EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4112918/2015

Held in Glasgow on 16, 17, 18 and 21 August and 24 October 2017 (Members' Meeting).

Employment Judge: Mrs M Kearns
Members: Mrs FS Paton
Mr AB Grant

Mr T Charity — **Claimant**
In person

Walker Love — **Respondent**
Represented by:
Ms C Gurevitz
Consultant

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal was that:-

(1) the claim under Section 13 Equality Act 2010 is dismissed;

(2) the claimant's claims under Sections 15, 20 and 21 Equality Act 2010 are well founded. The respondent is ordered to pay to the claimant compensation including interest amounting to **Eight Thousand, Nine Hundred and Fifty Seven Pounds (£8,957)**.

REASONS

1. The claimant who is aged 34 years was employed by the respondent as a customer service adviser until his dismissal for ill health absence on 1 September 2015. On 24 September 2015, having complied with the early conciliation requirements, he presented an application to the Employment Tribunal in which he claimed direct disability discrimination, discrimination arising from disability and discrimination by breach of a duty to make reasonable adjustments.

Issues

2. By a Judgment sent to the parties on 28 October 2016, the Tribunal held that the claimant was at all relevant times a disabled person as defined by section 6 of the Equality Act 2010 ("EqA") by reason of mild Hereditary Spherocytosis. The issues for the Tribunal were:-

(i) Whether the respondent directly discriminated against the claimant by treating him less favourably than others because of his disability;

(ii) Whether the respondent was subject to a duty to make any of the following adjustments; and, if so, whether it failed to make those adjustments:

a) to investigate the claimant's impairment and/or seek independent medical advice;

b) to disregard disability related absence when applying its absence practice for employees with less than 2 years' service;

c) to reduce the claimant's hours to 24 per week for a period before considering dismissal to see if it helped his attendance.

(iii) In relation to the reasonable adjustments claim, whether the respondent did not know and could not reasonably have been expected to know that the claimant had a disability and was likely to be placed at the disadvantage referred to in section 20 EqA.

(iv) Whether the respondent treated the claimant unfavourably because of something arising in consequence of his disability; and if so,

(v) Whether the respondent has shown that the treatment was a proportionate means of achieving a legitimate aim;

(vi) In relation to the section 15 EqA claim, whether the respondent has shown that it did not know and could not reasonably have been expected to know that the claimant had the disability;

(vii) Finally, in the event of one or more of the claimant's claims succeeding, the remedy to which the claimant is entitled.

Evidence

3. The parties lodged a joint inventory of productions ("J") and referred to them by page number. The claimant gave evidence on his own behalf. The respondent called the following witnesses: Ms Siobhan Brennan, their Collections Team Leader; Mr Andrew Fraser, their Contact Centre Manager and Ms Elspet Swan, their HR Officer.

Findings in Fact

4. The following facts were admitted or found to be proved:-

5. The respondent is a firm of messengers at arms and sheriff officers. It employs 127 staff across 10 offices. The claimant started working for the respondent as a customer service adviser on 24 November 2014. He was employed to work in the respondent's contact centre which primarily takes action on behalf of local authorities to recover council tax arrears. The contact centre involves interaction with council tax debtors. The respondent has agreed targets for debt recovery on behalf of local authority clients.

6. The claimant suffers from mild hereditary spherocytosis, a condition which affects his red blood cells and can cause anaemia. The condition has affected the claimant since his childhood and at all times relevant to this case. The primary effect is to make him intermittently fatigued. The claimant takes folic acid pills. In addition to fatigue, the claimant experiences stomach pain, queasiness, stomach cramps, a need to use the toilet and occasional vomiting as a result of his condition. The impact of the fatigue caused by the condition can be significant. A flare up can lead to a feeling of exhaustion and difficulty walking and thinking.

7. The claimant was interviewed for his post on 11 November 2014 by Mr Fraser, the contact centre manager and Ms Swan, HR Officer. Each interviewer noted his answers to their various questions on a spreadsheet (J91 and 92). At the interview the claimant stated, in answer to a question about his health that he had a blood disorder. One of the interviewers noted that this was "not serious". In the employee profile (J94) the claimant filled out at the start of his employment he stated: *"Blood disorder – "Hereditary Spherosytosis" – mild anemia. Gall Stones – Medications include folic acid.*"

8. At all relevant times the claimant lived in Johnstone and travelled to work each day by train. He purchased a season ticket to cover the cost of his travel. On or about 9 January 2015 the trains from Johnstone to Glasgow were cancelled due to extreme winter weather. The claimant telephoned Andrew Fraser, his line manager and explained that he was unable to get to work due to the severe

weather. Mr Fraser told the claimant he would 'see him tomorrow'. The claimant was also late to work on 5th, 13th (by 7 minutes) and 19th January 2015 (by half an hour) due to severe weather leading to train cancellations. After one of these occasions, the claimant's team leader, Siobhan Brennan told him that there had been an announcement that if trains were cancelled, it was possible to use a train pass on the buses.

9. In late January/ early February 2015 the claimant's grandmother died. The claimant took a day's bereavement leave on 6 February 2015 in order to attend her funeral. The claimant passed his three month probationary period on or about 24 February 2015.

