EMPLOYMENT TRIBUNALS

Claimant: Mr A Mitchell

Respondent: Amiho Technology Limited

HEARD AT: BURY ST EDMUNDS ET

ON: 19th - 22nd June 2017.
3rd July 2017 (Discussion Day)

BEFORE: **Employment Judge Laidler**

MEMBERS: Ms L Daniels and Mr D Hart

REPRESENTATION

For the Claimant: Mr A Robson, Counsel.

For the Respondent: Mr M Curtiss, Counsel.

RESERVED JUDGMENT

1. **The Claimant has a disability within the meaning of section 6 of the Equality Act 2010 by virtue of depression.**

2. **The Respondent knew or ought to have known that he had such a disability from 9 June 2016.**

3. **The Respondent acted unfairly when it dismissed the Claimant by reason of capability.**

4. **The Claimant's dismissal was unfavourable treatment because of something arising in consequence of his disability and the Respondent has not shown that it was a proportionate means of achieving a legitimate aim.**

5. The duty to make reasonable adjustments arose and the Respondent failed to comply with that duty in failing to make reasonable adjustments of suspending the disciplinary process until the Claimant had returned to work and mediation.

6. The Respondent is to pay to the Claimant £1,000 net of Income Tax and National Insurance in respect of the holiday pay claim.

7. Case management orders are set out below in relation to a remedy hearing.

REASONS

1. The ET1 in this matter was received on the 21st December 2016. In that the Claimant brought claims of unfair dismissal, disability related discrimination, failure to make reasonable adjustments and a claim for unpaid holiday pay.

2. In it's response the Respondent defended all the claims and denied that the Claimant satisfied the definition of disabled within the meaning of the Equality Act 2010.

3. There was a Preliminary Hearing before this Employment Judge on the 3rd March 2017 when the parties were represented as they were at this hearing. The representatives had agreed a list of issues which for the sake of completeness is now set out below: -

A. Unfair Dismissal pursuant to s.94 Employment Rights Act 1996 ("ERA 1996")

1.1 What was the reason for dismissal? The Respondent avers that the reason was ill health capability.

1.2 If the reason for dismissal was a potentially fair reason, did the Respondent act reasonably, in all the circumstances of the case, in treating that reason as a sufficient reason for dismissing the Claimant?

B. Disability Discrimination

1.3 Was the Claimant a disabled person within the meaning of s.6 Equality Act 2010?

a) The Claimant relies upon a mental impairment which took the form of depression and caused a substantial and long-term adverse effect on his ability to carry out normal day to day activities, as set out at paragraphs 1.3 to 1.4 of the Grounds of Claim.

b) The Respondent did not admit that the Claimant was a disabled person.

C. Discrimination arising from disability contrary to s.15 Equality Act 2010 ("EA 2010")

1.4 Was the Claimant treated unfavourably because of something arising in consequence of his disability?

a) The "*something arising in consequence of his disability"* relied upon by the Claimant is

(i) his sickness absence; and

(ii) his perceived lack of capability (see Grounds of Claim para 2.3).

b) The unfavourable treatment relied upon by the Claimant is his dismissal.

1.5 If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

D. Failure to make reasonable adjustments contrary to s.20(3) EA 2010

1.6 Was there a 'provision, criteria or practice' (PCP) applied by the Respondent which put the Claimant at a substantial disadvantage compared to someone who was not disabled?

The Claimant had prepared a table at the end of the draft list of issues which set out eight PCPs. The Judge had to query how some or all of these could ever amount to PCPs within the meaning of the statutory definition. Counsel for the Claimant agreed to refine these again.

1.7 Did the Respondent take such steps as it was reasonable to have taken to avoid the disadvantage? The Claimant avers that reasonable adjustments which should have been made include the 12 matters particularised at paragraph 2.5 of the Grounds of Claim, also set out in the table at the end of this list of issues.

1.8 The Respondent denies:

a) there were PCPs as alleged;

b) that the Claimant was put at a substantial disadvantage compared to someone who was not disabled; and

c) that the steps as alleged by the Claimant are reasonable for the Respondent to have taken to avoid the disadvantage.

E. Holiday Pay

1.9 Has the Respondent failed to pay the Claimant for any accrued but untaken holiday to the date of termination, 28 July 2016?

a) The Claimant claims entitlement to holiday pay of 7.1 days. He claims unlawful deduction from wages contrary to s.13 ERA 1996 and/or breach of the Working Time Regulations 1998 and/or breach of contract against the Respondent in respect of outstanding holiday pay.

b) The Respondent denies that any holiday pay is due.

4. The Judge had raised at that Preliminary Hearing some concerns about how the "provision, criterion or practice" (PCP) was framed for the reasonable adjustments claim.

5. By letter of the 30th March 2017 the Claimant's solicitors clarified his position:

> *"That the PCP applied by the Respondent which put him a substantial disadvantage compared to someone who is not disabled was their PCP of seeking to pursue a disciplinary procedure against him notwithstanding his disability which disability rendered him unable to properly defend himself within that process."*

6. At the outset of this hearing it was necessary for the Judge to raise again the way in which the PCP had been defined. It still did not seem to be within the meaning of the Equality Act 2010. After further consideration Counsel for the Claimant confirmed that the PCP was as stated in that letter, but more particularly described as: -

> *"The application and pursuit of the disciplinary procedure generally and specifically by requiring attendance at or written submissions for a disciplinary hearing."*

7. This put the Claimant at a disadvantage as he was not able or less likely to be able to attend meetings or formulate and submit submissions for such.

8. The adjustments relied upon were those set out in the letter of the 30th March 2017 by reference to paragraphs in the ET1. However, some of those paragraphs were then deleted for the purposes of the reasonable adjustments claim but they remained as matters that should be considered by the Tribunal when it considered the question of reasonableness. The paragraphs relied upon in the ET1 are as follows: -

   Paragraph 25.2 - suspending the disciplinary process

   Paragraph 2.5.3 - dropping the disciplinary charges

   Paragraph 2.5.7 - mediation

   Paragraph 2.5.8 - identifying guidelines/expectations for the Claimant

   Paragraph 2.5.11 - considering the part played by the Claimant's state of health during the incident in question and/or in relation to the appropriateness/fairness of moving straight to a disciplinary hearing.

Holiday Pay

9. The parties eventually reached an agreement regarding holiday pay that the Respondent pay to the Claimant £1,000 net of Income Tax and National Insurance in respect of the holiday pay claim.

Disability

10. At the outset of this hearing there was discussion as to the Respondent's stance on disability. It was confirmed that in the light of the evidence now produced the Respondent accepts that the Claimant was disabled at all material times but it denies it had knowledge of the disability. It accepts that from October 2015 to July 2016 the Claimant was signed off with depression but the Respondent did not know it was a long-term condition.

11. There were also some documents which had not been put in the bundle and were referred to as "disputed documents". These included a letter from the Respondent to the Claimant dated 6th October 2015 enclosing a settlement agreement. The Respondent waived privilege in relation to this document. Regarding the other documents the Respondent's position was there had been late disclosure and it was not prepared to agree to the documents going into the bundle. After further consideration, considering the overriding objective and being satisfied that the Respondent was not prejudiced the documents were allowed into the bundle.

12. There was another issue that arose later in the hearing concerning documents. In the bundle were some handwritten notes of the Dismissal Meeting at page 190. Only after Mr Clarke had given evidence did a transcript come to light on the 3rd day of the hearing midway through Mr Clarke's evidence. Also, he produced Minutes of Directors Board Meetings which had not earlier been disclosed.

