



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Tracy Ann Elder as administrator on behalf of the estate of Matthew Elder

**Respondent:** B&Q Ltd

**Heard at:** Leeds      **on:** 3 to 5 April 2023

**Before:** Employment Judge Cox

**Members:** Mr G Harker  
Mr M Taj

**Representation:**

**Claimant:** Mr Elder, Claimant's son

**Respondent:** Mr Piddington, barrister

## REASONS

1. Matthew Elder worked for the Respondent from April 2017 as a customer advisor at one of its stores. On 15 February 2022 he was dismissed without notice. He died on 22 March 2022. This claim is brought by his mother as the administrator of his estate, but in these reasons he will be referred to as the Claimant, in order to distinguish him from his brother Mr Alistair Elder, who represented him at the Hearing.
2. At the Hearing, allegations of failure to make reasonable adjustments and for "other payments" were withdrawn and dismissed. The remaining allegations were that the Claimant had been unfairly dismissed and that the decisions to suspend and dismiss him amounted to discrimination arising from his disability of depression and anxiety. The Respondent accepted that the Claimant was a

disabled person within the statutory definition at the relevant time as a result of these conditions, and that it knew he was.

3. For the Respondent, the Tribunal heard oral evidence from Mrs Julie Rodd, HR Administrator for the store where the Claimant worked, who was involved in providing support to him and his managers in relation to the impact of his mental ill-health on his employment; Miss Julie Shackleton, Showroom Manager, who conducted the investigatory interview in the Claimant's disciplinary process; Mr Andrew Low, Deputy Store Manager, who made the decision to suspend and then dismiss the Claimant; and Mr Lee Hirst, Unit Manager at a different store, who was charged with dealing with the Claimant's appeal against dismissal (although in the event an appeal hearing did not take place due to the Claimant's death).
4. For the Claimant, the Tribunal heard oral evidence from Mr Alistair Elder. It also took into account a witness statement from Mr Ben Atkinson, a friend of the Claimant and a former employee of the Respondent. It did not, however, give Mr Atkinson's statement significant weight as he did not attend to give his evidence and so it was not tested in cross-examination.
5. The Tribunal was also referred to various documents in a hearing file running to 257 pages.
6. The Hearing was a very difficult experience for all the witnesses in the light of the Claimant's death. Mr Alistair Elder was obviously still very upset over the loss of his brother, but nevertheless presented his case with great clarity and competence. Mrs Rodd, Miss Shackleton and Mr Low had all been closely involved with the Claimant and supported him in his struggles with his mental health and had been shocked and very upset when they heard of his death. Miss Shackleton in particular became visibly upset when giving her evidence. This did not detract from the Tribunal's assessment that she, like all the witnesses for both parties, was truthful in her evidence. The evidence of Mr Elder was in large part based on the account that the Claimant had given him about the way in which he had been treated by the Respondent. Whilst the Tribunal accepts the accuracy of Mr Elder's account of what the Claimant told him, the Tribunal found the direct evidence of the managers on how they had in fact treated the Claimant more persuasive.
7. On the basis of the oral and documentary evidence presented to it, the Tribunal made the following findings.

