evidence that at the time of the sending of the text, on 5 November 2017, he had suffered a *"mental breakdown".*

36. Even if the claimant had furnished medical evidence establishing a link between his medical condition and his actions, the tribunal acting as an industrial jury, finds that dismissal would still have fallen within the band of reasonable responses. In any event, no such medical evidence was put forward by the claimant for consideration by way of mitigation.

37. Further, the claimant in both his disciplinary hearing and subsequent appeal also relied on other mitigating factors in respect of his actions. These included work related and other stressors in his life, the impact on his mental health of his suspension, and the nature of his relationship and communication with his line manager. At the disciplinary investigation meeting, the notes record the claimant was stating he was *"ashamed of the text message. I typed it and sent it but I don't feel like the person who sent it."* He referred to that action as *"a moment of insanity brought on by mixture of medication and drinking and the stressful situation."* He further stated that the *"thyroid controls emotional reactions."* Whilst the claimant did assert he had been seriously unwell and that his condition had affected his mental state, he also made reference to *"drinking excessively"* at that time. During the disciplinary hearing he also referred to having *"felt betrayed"* by how his line manager had handled the other disciplinary allegation against him. He also asserted that he had been seriously unwell for the last 4-5 years, and that his condition had directly

impacted his mental capacity to handle stressful situations. The notes record that after the disciplinary outcome was delivered verbally by Mr Shaver, the claimant after asserting his disappointment stated the text was sent whilst drunk and under stress. The claimant's written Appeal Submission sent to Ms Mulley on 11 April 2018 included the following: *"As the company will know I was already suffering at the time of suspension from an ongoing serious disability. I believe there was no consideration given to my health and mental wellbeing and how it would be impacted by being suspended from the business."* The claimant went on to refer to other matters which were causing stress within his life, before stating: *"I began to drink very heavily and was not sleeping or eating…The reality is the situation in work pushed me over the edge and whilst heavily intoxicated I sent a message to [his line manager] which was unacceptable and very out of character. I have known [his line manager] as a friend for over 30 years and I felt (whilst intoxicated) that he has been trying to ruin my life by recommending disciplinary action against me."* (Tribunal's emphasis). In the final summary section, the claimant did assert that he was disciplined for conduct he did *"whilst medically unfit and mentally unstable."* In his statement to the tribunal, the claimant, after rehearsing the other external factors which were impacting him at that time, also candidly stated: *"the reality is the situation in work pushed me over the edge and whilst heavily intoxicated, suffering from depression and going through what I can only describe as a mental breakdown I sent a text message to [the line manager] which I realise was unacceptable and very out of character. I have known [the line manager] as a friend for over 30 years and I felt that he had been trying to ruin my life by recommending disciplinary action against me."* Again, in an email to Ms Mulley on 23 April 2018, in the context of the Appeal, contained at page 420 of the bundle, the claimant stated *"The message was sent at a time when I was consuming lots of medication and alcohol to block out the stress and anxiety of all that was happening around me."* In the tribunal's view, the claimant did not clearly advance the case at either the disciplinary hearing or the appeal hearing that his medical condition had rendered him no longer in control of his actions at the time he sent the impugned text message.

38. The tribunal further finds that the allegations of procedural unfairness identified by the claimant did not render his dismissal unfair. The claimant complained about being called to an investigation meeting without accompaniment on 2 November 2017 in relation to the disciplinary charge for which he received a final written warning. This is not the disciplinary process which resulted in his dismissal, and therefore is not directly relevant to these proceedings. In any event, the letter of 2 November 2017 at page 530 of the bundle records *"Your right to accompaniment was declined."* Further the notes at page 532 of the bundle appear to show that the claimant had been offered the right to be accompanied and declined.

39. The notes of the investigatory meeting of 22 December 2017 at page 219 of the bundle record the claimant having wanted his trade union representative to be present at the investigation meeting in respect of the sending of the text. The notes also record his decision to proceed without accompaniment, albeit that that decision is not countersigned by him on the pro forma, where

indicated. Even if the claimant is correct that he was not offered accompaniment at this investigation meeting, it is apparent that the investigation meeting was adjourned due to the non-availability of his trade union representative (page 397 of the bundle).

