RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr C Connolly**

Respondent: **Asda Stores Limited**

Heard at: **East London Hearing Centre**

On: **4, 5 & 6 December 2018 and (In Chambers) 3 January 2019**

Before: **Employment Judge M Warren**

Members: **Mrs W Blake-Ranken**
Mr L O'Callaghan

Representation:

Claimant: Mr J McCracken (Counsel)

Respondent: Miss T Hand (Counsel)

RESERVED JUDGMENT

The Claimant's claims that he was unfairly dismissed and discriminated by reason of disability and in breach of contract, (wrongful dismissal) fail and are dismissed.

REASONS

Background

1 By a claim form issued on 22 March 2018, Mr Connolly brings complaints of disability discrimination, unfair and wrongful dismissal following his dismissal from the Respondent's employment on 1 December 2017.

The Issues

2 The issues were identified and agreed at a Case Management Hearing before Employment Judge Russell on 2 October 2018 as follows:

"*Time limits / limitation issues*

4.1 Were all of the Claimant's complaints of disability discrimination presented within the required three-month time limit (as extended by ACAS Early Conciliation), including consideration of whether there was continuous conduct?

4.2 If presented out of time, should time be extended on a "*just and equitable*" basis?

Disability

4.3 Was the Claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of his mental impairment of depression and/or anxiety?

Section 15, EQA: discrimination arising from disability

4.4 Was the Claimant subjected to unfavourable treatment when he was dismissed on 1 December 2017?

4.5 Was his dismissal because of something arising in consequence of disability? The "something" is the Claimant's erratic behaviour and demeanour.

4.6 If so, has the Respondent shown that dismissal was a proportionate means of achieving a legitimate aim? The Respondent relies on the following as its legitimate aim(s):

(a) maintaining a harmonious working environment;

(b) maintaining appropriate standards of workplace conduct and protecting the Claimant's colleagues from feeling intimidated and/or threatened in the workplace; and/or

(c) ensuring that the Respondent's customers were not treated in a rude and/or aggressive manner, thereby bringing the Respondent into disrepute.

4.7 Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability?

Unfair dismissal

4.8 What was the principal reason for dismissal? The Respondent will say conduct. The Claimant will say that the real reason was his disability and sickness absence.

4.9 Was any belief reasonable based upon reasonable investigation? The Claimant will say that there was a failure to rely on up-to-date occupational health reports and or properly to take into account the medical evidence.

4.10 If so, was the dismissal fair or unfair in accordance with ERA section 98(4)? The Claimant's case is that his conduct was not intentional. There was a delay in the process, he was invited to a disciplinary hearing before conclusion of the grievance (the Respondent will say that this initial invitation was withdrawn) and that sanction was unduly severe having regard to his service disciplinary record and effects of his disability.

4.11 If dismissal was unfair, would the Claimant have been fairly dismissed in any event had a fair procedure been followed? (**Polkey**)

4.12 Should any award be reduced because of any blameworthy or culpable conduct by the Claimant?

Wrongful dismissal

4.13 Did the Claimant commit a repudiatory breach of his contract of employment entitling the Respondent summarily to dismiss him?"

3 At the outset of the hearing the Respondent conceded that Mr Connolly was a disabled person as defined in the Equality Act 2010 at the relevant time.

Evidence

4 The Tribunal heard evidence on 4, 5 and 6 December 2018. The Tribunal was due to convene for a fourth day on 11 December, but unfortunately it was not possible for the Tribunal to sit on that date. Fortunately, we were able to conclude the evidence and hear closing submissions before the end of day three on 6 December. The Tribunal convened in chambers to reach its reserved decision on 3 January 2019.

5 For the Claimant, we heard evidence from Mr Connolly alone. For the Respondents, we heard evidence from his manager Mr Shane Shine, "People Trading Manager", Ms Jacqueline Hall, Mr Oliver Manser, (Dismissing Officer) and Mr Steve Chamberlain, (Appeal Officer). We had before us typed witness statements from all five witnesses.

6 There were 2 lever arch file bundles of documents, running to page 629 and properly indexed. No documents were added to the bundle during the hearing.

7 The Tribunal read the witness statements and read or looked at the documents referred to in the witness statements during a reading break. I made clear to the parties

that they must not assume we have read and taken on board everything that is relevant in the documents and they must make sure that they take us to those passages which they regard as important during the cross-examination of witnesses.

8 It was explained to the Tribunal that Mr Connolly struggles with prolonged concentration. We agreed we would break every hour to allow him to rest and Mr Connolly understood that he need only say if he was struggling. It was also explained to us that he is not a, "great reader" and we agreed that we would keep that in mind and allow him time if he was referred to passages of length in the documents.

9 The Tribunal also lost time with a member of the panel having an urgent medical appointment to attend which meant that on day two, 5 December 2018, we resumed the hearing at 9.10am and adjourned for the day at 1.30pm. The representatives were nevertheless confident that it would be possible to finish the evidence in time, as indeed proved to the case.

The Law

Disability Related Discrimination

10 Disability Related discrimination is defined at s.15 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.*

11 The difference between Direct Discrimination on the grounds of disability and Disability Related Discrimination is often neatly explained in these terms: direct discrimination is by reason of the fact of the disability, whereas disability related discrimination is because of the effect of the disability.

12 As for the difference between making a reasonable adjustment and disability related discrimination, in General Dynamics v Carranza UKEAT 0107/14/1010 HHJ Richardson explained that a reasonable adjustment is about preventing disadvantage, disability related discrimination is about making allowances for that persons disability.

