RESERVED **Case No. 2401230/17**

EMPLOYMENT TRIBUNALS

Claimant: Mr A Lowe

Respondent: WM Morrison Supermarkets Limited

HELD AT: Manchester **ON:** 12 & 13 February, 25 June & 28 June 2018 (In Chambers).

BEFORE: Employment Judge Ross
Ms C Jammeh
Mr A Gill

REPRESENTATION:

Claimant:
In person

Respondent:
Mr N Singer, counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim that he was unfairly dismissed pursuant to S98 Employment Rights Act 1996 is not well founded and fails.

2. The claimant's claim that he was unfavourably treated because of something arising in consequence of disability pursuant to s.15 Equality Act 2010 is not well founded and fails.

3. The claimant's claim that the respondent failed to make reasonable adjustments pursuant to s20-22 Equality Act 2010 is not well founded and fails.

REASONS

1. The claimant is a man who suffers from ill health. There is no dispute he is a disabled person within the meaning of the Equality Act 2010. He suffers from a number of impairments which include hearing loss, Carpel Tunnel Syndrome "trigger finger" in both hands, a tremor in his left hand, osteoarthritis, obesity, glucose intolerance, problems with his feet and a skin infection. These have led to problems with mobility which is made worse because of cracked and infected skin on both feet, He has problems with his vision. He describes problems with short term memory.

2. He has required surgery for a testicular problem and a hernia.

3. The claimant worked for the respondent for over eighteen years as a Food Preparation Operative which involved taking raw vegetables and cutting or trimming them to the right side for the cutting or processing machines.

4. Because of his ill health the claimant had very substantial absences from work.

5. On 3 August 2016 the claimant was issued with a final written warning for his failure to contact the site or his manager during a period of absence from work, his manager being unable to contact him and unreasonable refusal to accept a phased return to work on amended duties.

6. On 2 September 2016 the claimant left site without permission.

7. The claimant was dismissed for gross misconduct for leaving the site without permission. He was summarily dismissed and therefore was not paid any notice pay. On appeal the Appeal Officer decided the penalty for dismissal for leaving site on 2 September was too harsh and issued a final written warning for it. However, when taken together with the claimant's previous final written warning which was live these cumulatively were "stacked" to cause the claimant's dismissal. However, he was paid his notice pay.

8. The claimant brought a claim to this Tribunal. He brought claims for unfair dismissal, disability discrimination and a claim for unlawful deductions from wages/breach of contract/holiday pay. These money claims were settled during the course of the hearing and a separate judgment in respect of those sums(gross) was issued.

9. At the first hearing we heard from the claimant, Mr Ricketts the Investigating Officer and Mr Rhodes, the Appeals Officer. Unfortunately, Mr O'Brien, the dismissing officer, was unwell after an operation on his knee. Accordingly, at the

stage his evidence was reached the case was adjourned part-heard and relisted for a date when he could attend and was convenient for all the parties, in June 2018.

10. The claimant attended two Case Management Hearings with Employment Judge Ryan where his claims were identified. The issues and claims are found at pages 33 to 35 of the bundle. The claims were narrowed by his solicitor's letter (p40). By the time of the Hearing the claimant was acting for himself. Therefore, in reaching judgment the Tribunal dealt with the issues and claims as set out by EJ Ryan, rather than on the more restricted basis as identified by his solicitor because the claimant appeared to consider the claim in relation to the chlorine checker role as still part of his case.

The Issues

11. I now record that the issues between the parties as identified by EJ Ryan to be determined by the Tribunal are as follows:

Unfair Dismissal claim

12.

12.1 What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996.

12.2 The Tribunal must be satisfied that: the respondent had a genuine belief in the misconduct and that this was the reason for dismissal; the respondent held that belief on reasonable grounds, having carried out as much investigation of the circumstances as was reasonable and that the decision to dismiss was fair, that is, was it within the reasonable range of responses for a reasonable employer?

12,3 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

12.4 Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

Disability

13.

13.1 The respondent accepts that by virtue of a variety of mental or physical impairments the claimant was a disabled person.

Section 15: Discrimination arising from disability

14.1 Did the respondent treat the claimant unfavourably because of something arising in consequence of the disability? The claimant's case is that the "something arising in consequence" were that:

14.1.1 he was unable to fulfil the duties of his role fully; and

14.1.2 that he was absent from work by reason of disability.

14.2 The claimant's case is that as to the first of those the respondent ignored his request for a job as a chlorine checker and that as to the second he was dismissed at least in party by reason of his absence. Does the claimant prove that the respondent treated the claimant in those ways?

14.3 If so can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent has not leaded facts in support of that contention yet. An order for an amended response is set out below.