40. The tribunal finds that the claimant was offered his statutory right of accompaniment in relation to the disciplinary hearing which took place on 1 February 2018. During the claimant's cross examination around the issue of having accepted and commenced employment in another full-time role, the claimant stated that he had contacted the respondent the week previous to commencing employment in order to expedite the proceedings and bring them to a conclusion one way or the other. The earliest date that was offered was Thursday, 1 February 2018. The tribunal therefore finds that it was the claimant's decision to proceed in the absence of accompaniment. The claimant referred to the failure of Mr Shaver to require him to sign off that he had been offered and declined the right to be accompanied. During cross examination, Mr Shaver agreed that the respondent had a policy to the effect that if a matter is not documented, it did not happen. However, the tribunal accepts that the right to accompaniment was set out in the disciplinary hearing invitation letter, contained at pages 243 to 244 of the bundle.

41. The tribunal wishes to record its concern regarding the content and tenor of the email correspondence from SN, reproduced by the claimant at page 397 to 399 of the bundle, a human resources manager who was not called as a witness to the hearing. It was inappropriate and would have resulted in the claimant having felt compelled to attend the disciplinary hearing, (which was not the disciplinary process which led to his dismissal), irrespective of the state of his health. However, this email did predate the availability of the claimant's Fit Note from his GP (page 176A of the bundle) which (from page 183 of the bundle) appears to have been sent on 18 December 2017. In his email to Mr Skinner at page 183, the claimant recorded his intention to attend the meetings which had been convened on 22 December 2017, against medical advice. The respondent's representative in his closing submission noted that a provision of a Fit Note means that an employee is not fit to attend work, but does not necessarily mean that an employee is unfit to attend a meeting.

42. The tribunal further agrees with the respondent's representative in his closing submission, when he asserted that the failure to adjourn the investigatory meeting on 22 December 2017 made no overall difference to the outcome.

43. The claimant also complained that he was not provided with the notes of either the disciplinary or investigation meetings on the day the meetings took place, noting that he was provided with them by email at a later date. The claimant states that given his medical and mental challenges, the lack of representation and the delay in the provision of the notes, that he had no idea if they were an accurate reflection or not. The claimant did not identify any particular irregularity at the hearing, and the tribunal views the notes as appearing to present an accurate summary of the relevant meetings. There does not appear to be any discrepancy between the account given verbally at the

meetings and the matters recorded in the various written documents prepared by the claimant, when he gave an account of his actions.

44. The claimant complained that his grievance hearing and appeal hearings were to be conducted by telephone conference. The tribunal is satisfied that this was caused by the need for more senior managers to deliver these hearings and these managers were not based in Northern Ireland. The disciplinary hearing with Mr Shaver was conducted face-to-face with the claimant, and the other panel member joining by teleconference. The claimant ultimately declined to engage in the Appeal hearing with Ms Mulley by telephone conference, electing instead to send a written submission. The tribunal finds that the Appeal Panel's actions around the Appeal process, and the outcome to have been fair and reasonable in all of the circumstances. The tribunal further finds that the arrangements for the appeal did not affect the fairness of the dismissal.

45. The tribunal is satisfied that the requirements of Article 130A of the 1996 Order were complied with. The tribunal finds that although the respondent could have made arrangements to obtain and review the claimant's medical notes and records and/or refer him to the occupational health physician for review, its failure to do so did not render the dismissal substantively unfair. The tribunal found Mr Skinner to be a credible and reasonable witness. He conducted a lengthy well-being meeting with the claimant. The claimant was asked to provide a list of his medication and information on his condition to allow Mr Skinner to consider next steps. The claimant only partially complied with this request and in particular did not provide a clear copy of the hospital letter, even when given an opportunity to do so.

46. The tribunal accepts Mr Shaver's evidence that he did not have a predetermined outcome in mind and approached the disciplinary hearing with an open mind. The tribunal accepts his evidence that he did not discuss the claimant's situation with the claimant's line manager. Mr Shaver admitted that he did make notes in advance of the hearing and that he did read from these when he gave the outcome of his deliberations orally. However, the tribunal accepts his oral evidence that there was no predetermined outcome. The tribunal finds that his decision was a reasonable decision in the circumstances. The tribunal also finds that his reasons for the disciplinary sanction of summary dismissal, as recorded at pages 301-302 and 304-305 of the bundle, are reasonable and appropriate, as per **Iceland Frozen Foods**.

47. The claimant also relied upon the apparent lack of consistency between his disciplinary outcome and that in another disciplinary appeal which he heard, where another employee who sent a barrage of inappropriate and abusive text messages to a manager had his dismissal set aside on appeal, in favour of a final written warning. The tribunal is not persuaded that this occurrence renders the claimant's dismissal unfair, as it is well established that there is a band of reasonable responses to an instance of gross misconduct, and the tribunal finds that the claimant's dismissal, in the particular circumstances which pertained, fell within this band, as per **Burchell.**

48. The tribunal shares the concerns of the claimant regarding the contact between his line manager and Ms Mulley. However, this did not affect the validity of the decision to dismiss by Mr Shaver. The tribunal accepts Ms Mulley's evidence as to the advice she provided to the claimant's line manager and also accepts that the correspondence did not influence the outcome of the Appeal. Further, the tribunal accepts her evidence that the existence and content of the correspondence was not known to the other member constituting the Appeal Panel.