13. The Tribunal having read the medical evidence in the bundle discussed with the Claimant's representative reasonable adjustments that it could make for him during his evidence. It was agreed that scheduling regular breaks so that the Claimant knew when these would occur would be of assistance, and these tended to be after 45 minutes to one hour of him giving evidence.

14. The Tribunal read the witness statements and relevant documents, and then the witnesses were called and cross examined. The Tribunal heard from the Claimant and Berenice Mann, and Stephen Clarke for the Respondent. It did not hear from the Director who took the decision to dismiss as he was no longer with the organisation.

The Facts

15. From the evidence heard the Tribunal finds the following facts.

16. The Claimant was a software engineer with the Respondent commencing employment on the 11th April 2011 and working 4 days a week.

17. In the early days of employment, the Claimant worked closer with Mr Clarke and indeed some of the time at Mr Clarke's home. It has however, not been suggested in these proceedings that Mr Clarke and/or the Respondent could have known that the Claimant was disabled by virtue of depression at that time. The Claimant's case as has been made clear at this hearing and in submissions is that the Respondent knew from the time of the alleged discriminatory acts.

18. The Claimant was absent on sick leave from the 15th to 28th September 2015 following a period of hospitalisation. He had been in considerable agony and had been taken to Addenbrooke's Hospital by ambulance. The cause was identified as faecal impaction and he was instructed to take a combination of three types of laxative to clear the problem. The 29th September 2015 was therefore his first day back in the office.

The Incident 29th September 2015

19. This matter involves Stephen Clarke who the Tribunal heard from. It is appropriate that the Tribunal states it's position at the outset concerning Mr Clarke's evidence. Firstly, as already recorded he was not the decision maker but the only witness that the Tribunal heard from the Respondent. The Tribunal has had to conclude that he was not giving his evidence in a way designed to assist the Tribunal. He was so evasive that the Judge had to intervene on numerous occasions to ask him to just answer the question. Often questions had to be put several times by Counsel for the Claimant as Mr Clarke either stated that was not something he could really answer (when it plainly was) or as a default position he resorted to stating he did not understand the question. For these reasons where the evidence of the Claimant conflicts with that of Mr Clarke the Claimant's evidence is to be preferred.

20. The Tribunal also accepts the evidence of Berenice Mann who attended this Tribunal to be cross examined. Firstly, she gave evidence that there was not a good relationship between Steve Clarke and David Blumstein (the Managing Director who is no longer with the Respondent). Communications between them were poor. She also gave evidence which the Tribunal accepts that Steve Clarke had a temper and could be very rude to his colleagues. It is also accepted that David Blumstein was difficult to work for and that he could be bullying and intimidatory. This is all relevant background to the incidents with which this tribunal is concerned that lead to the Claimant going off sick.

21. The Claimant prepared a time line of some events including this incident, and produced evidence from his computer that this document had been created on the 23rd October and last modified on the 28th October 2015. Save for being taken by his own Counsel to one aspect in re-examination he was not challenged on this document in cross examination and the Tribunal accepts it as an accurate contemporaneous record of what occurred.

22. On the 29th September, the Claimant was discussing a marketing document with Berenice Mann as she wanted some technical input. Steve Clarke intervened in the discussion. The Claimant felt that the way that Mr Clarke wanted to deal with the document would give a very mixed marketing message.

23. Mr Clarke asked the Claimant to “step outside” to have a word with him. When outside the Claimant did tell Mr Clarke he was being unreasonable, talking down to him and that he did not appreciate being taken out of the room and spoken to like a naughty school boy. Mr Clarke stated to the Claimant that he had asked him outside so they could speak freely. The Claimant tried to address Mr Clarke’s behaviour on this and other occasions with the way that he talks to people and how offensive it can be. The Claimant has no recollection of swearing during that conversation, but accepts that he was very annoyed and it is possible he may have done so.

24. The Claimant was off on his regular day off on Thursday 1st October 2015 and had a service engineer visit him to repair a dishwasher. He did not have the necessary part to fix it. He offered to return the next morning with it. By a Skype text based chat the Claimant asked Steve Clarke if he could have that day off, to which Steve Clarke replied that provided the Claimant gave him a copy of the latest version of the software and documents he was working on by placing it in Dropbox or emailing it him. Steve Clarke suggested he bring the laptop round to the Claimant’s home that evening so that the Claimant could send him the files knowing that was the one night in the week when the Claimant had a regular social commitment and that would therefore have been difficult and inconvenient for him. The Claimant accepts in his witness statement at paragraph 2.15 that he did get angry and used a single swear word to Mr Clarke.

25. The Claimant cancelled the repairman's appointment and did not take leave on the 2nd October 2015. By approximately 9.30am that day he had placed the software project in the Respondent's repository but knows that Steve Clarke made no effort to access the information until around 5pm or otherwise discuss it with him. Instead that day Mr Clarke was replacing the office router as the Respondent had been using an old router that the Claimant had lent to them.

26. Mr Clarke in his witness statement at paragraph 28 gave evidence that he reported his concerns about the Claimant's behaviour to the Board of Directors and he is referring in that paragraph to two separate incidents namely the 29th September and 1st October 2015. He then went onto state at paragraph 30 "it was with some regret that we as a Board collectively decided that we should follow the disciplinary procedure".

27. The later documents disclosed part way through Mr Clarke's evidence included his report prepared on the 30th September 2015 for a Board meeting on the 5th October 2015. This included the note in the second paragraph "software development is resource constrained and also suffering from personnel issues, including likely exit". Mr Clarke accepted in cross examination this was reference to the Claimant and referred to the "likely absence of the Claimant" which would mean that he would have to recast all his deadlines for projects.

28. The Tribunal is therefore satisfied that the Respondent's had decided that the Claimant had to go through disciplinary proceedings even before the alleged incident on the 6th October 2015.

6th October 2015

29. On this day Mr Clarke demanded angrily of the Claimant to know his laptop password and the Linux server admin password. The Claimant said he would give him the server password and asked him what he would like him to change his personal password to as he did not want to give him the one he was using. Mr Clarke got angry and demanded an explanation of why the Claimant wouldn't give him his existing password. Mr Clarke continued to get angry about the password situation and stormed off. The Claimant followed him into the kitchen to try and finish the discussion. The Claimant accepts that they were both quite agitated. Mr Clarke refused to engage in further conversation but moved towards the Claimant so he was only about 9-12 inches away. The Claimant raised his right hand with his fingers spread and made contact with Mr Clarke's upper chest with his finger tips. He did not apply any force and his arm was not extended. This is the "shove" which Mr Clarke alleges occurred.

30. Shortly after the above incident Mr Clarke asked to see the Claimant and they went into a meeting room at which point the Claimant was given the settlement agreement and covering letter dated 6th October 2015 which was revealed to the Tribunal in the "disputed documents". The covering letter given to the Claimant dated 6th October 2015 makes it clear that the matters

with which the company was then concerned were the 29th September 2015 and 1st October 2015. There is no reference in this letter to the alleged shove which could only in any event have occurred on the 6th October 2015. It was alleged in the letter that the matters with which the company were concerned could amount to gross misconduct and the company would have no option but to commence formal disciplinary process with the Claimant. As an alternative, they were offering the Claimant a compromise agreement.

31. The Claimant includes this meeting in his time line referred to above and his evidence to this Tribunal is that he was told he had a choice of taking a settlement and leaving or being taken through a disciplinary and that as his actions constituted gross misconduct "I would be fired". The Tribunal accepts the Claimant's evidence that this was made very clear to him. It is supported by the Respondent's own documents. Reference has already been made to the report for the meeting on the 5th October 2015 but there were others as follows:-

    (1) 14th December 2015 managing Directors Report to the Board refers to "process for exit of Andy Mitchell continues".