Reasonable adjustments: Section 20 and Section 21

15.1 Did the respondent apply the following provision, criteria and/or practice ("the provision") generally:

15.1.1 that staff should meet its production targets.

15.2 Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

15.2.1 it was more difficult for him to meet production targets.

15.3 Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant; however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

15.3.1 to modify the production targets of the claimant;

15.3.2 to sign the claimant work on tasks that had no or less rigorous targets;

15.3.2 by the claimant with a knife to make his tasks easier;

15.3.4 to allocate a co-worker to assist him in meeting his targets to sign him to alternative work as a chlorine checker.

Time/limitation issues

16.1 The claim form was presented on 19 January 2017. Bearing in mind the effects of ACAS Early Conciliation, any act or omission, which took place before 6 September 2016 is potentially out of time, so that the Tribunal may not have jurisdiction.

16.2 If so can the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

13.3 If not, can the claimant show that it would be just and equitable for time to be extended so that the Tribunal may find that it has jurisdiction?

FACTS

14. The Tribunal found the following facts. The claimant suffered from ill health and had substantial absences from work. His first long term absence was between 7 July 2011 until 30 April 2012.p65-80 The claimant was suffering from visual and balance disturbances as a result of a stroke. A phased return to work was discussed. following a meeting with his managers on 23.1 12(. P 73-4).

15. The second absence was from 26.02.2012 for 2 months with double vision.P.76. He met with Occupational Health and a phased return to work was agreed (P79-80)

16. The next third was 29/1/13 to 4/7/13. This was because of problems with a Urinary Tract Infection and Prostatism (page 82). The claimant returned to work, following an OH meeting on 24.04.13 (p90) when a phased return was discussed. During this bout of absence, the claimant had surgery to release a tendon on his thumb, plus testicular surgery. During this absence the claimant received a formal verbal warning in relation to his absence to stay live for 6 months. P95-6.

17. The fourth absence was from December 2013 to March 2014. claimant was absent for 6 weeks from 9.12.13 due to an operation on his hand(p97,99). He was referred to OH in Jan 2014. (p100) but did not attend. He was reminded of the importance of keeping in touch when absent on sick leave. P 104. He was absent from 29 01 2014 due to an abscess following testicular surgery. P106. He remained absent with post-operative problems until 24 March 2014.

18. The claimant was absent from work again from 25 June 2014 to 1 October 2014 due to a hernia. This was the fifth lengthy absence in 3 years. The respondent obtained from a work from occupational health dated 8 October 2014 and arranged

adjustments for the claimant, see page 135. He attended a long-term absence review meeting on 16 September 2014. P124. The letter of invitation reminded the claimant of the need to remain in contact with the respondent when absent from work, sick. P124, as did Mr O'Brian in the meeting. P126. The claimant apologised in the meeting for not submitting sick note. p126.The claimant was not issued with any sanction in relation to his absence and the respondent's sickness policy. P.132.

19. The claimant was absent from work again from 7 January to 8 January due to wisdom tooth removal, page 136 to 137.

20. The claimant then required hand surgery to his left thumb and was absent during the period 19 October 2015 to 14 January 2016, a sixth period of long term absence. Again, he was referred to occupational health during his absence, see page 147 and 152, 154. He had a phased return to work on which he was on light duties as recommended by the occupational health doctor. A return to work interview was conducted on 14 Jan 2016. P150

21. In these periods of absence from work which were extensive the claimant was rarely taken through the respondent's attendance management procedure which is to be found at page p58A and suggests a target absence rate of no more than 3%. He received occasional verbal warnings for example in 2013 for six months but the matter was not otherwise progressed and the respondent supported him with referrals to occupational health and phased return to work.

22. In or around May 2016 Mr Ricketts became the claimant's line manager. He held a welfare meeting with the claimant on 19 May 2016, see page 156.

23. The claimant was then absent from work with a skin infection on his feet which he initially self certified and then was later certified by his GP. His absence was from 8 January 2016 to 20 July 2016, page 159,178,180 and 185.

24. During this period of absence, the respondent encountered problems in contacting the claimant. The respondent's absence procedure, see page 58B requires the claimant to keep in regular contact with his managers. His manager Mr Ricketts was unable to contact the claimant. During the course of one conversation Mr Ricketts was told the claimant was out walking his dog in the Peak District.

25. A document at p 164 shows that on 17 June 2016 the claimant was being assessed for support by an external organisation "Independent Living Service." In this document the claimant is described as having "short term memory problems". It was not suggested that this document was provided to the respondent. For clarity the Tribunal confirms it is not an OH report as suggested in the bundle index.

26. Mr Ricketts problems contacting the claimant in June 2016 are logged at page 166.

27. The claimant was invited to a meeting on 23 June 2016, see page 167 to discuss the respondent's concerns about these matters. In that meeting he agreed he had been offered a return to work doing office based paperwork but said he had declined because his hands were peeling. (p174). At the Tribunal he said the skin infection on his feet had transferred to his hands.