## **Background to the suspension and dismissal**

8. The Claimant joined the Respondent in 2017. He did not mention his mental illness at the point of recruitment, but from July 2019 onwards he began to have significant periods of time off work due to his depression and anxiety and associated excessive drinking. At this point, Mrs Rodd began to give him very extensive support in managing his mental health and his work. In the Tribunal's view, she went far beyond what might reasonably have been expected of her as a manager in her efforts to help him.
9. During 2021, the Claimant developed a close friendship with D, who was a colleague at the store but worked in a different department. At some point, D withdrew from the relationship and that upset the Claimant. Meanwhile, D had developed a friendship with another colleague at the same store, E, who was a team leader.
10. The Claimant was upset that D had withdrawn from their relationship and continued to contact her. D also had poor mental health and became very upset at the Claimant continuing to speak to her. She spoke to Miss Shackleton, who was her line manager, about her distress at his behaviour.
11. The Claimant also started to express hostility towards E, directly to E himself and to other staff members. There was a lot of gossip amongst the shopfloor staff about the relationships between the Claimant, D and E, and the staff group ended up dividing into those who supported the Claimant and those who supported E. The atmosphere became toxic and began to affect staff morale.
12. In September 2021, it came to Miss Shackleton's attention that the Claimant had become angry on seeing D and E in the canteen together and had subsequently gone up to D on the shopfloor and "badmouthed" her in the hearing of customers. Miss Shackleton spoke to the Claimant and D separately about the incident. The Claimant told her that he had become frustrated with D and had feelings for her, but he realised that his behaviour had been unacceptable. He said that it would not happen again. He told Miss Shackleton that he had had a drinking problem but was getting counselling. Miss Shackleton told him that if he ever needed to talk or to offload any of his frustrations, he could speak to her or another member of the management team privately. She felt sympathetic towards the Claimant in the circumstances and decided not to take formal action but to issue him with an "informal action form" under the Respondent's disciplinary procedure. This form confirmed that he had been guilty of unacceptable behaviour on the shopfloor and that he needed to remain professional on the shopfloor in the future. It also stated that the Claimant would be subject to observations from time to time to make sure this was happening.

13. Miss Shackleton had cause to issue the Claimant with a further “informal action” in January 2022. The background to this was that in December 2021 the Claimant, D and others went on a night out. During the course of the evening, D drank to excess and had to go to the Accident and Emergency Department. The Claimant took her to the hospital and then back to his own home before she eventually returned to her own home. After this event, rumours began circulating amongst the store staff that D had had her drink spiked. Both D and the Claimant were very upset about what was being discussed.
14. Miss Shackleton offered them mediation, so that they could sit in a room together with her and have the opportunity to clear the air between them. They both agreed. Miss Shackleton emphasised the confidential nature of the mediation and that they were not to discuss the matter outside the mediation room.
15. At the mediation, they discussed how the Claimant was making D feel. He had continued to text her even though she was ignoring him and had asked him to stop. He was waiting for her after work and walking her to her car. She wanted all of this to stop because it was making her uncomfortable. The discussion got heated at times because the Claimant was not taking responsibility for his behaviour but eventually he apologised. It was agreed that they would stay away from each other, both inside and outside work, unless contact at work was essential for work-related reasons, and they would delete each other’s mobile ‘phone numbers.
16. It then came to Miss Shackleton’s attention that the Claimant had been talking to a number of colleagues on the shopfloor about things that D had said during the mediation. D spoke to Miss Shackleton about this and the fact that the Claimant continued to text her. She was in tears on more than one occasion. She felt that the Claimant was getting away with his behaviour.
17. Miss Shackleton discussed these matters with the Claimant. He initially denied disclosing confidential information but when Miss Shackleton gave him examples provided to her by D he acknowledged that he had. Although this was clearly a breach of the action agreed at the time of the first Informal Action, Miss Shackleton took into account that he was finding it difficult to reconcile himself with the breakdown of his relationship with D and decided to issue him with a second Informal Action Form rather than to take matters to the first stage of a formal disciplinary process. Nevertheless, she pointed out to him that he was not helping himself by the way he was behaving. He said that he was now over this. The second Informal Action Form confirmed that the Claimant and D had agreed to delete each other’s ‘phone numbers and that he needed to “avoid all situations” in working time.