    (2) Managing Directors Board Report 15th February 2016 "process for exit of Andy Mitchell continues. He is being unhelpful and we are using specialist legal support".

    (3) Managing Directors Board Report 14th April 2016 had a specific section on Andy Mitchell and stated "plan is to have situation resolved prior to DD (due diligence) for next round of investment".

    (4) 13th June 2016 in recording the Doctors report was on its way "next step is expedite process under advice to ensure swift and satisfactory conclusion for both parties. Plan is to have situation resolved prior to DD for investment".

32. The letter with the settlement agreement indicated to the Claimant he would not be required to attend work between then and the 16th October, and this would be a period of paid leave.

33. The Claimant returned to work on the 19th October 2015, and was called into a meeting by Mr Clarke at which he was told he was suspended pending a disciplinary hearing. The Tribunal saw a letter of the 19th October 2015 confirming the suspension. This stated that the Claimant had been suspended until further notice pending a disciplinary hearing into an allegation of gross misconduct regarding his behaviour and attitude at work, and "In particular you have on a number of occasions lost your temper and ranted at me when taking about outstanding work. We reserve the right to change or add to these allegations as appropriate in the light of our investigation." There was nothing in this letter about an alleged "shove".

34. The Claimant was told that he must cooperate with the investigation and may be required to attend the workplace for investigatory interviews.

Mr Clarke could not explain is cross examination why there was no mention of the alleged shove other than to say that the letter had been written by his Solicitors.

35. When it was put to Mr Clarke in cross examination that this letter referred to an investigation he was forced to accept that when it was written on the 19th October there had been no investigation. It was then put to Mr Clarke that there was no investigation on or after the 19th October and Mr Clarke's answer demonstrates the way in which he answered questions during cross examination: -

> *"I think it depends on what you construe as an investigation. I don't believe we took the disciplinary procedure further forward and there was no investigation."*

36. The Claimant attended an appointment with his GP on the 20th October and was signed off sick.

37. On the Claimant's return home from his GP he received a letter dated 20th October 2015 inviting him to a Disciplinary Hearing on 22nd October 2015. This now set out five distinct allegations as follows: -

    1. 'Displayed a serious lack of respect for management including the use of obscene language, bad attitude and offensive and aggressive behaviour;

    2. Expressed sincere misgiving about Amiho itself and your role/employment with the business generally;

    3. Displayed behaviour considered to be actual or threatened physical violence which is likely to have caused irreparably damage [sic] the working relationship and trust between us;

    4. Failed to comply with reasonable instructions given by management/gross insubordination;

    5. Your actions constituted behaviour which has undermined the trust and confidence that we have in you as an employee.

    The basis for these allegations is that:

    1. On 30 [corrected to 29th at this hearing] September 2015, whilst you were discussing a marketing document with Steve Clarke, you took exception to a phrase Steve wanted to include within the document; "specifically designed for". You reacted to this in an aggressive manner and when Steve asked you to step outside the office to discuss it further, you lost your temper, ranted and swore at him.

    2. On 1 October 2015, you requested to take a holiday the following day, 2 October. Steve Clarke stated that you would be able to take a day's

holiday as long as you put the work you had done on the wmbus_engine – radio interface into the Dropbox (which can be accessed by others) so it could be progressed in your absence. In particular, the time limit for completing this work was approaching and another employee had to carry out work on it to implement the radio functions. You reacted unprofessionally and aggressively to this request and used obscene language. The outcome was that that you decided to work on 2 October instead.

3. All work should be kept in the document Dropbox so that it is accessible by all those that need to access it from time to time.

4. On 6 October 2015, prior to a period of paid leave, you were asked by Steve Clarke for the password to your PC. You initially resisted and followed him out of the room ranting and subsequently shoved him. This took place within hearing of our new starters.

38. For the first time the allegation was now included that the Claimant had "shoved" Steve Clarke.

39. The Respondent made it clear that it did not intend to call any witnesses but advised the Claimant he may call any and if he intended to do so he must advise the Respondent by no later than 4pm on Wednesday 21st October. He was advised that if found guilty of misconduct they may issue a written warning, a final written or dismiss without notice. If found guilty of gross misconduct they may decide to summarily dismiss.

40. The Claimant's grievance that he had raised on the 14th November 2013 was it was alleged "linked to the disciplinary allegations" and they proposed to deal with that at the Disciplinary Hearing. Enclosed with this letter were transcripts from a Skype conversation between the Claimant and Mr Clarke, Mr Clarke's witness statement and the company's disciplinary procedure.

41. The witness statement of Mr Clarke was seen in the bundle at pages 91-92, it was confirmed that this was a statement made from notes of Mr Clarke's but typed up by Solicitors.

42. On receipt of the Disciplinary invite the Claimant emailed the Respondent stating that he had made it clear he would need to take legal advice and this would be difficult before the meeting on the 22nd October. He referred to this being very short notice. Further he advised he had been signed off sick until the 3rd November 2015 and would discuss with his lawyer "as to how this affects the process".

43. Mr Clarke replied (not Mr Blumstein) stating "I am working on the assumption that the meeting will go ahead until I know otherwise". He asked the Claimant to confirm by 10am on the Thursday whether he would be attending. In cross - examination he merely said that the Claimant had offered to see "what he can do" so at that point he was not sure if the Claimant was going to attend or not.

44. By email on the 21st October at 12:09 the Claimant advised that he had heard from his lawyer and "I must regrettably decline to follow your schedule with respect to deadlines and the meeting date".

45. David Blumstein replied at 16:56 stating "I consider that it would be in the interests of the Company and you that the meeting takes place and the issues are resolved as soon as possible". He therefore re-scheduled it to Monday 26th October at 2pm. The Claimant declined that as well in an email of the following day and said he would discuss "when is appropriate to proceed as soon as my lawyer is available for a face to face meeting".

46. Obviously Mr Blumstein did not attend to give evidence and it was put to Mr Clarke that there was no compelling reason to hold the meeting so quickly. He did not accept that and stated that they needed to discuss matters.

47. Although Mr Clarke stated in his witness statement that it was not appropriate for him to deal with his disciplinary matter as he was too involved and hence it was passed to Mr Blumstein it is quite clear from the Minutes of the Board Meetings that Mr Clarke was as involved as the other Directors as a member of the Board.

48. There was no investigatory meeting and the Claimant was never spoken to prior to an invite to the disciplinary hearing. In Mr Clarke's own statement that he prepared in October 2015, after the alleged shove he refers to "further discourse was interrupted by people exiting the adjacent room" and that the incident happened "within hearing of our new starters". There were therefore people to be spoken to even on Mr Clarke's own evidence.

49. In the invite to the Disciplinary Hearing as has been set out above although it refers to allegations the basis for these allegations is more a statement of facts from Steve Clarke's own evidence. The Tribunal can therefore understand why the Claimant believed as he sets out at paragraph 3.9 that these were being accepted by the Respondent as the way he had behaved.

50. The first sick note was that of the 20th October 2015 which signed the Claimant off with depression for 2 weeks to the 3rd of November 2015. All the sick notes stated depression save for the one dated 4th January 2016 which also added "folic acid deficiency". They stated the Claimant was not fit for work and did not make any recommendations.

