EMPLOYMENT TRIBUNALS

Claimant: **Mr M Newman**

Respondent: **Asda Stores Ltd**

Heard at: **Bristol** **On: 22–25 January 2018**

Before: **Employment Judge Sutton QC**

Members Mrs S Richards
Mr C Willis

Representation

Claimant: **Mr T Gillie, counsel**

Respondent: **Ms R Barrett, counsel**

JUDGMENT

1. The following complaints are upheld:-

   (a) unfair dismissal, contrary to s.98 Employment Rights Act 1996

   (b) discrimination arising from disability, contrary to s.15 Equality Act 2010

   (c) failure to make reasonable adjustments, contrary to ss.20 & 21 Equality Act 2010.

   (d) Wrongful dismissal.

2. The complaint of indirect discrimination, contrary to s.19 of the Equality Act 2010, is dismissed upon withdrawal.

REASONS

Complaints

1. By a claim issued on 12 May 2017, the Claimant complained of unfair dismissal under the general provisions of s.98 of the Employment Rights Act 1996, wrongful dismissal, discrimination arising from disability, contrary to s.15 of the Equality Act 2010, failure to make reasonable adjustments contrary to s.20 and 21 of the Equality Act 2010 and indirect discrimination, contrary to s.19 of the Equality Act 2010. The last of these complaints was withdrawn on 22 January 2018.

Witnesses

2. The Tribunal heard evidence from Gary James, formerly a General Merchandise (GM) Section Leader at the respondent's Haydon store, who supervised the claimant at the material time; Martin Johnson, GM Trading Manager and the claimant's former line manager; Colin Davis, Deputy Store Manager at the Haydon store, who acted as the dismissing manager and Dale Goodright who occupied the position of Deputy Store Manager at the West Swindon store and acted as appeal manager. The claimant also gave evidence.

Disability

3. It was conceded that the claimant had two impairments amounting to disabilities for the purposes of s.6 of the Equality Act 2010: partial sightedness and back pain. In relation to his sight impairment, the claimant was registered disabled from 1989. He was registered blind in July 1999 following changes in the disability benefits legislation. The claimant reads with considerable difficulty. He cannot see bus numbers, for example, and has difficulty identifying different colours. He can see text if he is given sufficient time and permitted to examine it very closely.

4. The claimant injured his back in August 2009. He attributes that injury to lifting heavy items in the workplace. He has scoliosis, a twisting of the spine. The claimant experiences neck stiffness exacerbated by differences in temperature. His discomfort is eased by rest. He often finds it painful to carry things. He experiences pain most days. His back pain is significantly aggravated by sustained periods of bending and twisting. The claimant's back is prone to stiffening with various levels of pain as described in his impact statement, the contents of which were not substantially challenged.

5. He has regularly been visiting a chiropractor since 2014 and he has been prescribed over a period of years cocodamol as pain relief, to be taken as and when needed. The claimant was told that he could double his standard dose if levels of pain and discomfort required it.

6. Along with a letter from the claimant's chiropractor, the Tribunal was also shown a letter from the claimant's general practitioner which essentially confirmed the picture that the claimant provided in evidence in terms of the effect of his back complaint. The report gave significant information about the medication that the claimant was receiving and its potential effects. We return to this evidence below.

Workplace policies

7. The respondent's workplace policies include a 'Diversity and Inclusion' policy which provides general guidance as to the various types of disability discrimination, including the duty to make reasonable adjustments. The guidance also refers to discrimination arising from disability and explains the circumstances in which that legal liability might arise. The policy highlights that absences related to disability should be treated differently and not included as part of the standard absence calculation. Managers are referred in this regard to the 'Attendance' and 'Health and Wellbeing' policies.

8. The disciplinary procedure makes reference to the particular role of the people manager, which is the respondent's terminology for the HR advisor, in providing guidance throughout the process. The investigation manager is required to bear in mind that often the more serious an allegation is, the more thorough an investigation will need to be in order to satisfy themselves as to whether there is a case to answer.

9. Detailed notes of the investigation must be taken, using the provided template. These must be reviewed by the investigating manager following the conclusion of the investigation meeting in order that they can make any amendments necessary. The final version must then be passed to the staff member under investigation to review and sign confirming that they are an accurate record of the discussion.