10. On or about 11 February 2015 the respondent introduced a new attendance management policy. This related to bonus deduction and stated that within a rolling year the first two days of absence would carry no bonus deduction; that days 3 – 7 would carry a 12.5% deduction per day of absence and days 7 onwards would carry a 20% deduction per day. Ms Brennan's email to her team announcing this (J107) stated: *"If your attendance becomes a problem it may lead to an investigation meeting and ultimately a disciplinary."*

11. From 3 to 5 March 2015 the claimant took his first period of sick absence. This absence was related to his disability of mild hereditary spherocytosis. Employees of the respondent with more than two years' service were managed according to an absence management policy. However, the policy was not necessarily applied to employees with less than two years' service, whose absence was often more informally managed. Mr Fraser's practice was to encourage attendance by warning employees with short service on their return from sick absence that further absence may result in their dismissal.

12. When the claimant returned to work on 6 March 2015 he attended a return to work interview with Mr Fraser and Ms Brennan. At that interview, which lasted around half an hour, Mr Fraser referred to the references the respondent had received from the claimant's previous employers which said that he had had a

higher than normal absence rate. Mr Fraser told the claimant that they had been going to fire the claimant that day, there and then but because they liked him they had decided to give him one final chance and keep him on. However, if he was absent again he would risk being fired. They asked him what he could do to minimise his attendance problems. The claimant agreed that he would manage his health condition appropriately. The claimant said that he had been off because of his gallstones and that these were caused by his blood disorder. He said that the sickness he had had during the absence had been as a result of his gallstones. At the end of the interview Mr Fraser wrote on the record: *"Discussed reason for absence which may have been brought on by gallstones condition. Raised overall attendance issues with reference made to previous employer references. Advised Theo that any further attendance issues would not be looked on favourably. Theo is aware of the new attendance procedure within the depart* [sic] *and with his own attendance KPI of 2%. Hopefully going forward there will be no attendance issues and Theo's attendance will be monitored closely."* The claimant wrote: *"I have understood everything noted above and I will ensure I manage my Health Condition appropriately in order to minimise effect on attendance. I am also happy with the effort Andy & Siobhan have made on my behalf and I shall endeavour not to let them down."* The reason for absence given by the claimant on the absence statement he signed on 6 March 2015 (J109) was "*migraine and sickness due to stomach bug"*.

13. On 2 April 2015 Mr Fraser wrote an email to one of the claimant's contact centre colleagues JT regarding attendance issues. The email stated: *"As per our discussion (01/04/2015) that followed on from your disciplinary meeting with Chris Bell and Elspet Swan (06/03/2015), you have now been placed on an attendance plan.*" The email informed Mr T that if he had three or more instances of absence or one instance lasting ten days or more in a rolling 12 month period then he would be invited to an investigation meeting which may then lead to a further disciplinary meeting. This procedure was not applied to the claimant. Mr T had more than two years' continuous service with the respondent. The reason why the respondent applied their attendance improvement procedure to Mr T and not to the claimant was that Mr T had more

than 2 years' employment and had acquired the right not to be unfairly dismissed, whereas the claimant had not.

14. On 19 May 2015 the claimant emailed Siobhan Brennan (J115) to ask her permission to go home from work. He stated: *"I feel really sick today my stomach is in a lot of pain (maybe gallstones or a bug I don't know) it's making me feel really queasy and lethargic"*. He asked to take a half day's leave to go home and recuperate. This absence was disability related. Ms Brennan replied to say that as one person was on holiday and two were off sick she could not sanction leave, that he could head home if he was not well but that it would be unpaid sick leave. The claimant went home and was also off the next day, 20 May. He returned to work on 21 May 2015 and signed an absence statement form (J116) on which he detailed the illness as "*stomach upset, cold symptoms – fatigue"*. He attended a return to work interview with Ms Brennan on 4 June 2015. An interview record was kept (J121). The record stated that the claimant had had a two day absence and that the reason had been: *"Stomach issues/Flu like symptoms"*. The discussion record stated: *"Theo left his shift early as he was experiencing flu like symptoms and stomach pains. We have already has* [sic] *discussions with Theo surrounding his absence which is now sitting at 5 days. This is above the acceptable level and if there are any other absence issues he may face disciplinary action."*

15. On 27 May 2015 Ms Brennan sent the claimant an email enclosing his stats from the previous day. The accompanying message stated: *"Your combined pause/ACW is sitting at 50.37% which essentially means you spent half your shift in one or the other. This is far too high and needs to be in the region of 35%. You also took the least calls in the whole team (even less than myself who was only on for a few hours). I know you've been out of the way of being on the phones for a while but we're really up against it with the call volumes at the moment and need everyone to be giving 100%."* The claimant responded: *"I'm so sorry about that, I knew I was going slowly between my calls but didn't realise it was having such an effect. I can see that my average call length is*

quite a bit higher than everyone as well which didn't help the amount of calls I took. I will amend this going forward and make sure I am more focused."

16. One of the claimant's colleagues, Ms LP was employed by the respondent for three months and then resigned, following a period of sickness absence lasting more than a week. LP was not disabled; She was absent on 9 May 2015; 28 May 2015 and 5 – 12 June 2015 (she resigned by email on 12 June). Her absence was managed in largely the same way as the claimant's.