51. Following the first absence the Claimant was signed off again but this time for 3 weeks to 24th November 2015.

52. The Claimant was then signed off again to the 14th December 2015.

53. By letter of the 27th October 2015 Mr Blumstein wrote to the Claimant expressing concerns about the Claimant's stress and stating "we need to address the problem head on and try to alleviate that stress for you". He

asked the Claimant to confirm by no later than 29th October "How you would prefer to proceed" and that was either a disciplinary hearing or for the grievance and disciplinary matters to be dealt with by way of written representations if the Claimant would be happy to proceed on that basis. He also asked that the sick note for the period up to the 3rd November be sent to him.

54. The Claimant replied on the 30th October stating that it was his intention to attend the hearing in person "when I am fit and able to do so". He stated that he would be contacting Howard Oakford and Barbara Kokocinska to ask them to act as witnesses for him. He also wished any hearing to be audio recorded. Mr Clarke in cross examination accepted that the Claimant was stating he would attend when fit and able to do so, and was engaging in the process.

55. In a further email of the 27th October the Claimant had stated he would be in touch when he had received legal advice.

56. Mr Blumstein sent a further letter to the Claimant on the 4th November asking that the Claimant confirm whether he intended to approach any other potential witnesses in respect of the Disciplinary and the Grievance process. He confirmed that he would have a note taker present and again asked for sick notes, he concluded that letter by stating: -

> *"I remain of the view that addressing the situation is what is required to alleviate any stress for you. Consequently and whilst I appreciate you are currently off sick, I would urged you to meet with me sooner rather than later. Indeed on the basis that you are able to consult with your lawyer and potential witnesses about the hearing it does beg the question as to why you are not fit to attend the hearing."*

57. The Claimant responded on the same say at 15:01 stating the sick note had been posted by 1st class on 2nd November and that "I would kindly ask that you do not use my attempts to make some progress as a means to pressurise me into taking part in the Disciplinary meeting while unfit to do so."

58. During that last period the Respondent wrote to the Claimant on the 7th December 2015 acknowledging receipt of the sick note of the 23rd November 2015. This letter was from David Blumstein and invited the Claimant to a "welfare meeting" on the 10th December 2015. The purpose of the meeting was it said to discuss the reasons for the Claimant's absence, determine how long the sickness absence is likely to last, consider whether medical advice is required, consider what measures if any could be implemented which might improve the Claimant's attendance or health and agree a way forward. There was no mention in this letter of holding a disciplinary meeting.

59. The Claimant responded to the letter 7th December on the 8th December stating "The chances of me being fit to attend a meeting this week is close to zero. Proposing it sent my stress levels through the roof yesterday."

60. On the 7th December, the Claimant had raised the question of holiday. In an email, he stated that he understood that while on SSP holiday continued to both accrue and could be taken to receive normal salary. He presumed he had to use up any holiday allowance before the end of the year but asked that Mr Blumstein confirm: -

    (1) 'What unused holiday allowance will have accrued by the end of the year?

    (2) What holiday must be taken this year, i.e. will you permitting the usual 5 days carry over?

    (3) Assuming that this is the case, and it is acceptable, I propose to be on holiday as a contiguous block ending on 31st December using the holiday that cannot be carried forward.'

61. In response to that in an email of the next day Mr Blumstein confirmed that the Claimant was right that holiday accrued whilst he was off on sick leave. If he wished to take part of his annual leave during sickness absence "then this is something we will consider". In circumstances such as this the Claimant would be entitled to carry forward "any annual leave that you had not taken by the end of the calendar year. I suggest that we discuss this when we meet later this week."

62. As it was not he that wrote this email it was obviously difficult for Mr Clarke to answer the question put to him as to why it required the Claimant to go to a meeting to discuss holiday. Having had the question put a number of times he stated that it was his understanding that David Blumstein "has neither denied or granted holiday and was asking for clarification". The Tribunal must accept the proposition that was put to Mr Clarke in cross examination which he did not actually answer that the price for having the holiday was to come to the meeting to discuss it rather than just having to ask for it which was normally the case.

63. The Claimant was signed off again on the 8th December until the 30th December. By letter of the 22nd December sent to the Claimant at 19:34 by email the Respondent raised for the first time obtaining a report from the Claimant's GP. Mr Blumstein stated to start with: -

    "It appears from your correspondence with me that the cause of your stress is work related. Consequently there seems little sense in 'burying our heads in the sand'. As such it would be sensible to address the issues which appear to be causing you this stress and therefore to attempt alleviate these issues. With this in mind I would like to hold a meeting with you early in the new year to discuss where we go from here."

64. He then suggested obtaining a medical report from the Claimant's GP and advised the Claimant of the Access to Medical Records Act 1998 and a consent form was attached. He then went on:-

> *"We need the report to consider the effect of your condition on your day to day activities, to take a view on your likely return to full health and to assist us to consider any suitable next steps in relation to your employment, including considering whether there are any reasonable adjustments that could be made."*

65. Mr Clarke denied vehemently that they had by this time considered that the Claimant might satisfy the definition of disabled. He maintained they were just trying to find out more details about his condition and it did not cross his mind the Claimant might be a disabled person. When asked why these words were used he merely stated that they were on advice but he was not involved in the drafting of the letter. The Tribunal must conclude that by this date the Respondent was considering whether the provisions of the Equality Act 2010 applied to the Claimant as the words used come straight from the legislation.

66. The Claimant was clearly very distressed to receive this communication and made this clear in his reply on the 23rd December. He suggested Mr Blumstein had chosen to act in a manner that he must have realised would cause him further harm and right before Christmas. The Claimant made it clear that when his doctor confirmed he is fit he would deal with the Disciplinary and Grievance procedure. He further stated "I am on holiday".

67. The next sick note the Claimant received was dated 4th January 2016 declaring the Claimant had been sick from 30th December 2015 and was not fit to return to work. The note covered the period to 25th January 2016.

68. The Claimant wrote again on the 23rd December 2015 to Mr Blumstein and it appears that his email of earlier in the day had not actually been finished. He explained in evidence that it had been sent in error. In the second email, he stated that he was seeing his doctor on the 4th January 2016 and would update the Respondent then. He concluded "I kindly request that until then you do not contact me again as I need some peace and quiet to get my head back together".

69. Mr Clarke in his witness statement at paragraph 89 had said they had no knowledge that the Claimant was on holiday as they had not received a holiday request form. In cross examination, he acknowledged that paragraph was incorrect and that in these emails they had received something making it clear to them that the Claimant considered he was on holiday.

70. The next letter to the Claimant was sent on the 11th January 2016 at 17:00 hours by email. It stated that they were awaiting an up to date sick note. If the Claimant had received a further sick note it must be sent as

soon as possible "and in any event by 13th January 2016 otherwise your absence will be deemed unauthorised". Mr Clarke could not explain why such a short timescale had been given and the same could be said to apply to other timescales given in this correspondence.

71. Mr Blumstein then made it clear that if there was a further sick note they would proceed with the sickness absence procedure and obtain a report from the Claimant's GP. He stressed they were within their rights to manage the Claimant's long term sickness absence and that the standard practice would be to obtain a GP Medical Report. He went on: -

> *"This is in order to better understand an employee's medical condition and to try and determine when the employee would be in a position to return to work or in your case be fit to attend the grievance and disciplinary meetings. We must bear in mind that when your sickness absence comes to an end you will continue to be suspended pending an invitation to a disciplinary meeting."*

72. Mr Blumstein stressed that he did not consider they had done "anything wrong or out of the ordinary".

73. Regarding the issue of holiday Mr Blumstein reminded the Claimant that the previous correspondence had made it clear that whilst he continued to accrue holiday entitlement during sick leave they would consider any requests made and suggested that they discuss this at a meeting. He stated "as a meeting has not taken place yet any application was not discussed and therefore no holiday leave has been authorised". Mr Clarke's only explanation as to why the disciplinary meeting was mentioned in this letter was that it would be "unfair" to the Claimant to pretend that the disciplinary might not proceed.