49. The claimant in his closing written submission, suggested that **Nottingham City Transport Ltd v Harvey UKEAT/0032/12/JOJ** was authority for the proposition that an employee was unfairly dismissed because the employer did not conduct a reasonable investigation nor consider mitigating factors when dismissing a disabled employee. In the claimant's case, the tribunal agrees with the submission of the respondent's representative that there is no issue with the reasonableness of the investigation, as the claimant admitted that he had sent the text. In this regards, the tribunal is satisfied that the test in **Burchell** has been met, in that the respondent entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time and that the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. If the claimant is suggesting that any behaviour which is linked to a disability could not amount to gross misconduct which would justify summary dismissal, the tribunal rejects such a contention, on the authority of **London Borough of Lewisham v Malcolm [2008] UKHL43**.

50. The claimant also referred the tribunal to the case of **Joanne Lamb v the Garrard Academy UKEAT/0042/18/RN** as authority for the proposition that it is the employer's responsibility to make reasonable checks in the event of an employee's potential disability. The judgment at paragraph 16 sets out the EHRC Employment Code which states: *"For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment."* The tribunal notes these provisions within the Code are relevant to the question of knowledge of a disability and the disadvantage to which the disabled person may be placed, rather than creating an onus on an employer in a disciplinary situation to carry out exhaustive investigations (which would have required expert medical opinion) to establish whether the misconduct was related to the disability.

51. Mr Shaver's witness statement records that he had reviewed the investigation documentation and the claimant's comments from the investigation. In his statement, he recorded that he concluded that the claimant's conduct constituted gross misconduct and that he therefore did not consider it necessary to carry out any investigation into the claimant's mental health. In cross examination, he explained his view that the claimant's conduct amounted to gross misconduct irrespective of the condition of the employee.

52. Applying **Connolly**, the tribunal finds that none of the matters relied upon by the claimant have led to unfairness to him which rendered it inequitable or contrary to the equity or the substantial merits of the case for the respondent to have dismissed him. The content and tenor of the text message, the timing of the text message, the seniority of the claimant, the greater seniority of the recipient and the finding of the respondent as to the intent of the text message were all aggravating factors, which, in real terms, meant that summary dismissal was an inevitable disciplinary sanction. In the tribunal's view, acting as an industrial jury, it would have been astonishing had the claimant not been dismissed for his actions in sending the impugned text message.

53. Even if the tribunal is in error in finding that these matters did not affect the fairness of the dismissal, the tribunal agrees with the submission of the respondent representative that the claimant's misconduct in this case was exceptional and would have given rise to a finding of 100% contributory fault, per **W Devis & Sons Ltd v Atkins,** with the consequent reduction on any basic and compensatory award to zero. The claimant in his final written submission referred to Harvey at paragraph [2510.01] which cited the case of **Langston v Department for Business Enterprise and Regulatory Reform UKEAT/0534/09*,* [2010] All ER (D) 36 (Sep***)*** (Wilkie J presiding) where the EAT held that a tribunal which had reduced the basic award by 100% had erred in law in failing to consider whether, and if so to what extent, the claimant was guilty of blameworthy or culpable conduct or had control over those events which gave rise to or contributed to the dismissal. The tribunal distinguishes that case, in which the claimant had brought forward medical evidence of the possibility of an acute transient psychotic disorder, from the present case, in which no such medical opinion was before the respondent or the tribunal. Moreover, the tribunal finds in the absence of such cogent and persuasive medical evidence that the claimant's conduct in sending the impugned text message was culpable and blameworthy to the extent that no compensation should be paid.

DISABILITY DISCRIMINATION CLAIM

54. **Relevant Law**

The Meaning of Disability

The Disability Discrimination Act 1995, as amended ('the 1995 Order'), provides:-

(i) Section 1 of the 1995 Act:-

> *"(1) Subject to the provisions of Schedule 1, a person has a disability for the purpose of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.*

(2) In this Act 'disabled person' means a person who has a disability.

(3) Guidance

A1 The Secretary of State may issue guidance about matters to be taken into account in determining whether a person is a disabled person.

(1) Without prejudice to the generality of sub-section A(1) the Secretary of State may, in particular, issue guidance about the matters to be taken into account in determining –

(a) whether an impairment has a substantial adverse effect on a person's ability to carry out normal day-to-day activities; or

(b) whether such an impairment has a long-term effect."

