Reserved judgment

Claimant: **Mr R Harkess**

Respondent: **E-Crunch Limited**

Heard at London South Employment Tribunal on 14 & 15 March 2018

Before Employment Judge Baron

Lay Members: **Mrs C Wickersham & Mr J Gautrey**

Representation:

Claimant: **The Claimant was present in person**

Respondent: **Max Cole - Counsel**

JUDGMENT

It is the judgment of the Tribunal that the claims are dismissed.

REASONS

Introduction

1 This is a claim by the Claimant made under the provisions of the Equality Act 2010. The protected characteristic in question is disability. The details of the claims are set out below.

2 The Claimant gave evidence and did not call any witnesses. Evidence for the Respondent was given by the following:[1]

Justine Cobb – Operations Director
Jamie Hollis – Lead Scrum Master
Darren Loft – Development Lead
Chris Olive – Senior Java Developer

3 We were provided with a bundle of documents running to something under pages, but as is so often the case thankfully we were referred to a relatively small number of them.

The facts

4 The Respondent provides online accountancy and allied services. The Claimant applied for employment as a Junior Java Developer in July 2016 through a recruitment agency. There was an initial interview carried out by Skype on 11 July 2016 by Mr Hollis and another person. There was

[1] The job titles are those at the material time.

then a technical assessment followed by an interview in person. That interview was carried out by Mr Loft and another person. The interview process was successful and an offer of employment was made and accepted.

5 On the commencement of his employment the Claimant completed a New Starter form. Only two points are relevant. The first is that he named his sister as the person to contact in case of emergency. The second is that there was a section where the Claimant was asked to advise the Respondent of any medical condition of which the Respondent should be aware. The form states as follows:

> The purpose of this question is to see whether you have any health problems that could affect your ability to undertake the duties of the job you have been offered or place you at any risk in the workplace.

The Claimant stated as follows:

> Yes – suffer from a hormone deficiency (fully managed)

6 The Respondent did not make any further enquiries about the matter. We find that at the commencement of the employment that was the only information which the Respondent had about the Claimant's health.

7 The Claimant's contract of employment only had two provisions which are material for the purposes of this claim. The first was that there was a three month probationary period. The second connected provision was that during that period the Respondent could terminate the employment on one week's notice if the Claimant's performance or conduct was found to be unsatisfactory.

8 The Respondent had a sickness and absence policy which required employees to call their manager at least half an hour before the start time on each day of absence. There was a flexi-time arrangement in force under which the Claimant could start work at any time between 8.30 and 9.30 am. Consequently the last time under the policy for the Claimant reporting that he was going to be absent was 9 am.

9 The first incident commenced on 30 August 2016. The Claimant accepts that this had nothing to do with any disability. He says that there was an incident with his car during which he hurt his back. He sent a text message to his line manager, Chris Olive, at 9.26 am saying that he was 'going to be a few minutes late as [he had] had a little car trouble'. Nothing further was heard from him during the day and Mr Olive sent a text to the Claimant at 5.08 pm asking if he would be in on the following day. There was no reply to that message. Mr Olive sent another message on 31 August at 9.45 am. There was no prompt reply to that message either. Mr Olive became concerned and contacted the agency through which the Claimant had been employed, and also the Claimant's sister.

10 Because of his continuing absence Mr Olive revoked the Claimant's rights to access data held by the Respondent, as he was concerned whether the Claimant had joined the Respondent in order to obtain access to the data. The Claimant eventually contacted Mr Olive on 2 September at 8.15 am saying that he had put his back out, which message was acknowledged

by Mr Olive. The Claimant returned to work on 5 September, being the next working day.

11 It was the Claimant's evidence that he was physically unable to move from his bed because of an injury to his back until 2 September 2016 and that his phone was not beside the bed. Whether that is true or not is irrelevant. The Claimant accepts that any immobility and any inability to contact the Respondent was wholly unrelated to his disability.

12 The next incident started on 23 September, which was a Friday. The Claimant sent a text to Mr Olive at 9.28 am saying that he thought he had mild food poisoning. There were then various exchanges of texts during the day from which it was clear that the Claimant's symptoms had worsened. At 1.07 pm the Claimant said that it was likely that he had a virus he had picked up from his nephew while babysitting, as the nephew then had developed similar symptoms. The Claimant said that he had been told that a virus was going round the nursery. The Claimant accepted at this hearing that this illness had nothing to do with his disability.