17. On 30 June 2015 the claimant had a discussion with Andrew Fraser, following on from an issue raised during his appraisal. It was agreed that the claimant's daily structure would be changed so that on Monday, Wednesday and Friday he would work on Council Tax (inbound and outbound calls); on Tuesday he would do TDX letters and dispute sheet management/ resolution and on Thursday he would work on QP management and emails. Mr Fraser emailed him on 30 June 2015 to confirm the new arrangement (J130). He stated: *"Hopefully this will give you the desired structure in your day to day role."*

18. On Saturday 4 July 2015 the claimant worked a shift along with Chris Brown and DMcW. Ms Brennan identified a problem with the productivity levels of all three members of staff who had worked on that date. Ms Brennan met with the claimant on 7 July 2015 to discuss the matter. A note entitled '*Stats for Saturday 04th July*" was taken by Ms Brennan (J144). Ms Brennan recorded that evidence had shown that the claimant had spent 86.25% of the shift 'de-assigned', i.e. not working on any account and that there were large unexplained time gaps. She recorded: *"Theo did not log in for his shift until half 9 and did not make any note on an account until half 10. When asked about this Theo advised that he did not log in for the first half hour, but 9.30 – 10.30 was spent reviewing correspondence that he had for TDX. Theo advised that his Dad had been unwell the week before and his concentration could have been affected by worry and stress surrounding this. He also advised he has a blood disorder which may be affecting his focus…..I explained to Theo that I would note this discussion and the issue may be taken further… "* Ms Brennan

had a similar conversation with DMcW (J145). Both the claimant and DMcW received final written warnings as a result of the incident. These were to stay on their files for 12 months. This was commuted to 6 months in both cases on appeal. Mr Brown was not disciplined. He does a different job from the majority of agents in the contact centre, tracing 'customers' who have moved. This involves a lot of offline work and his work is therefore more difficult to monitor.

19. On 20 July 2015 the claimant emailed Mr Fraser and Ms Brennan (J167) stating that he would like to become part time. He explained that he would like to go from 40 hours per week down to 24, giving up 16 hours. He gave three reasons for his request. Firstly: "*recent family difficulties"*; Secondly: *"I also find that my own health lately has not been as good as it could to be, due to my blood disorder I can suffer anemia type symptoms such as fatigue and some sickness which can result in a struggle to focus, so taking time to monitor my own health and have the regular doctors visits (that I am meant to have) without the worry of it impacting my work, making time up (increasing shift length etc) would be hugely beneficial."* Thirdly: *"as a final point I have considered part time study opportunities and this proposal would also accommodate that possibility."* The respondent accepted the claimant's application to go part time by letter dated 18 August 2015 (J173). The new arrangement, whereby the claimant would work reduced hours (down from 40 to 24 per week) was due to begin on Monday 7 September 2015. The respondent arranged it for 7 September without explaining to the claimant their reason for that date. There was a reasonable prospect that reducing the claimant's working hours to 24 per week would remove the claimant's disadvantage. He was suffering from anaemia symptoms including fatigue and sickness. The reduction in working time would have taken the pressure off him, giving him time to rest, monitor his health and make regular visits to his doctor without the worry of this impacting his work, and without the need to make time up (which had been increasing his shift length and adding to his difficulties).

20. The claimant was absent again from work from Tuesday 21 July to Friday 24 July 2015 on account of chest pains in the night. This absence was not disability

related. His return to work interview record dated 27 July 2015 (J169) stated: *"Theo called into work with pains in his chest and was feeling nauseous. He visited the Doctor who confirmed this could be anxiety due to recent stressful situations. Theo advised this has not happened before and all the tests performed by the Doctor came back clear. Theo does not anticipate that this will cause any further absences. I have advised Theo that this absence will go through as unpaid. Theo has been advised that should he have any further instances of absence he will be open to an investigation which may lead to disciplinary action."*

21. On 30 July 2015 Ms Brennan sent the claimant an email about his stats for that month (J170). It stated: *"Just to confirm what we discussed re your stats for the month. You made reference to the fact that July had been a 'write off' month for you due to the issues you were having at both work and home. You also advised it has taken time to get the balance between council tax and TDX accounts right.// It has been agreed that we will review this next month after your holiday in the hope that things will improve. If not we will review the situation to see what we can do to help you get to an acceptable level."*

22. The claimant was absent again at the end of August 2015. On 28 August the claimant had to go home from work due to extreme fatigue. He remained absent on 29 and 31 August and was still off on 1 September 2015. This absence was disability related. On that date, Elspet Swan telephoned him and told him that the respondent was terminating his employment contract. The termination had been prompted by the claimant's most recent absence beginning 28 August. The claimant was shocked and upset and he did not say much during the call. When he had recovered his composure he called Ms Swan back and told her he was upset. He said to her that she knew he had a health condition and that he felt his dismissal was unfair. She replied: *"We need people to be in.*" She made no reference to the claimant's performance as any part of the reason for his dismissal.