13 There are 2 separate causative steps: firstly, the disability has the consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular something, (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN).

14 There is no requirement that the employer was aware that the disability caused the particular something, City of York Council v Grosset [2018] EWCA Civ 1105 although,

as the Court of Appeal observed in that case, if the employer knows of the disability, it would be, "wise to look into the matter more carefully before taking the unfavourable treatment".

15 Simler P gave helpful guidance on the correct approach to s15 in Pnaiser v NHS England [2016] IRLR 170 as follows:

> *"…the proper approach can be summarised as follows:*
>
> *(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
>
> *(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
>
> *(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).*
>
> *(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in* Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*
>
> *(e) For example, in* Land Registry v Houghton *UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned*

treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that 'a subjective approach infects the whole of section 15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

16 If there has been such treatment, we should then go on to ask, as set out at s.15(1)(b), whether the unfavourable treatment can be justified. This requires us to determine:

16.1 Whether there was a legitimate aim, unrelated to discrimination;

16.2 Whether the treatment was capable of achieving that aim, and

16.3 Whether the treatment was a proportionate means of achieving that aim, having regard to the relevant facts and taking into account the possibility of other means of achieving that aim.

17 The test of whether there is a proportionate means of achieving a legitimate aim, (often referred to as the justification test) mirrors similar provisions in other strands of discrimination, such as in respect of indirect discrimination under s19 of the Equality Act, the origins of which lie in European Law.

18 There is guidance in the Equality and Human Rights Commission's Code of Practice on Employment, which reflects case law on objective justification in other strands of discrimination and which can be relied on in the context of disability related discrimination.

19 Thus, in Hensam v Ministry of Defence UKEAT/10067/14/DM the EAT applied the justification test as described in Hardys & Hansons Plc v Lax [2005] EWCA Civ 846. The test is objective. In assessing proportionality, the tribunal uses its own judgment, which must be based on a fair and detailed analysis of the working practices and business considerations involved, particularly the business needs of the employer. It is not a question of whether the view taken by the employer was one a reasonable employer would have taken. The obligation is on the employer to show that the treatment complained of is a proportionate means of achieving a legitimate aim. The employer must establish that it was pursuing a legitimate aim and that the measures it was taking were appropriate and legitimate. To demonstrate proportionality, the employer is not required to show that there was no alternative course of action, but that the measures taken were reasonably necessary.

20 The tribunal has to objectively balance the discriminatory effect of the treatment and the reasonable needs of the employer.

21 "Legitimate aim" and "proportionate means" are 2 separate issues and should not be conflated.

22 The tribunal must weigh out quantitative and qualitative assessment of the discriminatory effect of the treatment, (University of Manchester v Jones [1993] ICR 474).

23 The tribunal should scrutinise the justification put forward by the Respondent, (per Sedley LJ in Allonby v Accrrington & Rosedale College [2001] ICR 189).

24 In respect of the burden of proof, s.136 reads as follows:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred;*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

25 The Court of Appeal gave guidance on how to apply the equivalent provision of s.136 under the previous discrimination legislation, in the case of Igen Ltd v Wong and Others [2005] IRLR 258. There, the Court of Appeal set out a series of guidance steps, that guidance may still be relied upon, see Underhill LJ at paragraph 14 in Greater Manchester Police v Bailey [2017] EWCA Civ 425. We have carefully observed in this case in considering the claim of indirect discrimination, on the basis that those steps assist equally well under the Equality Act 2010.

Unfair Dismissal.

26 Section 94 of the Employment Rights Act 1996 contains the right not to be unfairly dismissed. Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal, one of which at subsection (2)(b) is the conduct of the employee. Section 98(4) then sets out the test of fairness to be applied if the employer is able to show that the reason for dismissal was one of those potentially fair reasons. The test of fairness reads:

> "*Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was 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."*

27 We have guidance from the appeal courts on how to apply that test where the grounds for dismissal relied upon by the employer is misconduct. The first is the test set out in the case of British Home Stores v Burchell [1980] ICR 303. The Tribunal must be satisfied that the employer holds a genuine belief, based upon reasonable grounds and reached after a reasonable investigation. It is for the employer to show the genuine belief, the burden of proof in respect of the reasonable grounds and the investigation is neutral.

28 If the employer is able to satisfy that test, the Employment Tribunal must go on to apply the test set out in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. The function of the Tribunal is to determine whether in the particular circumstances a decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If a dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

29 The band of reasonable responses test also applies to the question of whether or not the employer's investigation into the alleged misconduct was reasonable in all the circumstances. See Sainsbury v Hitt [2003] IRLR 23.

30 The investigation should be into what the employee wishes to say in mitigation as well as in defence or explanation of the alleged misconduct.

31 Mitigation must be actively considered by the decision maker.

32 We should look at the overall fairness of the process and not be distracted by questions such as whether an appeal is a rehearing or a review, see Taylor v OCS [2006] IRLR 613.

33 In this case, the Respondents say that Mr Connolly was guilty of gross misconduct justifying dismissal without warning. The test for gross misconduct, or repudiation, is that the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in its employment, see Neary v Dean of Westminster Special Commissions [1999] IRLR 288.

34 More serious allegations, which might have more serious consequences if upheld, call for a more thorough an investigation. The ACAS 2014 Guide to Discipline and Grievances at Work, (not the code of practice) advises as such and the EAT confirmed as such in A v B [2003] IRLR 405.

