THE INDUSTRIAL TRIBUNALS

CASE REF: 612/19

CLAIMANT: **Stephen Crean**

RESPONDENT: **British Telecommunications PLC**

DECISION

The unanimous decision of the Tribunal is that the claimant's claim of unfair dismissal is dismissed

Constitution of Tribunal:

Employment Judge: **Employment Judge Knight**

Members: **Mr E Grant**
Mr I Rosbotham

Appearances:

The claimant was unrepresented and appeared in person supported by Mrs Pauline Breen, a family friend.

The respondent was represented by Ms Maura Herron, Barrister-at –Law, instructed by Napier & Sons Solicitors.

Issues

1. The claimant's remaining claim is unfair dismissal, following the unanimous ruling by the Tribunal on 20 September 2019, appended to this decision, that the claimant does not have a disability, within the meaning of the Disability Discrimination Act 1995, as amended.

2. The remaining issues to be determined by the Tribunal were:

   (1) Was there a fair reason for dismissal having regard to Article 130 of the Employment Rights (NI) Order 1996?

   (2) Did the respondent, in the circumstances and having regard to the equity and substantial merits of the case, act reasonably in treating the reason identified at paragraph 1, as sufficient reason for dismissing the claimant?

As per previous case management directions made by Employment Judge Buggy, this is a liability hearing only. The respondent contends that the claimant was fairly dismissed by reason of his gross misconduct.

Evidence

3. The claimant gave his evidence on 13 September 2019 by witness statement and orally. The respondent's witnesses gave evidence, both by witness statement and orally, at the reconvened Hearing on 7 October 2019. The respondent's witnesses were Ms Nicola Hodgen, former Enniskillen Contact Centre Manager and at the relevant time the claimant's second line manager. She left her employment with the respondent at the end of September 2018; and Ms Fiona Williamson, Senior Operational Manager at the Enniskillen Contact Centre and the claimant's third line manager. The Tribunal also considered documents to which it was referred by the parties contained in the agreed Hearing Bundle and additional documentation produced during the Hearing.

Facts

4. The Tribunal found the following relevant facts proven on a balance of probabilities.

5. The claimant was employed by the respondent as an In-Life Advisor (Digital Care) from 10 July 2007 until his dismissal for gross misconduct on 20 September 2018. His main role was to deal with incoming customer calls. The claimant's first line manager was Mr Chris Owens. He reported in turn to Ms Hodgen. The claimant has an alcohol addiction and related health problems which adversely affected his attendance and performance at work. A performance plan was put in place for the claimant in July 2018 to help him improve his performance which appeared to be going well until August 2018. At that time, as part of his treatment for alcohol addiction, the claimant had been abstinent from alcohol for several weeks, was suffering from withdrawal symptoms, which put him under stress, although he did not report these symptoms to Mr Owens during a supervision meeting.

6. The events which eventually led to the claimant's dismissal started on the evening of Thursday 16 August 2018. Around 6.00 pm, a duty team leader, Zara Cooke queried over instant message ("IM") with the claimant why he had not dealt with a certain customer complaint. He replied that he would deal with it *"when I've a minute…or on another day, as I'm ready to pull my hair out."* She responded "*that doesn't sound good"* and the claimant replied, *"tisnt, at the end of my tether today*". He did not respond when she asked him, *"anything I can help you with?"* Mr Keith McKiernan, another duty team leader, followed up with the claimant around 7pm, to see if he had picked up the customer complaint. The transcript for the IM session shows the conversation between Mr Kiernan and the claimant over approximately the next ten minutes went as follows:

7.

Claimant: *ever feel like an Uzi day?*

Mr McKiernan: *like the buck in Vegas*
Out the window
I blame the country music

Claimant: *nps, nope in here, line them up about 10-20 people*
If no option to choose then just let ripped on the floor :D

Mr McKiernan: *that's very selective*

Claimant: *that'd just be day one :)*

Mr McKiernan: *Place on lockdown*

Claimant: *yup, you only get out in a bag*

Mr McKiernan: *This is very morbid*
I feel like the guy who took that plane though.
And done loop the loop
Then just crashed to do himself in

Claimant: : *O Wouldn't say very morbid, I can do much worse*

Mr McKiernan: *only getting out in a body bag is pretty morbid, let's be honest*

Claimant: *could be worse… Only not saying any more or you'll be having the white coats in for me.*

Mr McKiernan: *On standby at the min lol*

Claimant: *You've no idea how much they should be*. Session ends.

8. The next day, Friday 17 August 2018 around 9am, before the start of the claimant's shift, Mr Owens was approached some of his team members. They were visibly upset and told him that they felt uneasy and unsafe because of comments made by the claimant the previous evening, about a machine gun and people leaving work in body bags. Two female members of staff also reported that they were further alarmed because on previous occasions the claimant had shown them knives which he brought into work. Mr Owens placed a request for advice with HR Helpdesk. When the claimant arrived into work at 12.05pm, thirty-five minutes after his shift start time, he told Mr Owens that he was late because he had been in a lot of pain, had no medication and had not slept all week. Mr Owens advised the claimant he should contact his GP.

9. Shortly afterwards, Mr McKiernan informed Mr Owens about a conversation he had with the claimant the previous evening around 7.00 pm in which the claimant had asked him, *"do you ever feel like an Uzi day?*" and when Mr McKiernan had responded, *"Things are not that bad are they?",* the claimant had replied *"Nobody leaves the building, only in a body bag".* Mr McKiernan said although the claimant was laughing, on reflection he started to feel concerned and when he discussed the conversation with Ms Cooke, they had agreed he should report what was said the next day.

10. Documentation shows that Mr Owens was concerned because he was aware of the claimant's previous mental health and self-harm issues and what the claimant had told him when he came into work. He again contacted the HR Helpdesk for advice on how to proceed. He was advised not to suspend the claimant or hold a fact-finding meeting until further advice was received from Employee Managers Assist or the WHIST team. Mr Owens was informed that the advice from BT Security was formally to report the incident to them and to local police. Ms Hodgen was made

aware of the situation and she authorised Mr Owen to place the claimant on special leave. She asked him to contact the claimant's nominated emergency contact, who was his father, to ensure that the claimant got home safely. It was clear at this stage the respondent was treating the matter as a welfare issue.

11. Mr Owens tasked Mr McKiernan with making the formal report to BT security and to the police, while he phoned the claimant's father. Mr McKiernan contacted the BT Security around 5.00 pm who advised him to let the police know what the claimant had said to him and he was being released into his father's care. He reported to the police that the claimant had asked him if he had *"ever felt like shooting the place up"* and that "*nobody leaves except in a body bag".* He reported that he had taken the comments in jest because the claimant had been smiling at him but that at least one other person had overheard the comments which had *"caused alarm on site".*

12. Meanwhile the claimant's father arrived around 5.00 pm and was met by Ms Hodgen, who explained the situation. Mr Owens was in another room with the claimant. He informed him about the reports made about him by his colleagues. The claimant responded that his comments were only a joke. Mr Owens continued that he was worried about the claimant's wellbeing and that his colleagues were feeling upset and unsafe because of what the claimant said. He said that he had to act in accordance with his duty of care to both the claimant and his colleagues. He asked the claimant to leave the building, not to come into work and that he would be contacted again the following Monday with more information on the next steps. He told the claimant that his father had been called, as it was felt important that he did not leave by himself but that he should be passed into the care of his father. At this point, the claimant became very agitated and annoyed. He said his father should not have been called, that he would be better off in work and that Mr Owens was making a mistake. The claimant then left the room to get his belongings, but walked out of the building, past Mr Owens without seeing his father. Mr Owens informed the claimant's father and Ms Hodgen about what had happened. Later that evening, the claimant's father contacted Mr McKiernan to advise that the police had called out to establish that the claimant was not a risk to himself or others but the claimant was not in.