(ii) Schedule 1 of the 1995 Act:-

"2(1) The effect of an impairment is a long-term effect if –

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

(c) it is likely to last for the rest of the life of the person affected.

(2) Where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

...

4(1) An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following –

(a) mobility;

(b) manual dexterity;

(c) physical co-ordination;

(d) continence;

(e) ability to lift, carry or otherwise move everyday objects;

(f) speech, hearing or eyesight;

(g) memory or ability to concentrate, learn or understand; or

(h) perception of the risk of physical danger.

(i) taking part in normal social interaction; or

(j) forming social relationships

…

6(1) An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact the measures have been taken to treat or correct it, is to be treated as having that effect.

(2) In sub-paragraph (1) 'measures' include, in particular, medical treatment ... ."

55. **Goodwin v The Patent Office [1999] ICR 302** establishes that the tribunal's approach in determining whether a person has a disability is to consider:

a. Whether the person has a physical or mental impairment;

b. Whether the impairment affects the person's ability to carry out normal day-to-day activities;

c. The effect on such activities must be 'substantial';

d. The effects must be 'long term'.

56. The Equality Commission Disability Code of Practice – Employment and Occupation (as amended) states:

"<u>What does 'impairment' cover?</u>

It covers physical or mental impairments; this includes sensory impairments, such as those affecting sight or hearing.

<u>Are all mental impairments covered?</u>

The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities.

<u>What is a 'substantial' adverse effect?</u>

A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people." (Emphasis added)

57. In **SCA Packaging Ltd v Boyle [2009] IRLR 746** the House of Lords held that the individual's actual situation with the benefit of the course of treatment must be ignored and the claimant must be considered as if he was not having the treatment and the impairment was completely unchecked.

58. In **Nissa v Waverley Education Foundation Ltd and Joanne Newsome UKEAT/0135/18/DA** HHJ Eady QC stated at paragraph 15:

> *"Turning to the question, what is a substantial adverse effect, it has been observed in the case law that this sets a relatively low standard. As paragraph B1 of the Guidance states, a substantial effect is one that is "more than minor or trivial" and ought to be understood as applying where a limitation goes "beyond the normal differences in ability which may exist among people"; the focus should be on what an employee cannot do or can only do with difficulty, and not on what they can do easily. In this regard, the ET is required to look at the whole picture but it is not simply a question of balancing what an employee can do against what they cannot: if the employee is substantially impaired in carrying out any normal day-to-day activity, then they are disabled notwithstanding their ability in a range of other activities. Where there is unchallenged medical evidence as to the state of the employee's health,that should generally be accepted."*

WAS THE CLAIMANT A DISABLED PERSON FOR THE PURPOSES OF THE 1995 ACT? – RELEVANT FINDINGS OF FACT

59. The claimant appears to rely on his hyperthyroidism and complications arising from it as the cause of his disability, as well as anxiety and depression arising as a consequence of his thyroid condition and amounting to a freestanding disability, in their own right.

60. The claimant further appears to have approached the question of whether he had a disability as self-evident. The claimant in his final closing submission dated 16 September 2019 stated that *"the symptoms and impacts [of my condition] are widely known and directly linked to the condition itself."* Consequently, his witness statement did not set out his evidence in a clear fashion to show how he met the test laid down in the 1995 Act. In particular, his evidence did not address the effects of his condition(s) on his day to day activities. Contrary to the tenor of the claimant's submission, the tribunal does not share his view that the symptoms and effect of his condition are so well known that they should constitute a matter of judicial notice.

61. The tribunal notes the content of the letter from Dr Steven J Hunter to the claimant's GP dated 16 January 2018, following a consultation at the clinic

dated 21 December 2017. This letter stated: *"Thank you for referring Mr Loughran back to the endocrine clinic where I saw him on 21st of December. He has a history of primary hyperthyroidism with a first episode approximately four years ago and subsequently he has been on and off treatment… He did previously have some symptoms referable to his eyes which were sore and puffy but these resolved whenever he stopped smoking…"* The claimant provided other letters from the endocrinology clinic to his GP following his treatment with radioactive iodine on 17 January 2018.

62. On page 448 of the bundle there is a copy of a referral from the claimant's GP to the Endocrinology clinic dated 22 July 2016. This referral confirms the claimant's hyperthyroidism and his medication before recording *"However patient is [complaining of] feeling generally unwell with tiredness, and agitated feeling, sometimes palpitation and profuse sweats".* It also at page 449 of the bundle confirms that the claimant had thyroid eye disease recorded on 17 January 2012.