28. On 19 July 2017 the claimant attended a long term sick absence meeting and adjustments were considered, see page 181 to 3.

29. On 20 July 2017 the claimant returned to work and it was agreed he would work reduced hours during the phased return, see page 185. This was consistent with the GP's recommendation, see page 178. It was agreed if the claimant had any concerns he should contact Helen or Laura Hodgson while Mr Ricketts was absent. See p. 185

30. On 21 July 2016 the claimant was invited to a disciplinary meeting in relation to the issues during his absence, see page 187. The allegations were that in breach of the respondent sickness absence policy the respondent was unable to contact the claimant between 9/6/19- 22/06/16, that the claimant unreasonably refused a phased return to work on phased duties and finally although the claimant said he was unfit for work due to difficulties working caused by a foot infection, yet he told Mr Ricketts in a telephone call that he was walking the dog.

31. On 28 July 2016 the claimant sent in a handwritten letter asking for "health condition adjustment" (see page 189).

32. On 30.07 2016 a meeting was held with the claimant about his wife speaking to other employees abusively when attempts were made to contact the claimant. P191.

33. On 3 August 2016 the claimant attended a meeting about working flexibly with Mr Ricketts. Mr O'Brien was the note taker, see page 193 to 194. Although the claimant had sent a letter in a few days earlier about health condition adjustments when discussing the matter with Mr Ricketts he said he was fit to work. P194.

34. Also on 3 August 2016 the claimant attended a disciplinary meeting conducted by Mr Ratcliffe in relation to the issues about his contact during his most recent absence and issues about reasonable adjustments. P196-199. The result was a final written warning for gross misconduct-breach of company sick pay policy, see page 202. The claimant did not appeal that outcome.

35. On 22 August 2016 the claimant was invited to an Absence Review Meeting in accordance with the respondent's sickness policy, see page 211. The meeting took place on 26 August 2016, see page 218 to 221. It was conducted by Mr Ricketts and the claimant was given a verbal warning because of his absence level which was at 35.71%.

36. On 2 September 2016 the claimant went absent from work without permission. It is the claimant's case that this was due to a misunderstanding. He says he started work that morning as usual on the prep belt. There is no dispute that

the respondents operated a system required the 5 or 6 operatives on the prep belt to complete a target of a preparing a certain number of peppers per shift. The task the claimant was engaged in was "popping peppers" this meant removing the internal core and the seeds from peppers.

37. When the team had achieved their target, they were sometimes permitted to leave work early. There was no financial incentive to reach the target. This is because no financial bonus was paid for achieving the team target. Although employees might be permitted to leave early if the target was reached, they were only paid for the time during their shift they actually worked. If they were permitted to leave early they were not paid for the remainder of their shift Alternatively they were permitted to use up some of their holiday entitlement if they wanted to be paid for the remainder of the shift when being permitted to leave early.

38. We rely on the evidence of Mr Ricketts to find the system in relation to employees leaving early when the team target was reached was as follows: a supervisor would tell one of the team that team was to be allowed to go. However, individuals were not permitted to leave unless s/he had gone to check for authorisation with the supervisor or a more senior manager personally. He confirmed that there was no entitlement simply to leave the premises early because an employee had been told by a team member it was ok to go.

39. On 2 September 2016 although the claimant had started the day on the prep belt, he was moved to line 7 to assist a junior employee Jordan Skett, who was not fully trained. No one released the claimant from this task. It is undisputed at 12.30pm the claimant left. When this became apparent Mr. Ricketts rang the claimant at home. Mr Ricketts said the claimant told him he was in bed. The claimant said he asked if he should come back in and Mr Ricketts said no.

40. Mr Ricketts commenced disciplinary investigations. He interviewed the claimant's supervisor Diane Unsworth p227-30 and his colleagues including Emma Williams 231-3 and Catherine McCallum 234-6 and Jordan Skett 237-40. The claimant was interviewed by manager Laura Hodgson.p241-3.

41. The claimant had said Emma, the team member on the prep table had told him he could go.

42. However, when Mr Ricketts spoke to Emma she did not confirm the claimant's version of events. Instead she told Mr Ricketts she told the claimant “prep belt was going home, I don’t know about you or anyone else”.

43. Diane Unsworth the team leader said Mr Lowe had started on prep belt but explained she had moved him to line 7 and told him to assist Jordan on cooking and then when Jordan was to do cleaning or changing product on another line the claimant was told to assist him. She specifically said she told the claimant to stay after he asked her if he could go home: “I told him he was stopping at about 1200 when line 7 was broken down.” She confirmed she asked the claimant to clean and set up the line for at 15.30pm so it would be ready for the cooks to go in at 17.30pm. p229.

