EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104706/2018

Held in Edinburgh on 3,4,5 and 6 December 2018

Employment Judge: Iain F. Atack
Members: Mrs L Brown
Mr T Lithgow

Mr M Samson	Claimant Represented by: Mr W McPartland Solicitor
Baillie Estates Ltd	Respondents Represented by: Mr G Dunlop Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is:

(1) To find that the complaints presented to it under sections 13, 15, 20, 21 and 39(2) of the Equality Act 2010 are well founded;

(2) To order the respondent to pay to the claimant compensation, including interest amounting to Nine Thousand Six Hundred and Thirty Five Pounds 18 (£9635.18).

Reasons

Introduction

1. In this case the claimant complains of direct disability discrimination under section 13 of the Equality Act 2010, the less favourable treatment being dismissal; of unfavourable treatment because of something arising in consequence of disability under section 15 of the Equality Act 2010, the unfavourable treatment being the dismissal of the claimant and that the respondent failed to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010. The claims were all brought under section 39 (2) of the Equality Act 2010 in respect of dismissal. The respondent denies all these claims alleging that the claimant was dismissed because of his conduct, which resulted in complaints from customers.

2. The tribunal heard evidence from the claimant and for the respondent from Mark Baillie, one of their directors, Derek Minto another director, Paul Lennie their sales manager and from Ian Stronach a sales executive. The claimant was assisted throughout the Hearing by a Polish interpreter.

3. The parties lodged a joint bundle of documents which, including further documents lodged during the course of the hearing, comprised 123 pages. Reference to the documents will be by reference to the page number.

4. From the documents to which it was referred and evidence which was led the tribunal found the following material facts to be admitted or proved.

Material Facts

5. The claimant commenced employment with the respondent on 11th July 2016.

6. His employment was terminated with effect from 21st February 2018.

7. The business of the respondent is that of sign makers and installers.

8. The claimant was employed by the respondent as a fitter. It was his job to fit all types of sign and if necessary to dig holes for poles upon which signs were to be displayed and to concrete those poles into the holes.

9. On 27th October 2017 the claimant suffered from chest pains whilst at work and left work to see his GP. He was sent by the GP to the Edinburgh Royal infirmary. He drove himself there in the respondents van.

10. The claimant was discharged from hospital on 29th October and given an inpatient discharge summary, pages 77 and 81.

11. He was given a statement of fitness for work upon his discharge, page 79. That disclosed that he had suffered from chest pain with troponin rise secondary to polycythaemia. That statement was sent to the respondent.

12. The claimant remained unfit to work and did not return to work until 22nd January 2018. During the period of his absence he sent in statements of fitness for work completed by his general practitioner, pages 83, 85 and 89.

13. On 4th January 2018 the claimant telephoned the respondent to inform them that his father had passed away in Poland. He enquired about his holiday entitlement and was informed that none remained.

14. The claimant obtained a further certificate on 4th January that he was unfit for work from that date until 22nd January, page 89.

15. Whilst absent from work the claimant received statutory sick pay in accordance with his contract of employment.

16. Mr Baillie did not know what polycythaemia meant and googled the term. His understanding from that research was that polycythaemia was not a form of cancer but polycythaemia Vera was a form of blood cancer.

17. Polycythaemia vera is a form of cancer which affects the blood.

18. The respondent accepted that the claimant was at all material times a disabled person for the purposes of the Equality Act 2010.

19. On 5th December the claimant sent Mr Baillie an email which stated that having had a meeting with the haematologist they had said "*that it is definitely polycythaemia vera, now I need continued treatment – venesection plus drugs*", page 122.

20. The impact of the treatment on the claimant is that he suffers tiredness, swelling of his joints and a general feeling of being unwell.

21. Sometime prior to his return to work on 22 January the claimant attended the respondent's premises and spoke to Derek Minto. At that meeting the claimant raised concerns about his returning to work.

22. The claimant returned to work on 22nd January. No enquiries were made of him by the respondent regarding his health or the effect of his illness on his ability to carry out his job.

23. On 14th February 2018 the claimant was handed by Mr Baillie, in the car park, a letter page 59A.

24. That letter informed the claimant that he was being dismissed with notice of one week. The claimant's employment terminated on 21st February 2018.

25. The claimant was devastated at receiving the letter.

26. On 2nd February the claimant had been asked to attend a job at Denny for a business known as Best Way. The claimant did not have sufficient time to complete the job and left without completing it. The owner of the business complained to the respondent that the job had not been completed and stated the claimant said he should not have been sent to it in the first place.

27. It would have taken approximately 45 minutes to drive from the respondent's premises to the business in Denny and forty five minutes to return. The job itself would have taken about 2 hours. The text messages at page 110 show that the claimant could not have arrived at the premises until approximately 15.40. That would not have allowed sufficient time to complete the job.

28. The claimant was instructed to carry out a job at premises known as Finn and Bear. The job was to install a vinyl stencil onto a wooden backboard to enable the customer to paint the backboard.

29. The owner of that business contacted Mr Stronach to complain that the claimant had not carried out the work but was sitting in his van.

30. Mr Stronach contacted the claimant and ascertained that problem was that it was too cold to apply the vinyl. Mr Stronach advised the claimant how to overcome that problem.

31. The owner of the business complained to Mr Baillie when he was dropping his daughter at school that there had been a problem with the claimant refusing to hang wallpaper in her premises. She said the claimant spent more time in his van than on the job.

32. That issue relating to the hanging of the wallpaper was a separate matter and separate order.

33. Whilst the respondent is prepared to print and hang wallpaper which is self-adhesive it is not their business to hang traditional wallpaper requiring paste. The wallpaper which was the subject of this complaint was traditional wallpaper and would not been hung by the claimant.

34. Mr Stronach who was in charge of the job at Finn and Bear attached no blame to the claimant for failing to hang wallpaper in the premises.

35. On 13th February the respondent received a complaint that the claimant had not completed a job for the firm of Knight Frank.

36. On 14th February the claimant was instructed to complete that work which involved digging holes for 3 poles, fixing the poles and then concreting them in place.

37. Mr Stronach asked Mr Lennie to check on the claimant's progress in completing that job.

38. Mr Lennie did so. He spoke to the claimant who advised him that he was having difficulty finishing the work.

39. On 14th February the claimant and another employee had sat a health and safety test at Telford College. They did not return to work immediately after the completion of the test and took a break. The claimant felt exhausted after the test due to the fact that the test was conducted in English, which was not his native language, and it was the third time he had sat it. The claimant was the driver of the van in which the two men had travelled to Telford College. That break was not authorised by the respondent.

40. The respondent had been informed by Telford College before the two men had returned that they had passed the test. That information caused the respondent to be suspicious as to why the two men had not returned immediately.

41. Prior to the claimant's absence due to illness in October 2017 there had been few issues regarding his conduct. The only issues were minor issues of timekeeping and an issue relating to his wearing of the respondent's uniform. No disciplinary action was taken against him.

42. The claimant was not given any disciplinary warnings during his employment. It was alleged by Mr Minto that he had given the claimant a verbal warning but, on balance, we formed the view that that was not correct. No evidence was produced to us of the existence of this warning which was allegedly written on a holiday sheet. That holiday sheet was not produced to us. The respondent failed to convince us that any verbal warning had been given.

43. Since being dismissed the claimant has been unable to work due to ill-health. He continues to be unable to work due to ill health.

44. Since the date of his dismissal the claimant has been in receipt of benefits. He currently receives £425 per month in respect of PIP.

Submissions

Claimant

45. Mr McPartland referred to the list of issues which had been produced by the parties. He was concerned that although the respondent accepted that the claimant was disabled they appeared now to be seeking to deny knowledge of the disability.

46. He referred to Mr Baillie's evidence where he claimed that he had not been aware of the claimant's suffering from cancer until after his dismissal. Mr McPartland submitted that inferences should be drawn by the tribunal from that position.

47. He submitted that the tribunal could not rely upon Mr Baillie or Mr Minto and that the claimant had asked at a meeting before he returned to work for adjustments to be made or lighter duties to be given to him or a change of job.

48. The respondent had failed to accommodate the request for reasonable adjustments to be made.

49. He pointed out that no documents were produced in evidence of any complaints made by customers or colleagues and there had been no disciplinary proceedings against the claimant.

50. No prior issues had been raised with the claimant about any aspect of his conduct before his absence. The employment tribunal was entitled to draw inferences from these facts and Mr McPartland suggested that the complaints to which the respondent had referred simply did not exist. These were attempts by the respondent to distance themselves from any suggestion that the treatment of the claimant was disability related.

51. The tribunal should draw inferences from the fact that there was no occupational health report obtained and no reasonable adjustments made. The respondent had deliberately ignored evidence of the claimant's disability and the obligation to make reasonable adjustments.

52. So far as the failure to make reasonable adjustments was concerned the relevant provision criterion or practice imposed by the respondent was that employees are required to carry out physical tasks within set timescale's. Employees must therefore be fit to carry out these tasks.

53. The respondent knew of the claimant's disability and that the provision criterion or practice would place him at the substantial disadvantage. The respondents were on notice from 27 October 2017 and the email of 5th December 2017 had clearly set out the illness from which the claimant was suffering. The respondent had knowledge of the claimant's disability once they received the email of 5th December. It was for the respondent to do what they could to find out the true position and they had failed to do so.

54. The claimant in effect asked for reasonable adjustments when he spoke to Mr Minto before returning to work. The time to make reasonable adjustments was when the claimant returned to work. The onus was on the respondent to make these adjustments: not on the claimant. The respondent should have explored the nature of the disability to see if any changes required to be made to alleviate the disability. It was not sufficient for them to rely simply on the fit notes issued by the GP. It was self serving to say they had no suspicions.

55. The labour intensive tasks required by the respondent put the claimant at a disadvantage. The claimant had suggested reasonable adjustments to the respondent and they rejected those. They therefore failed in their duty to make reasonable adjustments. Those reasonable adjustments would have been putting the claimant on lighter duties or assigning him to a different job.

56. With regard to the claim of disability arising from discrimination, Mr McPartland's position was that if the tribunal found in favour of the claimant in respect of the reasonable adjustment argument it was self evident that there was unfavourable treatment. The failure to implement reasonable adjustments prior to dismissal was disproportionate. The claimant had been dismissed because he was less physically able to carry out his role.

57. That arose as a consequence of his disability. A lesser sanction could have been used but dismissal was disproportionate. There were no documents evidencing

any of the complaints and the claimant's position was that the complaints did not exist.

58. The tribunal should focus on the mind of Mr Baillie when he made the decision to dismiss and Mr McPartland submitted that it was the claimant's lack of ability to do the physical work that operated on Mr Baillie's mind.

59. There had been no problem with the claimant before he was diagnosed with cancer but on his return the alleged complaints were raised and the claimant was dismissed. Mr McPartland urged the tribunal not to rely on the evidence of the respondent's witnesses about any complaints as there was nothing documented and the claimant had not been told about them.

60. With regard to the claim of direct discrimination, it was submitted that the claimant had been dismissed because he was disabled. He had been subjected to less favourable treatment. The comparator upon which the claimant would rely was another fitter who did not have cancer and who would not have been dismissed.

61. Mr McPartland submitted the tribunal should consider the reason why the claimant received less favourable treatment and he submitted that was because of the claimant's disability.

62. So far as remedy was concerned Mr McPartland referred to the schedule of loss produced at pages 99-102 of the bundle. He accepted that the evidence was that the claimant had not been able to work since the date of his dismissal.

63. With regard to the claim for hurt feelings Mr McPartland submitted that this should be in the middle band of Vento **(Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] IRLR 102)**. The claimant had been devastated at losing his job and the alleged misconduct was demonised from a position of ignorance. He suggested an award of £17,000 in respect of injury to feelings together with interest at 8%.

64. Mr McPartland referred to the following cases:-

Lamb v The Business Academy Bexley UKEAT/0226/15/JOJ

Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640

Respondent

65. Mr Dunlop for the respondent, submitted there was no evidence of jobs requiring to be completed in a strict timescale. Jobs were allocated to fitters and the respondent knew what time the task would take and the claimant exceeded that. It was not the claimant's ability to perform tasks which concerned the respondent but the fact that he was found to be sitting in his van or on the phone and not completing tasks which concerned them.

66. In his submission the question of knowledge was at the root of this case. He referred to paragraph 20 (1) of schedule 8 of the Equality Act 2010 and submitted that the respondent needed to know that the claimant that the claimant was disabled and that the disability was likely to place him at a substantial disadvantage. It was for the claimant to show that the respondent ought to have known that the claimant was disabled and that the disability caused the claimant to suffer a substantial disadvantage.

67. It was for the claimant to prove that he was treated unfavourably in that the dismissal was due to the disability and that the respondent failed in their duty to make reasonable adjustments. The claimant must prove that the disability was the reason or substantial reason for the dismissal. That was separate from the second issue which not only requires proof of the knowledge of disability but also that the respondent was aware that the provision criterion or practice relied upon placed the claimant at a substantial disadvantage.

68. Mr Dunlop accepted as a general principle that the adjustments of a phased return to work, or amended duties and hours could fall to be reasonable adjustments in circumstances where such adjustments would benefit the person suffering from fatigue. There was evidence that other workers had been given amended duties following injury. The respondent did not consider that obtaining a medical report would fit within the context of reasonable adjustments in terms of the Act.

69. It was Mr Dunlop's position that the claimant had not suffered less favourable treatment due to disability and had not suffered unfavourable treatment as a result of something arising from disability. The claims should be dismissed.

70. Turning to the question of remedy, it was Mr Dunlop's position that the claimant could not bring a claim for loss of earnings as he had not been fit to work since 14 February 2018. If he had not been dismissed he would have been entitled only to statutory sick pay in terms of his contract but was in fact receiving more than that as a result of his PIP where he was receiving £425 per month.

71. If the tribunal found in favour of the claimant and was minded to make any award for hurt feelings that should be in the lower band of Vento as this was not conduct over a period of time but two incidents of short duration namely the meeting with Mr Baillie followed by the claimant's dismissal.

72. Mr Dunlop referred to the following cases:-

Ridout v T C Group [1998] IRLR 628
Secretary of State for Work and Pensions v Alam [2010] ICR 665
Prison Service and Others v Johnson [1996] ICR 275
O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701

Decision

73. The issues for the tribunal to consider were agreed by the parties as follows:-

1. Was the claimant, in comparison with persons who were not disabled, placed at a substantial disadvantage ?
2. What was the PCP?
3. Was there a duty on the respondent to make reasonable adjustments in terms of section 20 of the Equality Act 2010?
4. What reasonable adjustments should have been made to avoid the substantial disadvantage?
5. Did the respondent fail to comply with the duty to make reasonable adjustments in terms of section 21 of the Equality Act 2010?
6. Was the dismissal of the claimant unfavourable treatment of the claimant because of something arising in consequence of the claimant's disability, in terms of section 15 of the Equality Act 2010?
7. Was the dismissal of the claimant less favourable treatment of the claimant because of his disability, in terms of section 13 and section 39 (2) (c) of the Equality Act 2010?
8. Has the claimant suffered financial loss as a result of being dismissed?
9. Is the claimant entitled to compensation?
10. If yes, how much?
11. Is the claimant entitled to an award for injured feelings?
12. If yes, how much?

74. We accepted these as being the issues we required to consider in this case.

Duty to make reasonable adjustments.

75. Section 20 of the Equality Act 2010 provides, insofar as is relevant, as follows:-

> **"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable**

Schedule apply; and for those purposes, a person upon whom the duty is imposed is referred to as A

(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)……"

76. In this case we are only concerned with the first requirement and not the second or third.

77. Section 21 of the Act provides:-

(1) A failure to comply with the first second or third requirement is a failure to comply with the 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.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly not actionable by virtue of another provision of this Act or otherwise."

78. Paragraph 20(1) of Schedule 8 to the Act provides:-

"**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) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], 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.

(2) An applicant is, in relation to the description of A specified in the first column of the table, a person of a description specified in the column (and the reference to a potential applicant is to be construed accordingly)……"

79. In this case the respondent had accepted that the claimant was a disabled person in terms of the Act but they denied that the disability was likely to place the claimant at a substantial disadvantage. Mr Baillie stated in evidence that he had been unaware of the nature of the claimant's illness but had made enquiries using Google when he received the statement of fitness for work at page 79 which described the condition as "*chest pain and troponin rise secondary to polycythaemia*". It was his evidence that polycythaemia was not a cancer and he volunteered the information that polycythaemia Vera was a form of blood cancer, having ascertained that information from the NHS website. He did however accept that he had been sent an email by the claimant on 5th December, page 122, which specifically stated *"yesterday I had a meeting with the haematologist, they said it is definitely polycythaemia Vera, now I need continued treatment – venesection plus drugs."*

80. We were satisfied that Mr Baillie had knowledge that the claimant was suffering from a form of cancer and had that knowledge at least from as early as 5th December 2017. It was his own evidence that polycythaemia Vera was a form of blood cancer.

81. The Equality and Human Rights Commission's Code of Practice on Equal Pay (2011) states at paragraph 6.32 **"It is a good starting point for an employer to**

conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for the employer to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled worker in question before they are made."

82. In this case the claimant returned to work on 22nd January 2018. He asked Mr Baillie if should be at work as his fit note did not expire until the end of that day. He was simply asked if he was fit to do the job and no other enquiries were made of him. By that time Mr Baillie had knowledge that the claimant was suffering from polycythaemia vera. He was aware that was a form of blood cancer, as he put it. In our opinion Mr Baillie should have made reasonable enquires of the claimant. If he had done so at that stage he would have ascertained that there was a need to make reasonable adjustments. Those reasonable adjustments would have been giving the claimant a phased return to work, lighter duties or a change of duties in line with his skill set.

83. Having failed to make any enquiries the respondent expected the claimant to return to work to the same standard as a person who was not disabled, doing physical work.

84. There was a conflict in evidence between the claimant and Mr Minto as to whether or not the claimant had advised Mr Minto, at a meeting prior to his returning to work, that he wished upon returning, to have a change made in his duties due to health reasons. It was the claimant's position that he had asked Mr Minto about that but that Mr Minto had refused the request. Mr Minto denied any such conversation had taken place. On balance we considered that the claimant's version of that conversation was the more likely but it is not necessary for us to finally resolve that issue as the duty to make reasonable adjustments does not arise until the claimant indicated he was intending or wishing to return to work – **NCH Scotland v McHugh EAT 0010/06.**

85. The provision criterion or practice relied upon by the claimant is the requirement that he carry out physical tasks within set timescales.

86. We considered that if the respondent had made enquiries of the claimant on 22 January they would have discovered that his illness made him tired and that there might be a difficulty in carrying out physical tasks. We were satisfied that Mr Baillie knew that the claimant was disabled and we considered that he should have made a reasonable enquiries of the claimant on 22 January when the claimant enquired about returning to work that day. A simple enquiry would have elicited information sufficient to make the respondent aware that the claimant should either have had a phased return to work or should have been put on light duties.

87. We considered that the respondent knew that the claimant was disabled and should have known that his disability would have affected his ability to carry out the physical aspects of his work. Had Mr Baillie made enquiries of the claimant he would have been fully informed of the factors which might be relevant to a determination of what adjustments should reasonably be made in the circumstances. The respondent cannot rely upon their own ignorance for failing to take appropriate steps if they have failed to make any enquiries. The respondent's witnesses had given evidence of how other employees returning to work after an injury had been given light duties and so when faced with an employee suffering from cancer should have considered making reasonable adjustments.

88. We were satisfied that the requirement to undertake physically demanding work would put the claimant at a substantial disadvantage compared with persons who were not disabled.

89. If the claimant had been given light duties he would not have been asked to carry out the physical task of digging holes and cementing poles into the holes on 14th of February. In our opinion the respondent failed to comply with the duty to make

reasonable adjustments in terms of section 21 of Equality Act 2010. They did not take any substantive steps to comply with their duty.

Discrimination arising from Disability

90. The next question to consider is the claim for discrimination arising from disability. Section 15 of the Equality Act 2010 provides as follows: -

> **"(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."**

91. We found above that the respondent did know that the claimant was disabled. They knew and could have been reasonably expected to know after Mr Baillie received the email on the December from the claimant. It follows that subsection 2 of section 15 does not apply in this case.

92. The claimant alleges that the unfavourable treatment he received was his dismissal.

93. The wording of section 15 (1) (a) requires us to consider what was the respondent's reason for the dismissal. As Mr McPartland reminded us if the answer to that question is not immediately apparent then the tribunal must enquire into the mental processes, conscious or unconscious of the alleged discriminator.

94. The respondent's position was that the claimant was dismissed because of misconduct. They referred to the issues relating to the job undertaken at Denny for

the business known as Best Way, to the complaint made by the owner of the business known as Finn and Bear and the incident relating to the jobs for Knight Frank on the 13th and 14th of February and the delay in returning from sitting the test on the 14th. Those incidents they said justified the dismissal of an employee such as the claimant. He did not have 2 years' service and could not complain of unfair dismissal in the ordinary sense.

95. We were satisfied that a complaint had been made by the owner of Best Way but accepted the claimant's evidence that there was not sufficient time to complete the job on the day. We preferred the claimant's evidence about the timing of that job to that of Mr Minto. The text messages reproduced at page 110 shows that the claimant did not arrive at the premises until approximately 15.39 . That arrival time would not have provided the claimant with sufficient time to complete the job and return to the respondent's premises by around 5 o'clock which was his finishing time. Had the complaint been investigated it would have been clear that the claimant's assertions were correct.

96. With regard to the complaint relating to Finn and Bear, the evidence was confused. Mr Baillie gave evidence that the owner of that business had spoken to him as he dropped his daughter off at school. His evidence was that the complaint related to the claimant's refusal to hang a piece of wallpaper and spending too much time in his van. He also alleged Mr Stronach had spoken to him about this job. Mr Stronach, whom we found to be a credible witness, gave evidence that the installing of the wallpaper at the premises of Finn and Bear was a separate job and that blame did not attach to the claimant about that matter. His evidence was that whilst the respondent did provide a service of hanging wallpaper it was only provided if the wallpaper was of a self-adhesive variety and not one which required to be pasted in the traditional way. Mr Stronach stated that the owner of Finn and Bear had initially informed him that the wallpaper she wished to hang had been of the self-adhesive variety whereas in fact it required to be pasted. The job was only accepted on the basis that the wallpaper was self-adhesive. He did not consider this was a complaint against the claimant.

97. His evidence was that the owner of the premises had contacted him to say that the claimant had been sitting in his van and not carrying out work. When Mr Stronach spoke to the claimant he was informed that the claimant could not attach the vinyl to the wall in the premises because it was too cold. He advised the claimant how to deal with the problem.

98. On 14 February the claimant and another employee failed to return to work immediately after completing a health and safety test at Telford College. The respondent learnt of the successful outcome of the test before the claimant returned to work. They were surprised that the claimant had not returned immediately but did not carry out an investigation into the reason for the delay. If they had spoken to the claimant they would have ascertained that he was tired after that test which had been conducted in English which was not his native language.

99. Later that same day the claimant was sent to install posts for a job for Knight Frank. Mr Stronach requested Mr Lennie check on how the claimant was progressing. He was informed by Mr Lennie that the claimant was not working on the job but was speaking on his phone.

100. We did not accept Mr Lennie's evidence that he had simply driven to the site where the claimant was working and sat in his van observing the claimant and then simply reported to Mr Stronach. Mr Lennie is a sales manager who has been with the respondent 8 years and we found it simply incredible that someone in his position observing the claimant, as he alleged, doing nothing other than leaning on his van and using his phone, would not have at least enquired of the claimant why he was not working. We found the claimant's evidence that Mr Lennie had in fact spoken to him to be more convincing. Having accepted that Mr Lennie did speak to the claimant we also accepted the claimant's evidence that he had told Mr Lennie that he was finding it difficult to complete the work.

101. Upon the claimant's return to work that day he was met in the car park by Mr Baillie and given a letter terminating his employment with one week's notice.

102. We were satisfied that the claimant was telling the truth when he said that he was tired after sitting the test and that he told Mr Lennie that he was finding it difficult to complete the task of installing the posts. We were satisfied that the reason the claimant felt tired was because of his illness. His tiredness was something arising from the cancer which he suffers.

103. The reason that the claimant was dismissed was because he was tired after sitting the test and because he was taking extra time to complete the installation of the posts.

104. We were satisfied as stated above that the respondent did know that the claimant was disabled. The Code of Practice, referred to above, states at paragraph 5.15 **"An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."**

105. In this case the claimant had been employed since July 2016 and had no disciplinary record prior to his absence. He was absent from 27 October 2017 until 22nd January 2018 and in the few weeks following his return to work his conduct, say the respondent, was such that it merited the penalty of dismissal. In our opinion a reasonable employer faced with such an alleged change in behaviour by an employee who was disabled should have made enquiries to find out the reason for the perceived change in conduct. In our opinion what the respondent perceived as a deterioration in conduct should have alerted them to the possibility that such was connected to the disability. They should have explored with the claimant the reason for these perceived changes and whether those difficulties were because of something arising in consequence of disability.

106. We were satisfied that complaints had been made by the owners of Best Way and Finn Bear but we were not satisfied that those complaints would have merited any action against the claimant had they been investigated.

107. We were satisfied that the claimant had been treated unfavourably because of something arising from his disability. That something was fatigue which manifested itself after sitting the health and safety test and an inability to do the physical work of installing posts.

108. The unfavourable treatment was his dismissal. That dismissal took place within a few weeks of the claimant returning to work suffering from an illness classified as a disability.

109. We had to consider why the claimant had suffered the unfavourable treatment. We were not satisfied it was because of the claimant's alleged conduct. The only incidents which might have merited some action were the failure to return from the test having taken an unauthorised break and the length of time taken to install the posts. If those incidents had been investigated the respondent would have learnt the reasons for them were because of something arising from the claimant's disability. They chose to dismiss the claimant without any enquiries. We were satisfied on the balance of probabilities that the reason for the unfavourable treatment was something arising from the disability.

110. We were satisfied that the complaint under section 15 was well founded.

Direct Discrimination

111. The final complaint is of direct discrimination. Section 13 of the Equality Act 2010 provides, insofar as relevant, as follows: –

"(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.
(2)……"

112. The claimant's comparator is a fitter who did not have cancer. It was Mr McPartland's submission that the claimant was dismissed because he was disabled and that was the less favourable treatment.

113. We have to consider the reason why the claimant was dismissed. The respondent's position was that the claimant was dismissed because of his conduct.

114. In our opinion, as stated above, the claimant was dismissed because of the incidents which occurred on 14 February. We did not consider that the other incidents on their own would have resulted in the claimant's dismissal. No disciplinary action had been taken against the claimant in respect of them.

115. Section 23 of the Equality Act 2010 stipulates that there must be no material difference between the circumstances relating to each case when determining whether the claimant has been treated less favourably than a comparator. We agree that the correct comparator in this case would be a fitter who did not suffer from polycythaemia Vera. Accepting the claimant's evidence that the impact of the disease is that he suffers tiredness, swelling joints and a general feeling of being unwell a fitter not suffering from that disease would not have experienced tiredness after sitting the health and safety test or a difficulty in installing the posts on the Knight Frank site. The less favourable treatment the claimant experienced was his dismissal.

116. No explanation was given for the failure to investigate the allegations of misconduct. These allegations dated from about the end of January until the 14th February and there was adequate time to have investigated them and take disciplinary action if required. We noted that there had been no disciplinary action

taken against the claimant prior to his absence and the only incidents of conduct referred to were minor issues such as timekeeping and an issue with his uniform. It was not possible to ascertain precisely what was the respondent's concern about the claimant's conduct relating to the uniform as three different witnesses gave us three different versions of what the problem was. We concluded that if there had been an issue regarding uniform it was a very minor issue. It appeared to us that there was no satisfactory explanation as to why the respondent had acted as they did so soon after the claimant returned to work without making any enquiries of him. The fact that they carried out no investigation before dismissing the claimant led us to conclude that the real reason they dismissed the claimant was because he was disabled. He was taking, in their view, longer to carry out the tasks allocated to him and they decided to dismiss him.

117. We were satisfied that Mr Baillie knew that the claimant was disabled. He had knowledge of the disability and cannot escape liability by failing to make any further enquiries. He had stated as a justification for dismissing the claimant that he was looking after the interests of the business. We did not find that the respondent had proved it did not treat the claimant less favourably in any sense whatsoever on the grounds of the claimant's disability. We were satisfied that Mr Baillie dismissed the claimant because he was disabled.

Remedy

118. Although Mr McPartland produced a schedule of loss at pages 112-3 seeking loss of earnings from the date of dismissal to the date of the hearing and for future loss of earnings it was our understanding during the hearing that he accepted that as the claimant had been and still is unable to work due to ill-health there is no loss of income attributable to the respondent. We accepted Mr Dunlop's submission that had the claimant not been dismissed he would have been in receipt solely of statutory sick pay which was less than the PIP the claimant was receiving. No award is made for past or future loss of earnings.

119. Section 124 of the Equality Act permits the employment tribunal to order a respondent to pay compensation to the claimant if the tribunal finds there has been a contravention of a relevant provision of the Act in respect of which it has jurisdiction. The amount of compensation which may be awarded corresponds to the amount which could be awarded by a county court in England and Wales or a sheriff court in Scotland.

120. In **Vento v Chief Constable of West Yorkshire Police (No.2) [2002] IRLR 102** the Court of Appeal in England and Wales identified three broad bands of compensation for injury to feelings awards, as distinct from compensation awards for psychiatric or similar personal injury. The lower band of £500 and £5000 applied in less serious cases. The middle band of £5000-£15,000 applied in serious cases that did not merit an award in the upper band. The upper band of between £15,000 and £25,000 applied in the most serious cases (with the most exceptional cases capable of exceeding £25,000).

121. In **Da'Bell v NSPCC [2010] IRLR 19** the Employment Appeal Tribunal revisited the bands and upgraded them for inflation. The lower band was raised to between £600 and £6000; the middle band was raised to between £6000 and £18,000; and the upper band was raised to between £18,000 and £30,000.

122. In the case of **Simmons v Castle [2012] ECWA Civ 1039 and 1288** the Court of Appeal in England and Wales declared that with effect from 1st April 2013 the proper level of general damages in all civil claims for pain and suffering, loss of amenity, physical inconvenience and discomfort, social discredit or mental distress would be 10% higher than previously. In **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879** the Court of Appeal ruled that the 10% uplift provided for in Simmons v Castle would also apply to employment tribunal awards of compensation for injury to feelings and psychiatric injury in England and Wales. Although the court expressly recognised that it was not for it to consider the position as regards Scotland, account has now been taken of the position in

Scotland by the Scottish President of Employment Tribunals by issuing presidential guidance on 5th of September 2017.

123. The effect of that guidance is that in respect of claims presented on or after 11th September 2017 the Vento bands will be as follows: a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,200 (cases that do not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000.

124. In this case we considered that an award for injury to feelings to be in the middle band of Vento. Whilst the act of discrimination occurred on 14 February 2018 we did not consider it was appropriate to regard this simply as an isolated or one off occurrence which might place it in the lower band. We were satisfied that the claimant was devastated at being dismissed. We did not accept that he simply laughed when given the letter dismissing him. We consider the claimant's evidence that he was devastated to be more probable. There had been no prior indication to him that his future employment might be in jeopardy. He was still suffering from cancer. It appeared to us that the suggestion he simply laughed was improbable. This was a serious matter, the dismissal of a disabled employee because of his disability and because of something arising out of his disability and a failure to make reasonable adjustments. We accepted the effect in all the circumstances to be devastating upon the claimant and that it would not be appropriate to make an award in the lower band. We considered that an award in the middle band would be appropriate but close to the lower end of that band. We considered that an award of £9000 would be appropriate compensation to the claimant in the circumstances of this case. Interest runs on the award at the rate of 8% interest on sum of £9000 from the date of discrimination namely 14th of February 2018 until 2nd of January 2019 when the tribunal calculated the interest. That is a period of

322 days. Interest at 8% on £9000 for 322 days is £635.18. The total compensation due to the claimant including interest is £9635.18 and respondent is ordered to pay that amount to the claimant.

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Employment Tribunal: Atack
Date of Judgment: 03 January 2019
Entered into the Register: 07 January 2019