23. On 1 September 2015 the respondent's human resource officer, Elspet Swan wrote to the claimant (J196). In the letter she confirmed that the claimant's employment was terminated with effect from 1 September 2015. The letter stated that the claimant would be paid one month in lieu of notice less his absences on 28, 29 and 31 August 2015. The letter did not state the reason for dismissal. The claimant responded by letter dated 4 September 2015 (J197). He referred to the termination of his employment and stated: *"This was a decision made by the company due to my level of absence from the company."* He stated that he wished to appeal the decision. *"I have a physical disability in the form of a blood disease called hereditary spherocytosis. This is a condition that I made the company aware of on my interview and was hired regardless….by hiring me with the knowledge of my medical condition you are accepting that condition and should have been prepared to accept a higher absence rate from myself."*

24. Ms Swan replied to the claimant by letter of 8 September 2015 (J199). In that letter she stated: "*As you have less than two years' service our Company processes followed to terminate your employment effective from 1 September 2015 were correct."…"for the avoidance of doubt, you were not dismissed for a reason connected with your blood disorder.// As you are aware, you were dismissed due to your absence levels. The company have been monitoring your absence levels for some time and have been lenient regarding your absence levels.// At no time have you ever disclosed that the reasons for your absences or high absence levels were in any way connected to any disability which you suffer from. The reasons for your absences range from bereavement of your grandmother, colds and sickness bugs. I enclose a copy of your absence records which are signed by you which confirm the foregoing."*

25. At the date of dismissal the claimant was earning £1,243 net per month for a 40 hour week. On reduced hours of 24 per week he would have earned approximately £883 per month net. The claimant received universal credit payments of £317.82 per month with effect from 5 December 2015. He also

received one month's pay in lieu of notice. The claimant started a full-time college course on 1 September 2016.

Observations on the Evidence

26. Where there was a conflict between the claimant's evidence and that of the respondent's witnesses, on balance we preferred the claimant's evidence. The claimant gave his evidence in a measured way and made appropriate concessions. For example, he was asked about the disciplinary incident on 4 July when he and others had become distracted and done very little work. He was frank about this incident, saying: *"I acknowledge that we did get distracted. I don't deny I did wrong."* He was also frank about the absence of 24 July not being disability related.

27. There was a conflict in the evidence about what occurred at the claimant's return to work interview with Mr Fraser and Ms Brennan on 6 March 2015. We preferred the claimant's evidence about what took place at that interview, and we accepted that Mr Fraser told the claimant that they had been going to fire him that day, there and then but because they liked him they had decided to give him an eleventh hour reprieve and keep him on. However, if he was absent again he would risk being fired. We also accepted the claimant's evidence that he told Ms Brennan and Mr Fraser that he had been off because of his gallstones and that these were caused by his blood disorder. We noted that although Mr Fraser and Ms Brennan both denied it in their evidence, paragraph 24 of the ET3 states: *"It is accepted that* [the claimant] *was advised that they had considered terminating his contract but had decided to give him one final chance."* Their denial of this in evidence undermined the Tribunal's view of the reliability of their evidence.

28. Ms Brennan stated in her evidence that there had been an issue with the escalation of three of the claimant's calls in January 2015. She implied that this had been part of the reason for his dismissal on 1 September 2015, some eight months later, despite there having been no mention of performance as any part

of the reason for dismissal in Ms Swan's letter of 8 September. An escalated call might suggest that there had been some problem about the way the claimant had spoken to a caller. In support of this Ms Brennan referred to a list of escalated calls. The three concerning the claimant were dated 8, 22 and 27 January. The first stated that the caller was *"Not happy with agent tone or the fact we are unable to accept this offer."* The second said the caller had been unhappy with his advice and felt that the respondent had hindered him repaying his debt and the third simply stated the caller was *"not happy with tone of agent".* These calls all occurred during the claimant's probationary period, which he had subsequently passed. If there were any problems they clearly did not recur. We were not persuaded that these three call escalations in January were any part of the reason for the claimant's dismissal.

29. Contrary to the evidence of the respondent's witnesses, we also did not conclude that the claimant's performance was any part of the reason for his dismissal. The claimant accepted that his performance was not always as good as it might have been. On 30 July 2015 Ms Brennan told the claimant in an email (J170) that if his performance did not improve the situation would be reviewed "*to see what we can do to help you get to an acceptable level."* Thus, had performance been part of the reason for dismissal, it would have been preceded by a performance plan or some other measure. We considered that the reference to the claimant's performance and to call escalations in January were not part of the reason for dismissal at the time but were put forward retrospectively as justifications after the event. When the claimant told Ms Swan on the day of his dismissal that he thought it was unfair she replied: *"We need people to be in.*" She made no reference to the claimant's performance as a reason for his dismissal. Furthermore, it was an absence that prompted the dismissal. In her letter of 8 September 2015 (J199) Ms Swan stated: *"for the avoidance of doubt, you were not dismissed for a reason connected with your blood disorder.// As you are aware, you were dismissed due to your absence levels. The company have been monitoring your absence levels for some time and have been lenient regarding your absence levels."*

Applicable Law

Direct disability discrimination

30. Section 13 Equality Act 2010 provides as follows:

> "***13 Direct Discrimination***
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

Disability Discrimination claim – failure to make reasonable adjustments

31. Section 20 Equality Act 2010 provides:-

> *"(2) the duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(4) the second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(5) ....."*

32. Section 21 Equality Act 2010 provides:-

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

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

33. Schedule 8 to the Equality Act 2010 concerns the duty to make reasonable adjustments at work. Part 3 concerns limitations on that duty. Paragraph 20 of Schedule 8 deals with lack of knowledge of disability. It states:

"20 Lack of knowledge of disability, etc

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know -

(a) ……

(b) …that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

Discrimination arising from disability claim

34. Section 15 EqA provides:

"***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."