44. Jordan Skett confirmed the claimant was asked to assist him that day because he (Jordan) was not fully trained. P238.

45. The claimant confirmed at his disciplinary hearing that he had left site without asking anyone in authority if he could go. P253. He also said he “had misheard and misunderstood”. He admitted “no excuse I should have checked and double checked.” P252

46. He was dismissed for this conduct namely leaving site without the authority of the supervisor. Mr O'Brien preferred the evidence of the witnesses namely the supervisor Diane Unsworth and the claimant's work colleagues to that of the claimant that there was a misunderstanding.

47. The claimant appealed. The appeal officer whom we found to be a fair and conscientious witness re-examined the evidence and he took further statements from Ms Smethurst(HR), Mr O’Brian, dismissing officer and Frances(Colleague). He considered the claimant's lengthy service and decided that to sack for gross misconduct for one occasion of walking off site was too harsh and down graded it to a final written warning. However, he then had to take into account that the claimant had a live final written warning issued just a month before the incident on 2 September. When counted together in accordance with the respondent's disciplinary policy he concluded that dismissal was the only outcome.

48. Turning to the evidence in relation to adjustments the Tribunal heard that the targets issued in relation to the number of peppers to be popped were decided the evening before the shift started. There was no financial incentive to reach the target. The only benefit to the team if they achieved the target was that they may be permitted to go home early if authorised by a supervisor. However, that was without pay or they could use holiday pay. There was no other incentive. The claimant said he felt some pressure because the targets were individual as well as team targets and they were posted on the wall. It was not disputed no disciplinary action was taken against employees for not achieving the target.

49. The Tribunal heard evidence from Mr Rhodes about alternative suggestions from the claimant about how to carry out his job as a pepper popper. However, these were not suggested at the time. When the claimant returned to work after his skin infection in July 2016 his doctor had signed him fit for work.

50. In relation to a number of his absences the claimant had a phased return to work as authorised by occupational health department and his GP. No other adjustments were suggested.

51. The Tribunal notes that by the appeal stage of the hearing the claimant's own representative from the trade union conceded the claimant was no longer fit to do the job.

52. The Tribunal heard evidence from Mr Ricketts about the chlorine checker job. The Tribunal relies on his evidence to find that the vegetables were washed in a chlorine solution. As Mr Ricketts clearly explained it was crucial that the level of the chlorine solution was just right because "little would not kill pests and too much

would kill the customers". He also gave evidence that there was quite a lot of movement in this job because there were a number of different large vats of water "flumes" in which the vegetables were washed and each flume had to have chlorine added. Each flume was to be checked each hour. On each occasion the chlorine was added this had to be noted, records had to be kept. He explained that the company would be in serious trouble and potentially open to prosecution if used the wrong amount of chlorine in the water for washing the vegetables.

53. The claimant told us he had short term memory loss. This is referred to in a report which was not shown to the respondent at the time but appears to have been compiled by a Ms Bickerstaffe in relation to a social security benefit claim by the claimant. A GP report dated June 2017 produced for these proceedings states that following an assessment: “the claimant’s short term memory is actually quite good”.P32 .

54. There was no dispute the claimant also had mobility issues. Although he was trained as a chlorine checker and did this job from time to time to train other individuals he never did this job on a permanent basis. We accept the evidence of Mr Ricketts there was a stressful element to the job. If the chlorine in the water was not right the task had to be done again. If the chlorine checker made this decision it made them unpopular with the other employees because it delayed them getting on with their role.

55. **The Law**

56. The relevant law is found in the Equality Act 2010: Sections 20 to 22 (Duty to make reasonable adjustments), Section 15 (Discrimination arising from disability). The burden of proof provision is relevant, Section 136 and time limit provisions, Section 123**.**

57. We reminded ourselves of the principles in Igen Limited & others v Wong [2005] ICR 931 CA; Anya v The University of Oxford [2001] IRLR 377; Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL; Barton v Investec Securities [2003] ICR 1205; Madarassy v Nomura International PLC [2007] ICR 867; Laing v Manchester City Council [2006] ICR 1519; and Nagarajan v London Regional Transport [1999] ICR 877 HL.

58. In the reasonable adjustments claim the Tribunal had regard to the principles in Environment Agency –v- Rowan 2008 ICR 218 EAT, Project Management –v- Latif 2007 IRLR 579 and Smith –v- Churchills Stair Lifts Plc 2006 … 524 CA. The parties drew our attention to the Secretary of State for Work and Pensions (Job Centre Plus) –v- Higgins UKEAT/579/12 2014.

59. The Tribunal also had regard to the EHRC Code of Practice and in particular paragraphs 6.1, 6.10, 6.16, 6.28 and 6.29.

60. In the Section 15 claim (Discrimination arising from disability) the Tribunal had regard to Pnaiser –v- NHS England and Another 2016 IRLR 170 EAT. The Tribunal also had regard to para 5.9 EHRC Code of Practice.

61. Counsel drew our attention to additional authorities, namely:
O'Brien v Bolton St Catherine's Academy [2017] ICR 737
Charlesworth v Dransfield Engineering Services [2017] WL02301044
Secretary of State for Justice, HM Inspector of Prisons v Dr P Dunne [2017] WL01031982
T-Systems Limited v Mrs K Lewis [2015] WL5202390
Kingston-upon-Hull City Council v Matuszowicz [2009] ICR 1170
Abbey National PLC & another v Chagger [2010] ICR 397
In relation to the unfair dismissal claim:
Davies v Sandwell Metropolitan Borough Council [2013] EWCA Civ 135
O'Donoghue v Redcar [2001]

Applying the Law to the Facts

Discrimination arising from disability

We remind ourselves of the issues and turn first to the discrimination arising from disability claim.

The first issue identified at the case management hearing before Employment Judge Ryan is: Did the respondent treat the claimant unfavourably because of something arising in consequence of the disability?

The case was put on the following basis: that the unfavourable treatment was firstly the claimant's dismissal and secondly the respondent ignored his request for a job as a chlorine checker.

The claimant's case is that the 'something arising in consequence' were that:

(i) He was unable to fulfil the duties of his role; and
(ii) That he was absent from work by reason of disability."

66. The first matter relevant in considering a section 15 claim is to remind ourselves that as Mrs Justice Simler set out in **Pnaiser v NHS England & another [2016] IRLR 170**, the Tribunal first has to "identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment, focussing on the reason in the mind of the alleged discriminator, possibly requiring examination of conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The Tribunal must then determine whether the reason was "something arising in consequence of the claimant's disability".

67. In this case there is no dispute that the primary claim of unfavourable treatment relied upon by the claimant is his dismissal. The claimant was dismissed for gross misconduct by Mr O'Brien. This decision was upheld by Mr Rhodes although he dismissed the claimant with notice having "stacked" his original final written warning and his warning for leaving site without the permission of a supervisor. He dismissed with notice.

68. We also remind ourselves of **T-Systems Limited v Lewis** which reminds us that the key question is whether the "something arising in consequence of the disability" operated in the mind of the alleged discriminator consciously or unconsciously to a significant extent.

69. The Tribunal does not find that the "something arising in consequence" was either that the claimant was unable to fulfil the duties of his role fully or that he was absent from work by reason of his disability.

70. At the time the claimant was dismissed, the claimant had returned to work. We find at that point he was able to fulfil the duties of his role. Although he had very considerable periods of sickness absence during his employment with the respondent, his GP had certified him fit for work so long as he had a phased return (see page 180 where the fit note is dated 15 July 2016 it is for the period up to 29 July 2016).

71. On 20 July 2016 the claimant attended a return to work meeting which confirmed he was working on reduced hours, 6.00am to 11.00am, for the first week, increasing to 6.00am to 2.00pm the following week, depending how he got on.

72. At the meeting it was agreed that the claimant would return to work on the prep belt but could raise any issues or concerns to Helen in the short-term or Laura until Mr Ricketts (the line manager) returned (page 185). The claimant signed the fitness to work questionnaire (page 186) on 20 July 2016, although the claimant sent a letter on 28 July after he had received the invitation to the disciplinary hearing asking for "health conditions adjustments" (page 189).

73. When asked by his manager at a meeting to discuss this on 3 August (page 192), "are you telling me you are not fit to go back to your duties?" the claimant replied, "I'm fit, it's just on the advice of the solicitor". He was asked, "At out meeting on Saturday you made it clear you were ready to return to full-time work. Why do we need to contact your GP? If you're telling me you're ready to return to full-time work will he tell us different? (page 194). The claimant replied "no" to this question and stated " Doctor said if you need to clarify anything he will tell you". The manager asked again, "Because we received this letter I needed to clarify you're fit to return on full duties and on full hours from today". The claimant replied, "Yes I'm ok". The claimant was advised that if there was any change he needed to inform his manager straightaway, to which the claimant said "Ok". For this reason the Tribunal is not satisfied that the "something arising in consequence" was that the claimant was unable to fulfil the duties of his role fully.

74. Even if the Tribunal is wrong about this and the claimant can show he was unable to fulfil the duties of his role**,** the Tribunal is not satisfied there was any

evidence to suggest that Mr O'Brien dismissed the claimant because he was unable to fulfil the duties of his role.

75. In fact, the Tribunal finds that the business had been very supportive of the claimant over lengthy periods of absence (six long-term absences in a period of several years) where he was very rarely taken through a sickness absence procedure

76. Mr O'Brien was a clear and convincing witness. He explained clearly and simply that the claimant had been specifically told by team manager, Diane Unsworth, to remain on site. Despite that he left site. The claimant had said one of his colleagues, Emma had permitted him to go. Mr O'Brien relied of the evidence of witness Emma Williams that she had not said this at all. The Tribunal is not satisfied that there are any facts which could cause us to infer that Mr O'Brien dismissed the claimant either because the claimant was unable to fulfil the duties of his role fully or that the claimant was absent from work by reason of disability. We find he dismissed the claimant because of his conduct.

77. The Tribunal is mindful that the claimant by the time he appeared at this hearing was a litigant in person. At the appeal stage the Tribunal has found, and it is not disputed, that Mr Rhodes dismissed the claimant because he "stacked" his absence from work without authorisation warning with his previous final written warning". That previous final written warning was issued for three reasons:
    (1) The claimant failed to contact the site or his manager and when his manager was trying to contact him on several occasions between 9 June 2016 and 22 June 2016 he was unable to contact him.
    (2) He unreasonable refused to accept a phased return to work on amended duties.
    (3) He said he was unfit for work as he was finding it difficult to walk due to his foot infection but confirmed during a telephone conversation with his manager and also during both his investigation meeting and disciplinary meeting that he was out walking the dog on one of the occasions that he was unable to take a welfare call on 17 June 2016 (see page 202).

78. The Tribunal reminds itself that a significant influence is required when considering whether the claimant was treated unfavourably because of something arising in consequence of disability.

79. The Tribunal finds that two of the reasons for giving the final written warning were conduct matters, namely (1) failing to contact the site or the manager and being unavailable when the manager tried to contact him, in breach of the respondent's sickness absence procedure; and (2) out walking the dog when he had informed the respondent he had a foot infection and so was not well enough to work.

80. The Tribunal finds the "unreasonable refusal to accept a phased return to work on amended duties" is something arising in consequence of the disability. The claimant had told the respondent the infection had spread to his hands. Although the sick notes had previously referred to "foot infection" (see page 178) by 15 July 2016 the doctor had put "infective dermatological disorders" which is consistent with the claimant's suggestion that the infection had spread to his hands. This is also consistent with the claimant showing the respondent his hands at the investigatory meeting on page 174, and stating he could not do the office based paperwork "because my hands are peeling".

81. Accordingly, we are satisfied that there is a connection between the claimant's dismissal at the appeal stage and the final written warning, and we find the final written warning was in a small part a consequence of the claimant's disability.

82. We appreciate that Mr Rhodes may not have had knowledge as to the precise issue in relation to the unreasonable refusal to accept amended duties. He had not issued the final written warning. However, in **City of York v Grosset [2018] EWCA Civ 1105 CA** the question arose, "where an employer dismisses a disabled employee for misconduct caused by his or her disability, can the dismissal amount to section 15 discrimination if the employer did not know the disability caused the misconduct". The Court of Appeal held that it could.

83. The Tribunal finds that having regard to **Charlesworth v Dransfield Engineering Services Limited** a *significant* influence is required not a *mere* influence when establishing whether the claimant was unfavourably treated because of something arising in consequence of disability. In this case, the part of the refusal of the claimant to return to work in performing amended duties in his ultimate dismissal at the appeal stage is small because it was only one of three matters which led to the final written warning. The other two matters were conduct related. That in turn was added to the claimant's behaviour in going absent without permission from site. We are not satisfied that the "something arising in consequence of the disability" was significant, and accordingly the claim must fail at this stage.

84. However, in case we are wrong about that we have gone on to consider the employer's defence. We must consider whether the treatment, namely the dismissal of the claimant, was a proportionate means of achieving a legitimate aim.

85. We find the legitimate aim of the respondent was identified at page 43: it was to maintain appropriate levels of conduct, attendance and operational performance at the site.

86. The claimant was well aware that he was required to keep in touch with his employer under the terms of the sickness absence. It was clearly marked in the document and had been brought to his attention on previous occasions.

87. He accepted that he was out walking his dog and informed his employer of this at the investigation meeting and the disciplinary meeting, despite informing the respondent he was not well enough to work and was unable to take a welfare call. These matters of conduct together with such an experienced employee leaving site when he did not expressly have permission to do so means that we find the respondent has shown dismissal is a proportionate means of achieving the respondent's legitimate aim.

88. In reaching this conclusion we have taken into account that Mr Rhodes clearly considered lesser sanctions. He was a convincing witness. Evidence of how genuine and fair he was is illustrated by the fact that he did not rubber-stamp the decision of Mr O'Brien. He conscientiously undertook his own investigation and decided the original penalty of dismissal for walking off site was too harsh and substituted a final written warning. However, he found he had to "stack" the final written warning with the warning for walking off site which meant the claimant was still dismissed. He therefore dismissed the claimant with notice rather than summarily. Therefore, the claimant received a payment in lieu of notice of 12 weeks' pay, given his lengthy service. It is clear that at the time both the claimant and his union representative regarded that as a very satisfactory outcome.

89. For these reasons the claimant's claim that he was unfavourably treated when he was dismissed because of something arising in consequence of disability fails.

<u>The chlorine checker role</u>

90. At the case management hearing the claimant put his claim in the alternative that he was also relying on unfavourable treatment that the respondent ignored his request for a job as a chlorine checker. The "something in consequence of the disability" was again that he was unable to fulfil the duties of the role fully and that he was absent from work by reason of disability.

91. The Tribunal has considered this for the sake of completeness, given the claimant at the hearing was a litigant in person although the letter from the claimant's solicitor specifically does not refer to the chlorine checker role which suggests that part of the claim was abandoned.

92. The claimant did not give any clear evidence during the course of the hearing that he had actually made an application for the chlorine checker role (unfortunately he gave evidence in this regard in his submissions statement which the Tribunal cannot consider).

93. The Tribunal accepts the evidence of Mr Ricketts that to his knowledge the claimant did not ask to work as a chlorine checker on a permanent basis. The Tribunal finds the claimant failed to bring any application for the role of chlorine checker to the respondent's attention.

94. Mr Ricketts explained this job was a demanding and intense role. We refer to our findings of fact that it was absolutely crucial the role was performed correctly because too little chlorine "would not kill any pests, and too much would kill the customers".

95. We also accept Mr Rickets evidence that the company would be in serious trouble and potentially open to prosecution if it used the wrong amount of chlorine in the water for washing the vegetables. We also rely on evidence that the chlorine checker job was a physical role in the sense that there was a lot of walking. The chlorine checker also required mobility. It was evident the claimant had limited mobility. Although it is not supported by the medical evidence (the claimant's doctor specifically said there were no issues with the claimant's short-term memory) the claimant himself raised concerns about his memory with the respondent.

96. Thus if the Tribunal is wrong and the respondent was aware of the claimant's application the Tribunal finds he was treated unfavourably because of something arising in consequence of his disability, because the Tribunal finds Mr Ricketts was of the view that the claimant would have been unable to fulfil the duties of the role on a permanent basis given his mobility issues and the claimant's expressed concern about his own short-term memory.

97. The Tribunal; must then consider the response: was the treatment a proportionate means of achieving a legitimate aim? The legitimate aim must be the health, safety and welfare of the customers. As graphically explained by Mr Ricketts, too much chlorine could kill the customers: not enough would fail to kill the pests. Inaccuracy in either direction could leave the respondent liable to prosecution. It was absolutely a proportionate means of achieving a legitimate aim not to permit a person with mobility issues and express concerns about his short-term memory to carry out such a role.

98. Therefore, this claim fails.

Failure to make reasonable adjustments

99. The Tribunal turns to the claim for failure to make reasonable adjustments. The first question is: did the respondent apply a provision, criterion or practice that the staff should meet its production targets? It is not disputed that the respondent applied a provision that the staff should meet its production targets.

100. The Tribunal turns to the next question: did the application of any such provision put the claimant at a substantial disadvantage in relation to a

relevant matter in comparison with persons who are not disabled, in that it was more difficult for him to meet production targets?

101. Firstly, no detailed evidence was adduced that because of his disabilities it was more difficult for the claimant to meet the production targets. In addition, the Tribunal finds there was no substantial disadvantage to the claimant because he did not have an individual target. The evidence was that the targets were team targets. Moreover, no-one was disciplined for failing to meet the target, neither was there any financial advantage in failing to meet the target. There was no bonus. The only "reward" was being permitted to go home early without pay or to use up one's holiday entitlement.

102. Accordingly, having found there was no substantial disadvantage to the claimant in relation to the relevant matter the claim fails at this stage.

Time/limitation issues

103. The claimant's claim for disability discrimination has failed and accordingly there is no need for the Tribunal to go on to consider issues in relation to time limits.

Unfair dismissal pursuant to the Employment Rights Act 1996

104. The first question is: what is the reason for dismissal? The respondent asserts the reason for dismissal was conduct, which is a potentially fair reason under section 92 of the Employment Rights Act 1996. There is no dispute that the claimant left site without authorisation on 2 September 2016. Accordingly, the Tribunal is satisfied that this was potentially an issue of conduct and thus a potentially fair reason.

105. The Tribunal turns to the next question, which is whether the dismissal was fair or unfair. The Tribunal reminds itself of the principles in British Home Stores v Burchell, namely did the respondent have a genuine belief in misconduct based on reasonable grounds having carried out a reasonable investigation? The claimant admitted the misconduct of leaving site, and by the disciplinary hearing agreed that he had not asked anyone in authority if he could do so. However, he did also suggest that there had been a misunderstanding or he may have misheard.

106. We find that Mr O'Brien, the dismissing officer, had a genuine belief based on reasonable grounds following a reasonable investigation of the conduct. He relied on the evidence of the claimant's team manager, Diane Unsworth, in particular, who clearly stated she had not given permission for the claimant to leave and had specifically said to him he was to stay (see pages 228 and 229). She also specifically stated she did not tell Emma Williams to advise him to go home (see page 229). She also confirmed that Jordan Skett could not do the clean alone (see page 230). Mr O'Brien also

relied on the evidence of Emma Williams that she had not told the claimant he was authorised to go.

107. We find that as well as obtaining statements from Diane Unsworth, Emma Williams, Catherine McCallum and Jordan Skett, the claimant was given an opportunity to give his version of events both at an investigation meeting and at the disciplinary hearing. The claimant was provided with the relevant information from the investigation when he was invited to the disciplinary hearing by a letter of 8 September 2016 (see page 247). Accordingly, the Tribunal is satisfied the respondent had a genuine belief based on reasonable grounds following a reasonable investigation.

108. The Tribunal turns to the next question: was dismissal within the band of reasonable responses of a reasonable employer? In reaching this decision the Tribunal has also taken into account the evidence in relation to the appeals officer. The claimant had the opportunity of an appeal and Mr Rhodes approached the matter fairly and conscientiously, obtaining further information including on the claimant's suggestion that he suffered from short-term memory loss, his length of service, his disability and other matters raised within the claimant's appeal.

109. Mr Rhodes gave detailed consideration to all the matters raised by the claimant (see pages 316-318). As a result, he overturned the sanction of summary dismissal and instead issued a final written warning. However, when stacked with the original final written warning this still led to the claimant's dismissal albeit with notice.

110. The Tribunal turns to consider whether dismissal was within the band of reasonable responses of a reasonable employer. Leaving site without permission the Tribunal accepts is a very serious matter of conduct for the respondent. The Tribunal finds it was crucial that the respondent knows where its staff are at any time, not least for health and safety reasons such as a fire alarm. Although the claimant alleged the respondent could have looked at his clocking off record, the Tribunal accepts the respondent's evidence that the fact the claimant had not informed anyone he had left meant that no-one knew where he was and this would have caused a difficulty if there had been a fire because the respondent would not have relied on clocking off records alone in case there was any inaccuracy in them.

111. The Tribunal also takes into account that when the claimant left site he left the trainee, Jordan Skett, unsupervised. Although the claimant was assisting Jordan Skett and was not formally his supervisor, nevertheless The Tribunal accepts that is a serious matter to leave a trainee without assistance.

112. The Tribunal refers to its findings elsewhere in this judgment in relation to the final written warning. Although one small part of the warning might be considered to be related to the claimant's disability, the Tribunal is satisfied

that this was not a significant part of the warning. The two major matters were the conduct issue, in particular failing to keep in touch with the respondent during a period of sickness absence.

113. The Tribunal relies on **Davies v Sandwell Metropolitan Borough Council [2013] EWCA Civ 135** in relation to the final written warning. We must ask ourselves whether in this particular case it was reasonable for the employer to treat the conduct reason taken together with the circumstances of the final written warning as sufficient to dismiss the claimant. We remind ourselves it is not our function to re-open the final warning and it is not for us to decide whether or not it should have been issued. The question for us is whether a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct the final warning.

114. We find a reasonable employer of this size and undertaking could reasonably have taken the final written warning into account when determining whether to dismiss the claimant for conduct. Both the final conduct and the matter relating to the final written warning were matters primarily of conduct. They happened very close together in time. Therefore we find dismissal was within the band of reasonable responses of a reasonable employer.

115. In answering whether dismissal was unfair or fair we also take into account the procedure in this case. The respondent followed a fair procedure. They conducted a thorough investigation. The claimant had an opportunity to put his version of events at the investigatory meeting, disciplinary meeting and the appeal hearing. His lengthy service was taken into account at the appeal stage.

116. For these reasons we find his dismissal was fair.

117. Finally, the Tribunal turns to the **Polkey**, which is the last issue in this case. Does the respondent prove that if it had adopted a fair procedure for the claimant he would have been fairly dismissed in any event, to what extent and when?

118. There is no requirement for the Tribunal to answer this question because we have found the claimant was fairly dismissed.

Employment Judge Ross

Date 13 July 2018

JUDGMENT SENT TO THE PARTIES ON

.19 July 2018

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FOR THE TRIBUNAL OFFICE

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.