13 The Claimant did not make contact with Mr Olive on the following Monday, 26 September. Mr Olive sent a text at 9.50 am asking if the Claimant was intending to come to work that day. The Claimant replied at 10.31 saying that he hoped to be in on the following day. He said that he had been awake earlier and had forgotten to phone Mr Olive. On the following day, 27 September, the Claimant sent a further text to Mr Olive at 9.30 am saying that he had been advised to wait for another day before returning to work.

14 Mr Olive had been discussing the Claimant's absences with Kate Roper the Respondent's People Manager. A letter was sent to the Claimant on 26 September by Ms Roper requiring the Claimant to attend a probationary review meeting on 29 September at 4.30 pm. The letter said that the purpose was to 'review, measure and give constructive feedback on performance and attendance.' The letter made reference to the possibility of the employment being terminated.

15 We did not hear from Ms Roper but she then sent a further letter to the Claimant saying that he was suspended for the Respondent to conduct an investigation into an allegation of misconduct, being that he had breached the Respondent's sickness absence policy by failing to keep in touch and supply requested documentation.

16 The Claimant did not attend the meeting on 29 September because he had a hospital appointment, and the meeting was rescheduled for 30 September. The hospital appointment is of no relevance to this case. The meeting was held by Ms Roper and Mr Olive. They were not satisfied by such explanations as the Claimant gave, and the Claimant was dismissed. The letter confirming dismissal dated 30 September 2016 stated that the Claimant's performance had not reached a satisfactory standard.

17 The evidence of Mr Olive that he was not aware at the time of any pre-existing health condition of the Claimant was not challenged, and is accepted.

18 The Claimant wrote to Ms Roper on 5 October 2016 raising issues as to sick pay and holiday pay, which need not detain us. He questioned the legitimacy or appropriateness of the procedure which had been adopted. The Claimant then said what the Respondent had done 'left an argument case open for discrimination and thus unfair dismissal.' He added that he was 'asking for a pay off to not take [the Respondent] to a tribunal.' He asked for the Respondent to propose a settlement figure.

19 That was treated as an appeal, although there was no provision for any appeal in the Respondent's probationary procedures. It was heard by Ms Cobb, with assistance from a HR Consultant. The Claimant provided a list of bullet points to be discussed. The two points on which the Claimant focussed were as follows:

- How the disability discrimination and unfair dismissal claim is made up
- Pointing out remaining contractual issue
    - i.e.if disciplined no breach of contract would be capable
    - However, HR clearly used the probationary process
    - Contractually the probation period is three months

20 The appeal was not upheld. In the decision letter of 19 October 2016 Ms Cobb said that the Claimant had agreed that both periods of absence were not related to any disability. She added that full details of the disability had not been disclosed to the company.

The law, discussion and conclusions

21 On the claim form ET1 the Claimant had ticked the box to indicate that he was bringing a claim of disability discrimination. The details of the claim were as follows:

> The ability of a person to function whilst ill is clear. A person operates at a diminished capacity to a varying degree depending upon the illness. It therefore has to be stated that somebody already operating with a handicap is at a further disadvantage. Whilst e crunch ltd were perfectly within their rights to terminate my employment with them, my issue is with the manner of the termination. The idea that being suspended and effectively terminated whilst of ill reeks of poor planning and that the termination was because of a personal nature and to have a meeting that could be considered a return to work that was actually the formal dismissal meeting smells extremely fishy. To be clear although I had time off sick, at that time sick days were not being paid for and there was a genuine reason for being off ill. That and my work performance was above par for the length of service. So I have to question how and why the decision to terminate came about and the manner in which it was handled. Since I have a disability and I was off ill it has to be argued that I was at more of a disadvantage than a normal person in the circumstances. So the haphazard manner in which the termination took place can be argued as discriminatory under the disability discrimination. This is precisely what the tribunal needs to look at. The argument that the lack of contact at the start of the illness is the reason for the dismissal, does not wash specifically because there are reasons as to why it was not possible in one case.

22 In his closing statement to the Tribunal the Claimant said that the whole incident and the process adopted by the Respondent had been confusing. He had not stood a chance. He had had two exceptional illnesses during his six weeks of employment and had then been sacked. He had disclosed his disability to the Respondent. If the final meeting had been wrongly labelled. If it had been a probationary review meeting then his

probationary period ought to have been extended so that he could show that his absences had been exceptional. If the meeting had been a disciplinary meeting then there should only have been a warning. The Respondent did not follow due process and ensure that all was done properly.

23 The Claimant acknowledged that during his first absence the Respondent had acted well and had made many attempts to communicate with him. He said that the Respondent had decided very early on during his second absence what was to happen. If the Respondent had contacted the Claimant's family during that second absence then they would have been told of the severity of the gastric illness and he would not have been suspended or dismissed.

24 There was a preliminary hearing for case management purposes before EJ Spencer on 5 September 2017. The notes of that hearing record that the Respondent then accepted that the Claimant was a disabled person by reason of having hypogonadotropic hypogonadiasm, a hormone condition. Her notes add that one of the effects of the condition is periods of depression. There was clearly a discussion as to how the points made by the Claimant in the claim form which we have set out above fitted into the provisions of the Equality Act 2010. Judge Spencer stated that the Claimant was relying on sections 15 and 20 of the 2010 Act, together with other provisions associated with section 20. The provisions in question are as follows:

> **15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
>
> **20 Duty to make adjustments**
> (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 on 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.

25 Schedule 8 of the 2010 Act applies where a duty to make reasonable adjustments is imposed on the employer. Paragraph 20(1) provides as follows:

> **Lack of knowledge of disability, etc.**
> 20 (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 other case referred to in this Part 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.

26 Mr Cole's principal submission was that the Respondent was neither aware of the Claimant's disability, nor ought reasonably to have been aware of it. He said that the Respondent did not know that the Claimant had an impairment which had a long-term adverse effect on his ability to carry out normal day-to-day activities. He correctly said that the Claimant had not mentioned depression as a side-effect of the hormone deficiency. Further, said Mr Cole, it was not reasonable for the Respondent to have known of the disability.

27 We do not accept Mr Cole's submission. The Respondent was specifically made aware of the fact of the Claimant having a hormone deficiency. It was therefore aware of an impairment. The question on the New Starter form specifically asked for details of any medical condition which could affect the ability to undertake the duties of the job. We of course accept that a particular job is not the same as normal day-to-day activities for the purposes of the definition of disability. In our judgment, however, the Respondent was put on enquiry as to the effects of the hormone deficiency on the Claimant's abilities. That was the whole purpose of the question being asked. The Respondent has now accepted that the Claimant was a disabled person for the purposes of the 2010 Act, and we fail to understand how a different conclusion would have been reached if enquiries had been made at the time.

28 We therefore consider the provisions of sections 15 and 20. Judge Spencer identified the 'something arising' which was being alleged as the Claimant's inability to comply with the sickness absence reporting procedures, and the unfavourable treatment as being the dismissal. For the purposes of section 20 the provision, criterion or practice ('PCP') was the requirement to comply with the reporting procedures, and the substantial disadvantage was the inability to comply with them. Mr Cole accepted that the Respondent did apply the PCP in question.

29 The Claimant's case at this hearing was that he was being treated for the hormone deficiency on a two-monthly cycle. Towards the end of that cycle the effect of the medication reduced, causing depression. The illness which he suffered from 23 September 2016 had, he said, purged his system of the medication so causing him to be depressed. That, he maintained, meant that he was unable to contact the Respondent as required by the policy.

30 We do not accept that contention on the facts. We do not accept the Claimant's evidence now given to the Tribunal that he was so depressed on 26 September 2016 that he was unable to contact Mr Olive. We have referred to the emails of that day and the following day above. On 26 September the Claimant simply said that he had forgotten to phone. On 27 September he sent a text to Mr Olive without having to be prompted by him. The Claimant's assertion now made to the Tribunal does not accord with the evidence.

31 It is apparent to us from the details in the claim form ET1, the contents of the Claimant's closing statement and his oral evidence that what he was really concerned about was that he considered the procedure adopted by the Respondent to have been unfair. That is not the point. The Claimant had only been employed for a short period. He had not acquired the right under the Employment Rights Act 1996 not to be unfairly dismissed. The Respondent was entitled to dismiss him at any time by giving one week's notice, provided that such action was not unlawful under the provisions of the Equality Act 2010.

32 The Respondent was understandably dissatisfied with the Claimant's attendance, and his lack of communication with them. There is nothing from which we could conclude that the Claimant's disability had any relevance whatsoever to his failure to contact the Respondent early on 26 September 2016 and so his ability to comply with the reporting procedures resulting in his dismissal. He was not treated unfavourably because of something arising in consequence of the disability. It is not necessary therefore for us to consider to what extent that failure contributed to the decision of the Respondent to dismiss the Claimant by comparison with the earlier failure to make contact at the end of August 2016. Further there was nothing we could conclude that the Claimant was in the circumstances at a substantial disadvantage because of the PCP by comparison with individuals who did not have the Claimant's disability.

Employment Judge Baron
Dated 21 March 2018