74. By letter of the 26th January 2016 Mr Blumstein wrote to the Claimant again confirming he had received sick notes for the period 8 - 30th December 2015 and one for the period 30th December 2015 to 25th January 2016. He emphasised that period had now ended and that they required a further sick note. He stated that if they did not receive one by the close of business on Friday 29th January 2016 or otherwise hear from the Claimant with good reason as to why it had not been provided "we will consider that you are now fit to return to work and we will commence the grievance and disciplinary proceedings". If however the Claimant remained unfit and in addition to providing a timely sick note he was asked provide his consent to the obtaining of a medical report from the GP. That also had to be done by Friday 29th January 2016.

75. By email of the 29th January 2016 the Claimant explained the difficulty he had with the short deadlines being given to him and that he did not necessarily open the emails on the day of receipt. He stated that he had an appointment with his lawyer and would be happy to post original sick notes when next at the post office. He would not respond to the other points until he had obtained legal advice. In this email the Claimant stressed that the

tone Mr Blumstein was taking with him "reduces me to shaking hands and palpitations, and is not helping either of us".

76. By letter of 16th February 2016 the Claimant was invited to a "Sickness Absence Review" on Friday 26th February 2016. The Claimant was reminded of his right to be accompanied by a work colleague, Trade Union Representative or a friend or relative. If the Claimant was not able to attend the time stated and wished to have the meeting at another location or if he had any "specific needs at the hearing as a result of a disability" he should advise as soon as possible. It is of note that the word disability was used in this letter.

77. The Claimant replied stating he was not fit to attend such meetings and would let Mr Blumstein know when he was.

78. By letter of 15th March 2016 Mr Blumstein wrote a detailed letter to the Claimant, pointing out that he had been off sick for over 4 months and that although they had written twice requesting that he attend a welfare meeting the Claimant had declined to do so. As yet he had not provided his consent to a GP Report.

79. Mr Blumstein stated that the continued absence "does not mean the disciplinary process goes away. Furthermore, if you have grievances to be heard then these need to be addressed also. The passing of time does not help with any of this." He stated the Claimant had done nothing to assist the company in any respect and they were left with no option but to deal with matters as best they could in the circumstances. To that end they had scheduled a meeting for the 24th March 2016 to discuss: -

    (1) The Claimant's sickness absence.

    (2) The disciplinary process (reminding the Claimant if he was found guilty of gross misconduct his employment might be terminated).

    (3) The grievance process.

80. If the Claimant was unable to attend he was invited to submit written representations by the 21st March 2016. If the Claimant was unable to attend, then the meeting would go ahead in his absence.

81. Under a section headed 'history' allegations were put, but not the tribunal finds as allegations, but as statements of fact namely:-

> *"On 1st October 2015 whereby you lost your temper and not only swore at a Director but expressed some serious misgivings about the company as a whole. This culminated in a meeting with you on the 6th October 2015 in advance of which amongst other things you physically pushed a Director."*

There is no mention that these are allegations but they appear to be put down in the letter as statement of fact.

82. By email of the 16th March 2016 the Claimant provided his consent to a report being obtained from his GP. He asked Mr Blumstein to confirm that he was dropping his latest threat, deadlines and demands for meetings. The Claimant stated that the email had again reduced him to "shaking, palpitations and rapid breathing". Mr Clarke in evidence stated that he had been struck at the time by those words, but would still not acknowledge that he then knew the situation was serious or considered the Claimant might be classed as a disabled person.

83. The GP's report was dated 9th June 2016. This confirmed the Claimant had suffered depression for many years and was on medication for this when first assessed by that Doctor in 2014. He confirmed that the Claimant's sleep pattern had improved on medication but the anxiety persisted and he suffered from reduced concentration. Although his mood had improved he still lacked energy and motivation. He had been referred for CBT and if that did not help they would swap the medication to an alternative anti-depressant. This report gave no prognosis.

84. This medical report having been received the Respondent sent another invite to a hearing which really replicated the earlier invite of the 15th March 2016. This meeting was to take place on the 7th July 2016.

85. By email of the 29th June 2016 the Claimant wrote to David Blumstein but also Kevin Murphy another Director about the process. He explained again that the letter had reduced him to shaking hands and palpitations, and asked how he was supposed to prepare written submissions by the 4th whilst off sick and not fit to do so. He addressed Kevin specifically in stating that he understood he could raise a grievance through him. He asked that he look into David Blumstein's bullying and disability discrimination (failure to make reasonable adjustments), and also raised the issue of his untaken holiday.

86. Mr Blumstein replied regarding the posting of correspondence but referred the rest to Kevin Murphy. The Claimant wrote to Kevin Murphy on the 2nd July 2016 about the holiday.

87. Kevin Murphy replied on the 6th July 2016 explaining to the Clamant that he was a non-Executive Director which meant whilst on the Board he did not form part of the management team. On reviewing the matter, he could see that David Blumstein was already involved and for those reasons concluded it was an internal matter which David was dealing with and he did not feel that it was appropriate for him to get involved. He encouraged the Claimant to meet with David to discuss the matters he had outlined.

88. On the 8th July 2016 David Blumstein wrote to the Claimant saying he had had the email from Kevin Murphy. He suggested again a need for a meeting and stated: -

> "*That said in the event that you did wish to take holiday entitlement we would have to consider whether it would be appropriate for you to do so given the meeting that had been rescheduled for 18th July and also the outstanding disciplinary allegations of gross misconduct which arose prior to the start of your sickness absence."*

89. By email of the 8th July 2016 the Claimant wrote to David Blumstein about the holiday situation, but also stating it had taken him 4 hours to write the email and Mr Blumstein had no idea how he felt as a result. He would discuss the demand for a meeting on 18th with his lawyer but "right now I do not feel able to attend or prepare written submissions" in any event he believed he had a CBT appointment on the afternoon of the 18th and "I don't do mornings since they put me on Mirtazipne. Horribly sedating".

90. Mr Clarke was reluctant to accept in cross examination that the Claimant said he would have difficulty dealing with a meeting in the morning, stating that he could not be sure that was the effect of the medication.

Dismissal meeting – 18th July 2016

91. The only notes that the Tribunal had in the bundle of this meeting was the handwritten notes at page 190. The notes do not say on the face of them who took them but Mr Clarke gave evidence it was Dr Madeline Warner a Chemical Researcher. He accepted she had been known to him for several years but was an impartial notetaker. He then accepted he had both a personal and professional relationship with her. It was put to him that it was more than a friendship. Mr Clarke again had difficulty in answering the question but then acknowledged that from in or about July 2016 it had been more than just a friendship. He acknowledged that the Claimant was not told of their relationship.

92. The Claimant also recorded this meeting. A transcript was disclosed shortly before this hearing with the audio recording The Respondent had the opportunity to listen to it and make any amendments and it was agreed this would be added to the bundle.

93. The Claimant had attended without his chosen representative Berenice Mann, Marketing Manager of the Respondent at that time. She had been off sick and then the first day of her holiday was Monday 18th July 2016. The Respondent did not consider it appropriate or reasonable to delay the meeting further as it had already been rescheduled. As the Claimant made clear in the transcript he had been unable to get anyone else to attend with him.

94. This meeting started at 11am and the Claimant is noted in the transcript as stating that he needed to leave by approximately 11.50 (presumably to attend the CBT appointment he had already advised the Respondent about). Mr Blumstein said "Oh yes sure I am hoping we'll be done before then".