10. Where the recommendation is to progress the case to a disciplinary hearing, the investigating manager must confirm their recommendations to the staff member but explain that the disciplinary manager will review the case and will confirm next steps in writing. The investigation summary must be passed to a suitable manager who has authority to conduct a disciplinary hearing.

11. The disciplinary policy explains that, in even in cases of gross misconduct where the disciplinary manager accepts there are mitigating circumstances, they may decide against summary dismissal and issue a final written warning if they consider that dismissal would be too harsh in the circumstances.

12. The following material guidance is provided under the heading "When conducting an investigation." The policy highlights that it is important to consider the need to use open questions, to encourage the staff member to respond in full and to explain their comments. The investigator is required to consider all possible evidence that may support the decision-making process, including speaking with witnesses that may be key to the case.

13. The policy explains that, when coming to a decision on the outcome of the disciplinary complaint, if mitigation is related to medication or an underlying medical condition, it is important to consider the following amongst the potentially relevant factors: has Occupational Health or the staff member's GP been consulted? Does the staff member give an indication that they regret their actions and will improve? Has the staff member presented any mitigation significant to affect the overall decision?

14. A range of potential instances of misconduct are provided, including failure to meet company standards on matters over which staff members have control. Timekeeping is given as an example of misconduct. Under the heading of gross misconduct, a non-exhaustive list of examples is provided, including breaching swiping in and out rules, working hours including breaks where the '*intent is to defraud*' the company.

15. The staff handbook provides guidance in relation to appeals and is said to extend to all manner of appeals including in a disciplinary context. It is explained that, when coming to a decision about the outcome of an appeal, it is important to consider any mitigating circumstances or medical evidence which was not available at the time of the original decision. The process contemplates that, if fresh matters arise on appeal, this may justify referral back to the initial disciplinary manager for fresh consideration of his or her decision in the light of the same.

16. There is also a policy entitled 'Health and Wellbeing' that highlights a number of procedural steps aimed at addressing issues of poor health or wellbeing in the workplace and that Occupational Health clinics are available to support staff members as well as to assist managers with advice in relation to any medical health condition which may impact on colleague's attendance, behaviour or performance at work. An ongoing medical condition is a condition that is often chronic or persistent. The policy points out that such conditions are often not visible.

17. Where medical evidence indicates that the staff member is too ill to return to work in any capacity, the manager may consider the possibility of ill health retirement. Relevant to that consideration will be the option of alternative employment, possible reduction in duties or hours, and any other reasonable adjustments. In common with many such policies, a graduated approach is recommended to the consideration of incapacity related to ill health.

18. Even if someone has only been absent for a few weeks or month, the policy makes clear that the staff member could still be classed as disabled if it is likely that their condition could last for a period of twelve months. Where the staff member's attendance may be affected by their disability, support will be offered, including reasonable adjustments, following a referral to Occupational Health.

19. This referral will identify what adjustments might assist the staff member in their role or an adjusted role. The policy emphasises that it is essential to understand a staff member's medical condition and what adjustment may be made to facilitate their attendance at work. Wellbeing meetings should be used to explore and agree adjustments with the colleague in addition to reviewing medical information or advice from Occupational Health or a staff member's GP. Reference is made to a separate policy called the 'Reasonable Adjustments' policy and the 'Access to Work Scheme', neither of which was produced to the Tribunal.

20. The same policy makes clear that, where absence is related to an underlying medical condition and/or disability, this should not trigger management of the case in the normal way. Managers are directed to address such cases in line with the 'Health and Wellbeing' policy. Where there may be doubt as to the definition of an underlying medical condition managers can make a referral via Occupational Health to the external provider, People Asset Management, for assistance.

Findings of Fact

21. The claimant commenced his employment on 30 October 2001 as a Retail Assistant at the Haydon Superstore, working in the Electrical department. He performed satisfactorily in that role for a sustained period of time. He was regarded as a dependable and diligent employee. No previous disciplinary issues had been raised about him. There was no suggestion that he was other than a wholly honest individual.

22. Gary James, one of his immediate supervisors, credited the claimant with being generally punctual and stated that he would always notify his supervisor if he was likely to be absent. "Timekeeping never appeared to be an issue for him". He was supervised by Mr James over a period of some three years. Colin Davis, the first stage Disciplinary Manager, described him as a good employee, saying that he had done a "fantastic job" over fifteen years.

