



EMPLOYMENT TRIBUNALS

Claimant: Mr Sean Holmes
Respondent: Royal Mail Group Plc

AT A FULL HEARING BY CVP

Heard at: Nottingham On: 23, 24, 25 August 2021
In chambers: 26 August 2021

Before: Employment Judge M Butler

Members: Mr K Rose
Mr A Greenland

Representation

Claimant: In person, assisted by his wife Mrs N Holmes
Respondent: Mr S Peacock, Solicitor

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

1. The unanimous Judgment of the Tribunal is that the claims of unfair dismissal and disability discrimination pursuant to Section 15 of the Equality Act 2010 (EQA) are well founded and succeed.
2. The claims of direct disability discrimination under Section 13 EQA and failure to make reasonable adjustments under Sections 20 and 21 EQA are not well founded and are dismissed.
3. The claim in respect of unpaid wages is dismissed on withdrawal by the Claimant.

RESERVED REASONS

The Claims

1. The Claimant claims his dismissal was unfair in that his alleged misconduct was not properly investigated, relied on false information and was procedurally flawed. His claim of failure to make reasonable adjustments arises out of a requirement for him to resume his full duties without regard to his disability of PTSD. The acts of direct discrimination upon which the Claimant relies comprise a failure to carry out a thorough investigation of a number of matters and also his dismissal in circumstances where a hypothetical comparator would not have been dismissed. The claim of discrimination because of something arising in consequence of his disability is based on the fact that, due to the Claimant's disability, his conduct arising from that disability was adversely affected. The claim for unpaid wages was withdrawn by the Claimant on 17 July 2020. The Respondent defends the claims on the basis that the Claimant committed an act of gross misconduct resulting in his dismissal being fair and that he was not discriminated against. It further argues that the claim of failure to make reasonable adjustments is out of time.

The Issues

2. The parties have helpfully agreed a list of issues which are summarised as set out below.

- (i) The Respondent concedes that the Claimant is a disabled person due to the mental impairment of Post-Traumatic Stress Disorder.
- (ii) Was the reason for dismissal potentially a fair reason pursuant to Section 98 (1) and (2) of the Employment Rights Act 1996 (ERA)?
- (iii) Did the Respondent act reasonably in treating the reason for dismissal as sufficient to justify dismissal taking into account all the circumstances including the size and administrative resources of the Respondent and in accordance with equity and the substantial merits of the case under Section 98 (4) ERA?
- (iv) Did the Respondent have a genuine belief that conduct was the reason for dismissal?
- (v) Did the Respondent have reasonable grounds for the belief that the Claimant had sent a number of abusive and threatening text messages to his operations Manager, Mrs K Ellis?
- (vi) Did the Respondent carry out a reasonable investigation?
- (vii) Was the Appeal Hearing in respect of the Claimant's dismissal a full re hearing?
- (viii) Was the decision to dismiss a fair sanction being within the range of

reasonable responses?

- (ix) Was the Claimant's dismissal procedurally unfair?
- (x) If the Claimant was unfairly dismissed, did he contribute to his own dismissal and, if so, to what extent?
- (xi) Did the Respondent treat the Claimant less favourably than it treated or would have treated an appropriate comparator by dismissing him? In particular, was it consistent with other incidents of the same nature, was there a thorough investigation into the allegation that the Claimant held his mother hostage in her property in 2018, were any allegations against the Claimant false and was some of that false information regarding other incidents made up by the Dismissing Officer, Mrs L Thompson?
- (xii) Did the Respondent treat the Claimant unfavourably by dismissing him because of something arising in consequence of his disability? If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?
- (xiii) Did the Respondent apply a provision, criterion or practice that was discriminatory in relation to disabled people by insisting that the Claimant carried out his full contractual duties?
- (xiv) Did the Respondent take steps to alleviate the substantial disadvantage in comparison with persons who are not disabled?

The Law

3. We were referred to a number of authorities by the Respondent and these are considered below insofar as the Tribunal deemed them to be relevant.

4. Section 98 ERA provides:

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

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

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

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

(a)

(b) relates to the conduct of the employee,

(c)....

(d)

(3)

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

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

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

5. Section 13 EQA provides:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

6. Section 15 EQA provides:

"(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."

7. Section 20 EQA provides:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(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."

8. Section 21 EQA provides:

"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

The Evidence

9. We heard evidence from the Claimant, his wife, Mrs N Holmes, and his mother Miss C Humphries. For the Respondent, we heard evidence from Mr B Cordon, Delivery Line Manager, Mrs K Ellis, Operations Manager, Mrs L Thompson, Delivery Manager and Dismissing Officer, and Mr A Brown, Independent Casework Manager and Appeal Officer.

10. There was an agreed bundle of documents comprising 596 pages and references to page numbers in this Judgment are to page numbers in that bundle.

11. Due to the Claimant's disability, he has difficulty in managing his thought processes and with his concentration. Accordingly, with the agreement of the parties, adjustments were made for him. These included allowing his wife to speak for him (although not when he was being cross-examined) and to cross-examine the Respondent's witnesses. We also had short breaks throughout the hearing to alleviate any difficulties he had in relation to managing his thought processes and his concentration levels.

The Factual Background

12. The Claimant commenced employment with the Respondent as a Postman on 1 January 2008. In 2012 he was diagnosed with PTSD after finding the body of his father who had died of a drugs overdose. In 2016 his mother was diagnosed with stage 3 breast cancer which caused the Claimant's mental health to deteriorate to the extent that he suffered delusional and psychotic thoughts. Realising he was suffering with his mental health, the Claimant attended Millbrook Mental Health Unit on two occasions in one day but could not be seen. Thinking his mother needed protection, he asked his wife to bring his mother to her house and contacted the Police for help. He then went to his mother's house, locked them inside and awaited the arrival of the Police. When they arrived, he thought the Police were bad people and he refused to open the door. This event attracted some media coverage and, as a result of it, the Claimant was sectioned under the Mental Health Act for approximately one week.

13. On 28 June 2018, Mr L Sharpe, Delivery Office Manager, wrote to Ms V Roberts of the Respondent's HR Team (page 157) asking for help saying the Claimant had become unmanageable and had made verbal threats to kidnap people at Mansfield Delivery Office if he did "*not get his own way*". On 6 July 2018, the Claimant was sent home on medical suspension and referred to Occupational Health on 29 October 2018 (page 158). Because of the Claimant's mental health issues, his case was escalated to be considered by an Occupational Health Physician, Dr A Scott, Consultant Occupational Physician (page 174). Inter alia, Dr Scott, who saw the Claimant on 23 November 2018, recommended a phased return to work and said he should have an individual stress risk assessment followed by a risk management plan "*asap*". No such assessment or plan was undertaken. Dr Scott also noted that the Claimant "*will have to work alone but has no restrictions on his driving so could do a van based duty if necessary*". Dr Scott also noted "*there is no evidence that he is a danger to anybody and his reactions at work seem to be more frustration and agitation than aggression.....Managers need to be sensitive to his history and condition, and be aware of how their reactions to him can affect him emotionally*".

14. On 2 January 2019, the Claimant returned to work carrying out what the Respondent refers to as rehabilitative duties. These comprised working alone and delivering packages.

15. After a period of bereavement leave, Mr Sharpe then left the Mansfield Delivery Office and Mrs Ellis, who had recently been appointed Operations Manager, arranged a meeting with the Claimant on 25 June 2019 (page 103) with the objective of agreeing a plan to support the Claimant back to full duty. The Respondent states that he was never intended to continue with his rehabilitative duties for longer than three months but that this was overlooked due to Mr Sharpe's absence. The notes of the meeting state that Mrs Ellis did not delve into the Claimant's medical history but that the subject was discussed in relation to his current medication and medical advice. It is recorded that the Claimant said he did not wish to return to full duties and that he said he had had issues with management in the past and had threatened a previous Operations Manager, Mr M Overton, by saying he would go round to his house and cause him grievous bodily harm. Mrs Ellis noted that if she was unable to return the Claimant to his contracted role "*we may need to complete a scoping exercise or consider alternative options*". It was noted that there would be a further referral to Occupational Health.

16. The report from that referral (page 185) is dated 23 July 2019. In it the Occupational Health Advisor notes that the Claimant "*told me that he is willing to try and resume his full duties and he terminated my call..... It is my opinion that Mr Holmes is fit for work with restrictions at this time*". On 6 August 2019, the Claimant met with Mr Cordon and Mrs Ellis and discussed his new working arrangements (page 195). On 14 August in an email to Mrs Ellis, Mr Cordon noted that all seemed well with the Claimant (page 196).

17. On 14 August 2019 there was an altercation between a Manager, Mr G Scott, and the Claimant as a result of which the Claimant attempted to call Mrs Ellis. She returned his call the following day when he said he would not meet with her the following day but on 16 August the Claimant called Mrs Ellis and they arranged to meet later that day. There are notes of the meeting at page 199 wherein Mrs Ellis explains his behaviour earlier in the week was unacceptable as was the way he had spoken to her on the telephone.

18. From 24 August 2019 until 31 August, the Claimant sent a number of inappropriate text messages to Mrs Ellis (page 200). Mrs Ellis spoke to Mrs Holmes and noted the contents of two telephone calls that day (page 202) and, because she felt threatened, Mrs Ellis notified the Police (page 203).

19. This was then treated as a conduct matter and Mrs Ellis directed Mr Cordon to write to the Claimant advising that he was suspended. The Claimant was sent home and Mrs Ellis telephoned him having confirmed with his wife that she would be at home at the time of the call wherein she advised him he was suspended. The letter of suspension from Mr Cordon is at page 205.

20. On 3 September 2019, Mr Cordon invited the Claimant to a fact-finding meeting on 6 September 2019 (page 210). On 6 September 2019 the Claimant sent a note to Mr Cordon explaining why he sent the text messages (page 212). The fact-finding meeting took place as arranged and was minuted (page 213). The Claimant sent further comments to Mr Cordon by letter dated 10 September 2019 making reference to his mental health (page 217). Mr Cordon then referred the case to Mrs Thompson since the potential penalty for the Claimant's conduct was dismissal and he did not have authority to take the matter further. Both Mrs Thompson and Mr Cordon are under the line management of Mrs Ellis.

21. Mrs Thompson invited the Claimant to a conduct meeting by letter dated 24 September 2019 (page 229). The minutes of that meeting begin at page 232. The Claimant declined union representation but asked if his wife, who is his carer, could be present. Mrs Thompson says she attempted to speak to someone in the HR team for advice in relation to this request, but no one was available. She then contacted Mrs Ellis and asked whether an employee could be accompanied by a family member in a conduct hearing. Mrs Ellis replied that this was not permitted.

22. During the conduct meeting, the Claimant explained that his contact with Mrs Ellis had affected his mental health. Mrs Thompson handed the Claimant a piece of paper with the text messages printed on it and he screwed it up and threw it (page 239). The notes of the interview were sent to the Claimant on 2 October 2019 (page 241). The Claimant had consented to a further Occupational Health referral and the report is dated 31 October 2019 (page 257) the report acknowledges that the Occupational Health Advisor was of the opinion that the Claimant's *"health status would not prevent him from undertaking his work duties. I would advise that management aim to complete the suspension process as soon as possible and confirm a return to work date with him"*. It also notes, *"his medical condition cause (sic) psychological symptoms which are persistent enough to have a significant impact on the persons day to day life. It is therefore quite likely that his health condition contributed to his behaviour"*.

23. Throughout this time, the Claimant remained on suspension with full pay. On 19 November 2019 Mrs Thompson interviewed Mrs Ellis (page 277). Heavily redacted minutes of that meeting were sent to the Claimant on the grounds that they contained personal and sensitive information.

24. Mrs Thompson also interviewed Mr Cordon on 2 December 2019 (page 302) and Mr Overton on the same day (page 305). The minutes of those meetings were sent along with those of Mrs Ellis to the Claimant on 5 December 2019 (page 308). That letter said, *"If you would like to make any comments on these interviews, if these comments are not returned to me by the time specified, and there is no acceptable explanation why this has not been done, I shall assume that you do not wish to add any further comments and I will continue to make my decision on the available information as it is and with the enclosed notes"*. The Claimant did not reply until 13 December 2019 (page 314) when he asked for an extension of time until 27

December 2019 in order to reply. On 19 December 2019, the Claimant wrote to Mrs Thompson asking to be re-interviewed with his union representative present since he disputed some of the notes he had been sent. Mrs Thompson replied, *“Unfortunately, I must advise you I am unable to grant this request and I do not accept that the notes are not an accurate reflection of our meeting as an independent note taker was present”* (page 339).

25. Mrs Thompson wrote to the Claimant on 14 January 2020 enclosing a report and confirming he was summarily dismissed for gross misconduct for sending a number of abusive and threatening text messages to Mrs Ellis (page 345). In her report, Mrs Thompson made reference to the alleged threats made by the Claimant to Mr Overton (page 352). She noted that, *“In addition, from my own personal perspective I have found Sean’s behaviour during the conduct investigation troubling and inappropriate. I found his demeanour in our meeting to be intimidating and aggressive at times. I recognise he has a condition which no doubt contributes to this behaviour, but I can appreciate the impact this has on management. In addition, I was made aware he threatened to return to the unit whilst suspended and whilst the investigation was ongoing without authority which demonstrates the difficulty management have in managing his behaviours”* (page 354). She also said in her report, *“My view is that legitimate management of Sean’s behaviours will continue to prompt aggressive and unreasonable behaviour”* (page 352).

26. On 15 January 2020, the Claimant appealed against his dismissal (page 358). He was invited to an Appeal meeting to be held by Mr Brown by letter dated 22 January 2020 (page 360). Mr Brown noted that the Claimant had sent in total 32 text messages to Mrs Ellis and he asked her to provide them. She responded by sending the 5 text messages which had formed the basis of the allegations against the Claimant and said in evidence she could not retrieve any of the others because she had changed her work mobile phone.

27. The Appeal Hearing was held on 12 February 2020 and the notes of the meeting are at page 371. Mrs Holmes was allowed to attend the Appeal Hearing to support the Claimant and his official companion was his union representative, Mr S Blower.

28. On 25 February 2020, Mr Brown wrote to the Claimant dismissing his appeal (page 519).

The Oral Evidence

29. The Claimant’s evidence was punctuated with long pauses and many instances where, although some behaviours attributed to him were admitted, he said he could not recall them. It was apparent to the Tribunal that his thought processes

were slow and at times he was unable to concentrate on either the questions put to him or his answers.

30. Nonetheless, we consider the evidence of the Claimant to have been truthfully given. He accepted it was quite reasonable for Mrs Ellis to meet with him to discuss ways of getting him back to full duties. He said that he at no time threatened Mr Overton with grievous bodily harm (and this is supported by Mr Overton's own statement to Mrs Thompson). He agreed to the Occupational Health referral suggested by Mrs Ellis but said the report (page 185) did not give the full picture of the conversation he had with the Occupational Health Advisor. Unfortunately, he was unable to offer any further details as to what was omitted from the report. Following receipt of the report, he met with Mrs Ellis again (page 184) and said she made him feel stressed and he felt obliged to go through his background again. His current mental health situation is connected to his past and those memories bring on his PTSD symptoms. He readily accepted that it was Mrs Ellis' job to get him back to work and he was prepared to work with her to return to full duties. In doing this, she did not put him under any pressure, but he put himself under pressure. Regarding the note at page 197, he did not remember saying anything about "*star tattoos*". He considered his behaviour at the meeting with Mrs Ellis on 16 August 2019 would have been unacceptable had he not been suffering PTSD.

31. When Mrs Ellis went on holiday in August 2019, the Claimant said he also took some leave. In relation to the text messages, he accepted that they would have had substantial negative impact on Mrs Ellis but added that none of them make any sense at all. At the time he sent them, he believes he was having another psychotic episode. Although the messages were unacceptable, he was not himself at that moment in time. Had he been given the chance he would have apologised and it was not his intention to scare anyone. The messages were not intended as a personal attack on Mrs Ellis.

32. In relation to his conduct in the interview with Mrs Thompson, the Claimant said he did not recall screwing a piece of paper up and throwing it at her. He had no recollection of any incident with Mr Scott.

33. The Claimant expressed concern with the procedure followed by the Respondent in relation to the conduct investigation. In particular, he noted that Mrs Thompson is junior to Mrs Ellis and reports to her. Nevertheless, Mrs Thompson sought advice from Mrs Ellis in relation to the Claimant being allowed to be accompanied by his wife. He did not accept that this procedural error was put right by a re-hearing on appeal because it was not a re-hearing.

34. Miss Humphries is the Claimant's mother and not an employee of the Respondent. She gave evidence that she had tried to make people at the Respondent aware of the Claimant's complicated mental health issues and the barriers he faced. She had attended the Respondent's depot several times to speak to managers.

35. Mrs Holmes is the Claimant's wife. She pointed out that comments attributed to her in a conversation with Mrs Ellis (page 202) were not accurate. She was concerned that the Respondent had not supported the Claimant.

36. Mrs Holmes said that she is registered as the Claimant's carer with the local Council. She noted that no stress risk assessment had been carried out and she had told the Respondent this in a meeting with Mr Overton and a representative of the HR team in late 2018.

37. Mr Cordon is still employed by the Respondent. He said that after Mr Sharpe's departure from the Mansfield depot, the Claimant stayed on rehabilitative duties and no one questioned this until Mrs Ellis took up her post. He had daily informal chats with the Claimant to see how he was getting on and such informal conversations are not documented within the Respondent.

38. Mrs Thompson gave evidence that, at the time of the investigation into the Claimant's conduct, she reported to Mrs Ellis. Her witness statement records at paragraph 2, *"I am fully familiar with Royal Mail's policies and procedures including its Conduct Policy and our business standards. I have been dealing with conduct cases up to and including dismissal for four years since attending the relevant training courses"*. On a number of occasions, Mrs Thompson made reference to how she considered she had acted with integrity throughout the conduct investigation. With this experience, we were concerned in the first place that Mrs Thompson had to consult Mrs Ellis when the Claimant asked for permission for his wife to attend his conduct investigation meeting. She said that she tried to take advice from HR, but no one was available. We found that evidence to be difficult to accept given the size and administrative resources of the Respondent. It is evident that the Claimant referred to his wife as his carer when making the request. When Mrs Thompson asked Mrs Ellis she said she gave no indication as to the identity of the employee being investigated and did not say that the employee wanted his wife and carer to accompany him but only that he requested that a member of his family be permitted to attend to support him. When Mrs Ellis replied she just said that the Respondent's policy only permitted an employee to be accompanied by a work colleague or a trade union representative.

39. We had issues with this evidence. Why, for example, if an employee with known mental health issues wishes to be accompanied by his wife and carer for support did Mrs Thompson only request information regarding a family member being permitted to accompany the employee? Why, if Mrs Thompson could not indeed locate anyone in the HR team, did she not adjourn the investigation meeting until she could take proper advice? Finally, is it really credible that Mrs Ellis did not know that Mrs Thompson was dealing with the Claimant's conduct investigation when Mrs Ellis had been the subject of the abusive text messages, had ordered the suspension of the Claimant and was the direct superior of Mrs Ellis?

40. The Tribunal was unimpressed with Mrs Thompson's application of the Respondent's conduct policy. At page 111 it says, "*The manager progressing the case will invite the employee to attend a formal conduct meeting. The manager must also include copies of any notes or evidence that will be referred to during the meeting..... following the formal meeting the manager makes the decision whether the allegation is upheld and what penalties should apply.*" When Mrs Thompson met with the Claimant on 27 September 2019, she did not provide him with notes of her meeting with Mrs Ellis who was the person who started the whole disciplinary process. The reason for this is that she did not meet with Mrs Ellis until 19 November 2019 (page 277 to 287). Accordingly, she could not have provided all of the information to the Claimant. Even then, the Claimant was only provided with redacted notes of Mrs Thompson's interview with Mrs Ellis claiming that they were redacted because they contained sensitive and/or personal information. Some of the pages of the notes are heavily redacted. The Claimant would not have been able to assess the true context of the interview because he would not have known what the redacted parts said.

41. Mrs Thompson said that she would re-interview an employee under the conduct policy if she thought it was appropriate to do so. The Claimant clearly had issues with Mrs Ellis' interview notes and told Mrs Thompson so. Mrs Thompson refused to interview the Claimant again.

42. After her meeting with the Claimant, Mrs Thompson did make a further referral to Occupational Health. That report is at page 257 and says, "*Based on the consultation today, my clinical opinion is that his health status would not prevent him from undertaking his work duties. I would advise that management aim to complete the suspension process as soon as possible and confirm a return work date with him.*" Further (page 258), the report says, "*the context of the behaviour was that he was in a situation where he had to relive a traumatic and distressing event, which affected his coping strategy. Preventing this situation from recurring is also likely to prevent the behaviour from recurring.*"

43. Mrs Thompson was at pains to say that the Claimant's conduct complained of related solely to the text messages sent to Mrs Ellis. The Tribunal was, therefore, perplexed as to why she considered it necessary to interview Mr Overton. We further note that those interview notes do not appear to have been sent to the Claimant before she met him because the interview took place on 2 December 2019. In fact, she did not send copies of the interview notes to the Claimant until 5 December 2019. Mrs Thompson said she did not take into account the interview with Mr Overton in which, incidentally, he does not support Mrs Ellis's account that the Claimant threatened to "do grievous bodily harm", and that she merely used it for "*context*". We do not accept that this was the case and Mr Overton's statement and the circumstances surrounding it were not relevant to the allegation against the Claimant.

44. Mrs Thompson addressed the question as to whether it was appropriate for her to conduct the investigation as Mrs Ellis was her Line Manager. She said she did enquire about this but that HR *“said it was ok”*. This surprised the Tribunal given Mrs Thompson’s alleged experience in disciplinary matters. She also said that she reviewed the paperwork she was given but could not recall if it included the Claimant’s medical information. Again, in relation to the text messages, she only received those submitted by Mrs Ellis and said she did not ask if there were anymore.

45. Again, at paragraph 55.2 of her statement, Mrs Thompson said that she mentioned the *“hostage situation, incident in 2018”* as part of a *“wider context”*. Mrs Ellis had told her about it, but she did not think it was relevant to the conduct she was investigating. We wondered why, if it was not part of her decision, she mentioned this and other matters which were not relevant. Further, in paragraph 55.3 of her statement she refers to Mrs Ellis telling her that the Claimant had told other work colleagues at the Mansfield depot that he was coming back to work during his suspension in November 2019 but she made no further enquiries about it to ascertain whether this was actually true.

46. We did not find Mrs Thompson’s reasoning behind her decision to dismiss the Claimant to be reliable. As noted above, she seems to have taken into account matters which were not relevant to the issue before her and failed to follow the Respondent’s own conduct policy. We found her investigation to be somewhat superficial.

47. We found Mrs Ellis’s evidence to be quite aggressive in defending her position when questioned. She repeatedly made reference to her attempts to support the Claimant even when this evidence was not relevant to the questions she had been asked. There were also inconsistencies in her evidence. For example, she said in oral evidence that she did not place the Police involvement after the text messages on hold, but this is specifically referred to in her interview notes at page 285. She also said she did not recall when she told Mrs Thompson about the Police involvement, but this is also noted at page 285.

48. She also said that she had not seen a paper copy of the Occupational Health Report of Dr Scott (page 174) when she first met the Claimant but clearly saw some kind of copy as she gave evidence that she did not think about getting the recommended stress risk assessment and did not think *“it had any bearing on my support for the Claimant and had I seen it I would still not have requested such an assessment”*. This rather flies in the face of her repeated mantra of how she did try to support the Claimant.

49. There was a further inconsistency in her evidence in relation to the incident involving Mr Overton where the Claimant allegedly threatened him. Mrs Ellis admitted that her witness statement was inaccurate at paragraph 23 where she says,

“(the Claimant) said that he had issues in the past with the previous Operations Manager, Martin Overton, where he threatened to go around and cause him grievous bodily harm. In her oral evidence, she denied using the expression “grievous bodily harm” but said the Claimant had threatened to go around to Mr Overton’s house and punch him. Whatever Mrs Ellis now claims to be the accurate record from her perspective of this incident, it contradicts completely Mr Overton’s statement in his interview with Mrs Thompson (page 306) where he records the Claimant as saying he should get ready as “he was coming round my house”.

50. In relation to the abusive text messages, Mrs Ellis said there were many more messages as well as the 5 she disclosed to the Police and in connection with the disciplinary process. She said that she did not supply the other messages (according to the Claimant, about another 27) because she had changed her work phone. This did not make any sense to the Tribunal. She must have had all of the messages when she disclosed them but only disclosed five. She said she did not think the others were relevant and disclosing them would not have helped the Claimant at all. With respect to Mrs Ellis, this should have been a matter upon which Mrs Thompson should have formed a view. The Tribunal noted that the other 27 text messages might have given more context to the abusive texts; for example, did they contain an apology and/or were they more measured? Assuming Mrs Ellis had an iPhone or comparable phone, it is very doubtful she would have lost 27 of 32 text messages and we viewed her evidence in this regard with some circumspection. The Claimant had been unable to supply any of the messages because he said he only had a Nokia phone with limited storage and old messages are automatically deleted.

51. Mrs Ellis was also asked why the alleged intimidation of managers and front line staff by the Claimant in early September 2019 was not included in her interview with Mrs Thompson. Her answer was that she had no reason for it not being included. At this particular point in the proceedings, Mrs Ellis seemed to become quite agitated and aggressive. She was then forced to accept she had instructed managers to ask the Claimant to leave if he turned up at the depot without an invitation, but he had never done so when not invited.

52. In response to the Tribunal’s questions, she said Mrs Thompson’s enquiry as to the Claimant’s companion was a *“process based enquiry”*. She gave the business answer, a black and white answer and did not delve deeper. She accepted that when she saw the text messages from the Claimant, she told Mr Cordon to tell him he could not come to the depot. She also said she had not seen the Claimant’s interview notes when she attended her interview with Mrs Thompson and also that she played no part in the appointment of Mrs Thompson as the Disciplining Officer. She said Mrs Thompson had the right level of experience to deal with the case and it was appropriate for her to do so. The fact that Mrs Ellis raised the complaint in the first place would have had no bearing on Mrs Thompson’s integrity in dealing with it.

53. Mr Brown insisted that the Appeal Hearing he presided over was a re-hearing. He confirmed receipt of the Claimant’s substantial appeal documentation. He

allowed the Claimant's wife to accompany him and then said that the Claimant's behaviour at the hearing was *"animated, but not overly so. His demeanour was ok. I can't say whether having (her) as support helped him"*.

54. Mr Brown said he understood there were a number of other texts in addition to the ones provided by Mrs Ellis, but she had not provided them. He did not know if she just picked out the ones of interest to her.

55. From a procedural point of view, he said he would only re-interview witnesses if it was necessary in that particular case. He noted that the Claimant in his appeal documents raised many issues in relation to Mrs Ellis's interview notes, but he did not speak to any of the witnesses whose statements were challenged by the Claimant. He also confirmed he did not carry out any further investigation into PTSD and relied on the body of information in the appeal pack and the Occupation Health Reports. He thought there was sufficient evidence available to him without further investigation in order to reach his decision. He said he took Mrs Ellis's notes as read and asked her no further questions. The Claimant's union representative, Mr Blower, sent further documents to Mr Brown after the appeal hearing but he said he did not feel it necessary to interview Mrs Ellis further as a result of reading them.

56. Our overall view of Mr Brown's evidence was that he had failed to properly investigate and consider the evidence before him and the fact that he chose not to re-interview any of the witnesses and, in particular, Mrs Ellis, meant that the Appeal Hearing fell well below what would constitute a re-hearing and presented more as a tick box exercise.

Findings of Fact

57. We find the following facts relevant to the issues before us.

- (i) The Claimant commenced employment with the Respondent on 4 December 2006 as a Postman. Up until the investigation which led to his dismissal on 14 January 2020, he had a clean disciplinary record.
- (ii) In 2012, the Claimant found his father's body, his father having died from a drugs overdose. This incident affected him significantly such that he was diagnosed with Post-Traumatic Stress Disorder.
- (iii) The Claimant was at all times open with the Respondent's management about his acknowledged disability and he was referred on several occasions to the Respondent's Occupational Health Service. None of the subsequent reports indicated the Claimant was a danger to himself or his colleagues.

- (iv) In 2016, the Claimant suffered a psychotic episode following his mother's diagnosis with breast cancer. He locked himself and his mother in her house and called the Police. When the Police arrived, he thought they were "*bad*" people and would not let them in. This incident attracted considerable media attention but at no time did the Claimant's mother think she was in any danger. Immediately after the incident, the Claimant was sectioned under the Mental Health Act and remained in hospital for about a week.

- (v) The Claimant's behaviour became somewhat erratic when he was at work and this was concerning for management and his colleagues. On 28 June 2018 Mr L Sharpe sent an email to management about the Claimant saying, "*this individual has become unmanageable*". Subsequently, on 6 July 2018 the Claimant was sent home on medical suspension. Throughout the Claimant's employment, his wife and mother had frequent discussions with the Respondent's management about the Claimant and his wife was registered as his carer with the local authority and provided significant support to him.

- (vi) The Claimant was referred to Occupational Health on 17 October 2018. At his initial consultation his symptoms and medication were noted and he was open about the mental problems he faced. He was stated to be suffering from severe anxiety. The Occupational Health Advisor referred the Claimant to Dr A Scott, Consultant Occupational Physician, who produced a detailed report dated 23 November 2018. Inter alia, this recommended the Claimant had a phased return to work and there should be an individual stress risk assessment and risk management plan produced as soon as possible. In particular, Dr Scott said, "*there is no evidence that (the Claimant) is a "danger" to anybody and his reactions at work seem to be more frustration and agitation than aggression*". Further, he said "*managers need to be sensitive to his history and condition and be aware of how their reactions to him can affect him emotionally*". The Respondent completely ignored the suggestion that a stress risk assessment be carried out.

- (vii) The Claimant returned to work on 2 January 2019 on what is referred to by the Respondent as rehabilitative duties. His Manager, Mr Sharpe, went on long term compassionate leave and, although the Respondent says the reduced duties should only have been in place for about three months, the Claimant remained on those duties for over six months.

- (viii) Mrs Ellis became Operations Manager towards the end of these duties and arranged a meeting with the Claimant on 25 June 2019 to try to agree a return to full duties. During the meeting the Claimant said he did not wish to return to normal duties and if he was compelled to do so he would just go off sick. He suggested that Occupational Health and his wife be involved.
- (ix) The Claimant did go on sick leave from 17 to 22 July 2019. He attended a return to work meeting with Mrs Ellis on 23 July. He contacted Mrs Ellis that same day confirming he would work with her to get back on deliveries.
- (x) On 23 July 2019, the Claimant was again referred to Occupational Health. The report, dated 23 July 2019, said he was fit for work with restrictions. There was then a further meeting with Mrs Ellis and Mr Cordon at which he talked about his past and, following which, he was placed on reserved duty. Mr Cordon had almost daily meetings with the Claimant at the end of his shift each day.
- (xi) On 14 August 2019, there was an altercation between the Claimant and Mr G Scott, his Line Manager, which was followed by two telephone calls between the Claimant and Mrs Ellis. They had a meeting on 16 August 2019 at which Mrs Ellis told him that his behaviour had been unacceptable.
- (xii) Both the Claimant and Mrs Ellis then took annual leave and when Mrs Ellis returned from holiday, she found about 32 text messages from the Claimant on her work mobile. Five of those messages were abusive and used bad language. Mrs Ellis instructed Mr Cordon to send the Claimant home from work and to suspend him. She took advice and was told this should be treated as a conduct matter. Mrs Ellis spoke to the Claimant's wife who was bemused by his conduct in sending the text message. The matter was reported to the Police, but no criminal action was taken against the Claimant who was not interviewed by the Police as a result of Mrs Ellis's complaint. The Claimant's suspension was effective from 3 September 2019.
- (xiii) Mr Cordon met with the Claimant on 6 September to conduct a fact-finding meeting in relation to the text messages and notes of that meeting are at pages 213 to 216. The notes were sent to the Claimant who on 10 September 2019 sent detailed comments on those notes (pages 217 to 219).

- (xiv) On 19 September 2019, Mrs Thompson was instructed to conduct an investigation into the Claimant's actions in accordance with the Respondent's Conduct Policy (pages 108 to 114). The meeting with the Claimant was not in accordance with the Respondent's Conduct Policy (page 111) since she had not yet interviewed Mrs Ellis and the Policy requires *"the manager must also include copies of any notes or evidence that will be referred to during the meeting"*. Accordingly, the Claimant was denied the opportunity of commenting on Mrs Ellis's complaint in his interview with Mrs Thompson.
- (xv) Mrs Thompson did not make any effort to recover approximately 27 text messages which were not shared with anyone by Mrs Ellis. Mrs Ellis made no attempt to recover those text messages and we do not accept she could not do so because she changed her work mobile. Mrs Thompson also interviewed other members of staff, in particular, Mr Overton, and the notes of her meeting with him were not sent to the Claimant prior to his own meeting with Mrs Thompson. Although Mrs Thompson said that she interviewed others to understand the context of the Claimant's conduct, they were not relevant to the text messages, but nevertheless, she took them into account in making her decision regarding the sanction to be applied to the Claimant.
- (xvi) Mrs Thompson did put in hand a further Occupation Health Report (page 257) which concluded that the Claimant's health status *"would not prevent him from undertaking his work duties, I would advise that management aim to complete the suspension process as soon as possible and confirm a return to work date with him"*. It further noted that the Claimant's medical condition causes psychological symptoms significant enough to have an impact on his day to day life and that this condition was likely to have contributed to his behaviour.
- (xvii) On 2 December 2019 Mrs Thompson conducted investigation meetings with Mr Cordon and Mr Overton and she sent all of the investigation notes to the Claimant on 5 December 2019. On 24 December 2019 the Claimant requested to be re-interviewed with his Union representative present. Mrs Thompson refused this request.
- (xviii) Mrs Thompson had also refused to allow the Claimant's wife to attend his conduct meeting taking advice from Mrs Ellis before making her decision. We find it probable that Mrs Ellis was well aware that Mrs Thompson's query concerned the Claimant.
- (xix) On 14 January 2020 Mrs Thompson sent her conduct decision letter and report to the Claimant (page 345). She found him guilty of gross

misconduct and summarily dismissed him. In her report she made reference to her interview with Mr Overton. Mrs Ellis had previously referred to the Claimant threatening Mr Overton with grievous bodily harm. She changed that evidence under cross-examination to the Claimant threatening to punch Mr Overton. Mr Overton's comments in his interview showed that neither of the assertions made by Mrs Ellis was true and they were an exaggeration. This influenced Mrs Thompson in her comment that, *"My view is that legitimate management of Sean's behaviours will continue to prompt aggressive and unreasonable behaviour"*. She said that she had taken full account of the Occupational Health Report but there is no evidence that she did. She also took into account an alleged threat by the Claimant to return to the depot whilst suspended without authority *"which demonstrates the difficulty management have in managing his behaviours"*. The comments about this threat were made by a member of the Claimant's family who also works for the Respondent and with whom there were family difficulties. Mrs Thompson, in reaching her decision, took into account matters which had no relevance to the Claimant's conduct in sending the text messages.

- (xx) The Claimant appealed the decision to dismiss him and by letter dated 22 January 2020 Mr Brown invited him to an appeal meeting. In his various documents submitted for the appeal, the Claimant included a letter from his GP (page 466) which confirmed the diagnosis of PTSD and the importance to the Claimant of consistent routine to maintain stability in his life. It also noted that he struggles with changes to his management and his routine and this often acts as a trigger for his anxiety.
- (xxi) Unlike Mrs Thompson, Mr Brown permitted the Claimant to be supported by his wife during the appeal hearing. This was not a re-hearing of the conduct investigation. Mr Brown did not interview Mrs Ellis again to obtain her comments on the Claimant's comments sent to Mrs Thompson. He did not think it was necessary; nor did he make any attempt to investigate the other 27 text messages sent by the Claimant to Mrs Ellis which may have given some context to the other five. In fact, Mr Brown gave scant regard to the information before him and does not seem to have made any further relevant investigations.
- (xxii) Neither Mrs Thompson nor Mr Brown gave any consideration to the possibility that the Claimant might be eligible for ill health retirement.

Submissions

58. Both parties made submissions. Mr Peacock helpfully submitted written submissions and Mrs Holmes read out her prepared submissions. Whilst we summarise the submissions briefly, we took full account of them in reaching our conclusions.

59. Mr Peacock submitted that the Respondent had acted reasonably in treating the conduct of the Claimant as sufficient to justify summary dismissal. He said that Mrs Thompson *“gave significant weight to the impact (of the Claimant’s text messages) on Mrs Ellis and that there had been previous incidents of unacceptable aggressive outbursts”*. The dismissal procedure was compliant with the ACAS Code. He accepted that it was not ideal for Mrs Thompson to undertake the disciplinary stage that resulted in dismissal, but she was an experienced manager who conducted the conduct case *“with integrity and without interference or influence”*. Mr Peacock submitted that the appeal constituted a full re-hearing.

60. In relation to the claim under Section 15 EQA, Mr Peacock said it was a legitimate aim for the Respondent to take such steps as reasonably necessary to protect its employees from the sort of treatment suffered by Mrs Ellis.

61. For the Claimant, Mrs Holmes concentrated on failures to investigate matters which were taken into account in making the decision to dismiss the Claimant, the influence of Mrs Ellis over Mrs Thompson and the failure to allow the Claimant to have her support during the conduct investigation.

Conclusions

62. We deal firstly with the unfair dismissal claim. The Respondent’s Conduct Policy was not followed by Mrs Thompson. Certainly, in this case, the Claimant was not provided before his interview with Mrs Thompson with all of the evidence against him. He was not given the statements of Mrs Ellis, Mr Overton or Mr Cordon. Mrs Thompson said in evidence that she would only re-interview an employee if she felt it was appropriate to do so. The Claimant requested that he be re-interviewed in the light of the evidence sent to him sometime after his own interview and which he had not previously seen. She rejected that request out of hand. She did not deem it appropriate. We find it would have been advisable for her to re-interview the Claimant in the interests of fairness.

63. Mrs Thompson made several references to acting with integrity. She had considered whether it was appropriate for her to conduct the disciplinary investigation given that she reported directly to Mrs Ellis who was effectively the complainant. She seems to have taken at face value comments made by Mrs Ellis, for example, in relation to an allegation that the Claimant had threatened to do grievous bodily harm Mr Overton. That was quite clearly an exaggeration. Further,

Mrs Thompson, who said she had much experience of disciplinary matters, turned to Mrs Ellis when the Claimant asked for his wife to accompany him to his interview with Mrs Thompson. We do not accept that Mrs Thompson was unable to contact any member of the Respondent's HR team. The Respondent is Royal Mail. Its administrative resources, including access to HR, are substantial. She did not consider adjourning the hearing to allow time to consult HR about the Claimant's wife accompanying him to the interview. Instead, she turned to her Line Manager who was also the complainant in the allegations against the Claimant. We do not accept Mrs Thompson's evidence or that of Mrs Ellis that, when Mrs Simpson asked Mrs Ellis for advice, Mrs Ellis did not know she was asking for that advice in connection with the Claimant.

64. Mrs Thompson also seems to have put her own interpretation on to the Occupational Health Report. All but one of these reports were compiled by Occupational Health Advisors. None of them conclude that the Claimant is a danger to management or other colleagues. Indeed, the only report from a medically trained Consultant, Dr Scott, concluded that the Claimant is not a danger to anyone. Nonetheless, Mrs Thompson took into account other incidents involving the Claimant as a result of which he faced no disciplinary action and which she justified by reference to them providing "context".

65. It has to be acknowledged in this case that the influence of Mrs Ellis loomed large over the disciplinary investigation and the decision to dismiss. Mrs Thompson could not have approached the conduct investigation with any degree of independence and, with all her self-professed experience, should have known better than to take on the role of investigator.

66. Taking into account the **British Home Stores v Burchell** principles, we acknowledge that there was a genuine belief in the misconduct of the Claimant. He acknowledged sending the text messages. But that belief must be maintained after a reasonable investigation as in the **Sainsbury's Supermarkets v Hitt** case. We do not consider that the investigation was reasonable in this case. Mrs Thompson's assertion that the Occupational Health Report, which she requested, reached conclusions based merely on what the Claimant had told the Occupational Advisor is particularly concerning. It begs the question as to how she reached this conclusion. Rather than speak to the Occupational Health Advisor directly, without any medical qualifications herself, Mrs Thompson effectively assumed that the report itself was unsound.

67. In relation to the context issue, Mrs Thompson failed to make any further investigation into the other text messages sent to Mrs Ellis which may not have been aggressive or abusive. For example, did they contain an apology from the Claimant or other words of regret? The Claimant gave evidence that he has an old Nokia mobile phone. The storage facility in such phones is limited. The mobile used by Mrs Ellis would presumably have been a far more recent model and text messages would not have just been deleted automatically. We did not accept Mrs Ellis's evidence that

they had been. Certainly, there was no evidence before us that anyone had tried to recover them.

68. The Respondent had a significant amount of information about the Claimant's medical condition. They acknowledge in these proceedings that he is disabled for the purposes of Section 6 EQA. They failed to consider, in the light of the obvious difficulties in managing him, whether he should be referred for a decision as to whether he could take early retirement on the grounds of his ill health. It was obvious to the Tribunal, in the light of all of the medical evidence in the bundle and having seen the demeanour of the Claimant in the hearing and observed his obvious difficulties with his thought processes, that he has significant mental health issues because of his disability.

69. For the above reasons, bearing in mind the lack of independence of Mrs Thompson, the influence of Mrs Ellis and the substantial administrative resources of Respondent, we do not consider the Claimant's dismissal fell within the range of responses of a reasonable employer. Occupational Health reports were seemingly ignored or given a personal interpretation by Mrs Thompson who is not qualified to do so. The decision to summarily dismiss the Claimant fell outside the sanction of a reasonable employer.

70. We have already made clear above that the appeal conducted by Mr Brown, who was at least independent, fell well short of being a re-hearing. Only a substantive re-hearing in this matter would have gone some way to remedying the flaws in the procedure followed by the Respondent throughout the disciplinary investigation. Not only, did Mr Brown not re-hear the case, he did not even think to interview Mrs Ellis.

71. We are also of the view that the Respondent's Conduct Policy was not followed and the procedure which was followed did not accord with the ACAS Code of Conduct in that the Claimant was interviewed without having seen the evidence against him.

72. In relation to direct disability discrimination under Section 13 EQA, the Claimant's case is not made out. Whilst the Claimant refers to another employee who allegedly threatened a manager and who was not dismissed, he could give no further information about that incident; it happened after his own conduct investigation and no details have been provided. If a hypothetical comparator was to be considered, it would be someone who did not suffer from a disability but who threatened a manager. We are satisfied that, in such circumstances, the Respondent would also have instigated a conduct investigation, and in that sense, the Claimant cannot assert he was treated less favourably.

73. In relation to the claim for a failure to make reasonable adjustments, we find that the claim is out of time. The Claimant relies on a failure to adjust his duties in accordance with his wishes and, as Mr Peacock points out, he was suspended in early September 2019 and submitted his claim on 25 March 2020. Accordingly, anything which occurred prior to 24 November 2019 would be time barred. The Claimant's reference to the reasonable adjustments which should have been made dates back to the Summer of 2019. There has been no application before us to allow that claim to continue out of time on the grounds that it is just and equitable to do so.

74. For the purposes of Section 15 EQA, the "*something arising*" from the Claimant's disability is his conduct, principally in the form of aggressive and/or abusive comments. We have to consider, however, whether the decision to undertake a conduct investigation and ultimately to dismiss the Claimant was a proportionate way to achieve the legitimate aim of insuring that the Claimant's colleagues were not subjected to the kind of behaviour involved in the text messages sent to Mrs Ellis.

74. In his written submissions, Mr Peacock notes that Mrs Thompson relied on the Occupational Health Report dated 31 October 2019. She said the Respondent accepts the medical guidance in that report that "*it is quite likely that his health condition contributed to his behaviour*". Mr Peacock suggests that the dismissal of the Claimant was reasonable to protect the Respondent's employees from this sort of treatment and submits that the Respondent "*could have no confidence that similar (or worse) incidents would not again occur*". We take issue with those submissions. The reference to "*or worse*" is an exaggeration viewed in the light of the Occupational Health Reports. None of them say the Claimant is a danger to his colleagues. Indeed, Dr Scott's report says the opposite, that he is not a danger to anyone. The Respondent has taken no steps since 2014 to carry out a risk assessment or stress risk assessment in relation to the Claimant. Dr Scott's recommendation in this regard has effectively been swept under the carpet. We considered the reality of the situation is that Mrs Ellis, in her position of control and influence, decided that the Claimant should be dismissed because she was affronted by the text messages sent to her. We are extremely concerned that the other text messages sent to her have not been disclosed and the Claimant cannot remember what he said in them.

75. The question is whether the dismissal of the Claimant was a proportionate means of achieving the legitimate aim of protecting other colleagues from the kind of conduct for the which the Claimant was dismissed. Given the Respondent's failings in not carrying out a stress risk assessment, not following its own Conduct Policy or the ACAS Code, we cannot conclude that his dismissal was proportionate in terms of that legitimate aim. Accordingly, we conclude he was discriminated against as a result of something arising from his disability.

76. As we have heard no evidence in relation to remedy, a remedy hearing will now be listed to be held remotely by CVP. An order accompanies this Judgment

Employment Judge M Butler

Date: 30 September 2021

JUDGMENT SENT TO THE PARTIES ON

5 October 2021

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FOR THE TRIBUNAL OFFICE

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