95. Mr Blumstein then went on to say in the transcript that the reason for the meeting “is purely for today as discussed/agreed is just to discuss long term sickness absence that’s the purpose of the meeting today”.

96. When asked how he was feeling the Claimant said “terrible”. He stressed that the threat to pursue disciplinary and grievance procedures when he was in no fit state to deal with them had not helped and made things very difficult for him.

97. There was discussion about his depression and the Claimant stated he had suffered this for many, many years although he could not remember the start date. Mr Blumstein discussed the Claimant’s new medication and the Claimant said it was “absolutely horrible”. The Mirtazipne he was on was incredibly sedating and he felt he was completely non-functioning. “I just can’t think, I’m just in a daze, poor hand eye co-ordination, can’t think. Really quite unpleasant.” He did not think it was actually helping the depression and believed that at some point they would review the medication again but at the moment that was why he had not wanted an early morning meeting. He confirmed that his next appointment for CBT was that day.

98. Mr Blumstein then went on to ask that Claimant if there were any measures that the Claimant could put in place or implement which might improve his health and/or attendance and ability for work ‘things to consider that might help the anxiety, the reduced concentration and lack of energy and motivation.’ The Claimant emphasised that the various emails he had received and impossible deadlines had not helped his stress levels and they had been incredibly difficult for him to deal with.

99. When asked how long the absence was likely to last the Claimant said it was impossible to answer. It could be the next time he saw the Doctor as if there had been no improvement his anti-depressants would be changed and then that could potentially make a difference in a week or two or may not. He had no way of knowing.

100. Having told the Claimant at the outset of the meeting that all they were there to deal with was the sickness absence Mr Blumstein then reminded the Claimant “if you are in a position to return to work it would be the first thing we would need to look at, we would need to deal with the grievance and the disciplinary issues.”

101. Mr Blumstein then asked the Claimant if he could put down any timescale for his return.

102. Mr Blumstein then stressed that it was in everyone best interests to deal with all issues sooner rather than later and that would include the ability to deal with the disciplinary and grievance issues. Unfortunately he said, it was not possible for the Claimant to remain on sick leave indefinitely. He would consider everything that had been said and then write to the Claimant

but he had been advised that one of the options was that his employment would be terminated due to ill health on a capability basis. The Claimant would have the right to appeal if that was the decision. The Claimant questioned who he could appeal to and Mr Blumstein did mention ACAS. The Claimant could write to the company personally and the Claimant did query this as "you get to make all the decisions over everyone's actions".

Dismissal

103. By letter of the 28th July 2016 Mr Blumstein confirmed the Claimant's dismissal. The fact remained the Claimant had been off work since the 20th October 2015 and they could not as a small business let him remain on sick leave indefinitely. The Claimant had said that he did not know when he would be in a position to return to work or deal with the outstanding grievance and disciplinary issues, and the medical report did not provide a proposed date for return.

104. Mr Blumstein said that he had considered whether there were any reasonable adjustments which could be made to enable him to return to work or deal with the grievance and disciplinary allegations, he considered the information given by the GP and "unfortunately however given the circumstances I do not consider there are any adjustments that could be made which would assist you".

105. In terminating the Claimant's employment on the grounds of ill health he advised the Claimant of his right to appeal to him in the first instance, and then the matter would be passed to Clive Thomas who deals with appeals. This made it clear that the Claimant could appeal to Clive Thomas or an independent third party who would hear the appeal "and provide recommendations for me to consider". So, the ultimate decision maker on the appeal would still be Mr Blumstein.

106. Mr Blumstein concluded that he was disappointed "we weren't able to discuss the outstanding grievance and disciplinary issues when we met as I was confident that by discussing them the matters would be resolved."

107. The Appeal had to be submitted by the 4th August 2016, again a very short deadline.

108. The Tribunal saw Minutes of a Board Meeting held on the 2nd August 2016 attended by Kevin Murphy, Clive Thomas, John Bailey, David Blumstein and Steve Clarke when it was recorded: -

> *"A meeting was convened with Andy Mitchell on the basis of discussing only his health and not including the disciplinary. During the meeting it was acknowledged by Andy Mitchell confirming his doctors report that he was unable to give any indication of when he might be well enough to return. As a consequence it was decided to terminate his employment on the grounds of lack of capability paying his notice period and outstanding holiday."*

It was clear from Mr Clarke's evidence and in particular paragraph 142 of his witness statement that he was involved in the discussion with Mr Blumstein to terminate the Claimant's employment.

109. The Claimant did not exercise his right of appeal. His Solicitors Hewitsons wrote to the Respondent on the 10th August 2016 stating that their client had no intention of appealing given the history of the matter and that he had no trust and confidence in the Respondent's ability to deal with any appeal fairly. This letter went onto set out the Claimant's position in detail.

110. In answer to a question in cross examination as to why it would not have been feasible to get the Claimant back to work and fit before approaching any disciplinary action with him, Mr Clarke stated that they had an obligation to consider the staff in the company. They had serious concerns about the Claimant's behaviour before he went off sick and that every employee deserved a safe environment and that included the Claimant and he Mr Clarke.

Report of Dr Adam Campbell Consultant Clinical Psychologist 12th May 2017

111. This report was commissioned for the purposes of these proceedings by the Claimant. Mr Campbell was not a jointly instructed expert. He found on the balance of probability the Claimant to be presenting with a mental impairment of depression and anxiety. There were clear signs that his impairment is having an adverse effect on his ability to carry out normal day to day activities and that the effects were substantial. The indications were that the effects of his anxiety and depressive disorder are long term. The earliest reference to depression was 2005.

Relevant Law

Unfair Dismissal

112. The Respondent must satisfy the Tribunal that it had a reason for dismissal and that this was a potentially fair reason falling within Section 98 of the Employment Rights Act 1996 (ERA). Capability is such a reason and is defined in sub section (3)(a) as "his capability assessed by reference to skill, aptitude, health or any other physical or mental quality".

113. If the Respondent satisfies the Tribunal as to the potentially fair reason the Tribunal must consider within the meaning of Section 98(4) whether the dismissal was fair or unfair and that will depend on all the circumstances of the case and "equity and the substantial merits of the case".

114. The guidance in *Burchell v British Homes Stores [1980] ICR 303* is still relevant even though that primarily applies to conduct dismissals. In relation to conduct the employer must establish a belief in the misconduct, that the employer had in it's mind reasonable grounds on which to sustain

that belief and at that point it had carried out as much investigation into the matter as was reasonable in all of the circumstances of all the case.

115. Reference was made in the Claimant's submission to the case of *DB Schenker Rail (UK) Ltd v Doolan [2010] UKEATS/0053/09* in which it was stated that the Tribunal should ask "whether the Respondent genuinely believed in their stated reason, whether it was a reason reached after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did".

116. It is not for the Tribunal to substitute it's view for that of the employer but to determine whether dismissal was within the band of reasonable responses.

117. In *Spencer v Paragon Wallpapers Ltd [1976] IRLR 273* it was emphasised that every case depends on its own circumstances but the basic question is whether the employer can be expected to wait any longer and if so, how much longer where ill health is the reason for dismissal. All of the circumstances of the case will include "the nature of the illness, the likely length of the continuing absence and the need of the employers to have done the work which the employee was engaged to do".