13. After the claimant left work, he went immediately to get a drink. He continued to drink heavily throughout the weekend. On the Friday evening, he bumped into a work colleague Mr Aaron Gilbride, with his partner and baby, at a local supermarket. The claimant was very agitated and pressed Mr Gilbride to give him Mr Owens' phone number. He said that he urgently needed to speak with him. Mr Gilbride was unaware at this point of the allegations against the claimant. He was made to feel uncomfortable and uneasy by the claimant's demeanour and wanted to get his partner and baby away from the claimant as quickly as possible. He gave the claimant Mr Owens' phone number and when the claimant left, Mr Gilbride rang Mr Owens to warn him, in case he received a call from an unknown number.

14. The claimant proceeded to send Mr Owens several angry text messages on the Friday evening and sent further text messages and phone calls on his mobile phone throughout Saturday and Sunday. He also tried to telephone and contact Mr Owens via a gaming app over the weekend. Mr Owens did not respond. The messages and texts sent by the claimant to Mr Owens were disrespectful, sarcastic and abusive and conveyed that he was angry and critical that the matter had been reported to the police and that his parents had been involved.

15. On Saturday 18 August 2018, the claimant phoned into work and spoke to Mr Gilbride, who was acting Duty Manager. The claimant said he was angry as he had just been interviewed at a Police Station. Mr Gilbride explained that he had no knowledge of the events of the last few days. The claimant confirmed that he had been told to go home on Friday and that he did not need to come in over the weekend but said that he wanted to know when he was due back into work. Mr Gilbride reassured the claimant he would find out and he would call him back. After speaking with Mrs Hodgen, Mr Gilbride telephoned the claimant and confirmed that he had been told on Friday evening that he did not need to come in to work for a few days and that someone would be in touch with him again by Monday afternoon. The claimant said that he would contact his trade union on Monday. After this call, Mr Gilbride discovered that earlier in the day, the claimant had sent him private messages over Play Station which said *"If you are mates with Chris o I'd advise he contact me before this gets out of hand"* and two minutes later another message saying *"I did try"".* Mr Gilbride did not respond to these messages, having already spoken with the claimant.

16. Mr Gilbride was contacted later that evening by the police who advised that they had spoken to the claimant about his comments and that they were closing their investigation as he had told them that he had no intention to follow them through. They advised that any further incidents should be reported to them. Mr Gilbride emailed Mr McKiernan and Mr Owens about this at 6.20 pm.

17. During the Saturday, the claimant also made a drunken and rambling telephone call to BT Property Services. During the call he made a number of statements including, *"Did you ever have a bad day and you went you know what I would love to come in with an Uzi and kill 10 to 20 people if I was given a choice but if not given a choice I would come in and just open fire".* He said that he meant this as a joke, that he didn't have an Uzi and that he was not going to kill people but he went on to say that the matter should be *"sorted out or my manager will be dead one or the other".* He also swore and made some inappropriate sexual references. The recipient of this call said that they did not wish to comment and that he should speak to HR.

18. Throughout the weekend, the claimant sent numerous messages to other colleagues, including Aideen Meehan, Aaron Lindsay and Catherine Smyth, asking for Mr Owens' phone number. These were the colleagues who had reported concerns to Mr Owens. Ms Meehan also reported on 18 August 2018, that the claimant had sent her numerous messages throughout the evening of 17 August 2018 which had made her feel very frightened, including a message threatening Mr Owens' life.

19. On Monday 20 August 2018, Ms Hodgen arrived in to find several emails sent from different managers over the course of the weekend reporting further contacts from the claimant over the weekend to various personnel. Mr Hamill, Team Leader of the Digital Care Team advised that he had received a call from the claimant seeking the EAP number; Ms Karen McCall the Centre Manager reported a telephone call from the claimant on 19 August 2018 at 1.45 pm taken by Sinead Montcrieff in which he appeared to be slurring and asking when he was to return back to work and in which he stated that he did not know why he had been asked to leave the office; and a report from Ms Moncrieff regarding another phone call to the office on 19 August 2018 at approximately 3.00 pm asking if someone could call him as soon as possible *"as it is now Sunday"* and that he "*doesn't feel as if he is being treated*

as an adult". Mr Owens also reported to her the claimant's numerous attempts to contact him over the weekend. He confirmed that he received no further communications from the claimant after Sunday, 19 August 2018.

20. Ms Hodgen held a conference call with Mr Owens and HR Personnel, Bobby Dickson, Emma Victor, Charmaine Meighten. It was agreed that HR would update the security and the PSNI concerning the most recent developments. Ms Hodgen also tried to contact the trade union to see if someone would be available to provide the claimant with support, as he had indicated his intention to contact his union.

21. Shortly after this conference call, Mr Owens was informed about the message received by his team member from the claimant threatening his life. He became very upset and told Ms Hodgen that he did not wish to have any further involvement in the process given this alleged threat, which he reported to the Police later that day. Subsequently, he went on sick leave, certified as unfit for work due to feeling frightened and anxious with nightmares.

22. Ms Hodgen held a second conference call with HR at 2.30 pm on 20 August 2018, which included Mr Dave Reynolds of BT Security. It was decided it was no longer appropriate for the claimant to remain on special leave pending a fact-finding meeting. It was decided to suspend the claimant to facilitate internal investigations. Ms Gilleece was directed to take over first line manager responsibilities for the claimant in the absence of Mr Owens, to carry out the investigation into the claimant's actions and to inform him of the decision to suspend him. As she was not comfortable with dealing with a suspension meeting with the claimant face to face, HR and BT Security confirmed that she could deal with the suspension procedure over the phone. Ms Gilleece telephoned the claimant on 22 August 2018 to advise him that he was being suspended from the workplace pending an investigation into allegations that he had engaged in unprofessional behaviour by using threatening language towards colleagues. This was later confirmed in writing and the claimant was reminded about the Employee Assistance Programme which could provide him with support.

23. Ms Gilleece took statements from the claimant's colleagues, Catherine Smyth, Nicola Burn, Aaron Lindsay, Keith McKiernan, Chris Owens and Aaron Gilbride. She obtained transcripts of telephone calls made by the claimant to BT on 18 August 2018, a copy of the report to the police and a timeline compiled by Mr McKiernan, screenshots of various emails, text messages, WhatsApp messages and details of missed calls to Mr Owens. The investigation meeting with the claimant took place on 24 August 2018. The claimant was accompanied by his Trade Union Representative. The claimant confirmed he had made the comments attributed to him by Mr McKiernan. However he said that he meant them in a funny way, -*"a gamer away",* as he contended that Mr McKiernan also plays interactive games. He said he had not realised his comments would be taken seriously. He confirmed that he was angry when he left work and he had been drinking when he had made the calls to Mr Owens and other colleagues over the weekend. When asked why he had called in five times to the duty phone to ask the same question about what was going on with his case, he responded that he was very agitated, it was all up in the air and he wanted to know what was happening. He told Ms Gilleece that with hindsight, he understood the seriousness of the comments and that colleagues were frightened and concerned. He conceded that this was not acceptable behaviour. The claimant also confirmed that he kept a penknife on his keyring which he brought into work on different occasions and he brought another

larger knife which was kept in his bag and which he showed to various colleagues. In mitigation he said that he had been in a lot of pain, had been unable to exercise, that he felt agitated all the time and that he was getting counselling and did not wish to go into work hungover. When Ms Gilleece urged him to use the EAP, the claimant stated that he was more comfortable using the Ashling Centre and his GP for support and he was trying to make an appointment with his GP.