18. Unfortunately, matters continued to escalate between the Claimant and D. Because of her deteriorating mental health, D asked for a transfer to a different store and Miss Shackleton supported her with this, in order to protect her mental health. Separately, E decided to move to a post in another store, partly in order to distance himself from the Claimant.
19. Shortly before D was due to transfer in February 2022, there was an incident when the Claimant was dealing with a customer query and approached D to ask her a question. D was on the 'phone at the time and another customer adviser was available to whom he could have addressed his query. D responded that he had been told to stay away from her. The Claimant went to Mr Low to complain that D had told him to "fuck off". Shortly after this, D went to a room to make a 'phone call, possibly to arrange a counselling session to help with her mental health. She locked the door. The Claimant tried to enter the room and, finding it locked, banged on the door and tried to speak to D.
20. Mr Low and the Claimant's line manager Ms Swallow met the Claimant to discuss this incident and remind him of all that had been discussed and agreed with him about the need for him to change his behaviour. In spite of this, Mr Low was disappointed to learn from E that shortly afterwards the Claimant had approached him. In the written statement he gave Mr Low, E said that the Claimant had said to him: "I know we're not supposed to talk and we're not friends but friendly warning, stay away from her". The Claimant had then gestured towards the returns desk where a colleague C was working. The following day the Claimant had approached E again and said, "I recommend you take my advice from yesterday".
21. After taking advice from the Employee Relations team, Mr Low decided to suspend the Claimant because he was continuing to act in an inappropriate way and appeared to have been threatening E. Mr Low felt that the Claimant was becoming more and more of a "loose cannon" and he wanted to protect the Claimant from putting himself in any more situations that might compromise his position.
22. In the meantime, on hearing of the Claimant's attempt to enter the room where D had been making a 'phone call, Miss Shackleton had decided that she now needed to hold a formal investigatory meeting into the Claimant's conduct, as he continued to behave inappropriately in spite of all the advice and support he had received and all that had been agreed as part of the informal actions. She had also been told by an employee F that he had heard the Claimant making derogatory comments towards E and she intended to include this as part of her investigation. On the advice of the Employee Relations team, Miss Shackleton decided to deal with the derogatory comments about E and the potentially threatening comments to E as part of her investigation.

23. Miss Shackleton had been given a copy of E's statement for Mr Low. She herself spoke to employee F, who gave details of how the Claimant had described E as a "prick", to F and then, later the same day, to Mr Atkinson, an ex-employee who had been in the store. Another employee, J, provided a statement that the Claimant had been making hostile remarks about D and E in the staff room.
24. In Miss Shackleton's investigatory interview with the Claimant, she put to him the content of the statements she had. He admitted that he had knocked on the door and asked D to speak to him, but this was because he wanted to clear the air between them and get "closure" before she moved store. He accepted that he had made hostile comments about E in the staff canteen. He did not deny that he had made derogatory comments about E in front of another employee and Mr Atkinson. He accepted that he had said to E "a word of advice, I know we are not mates. Stay away from that girl", although this was a reference to D, not C. He understood that the comments could come across as threatening, but he had not intended that. He said he just wanted to warn E that D was "nuts".
25. Mr Low conducted the disciplinary hearing with the Claimant on 15 February 2022 and decided to dismiss him without notice.

### **Unfair dismissal**

26. The first issue in the unfair dismissal claim was, what was the reason for Mr Low's decision to dismiss the Claimant?
27. The Tribunal found Mr Low's evidence to be clear and compelling. The reason he dismissed the Claimant was because he genuinely believed that, in spite of being repeatedly told not to contact D and E, the Claimant had continued to do so. Two of those contacts had involved the Claimant making comments to E that Mr Low considered amounted to threatening behaviour. The Claimant had also referred to E in extremely derogatory terms in front of others.
28. The reason related to the Claimant's conduct and was therefore a potentially fair reason for this dismissal (Section 98(2)(b) Employment Rights Act 1996 – the ERA).
29. The next issue for the Tribunal was, in all the circumstances, including the Respondent's size and administrative resources, did Mr Low act reasonably in treating that reason as a sufficient reason for dismissing the Claimant (Section 98(4) ERA)? That question had to be decided in accordance with equity and the substantial merits of the case.

### Reasonable grounds?

30. In this context, the Tribunal considered first whether Mr Low had reasonable grounds for his belief that the Claimant had been guilty of the conduct in question. It was clear that he had. Both at the investigatory interview and in the disciplinary hearing, the Claimant accepted that he had been told that he must not approach D or E and that he had done so. Although he denied that he had intended his comments to E to be threatening, he accepted that he made them and that they could be interpreted as threatening. He also accepted that he had referred to E in derogatory language.
31. At the Tribunal Hearing, Mr Elder criticised the Respondent for not interviewing E about the alleged threatening comments but relying only on the written statement he had provided to Mr Low. The Tribunal accepts that, ideally, E would have been interviewed by Miss Shackleton. It does not, however, consider the Respondent's failure to do so made its investigation unreasonable. The Claimant accepted that he had used the words that E said he had used. Although E was not asked whether he in fact felt threatened, the Tribunal accepts that Mr Low could reasonably interpret them as intended to be threatening. He believed the Claimant was warning E off contact with D out of jealousy of E's relationship with D and to warn him off a relationship with her that the Claimant himself had not been able to maintain. The Claimant himself accepted at the disciplinary hearing that his words could be interpreted in that way, even though that was not his intention.
32. Mr Elder also criticised the Respondent for not interviewing Mr Atkinson. The Tribunal considers it reasonable for the Respondent not to do so. Mr Atkinson was no longer its employee and its policy was not to involve third parties in internal disciplinary matters, unless the disciplinary proceedings resulted from a complaint by that party. Further, Mr Low did not consider that Mr Atkinson's evidence was necessary since the Claimant had not denied using derogatory language about E to Mr Atkinson.
33. Mr Elder said that it was unreasonable for the Respondent not to have viewed the CCTV footage of the alleged threatening conversation between the Claimant and E and shown it to the Claimant. The Tribunal does not accept that the Respondent's failure to do so made its investigation unreasonable. The Claimant had accepted that he had used the words he was accused of using. In particular, Mr Low had accepted the Claimant's account that the comments he made to E referred to D, not C. It was therefore irrelevant whether the Claimant gestured towards the desk where C was standing when he made his comments.

34. In summary, the Tribunal is satisfied that Mr Low had reasonable grounds for concluding that the Claimant had been guilty of the conduct upon which his dismissal was based.

### **Reasonable sanction?**

35. The next issue for the Tribunal was therefore whether Mr Low's decision to dismiss the Claimant, rather than impose some lesser sanction, was reasonable in all the circumstances.

36. Mr Low was aware that the Claimant had not yet had any formal disciplinary warnings about his behaviour. He also knew, however, that Mrs Rodd, Miss Shackleton and he himself had given the Claimant a very substantial amount of time and support in handling the impact of his mental health on his work and in controlling his behaviour. They had all told him that he could talk to them at any time if things were getting on top of him. They had all emphasised that he had to behave in a professional way on the shopfloor and he had to avoid contact with D and E if he wanted to avoid matters escalating into formal disciplinary action.

37. In summary, Mr Low knew that the Claimant had been told repeatedly what was expected of him in terms of his behaviour, he had repeatedly promised to change but had then continued to act in an unacceptable way. This led Mr Low to conclude that the Respondent had lost trust in the Claimant as its employee. Personal misconduct that breaches the trust that needs to exist between the company and its employee is defined as gross misconduct in the Respondent's disciplinary procedure.

38. Although Mr Low considered that the Claimant had been guilty of gross misconduct, he gave very serious consideration to whether he should give him a final written warning rather than dismiss him. He liked the Claimant and had put a significant amount of time into supporting him. He did not want to dismiss him. He knew that D had now transferred to another store and E had been promoted to a position in another store, so there was no longer any danger of the Claimant acted inappropriately towards these two particular individuals.

39. It remained the case, however, that in spite of the best efforts of management, the Claimant had persisted in behaviour that had created a great deal of friction between colleagues in the workplace. It had led to a toxic work environment that had been difficult and time-consuming to manage. It had affected the mental wellbeing of other staff, to whom the Respondent also owed a duty of care. Whilst D and E had now left the store, the Claimant would doubtless develop other friendships with colleagues in the future and Mr Low could not trust the Claimant not to get into a similar situation again.



40. Mr Low was also significantly influenced in his decision-making by the Claimant's attitude in the disciplinary hearing, which had surprised and disappointed him. The Claimant was not prepared to accept responsibility for his actions and wanted various aspects of the evidence against him to be discounted. He said that his threatening comments to E, for example, could not be proven because no CCTV footage had been produced. Only after a break in the Hearing did he apologise for what he had done, and the tone of that apology led Mr Low to conclude that it was not sincere.
41. In all the circumstances, the Tribunal considers that Mr Low's decision that the Claimant should be dismissed was within the range of possible reasonable responses to the Claimant's case.

### **Other alleged flaws in the disciplinary process**

42. Mr Elder made various other criticisms of the Respondent's handling of the Claimant's case.
43. He said that Miss Shackleton and Mr Low were biased against the Claimant and wanted to dismiss him because they were fed up with his sickness absences and his behaviour and the trouble he was causing them as managers. There was no evidence at all before the Tribunal to indicate that either of these individuals was biased against the Claimant. In fact, they both liked him, had supported him extensively and both very much regretted the need to dismiss him. If anything, they were biased in his favour, not against him.
44. The Tribunal accepts that it might have been preferable for a manager from another store to conduct the disciplinary hearing, on the basis that he or she would have had no prior dealings with the Claimant and would come to the case with no preconceptions. The Tribunal also accepts, however, that it was not unreasonable for Mr Low to decide that he should deal with the case because he had extensive knowledge of the Claimant's background that it would be fair to the Claimant to take into account in mitigation when reaching a decision.
45. Mr Elder criticised the wording of the letter inviting the Claimant to the disciplinary hearing. It describes the disciplinary charge as "inappropriate verbal conduct towards a team leader directly and to another colleague about that same team leader", whereas the decision to dismiss the Claimant was based in part at least on his repeated failure to obey instruction to stay away from D and E. This was a breach of paragraph 9 of the ACAS Code on disciplinary procedures, which states that the employee should be given "sufficient information about the alleged misconduct . . . and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting".

46. The Tribunal accepts that the letter of invite, which was drafted by the Respondent's Employee Relations team and not Mr Low, was not particularly well drafted. This was not, however, a serious enough flaw to make the decision to dismiss the Claimant unreasonable. He knew what was at issue in this disciplinary process because it had been discussed at the investigatory meeting and he had a fair opportunity to address all the issues at the disciplinary meeting. Amongst other things, he readily accepted that he had been told to stay away from D and E and that he had not followed that instruction.
47. Mr Elder criticised the Respondent for not providing the Claimant with the notes of the investigatory meeting earlier and in a legible form. The Tribunal accepts that the notes were handwritten but does not accept that they were illegible: all three members of the Tribunal had no difficulty in reading them. Further, the notes were given to the Claimant in advance of the disciplinary hearing and so had a chance to prepare on the basis of them.
48. In summary, the Tribunal does not accept that any of the other flaws or alleged flaws in the procedure the Respondent followed made Mr Low's decision to dismiss the Claimant unreasonable.
49. The claim of unfair dismissal therefore fails and is dismissed.

### **Disability discrimination**

50. It is unlawful for an employer to treat a disabled employee unfavourably because of something arising in consequence of his disability (Section 39(2) read with Section 15 of the Equality Act 2010).
51. The Claimant was suspended and dismissed because of the Respondent's concerns about his conduct in relation to D and E. The first issue for the Tribunal was whether that conduct was something that arose in consequence of his disability of anxiety and depression. It was for the Claimant to establish that link.
52. Although the Respondent itself appears to have acted leniently towards the Claimant because it accepted that his mental health might be affecting his behaviour, there was no evidence before the Tribunal to establish that one arose in consequence of the other. This was not a case where it could be viewed as self-evident that an employee's behaviour arose in consequence of his disability. It is possible that some of the Claimant's actions arose in consequence of his depression and anxiety. Mr Elder asserted in his evidence that that was so. Equally, however, it is possible that the Claimant's behaviour was that of someone who had been disappointed, upset and angry at the failure of a close relationship and had developed an antagonism towards a new friend in that person's life. When Mr Low asked the Claimant in the disciplinary hearing how

he could justify his behaviour as acceptable, the Claimant responded: "I can't really. [D] antagonised me". When Mr Low responded, "Have you not done the same to her?", the Claimant said, "I suppose, yeah".

53. The claims of discrimination arising from disability therefore fail and are dismissed.

Employment Judge Cox  
Date: 9 May 2023