35 Section 207(2) of the Trade Union & Labour Relations Act 1992 provides that any Code of Practice produced by ACAS under that Act which appears to an Employment Tribunal to be relevant shall be admissible in evidence and shall be taken into account.

36 One such code of practice is the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2009) to which we have had regard.

Findings of Fact

37 The Respondent is a nationwide chain of 300 supermarkets. It has approximately 170,000 employees. Mr Connolly's employment with the Respondent commenced on 22 May 2010. He was recruited to work at the Shoeburyness store, which has approximately 330 employees. He is aged 36.

38 Mr Connolly has a history of anxiety and depression and thus we saw in the bundle of documents, a collection of Occupational Health reports which we summarise as follows:

38.1 From Ms Ralphs, Wellbeing Adviser, a report dated 10 August 2012 which explains that Mr Connolly was referred because of management concern regarding his psychological wellbeing and sickness absence. His GP had diagnosed anxiety. He was said to have reported experiencing management relationship issues leaving him frustrated, stressed and angry. The recommendation was that he be referred for individual counselling for some, "conflict resolution work".

38.2 A report from Mr Smith, Wellbeing Manager, dated 25 October 2012 stating that Mr Connolly had been referred because of concerns about his psychological wellbeing. It was reported that Mr Connolly had been diagnosed with suffering from depression by his GP three years earlier, that he had been prescribed antidepressant medication and was due to start a course of Cognitive Behavioural Therapy (CBT).

38.3 After a two week period of sickness absence, a report was provided dated 18 February 2014 referring to the reason for absence as depression, said to have been triggered by work and home related stress. He had reported finding work stressful because his workload had increased due to staff

shortages. The report recommends he be allowed more time away from the workplace, that his hours be reduced to 30 hours a week and a stress risk assessment be undertaken.

38.4 After a period of two months absence due to depression and work related stress, a report was provided by a Wellbeing Adviser, (Ms King) on 2 June 2014. This refers to the period of absence being due to depression and work related stress, caused by family and work problems. The report refers to an ongoing grievance. His anxiety was assessed as severe and his depression as moderately severe. Counselling was recommended.

38.5 After another period of absence in November and December 2015, a report of 8 December 2014 explains that his absence is due to reaction to medication and that Mr Connelly is being referred again for CBT.

38.6 Subsequent reports beginning with that of 8 February 2017, are referred to below, where we set out the chronology of events.

39 The Respondent has a diversity and inclusion policy, (page 124).

40 The Respondent's disciplinary policy provides the usual non-exhaustive list of examples of gross misconduct, which would potentially justify dismissal without notice or prior warning, which includes an act of misconduct so serious as to destroy trust and confidence, threatening behaviour, serious harassment discrimination or bullying of colleagues, (page 100/101).

41 Mr Connolly has complained in the past about having been bullied by Mr Shane Shine, latterly his line manager. Certainly, we can see that he had issues with Mr Shine, for example at page 137 is an undated, "outcome of first wellbeing meeting" in which a Deputy Store Manager records exploring with Mr Connolly why he had declined taking up the post of Grocery Colleague, the reasons for which included that he felt that he could not work with Mr Shane Shine. This is a document apparently dated some time in March 2015.

42 Mr Connolly accepted in his oral evidence that in his own words, he was "high maintenance" and that he had during his employment, fallen out with a number of people.

43 Early in 2016, Mr Connolly requested a move to the Respondent's Raleigh Store. He says this was because he was being bullied by Shane Shine and he suggests that Ms Hall was obstructive to his request and that he achieved the move with the help of his union. Ms Hall says that Mr Connolly's problems were with a different manager and that she did help Mr Connolly because at the time, Rayleigh only had part-time vacancies; she intervened with the management at Rayleigh and persuaded them to give Mr Connolly a full-time post.

44 In September 2016, Mr Connolly was offered promotion to that of Section Leader, but the promotion would involve his moving back to Shoeburyness. He says that he was assured at interview that he would not have to work with Mr Shane Shine, who would be moving on to, "other things" and on that basis, he accepted the offer. Ms Hall says that is

not true and that Mr Connolly would not have been brought back into the Shoeburyness store if he had stipulated that he could not work with Mr Shine. She says that he knew that Mr Shine would be his manager; Mr Shine was what was known as the "Chilled Manager" and that the Claimant's new role was to be that of Section Leader in Produce, which comes under the management of the Chilled Manager. Mr Connolly claims that one week after starting working at Shoeburyness, he was told that Mr Shine would be his manager.

45 There is no evidence that there had ever been any proposal that Mr Shine would move onto any other role. Ms Hall's evidence appears compelling. However, she would not have been present at the interview and she could not comment on what Mr Connolly might or might not have been told at the interview.

46 Mr Connolly says that he felt under pressure working back at Shoeburyness because there was a lot of work to do and he felt bullied by Mr Shine. He makes reference to diary entries, page 144 and 155. Those diary entries make reference to Mr Shine, but it is not apparent why the matters recorded there might be regarded as bullying.

47 Ms Hall had to formally warn Mr Connolly a number of times for inappropriately voicing opinions about other colleagues, including the general store manager, Mr Scraff. Ms Hall's evidence about that was unchallenged.

48 After the Respondent's Christmas party in December 2016, Mr Connolly became involved in an incident as a result of which he was convicted of assaulting a police officer. The Respondent chose not to discipline Mr Connolly as a result of this incident, although Ms Hall was in favour of doing so. On a separate occasion at about this time, Mr Connolly had been found drunk, having vomited, outside the store.

49 On 8 February 2017, the Respondent was provided with a psychological assessment report prepared by a therapist. The report indicates that it was instigated as a result of a referral due to management concerns in respect of Mr Connolly's emotional wellbeing. The assessment was carried out by telephone. At the time, he was absent from work due to, "sickness and diarrhoea". He was reported to enjoy his work and being aware that his personal issues were impacting on him at work. He described management as, "supportive". Mr Connolly is recorded as reporting to the therapist that his GP had diagnosed him as having anxiety and depression and that he had issues with alcohol. He was taking 20mg of citalopram, 5mg of nitrazepam and 330mg of campral. The latter is used in the treatment of alcohol dependants. In the assessment he scored 15/21 for anxiety, (which is "severe") and 19/27 for depression, (which is "moderately severe"). The therapist stated that Mr Connolly was keen to engage with support for his alcohol issues and she advised six sessions of telephone counselling in respect of his anxiety and depression. She states in her report that she had made a referral for such counselling that day. That is for counselling paid for by the Respondent.

50 He was discharged on 9 March 2017. The therapist provided to the Respondent a discharge report which states that Mr Connolly had completed three counselling sessions. He was said to report a significant improvement in his anxiety and mood and felt much greater confidence in his ability to cope at home and at work. He is reported as feeling very positive about his move at work to a new department and committed to managing his emotions better at work. His scores were now 1/27 for depression and 2/21 for anxiety. The therapist's opinion is expressed to be that counselling has worked well and that the

move at work seems to have played a large part in the improved situation.

51 Sometime during March 2017, Mr Connolly complained to Ms Hall that Mr Shine was not providing him support as a manager. Ms Hall commissioned a listening group, in other words she consulted with other section leaders also managed by Mr Shine and based upon the feedback she received, concluded that Mr Connolly's complaint could not be substantiated.

52 Between 22 April and 2 May 2017, Mr Connolly was away from work with the flu.

53 The Respondent has a policy with regard to Sunday working which requires staff to work one Sunday in every three. Under the terms of that policy, if a member of staff is absent from work ill on a Sunday they are due to work, they are not required to make that up by working on another Sunday. Sometime during this period of absence, Mr Connolly made a telephone call to Mr Shine to discuss his return to work. Mr Shine asked him to work on Sunday 7 May as he had been rostered to work on Sunday 30 April and had not done so due to illness. Mr Connolly agreed.

54 On 3 May 2017, Mr Connolly returned to work and on that day, he sent an email to Mr Shine saying that he could not in fact work on Sunday 7 May because he had forgotten about a, "prior engagement".

55 Also on 3 May 2017, Mr Connolly attended an Attendance Counselling meeting conducted by Ms Hall, at which she warned him that another period of absence could trigger a Stage 1 Attendance Review.

56 We now come to the key incident in this case which the Respondent says, led to Mr Connolly's dismissal. We have pieced together the account set out below by drawing together and considering the witness statements, the accounts in the interview records from the grievance investigation and the oral evidence before us with the individuals involved.

57 On 4 May 2017, Mr Shine spoke to Mr Connolly about the fact that he was now indicating that he would not work on Sunday 7 May. The reason that Mr Connolly was unable to work was that he was going to a friend's barbeque. He says that he told Mr Shine that was the reason, Mr Shine says that Mr Connolly refused to tell him what the reason was. Mr Shine told Mr Connolly that if he did not work that Sunday, it would be treated as an absence. Mr Connolly was not happy with that and wanted to speak to his GMB representative, Mr Girvan. He went to find him and in the meantime, Mr Shine went to find the company handbook so that he could show its provisions relating to Sunday working to Mr Connolly and Mr Girvan. Mr Shine also spoke to Ms Hall, who called a meeting with Mr Connolly which was to be attended by Mr Girvan, Mr Shine and Ms Hall.

58 Mr Connolly says that the meeting began with Ms Hall asking him what was going on with regard to the Sunday working. He says he explained the situation and that Ms Hall took Mr Shine's side. He says that he said that Mr Shine was being a bully and that Ms Hall then asked what it was, "with you two, this has been going on since you got back in the store".

59 Mr Connolly said that there were a few things that he wanted to get off his chest and Ms Hall indicated that it would be okay if he were to do so. Mr Connolly then complained about a lack of management support and proceeded to say that there was unrest in his department, as there were rumours that Mr Shine was having an affair with a colleague. This led to an argument and Mr Shine left the meeting.

60 Mr Shine alleges that as he left the meeting, he made a remark about wanting to, "put this to bed" and that Mr Connolly replied along the lines that he, (Mr Shine) had been putting a lot to bed and then winked at him. Mr Connolly denies this.

61 After Mr Shine had left, Mr Connolly told Ms Hall that she was hated in the store.

62 We now turn to Mr Girvan's account of what was said, taken from the record of the subsequent grievance investigation. At page 216:

> *"… he started talking about Jackie's work ethic that colleagues didn't think she cared which Jackie answered "I don't care" Chris took that the wrong way I interjected and said she doesn't care what the colleagues think of her. Chris's response was that it was typical of this store … when Chris said he didn't feel well it was agreed he could go home. You could see that Jackie was upset she was crying."*

63 At page 218 Mr Girvan is recorded as saying that he had apologised to Mr Shine and Ms Hall and had said that he had never seen a colleague that aggressive in a meeting, he said that he had found Mr Connolly to be aggressive, antagonistic and he felt that he was not prepared to represent him anymore. At page 219 he is recorded as saying:

> *"I have seen some hard things happen in my work life, but to see a lady who is the hard rock of the store reduced to a trembling mess and this is all over someone not wanting to work Sunday."*

64 We note at page 214, that Mr Girvan says all was calm until the question of Sunday working was raised and it was then that Mr Connolly brought up Mr Shine's alleged affair.

65 In a handwritten statement produced by Mr Girvan for the grievance investigation, (starting at page 172) he wrote at page 174, *"the conversation between the parties got more heated and on Chris's part threatening"* and at page 174, *"… a character assassination of Jackie by Chris and was uncalled for. Chris continued to get more aggressive in his attacks and it came to the point where he told Jackie he was going home to which she agreed…".*

66 At page 215, we see that Mr Girvan says that Mr Connolly had insisted on pressing on with discussing the matter of Mr Shine's alleged affair, even though those present kept telling him that it was not relevant.

67 As for Ms Hall, during interview with the grievance investigator, (the first interview) she said, *"I told Chris that in 25 years in Asda nobody had made me feel how he had … I*

feel scared to work with Chris which is not like me" and at page 263, (the second interview) *"once Shane had left the room and I sat back down Chris turned to me and slandered me saying I was no good at my job that nobody liked me he also stated I had no duty of care for my colleagues he also said the management team spoke about me behind my back saying they didn't like me. He said it with hate in his voice. I said to him in 25 years of working for Asda I have never been spoken to how he was. At that point John Girvan … intervened".*

68 Mr Connolly accepts that he told Ms Hall that she was hated in the store. He acknowledged this to the grievance investigator, (page 233). He now accepts that what he said to her and the way that he spoke to her was inappropriate and he is apologetic. At the grievance interview, he said that he was, "firm and fair", (page 238). By the second grievance interview his position had changed and he was apologetic, referring to his comments, he is recorded as saying at page 253, *"they were unacceptable and I am deeply sorry for those actions".*

69 Mr Shine and Ms Hall each separately and independently raised written grievances against Mr Connolly. They are in the bundle at pages 186 and 189. They are unsigned and undated, but they were raised very shortly after the incident, in Ms Hall's case on 9 May, being the date she gives at paragraph 17 in her witness statement.

70 Mr Shine complained amongst other things, of Mr Connolly accusing him of having an inappropriate relationship with a colleague and he expressly recites Mr Connolly winking at him and saying, *"yea you've put a lot to bed".*

71 Ms Hall also complains about other unrelated matters, but specifically with regard to the meeting on 4 May, she complains of Mr Connolly making reputation damaging and personally hurtful claims, attacking her role in the store, telling her that she was hated and that people spoke about her behind her back. She referred to his attempting to upset her and tarnish her reputation, his vicious demeanour and she stated, *"I believe Chris cannot repair the damage he has done with his accusations".*

72 On 8 May 2017, Mr Connolly began a period of absence due to stress.

73 On 9 May 2017, Mr Girvan provided his written statement in support of the grievances, already quoted above. In addition to the above quotes, we note he concluded his written statement with, *"I found him to be aggressive, antagonistic, threatening in his behaviour to get what he wanted. At no point should anyone have been spoken to in that manner."*

74 On 19 May 2017, the General Store Manager, Mr Max Scarff, informed Mr Connolly that Ms Hall and Mr Shine had filed grievances against him.

75 In the meantime, the Respondent had again referred Mr Connolly to occupational health advisers and a therapist provided a further report, following a telephone assessment. Mr Connolly was reported to be unaware that there was to be an investigation. He was reported to still be taking the citalopram and nitrazepam as before. He was also now taking diazepam and benzodiazepine for treatment of anxiety and insomnia respectively. His anxiety score was reported as 20/21 and his depression score

25/27. The therapist's opinion was that Mr Connolly was experiencing an acute stress reaction in relation to reported workplace and personal stressors and historical trauma. He recommends six face to face counselling sessions, for which a referral had been made that day. The advice was that there was no reason why Mr Connolly could not attend any investigation meetings, provided there were regular breaks.

76 Mr Jeff Allen was appointed to investigate the grievances. On the 21 July 2017 he met separately with Ms Hall and Mr Shine. We have already quoted excerpts from the notes taken of those meetings.

77 Mr Allen met with Mr Girvan on 27 July 2017. We have already quoted from the notes of that meeting as well. We further note at page 213, Mr Girvan expressed the view that raising the suggestion that Mr Shine was having an affair with somebody was an attempt at blackmail to avoid having to work on the Sunday.

78 Mr Connolly was interviewed by Mr Allen on 27 July as well. His response to the statement by Mr Girvan was, as it was before us in Tribunal, that it was untrue.

79 Mr Connolly was suspended on 28 July 2017.

80 Mr Allen met with Mr Connolly for a second time on 7 September 2017. We have already seen during the course of this interview, Mr Connolly apologised for his actions.

81 We then see in the bundle at page 257, a document that records Mr Allen reaching his conclusion on the grievance. The document is dated 8 September 2017. He concludes that the grievances by both Mr Shine and Ms Hall should be upheld.

82 The grievance investigation papers were then passed to Mr Manser, (Deputy Store Manager at Ipswich) who had been appointed to hear the disciplinary case against Mr Connolly. Mr Manser reviewed the interview notes and then told Mr Allen:

> 82.1 That he should have met with Mr Connolly to give an outcome to the grievance and inform him that the matter would be passed on for disciplinary action, and
>
> 82.2 He should further meet the grievers as he, (Mr Manser) was not happy with the amount of information provided on how they, "felt". There was apparently an email between Mr Manser and Mr Allen to this effect, but it was not disclosed and it is not in the bundle, which is surprising. It would clearly have been a relevant document. Mr Manser agreed in evidence that he was looking for evidence to support charges against Mr Connolly, in the sense that he wanted more information on how in particular, Ms Hall felt.

83 We are uncertain as to the timing of this, we do not know when the papers were passed to Mr Manser and we do not know when he contacted Mr Allen.

84 Mr Allen then had a further meeting with Ms Hall on 10 October, (page 263) and with Mr Shine on 11 October, (page 273).

85 On 13 October 2017, Mr Allen telephoned Mr Connolly to say that he was to be subjected to disciplinary action because of the matters raised in the grievances. Subsequently on 15 October, he telephoned him again and said that this was a mistake and that first he must meet with him and tell him the outcome of the grievance.

86 Thus, on 10 November 2017, Mr Allen met with Mr Connolly and informed him that he upheld both grievances. He informed Mr Connolly that the papers have been forwarded to a disciplinary manager to consider whether disciplinary action should be taken.

87 By a letter dated 13 November 2017, (page 289) Mr Connolly was invited to attend a disciplinary hearing on 22 November. The allegations were that, by reference to a meeting on 4 May 2017:

> *"your behaviour was such, that Jackie Hall felt both intimidated and upset by your demeanour and attacks on her personal reputation. Shane Shine also has alleged that aspersions were cast with regards to his behaviour with other colleagues on his department. Intimidating behaviours within the workplace and casting aspersions on other colleagues may be construed as gross misconduct".*

88 A comprehensive set of copies of the documents created in the grievance process thus far were included with the letter.

89 For reasons that are not clear to us, the disciplinary hearing was postponed until 30 November and in the meantime, Mr Connolly obtained a letter from his GP dated 28 November 2017, which is copied in the bundle at page 293. Relevant extracts from this letter are as follows:

> *"I can confirm he has long term mental health trouble suffering with depression, anxiety and substance abuse and that he has been on long term treatment with antidepressants and tranquilisers.*
>
> *He self medicates with alcohol on a fairly regular basis.*
>
> *I believed he has been absent from work for six months pending this hearing and the time delay and social isolation from his colleagues has certainly exacerbated his mental health problems.*
>
> *I am sure that his underlying mental health problems and medication could lead to rather erratic behaviour and I would be grateful for your consideration of his health needs in your assessment of his case."*

90 The disciplinary hearing took place on 30 November 2017. The notes of that hearing start at page 294. During this discussion, Mr Connolly dismissed Mr Girvan's statement on the basis that it was a personal attack on him because they had some bad history. He referred to it as a, "rant of rubbish". (page 299). He acknowledged, (page 300) that what he had said to Ms Hall was, *"totally and utterly unacceptable for which I am deeply sorry about"* ; at page 304, *"as I said no defence what I said to Jackie"* and at page 306, *"I think my behaviours are misconstrued at times I am misunderstood at times but*

ultimately comments to Jackie are not acceptable in a leader". He was asked, (page 307) *whether* a working relationship could be maintained between him and the managers involved to which he replied, *"I have lost the trust in the management team at Shoeburyness so unfortunately no. Especially when the People Manager has threatened to leave the store should I return".*

91 During an adjournment, Mr Manser looked at options for a possible transfer to another store. He spoke to a HR Adviser called Tracy Peddie and she told him that Mr Connolly had burnt his bridges in a number of stores; he could not go back to Rayleigh, East Gate or South Woodham because of outstanding or past grievances.

92 During the hearing, Mr Connolly provided Mr Manser with a copy of the doctor's letter dated 28 November quoted above. Mr Manser adjourned to read that letter and to review Mr Connolly's file. He came back into the meeting and made reference to the Occupational Health report on 9 March 2017 referred to above, which he said was the closest to the incident on 5 May and that in effect, that report was the relevant report to consider in the context of the incident. He noted that report indicated an anxiety score of 2/21 and that he was said to have made excellent progress and was discharged from their service. He concluded, (page 316):

> *"The way you behaved towards Jackie Hall alone is so serious that I am upholding the allegation of threatening behaviour and serious provocation of any person and company property which is a gross misconduct offence within Asda's disciplinary policy and results in your summary dismissal."*

93 That Mr Connolly was dismissed was confirmed in a letter from Mr Manser dated 1 December 2017. In that letter he gives as his reasoning:

- *"that I reviewed your absence file and noted an Occupational health report dated 9 March 2017, which was closest to the incident to the 5 May 2017. It clearly stated that your anxiety only measured on the GAN 7 scale of anxiety only measured 2 out of 21. This is a good indication of your anxiety and mood. You were discharged from counselling.*

- *That you fully admitted your behaviours to Jackie Hall was completely unacceptable.*

- *During the disciplinary hearing you admitted that you could be seen as aggressive and your behaviour during the meeting on 5 May was totally unacceptable."*

94 We note in particular that as with the concluding notes of the disciplinary hearing, Mr Manser's focus is on Mr Connolly's behaviour towards Ms Hall.

95 Mr Connolly appealed in writing against his dismissal in a handwritten letter dated 8 December 2017, a copy is at page 320. He appeals on the following basis:

95.1 That Mr Manser was wrong to rely on the Occupational Health report of 9

March, but should have had regard to the report of 19 May, in which he was stated to be unfit for work. He felt the earlier report was being used as a means to disregard the doctor's letter.

95.2 He queried why, if his conduct was so serious, he had not been suspended at the time and not some weeks later.

95.3 That everything had taken far too long.

95.4 That he had been invited to a disciplinary meeting before the grievance/investigation had been concluded and he was off sick at the time.

95.5 That he had not received a response to an ethics complaint, (not something that has been raised with the Tribunal).

95.6 That the punishment of summary dismissal was excessive. Other options could have been considered, such as a transfer from the store, demotion, a finding of misconduct rather than gross misconduct and a first written or final written warning.

96 The appeal was heard on 12 January 2018 by a Store Manager from Harlow, Mr Chamberlain.

97 Notes of the appeal hearing are at page 326. In discussing the Occupational Health reports, Mr Connolly told Mr Chamberlain that the March report had been because of alcohol abuse and that actually, he had lied to Occupational Health because he did not want it to get it back to Ms Hall that his anxiety levels were high.

98 With regard to his comments to Ms Hall, Mr Connolly said, (page 328) *"what I did say to Jackie at the time, I lost the plot, lose sight of what to say to people, lose control, very upset, and say things that I regret. I took it too far."*

99 Mr Chamberlain queried, (page 329) with Mr Connolly how the Respondent could take into account mitigation regarding his mental health if he is telling him that he lied to Occupational Health? Mr Connolly replied that he only lied once, in the 8 February clinic. He said that the Occupational Health Advisers were employed by Asda and he was not going to tell them the truth about what was going on. He said he was more comfortable talking to his GP. A little later in the meeting, (page 331) he said he lied in all of his clinics. It is fair to say after an adjournment at the instigation of his representative, he withdrew that comment but said, (page 332) that he had omitted to mention certain things. Then he said he had not lied, but he had given incorrect answers. He acknowledged he had misled the therapist.

100 With regard to the incident on 4 May he said, (page 334) that he had not appreciated that his behaviour would be regarded as threatening and aggressive until that had been explained to him during the investigation. He had thought that the word aggression is only appropriate by reference to threats of physical violence.

101 He explained that he thought that being invited to a disciplinary hearing before being provided with the conclusion to the grievance investigation was indicative of a pre-determined decision.

102 Mr Chamberlain provided an outcome to the appeal in a letter dated 16 January 2018, which starts in the bundle at page 339:

102.1 Somewhat bizarrely, given that the dismissal had been on the basis of Mr Connolly's behaviour towards Ms Hall alone, he concluded that the nature of the incident involving both Ms Hall and Mr Shine was aggressive threatening behaviour. He did not uphold the appeal.

102.2 He concluded that as Mr Connolly said that he had lied and manipulated anxiety/mood tests, he regarded Mr Connolly's arguments regarding Occupational Health in mitigation as inadmissible.

102.3 He explained that Mr Connolly had not immediately been suspended because it had been thought that his leaving the store would be sufficient to cool things down.

102.4 He agreed that the appropriate process had not been followed when he had been contacted regarding disciplinary matters before a grievance outcome had been provided.

102.5 With regard to the delays in process, he said that he had investigated this and had found that there were factors causing delay, including annual leave, bereavement, the needs of the business and the complication of trying to find a suitable date that all parties could attend.

102.6 He concluded that:

> *"dismissal on the grounds that your behaviour towards Jackie Hall and Shane Shine was so serious that we no longer have enough trust and confidence for a working relationship to be maintained is* upheld."

Conclusions

103 There are a number of conflicts of evidence referred to in our findings of fact narrative that we have not found it necessary to resolve in order to reach our conclusions.

Time

104 Both the disability discrimination and unfair dismissal claims are in relation to Mr Connolly's dismissal. The date of dismissal was 1 December 2017. The three month time limit would therefore expire, but for early conciliation, on 28 February 2018. Early conciliation was from 25 January to 23 February 2018, extending time by 29 days to 29

March. The claim was issued on 22 March, which is in time.

Disability Related Discrimination

105 The respondent conceded that Mr Connolly was a disabled person as defined in the Equality Act 2010. Given the medical evidence in the form of occupational reports in the hands of the respondent, as outlined above, it is surprising that concession was not made until the start of the hearing. It is also surprising that none of the respondent's managers nor the HR advisors involved in this case, recognised or considered as a possibility during the events in question, that Mr Connolly might be disabled. They do themselves no credit in that regard.

106 Being dismissed was undoubtedly unfavourable treatment of Mr Connolly.

107 The key question is, was he dismissed because of something arising in consequence of his disability? The list of issues at 4.5 refers to the, "something arising" as being Mr Connolly's erratic behaviour and demeanour. That seems like an odd choice of words, but they have no doubt been chosen because of the reference to, "erratic behaviour" in the doctor's letter of 28 November 2017.

108 Mr Connolly was dismissed because of his rude and aggressive behaviour toward Ms Hall on 4 May 2017. Was that something arising in consequence of his disability? We do not have evidence before us that it was. The doctor's letter is not such evidence. It is evidence that his disability might cause erratic behaviour, which does not in our judgment, amount to subjecting a hardened HR practitioner to such a verbal assault that she is reduced to tears and made to feel scared and which provokes a trade union representative to comment on his member's behaviour as aggressive, antagonistic and threatening, reducing its hardened recipient to a trembling mess.

109 It was suggested that such evidence is contained within the medical records, but as Mr Connolly acknowledged in evidence, his medical records contain no references to anger management and he said that anger was not a problem anyway.

110 We do not have evidence from a medical practitioner that sets out the behaviour by Mr Connolly and which states that such behaviour arises or may have arisen because of depression and anxiety.

111 Mr McCracken suggests that we do not need such evidence, he refers us to Chapter 5 to the EHRC 2011 Code of Practice on Employment, in particular to paragraph 5.9. We find nothing in chapter 5 that suggests that we do not need some evidence of causation, save that 5.9 refers to some cases in which it will be obvious, such as an inability to walk or use work equipment. This is not such a case. Mr McCracken refers to the example given of a person with cancer losing her temper because of the pain. We read that as an example of a connection between disability and the consequence, not an example of something that is obvious and therefore requires no evidence.

112 Should we as a matter of common sense take the view that it must follow that Mr Connolly's outburst arose as a consequence of his anxiety and depression? We took the

view that we could not do so, we simply do not know whether that is the case or not.

113 For this reason, Mr Connolly's complaint of disability discrimination fails.

114 We have gone onto consider what the outcome would have been had we decided otherwise, which will be instructive for the respondent.

115 If we had before us evidence that would have lead us to the conclusion that Mr Connolly's behaviour toward Ms Hall arose as a consequence of his depression and anxiety, could his subsequent dismissal be justified as a proportionate means of achieving a legitimate aim?

116 We are starting from a false premise; that we have concluded on the evidence that Mr Connolly's behaviour arose as a consequence of his disability. The list of issues at 4.5 identifies 3 proposed legitimate aims. There is no suggestion here of there being any risk of Mr Connolly behaving inappropriately with customers. We disregard that. However, maintaining a harmonious working environment and protecting colleagues from feeling intimidated or threatened, are legitimate aims.

117 The difficulty for the respondent would have been, showing that dismissal was a proportionate means of achieving that aim. The respondent's HR practitioners' and managers' failure to recognise that Mr Connolly's mental health issues amounted to a disability is remarkable. Had they done so, we would have expected them to then make enquiries of their occupational health advisors which would have revealed that his behaviour arose as a consequence, (we remind the reader, this is based on the above mentioned false premise). That in turn ought to have led to enquiry as to the likelihood of reoccurrence and whether steps could reasonably be taken to avoid reoccurrence in the future. We would have accepted that it would not have been appropriate to expect Mr Connolly to continue working in the same store as Ms Hall, but enquiry could have been made as to whether there were other stores to which Mr Connolly would have been prepared to travel. In the absence of the respondent taking these or similar steps, we would not have concluded that dismissal was a proportionate means of achieving a legitimate aim; it might have been, but not without making those enquiries first.

118 4.7 of the list of issues poses the question, whether the respondent had shown that it did not know or could not have been expected to know that the claimant had a disability? It certainly has not. From the occupational health reports in the respondent's possession, it ought to have been obvious that he was disabled.

Unfair Dismissal

119 The reason Mr Connolly was dismissed was his conduct toward Ms Hall, not his disability or his sickness absence, as suggested at 4.8 of the list of issues. That is a potentially fair reason.

120 The respondent had reasonable grounds to believe that Mr Connolly was guilty of the conduct; they had the corroborative evidence of the trade union representative Mr Girvan and ultimately, Mr Connolly admitted that he had behaved as alleged. The belief on

the part of Mr Manser and Mr Chamberlain was genuine.

121 Was the decision to dismiss within the range of reasonable responses? The list of issues suggests 4 reasons contended for by Mr Connolly as to why it is not:

121.1 That his actions were not intentional. They were, in the sense that they were not involuntary. He did not go into the meeting intending to, "blow up" at Ms Hall but when he did lose his temper, that was intentional. That is our finding. The evidence before the respondent was that the outburst was not, unintentional.

121.2 That there was delay in the process. There was delay and that is regrettable. There so often is in cases that we hear. The delays were not sufficient, having regard to all the circumstances of the case, so as to render the dismissal unfair in our view. Mr Connolly argued that the delay made it hard for him to recall events, but that does not seem to have been a factor in the disciplinary or appeal hearing, nor in the hearing before us.

121.3 That he was invited to a disciplinary hearing before the conclusion of the grievance. That is not correct. The grievance had been concluded by the time he was told that disciplinary action against him would be recommended. There was an error, in giving him this information before he had formally been told of the grievance outcome. That was not something that having regard to all the circumstances of the case, rendered the dismissal unfair.

121.4 That the sanction was unduly severe, having regard to his length of service, his disciplinary record and his disability. Mr Connolly's outburst was sufficiently severe as to have a profound impact on Ms Hall and attract forthright condemnation from his trade union representative. His disability did not provide an excuse or a reason for his outburst. Whatever his length of service or his disciplinary record, we could not say that dismissal was too severe a sanction and outside the range of possible responses by a reasonable employer.

122 During the hearing a further point arose, upon which Mr McCracken relies. That is that Mr Manser told Mr Allen to go back and ask further questions of the grievers and the fact that we have not been provided with a copy of the relevant email. That is odd. Mr McCracken suggests that the decision maker was entwining himself in the investigation. However, it is not necessarily wrong or inappropriate for a disciplinary officer to ask for more information or for further enquiry by the investigatory officer. After all, a disciplinary officer could hold a hearing in which he hears evidence from the parties involved and could have asked further questions himself.

123 We have stood back and looked at the facts of the case in the round and taken all of the points made as to why we should find the dismissal unfair together and considered whether collectively, they are sufficient to render the decision to dismiss unfair, to take the dismissal outside the range of reasonable decisions a reasonable employer might make and we conclude that they do not.

124 For these reasons, the claims of unfair and wrongful dismissal also fail.

Employment Judge M Warren

24 January 2019