63. On page 480 of the bundle a letter from Dr Connor Hamill from the regional centre for Endocrinology and diabetes dated 6 November 2016 confirms the claimant was at that time feeling *"agitated and sweating, reduced energy levels and quite marked mood swings."* He was referred to an ophthalmic surgeon for further assessment of his eyes to see if his disease was stable.

64. On page 483 of the bundle, a copy of an urgent referral to Dr Hunter was made on 14 November 2017, recording the claimant's thyrotoxicosis. This referral records that the claimant *"feel tired, anxious, not sleeping well, stress and work, doesn't feel coping well at present, sending emails late at night."*

65. Page 487 of the bundle is comprised of a letter dated 10 September 2015 from Dr McKeever to the claimant's GP confirming the claimant's long-standing history of primary hyperthyroidism and his history of thyroid eye disease.

66. Thyrotoxicosis is recorded by the GP on 8 August 2017 and 14 November 2017.

67. The claimant's GP notes and records also record a number of instances of low mood and mental health symptoms. Entries on 6 February 2017 and 3 March 2017 record stress and anxiety arising from work related matters. An entry on 18 December 2017 records the claimant's poor sleep and appetite and lack of motivation, and an entry on 25 January 2018 records his low mood and other related symptoms

68. The claimant's witness statement makes reference at paragraph 2 to having reported a serious mental health issue to his work in late 2016. This mental health issue is not corroborated by his GP notes and records.

69. The claimant's evidence around his thyroid issue was that in August 2017 it had deteriorated to become life threatening. He was immediately signed off

work and reported a significant and dramatic weight loss. At paragraphs 9 and 15 of the claimant's witness statement he describes that in November and December 2017 he was facing significant mental health challenges. These significant mental health challenges are not fully corroborated by the GP notes and records.

70. In these circumstances, the tribunal is faced with a dilemma. The claimant, who is a litigant in person, clearly has a long term condition which amounts to a physical or mental impairment. The claimant did not reference or rely on his thyroid eye disease in his witness statement. He did not reference the matters set out at paragraph 4 of Schedule 1 to the 1995 Act set out at paragraph 54 above. The claimant in his witness statement did not properly address the effect of his condition on his day to day activities, and the tribunal is left to consider what can be distilled from the medical notes and records provided in the bundle. The claimant also referred the tribunal during his evidence to the symptoms listed at pages 200-203 of the bundle, some of which may engage the elements of paragraph 4 of Schedule 1 of the 1995 Act.

71. In these circumstances it is very difficult to address the question of whether the claimant is disabled for the purposes of the Act. However, for the reasons set out below in this decision which result in the rejection of the claimant's claims of discrimination on other grounds, no finding on this question is necessary, nor is it necessary to consider the question of whether the respondent had actual or constructive knowledge of the claimant's disability, nor engage with the test set out in **Gallop v Newport City Council [2013] EWCA Civ 1583** (namely whether the employer had actual or constructive knowledge of the Section 1/Schedule 1 facts which constitute the disability).

DISCRIMINATION

72. *Meaning of Discrimination*

Section 3A of the 1995 Act:-

> *"(1) For the purposes of this Part a person discriminates against a disabled person if –*
>
> *...*
>
> *(2) For the purpose of this Part a person also discriminates against a disabled person if he fails to comply with the duty to make reasonable adjustments imposed on him in relation to the disabled person.*
>
> …
>
> *(5) A person directly discriminates against a disabled person if, on the grounds of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant*

circumstances including his abilities are the same as, or not materially different from, those of the disabled person.

(6) If, in a case falling within sub-section (1), a person is under a duty to make reasonable adjustments in relation to a disabled person but fails to comply with that duty, his treatment of that cannot be justified under sub-section (3) unless it would have been justified even if he had complied with that duty".

73. *Duty to Make Reasonable Adjustments*

Section 4A of the 1995 Act:-

"(1) Where –

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

(b) any physical feature or premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to provision, criterion or practice, or feature, having that effect.

(2) In sub-section (1) 'the disabled person concerned' means –

...

(b) in any other case, a disabled person who is –

...

(ii) an employee of the employer concerned;

(3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know –

...

(b) in any case, that person has a disability and is likely to be affected in the way mentioned in sub-section (1)."

74. In **Environment Agency v Rowan [2008] IRLR 20**, the EAT stated:

"In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:

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

(b) the physical feature of premises occupied by the employer,

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant. …

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under Sections 3A(2) and 4A(1)without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage".

75. In **Royal Bank of Scotland v Ashton [2011] ICR 632** Langstaff J held that a Tribunal had to be satisfied there was a PCP which had placed the disabled person concerned at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled.