24. Ms Gilleece concluded from her investigations, that the claimant had used unacceptable and threatening language to a Team Leader, Mr McKiernan and said *"have you ever wanted to use an Uzi"* and *"everyone leave in body bags";* that he had also made a threat to his Line Manager's life on an inbound call to BT on 18 August 2018 at 23.57pm; that he had harassed his Line Manager all weekend sending numerous texts, WhatsApp messages and calls from both his landline and mobile number; that he had telephoned into the Enniskillen Centre on five separate occasions between Saturday and Sunday and was very frustrated, agitated and upset on these calls and was consistently told he would be updated on Monday 20 August 2018; that he had approached another team member in a public shopping centre when he was with his partner and small daughter and was causing a general scene in the shop in his private time; that he called into BT facilities on 18 August 2018 made a threat on his manager's life and made reference to using an Uzi and killing 10 to 20 people, he was also using a lot of "curse words" on this call and made some sexual references; whilst conducting the interviews with a number of people involved in recent events two team mates had explained that the claimant had been carrying knives into work and that this, with recent behaviours, had made them fear for their own safety and for the safety of others in the workplace; that significant threatening behaviour had had a massive impact on the wellbeing of the centre as whole and it was a huge concern that the claimant could not explain his actions and agreed that this was completely unacceptable behaviour which had massively impacted on all involved. She recommended that the case be progressed as gross misconduct under the disciplinary procedure.

25. Ms Hodgen was nominated by HR to act as the disciplinary officer. The claimant was invited to a disciplinary meeting on 10 September 2018 to discuss allegations that he had committed, disciplinary offences constituting gross misconduct namely,

"Unprofessional intimidating, threating and offensive behaviour. In that:-

- *On 16 August 2018 whilst in the workplace and in the presence of colleagues, you made comments regarding shooting colleagues and nobody leaving unless in a body bag.*

- *By your own admission you have been in possession of 2 knives in the workplace, one of which you described as a penknife, the other you describe as a 4-inch knife. You have shown the knives to colleagues.*

- *Between 16 August 2018 and 20 August 2018 you made excessive unwanted and unwarranted contact of an inappropriate, intimidating and threatening nature with colleagues via the Play Station messaging network, email, text messaging, in person and by phone.*

Your actions have had a significant impact upon the overall wellbeing and perceived safety of your colleagues and the centre."

26. A copy of the investigation report compiled by Ms Gilleece and all the documentary evidence referred to in that report was enclosed with the invitation letter.

27. The claimant was accompanied by his Trade Union Representative, Mr Murphy at the disciplinary meeting. The claimant made the following representations: -

    (1) He carried the knives for convenience, one was in his bag and the other was on the keyring. He believed it was legal for him to carry them.

    (2) He had not meant to be intimidating when he approached Mr Gilbride in Asda.

    (3) The comments to Mr McKiernan were not meant to be threatening. He was agitated, felt stressed and that the things said were in jest.

    (4) He had not been drinking alcohol prior to 16 August 2018 but drank heavily over the weekend.

    (5) Mr Murphy suggested that the claimant's conversation with Mr McKiernan was by instant message only and a verbal conversation had not taken place. He asserted that the claimant had not mentioned about "*having an Uzi day"* but conceded that the claimant had mentioned about *"letting people leave in body bags".* He questioned how colleagues had become aware of the instant message conversation and suggested there had been a breach of confidentiality by Mr McKiernan.

    (6) The claimant said he was sorry for the incidents and that he did not intend to cause stress and wanted to make amends with the people who he had hurt. The claimant confirmed to Ms Hodgen that he accepted he had behaved in a way which was unprofessional, threating and intimidating. He reiterated that he was very sorry that he had caused worry to other members of staff, that he had been having a bad day, had made a comment which had been misinterpreted and that people had overreacted. Mr Murphy highlighted that the claimant's version of events in relation to this conversation with Mr McKiernan differed. The claimant reiterated that he had not made the comments verbally and they had only been made via instant message.

28. After the disciplinary meeting, Ms Hodgen sought clarification from Mr McKiernan about what had been said by the claimant, and the sequence of events on the evening of 16 August 2018. Mr McKiernan confirmed that during the IM conversation, the claimant did mention it being an *"Uzi day"*. He confirmed that afterwards he went down the call floor and asked the claimant at his desk *"was he alright?"* In this conversation, the claimant had again talked about having an *"Uzi day"* and *"letting people leave in body bags".* Mr McKiernan believed that this conversation was overheard by colleagues nearby.

29. Ms Hodgen considered the claimant's representations, the evidence and the additional information provided by Mr McKiernan in response to her further enquiries. She concluded that the claimant had been guilty of gross misconduct. She considered that the claimant had made threatening comments to Mr McKiernan

on 16 August 2018 as her further investigations had shown that the IM did refer to an Uzi day, despite the claimant's denial, and in a follow up conversation which had taken place with Mr McKiernan at the desk, the claimant referred to allowing people to leave in body bags. She took into account that the claimant had admitted to having made both comments in communications and she concluded that no matter the medium used to make these comments, *"they are still unacceptable threatening behaviour".* She further concluded that over the weekend, there had been over thirty individual incidents of the claimant contacting colleagues, which the claimant agreed was accurate and that he was responsible for them. These included the threat to his Line Manager on a call to BT. She was concerned that these instances of threatening behaviour towards other BT employees had taken place over the course of a weekend and had been directed to more than one person and that these incidents had also affected more people than those directly involved. The claimant had acknowledged to her that his colleagues had felt threatened, albeit this was not his intention. Further, she was concerned that claimant had admitted carrying and considered it was acceptable to carry a penknife on his keyring to work and that sometimes carrying other knives, one four inches long, into work. She stated that it was illegal to carry a knife in public without good reason and that the claimant had admitted that the second knife was larger than allowed by law and therefore concluded that it was illegal for the claimant to have brought this knife into work. She considered that it was his responsibility to be aware of the law regarding the carrying of knives. She felt she had to balance not only a duty of care to the claimant but also to all members of staff within BT who had been affected by the actions of the claimant. Several members of staff had had to avail of the Employee Assistance Programme as a result of the claimant's actions and others were absent due to stress. She considered the potential impact of allowing the claimant to return to work was too severe and she felt she could not trust the claimant not to behave in such a manner again. Her view was that the only appropriate action was dismissal. She did not consider a lesser sanction was warranted. Her decision was to summarily dismiss the claimant and she confirmed this in the outcome letter dated 18 September 2018. This stated the claimant's last day of employment to be 20 September 2018.

30. The claimant subsequently appealed against the decision to dismiss him. Ms Fiona Williamson, the Senior Operational Manager for Enniskillen Contact Centre, was appointed to deal with the appeal. The claimant emailed Ms Williamson on 27 September 2018 requesting a copy of the instant messages between himself and Mr McKiernan and Ms Cooke, a copy of his disability passport, the recording of the inbound call made by him on Saturday 18 August 2018 and the record of the disciplinary meeting with Ms Hodgen together with all notes and statements used for the meeting.