35. Section 136 EqA provides:-

"136 Burden of proof

1. This section applies to any proceedings relating to a contravention of this Act.

2. If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

3. But subsection (2) does not apply if A shows that A did not contravene the provision."

36. In the recent case of Efobi v Royal Mail Group Ltd UKEAT 0203/16 the EAT pointed out that the wording of this section in the Equality Act 2010 differs from that of the preceding legislation. Although it is headed '***burden of proof***', it states "*if there are facts from which the court could decide, in the absence of any other explanation, …"* whereas the sections of the various Acts which preceded the 2010 Act provided that '*where* ***a complainant proved*** *facts from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent that…*' Thus, the EAT held in Efobi that there is no longer a burden on claimants to prove facts from which a tribunal could decide that the

respondent discriminated. Rather, the test requires the Tribunal to consider all the evidence from all sources at the end of the hearing to decide whether or not there are facts from which it could decide etc…" Clearly, the mere fact of the claimant establishing a protected characteristic and there having been a difference in treatment would only indicate a possibility of discrimination. These factors are not sufficient on their own for a court to decide on the balance of probabilities that the respondent discriminated. There must be 'something more' in the factual matrix from which the court could decide that the protected characteristic was the reason for the treatment and any explanation by the respondent must be considered.

Discussion and Decision

Knowledge of disability

37. The respondent admitted knowing from the outset of the claimant's employment that he had a blood disorder, but stated that it was not aware this condition was a disability. Their submission was that whilst the claimant made reference to a blood disorder, he 'played it down', giving the respondent no cause for concern and "*no reason to believe he was suffering with any long term condition which was affecting him or that any absences and/or poor performance were in any way connected to his disability*." (Paragraph 6 - respondent's written submissions.) It was clear that by the time they made the decision to dismiss the claimant, the respondent was on notice about his blood disorder. They may not have appreciated that it amounted to a disability, but they did not ask the claimant for the information they required in order to make that assessment. Thus, for the purposes of section 15 we have concluded that the respondent knew or could reasonably have been expected to know at the relevant time that the claimant had the disability. 'The disability' in this case was the claimant's blood disorder. A prudent employer who knows an employee has an impairment will act as though that impairment may qualify as a disability, or satisfy themselves that this is unlikely by seeking medical or occupational health advice.

38. The test of knowledge applicable to the duty to make reasonable adjustments is expressed slightly differently. It is whether the respondent did not know and could not reasonably have been expected to know that the claimant had a disability and was likely to be placed at the disadvantage referred to [in this case by the application to him of the relevant PCP]. For both purposes (the section 15 claim and the reasonable adjustments claim), we concluded that the respondent knew or could reasonably have been expected to know that the claimant had the/a disability for the following reasons: a) the claimant disclosed his condition to Mr Fraser and Ms Swan at his interview on 11 November 2014; b) He gave details of the condition on his employee profile form (J94); c) The claimant said at the return to work meeting on 6 March 2015 that he had been off because of his gallstones and that these were caused by his blood disorder; d) At his meeting with Ms Brennan on 7 July 2015 she noted: "*He also advised he has a blood disorder which may be affecting his focus"*; e) In the email (J167) the claimant sent Mr Fraser and Ms Brennan on 20 July 2015 making his request to work part time the claimant stated that one of his three reasons was: *"I also find that my own health lately has not been as good as it could be, due to my blood disorder I can suffer anemia type symptoms such as fatigue and some sickness which can result in a struggle to focus, so taking time to monitor my own health and have the regular doctors visits (that I am meant to have) without the worry of it impacting my work, making time up (increasing shift length etc) would be hugely beneficial."*

39. With regard to whether the respondent knew or ought to have known at the relevant time that the claimant was likely to be placed at the disadvantage referred to by the application to him of the PCP, we have considered this in relation to the PCP referred to in paragraph 50 below. This became an issue with effect from 20 July 2015. The respondent was put on notice by an email of that date quoted in the preceding paragraph. They ought to have known from the email that the claimant had the disability and that applying or continuing to apply the PCP would be likely to place him the substantial disadvantage referred to below.

Claim of direct disability discrimination

40. We turned to consider whether the respondent directly discriminated against the claimant contrary to section 13 Equality Act 2010. This depended upon whether the claimant was treated less favourably than other employees of the respondent were or would have been treated because of his protected characteristic of disability, here, his hereditary blood disorder. The less favourable treatment identified by the claimant in this case was set out in the parties' further particulars at pages 29 to 49 of the productions as follows:

(i) *"The main instance in which I was subjected to unfavourable treatment occurred on the 6th of March 2015 in a meeting I had with Andrew Fraser and Siobhan Brennan. This meeting occurred in response to an absence from work I had which lasted for three days from …. 3rd.. March 2015 to .. 5th .. March 2015. This was the first absence from work …due to ill health and it occurred almost four months into my time with Walker Love. I was told in no uncertain terms that my absence was unacceptable and that their intention was to terminate my contract of employment there and then after one instance of absence. However, due to the fact that "I was liked" they told me that they had an eleventh hour change of heart and that I was to be given a reprieve on this occasion. It was then made clear that a further absence would not be tolerated and I was explicitly told that a further absence would result in my employment with the company being brought to an end."*

(ii) The claimant's second instance of less favourable treatment was said to have followed a second absence when the claimant attended his grandparent's funeral on 6 February 2015.

(iii) The final instance of alleged less favourable treatment raised by the claimant concerned having been disciplined for an incident at work on the morning of Saturday 4 July 2015 when he and other members of staff did little or no work. An investigation was held and the claimant and

one other employee, DMcW were each given final written warnings to stay on their files for 12 months. (This was reduced to 6 months on appeal in both cases).

41. With regard to the comparator for (i) and (ii) above, the claimant put forward LP and JT, colleagues with the same role and responsibilities as himself, who he argued had high absence rates. He put forward DMcW as his comparator in relation to (iii). The claimant submitted that LP had not been taken aside and told her employment would be terminated if she was absent again as he was. He did not say how he knew this to be the case. Alternatively, he said that his comparator was hypothetical.

42. We concluded that the 'less favourable treatment' suggested in paragraphs (ii) and (iii) above appeared to be misconceived. With regard to (ii) we were unsure what the disparity was said to be. In any event, as the absence was not submitted to be disability related, we did not understand how treatment in relation to it could be discriminatory. With regard to (iii) the claimant and his comparator were treated in exactly the same way. With regard to (i), although we concluded that the claimant's account of this meeting was preferable to the respondent's and made findings in fact accordingly, we did not conclude that the treatment was meted out because the claimant suffered from mild hereditary spherocytosis, but because he had been absent. Thus, if there is a claim in relation to his treatment at the meeting of 6 March 2015, it would relate to the absence arising from the claimant's disability (section 15) and would be subject to the question of whether his treatment at the meeting was a proportionate means of achieving a legitimate aim. It is not a claim for direct discrimination. Thus, the claim of direct disability discrimination does not succeed.

Claim of discrimination by failure to make reasonable adjustments

43. In Environment Agency v Rowan [2008] IRLR 20 the EAT gave general guidance on the approach Tribunals should adopt in reasonable adjustment

claims. The EAT held that "*An employment tribunal considering a claim that an employer has discriminated against an employee .... by failing to comply with the ... duty must identify:-*

(a) the provision, criterion or practice applied by or on behalf of an employer, or;

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

They observed that "*An employment tribunal cannot properly make findings of a failure to make reasonable adjustments under ss.3A(2) and 4A(1) without going through that process. Unless the employment tribunal has identified the four matters at (a)–(d) it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."*

44. With that in mind we considered the adjustments contended for.

a) To investigate his impairment and/or seek independent medical advice.

45. This is not, in itself, a reasonable adjustment. On the authority of Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664 and the cases that followed it, there is no separate and distinct duty to consult either with a claimant or with an independent medical adviser. The question is objectively whether the employer has complied with its obligations or not. Consulting with an employee or seeking medical advice are not in themselves reasonable adjustments. At paragraph 71 of Tarbuck the (then) President of the EAT said this:

"If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant. It may be an entirely fortuitous and unconsidered compliance; but that is enough. Conversely, if he fails to do what is reasonably required, it avails him nothing that he has consulted the employee."

b) to disregard disability related absence when applying their absence practice for employees with less than two years' service.

46. With regard to this suggested adjustment, the claimant submitted that the PCP applied to him at his return to work meeting on 6 March 2015 was the practice of requiring that he have no more sickness absences on pain of termination of his contract. He stated that this practice placed him at a substantial disadvantage in comparison with other employees who do not suffer from his condition because he could not comply with it and it increased his stress level and affected his ability to concentrate. On the comparison point, we accepted Mr Fraser's evidence that he would normally make similar remarks to anyone whose absences were impacting on the team targets. There was evidence that those with more than two years' service were managed according to an absence management policy but that employees with less than two years' service were more informally treated and the practice was to encourage their attendance by warning them that any further absence may result in dismissal. On this basis, we concluded that it was a practice of Mr Fraser's to warn employees with less than two years' service that if they are absent again they risk dismissal. In normal circumstances that is not necessarily an unreasonable position for an employer to take. Absence requires to be managed. We concluded, however in the present case, that the practice did put the claimant at a substantial disadvantage in comparison with persons who do not suffer from his disability. The substantial disadvantage to which the claimant was put was that he was unable to comply with the instruction not to be absent again because of his disability and he was therefore at higher risk of dismissal. The comparators were employees with similar absence levels but without the claimant's disability. They were not similarly disadvantaged as they would be

able to comply and in relation to them, the warning might have the desired effect. Thus, we have concluded in this case that the duty was triggered. Ms Gurevitz submitted on page 9 of her written submissions that the respondent did make a reasonable adjustment in respect of the claimant because he had six periods of absence before the respondent took any action against him. She said that this was twice the number that any other employee was expected to have in a 12 month rolling period. She said that the respondent had therefore taken the step of doubling the trigger point in order to avoid any disadvantage to the claimant. She submitted that increasing the absence trigger any further and/or placing the claimant on an attendance plan would not have been effective in removing the disadvantage and would not have been practicable. She stated it was not therefore a reasonable step to take.

47. The duty, once triggered, is *"to take such steps as it is reasonable to have to take to avoid the disadvantage."* As the EAT emphasized in Royal Bank of Scotland v Ashton 2011 ICR 632, since [section 20 Equality Act 2010] is concerned with practical outcomes, rather than fair procedures, a Tribunal must look at whether the adjustment proposed by the claimant is itself reasonable. The sorts of factors which a Tribunal might consider in making that assessment are listed in paragraph 6.28 of the EHRC Code.

48. We considered the extent to which taking the step of further disregarding the claimant's disability related absence would prevent the disadvantage. The respondent submitted that even if the Tribunal were to find that the absences contended for by the claimant (3 – 5 March 2015 – 3 days; 19 and 20 May – 1.5 days; and 28 August to 1 September – 3.5 days) were all disability related, and should all be discounted, the claimant still had six days' non-disability related absence on his own best case as against only 9 months' length of service. Thus, they argued, his non-disability related absences would have triggered action under the absence policy, which, due to his length of service, would have included dismissal. The respondent referred to Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1205 paragraph 76 in which the Court of Appeal said this: *"an employer is entitled to say, after a pattern of*

illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision." Without any medical evidence to that effect, we did not conclude that further relaxing the absence trigger for disability related absence alone would have been likely to prevent the disadvantage. The pattern of absence suggested that it was not likely that the claimant would have complied with the policy while he remained on full time hours as the evidence suggested that he could not cope with those hours (see below).

49. We also considered whether further disregarding the claimant's disability related absence would have been practicable. The respondent argued that further relaxing the absence trigger would have made the claimant's absence unmanageable. Ms Gurevitz submitted that such an adjustment would only have encouraged the claimant to be off sick. She cited the case of O'Hanlon v Revenue and Customs Commissioners [2006] ICR (which concerned whether continuing to pay enhanced sick pay during absence was a reasonable adjustment): *"the purpose of the legislation is to assist the disabled person to obtain employment and to integrate them into the workforce…The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity which, as the Tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to come to work."* The respondent's submission was that the principle applied in the present case as follows: continuing to allow the claimant's poor attendance (by further increasing the trigger points), having already made adjustments which had not made any improvement) were not reasonable adjustments because, if anything, they would have encouraged the claimant to be off sick. Thus, they were not practicable and unlikely to be effective. We accept that submission subject to paragraph 50 below.

c) to reduce the claimant's hours to 24 per week for a period before considering dismissal to see if it helped his attendance.

50. With regard to this suggested adjustment, the PCP applied to the claimant was the requirement that he continue to work full time after 20 July when he requested to drop his hours on grounds of *inter alia* his health problem. (He requested this from 1 September but we considered that the respondent ought to have implemented this shortly after being put on notice that the claimant needed to reduce his hours because of his health). The substantial disadvantage to which he was put by this PCP in comparison with other workers of the respondent not suffering from his disability was that because of his blood disorder he was becoming fatigued by working full time so that he required to be absent from 28 August to 1 September and was then dismissed. The claimant argued that having agreed to this in part for reasons to do with his health condition (which has been found by the Tribunal to be a disability), it would have been a reasonable step for the respondent to have applied it before dismissing him to see if it solved his attendance problems. We considered that the adjustment was clearly practicable because the respondent had agreed to it. It was unclear to us why they put off implementing it until 7 September. We also concluded that there was a real or even good prospect of the adjustment removing the disadvantage on the evidence before us. The claimant was suffering from anaemia symptoms such as fatigue and sickness. The adjustment would have taken the pressure off him, giving him time to rest, monitor his health and make regular visits to his doctor without the worry of this impacting his work, and without the need to make time up (which had been increasing his shift length, thereby adding to his fatigue). In Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075 the EAT applied Romec v Rudham [2007] All ER (D) 206 and Cumbria Probation Board v Collingwood [2008] All ER (D) and held that when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be a 'prospect' of the adjustment removing the disadvantage. It does not have to be a 'good' or even 'real' prospect of that occurring. With regard to other factors, we did not conclude that there were resource or organisational issues on the evidence

before us. Clearly, if the claimant worked fewer hours, he would receive less pay. We were not persuaded that the claimant dropping 16 hours per week would make a material difference to the performance of the department. We therefore concluded that the respondent did fail in its duty to take this reasonable step and that the claimant's claim is well founded to that extent.

Claim of discrimination arising from disability

51. Section 15 Equality Act provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability; and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. In this case, as we understand it, the claimant submits that the unfavourable treatment he received was the termination of his employment. He goes on to argue that he was dismissed because of something arising in consequence of his disability, namely, his absence levels. As set out in the findings in fact above, the Tribunal accepts that some, but not all of his absences were disability related. (8 days were disability related and 6 days non-disability related). It is quite clear from the evidence, which is discussed in our observations on the evidence above, that the reason for dismissal was the claimant's absence. The final trigger for dismissal was his disability related absence from 28 August to 1 September. Thus, the claimant was dismissed for something arising in consequence of his disability, namely his disability related absence.

52. Thus, the key question is whether the claimant's dismissal was a proportionate means of achieving a legitimate aim. The respondent submits that securing consistent attendance was the legitimate aim in this case and we accept that submission. The key issue here is proportionality. Had it simply been a question of considering the claimant's level of absence against the absence policy, taking account of his short service, dismissal may well have been proportionate. However, the Tribunal has found in this case that the respondent failed to take the reasonable step of reducing the claimant's hours for a period before deciding upon dismissal to see if working the agreed reduced hours

helped his attendance. Since we find that the respondent should have made this adjustment to remove the substantial disadvantage and failed to do so, we conclude that dismissal was not a proportionate means of achieving the legitimate aim of securing consistent attendance. We cannot see how it could be proportionate to dismiss when the problem may have been solved imminently by a less radical solution. Our view in this is supported by paragraph 5.21 of the EHRC Employment Code which states: *"If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."*

Remedy

Financial Loss

53. Section 124 Equality Act 2010 deals with remedies and provides that the Tribunal may *inter alia* award compensation. If compensation is awarded it must be calculated in the same way as damages for delict, in other words, it should, as far as money can do it, put the claimant in the position he would have been in but for the unlawful conduct. We therefore require to consider the position the claimant would have been in but for his dismissal and the failure to take the reasonable step set out above. The claimant received one month's pay in lieu of notice. The claimant would have reduced his hours to 24 from 40 per week if the reasonable step had been taken. On the evidence before us we concluded that, had the claimant not been dismissed on 1 September 2015, he would have continued in the respondent's employment until the beginning of September 2016, when he started his college course. We considered, however, that he would have been able to cope on the reduced hours.

Injury to Feelings

54. In Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318 the Court of Appeal in England & Wales

identified three broad bands of compensation for injury to feelings awards: a top band applicable only to the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment; a middle band used for serious cases that do not merit an award in the highest band; and a lower band appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. Tribunals have considerable flexibility within each band allowing them to fix what they consider to be fair, reasonable and just compensation. The bands were updated for inflation by the EAT in 2009 in the case of Da'Bell v NSPCC (2009) UKEAT/0227/09, [2010] IRLR 19. The lower band was raised to between £600 and £6,000; the middle band was raised to between £6,000 and £18,000; and the upper band was raised to between £18,000 and £30,000. These figures have recently been updated again by the Presidents of the English and Scottish Tribunals. However, the new figures only apply to claims presented on or after 11 September 2017. The award is meant to compensate for the hurt and humiliation suffered by a claimant and it is for the claimant to lead the necessary evidence. The award depends not on seriousness of the discrimination but the nature of the claimant's reaction to it. The task of the Tribunal is to decide what effect the discrimination has had on the life of the claimant. Key factors are whether the discrimination has led to any medical condition, such as depression, panic attacks or stress related illness; how it has affected the claimant's personal relationships; and whether the claimant continues to suffer as a result of it. The Tribunal has to do the best it can to make a sensible assessment on the material available. On the basis of that material, the claimant was stressed in late August and if the respondent had made the reasonable adjustment earlier, the stress could have been avoided or reduced. He was absent from work from Tuesday 21 July to Friday 24 July 2015 on account of chest pains caused by the stress. At his return to work interview on 27 July 2015 he said that he had: *"visited the Doctor who confirmed this could be anxiety due to recent stressful situations".* He was also 'shocked and upset' by his dismissal. On the basis of the material before us, we assess injury to feelings at the lower end of the bottom band of Vento and award £1,600.

Interest on awards

55. Under Regulation 2 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 the Tribunal is required to consider whether to award interest even if the claimant does not specifically apply for it. In the absence of any agreement by the parties regarding how much interest to award, interest is calculated under the Rules set out in Regulation 3. For injury to feelings awards, the interest runs from the date of the act of discrimination complained of and ends on the day the Tribunal calculates interest ('the day of calculation'). For the financial loss award, interest is awarded from the period beginning on the mid-point date and ending on the day of calculation. The mid-point date is the date halfway through the period beginning on the date of the act of discrimination and ending on the day of calculation. In Scotland, regulation 3(2) provides that interest accrues at the rate prescribed from time to time by the Act of Sederunt (Interest on Sheriff Court Decrees or Extracts) 1975. The current figure is still 8%, set by the Act of Sederunt (Interest on Sheriff Court Decrees or Extracts) 1993.

56. With regard to interest on the financial award, 8% of £6,492.62 gives an annual figure of £519.41 and a weekly figure of £9.99. The act complained of occurred on 1 September 2015. The day of calculation is 13 November 2017 (114 weeks). The mid-point is 57 weeks. Therefore, interest on the financial award is 57 x £9.99 = £569.43.

57. With regard to interest on the injury to feelings award, 8% of £1,600 gives an annual figure of £128 and a weekly figure of £2.46. The Tribunal found that the first act/omission complained of occurred on or about 21 July 2015. The calculation day is 13 November 2017 (120 weeks). 120 x £2.46 = £295.20. Total interest on the awards is £569.43 + £295.20 = £864.63.

58. The total award of damages, rounded to the nearest whole pound is calculated as follows:

Financial Loss Loss of earnings from 1 September 2015 to 31 August 2016 (12 months @ £883 per month) 12 x 883 = £10,596.00	£10,596.00
Less 9 months' universal credit @ £317.82. 9 x £317.82 = £2,860.38	(£2,860.38)
Less one month's pay in lieu of notice @ £1,243	(£1,243.00)
	£6,492.62
Injury to Feelings	£1,600.00
Interest	£864.63
Total award	**£8,957.25**

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Employment Judge: Mary Kearns
Date of Judgment: 13 November 2017
Entered in Register: 15 November 2017
and Copied to Parties