76. In **Carreras v United First Partners Research UKEAT/0266/15/RN** the Employment Appeals Tribunal held *"In approaching the statutory definition, the protective nature of the legislation meant a liberal, rather than an overly technical approach, should be adopted (***Nottingham City Transport Ltd v Harvey UKEAT/0032/12/JOJ** *at para 18; EHRC* Code of Practice on Employment 2011 *at para 6.10"*

77. In **Nottingham City Transport v Harvey UKEAT/0032/12/JOJ,** at paragraph 18 of the decision, Langstaff P stated:

""Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply."

Paragraph 21 of that judgment states:

> *"It seems plain to us that the Tribunal erred in law by identifying the particular flawed disciplinary process that the Claimant underwent as being something that fell within the heading "provision, criterion or practice", and, as Mr Soor points out, as showing that because of his disability those aspects caused a disadvantage over others who were not disabled, when it may seem obvious that a failure to consider mitigating circumstances and a failure reasonably to investigate is likely to cause misery whoever is the victim. Accordingly, as it seems to us, the appeal must be allowed."*

78. In **Carphone Warehouse Ltd v Martin UKEAT/0371/12/JOJ, UKEAT/0372/12/JOJ** the EAT held that neither incompetence nor failing to take care could properly be construed as amounting to a breach of Section 4A of the 1995 Act. It held:

> "*First, a lack of competence in relation to a particular transaction cannot, as a matter of proper construction, in our view amount to a "practice" applied by an employer any more than it could amount to a "provision" or "criterion" applied by an employer. Secondly, the obligation created by s 4A is to take steps, or such steps as are reasonable. However it is phrased, what the Employment Tribunal were saying, in effect, was that The Carphone Warehouse had failed to take proper care in preparing Mr Martin's pay packet in July 2010. Taking care cannot be properly described, in our view, as taking a step or steps for the purposes of s 4A(1) of the DDA. What the Employment Tribunal is seeking to do, perhaps understandably, is to give the Claimant a remedy for what they regard as rather egregious incompetence by The Carphone Warehouse, but we do not think the facts can be shoehorned into the relevant provisions of the DDA. Therefore, that finding of discrimination, in our view, cannot stand."*

79. *Burden* of *Proof*

Section 17A of the 1995 Act (Burden of proof):-

> *"1(C) Where, in the hearing of a complaint under sub-section (1), the complainant proves facts on which the Tribunal could, apart from this sub-section, conclude in the absence of an adequate explanation that the respondent is acting in a way which is unlawful under this Part, the Tribunal shall uphold the complaint unless the respondent proves that he did not so act."*

80. In **McCorry and Others (as the committee of Ardoyne Association v McKeith [2017] NICA IRLR 253** the Northern Ireland Court of Appeal summarised the relevant law regarding the passing of the burden of proof:

> ***"39***

The approach to the shifting burden of proof was considered by the Court of Appeal in England and Wales in ***Igen Ltd v Wong [2005] IRLR 258****. It was stated that the statutory amendments required a two-stage process. The first stage required the complainant to prove facts from which the tribunal could, apart from the section, conclude, in the absence of an adequate explanation, that the employer had committed, or was to be treated as having committed, the unlawful act of discrimination against the employee. The second stage, which only came into effect on proof of those facts, required the employer to prove that he did not commit or was not to be treated as having committed the unlawful act, if the complaint is not to be upheld.*

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The issue was revisited by the Court of Appeal in England and Wales in ***Madarassy v Nomura International plc [2007] IRLR 246*** *which set out the position as follows (italics added):*

> '56. The Court in ***Igen v Wong*** expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. *The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> 57. "Could conclude" [in the Act] must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the complaint to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by [the Act]; and available evidence of the reasons for the differential treatment.
>
> 58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to

whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.' "

81. In relation to a failure to comply with the duty to make reasonable adjustments, in **Project Management Institute v Latif [2007] IRLR 579**, it was stated by the EAT that:

> *''we very much doubt whether the burden shifts at all in respect of establishing the provision, criterion or practice or demonstrating the substantial disadvantage. These are simply questions of fact for the tribunal to decide after hearing all the evidence, with the onus of proof resting on the Claimant."*

This was endorsed in **Jennings v Barts and the London NHS Trust UKEAT/0056/12/DM** which stated;

> *"we think that the concept of shifting burdens is an unnecessary complication in what is essentially a straightforward factual analysis of the evidence presented."*

82. **Harvey** at Division L, Part 5, Section D, paragraph 812.01 states:

> *"It is for a claimant to show both the PCP and the disadvantage before applying the reversal."*

The claimant's disability discrimination claim

Discrimination on grounds of disability

83. The claimant provided replies to a Notice for Additional Information dated 4 October 2018, which are set out at 48-51 of the bundle. To the extent that the claimant alleged direct discrimination he was asked to set out the particulars of same. He replied that he was discriminated against over a three year period from when he was promoted to the post of Operations Manager in not receiving support from a wellbeing perspective, contrary to the respondent's policies. He also set out a number of comparators, one of whom appeared to be the employee whose dismissal in similar circumstances was overturned by the claimant on appeal. He also cited two other employees who received wellbeing calls, occupational health assessment and return to work/wellbeing meetings. This aspect of his case was not pursued in his witness statement nor did the claimant make any suggestion that the difference in treatment was

on the grounds of his disability. Accordingly, the claimant did not prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer had committed an unlawful act of discrimination against the claimant per **Igen** and **Madarassy**. The claimant's claim in this respect therefore fails and is dismissed.

Failure to make reasonable adjustments

84. In the Replies referred to above, the claimant did not identify any PCP to which he was subject. Rather, he made reference to not having received the benefit of the application of the respondent's wellbeing policies. For this reason, he was asked to identify both the PCPs which he alleged were applied and the nature of the substantial disadvantage to which he was placed at the outset of the hearing. He informed the tribunal that other members of staff had enjoyed the benefit of return to work interviews, risk assessments, well-being meetings and were referred to Occupational Health or had their medical records reviewed before decisions were made. He also asserted that in June 2017 when he was moved to have responsibility for an underperforming account, there should have been a risk assessment carried out. He further asserted that before, during and after the period in which he sent the text message he was seriously unwell and that the respondent's failure to access or consider his medical information placed him at a substantial disadvantage.

85. In his closing submission, the respondent's representative referred the tribunal to Harvey at Division L Equal Opportunities, Part 3. Prohibited Conduct, Section B. The duty to make reasonable adjustments, Subsection (2) Provision, criterion or practice, at paragraph [389.01], noting that a flawed disciplinary hearing on a one-off basis does not constitute a PCP. He cited **Nottingham City Transport v Harvey UKEAT/0032/12/JOJ** as authority for the proposition that a one off failure to apply a policy to the claimant could not constitute a PCP. The claimant in his written submission of 16 September 2019 also made reference to this decision, albeit the final section quoted by him was the decision of the employment tribunal on discrimination which was successfully appealed at the EAT.

86. The PCPs advanced by the claimant at the hearing were as follows: (i) other members of staff received return to work interviews, risk assessments and well-being meetings and the claimant did not; (ii) medical notes were reviewed in respect of other employees before determinations were made and were not reviewed in the claimant's case; and (iii) other people received occupational health referrals when the claimant did not. In the respondent's representative's submission all of these suggested PCPs fail on the application of the **Nottingham City Transport** (see paragraph 77 above).

87. The tribunal agrees with the respondent's representative's submission in this regard. Even if this were not the case, and these matters did amount to relevant PCPs applied to the claimant, the tribunal is not possessed of any evidence which would tend to show what the substantial disadvantage

sustained by the claimant was compared to non-disabled employees. The respondent's representative pointed to the fact that the claimant had performed so well following his move to the O2 account in June 2017 that he received an off cycle pay rise. The respondent's representative contended that if the claimant was asserting that the substantial disadvantage was a diminution in his health, the tribunal would need to be in possession of evidence linking this with the alleged PCP. The tribunal agrees that the claimant has not brought forward such evidence which establishes this linkage.

88. The claimant also advanced a case that the failure to hold face-to-face meetings in respect of his grievance and appeal meetings amounted to a failure to make reasonable adjustments. The tribunal concurs with the respondent's representative's submission that the claimant failed to adduce any evidence as to how he was placed at a substantial disadvantage when compared to non-disabled colleagues. Prior to the occurrence of the meetings on 22 December 2017, the claimant sent an email to Mr Skinner on 18 December 2017 stating *"given the nature of my illness it makes little difference whether I attend onsite, by phone or at a neutral venue – I am medically unfit to represent myself to the best of my ability."* Further, at the time of the disciplinary hearing on 1 February 2018 (which was face to face with Mr Shaver, with the other panel member joining by teleconference) and the appeal meeting to which the claimant sent a written submission, the claimant was in full time employment in similar work with his new employer. This would serve to undermine the credibility of any claim by the claimant of the existence of any substantial disadvantage to the claimant in respect of these meetings.