118. Counsel for the Claimant refers to *Crampton v Dacorum Motors Ltd [1975] ILR 168* as authority for the proposition that it may be appropriate for an employer to request that the employee submit to a medical examination before reaching its decision where a diagnosis and arguably a prognosis is uncertain. That case concerned a Claimant with angina and the court said:-

> *"Before a decision is taken to dismiss a man over the age of 50 from a responsible position on the basis of a diagnosis made by a general Medical Practitioner we think that the employer should invite the employee to submit to a further examination by a specialist, preferably, though not necessarily, selected by the employer."*

119. Another authority referred to by Counsel for the Claimant was that of *O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145*. In that case the court commented on the link between unfair dismissal in a case of long term sickness and a claim under Section 15 of the Equality Act 2010. At the paragraph 53 Underhill LJ stated: -

> *"However, the basic point being made by the Tribunal was that it's finding that the dismissal of the appellant was disproportionate for the purpose of Section 15 meant also that it was not reasonable for the purpose of Section 98(4) in the circumstances of this case I regard that as entirely legitimate. I accept that the language in which the two tests is expressed is different and that in the public law context a 'reasonableness review' may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remain much debated) but it would be a pity if there were any real distinction in the context of dismissal for long term sickness where the employee is disabled within the meaning of the 2010 Act.*

> *The law is complicated enough within parties and Tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately, I see no reason why that should be so …"*

120. In rejecting the position stated by Judge Serota in the EAT Underhill LJ stressed that the test under Section 98(4) is objective no less than the test under Section 15 of the Equality Act.

Disability

Discrimination arising from disability, Section 15 of the Equality Act.

121. Section 15 of the Equality Act provides 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.

122. The EHRC Code of Practice on Employment at paragraph 5.7 makes it clear that unfavourable treatment for the purposes of this section means that the disabled person "must have been put at a disadvantage".

123. In *Basildon v Thurrock NHS Trust v Weerasinghe [2016] ICR 305*, Langstaff P at paragraph 26 stated that the current statute requires two steps namely:-

> *"The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus on the words "because of something", and therefore has to identify "something" –and second on the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential link). These are two separate stages. In addition, the statute requires the tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B..."*

124. The test for justification is an objective one and was summarised in the context of indirect discrimination by reference to the leading case of *Bilka-*

Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317 by *Mummery LJ in R (Elias) v Secretary of State for Defence 2006 IWLR 3213* at paragraph 151:-

> *"… the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*

125. Whether or not the aim was legitimate is a question of fact for the Tribunal. The saving of cost alone cannot constitute a legitimate aim although it can be combined with other justifications and weighed into the balance.

126. The proportionality question can effectively be expressed to be a balancing exercise.

Reasonable Adjustments

127. Section 20 (3) Equality Act provides as follows:-

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

128. Paragraph 20 of Schedule 8 of the Equality Act makes it clear an employer is not subjected to a duty to make reasonable adjustments if it "does not know and could not reasonably be expected to know" that an employee "has a disability and is likely to be placed at the disadvantage".

129. Guidance was given by the EAT in *Environment Agency v Rowan [2008] IRLR 20* that the Tribunal should: -

(1) Identify the PCP applied by or on behalf of an employer.

(2) Identify the non-disabled comparators where appropriate.

(3) The nature and extent of the substantial disadvantage suffered by the Claimant.

130. The question of substantial disadvantage is a question of fact for the Tribunal to be able to determine.

131. The reasonableness of a particular adjustment will always depend on the circumstances of the case. The adjustment contended for need not eliminate the disadvantage entirely.

Submissions

132. Written submissions were handed up by both Counsel and it is not proposed to recite those again here.

Conclusions

Disability

133. The Tribunal is satisfied from having heard the Claimant and read the report of his General Practitioner and that of Dr Campbell that he is now a disabled person by virtue of depression. The Respondent has conceded at this hearing that the Claimant satisfied the definition at the date of the relevant acts complained of. It still disputes knowledge of disability.

134. Even though the Claimant gave evidence that he had worked with Mr Clarke from his home address, and Mr Clarke knew him quite well the Tribunal cannot infer that Mr Clarke and consequently the Respondent had knowledge of disability then. Their knowledge that the Claimant was suffering from depression only occurred once the Claimant was signed off sick from the 20th October 2015. That though did not necessarily alert the employer to the fact that the Claimant was suffering from a disability within the meaning of the Equality Act.

135. The Tribunal has concluded from all its findings that from the 9th June 2016 the Respondent knew or reasonably ought to have known that the Claimant was suffering from a disability. Not only did it then have the General Practitioner's Report but it had experienced numerous email exchanges with the Claimant in which he had gone to great lengths to emphasise to the Respondent the effect that the emails were having on upon him, and on some occasions causing him to have shaking hands and palpitations. These exchanges together with the General Practitioner's Report ought reasonably to have alerted the Respondent to the fact that the Claimant was likely to have a long-term condition.

136. Further the Respondent is being disingenuous in suggesting through Mr Clarke that it had never occurred to it that the Claimant might be disabled. As highlighted in its findings of fact there are a number of occasions when the letters sent by the Respondent through Mr Blumstein refer to disability and indeed the very test that would need to be established within the meaning of the Equality Act. The Tribunal is satisfied that the Respondent had indeed been alerted to the possibility that the Claimant might satisfy the definition of disability and is satisfied that from the 9th June 2016 it knew or reasonably ought to have known the Claimant was a disabled person within the meaning of the Equality Act.

Unfair Dismissal

137. The Respondent dismissed the Claimant for reasons of capability, a potentially fair reason falling within the meaning of Section 98 of the Employment Rights Act 1996.

138. The Respondent acted unfairly in treating that as a reason for the dismissal of the Claimant.

139. The Respondent did not disclose its Board Minutes until part way through the evidence of Mr Clarke at this hearing. They clearly should have been disclosed. These show that from the outset they were working towards a dismissal of the Claimant. There is no other reasonable reading of the terminology of "exit". In his report of the 30th September 2015 (the day after the incident on the 29th September 2015) there is reference to a "likely exit". On the balance of probabilities that must have referred to the Claimant.

140. If there was any doubt that the Claimant's exit was being proposed the Managing Director's Report of the 14th December 2015 confirms that that process "continues". By the 15th February 2016 Report again the planned exit "continues" and it is noted the Respondent is using specialist legal support. By the 14th April 2016 the plan is likely to have been "resolved" prior to due diligence. The Respondent had decided that the Claimant was to be dismissed. That is the position that was made known to the Claimant at the meeting Mr Clarke had with him when he was presented with the compromise/the settlement agreement namely, either accept it or be dismissed for gross misconduct.

141. In his witness statement and evidence Mr Clarke stated that as he was involved in the initial incident with the Claimant he could not deal with the procedure and therefore passed the matter to Daivd Blumstein. However, the Tribunal has concluded that Mr Clarke was clearly still involved with this matter. He regularly discussed matters with Mr Blumstein and was involved in all the Board Meetings. He was preparing reports for them relating to the Claimant's "exit" and gave evidence that he discussed the decision to dismiss with Mr Blumstein and agreed with it. He did therefore not distance himself from the matter as he suggested.

142. Even though the Respondent was receiving sick notes stating that the Claimant had depression and the Claimant's own emails were emphasising to them the effect that their continued correspondence was having upon him the Respondent continued to write to the Claimant to remind him that the disciplinary matters needed to be dealt with. Even when they wrote to him with regards to welfare matters they again stated that the disciplinary would have to be dealt with and that it was in his best interests for that to occur.

They knew however that they intended to dismiss when the disciplinary was dealt with.

143. Even at the dismissal hearing itself Mr Blumstein is recorded in the transcript as stating that it was a welfare discussion to then move on to dealing with dismissal.