31. Ms Williamson replied to the claimant on 1 October 2018. She confirmed that he had already been provided with the statements and evidence considered by Ms Hodgen and a copy of the disciplinary policy and procedure. She pointed out that as he "owned" his disability passport, it should therefore already be in his possession and Mr Owens did not have it. She informed him that she was attempting to obtain copies of the IM conversations and written record of the disciplinary meeting. She emailed the claimant on 4 October 2018 to advise that arrangements would be made for him to listen to the inbound call to BT on 18 August 2018, prior to the appeal meeting and allow him time to consider the recording before the appeal meeting began. Ms Williamson provided copies of the transcripts of the inbound calls to BT made by the claimant on 18 August 2018.

She was not able to obtain the IM conversation transcripts prior to the appeal meeting, which took place on 16 October 2018. The appeal meeting was recorded and the claimant was accompanied by his Trade Union Representative, Mr David Bland. After Ms Williamson read out the disciplinary charges, she invited the claimant and his trade union representative to make representations in support of his appeal. The following points were made by the claimant: -

(1) He had not intended to be intimidating or threatening and he was sorry that his colleagues felt that way.

(2) He admitted bringing the knives into work but disputed that they were illegal as one was the penknife on his keyring and the other was 2.75 inches and therefore within the legal limits. He disputed that the knives had caused distress to other members of staff at the time. He did not think it inappropriate to bring knives into the workplace. He outlined one was on his keyring and he kept the other for use on his parents' farm and did not consider them as a weapon nor did he intend to use them to threaten others. He raised an issue that the knives had been brought into the disciplinary investigation as an *"afterthought",* as they did not feature in the events of 16- 20 August 2018,

(3) He did not have verbal conversation with Mr McKiernan on 16 August 2018 and asserted that the comments were made by him via instant message only. He was unaware as to how his colleagues became aware of the conversation on IM and commented that it would have been more appropriate for Mr McKiernan to have had any conversation off the floor. Mr Bland suggested that Mr McKiernan had breached confidentiality which quickly led to rumours being spread among colleagues about the claimant. Mr Bland also queried why Aaron Lindsay had been asked to make a statement as he had not been on duty on 16 August 2018.

(4) He admitted he had made comments about having an Uzi day and staff leaving in body bags. He said this because he was having a bad day however he believed that Mr McKiernan would take this as a joke. He had used gaming language and Mr McKiernan is a gamer. He said he had been feeling stressed that week as he had been off alcohol and was unable to exercise due to pain from his medical condition. He confirmed that he did not raise any issues about his physical or mental state with anyone at work on 16 August 2018. Mr Bland suggested that team leaders had *"missed clues"* that all was not well with the claimant and that the comments to Mr McKiernan on the IM, although with hindsight were clearly not inappropriate, but may have been a cry for help and a way of communicating stress.

(5) He stated that he had informed Mr Owens on 17 August 2018 that these comments were a joke, and not meant literally. He could not understand why his father had been called without consulting him first and that he did not want him contacted as they had had an argument. He felt he had not been treated as an adult and this action had aggravated the situation. He confirmed that he appreciated why his father had been called to collect him but this agitated him and the first

thing he did was get a drink and after receiving a phone call from the police he had gone into Asda to get more alcohol and while there bumped into Mr Gilbride. He confirmed that he was very agitated at that point but that he would not have considered himself as a threat to Mr Gilbride or his family.

(6) The claimant acknowledged that he was informed by Mr Owens on 17 August 2018 that there was concern for his wellbeing, that he was being sent home for the weekend and that he would be contacted on the following Monday with more information as to the next steps. He stated that nevertheless he tried to contact Mr Owens as he was not clear what was happening and he was stressed and anxious throughout the weekend, which was "a blur". He asserted that he had not meant to intimidate Mr Owens or his other colleagues and acknowledged that his contacts and attempts to contact them had been with hindsight, inappropriate.

(7) The claimant confirmed he had been provided with a transcript of his call to BT on 18 August 2018. He accepted that he was under the influence of alcohol when he made the call and that he did say that his manager *"would be dead one, or the other",* as well as making other highly inappropriate and unprofessional comments.

(8) The claimant provided a number of character references. These contained opinion that the claimant is not a violent person and exhorted the respondent to uphold the claimant's appeal. He expressed remorse for causing offence to others and making them feel unsafe at work but stated that he was also disappointed considering how long he had known them that they felt that way. He felt it had been blown out of all proportion from an instant message.

32. It was agreed that Ms Williamson should defer making her decision on the appeal until after she had obtained the transcripts of the IM conversations. These were duly obtained and copies of the transcripts were sent to the claimant on 24 October 2018. Mr Bland sent further written representations about the transcripts. He contended the transcripts showed that:

(i) the claimant clearly signalled to Ms Cooke that he was stressed and having a bad day. Although she had asked if there was anything she could do to help, she did not follow through by checking that he was alright.

(ii) The claimant made comments to Mr McKiernan through IM and not verbally on the floor. These comments should have been a cause for concern; however if a follow up conversation took place it should have been conducted off the floor rather than at the claimant's desk.

(iii) There was no evidence that the claimant had told anyone about the contents of this exchange and therefore if his colleagues were aware of the subject matter of the exchange this was because Mr McKiernan divulged it inappropriately.

33. Ms Williamson also had a follow up conversation with Mr McKiernan before reaching her decision. He confirmed to her that he had conversations with the

claimant by IM and on the floor afterwards. He was following up with the claimant if he had picked up the customer call and the claimant had responded by asking him "*do you ever feel like shooting the place up"* and saying about people leaving in *"body bags".* He clarified that at this point he did not feel it was a cause for concern but had discussed it with another team leader and agreed that he should report it to Mr Owens when back on shift the next day. With hindsight he now felt that he should have raised it on the day. He told her that he was not a gamer as had been alleged by the claimant.

34. Ms Williamson considered evidence gathered during the appeal and the earlier stages of the disciplinary process and the additional information from Mr McKiernan. She considered the representations made by and on behalf of the claimant, including the contents of the character references. Her decision was to uphold the original disciplinary decision and penalty. She took into account the T Standards of Behaviour policy which states that BT will *"endeavour to create an environment free of bullying and intimidating behaviour"* and will *"take appropriate actions to protect individuals and create a safe working environment"* and the standards of behaviour which referred to *"acts of bullying, harassment, discrimination or violence"* and *"unacceptable behaviour towards customers or colleagues".* The claimant had admitted that on 16 August 2018 he made comments about shooting colleagues and no one leaving unless in a body bag. She considered that the evidence supported that there had been a verbal conversation between Mr McKiernan and the claimant in addition to their IM conversation. She noted that the claimant made the offending comments as part of his response to a query from Mr McKiernan if he had picked up the customer complaint. She concluded that it was normal practice for team leaders to ask advisors to pick up work on the floor and that this would not require a private conversation. She did not accept that Mr McKiernan had breached confidentiality. She confirmed that the reason that Mr Lindsay had been interviewed was because he had had a conversation with another advisor about the conversation between the claimant and Mr McKiernan being overheard on the floor. The claimant also admitted that he brought knives into the workplace. Ms Williamson considered that it was appropriate that this had been investigated even though it did not form part of the claimant's actions between 16 and 20 August 2018. The matter had been raised by colleagues, who said they were anxious about him carrying knives in the context of the comments made by the claimant to Mr McKiernan and who now acknowledged that they should have reported earlier that the claimant was carrying knives. Her view was that it was *"wholly inappropriate to carry a knife into the workplace"* in view of BT's Standards of Behaviour. The claimant accepted that between 16 and 20 August 2018, he had made inappropriate, unwarranted and excessive contact despite having been informed on numerous occasions over the weekend that someone would contact him on Monday. The claimant could not recall and did not dispute many of these actions. She was particularly concerned by the call from the claimant on 18 August 2018 in which he had made a threat to kill his manager and repeated his comments that he would *"kill 10 or 20 people if I was given a choice but if not given a choice I would come in and just open fire"* and *"you can't even say that you want to take the person that did it by the throat because that might be taken out of context".* She understood that the claimant had not intended to upset, intimidate or offend anyone but it was clear that other members of staff had been left feeling uncomfortable and intimidated. Her view was that this was compounded by the claimant's reaction on 17 August 2018, to being sent home and that it was the *"actions and reactions of the claimant to this that caused people to feel threatened".* Her view was that the claimant needed to consider the perception of

others and take responsibility for his own actions. Ms Williamson considered the impact of the claimant's addiction and health problems on his actions and that he had been off alcohol before the events occurred. She noted that the claimant had confirmed that he had not raised it with anyone and that he had a responsibility to raise with his team leader anything that may impact upon his ability to carry out his role and his overall wellbeing. She noted that the claimant did not respond to Ms Cooke's query if she could help him with anything. She acknowledged that colleagues had made statements which indicated that something was not right and that Mr McKiernan should have addressed the claimant's behaviour earlier, however when it was reported to Mr Owens, it was recognised that there was a need to look after the claimant's welfare as well as minimising the impact of his behaviours on his colleagues. She considered that Mr Owens had acted professionally and followed normal protocol and that he was genuinely concerned with the claimant's welfare. She noted also that on previous occasions, the claimant had raised no issue when his father had been contacted. Mr Owens was unaware on this occasion that the claimant and his father had argued. She stated that *"the intention was for you to leave for your own wellbeing and into the care of your father, then for Chris to follow up on Monday. Had you done this without the numerous events over the weekend, this would have played out differently also. Although clearly you are remorseful, it is important that you take responsibility for your own actions."* She noted that his actions made people feel threatened and intimated and some team members had reported absent from work due to stress. Ms Williamson considered whether a final written warning would have been a more suitable penalty but rejected this given the extent of the claimant's actions and reactions and the impact of these on his colleagues.

35. Ms Williamson informed the claimant of the appeal outcome by letter dated 31 October 2018 which provided the rationale for her decision. She also telephoned the claimant on 1 November 2018 to discuss the appeal outcome.

36. The claimant's closing submissions at the Hearing may be summarised as follows:

    (1) The claimant accepted that on 16 August 2018, he made comments to Mr McKiernan about having an Uzi day and people leaving in body bags. He accepted that these comments were inappropriate. He continued to deny that he had a verbal conversation with Mr McKiernan in which he repeated these comments in front of other colleagues. It was contended that the respondent failed to investigate whether there had been a follow up conversation with Mr McKiernan after the IM message. He maintained that the comments were made in jest, that Mr McKiernan knew this and that his comments could not reasonably have been perceived to be a threat of violence. It was submitted that Mr McKiernan had breached confidentiality and by disclosing the content of the IM conversation, he had created hysteria among the claimant's colleagues. It was further submitted that the respondent failed properly to investigate the actions of Mr McKiernan, who he said had encouraged and steered the conversation towards a *"darker turn of events"* by mentioning an incident in Vegas and a pilot who had taken a plane down by killing himself. The Tribunal notes that this latter suggestion was not raised by the claimant in terms at any point during the disciplinary process.

    (2) The claimant's actions on 16 August 2018 and subsequently, resulted from his struggles with mental health issues and alcohol addiction. The claimant

did not deny the contact and comments made to his colleagues over the weekend. He accepted that it was inappropriate and culpable behaviour. He told the Tribunal that he felt guilty and ashamed but that alcohol, mixed with his medication, had affected his behaviour and clouded his judgment. It was suggested that the respondent did not take all steps necessary to address the claimant's health issues. *He "felt betrayed"* and was *"furious"* that they had contacted his father. The respondent had caused him undue stress and agitation by reporting the matter to the police.

(3) The respondent had exaggerated and reacted disproportionately to the claimant bringing knives into work. The police had confirmed that the pocketknife was legal. He is a farmer's son who uses the knives primarily on the farm and he finds it useful to keep one in the car. During the disciplinary investigation his colleagues had confirmed that they had not been alarmed at the time he had shown them the knives prior to 16 August 2018. Hysteria had set in because staff members were not familiar with the facts of the situation.

(4) The penalty of dismissal was too harsh in circumstances where BT managers had not kept the matter confidential and hysteria had led to rumours which got out of control. It was accepted that the claimant was guilty of misconduct but that a final written warning would have been a more suitable penalty in the circumstances.

The Law

37. The right not to be unfairly dismissed is set out in the Employment Rights (Northern Ireland) Order 1996 as amended ("the 1996 Order"). Article 130 provides that it is for the employer to show the reason for the dismissal and that the reason falls within one of the fair reasons outlined at Article 130(2). One of the potentially fair reasons for dismissal, listed at Article 130(2)(b), relates to the conduct of the employee. If the Tribunal finds that the employer has dismissed for a potentially fair reason, the Tribunal must then go on to consider whether the dismissal was fair or unfair in accordance with Article 130(4) which states:

> *"(4) Where the employer has fulfilled the requirements of paragraph (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".*

38. The task for the Tribunal in a misconduct dismissal case is set out as follows in ***British Home Stores Ltd v Burchell 1980 ICR 303***:

> *"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of misconduct in question … entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating*

shortly and compendiously what is in fact more than one element. First of all there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case".

39. The Northern Ireland Court of Appeal decision in the case of ***Rogan v the South Eastern Health and Social Care Trust 2009 NICA 47*** endorses the ***Burchell*** approach and outlines the task for the Tribunal in a misconduct dismissal case. The test is whether dismissal was within the band of reasonable responses for a reasonable employer. The Tribunal must not substitute its own view for that of the employer but must assess whether the employer's act in dismissing the employee fell outside the band of reasonable responses for a reasonable employer to adopt in the circumstances. This assessment applies to both procedure and penalty.

40. The case of ***Connolly v Western Health and Social Care Trust [2017*]** NICA states as regards dismissal for gross misconduct:

"[22] The decision is whether or not a reasonable employer in the circumstances could dismiss bearing in mind 'equity and the substantial merits of the case'. I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer's decision to dismiss without comparing that decision with the alternative decisions? In the context of dismissal the alternative is non dismissal i.e. some lesser sanction such as a final written warning.

*[23] The authority for the Tribunal's statement given in Harvey, Industrial Relations at paragraph [975] is the decision of the Court of Appeal in England in **British Leyland UK Limited v Swift [1981] IRLR 91**. Lord Denning MR said the following at p. 93:*

"The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said:

'… A reasonable employer would in our opinion, have considered that a lesser penalty was appropriate'.

I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the

dismissal must be upheld as fair: even though some other employers may not have dismissed him."

Ackner LJ and Griffiths LJ, as they then were, gave concurring ex tempore judgments. None of those say that a lesser penalty was not a consideration that was relevant for the Tribunal to take into account. They were stating that the overall test was. I think it important to bear this in mind. Harvey also cites in support **Gair v Bevan Harris Limited [1983] IRLR 368***. The judgment of the Lord Justice Clerk does indeed cite and follow the decision in* **British Leyland** *but it does not exclude consideration of a lesser sanction as a relevant consideration".*

41. The ***Connolly*** decision confirms that the task of the Tribunal is not to substitute its view for the employer's. The Tribunal must decide in a gross misconduct case whether there was wilful and deliberate disregard for rules or policies and whether dismissal was an appropriate sanction. The Tribunal must look at whether the actions of the employer with regard to process and penalty were within the band of reasonable responses for a reasonable employer in the circumstances. The Tribunal must then determine whether the dismissal was fair or unfair in accordance with equity and the substantial merits of the case. As part of this assessment the Tribunal must look at whether a lesser sanction was appropriate in the circumstances.

Conclusions

42. The respondent complied with the statutory dismissal procedures and therefore the Tribunal went on to consider the fairness or otherwise of the claimant's dismissal pursuant to Article 130 and 130A of the 1996 Order as amended.

43. The Tribunal was satisfied that the respondent had established that the principal reason for the claimant's dismissal was his conduct, which is a potentially fair reason

44. Therefore the Tribunal had to determine whether the dismissal was fair or unfair within the meaning of Article 130(4) and whether the decision to dismiss the claimant did fall within the band of reasonable responses which a reasonable employer might have adopted, mindful that it is not for the Tribunal simply to substitute its own view that another course of action might have been taken by the respondent.

45. The Tribunal is satisfied that in the present case the respondent had a genuinely held belief that the claimant was guilty of gross misconduct. In relation to the comments made on 16 August 2018, the respondent did in fact, as found above, carry out further investigations into the claimant's allegation that he did not have a verbal conversation with Mr McKiernan on the floor. This issue was addressed at both the disciplinary and appeal stages. The Tribunal considered that the investigation into this matter was thorough and there was sufficient evidence upon which to conclude that the verbal conversation did take place and that consequently there had not been a breach of confidentiality by Mr McKiernan. The claimant admitted making the statements about having an "Uzi day" and shooting colleagues and there was evidence before the decision makers that the claimant's colleagues were thereby caused great alarm and distress, which was heightened by the fact that the claimant had previously disclosed that he carried knives into work. The

Tribunal did not consider that the respondent acted unreasonably in investigating the knives issue, given that this had been reported to the respondent by the claimant's colleagues. It was recognised, in the disciplinary process, that even though the claimant did not intend to cause alarm and did not himself think there was anything wrong with bringing knives into work, it was not unreasonable in the circumstances for the respondent to conclude that it was wholly inappropriate for the claimant to bring knives into the workplace. The claimant has showed little or no insight into the impact of his actions upon his colleagues.

46. The Tribunal rejected the contention that the respondent failed in its duty of care towards the claimant. The claimant had not in fact requested assistance on 16 August 2018. Further, it was clear that the respondent initially adopted a "welfare" approach by placing him on special leave and trying to place him in the care of his father, rather than immediately suspending him. The Tribunal considers that the response of the respondent was reasonable and proportionate in the circumstances and does not accept that the claimant has any cause for criticising the respondent and his first line manager for calling his father and reporting the initial alleged comments to the police. Mr Owens followed correct procedures and balanced his duty of care both to the claimant and his colleagues. The Tribunal considers that the decision to send the claimant home on special leave was fully justified, given the nature of the comments he made to Mr McKiernan and also because the claimant reported to Mr Owens that he was suffering from stress, had run out of medication and had not been sleeping. Given the nature of the comments made by the claimant and the surrounding circumstances, the Tribunal considers that the respondent acted correctly in reporting the matter to the police.

47. It is noted that disciplinary action was only instituted by the respondent following the claimant's actions after his meeting with Mr Owens and over the weekend. The claimant conceded in cross examination that his actions amounted to excessive, unwanted and unwarranted contact and with hindsight that they were inappropriate, and intimidated and threatened his colleagues. He further conceded that this behaviour was correctly categorised by the respondent as gross misconduct. The evidence obtained during the disciplinary process was that even though the claimant was aware that his colleagues had raised concerns about comments made to Mr McKiernan, he nevertheless repeated those comments and additionally made death threats against his first line manager in telephone calls to third parties.

48. The Tribunal was therefore satisfied that the respondent correctly categorised the claimant's actions as gross misconduct which, it is clear from the respondent's disciplinary policy, will normally attract a penalty of summary dismissal. The claimant's case is that the penalty was excessive although he considered his actions were culpable and serious enough to warrant a final written warning. The appropriateness of the penalty was fully aired at the appeal hearing and consideration was given by Ms Williamson to the imposition of a lesser penalty. She did not feel that this was appropriate given the serious impact of the claimant's actions upon his colleagues. Ms Williamson weighed all the relevant mitigating factors, including her acceptance that the claimant did not intend to intimidate and threaten his colleagues and his expressions of remorse. She also took into account the impact on his behaviour of the claimant's addiction and health problems. Nevertheless she concluded on the evidence available to her, that a lesser penalty was not appropriate, particularly in view of the nature and impact of the claimant's actions upon the wellbeing and perceived safety of his colleagues. She had ample basis upon which to conclude that it was the claimant's actions and reactions after

being sent home, which had impacted most upon his colleagues. The Tribunal therefore considers that Ms Williamson's decision to uphold the original decision to dismiss was within the band of reasonable responses and was reasonable in all the circumstances.

49. Accordingly, the Tribunal is satisfied, that the dismissal was fair in accordance with equity and the substantial merits of the case. The claim of unfair dismissal is not well founded and is dismissed in its entirety.

Employment Judge:

Date and place of hearing: 13 September 2019 and 7 October 2019, Belfast.

Date decision recorded in register and issued to parties:

THE FAIR EMPLOYMENT TRIBUNAL

CASE REFS:
7/19 FET
612/19

CLAIMANT: **Stephen Crean**

RESPONDENT: **British Telecommunications PLC**

RULING ON AN APPLICATION

Constitution of Tribunal:

Employment Judge: **Employment Judge Knight**

Members: **Mr E Grant**
Mr I Rosbotham

Appearances:

The claimant was unrepresented and appeared in person supported by Mrs Pauline Breen, a family friend.

The respondent was represented by Ms Maura Herron Barrister-at -Law instructed by Napier & Sons Solicitors.

Issues

1. The claimant alleges that he was unfairly dismissed and has suffered discrimination on the grounds of disability relating to his summary dismissal on 20 September 2018 for gross misconduct.

2. The parties confirmed that the legal issues for determination are those identified in a provisional list of issues set out at a case management discussion on 1 May 2019 at which the claimant had legal representation. Since then his legal advisors went off record and the claimant became self represented.

3. The legal issues as set out at that case management discussion are as follows:-

Unfair Dismissal

'1. Was there a fair reason for dismissal having regard to Article 130 of the Employment Rights (NI) Order 1996?

2. Did the respondent, in the circumstances and having regard to the equity and substantial merits of the case, act reasonably in treating the reason identified at paragraph 1, as sufficient reason for dismissing the claimant?

Disability Discrimination

3. Does the claimant have a disability as defined by section 1 of the Disability Discrimination Act 1995 ("the DDA")?

4. If the claimant is a disabled person, was the claimant subjected to unlawful discrimination on the grounds of his disability, contrary to section 3A(5) of the DDA.

4. At the outset of the hearing the claimant expressly withdrew his complaint of religious discrimination. He informed the tribunal that he intended to pursue a complaint that the respondent failed to make reasonable adjustments for him contrary to section 4A of the DDA as averred to in his originating application and as asserted in his written statement of evidence

5. Case Management Discussions ("CMD") took place on 1 May 2019,14 June 2019, 4 July 2019 and 21 August 2019. At the CMD on 1 May 2019 the claimant clarified that the disabilities relied upon by him were psoriatic arthropathy and "depression". It was indicated that the respondent accepted the claimant was a disabled by reason of psoriatic arthropathy but did not accept that he was disabled by reason of depression. On 21 August 2019 Employment Judge Buggy's opinion was that the claimant currently had "significant mental health problems" and directed that the liability hearing be split into two phases, the claimant's evidence to be on the 13 September 2019 and the respondent's evidence to be heard on 7 October 2019. A remedies hearing was to be arranged as may be appropriate thereafter. Employment Judge Buggy directed that written witness statements "may be provided only if the providing party wished to do so". Although not expressly stated in the CMD records Employment Judge Buggy informed the claimant that it was his responsibility to provide relevant medical evidence of his alleged disabilities for the purposes of the Hearing.

6. On 21 August 2019 it was indicated that at the end of the September phase of the liability hearing the respondent is likely to ask the FET to strike out the case on the basis that each of the claimant's claims has "no reasonable prospect of success". Mrs Breen was present to support the claimant at this CMD. A record of the CMDs was sent out to the parties afterwards.

7. At the Hearing on 13 September 2019, the claimant contended that his actions which started the process leading to his summary dismissal were attributable to a mental impairment, namely depression. The claimant accepted that he has an addiction to alcohol, but he asserted that this and self-harming were coping mechanisms for his depression, which was further adversely affected by the pain killing medication prescribed for his psoriatic arthropathy. He asserted that the respondent had failed to take these matters into account in mitigation of his actions and confirmed that these contentions formed the basis of his disability discrimination claims as well as his unfair dismissal claim. Additionally, he alleged that the respondent had failed to take measures to keep him safe at work such as making regular referrals to occupational health and filling in a "passport" to monitor his health needs. These matters were all disputed by the respondent, as put to the claimant in cross examination.

8. At the conclusion of the claimant's evidence, Ms Herron BL made an application to strike out the claimant's complaints of disability discrimination as having established no case to answer on the grounds that:

1. the claimant's mental impairment at the relevant time was alcohol and drug dependency which is expressly excluded from the definition of disability for the purposes of the DDA. Ms Herron again confirmed that it was accepted that the claimant suffered from a physical impairment, namely psoriatic arthropathy;

2. for the purposes of his direct disability claim, the claimant had failed to identify a suitable evidential (actual or hypothetical) comparator or to establish facts to show that he had been treated less favourably on grounds of his disability therefore this claim must fail;

3. in respect of his claim of a failure by the respondent to make reasonable adjustments, the claimant had not been able to show that he had been placed at a substantial disadvantage, in comparison to persons without a disability, by a provision, criterion or practice applied by the respondent in accordance with the statutory requirements and judicial guidance contained in the case of ***Environment Agency v. Rowan [2007] UKEAT 0060_07_0111.***

The nature of a disability as a preliminary issue

9. The tribunal is mindful that the line of legal of authorities is against granting an application of no case to answer after hearing the evidence of only one party in discrimination cases. This was confirmed by the Court of Appeal in ***Logan v Commissioners of Customs and Excise [2003] EWCA Civ 1068, [2004] IRLR 63***. Ward LJ stressed the exceptional nature of the power to dismiss a case after hearing only one side, and stated that it should be rare for a submission of no case to be made in an employment tribunal and even rarer for it to succeed. The case highlights the danger of dismissing a claim on the strength of a submission. This applies equally to applications to strike out a claim on the basis that there is no reasonable prospect of success.

10. The tribunal however considered that in the present case it was in the interests of justice to deal with the question of whether the claimant has mental impairment which amounts to a disability within the meaning of section 1 of the DDA as a preliminary point. The claimant was aware that this was a disputed issue which he was required to prove on a balance of probabilities. Further he was put on notice of the respondent's likely intention to make such an application to strike out his claims at the CMD on 21 August 2018. The tribunal did not consider, in relation to this discrete issue, that the respondent's witnesses would be able to add anything further to the evidence already before it which was the claimant's own evidence, occupational health records and selected medical records provided by the claimant. In the event of a finding in favour of the claimant that he did at the relevant time suffer from depression, the tribunal would have declined to accede to the respondent's application dismiss the disability discrimination claims without first hearing the evidence from its witnesses.

Meaning of disability within the DDA

11. Section 1(1) of the DDA states that: 'Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.'

Schedule 1 of the DDA at paragraph 2(1) provides that: 'The effect of an impairment is a long-term effect if –

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

(c) it is likely to last for the rest of the life of the person affected.'

Paragraph 4(1) of Schedule 1 provides that: 'An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following –

(a) mobility;

(b) manual dexterity;

(c) physical co-ordination;

(d) continence;

(e) ability to lift, carry or otherwise move everyday objects;

(f) speech, hearing or eyesight;

(g) memory or ability to concentrate, learn or understand; or

(h) perception of the risk of physical danger.'

12. Regulation 3(1) of the Disability Discrimination (Meaning of Disability) Regulations (NI) 1996 provides:

(1) Subject to paragraph (2), addiction to alcohol, nicotine or any other substance is to be treated as not amounting to an impairment for the purposes of the Act.

(2) Paragraph (1) does not apply to an addiction which was originally the result of administration of medically prescribed drugs or other medical treatment.

13. The burden of proving disability within the terms of the DDA rests with the claimant to be established on the balance of probabilities.

14. Neither party referred the tribunal to any specific legal authority in respect of the meaning of disability.

15. The tribunal has also considered the content of the Equality Commission's DDA Code of Practice – Employment and Occupation (including the April 2013 updates). This states it is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment, although alcoholism itself is expressly excluded from the scope of the definition of disability in the Act. What it is important to consider is the effect of an impairment not its cause.

Facts found concerning the existence of a disability within the meaning of the DDA

16. For the purposes of his disability discrimination claims the claimant is relying solely on his assertion that at the relevant he suffered depression and that his depression constituted a disability within the terms of the Disability Discrimination Act 1995 (as

amended) ['DDA']. His psoriatic arthropathy, which is accepted to be a disability under the DDA, is only relevant to the disability discrimination claims made by the claimant to the extent that he alleges that the effects of the pain-relieving medication prescribed for that condition exacerbated his alleged depression.

17. The claimant told the tribunal that he has struggled with mental health issues since age of 16 resulting in continuous self harming episodes. The claimant was using cannabis from his teenage years. As stated above the claimant has characterised his mental health condition as being depression and that he copes with this by using alcohol and self-harming. The claimant has received treatment for an alcohol addiction for many years. He attributed his actions and comments on 16 August 2018 to suffering with "mental health struggles with addiction while taking medication." He had been abstinent from alcohol for a period of time prior to 16 August 2018 and the withdrawal of alcohol added to him feeling stressed and overwhelmed on that date which he said was the explanation for comments made by him that day to Keith McKieran and that he resumed drinking alcohol some days afterwards which explained his actions towards his colleagues after 21 August 2018.

18. The claimant was employed by the respondent as an In-Life Advisor (Digital Care) from 10 July 2007. He had significant periods of sickness absence throughout his employment from a relatively early stage. Most of these absences were related to his consumption of alcohol and psoriatic arthropathy. Occupational health reports from the claimant's personnel file were before the Tribunal. The respondent referred the claimant for OH assessments due his sickness absences. These included reports from Dr Zubier dated 27 January 2010 and 4 January 2011 respectively. Dr Zubier described the claimant in his first report as having a "lifestyle issue" and suggested that the respondent may wish to invoke its alcohol policy. He recommended that any perceived pressure in work could be alleviated by appropriate training, support and supervision. In the second report, Dr Zubier confirmed his opinion that the claimant "continues to have an alcohol problem" for which he was receiving counselling but believed the claimant would benefit from a more structured treatment programme. Dr Zubier's expressed his view that the claimant's medical condition would "not be afforded protection under the disability legislation".

19. A medical report from the claimant's own GP, Dr Cathcart dated 28 September 2018 sent to the respondent during the disciplinary process confirmed that claimant suffering from psoriatic arthropathy for which he "is currently prescribed a combination of DMARDs and strong opiate analgesics to control pain and disability". Dr Cathcart suggested in this that the claimant's "health problems over past three years and powerful medication" as being "mitigating factors which may have temporarily adversely affected his judgment and interpersonal skills". There was no mention of depression or that the painkilling medication might adversely affect his mental state.

20. The claimant did not provide any medical report which confirmed that he had depression. He produced a selection of medical records which were included in the hearing bundle. He was invited by the Tribunal to point out those particular records which he contended proved that he had depression. These were considered very carefully by the Tribunal.

21. A letter dated 9 December 2009 from Mr Eddie Gavin of the Community Addiction Team, Tyrone and Fermanagh Hospital to the claimant's GP, confirmed that he had been assessed as having high dependency on alcohol. The history given by the claimant was that he was drinking up to a bottle of spirits every other night and that "alcohol impacts negatively upon every area of his life". He admitted also to using

cannabis. The claimant reported to Mr Gavin that, "Psychologically he experiences social phobia and depression and is aware that his use of alcohol exacerbates these illnesses. He admits to thoughts of life not worth living and self-cutting in the past." The claimant was discharged by Mr Gavin after three appointments as he felt the claimant was not motivated to address his alcohol issues or prepared to accept his advice.

22. A further letter dated 15 February 2011 from Mr Gavin, confirmed that the claimant continued to drink very heavily. The claimant told him he had experienced physical withdrawal symptoms and psychological problems relating to his alcohol use including "anxiety and depression". There was however no medical evidence to show that the claimant was diagnosed with or received any treatment specifically for anxiety and depression.

23. A letter dated 19 May 2011 from Dr Murty, a SHO to Dr O'Hara in the Addiction Treatment Unit, Tyrone and Fermanagh Hospital advised that the claimant was removed from a 6-week rehabilitation programme due to a perceived lack of commitment. The claimant was reviewed prior to his discharge during which he described his "mood as being fine".

24. An undated letter from the Addiction Treatment Unit to the claimant's GP concerning his admission from 8-11 August 2011 stated the claimant's "Past Medical/Psychiatric History as including deliberate self-harm, alcohol dependence syndrome, use of cannabis and other illicit drugs and anxiety". No further details are given about these matters.

25. Another undated letter from an Anne Marie Hughes confirmed that the claimant, following completion of two weeks in the inpatient programme of the Addiction Treatment Unit, continued to work with her in relation to his alcohol and cannabis use. He was discharged as he appeared to be managing well.

26. A letter dated 12 December 2012 from Mr Herbert, Consultant Plastic Surgeon refers to self-harming scars from "a difficult time in his teenage years" and confirmed that his wounds were unfortunately unsuitable for revision surgery.

27. A letter dated 28 November 2018 from the Alcohol and Drugs Service confirmed that the claimant was admitted for detoxification following a seizure at home.

28. A letter dated 28 December 2018 letter from Dr Scott Payne, Consultant Addiction Psychiatrist of the Alcohol and Drugs Service, confirms that the claimant gave a history of approximately 10 years heavy alcohol use and a long history of mood fluctuation and self-harm, particularly when he is drinking. He told Dr Payne that he had last self- harmed several weeks before which was related to negative emotions, not an attempt to end his life. Dr Payne found no evidence of any psychotic symptomology, passivity phenomena or auditory hallucinations. There was a discussion about the claimant carrying knives and the circumstances surrounding his dismissal. Dr Payne stated that the claimant told him he had sent an email stating that he was having "thoughts about harming colleagues but that this was sent as a joke, as he was just feeling frustrated". At the date of this examination the claimant's appeal against dismissal was pending. He recognised that abstinence from alcohol could be the better option but that he was planning to try to control his drinking in the short term. Dr Payne reported: "Stephen feels that his mood difficulties at present are due to his situation regarding work and are not too bad as long as he doesn't return to heavy drinking" and that the claimant was not interested in any talking treatment or medication options to help with his mood or self harm behaviour.

CONCLUSIONS

29. The issue is whether or not the claimant has satisfied the tribunal on the balance of probabilities that at the relevant time he was suffering a mental impairment which amounts to a disability within the meaning of the DDA. If the claimant fails to do so then his claims of direct disability discrimination and disability discrimination by reason of the failure to make reasonable adjustments will automatically fail, even though the claimant does have a physical impairment which amounts to a DDA disability. This is because the claimant's claims of unlawful disability discrimination are not premised upon his physical disability.

30. The tribunal determines this issue based on the evidence before it.

31. The tribunal is satisfied on a balance of probabilities as shown by the medical evidence and on his own evidence that the claimant at the relevant time was suffering from alcohol dependency which amounts to an addiction for which he has been treated for many years. The claimant has reported health issues to his medical advisors including "anxiety", "low mood", "depression", "social withdrawal" and he has self harmed. However, there is no medical evidence to suggest that these issues themselves constitute impairments which flow from his alcohol dependency, in the nature of the liver disease example given above. In the absence of such medical evidence and because the available medical evidence focuses exclusively on his alcohol dependency, the tribunal considers that these health issues must be viewed as part and parcel of claimant's alcohol dependency

32. Further, there is no medical evidence to show that the claimant received any treatment specifically for anxiety and depression. Significantly Dr Cathcart in his letter dated 28 September 2018 does not specify that the claimant's health problems include depression, nor does he make any reference to anti-depressant medication as having been prescribed. Nor does Dr Cathcart suggest that the pain-relieving medication prescribed for the claimant adversely affected his mental health. The claimant's GP has the primary responsibility for treating the claimant and so the Tribunal would have expected this to be mentioned in this letter if the claimant had depression as was alleged by him.

33. The claimant's mental impairment amounts to an addiction to alcohol, therefore it must be treated as not amounting to an impairment for the purposes of the DDA. The claimant's claims of unlawful disability discrimination are dismissed in their entirety.

34. The Hearing will reconvene on 7 October 2019 to deal with the evidence of the respondent and closing submissions from the parties on the liability issues set out an paragraphs 1 and 2 above in relation to the complaint of unfair dismissal.

Employment Judge: [signature]

Date: 20.09.2019