23. As already noted, the claimant sustained a back injury in 2009 which caused him to be absent from work for some weeks. He attributed that injury to lifting heavy microwave ovens and he returned to work on light duties, although the Tribunal makes no finding in this regard. He was referred at that time to the respondent's Occupational Health advisor. He also started taking the cocodamol painkillers. In 2010 the claimant's back condition was aggravated when he slipped on some ice and he was away from work for a week.

24. In 2011, a further Occupational Health assessment diagnosed mechanical back pain suffered over the previous two years. The claimant was referred for physiotherapy. In 2012 he was again referred to Occupational Health. His manager explored with him the idea of reducing his working hours to 18 hours per week. The claimant was reluctant to agree with this, he saw such an adjustment as jeopardising his job security and he therefore maintained his full-time working commitment.

25. In 2014 the claimant was absent from work for a month again due to back pain. On his return it was agreed that he would not lift any microwave ovens. However, the claimant maintained that he was frequently obliged to do so because there was no-one else to perform the task. The Tribunal was satisfied that that was a reflection of the claimant's diligence and commitment rather the result of any compulsion on the part of his employer. The claimant could have declined to do those tasks and insisted that a co-worker did them.

26. In August 2016 the claimant began taking cocodamol in the mornings. He would take a dose in the canteen and sit down in order for the medication to take effect. He notified his supervisors about these breaks and his supervisors were amenable to him taking short periods away from the shop floor in order to take this medication. The claimant felt a degree of drowsiness and loss of concentration as a result of this medication. He did not initially report those side effects because he was fearful once again of the response of his managers and the potential for having his hours reduced.

27. In September 2016 the claimant was put on what has been referred to as 'batteries duty.' This was intended as an adjustment to give him a less physically arduous role, but the claimant said that it did nevertheless involve repeated twisting. He said that any continuous activity beyond an hour and a half was likely to have a seriously aggravating effect on his back condition and cause pain. On several occasions he needed to ask to go home. Once again, there was no compulsion on the claimant to perform this task and no indication that the company was seeking to flout its policies. But the claimant was fearful of the implications of raising these matters with his employer at the time and for that reason did not do so.

28. In December 2016 there was an increased expectation in terms of productivity and intensity of working in the run up to the Christmas period. This affected the way in which the claimant approached his work. The claimant raised with his supervisor his discomfort resulting from some six hours of continuous work doing the batteries task. Mr James offered the option of an Occupational Health referral, but the tone in which it was communicated was not perceived by the claimant to be supportive and he was reluctant to accept the suggestion of referral at that stage - once again believing that it would expose him to some employment risk.

29. Between the 12 and 24 December, the claimant absented himself for extended periods, well in excess of the authorised entitlement. He spent these times sitting in the staff canteen. His absences were not discussed specifically with his supervisors, who were unaware of the extent of these absences. There is dispute as whether claimant appreciated what was taking place during those periods and how long he was spending away from the workplace. On 14 December the claimant's pet needed to be put down and that was an additional cause of distress to him and to his girlfriend. He was permitted to go home on that day.

30. The Tribunal is satisfied that on each of the seven occasions when the claimant absented himself for extended periods, the precipitating cause of his absence was extreme discomfort associated with his back condition and that his appreciation of events was diminished by the combined effects of back pain and the increased doses of cocodamol which he was taking to treat it. That medication, amongst its side effects, was capable of impairing cognition and inducing drowsiness.

31. Mr James the claimant's supervisor, learned from fellow staff members that the claimant was engaged in these extended periods of absence. Rather than speaking with the claimant directly to try and obtain his own understanding of what was going on and why, Mr James decided to refer the matter to the claimant's line manager, Mr Johnson, for him to consider what action ought to be taken.

32. During that period in December 2016, there were a significant number of occasions when the claimant had exceeded the permitted period of absence by substantial margins. But there was no evidence as to how the claimant appeared to others in terms of his demeanour and well-being or how he was coping with his tasks, save for what the claimant himself could recall and that recollection was very sketchy. No co-workers were interviewed about what was taking place or what their perception of the claimant was at that time.

33. The maximum length individual period of anyone absence was sixty-four minutes. On each such occasion, the Tribunal is satisfied that the predominant cause of the absence was back discomfort and the effects of medication aimed at treating the same. During those periods, the claimant was not wilfully flouting the respondent's rules. He was simply responding to the immediate effects of his discomfort and pain. He was effectively incapacitated during those periods by reason of his back condition.

34. The claimant was asked to attend a fact-finding interview on 2 January 2017. Rather than being sent a letter which set out the severity of the concerns that the respondent had about his conduct, he was summoned to the meeting by the shop floor tannoy system. Prior to that meeting, at 11.00, the claimant had taken two cocodamol tablets and the meeting began at 12.30. During the meeting he was asked by Mr Martin Johnson, his line manager, to account for his movements.

35. The claimant was asked if he wanted a representative and he declined that offer. It was put to the claimant that he was taking longer and more frequent breaks than he was entitled to. The claimant conceded that he had been struggling with back pain but had not mentioned this to management. He explained that he had been taking "strong cocodamol". He made some reference to the side effects of the medication but "knew that he could not use that as an excuse".

36. He explained that he had been "struggling" and described being in pain for three or four months. In a telling exchange, the case investigator, rather than probe in an open-minded way the potential effects of the claimant's medical condition on his behaviour, stated "*is it pain or have you just got to the stage where you are getting away with it*".

37. The case investigator was not at all receptive to a possible medical explanation, in breach of the guidance in the respondent's policies. Although that criticism is primarily directed at the investigator, the Human Resources Manager had a vital role to play and failed to provide the sort of input that was to be expected. The Tribunal considers that the appropriate response to issues of disability in the workplace is an area in which the expertise of a properly trained human resources advisor is likely to be of pivotal importance.

38. The claimant maintains that he made reference at the investigation meeting to the treatment he had received from his chiropractor and also to the effects of cocodamol, including grogginess. Although not minuted in the notes of the investigation meeting, the Tribunal accepts the claimant's account that he offered to make up the lost pay that the respondent had suffered as a result of these periods of unauthorised absence.

39. The case investigator failed to give any proper consideration to the fact that the claimant's unauthorised absence during those seven days in December was wholly out of character, contrasting as it did with his behaviour over years when his performance was highly rated by his employer. That was bound to be a relevant consideration, particularly where issues of health were so clearly to the fore, in deciding whether or not this apparently aberrant behaviour might have a medical cause rather than being viewed simply as wilful misconduct.

Disciplinary hearing.

40. The claimant was invited to attend a disciplinary meeting on 7 January 2017. Contrary to the terms of the respondent's own policy, the decision to escalate this as a matter of discipline was taken by the case investigator rather than by a separate manager. One of the procedural safeguards, no doubt aimed at achieving an enhanced level of independence and scrutiny in relation to the decision whether to escalate matter to a disciplinary hearing, was thereby omitted.

41. The way in which the charge was formulated effectively replicated the wording of the gross misconduct provision in the disciplinary policy: breach of the company's attendance requirements was linked to an intention to defraud. An allegation of intention to defraud is plainly amongst the most serious things that could be levelled against an employee and needed to be considered with the greatest of care, given its potential impact on an employee's future employment position. The respondent should look for cogent evidence to support such a grave allegation.

42. The disciplinary hearing took place before Mr Davies on 19 January 2017. Mr Fellows acted as a notetaker and the claimant attended with a workplace colleague in the role of his companion but not as a representative. The claimant was not a member of the recognised trade union. He had been warned that dismissal was a potential outcome of this process in conformity with statutory requirements.

43. The claimant gave an account of his conduct which again down played the potential significance of his disability and associated matters as an explanation for the alleged misconduct. It is a feature of this case that, at each stage of the process, the claimant sought to dilute the potential relevance of his disability as an explanatory factor. Account must be taken of what the respondent's investigator and disciplinary managers could reasonably take from those remarks and whether or not that excused them from making any fuller enquiry into exculpatory matters. The Tribunal has carefully weighed this consideration in reaching its ultimate conclusions.

44. In his account of events to Mr Davies, the claimant said that he had been struggling for the last few months. The claimant made it quite clear that he did not realise how long he had been away from the shop floor but he was willing to accept, with disarming frankness, that his behaviour must look "dreadful".

45. Having concluded the hearing of the evidence, Mr Davies summed up his assessment of the evidence. There is some reference to the fact that the claimant was taking pain killers on a regular basis and had been for some time, but it was suggested that, by the claimant's own admission, there were no adverse side effects and that only a ten minute medication break should have been needed to take the tablets.

46. Mr Davis quite properly paid regard to what the claimant himself was saying about the effects of his medication and his medical condition in general. But he was engaging with a topic where expert medical guidance was bound to be relevant before any secure and properly informed conclusions could be reached. Instead, the matter that most powerfully weighed with Mr Davis was the impact on the respondent financially of the periods of absence which, to adopt a phrase used in cross-examination, the claimant had 'awarded to himself'.

47. In other words, there was an underlying assumption that these periods of absence were wholly the product of the claimant's voluntary decision making, for which he should be held fully accountable. At one stage in the evidence the value of the claimant's time away from the shop floor was equated to the cost of television sets. Such was the degree of disengagement from the circumstances in which these absences occurred, their anomalous nature in the context to the claimant's past performance and the pointers to potential medical explanations.

48. The claimant was summarily dismissed following the first stage disciplinary hearing. He submitted an appeal on 31 January and then was asked to present his appeal grounds in a different format which appear in a letter dated 8 February 2017.

The Appeal

49. The appeal hearing was conducted by Dale Goodright, who occupied an equivalent position in terms of seniority to Mr Davies, who was well known to him as a colleague. The hearing was adjourned in order that Occupational Health advice could be obtained as was clearly appropriate. The question that arises is whether the extent of the Occupational Health advice was sufficient fully to inform the appeal manager's understanding and whether it raised questions that demanded further enquiry into the background circumstances.

50. The report in question was produced by an Occupational Health nurse Gail Jones. It followed an assessment that took place on or about 22 February 2017. The nurse reported that the claimant exhibited a pain score on a range of movements, but without medication, ranging from no pain to tolerable pain. It was noted that the claimant was obtaining monthly chiropractor treatment.

51. The claimant pointed out that, at the time this assessment took place, it had been several weeks since he was engaged in the sort of shop floor activities which had induced the pain he experienced in December. Relevantly, the Occupational Health Advisor went onto comment that the medication he was taking occasionally may cause drowsiness and effect one's ability to drive and operate machinery. It was observed that the claimant "does not take it regularly but frequently in a week. I have advised him to discuss his medication with his GP to see if alternative [sic] more suitable for him as he mentioned he has had some issues with drowsiness during the Christmas period where he require [sic] an increase in frequency of the medication."

52. From that report the Tribunal considers that a reasonable manager in the position of Mr Goodright would have noted that cocodamol taken at a higher level of frequency might not be suitable for managing the claimant's pain and that it was capable of inducing drowsiness. What the letter does not describe is quite how potent those effects might be. The Tribunal considers that a reasonable manager equipped with that report, and with an eye to the respondent's policies, would have wished to inform themselves more fully about the potential effects of cocodamol if taken in a more concentrated way than the claimant was used to.

53. There are two pointers to what that further information might have revealed. In a chiropractic report produced for the purposes of these proceedings dated September 2017, Mr Christopher Biggs commented that cocodamol can indeed cause notable drowsiness in certain individuals and disorientation. As such it is common to be advised to avoid work while taking this medication. It is therefore feasible that if the claimant was in considerable pain that the medication would indeed have altered his perceptions. In the same report Mr Biggs noted that he had been consulted by the claimant in the middle of the relevant period of absence when the claimant had reported notable discomfort in his neck, middle and lower spine.

54. Further information which a reasonable medical enquiry might have produced is the GP letter of Dr Stephenson produced again in the context of these proceedings, dated 4 October 2017. Dr Stephenson comments that it is likely that the claimant's increased dose of cocodamol could have caused drowsiness and could certainly lead to him falling asleep.

55. When this evidence was put to Mr Davies, the first stage Disciplinary Manager, in cross examination, he fairly conceded that it could well have weighed with him in deciding what the appropriate outcome of the disciplinary complaint might have been. He contemplated that it might have justified at least considering a downgrading of sanction and he might have considered transferring the whole process for consideration under the capability procedure.

56. The Occupational Health report also flagged that the claimant was likely to satisfy the definition of a disabled person and therefore, if there was any doubt at an earlier stage in the process as to the applicability of the Equality Act and the specific duties that regime brings into play, then those are matters that certainly should have been apparent at that stage of the appeal.

57. The appeal was dismissed by letter dated 27 February 2017. Once again there was assertion that extra breaks are considered theft of company time and defrauding the company of money. The Tribunal considered that this was another clear indication of the Company's tendency uncritically to equate the objective fact of unauthorised absence with some dishonest intent. In the Tribunal's view, this approach served to deflect the respondent's focus away from a robust and fair-minded probing of the claimant's mindset to assess whether or not he really had formulated a dishonest intent, at each stage of the process from investigation to appeal. There was simply an assumption that any unauthorised absence that could not be satisfactory accounted for was tantamount to theft.

Submissions

58. Counsel for both claimant and respondent produced commendably thorough written submissions, which set out the relevant statutory provisions in respect of each of the headings of complaint and the principles derived from key authorities. These submissions were developed orally. Aside noting the assistance derived by the Tribunal from these submissions, the Tribunal does not propose to recite their contents in these Reasons.

Conclusions

Unfair dismissal

59. The respondent is a substantial organisation and, given its size and administrative resources, a high level of procedural fairness is to be expected. The severity of the charges, including allegations of fraud, demanded a robust investigation, giving proper weight to exculpatory factors. Given the claimant's acknowledged status as a disabled person, careful regard needed to be paid to the potential relevance of disability as a causative ingredient in the alleged misconduct.

60. Was there a genuine belief on the part of the respondent that the claimant had committed gross misconduct? The Tribunal is quite satisfied that the dismissing manager held such a belief. Were there reasonable grounds to sustain such a belief? The Tribunal unanimously finds that there were not. There was wholly insufficient evidence to support a finding of an intention to defraud. There was no proper inquiry into the claimant's subjective mindset. Had there been, the decision makers would inevitably have focussed on the potential for a disability related explanation. There were sufficient signposts in the evidence to put a reasonable employer on inquiry in that regard.

61. Was there a reasonable investigation? Once again, the Tribunal was unable to accept that there was. We consider that Mr Johnson approached the potential relevance of a medical explanation with a closed mind. When the matter was raised in the course of the investigation meeting it was discounted out of hand without any proper critical inquiry. There was a wholesale failure to examine the potential for a disability related explanation for the alleged misconduct until the appeal stage and, even then, there was an insufficiently probing examination of features of the evidence which clearly demanded further inquiry and consideration.

62. The perception of an unfair process was contributed to by other features, of perhaps less importance when viewed in isolation. The Tribunal considered the manner in which the claimant was called to the meeting by loud speaker, without any forewarning of the very serious matters he would be questioned about, was highly unsatisfactory.

63. Another troubling feature, in the context of an employee with a known sight impairment, was the expectation that, at each stage of the disciplinary process, he would be in a position to approve the meeting notes. As a matter of basic fairness and without regard to the specific features of this policy, the Tribunal should have thought that it was quite obvious that someone with partial sightedness ought to have been given a full opportunity to consider, in an unpressurised environment and if necessary with the help of his companion, the accuracy of the notes rather than be expected to approve them on the spot.

64. Turning to whether a finding of contributory fault is justified, the Tribunal has considered closely the issue of whether or not there ought to be a deduction to reflect culpable or blameworthy conduct. It will be apparent from our findings that there were certain points before the December absences when the claimant made a conscious decision not to escalate matters relating to his own back pain, including an Occupational Health referral, because he considered that this might render him vulnerable in terms of his future employment position.

65. We consider, however, that the circumstances that gave rise to the claimant's dismissal were specifically in connection with his absence in December. These did not involve any real choice on the claimant's part but were essentially a response to circumstances where the claimant was focused on managing the immediate effects of his pain and the impact of his heightened doses of medication. It was those absences which were the real trigger for the instigation of the disciplinary process. We do not consider that this is a case where a contributory fault deduction falls to be made.

66. So far as ***Polkey*** is concerned, the Tribunal has considered whether or not, absent the procedural defects that we have criticised in this case, there is at least a percentage prospect that the claimant would be dismissed in any event following the implementation of a fair procedure. The Tribunal is not able, on the basis of the evidence, to conclude that a such a process might have led to that result. Whether a capability process could hypothetically have been invoked in the circumstances and whether that ultimately could have resulted in some prospect of the claimant's dismissal is a matter that can if necessary be considered at the remedy stage.

Wrongful dismissal.

67. The Tribunal finds that the complaint of wrongful dismissal is made out. On the evidence before the Tribunal, the claimant did not act in a way that fundamentally breached his employment contract. The respondent was not lawfully entitled to dismiss the claimant without providing the requisite period of notice.

Disability discrimination contrary to s.15 of the Equality Act 2010.

68. The Equality Act 2010 provides as follows:-

> 15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

69. 'Unfavourable treatment' for the purposes of this provision includes the creation of a particular disadvantage. *Williams v Swansea University Pension and Assurance Scheme* [2015] ICR 1197 EAT. In reaching its determination, the Tribunal took account of the guidance of the EAT in *Pnaiser v NHS England and Coventry City Council* [2016] IRLR 170.

70. Turning to the agreed list of issues, the Tribunal notes that the actions of subjecting the Claimant to investigation; his dismissal and the rejection of his appeal are agreed between the parties as being capable of constituting unfavourable treatment for the purposes of this heading of claim.

71. The Tribunal considers that certain of the instances of alleged unfavourable treatment set out at paragraph 8 of the list of issues are more apt to be considered as potential breaches of the duty to make reasonable adjustments. The requirement to read and sign minutes falls within this category.

72. The other two headings of disputed unfavourable treatment are as follows:

(i) arguing with the claimant when he refused to do a full shift replenishing batteries in December 2016;

(ii) suggesting that the Claimant acted dishonestly during the disciplinary procedure.

The Tribunal finds that the first of these headings of complaint is not established as a breach of s.15 of the Equality Act 2010. The Tribunal was not satisfied on the evidence that the respondent had argued with the claimant in the circumstances alleged.

73. As to the allegation of dishonesty derived from the claimant's authorised absences from the shop floor, the Tribunal has found that the conduct that caused the respondent to instigate the investigation and consequential disciplinary process were all directly associated with matters arising out of the claimant's back pain, exacerbated by the effects of the medication he was taking to treat that disability. The allegation of dishonesty was a central feature of that disciplinary complaint, and one which arose in consequence of the claimant's disability.

74. Justification is raised under paragraph 11 of the list of issues. The Tribunal has balanced the legitimate aim of the employer in instituting procedures aimed at securing punctual attendance in the workplace and ensuring that those are strictly adhered to and that rules to achieve that should be robustly enforced.

75. But those legitimate aims must be achieved in a way that is proportionate, having regard to the effects of the claimant's disability and the disadvantage caused to him. The Tribunal does not consider that there can be any legitimate justification for subjecting of the claimant to a disciplinary process in the circumstances we have described in our findings. The complaint under s.15 of the Equality Act 2010 is upheld in that respect.

Failure to make reasonable adjustments: Equality Act 2010 ss.20-22

76. The Tribunal has had regard to the provisions of s.20-22 of the Equality Act 2010 as well as the relevant provisions of Schedule 8 of the Act. The respondent had actual knowledge of the claimant's sight impairment and his back pain prior to the events which gave rise to the disciplinary process. The claimant's supervisors were well aware of the claimant's need for routine medication breaks to manage the effects of his back condition.

77. The Tribunal notes that the parties have agreed that the following constituted PCPs: applying the respondent's policy on breaks and punctuality and applying/instigating its disciplinary policy. The Tribunal finds that, because of his back pain and the associated effects of medication, the claimant was placed at a substantial disadvantage by reason of the application of those PCPs in comparison with persons who are not disabled.

78. The Tribunal does not find either of the disputed PCPs, detailed in the agreed list of issues, to have been established on the evidence: applying a condition that the Claimant manoeuvre heavy items; and that he carry out tasks which involved bending and/or twisting and/or lifting repetitively.

79. The evidence established that the tasks which the claimant had been assigned to undertake were given to him in order to ameliorate the effects of his back condition. There was no medical evidence to show that the batteries task was one which was inherently unsuitable having regard to the effects of his disability.

80. The Tribunal finds that the third of the disputed PCPs was applied, as set out at paragraph 14.3 of the list of issues, namely, requiring that participants in meetings sign minutes at the end of the meetings and not reading out the minutes at the end of the meeting. Because of his partial sightedness, the claimant was unreasonably placed at a substantial disadvantage by reason of the application of that practice.

81. Having regard to its duties arising under ss.20 and 21 of Equality Act 2010, and the requirements of reasonableness, the respondent should not have subjected the claimant to a disciplinary procedure in the circumstances. The manner in which such procedure was conducted gave rise to a further breach of the respondent's duty as found above.

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Employment Judge Sutton QC

JUDGMENT & REASONS SENT TO THE PARTIES ON

28th March 2018

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FOR THE TRIBUNAL