89. At the submissions stage, the claimant purported to advance a PCP which had not previously been identified in the case, namely that he had not been permitted accompaniment. The respondent's representative objected to any attempt by the claimant to amend his claim of failure to make reasonable adjustments at the submission stage of the hearing, but in any event highlighted to the tribunal that there was no evidence of the particular disadvantage to which the claimant was placed. As per the findings at paragraphs 38-40 above (but subject to the caution expressed in paragraph 41), the tribunal finds that the claimant was permitted accompaniment throughout the process and that it was his decision to proceed unaccompanied. It was his evidence that, given that he accepted the offer of new employment, he wanted the disciplinary meeting expedited.

90. The claimant at the hearing did not pursue an amendment application that the failure to provide notes of meetings in a timely fashion constituted a PCP which placed him at a substantial disadvantage. In any event, the claimant's case did not put forward any evidence of the nature of such disadvantage. In putting questions to Ms Mulley before the objection was raised, the claimant acknowledged that any person would have been disadvantaged by this occurrence. In these circumstances, the tribunal agrees that the claimant has

not shown the substantial disadvantage he was subject to compared to non-disabled persons.

91. The claimant's initial written submission which was furnished at the hearing put forward for the first time a claim that the respondent organisation had a practice of not completing documented return to work interviews with employees. The tribunal understood Mr Skinner's evidence to be that return to work interviews should always take place and be documented, but that there is not a 100% compliance rate with this objective. The tribunal accepts Mr Skinner's evidence and rejects the contention that the respondent had a practice of not completing documented return to work interviews with employees. Where there were individual one off failures, this would not amount to a practice. Moreover, a failure to complete documentation seems in the tribunal's view to be incompetence rather than a PCP, as per **Carphone Warehouse Ltd**.

92. The claimant further identified and put forward for the first time an alleged PCP in his initial closing submission document, namely that the respondent had a policy of not allowing a letter of appeal to be amended. Ms Mulley's witness statement and the correspondence generated at that time confirm that the claimant was not permitted to withdraw and resubmit his grounds of appeal after the expiry of the time limit for an appeal. The disciplinary policy contained within the bundle, specifically at pages 137 and 138, does not set out any prohibition against adding new grounds to an appeal. The respondent's representative contended that the claimant could only show that there had been a general unfairness towards him, rather than having established that there was any repetition which could have established a practice. Further, the claimant did not give evidence in his witness statement or during the hearing as to how he was placed at a substantial disadvantage compared to nondisabled persons.

93. In his closing submission, the claimant also asserted for the first time that the respondent's employees, who are not medically trained, make judgement calls on whether an employee should be referred to occupational health for an assessment. The tribunal accepts that this could have amounted to a practice on the part of the respondent, however the tribunal has no evidence whatsoever of the nature of the disadvantage to which the claimant alleges that he was placed compared to non-disabled persons. It appears to the tribunal that non-disabled persons could likewise be disadvantaged by such an approach.

94. The claimant also advanced a case at the hearing that, in general terms, the respondent had failed to discharge a duty of care to him following two periods of sickness absence, including in August 2017, when his wife texted his line manager to make him aware of his "thyroid storm". In particular, the claimant asserted that the respondent had failed to properly investigate or to consider his condition moving forward, by referring him to occupational health or carrying out a risk assessment. The claimant may well be right that a prudent

employer would have made the referral and considered the information yielded by such an exercise, however, as per **Carphone Warehouse Ltd** these matters do not amount to a breach of section 4A of the 1995 Act.

95. In the circumstances, the claimant has failed to establish that he was both subject to a PCP and that he was placed at a substantial disadvantage as per **Project Management Institute.** Accordingly, the claimant has not established that the respondent was under any duty to make reasonable adjustments and his claim for alleged breach of that duty fails. Accordingly, the claimant's claim in respect of discrimination by an alleged failure to make a reasonable adjustment is also dismissed.

96. There can be no doubt that the claimant feels that he was treated unfairly by the respondent, however general allegations of unfairness do not equate with the application of a PCP and consequent substantial disadvantage as required by Article 4A of the 1995 Act.

97. The tribunal acknowledges that the claimant will be deeply disappointed with the outcome to his claim, which clearly runs contrary to his view of how he was treated. The claimant has, in the tribunal's view, sufficient insight to realise that the sending of the text message was a grave misjudgment on his part. The consequences of so doing have resulted in the claimant losing a job that he excelled at. The tribunal hopes that the claimant will be able to find closure and move forward, given that he was clearly a hard-working, motivated and successful manager in the respondent's business.

Employment Judge:

Date and place of hearing: 2-6 September 2019, Belfast.

Date decision recorded in register and issued to parties: