EMPLOYMENT TRIBUNALS

Claimant: Mr G Eykyn

Respondent: Bepton Hotels Limited

Heard at: Southampton **On:** 6 to 8 June 2022

Before: Employment Judge C H O'Rourke
Mr J Shah MBE
Mr N A Knight

Representation
Claimant: Mr P Doughty - Counsel
Respondent: Miss S Clarke – Counsel

JUDGMENT

1. The Respondent discriminated against the Claimant in consequence of something arising from his disability, contrary to s.15 of the Equality Act 2010 ('the Act').

2. The Claimant's claims of failure to make reasonable adjustments (ss.20-22) and harassment (s.26 of the Act) fail and are dismissed.

3. The Respondent is ordered to pay the Claimant the sum of £29,746.54.

4. Subject to s.124(2)(c) of the Act, the Tribunal makes a recommendation that by 12 September 2022, the Respondent reviews and updates its policy in regard to disabled employees and also its disciplinary and grievance procedures and crucially, thereafter, applies both such policy and procedures, as appropriate.

REASONS

(having been requested at the Hearing, subject to rule 62(3) of the Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant was employed as a food and beverage assistant in the Respondent's Park House Hotel, at Midhurst in West Sussex, from 21 February 2020, until his dismissal with effect 19 August 2020.

2. It is common ground that the Claimant was and is disabled, at all relevant times, subject to s.6 of the Act, due to his condition of Type-1 Diabetes.

3. As a consequence, the Claimant brings claims of discrimination arising from disability (s.15), relating mainly to his dismissal; failure to make reasonable adjustments (s.20-22), in relation to fixed breaks and harassment on the grounds of disability (s.26 of the Act), in relation to alleged harassment by his manager.

4. The issues were set out in a case management order (CMO) of 13 July 2021 [53] and which were confirmed by the parties at the outset of the Hearing, less the agreed following matters, in addition:

   a. In respect of the claim for reasonable adjustments, the alleged 'substantial disadvantage' be amended to read '… *compared to someone without the Claimant's disability, in that it prevented him from better controlling his diabetes and that he felt tired and drowsy.'*

   b. That as to knowledge of the Claimant's disability, the Respondent accepted that they had such knowledge at all relevant times.

The Law

5. We were referred to the above-stated sections of the Act (and as set out in the CMO).

6. Counsel also referred us to the case of **Sheikholeslami v University of Edinburgh [2018] IRLR 1090 UKEATS**, which held that:

> '*the approach to s.15 Equality Act 2010 is now well established and is not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in the light of the evidence.'*

7. In **Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893 UKEAT**, the EAT clarified that a claimant needs only to establish some kind of connection between the claimant's disability and the unfavourable treatment. A s.15 claim could succeed where the disability had a significant influence on, or was an effective cause of, the unfavourable treatment.

8. As to the burden of proof, s.136 of the Act essentially provides that once a claimant has proved facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to the respondent to prove a non-discriminatory explanation. In the context of a s.15 claim, in order to prove a prima facie case of discrimination and shift the burden to the employer to disprove his or her case, the claimant will need to show:

    - that he or she has been subjected to unfavourable treatment
    - that he or she is disabled and that the employer had actual or constructive knowledge of this
    - a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment
    - some evidence from which it could be inferred that the 'something' was the reason for the treatment.

    If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either:

    - that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability, or
    - that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

<u>The Facts</u>

9. We heard evidence from the Claimant and his mother, Mrs Julie Eykyn. On behalf of the Respondent we heard evidence from Mr Stuart Brown, the Operations Manager and Ms Chelsea Dougan, no longer employed by the Respondent, but at the time the Restaurant Supervisor and the Claimant's direct line manager.

10. The Claimant worked in the restaurant. He had previously worked for the Respondent some years before and in the interim, before rejoining on 19 February 2020 (all dates hereafter 2020), he had also worked in a variety of other restaurants.

11. He was interviewed on 14 February and said that at that interview '*I told Stuart that I had Type-1 diabetes and that sometimes my blood glucose levels may go high/low and that this may affect my ability to perform my role. I told him that if I was struggling, I would let him know.'* (ws12).

12. Mr Brown said that he couldn't recall the Claimant referring to the effect upon him of high/low blood sugar levels. We note, at this early stage that Mr Brown accepted in his evidence that he did not carry out any further enquiries, or seek to educate himself further as to the condition, a lapse, we find, on his part, as a manager of a disabled employee.

13. Following a successful trial shift, the Claimant commenced work and was warmly welcomed to the Team [92].

14. Unfortunately, for all concerned, the COVID pandemic then intervened and the Claimant, along with all his colleagues, went on furlough on 23 March 2020.

15. Between his start date at work and going on furlough, the following matters of significance arose:

    a. The Claimant accepted that on at least two occasions he was late for work.

    b. Sometime in the third week of his employment there was an incident where Ms Dougan told the Claimant to iron his uniform shirt (as he had just taken it out of the packaging), which, she said, he did with bad grace and had then behaved '*spitefully'* for the rest of the shift.

    c. On 10 March, it was agreed evidence that Ms Dougan challenged him for being late. It is also agreed evidence that the Claimant, in response, disputed an unrelated proposed requirement by the Respondent that employees take unpaid leave (in response to the downturn in custom caused by the pandemic). That proposal by the Respondent was not pursued and is not of any further significance in this claim. What is of significance is that it is agreed evidence that the discussion became heated and Mr Brown (who was nearby) had to intervene to calm things down. Ms Dougan said that she was surprised by the Claimant's reaction to her reprimanding him for being late, by bringing up an entirely unrelated matter and said that '*he was becoming irrational and talking over me'* and was '*irate'*. She said that she could '*be sure that the Claimant said nothing about his diabetes'* (ws 14&15).

16. For the first time, in his witness statement (17-29), the Claimant made various allegations in respect of this period of time, as to the location where he carried out his blood testing (at that point doing a finger prick test) (the staff toilets) and also alleged various disparaging comments having been made by colleagues (not Mr Brown or Ms Dougan) as to his condition and the need to inject insulin. It is common ground that none of these allegations were made at the time and nor were they raised in a post-termination grievance brought by the Claimant, or in his claim form. Nor were they canvassed at the case management hearing. Accordingly, therefore, we do not consider them further.

17. It is clear that even by this point, Ms Dougan was finding the Claimant's behaviour difficult to manage.

18. Also during this period, Ms Dougan had agreed to alter the Claimant's rotas, in order that he would be more easily be able to get a lift to work from his mother (as there was no public transport). Ms Dougan also said

that she discussed the Claimant's need to take breaks and to have soft drinks, due to his diabetes, to which she was amenable.

19. The Claimant and his colleagues returned from furlough on 20 July. Initially, he was required to work only part-time, but that was changed to full-time.

20. By this point, the Claimant had been prescribed a Continuous Glucose Monitor (CGM). This no longer required him to do a pin-prick blood test, as it constantly showed his levels, in graph form, via a subcutaneous monitor in his arm, on an app on his phone. This required him, on occasion, to place his phone near or on the monitor. We were shown examples of such graphs [114]. These showed his blood sugar levels throughout the day. The Claimant explained that a 'normal' level was between 4 and 8 on the graph and that levels considerably above resulted in him having a hyperglycemic episode, or considerably below, a hypoglycemic episode.

21. It was common evidence that on 20 July, Mr Brown saw the Claimant looking at his phone and challenged him as to that behaviour, as staff were not permitted to use phones during the working day. There is a conflict of evidence on this point, as Mr Brown thought that the Claimant was either texting or using social media and the Claimant said that he tried to explain to Mr Brown that he was inspecting a graph on his new device, but that Mr Brown seemed disinterested. We prefer the Claimant's account in this respect, as it does seem more likely than not that the Claimant would seek to explain his use of the new CGM to Mr Brown, to justify using his phone and Mr Brown's stated reaction seems to accord with his general lack of interest in the Claimant's disability.

22. On 23 July, both Ms Dougan and Mr Brown said that they together discussed the Claimant's performance, with Ms Dougan stating that his behaviour and attitude towards her was poor and negative and that he was rude, difficult and argumentative. Mr Brown went on to say (ws 29) that:

'*Chelsea explained that there was always an issue when she asked the Claimant to do something. Chelsea further complained that the Claimant would avoid doing his work and chat to guests for a lengthy period with his back to service, so he was prevented from seeing when he was needed. Chelsea referred to an incident when the Claimant was speaking to a guest for over 15 minutes with his back to service, so she had to come over to the Claimant and the guest, excuse herself and informed the Claimant that he was needed elsewhere. Chelsea also complained that he continued to attend his shift late and his attitude towards her and the team was poor. Everyone was trying their best to deal with the work load after furlough and Chelsea felt the Claimant was letting the team down. As the Claimant's line manager, Chelsea knew that she needed to speak to the Claimant about these matters, which she had tried to do before lockdown, but she was concerned about the Claimant's reaction if she did this and that he would argue with her as he always tended to do when she*

spoke with him. I offered to speak with the Claimant for Chelsea which Chelsea welcomed.'

23. Mr Brown then arranged a meeting with the Claimant, on 24 July, which took about 15-20 minutes or so. There are entirely differing accounts of this meeting. The Claimant says that Mr Brown said that it was a 'catch-up meeting', following everybody's return from furlough and was general in nature, with questions being put to him as to how he coped while on furlough. He also said that he described his use of the CGM and the effect it had on his ability to better manage his diabetes. He said that he asked if he could have orange juice or coke from the bar, if his sugar levels were low, to which, he said, Mr Brown agreed, but told him '*not to take the piss'*. He also said that he told Mr Brown that he required fixed regular breaks to monitor his blood sugar levels. Crucially, however, as indicated in his email [142], sent in response to his subsequent dismissal, querying the reasons for his dismissal, he said that:

'*In your previous email you mentioned that we had a lengthy discussion which I recall was on 24/7/2020 about returning to work where we discussed multiple things and topics in the conservatory.*

I recall you asking what my future career plans at the hotel were and I told you that my plan was to continue in my current role whilst I continue my diabetes management control concerns and that by Xmas time we could talk about opportunities furthering my career at the hotel.

We discussed the current financial position with paying off my credit card and the importance of my job in regard to securing financial security and then the prospect of saving up for a car so I could drive to work.

We also discussed how the hotel was very busy at the time and that everyone in the team was tired and stressed with long/split shifts and not having fixed rest breaks and talked about the hotel occupancy the following week over the Goodwood period and the importance of looking after the high paying guests.

My first concern is that during this discussion I was unaware of any 'specific' areas that you say you highlighted to me that needed 'immediate improvement'. You expressed that my service and interaction with guests at the hotel was of a high caliber and was a reflection of my years served in the hospitality industry.

You did in the discussion suggest I could think about different approaches to general situations such as when talking to guests or taking orders at certain tables to try to position myself so that I didn't have my back turned to the restaurant, but you addressed this as a way that I could become a more professional and competent waiter and did not highlight or address this as an immediate issue, or make clear that I was not performing my duties to an acceptable standard.'

24. In contrast, Mr Brown said that he, in effect, had a robust conversation with the Claimant, pointing out his failings in respect of his attitude to Ms

Dougan and effectively stating that he needed to rectify his behaviour. In his dismissal email [133], he said '*Having had a lengthy conversation with you on your return to work, in the restaurant conservatory whilst on shift – I highlighted to you areas that required immediate improvement. I do not feel that these have been improved immediately, finding your mannerism towards your peers and management unprofessional.'*

25. On balance, generally, we prefer the Claimant's account of this meeting and we do so for the following reasons:

    a. Both parties referred to it as a 'catch-up' meeting, which form of meeting Mr Brown was having with all employees returning from furlough.

    b. Mr Brown made no contemporaneous notes of the meeting, or emailed the Claimant afterwards, to confirm his concerns and the actions required of the Claimant. We consider that if Mr Brown's account of events was correct then, as an experienced manager that would have been the natural thing for him to do.

    c. Mr Brown did not seek to contradict or correct the Claimant's near-contemporaneous account in his email, two weeks later.

26. One exception to that account of the Claimant's, however, which we do not accept is his reference to his request for fixed breaks. We do so for the following reasons:

    a. The Claimant did not raise this issue in his post-termination email.

    b. He only obliquely refers to it in his detailed grievance of 17 August [146] and indeed says, at paragraph 15 that he '*felt intimidated and difficult'* to bring up the subject, implying to us that they while he may have wished to do so, he may not in fact have done so.

    c. Finally, in cross-examination on this point, he was unable to describe in any detail whatsoever how Mr Brown reacted to any such request, or whether there was any follow-up to it, such as agreeing the times and frequencies of such breaks. He also, only for the first time in cross-examination, referred to raising the issue also with Ms Dougan but was, again, similarly vague as to how that conversation went.

27. The next event was on 28 July. On that night, the Claimant was allocated to work '*on the pass'*, which was essentially a liaison role between the kitchen and the waiting staff, ensuring that orders were correctly and promptly processed. This meant that the Claimant did not have any direct contact with customers, at table, which he felt was his strength. It is common ground that he behaved badly on that evening. He said that (ws 74&75):

'*Stuart Brown was hovering around in the kitchen whilst I was working and instead of helping me he just kept on standing over me saying 'why hasn't starter cutlery been taken out', why hasn't this been done etc. I tried to reply to Stuart's questions and explain my actions.*

I felt overwhelmed with the service being in full swing and with the chef needing food taking to tables and the white board being amended with changes. I did raise my voice and said 'well, why don't you do it then, huh?' I admit this was unprofessional, but I did not swear or use any inappropriate language in my response.'

28. At the end of the food service Mr Brown asked to see the Claimant privately. The Claimant said that in effect Mr Brown committed an act of harassment in how he spoke and behaved towards him. He said that he felt intimidated by Mr Brown remaining standing, while he had initially sat down and that Mr Brown said, in a hostile tone, that '*I was never to speak to him or raise my voice to him, especially in front of other staff, or I'd be gone from this place.'* The Claimant also said that he explained about his sugar levels and the effect that they had on his behaviour.

29. Mr Brown said (ws41):

'We went into the barn and remained standing. We were stood about a meter and a half away from each other. During the discussion, I told the Claimant that any issues he was having during service needed to be spoken about after service had finished. The Claimant was clearly agitated and he kept speaking over me about cutlery changes. The Claimant spoke in a raised voice and was flailing his arms around. The Claimant was clearly annoyed and wanted to keep telling me about the cutlery changes – he didn't have time to change the steak knife for example. In response I was trying to explain that any issues shouldn't be raised during service and instead spoken about later. I also tried to explain to the Claimant that he needed to work as part of a team and the team needed to work together and support each other. The Claimant complained about working on the Pass and I was explaining that this was part of his role. The discussion lasted about 10/15 minutes. Things were getting a bit heated as it was clear that the Claimant didn't want to listen to what I was saying. I didn't shout but my voice was slightly raised albeit quieter than the Claimant's voice. I felt I needed to try and calm the Claimant down and felt I was achieving little. I can't recall how the conversation ended ….'.

30. The Claimant said that as a consequence of these events, he feared losing his job and it is common ground that he apologised the next day to both Mr Brown and Ms Dougan. He said that he explained that his behaviour was due to his blood sugar levels. He said that his apologies were accepted.

31. The Respondent's witnesses denied that the Claimant referred to his diabetes. On balance, however, we prefer the Claimant's account of both these events. It seems highly unlikely to us that a diabetic employee, who

accepted that he had behaved badly and feared dismissal, would not have raised this obvious issue in his defence.

32. While both Respondent witnesses said that they accepted his apology, with, Mr Brown saying, he '*moved on'*, he nonetheless, only two days later, had decided to dismiss the Claimant. This followed a discussion between him and Ms Dougan, where she said that the Claimant's continued employment '*wasn't going to work out'*.

33. By this point, the Claimant was on sick leave. On 1 August, Ms Dougan removed him from the staff WhatsApp group and while Mr Brown did not confirm the dismissal, until he called the Claimant on 6 August, it is clear that the decision had been made, at the latest, on 1 August (confirmed by Ms Dougan in cross-examination).

34. The Claimant challenged the reasons for his dismissal in his email of 9 August [142] and Mr Brown replied on 17 August [150] that it was '*your argumentative unprofessional manner and friction you bring to the team'.*

35. Mr Brown also said in evidence that he had noted that in the Claimant's absence on sick leave that the food and beverage team worked more harmoniously and smoothly, indicating that they could cope with the Claimant's absence.

36. The Claimant subsequently brought a grievance which was responded to by the Respondent's solicitors.

Conclusions

37. We deal now with each claim in turn, in reverse order to the list of issues in the case management order.

38. Firstly, the claim of harassment: we do not consider that Mr Brown's conduct on 28 July (even based on the Claimant's version of events) constituted an act of harassment, by 'violating the Claimant's dignity, or creating an intimidating or hostile environment etc.' for him, or that it had the purpose or effect of doing so. We find this for the following reasons:

    a. The Claimant complained about Mr Brown's stance, as he was standing, while he, the Claimant, was sitting, but that was, on his own evidence, rectified by him choosing to stand himself. While he also alleged that Mr Brown had been angry and confrontational, it appears to us that it was, at least initially, the Claimant who was behaving thus and that it was Mr Brown who was trying to defuse the situation and who perhaps himself then, became frustrated with that behaviour and responded in some form of kind.

    b. We think it likely that Mr Brown did make the '*never speak to me again like that'* comment, but that was in the circumstances of the Claimant's behaviour towards him on the night – an entirely understandable and routine statement, we find, for a manager to make in such a situation. It was not a statement made to harass

the Claimant, but to remind him of his position in relation to his manager and the entirely legitimate consequences for him if he continued to behave in that manner. We certainly don't consider it reasonable, in all the circumstances of this case, for such behaviour to have the effect of harassment on the Claimant.

c. The Claimant apologised the next day, whereas if he had genuinely felt harassed, it seems less likely, on balance that he would have done so.

d. He did not allege harassment in his grievance, merely referring to Mr Brown being '*slightly confrontational'*.

39. Next is the Claimant's claim for reasonable adjustments: we don't consider that this claim is well-founded, for the following reasons:

a. As already found, while the Claimant may have *wished* to have raised the issue of fixed breaks, he did not do so and that therefore the Respondent was unaware of this potential adjustment.

b. We see no reason why, in the absence of the Claimant telling the Respondent of this adjustment that the Respondent should otherwise reasonably have been aware of this requirement and thus that failing to apply it would put the Claimant at a substantial disadvantage. The Diabetes UK guidance to which the Claimant refers [167F] (and which he considers the Respondent should have had reference to) does not refer to such regular hourly breaks, but simply regular meal breaks, which he did have.

c. The Claimant's own evidence was that he was allowed to take breaks whenever he needed to do so and we are confident, therefore, from both Respondent witnesses' evidence that had he made this request it would have been granted.

40. Finally, we turn to the Claimant's claim of discrimination arising from disability. The first issue is as to whether or not the Respondent treated the Claimant unfavourably. Clearly, as agreed, dismissal is unfavourable treatment, but we do not consider the only other allegation of such treatment, Mr Brown's robust discussion with the Claimant on 28 July, to be such. For similar reasons as to our finding in respect of the allegation of harassment, it cannot, in our view, be unfavourable treatment for a manager to reprimand an employee who has been as rude as the Claimant had been to Mr Brown, particularly in front of other staff and who continued to be argumentative thereafter.

41. Mr Brown accepted in cross-examination that the sole reason for the dismissal ('the something') was the Claimant's behaviour (as opposed to his previous poor time-keeping and latterly his being on sick leave). Even if there was a potential other reason (which we don't consider to be the case) the **University of Edinburgh** authority makes it clear that that the 'something' has to be only more than a trivial part of the reason for the unfavourable treatment.

42. We come now to the nub of this claim: was the Claimant's admitted poor behaviour, both generally, but particularly on the 28th, arising in consequence of his disability? We find that it was, for the following reasons:

    a. We had no reason to doubt the Claimant's description of the effect his uncontrolled diabetes had on his behaviour.

    b. The Claimant provided a detailed, completed questionnaire from his GP [172], which, while not categoric in respect of the likely symptoms of hyperglycemic episodes (as experienced by the Claimant in respect of his behaviour) said that they differed greatly from person to person, with the implication the Claimant's behaviour could have been linked to his condition. In respect of hypoglycemic episodes (which the graphs show, the Claimant also suffered), the GP listed symptoms such as '*confusion* and *difficulty concentrating.'* Additionally, the generic employer/employee advice on the subject does refer to the possibility of changes in behaviour [e.g.167V). Both Respondent witnesses referred to him as behaving irrationally and talking off the point.

    c. The graphs provided by the Claimant indicated considerably high or low blood sugar levels, daily, over a period of time (for example, on the 28th [118], he had a high of 17.1 at about 7pm) and his evidence was that the effect of such a high (or low) took some time to pass (the generic guidance indicating that such effects could continue into the next day [167N].

    d. We consider that this evidence established a link or connection (**Hall**) between the 'something' and the Claimant's disability, thus shifting the burden of proof to the Respondent, to prove otherwise and in this respect the Respondent provided no medical evidence to contradict the Claimant's description of his symptoms. We note also that during the Claimant's employment, the Respondent made little or no effort to enquire into the condition, to seek medical advice, or even to question the Claimant on this point, which perhaps, had they done so, may even have permitted them to challenge the claimed symptoms, but they did not.

43. We briefly consider whether or not the Respondent can rely on the statutory defence of their actions being a proportionate means of achieving a legitimate aim, but find that they cannot, for the following reasons:

    a. It was common ground between Counsel that the aim advanced by the Respondent, the requirement for its employees to have an acceptable level of behaviour, attitude and professionalism was entirely legitimate.

    b. However, there is no question in our mind that the Respondent failed to attempt to achieve that aim in anything like a proportionate manner. We find this for the following reasons:

i. It never discussed the Claimant's condition with him in any detail;
ii. When they considered that he was underperforming, they conducted no formal interview or written follow-up, setting out what was required of him and within a reasonable timeframe;
iii. They sought no medical advice;
iv. They failed to follow even their own, contractual, disciplinary procedures; and
v. They gave no consideration to any alternatives to dismissal.

Judgment

44. The Respondent discriminated against the Claimant because of something arising in consequence of his disability. The Claimant's claims of harassment and failure to make reasonable adjustments fail and are dismissed.

REMEDY

1. Following the giving of Judgment, we proceeded immediately to hear evidence and submissions as to remedy.

2. The Claimant again gave evidence and his mother's evidence (given during the liability hearing) was also taken into account.

3. The Claimant was questioned as to his efforts at mitigating his loss of earnings by seeking alternative employment. His schedule of loss [175] stated that he found new employment, in a factory, on 14 December 2020, so approximately seventeen weeks after his dismissal, at which point his loss of earnings (of £4,446, less £409.89 Universal Credit - £4036.11) ceased.

4. He was challenged as to why he had not sought re-employment in the same industry, which, Mr Brown said, was actively recruiting and he said, firstly, that that was not the case, as COVID '*had had a big effect'*. He also said, however that he'd been put off the sector generally and shift work in particular due to his recent experiences and considered that more regular hours would be beneficial both for his health and his ability, transport-wise, to get to work.

5. He agreed that for the first four months, or so, he had not made extensive efforts to find work and that when he did so, in early December, he quickly succeeded. He said, however that following his dismissal, his mental health deteriorated and it was not until December that he was really ready to seek employment. He was referred to a letter from 'Time to Talk Health' (an NHS department offering treatment for mental health problems), of 2 September [195], which set out his symptoms of low mood and anxiety (with reference also to suicidal ideation) and it was suggested to him that while losing his job would be stressful, there were other factors,

predating his employment with the Respondent, which lead to him seeking treatment. He disagreed, stating that his dismissal had been the cause and objected to being described as being 'back to normal' after four months' treatment. He said that he had lost his planned long-term career in hospitality, which, he hoped, could have led to him being a hotel or restaurant manager.

6. In his statement, he said that the dismissal led to him feeling anxious and worried about his future and that he felt like '*everything I was working for i.e. paying off my credit card, moving out of my parents' house, working towards a career, gaining independence was all being taken away from me … I stopped speaking to friends and became paranoid that they were judging me and laughing behind my back about still living with my parents at 30. I had no career, no money or girlfriend.'* He had sleep problems and suffered nightmares, leading to him seeking medical advice and treatment, which included Cognitive Behavioural Therapy and medication [189-204].

7. We heard closing submissions from both counsel, which we summarise briefly as follows:

<u>Respondent</u>

a. It was agreed that the Claimant's net weekly pay was £260.72.

b. During the period of his employment, the hospitality industry was actively seeking employees and the Claimant could, therefore, have obtained further employment in that area within a few weeks. The Claimant has a duty to mitigate and he effectively did nothing for four months. He also applied for jobs for which he was not qualified, such as teaching assistant. His mental state was not so severe that he was unable to find work, except perhaps for a few weeks, or to work part-time, initially.

c. The then-current Vento guidelines are agreed. As only one of his claims succeeded, this should place his claim for injury to feelings in the lower band (up to £9,000). The Claimant may argue that because the act of discrimination resulted in his dismissal that that places it in the middle band (£9,000 to £27,000), but each case is specific to its facts – the Claimant had only worked for the Respondent for, in actuality, a couple of weeks and this is not a case of direct discrimination against him personally, but due to a lack of knowledge on the Respondent's part. The appropriate point would be the mid-point of the lower band (£4500).

d. The Claimant also brings a claim for personal injury, based on the mental impact upon him of his dismissal and the Tribunal was urged to avoid any overlap between any such two awards, either treating it as an entirely discrete claim, or factoring it into the injury to feelings award. The injury claimed is at the 'less severe' end of the Judicial College guidelines (which shows a range of £1540 to £5860). An award can only relate to injury caused by actions of the

Respondent and it should be noted that there are, here, other factors at play, with the dismissal bringing them to a head. Also, the timeframe is relatively short and with a quick recovery by the Claimant.

Claimant

e. The Claimant seeks a formal recommendation by the Tribunal.

f. As to loss of earnings, this is a bad point to take by the Respondent – the Claimant's medical condition rendered it wholly unrealistic for him to find employment earlier than he did. Did he do as much he could have? Probably not, but he has not behaved unreasonably. He is also in a difficult situation, living in the countryside, with no public transport, reducing his opportunities. In that situation, four months is not unrealistic.

g. In respect of injury to feelings and personal injury, it can be somewhat artificial to try to distinguish between two such awards. What is clear is that the dismissal had a very serious impact upon him and he became very seriously unwell. His problems with debt management and his loss of purpose and career are clearly linked to his dismissal. He was not unwell in this way when working.

h. This aspect of his claim pushes the award for injury to feelings (to include personal injury), overall, into the middle of the middle bracket (£18,000).

i. The Claimant also seeks an uplift to the award due to the Respondent's failure to follow the ACAS Code. That failure was not malicious, but in the circumstances of their disciplinary procedure being a contractual one, was extraordinary. He was also not told that he could raise a grievance and was told that he couldn't appeal against the decision. The uplift should be in the region of 15 to 20%, as this was not the worst of such cases, but was a bad mistake by the Respondent.

Conclusions

8. We found the loss of earnings claimed by the Claimant to be entirely reasonable, in the circumstances of his mental health condition (for which he was not discharged from treatment until 11 December), but, after which, to his credit, he rapidly found employment.

9. In respect of injury to feelings, we accept Mr Doughty's rationale that this award and one for personal injury should be considered globally, as the two are inextricably linked, with the injury to his feelings contributing to his poor mental health and perhaps vice versa. The evidence the Claimant gave (and supplemented by his mother's evidence) as to the severity of his mental health condition was unchallenged in cross-examination. On looking at the medical evidence, the following is apparent:

a. The GP's notes [190] indicate no previous history of poor mental health (in that when he reports to his GP in August as his depression no reference is made to any previous episodes).

b. The timeline of his dismissal and the reporting of his condition match.

c. He is described as having a depressive disorder, having been '*devastated'* by his dismissal. His medication dosage was increased in September.

d. At initial assessment, he was graded on the symptoms of depression 'score', as being 18 (maximum 27) and 18 (maximum 21) for anxiety. This was much improved (4 and 2, respectively) on his discharge.

10. We conclude from that evidence that the Claimant was suffering severe depression and anxiety, due to his dismissal, for at least three months. The range given in the Judicial College guidelines is a wide one, potentially up to nearly £6000.

11. We consider that combining any such award with an award for injury to feelings firmly places that total in the middle band and for the following reasons, in the middle of that band, at £18,000:

a. The summary and (to him, at least) the unexplained nature of his dismissal, from an area of employment that he considered his future career and to which he has decided not to return. We don't consider the relatively short period of his employment significant, as, as stated, he viewed it as his career and he had worked for the Respondent before and was thus returning to a familiar and, he no doubt hoped, a stable and supportive environment.

b. The effect on his mental health for at least three months, indicating also the extent of injury to his feelings.

c. Had any of his other claims succeeded, we would have placed this award in the upper end of this band.

12. In respect of an uplift to reflect the Respondent's failure to follow the ACAS Code, we place that at 20%, as there was a near-complete failure to follow the Code (apart from the response to his grievance). This was exacerbated by the Respondent either ignoring (or being negligently unaware of) their own contractually-binding disciplinary procedures and the necessary application of them (regardless of whether or not the Claimant was still on probation at that point) and by doing so in an arrogant tone ('*because I can'*), despite being a medium-sized employer and having access to legal advice. Further, some application of the Code may, in this case, have resulted in the Respondent gaining further information to inform, change, or even justify their subsequent decision. We are conscious of the guidance in **Slade v Biggs [2022] IRLR 216**

UKEAT and consider that we have justified the need for and percentage level of the award. We do not consider that the overall award, including the 20% uplift will, in the circumstances of this case, be disproportionate, .

13. We make the recommendation that by 12 September 2022 and subject to s.124(2)(c) of the Act, the Respondent reviews and updates its policy in regard to disabled employees and also its disciplinary and grievance procedures and crucially, thereafter, applies both such policy and procedures, as appropriate.

14. Calculation of Award (and subject to minor correction from the Hearing)

Loss of Earnings – 16.71 weeks at £260.72 pw	£4356.63
(less £409.89 Universal Credit)	£ 409.89
Sub-total	£3946.74
Plus interest at 8% for 329 days at £0.86 per day	£ 282.94
Total Loss of Earnings	£4229.68
Injury to Feelings	£18,000
Plus interest at 8% for 658 days at £3.95 per day	£ 2559.10
Total Injury to Feelings	£20,559.10
Sub-total Award	£24,788.78
Plus 20% ACAS uplift	£4957.76
GRAND TOTAL	£29,746.54

15. Remedy Judgment. Accordingly, the Respondent is ordered to pay the Claimant the sum of £29,746.54.

Employment Judge O'Rourke
Date 20 June 2022

Judgment & reasons sent to the parties: 29 June 2022

FOR THE TRIBUNAL OFFICE