144. As the Tribunal has stated throughout it did no hear from Mr Blumstein but no consideration appears to have been given to assisting the Claimant to return to work, wait until he was fit and well and then re-consider the disciplinary matters. In suggesting that they had fears of the Claimant returning to work because they had a duty of care to their employees and to the Claimant, Mr Clarke was completely disingenuous. There had been raised voices between the Claimant and Mr Clarke, and possibly a shove in a business where the two main directors appeared always to be shouting at each other. The Respondent had no genuine fear for other employees, this was not something expressed at the time and was something thought of by Mr Clarke in cross examination.

145. The Respondent did eventually obtain a General Practitioners Report but no thought was given to obtaining more evidence as to the prognosis, either from the GP or perhaps from an Occupational Health Professional or Psychologist. The Respondent moved straight away to dismissal.

146. Further, although the Claimant said at the dismissal hearing that he did not know when he could return to work, he did mention a forthcoming change to his medication. That gave a reasonable employer a reason to forestall taking any action until the medication had been changed and a review conducted as to the effect of that on the Claimant.

147. The Respondent did not give consideration to the Claimant's chosen representative, Berenice Mann attending with him. It merely stated that she had been off sick and was then on annual leave, and they refused to postpone the meeting so she could attend. There was no justification for taking this stance with someone suffering from depression who they must have known or reasonably ought to have known would have difficulty in obtaining someone else to attend with him. There has been no justifiable reason put forward as to why the hearing could not be postponed to allow Berenice Mann to attend.

148. The dismissal meeting was held in the morning, even though the Claimant had said he had difficulty functioning in the morning and would need to leave to attend a CBT appointment. It is however of note that in the transcript Mr Blumstein started the meeting by saying that it should not take that long which obviously shows that he had already decided he did not need to discuss matters with the Claimant for very long having already come to the conclusion that there would be a dismissal.

149. The Respondent stance on holiday was also unreasonable. The Claimant was trying to ensure that he had more pay than statutory sick pay whilst off

sick, and was clearly trying to use his holiday to achieve that result. For Mr Blumstein to take the position that the Claimant had to attend a meeting so this could be discussed was entirely unreasonable (particularly as Mr Blumstein knew that at that meeting he intended to consider dismissal)

150. When the Claimant raised the issue about holiday pay with Mr Murphy he refused to deal with the matter passing it back to Mr Blumstein about whom the Claimant was complaining.

151. The time limits given to the Claimant to respond to any correspondence were completely unreasonable, often being only 2 working days. This was someone that the Respondent knew was suffering from depression. It would not be unlikely for him to find it difficult to deal with the emails he was receiving and not to be able to attend a post office straight away to send sick notes to the Respondent. No consideration was given to imposing realistic deadlines.

Discrimination arising from Disability

152. The Claimant's dismissal was clearly unfavourable treatment because of something arising from his disability as he was dismissed due to his sickness absence which was entirely due to his disability, and because he could not say when he would return. The Respondent knew or reasonably ought to have known that he was disabled by the time of the dismissal meeting. The dismissal clearly amounted to unfavourable treatment.

153. The justification defence is set out at pages 59B-E and identified two legitimate aims:-

(1) To manage the Claimant's long term sickness absence in order that he could:-

(i) Return to work.

(ii) Deal with the disciplinary allegations against him and other outstanding matters.

(2) To act in the best interest of the business to:-

(i) Ensure client demands were met.

(ii) Ensure the cost effective use of resources was in it.

154. The Tribunal has to accept the submissions made on behalf of the Claimant that the first of these cannot be a legitimate aim pursued by the Respondent in deciding to dismiss the Claimant as clearly they were not endeavouring to ensure he returned to work by dismissing him.

155. The only other legitimate aim advanced namely that they were acting in the best interests of the business to ensure client demands were met and ensure that cost effective use of resources must fail. There is no evidence that client demands were not being met and the cost effective use of resources has not been evidenced. Evidence was heard that the Claimant was on SSP and the only cost to the Respondent was that he continued to accrue his holiday pay.

156. The Claimant lost his job in circumstances which the tribunal has already found were unfair and the Respondent has not advanced any proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

157. The PCP that was finally identified by the Claimant's representative was the application and pursuit of the disciplinary procedure generally, and specifically requiring attendance at or written submissions for a disciplinary meeting.

158. The Tribunal accepts that the relevant pool of comparators would be employees who are subjected to disciplinary proceedings but do not share the Claimant's disability. The substantial disadvantage suffered by the Claimant was being unable or less able attend meetings, and/or prepare for them and/or prepare written submissions. Indeed the Claimant in one of his emails stated that email alone had taken him 4 hours to prepare

159. When the issues were clarified at the outset of this hearing the Claimant indicated that he only relied on the following adjustments in the ET1, paragraphs 2.5.2, 2.5.3, 2.5.7, 2.5.8 and 2.5.11. The Tribunal does not find all of those to amount to reasonable adjustments.

160. The following are adjustments which the Tribunal accepts would have been reasonable for the employer to make:-

(1) Suspending the disciplinary process until the Claimant had returned to work.

This would have been entirely reasonable but not something that the Respondent considered. It even went so far as to say in some of its letters the important thing was to assist the Claimant in returning to work. The employer could then have reviewed his state of health and indeed reviewed the disciplinary charges to ascertain whether they should be pursued further or whether in fact in all of the circumstances it was appropriate to take no further action.

(2) Mediation

This was again an appropriate adjustment that could but was not considered as it may have assisted in the relationship between the Claimant and members of the Respondent being repaired and continuing.

161. The other adjustments proposed the Tribunal does not consider to be reasonable. It is not a reasonable adjustment that the disciplinary charges be dropped in their entirety. That is however all part and parcel of the Respondent suspending their disciplinary process and then giving it careful consideration when the Claimant was fit and well.

162. Identifying guidelines/expectation for the Claimant in lieu of the disciplinary process, again was not a reasonable adjustment. Again it could have formed part of the Respondent postponing matters and revisiting them when the Claimant was fit and well.

163. Considering whether the Claimant's state of health played a part in the incident in question. This would not be an appropriate adjustment itself, but would have been something any reasonable employer would have taken into account if the Claimant was fit and well to return to work and the disciplinary charges were reconsidered.

Polkey

164. This is not a case where the Tribunal can say that had the Claimant not been dismissed when he was that due to procedural shortcomings he would in any event have been dismissed fairly at some later date. The relevant consideration is whether he could have been dismissal fairly. From its findings the Tribunal is satisfied that what would have occurred would have been an unfair dismissal. This employer had no intention of dismissing the Claimant fairly. Had he not been dismissed when he was, and for example the employer had waited until Berenice Mann was free to attend the disciplinary hearing the Tribunal is satisfied on the balance of probabilities that the Respondent would still have dismissed, but unfairly.

165. Another alternative is that an Occupational Health Report could have been obtained, but the Tribunal has no confidence that the employer in this case would have then acted fairly in the way it treated the Claimant.

166. The guidance in *Polkey* is for the Tribunal to look at whether if a procedural shortcoming had not have occurred then the dismissal was still more likely to have occurred either then or at some future date. The Tribunal could not say that in this case. There were so many fundamental flaws by the employer that there will be no Polkey deduction.

CASE MANAGEMENT ORDER

1. The parties to advise the tribunal within 28 days of the date on which these Reasons are sent to the parties whether or not they require a remedy hearing. If they do they must file within the same time limit an agreed list of issues for the Remedy hearing, their agreed time estimate for it and dates to avoid for the following 3 months.

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Employment Judge Laidler, Bury St Edmunds

13 September 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS