**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102653/19**

**Held on 23, 24 and 25 February and 12 May 2021**

**Employment Judge: J M Hendry**
**Members: A Perriam**
**F Parr**

| | |
|---|---|
| **Mr D MacPherson** | **Claimant**<br>**Represented by**<br>**Mr S Smith,**<br>**Solicitor** |
| **Loch Ness Coffee Company Limited** | **Respondent**<br>**Represented by**<br>**Ms E Grant,**<br>**Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**The unanimous decision of the Employment Tribunal is as follows:**

1. **The Claimant was unfairly dismissed from his employment.**
2. **The Respondent shall pay to the Claimant a monetary award in the sum of Nine Thousand Six Hundred and Ninety-Eight Pounds and Thirty-Eight pence (£9698.38) in respect of the dismissal.**
3. **The Claimant was discriminated against by the Respondent in terms of Section 15 of the Equality Act 2010 and as a consequence the Respondent shall pay to the Claimant the sum of Ten Thousand Pounds (£10,000) as injury to feelings.**

**REASONS**

**E.T. Z4 (WR)**

1. The claimant in his ET1 sought findings that he had been unfairly dismissed from his employment as a Baker/Superviser and that he had also been discriminated against on the grounds of his disability under Section 15 of the Equality Act 2010 (‘‘EA’’).

2. The respondent’s position was that the claimant had been fairly dismissed for gross misconduct in relation to his numerous absences. Their position was that there had been a fair disciplinary process although they conceded the company had failed to provide the claimant with an appeal despite one being lodged by him. They did not concede that he had been discriminated against for something arising from his disability.

3. At an earlier hearing the Tribunal found that the claimant was disabled in terms of the EA and that the respondent’s managers were aware or should have been aware of this at the date of dismissal. It did not determine if they had become aware at an earlier date.

**Issues**

4. It was up to the respondent company to establish the reason for dismissal and if it was a potentially fair reason. Thereafter, the Tribunal required to consider the fairness or unfairness of the dismissal in terms of s98(4) of the Employment Rights Act 1996 (‘‘ERA’’) and whether the dismissal fell within the ‘‘band of reasonable responses’’ open to the employers. In relation to disability discrimination the burden was on the claimant to demonstrate that the respondent’s managers were aware or should have reasonable been aware of his disability. If this was demonstrated then the next issue was whether or not a claim then arose under Sections 15 EA.

**Evidence**

5. The hearing took place partly in person and partly by CVP and Videolink. Ms Grant had been required to self-isolate prior to the hearing because of restrictions imposed to combat the Corona Virus and joined the hearing by CVP. Mr Cameron, the respondent's only witness joined by Videolink from Australia. It would be fair to say there were difficulties with the digital/electronic media used which did not assist either parties or the Tribunal but the Tribunal wishes to thank parties for persevering with these problems and having the evidence concluded.

6. It was agreed at the close of the hearing that written submissions would be exchanged and thereafter the Tribunal would reconvene to consider those.

7. The Tribunal had the benefit of a Joint Bundle (JB1-37). Ms Grant was allowed to add to the joint bundle by lodging a statement from Mr Peter Kent (JB38) and on the following day she lodged extracts from the company staff handbook (JB39). Mr Kent did not give evidence. The claimant gave evidence on his own behalf and called as a witness his partner Gillian Mackay and his Mother, Anne Gregory.

**Facts**

8. The claimant is 34 years of age. He lives in Inverness. He began working with the Loch Ness Coffee Company Limited from 23 March 2013. He began his employment as a cleaner and was then moved to a position in the bakery latterly being promoted to Bakery Superviser. He enjoyed his work and was well thought of. He had a clean disciplinary record. He was not provided with a statement of terms and conditions.

9. The claimant's average gross weekly pay was £377.50 per week or £300 net approximately.

10. The respondent company is part of a larger group of companies which includes Hotels and Coffee shops. The bakery business is located in Drumnadrochit near inverness and bakes cakes. It is busiest in the tourist season. The group of companies employs about 350 employees in total. The claimant supervised a team of between 4 and 5 people.

11. The respondent's owners pride themselves on being good and caring employers who try and support their staff who are mostly drawn from the local area.

12. The claimant enjoyed his work and had a good relationships with his managers Sheena Lloyd and Peter Kent. He also knew Mr Rory Cameron who is a Director of the company. Mr Cameron was involved in various aspects of the business but would visit the bakery and speak to staff once or twice a week. He knew the claimant because the claimant had known Mr Cameron's grandfather with whom the claimant had a shared interest in fishing.

**Personal circumstances**

13. The claimant's mental health deteriorated towards the end of April 2017. He became depressed and lacked motivation. Thereafter his mental health never fully improved although he would have periods when he felt a little better. His depression remained underlying and his worst symptoms would recur during periods of stress. When the symptoms recurred this would have a substantial impact on his ability to carry out day to day activities. He would lose motivation. He would shun social gatherings. He would not take care of his personal hygiene. He would not get up to go to work despite prompting to do so.

14. The claimant was experiencing these symptoms towards the end of 2017. His family were concerned about his welfare. His mother, Anne Gregory, became particularly concerned about him and persuaded him to see his G.P. on 18

December 2017. Thereafter the claimant periodically visited his G.P. and was prescribed medication for his depression latterly Sertraline.

15. Mrs Gregory also worked at the bakery. She was aware that the claimant made no secret of his depressive condition. He had told her he had discussed it with his Manager Mr Kent and with Mrs Lloyd and also with Rory Cameron a Director.

16. Mrs Gregory had on occasion reported the claimant's absence to the managers. When she had done so the managers, Mr Kent and Mrs Lloyd, would ask her what was wrong with the claimant. She told them that he was suffering from depression. Mrs Lloyd was sympathetic. She had a nursing background. She mentioned that a close relative had suffered from depression.

17. The claimant's partner gave birth to a son in August 2017. She was unwell after the birth. She was diagnosed as having post-natal depression. She became pregnant again and gave birth to a son Archie on 28 July 2018. The first son Donald was born on 31 August 2017. These events affected the claimant's own mental health and exacerbated his anxiety and depression. He found life difficult to cope with life. He found it difficult to sleep and was anxious. He lacked motivation. He would find it difficult to get up, dressed and go work. He spoke to his manager Mr Kent at this time about these difficulties Mr Kent suggested the name of a self-help book to the claimant on one occasion when he was anxious and finding it difficult to sleep.

**Absences**

18. The respondent is a seasonal business with peak demand being in the high tourist season in the summer months. They were often quiet over the winter. During periods when they were quiet the managers allowed staff to take what were referred to as "personal days off". These were agreed absences which were unpaid.

19. The claimant took a number of such personal days absence in 2017. Some were allowed retrospectively when he had failed to turn up to work. The respondents recorded 21 days. In addition, the claimant had 29 sick days.

20. In 2018 the claimant accrued a large number of personal days absence and in excess of 20 sick days.

21. The respondent's managers resolved to take action against the claimant in relation to his high level of absence.

22. The respondent's policy was to have a return to work meeting with staff such as the claimant after a period of illness. No records of return to meetings with the claimant were produced or spoken to.

23. The respondent's managers wrote to the claimant on 17 October (JBp.54/55). They suspended him and asked him to attend an investigatory meeting on Wednesday 24 October. They wrote:

"*This meeting has been arranged because we are in the process of investigating your high levels of absence. However, we reserve the right to change or add to matters as appropriate in the light of our investigation.*

*Please note that the meeting is entirely a fact finding exercise and does not form part of the organisational formal disciplinary procedure. As such, you do not have a right to be accompanied at this stage. If, once our investigations have concluded, we wish to proceed with formal disciplinary proceedings against you, you will be invited to attend a disciplinary hearing.*

*The investigatory meeting will be chaired by Erin Grant but I will also be present to take an attendance note of the meeting. Please bring with you any information that might be of assistance to the investigation.*

*As of today you have been suspended from work until further notice…….During your suspension, we shall continue to pay your salary in the normal way. You are also entitled to your normal contractual benefits.*

The letter continued:-

*If you know of any documents, witnesses or information that you think will be relevant to the matters under investigation please let me know as soon as possible. If you require access to the premises or computer network for this purpose please let me know and we may agree to arrange this under supervision.*"

24. The investigatory meeting took place on 24 October 2021. The claimant was in attendance at the meeting along with Ms Grant the respondent's in house solicitor and his manager Peter Kent. Ms Grant explained that the meeting was an investigatory meeting into the claimant's alleged misconduct. She explained it wasn't a disciplinary hearing. She advised that once the investigation had been concluded he would be told of the next steps. She advised him that the purpose of the meeting was to explore his high levels of absence and failure to adhere to the policy for reporting the same.

25. When asked about his absences the claimant explained that most of his recent absences were due to personal problems with his partner. He told them that he had been down in Glasgow and had a row with her. He returned to Inverness on his own and had stayed with his father. His mobile telephone had run out of charge and he was unable to report that he would be absent that day. He was asked whether he couldn't use a pay phone and he responded: "*he didn't know where his head was"* after the argument with his partner and agreed that he should have telephoned on Monday to report his likely absence. He was then not at work on Tuesday and Wednesday. He explained that following the row he had been looking for alternative accommodation and had send a voicemail to say that he wouldn't be in to work on Wednesday. He had self-certified himself off work as unwell. It was recorded: "*he felt that his personal situation had gotten better as his partner had been diagnosed with post-natal depression and was now taking medication and things had gotten better in the last few days. He didn't think there was any need for him to go to the doctor.*" He later told them that he had started taking antidepressant medication again (JBp57).

26. At the meeting the claimant explained that his partner had had a baby 14 or 15 weeks earlier. It was recorded that he had started taking antidepressant medication again. He now realised that he had to keep taking in order to keep well. The claimant advised that this was an old prescription and he had not been to the doctor to discuss going back on his medication. He was asked when he had last been to see his G.P. and said this was July. It was noted that one of the reasons he had previously given for an absence in July was going to the doctor. The claimant advised that he hadn't actually gone to the doctor that day but that he had planned to go. It was recorded that he realised that when he didn't go to the doctor he should've gone into work. He confirmed that he knew he should leave a message if he was unable to get into work. He said that he sometimes did leave a message or had asked his mother who worked in the bakery to say that he wasn't coming in.

27. The claimant was asked what he was going to do with his medical issues and he said that he was going to go back to his G.P although he had been given time off to look for accommodation. He hadn't actually done so. The discussion turned to an occasion when the claimant had a day off to go to the dentist but he said that he did not go as he realised that he didn't have any money to pay for the filling he needed. The claimant was then asked about two funerals he had attended. He had attended one in April for a friend. The claimant indicated that in relation to the day off that had been taken for the second funeral, for a John MacDonald, he had changed his mind and didn't want to go. His wife had gone in his place. The claimant accepted that he had given assurances that he would try and keep his absences to a minimum and that they would be for legitimate reasons and that he would follow the absence procedure properly. He accepted that on numerous occasions he had failed to do so.

28. At or about this time the claimant applied for a job with Three Little Bakers prior to his dismissal as it was based in Inverness closer to his home and he would not have to travel to Drumnadrochit where the respondent was based. (JBp96)

29. The claimant received a letter on 12 November that was hand delivered to his house asking him to attend a disciplinary hearing on 13 November. The date of the disciplinary was altered by the company to the 15 November and the claimant received a letter hand-delivered to his house on 14 November advising of the disciplinary hearing. The letter stated:

"*The purpose of this meeting is to consider allegations of gross misconduct related to high levels of absence.*

*You will be provided with a copy of the Minutes of the Investigation Meeting tomorrow and will be given an opportunity to both read and comment on same.*

*We do not intend to call any witnesses to the hearing. If you wish to call any relevant witnesses to the hearing please let me know by return. Similarly, if there are any further documents you wish to be considered please provide copies as soon as possible. If you do not have those documents, please provide details so they can be obtained.*"

30. The claimant was advised that he could have a representative.

31. Following the investigatory meeting the claimant had spoken to his partner. He was unsure as to what dates he had taken off either as personal days or sick days. She asked him to ask for the records to allow him to ensure that they were accurate and help him give explanations. This he did by telephone. He was not provided with this information.

32. A disciplinary meeting was held on the 15 November 2018. The disciplinary hearing was minuted (JB18). Ms Grant explained that the meeting was a disciplinary hearing regarding the claimant's alleged misconduct and the company had decided to take disciplinary action following the investigatory meeting. The claimant was critical of the short notice he had been given. It was also recorded: *"he was also concerned he was not being given all the "fact finding" information"* that the company had obtained. It was noted that the company had noted his concerns and had postponed the hearing for 48 hours to allow him further time to prepare. In this period the company had provided him with a copy of the absence policy but not with details of the days

taken off. With regards to the length of time between the investigatory hearing and the disciplinary hearing Ms Grant said that the company had a duty of care to all employees including the claimant and there had to be internal discussions as to whether commencing disciplinary action was appropriate. The discussions had happened and the business progressed the matter as soon as practicable. Ms Grant (''ELG'') then asked the claimant (''DM'') some additional questions. It was recorded as follows in the Minutes:

*"ELG asked whether post investigatory meeting to the doctors. DM confirmed he had and he had been prescribed the same anti-depressants as he had previously been on. He advised ELG that he had been on anti-depressants on and off for around 14 – 18 months. He had previously stopped taking them but he felt better and had done this without medical advice. DM advised that one of the reasons he had stopped taking them because he had difficulty in sleeping whilst on them. However, he did now realise he had to continue taking them if he was going to manage to go back to work and try and eliminate his absences and thought he might go back to the doctors to ask for a different type to see if that improves his sleep."*

33. The claimant was asked by Ms Grant if he had any objection to the company obtaining a medical report and he indicated he was agreeable to this. There was a discussion about reporting absences. He also asked about taking time off to look for accommodation but not actually looking for that accommodation. He accepted that he should have contacted his work but that he had been unwell. He had "*hit a dull place*". He was asked him about the dental appointments that he hadn't kept and other reasons given for time off. He asked if he could reassure the company that there would be a significant decrease in his absence and he would follow the absence policy. The claimant explained that his partner had been diagnosed with post-natal depression and was now receiving appropriate treatment and this had helped considerably with home life which in turn had helped with his depression.

34. At the close of the meeting Ms Grant advised what the next steps would be. She explained that there would now require to be a discussion with management to determine the best way forward. She emphasised that the outcome of the hearing had not been prejudged and a decision had to be taken on the basis of the facts including what had been discussed that day.

She said she would try and discuss the matter with ‘‘Rory’’ later that day although she thought he might be away at meetings all day. She promised that an initial e-mail would be sent out at the end of the week advising him as to ‘‘ongoing progress’’.

35. Mr Cameron was contacted about the disciplinary meeting and told what had transpired. He felt that the absences were disruptive. He gave permission to have the claimant dismissed.

36. Ms Grant e-mailed the claimant on 16 November (JBp.77):

“*Dear Donald*

*Further to my earlier correspondence please find attached minutes of the disciplinary hearing together with amended minutes of the investigatory hearing incorporating your comments.*

*I have not yet managed to speak with Rory regarding the proposed next stage. However, will endeavour to do so over the course of today and will revert as soon as I have spoken with him.*”

37. Ms Grant was able to discuss matters with Mr Cameron. He in turn discussed the matter with Mr Kent. Mr Cameron decided that the claimant should be dismissed because of his absences and the failure to report them in accordance with the policy.

38. The claimant had received a letter on 21 November (JBp.65/66) dismissing him for gross misconduct. It recorded:

“*The reason for your dismissal is both your excessive level of absences as well as your repeated failure to notify the company adequately in advance of planned absence.*

*Your manager has spoken with you on several occasions but your absences and have reminded you of the absence procedure you are required to follow. We accept that on a number of occasions you have been absent from work when in fact, you could have worked at least part of a shift, e.g. being absent for dental appointments but then not actually going to the said appointment. You also accept that you have repeatedly failed to follow the absence*

*procedure despite assurances to your managers that you understood the procedure and would follow it next time.*

*Your behaviour over a prolonged period has caused significant disruption to the running of the business and has meant the company had to rely on other staff members to cover your shifts often at short notice.*"

39. The letter provided the claimant with an appeal.

40. The claimant had contacted Rory Cameron after the investigatory meeting asking what was happening as he hadn't received minutes or notes. When he received the first invitation to the disciplinary hearing on 12 November he had asked for a delay because he didn't have any of the relevant information that was being used. He contacted Peter Kent his manager and the hearing was put back. He had not received any details of the absences that the company were relying on by the time of the hearing.

41. The claimant was upset and surprised at being dismissed. He thought he would be given a chance to show his attendance could improve. He took advice about what had happened and he e-mailed Rory Cameron (JB86) asking for a full list of absences and reasons as stated.

42. The claimant wrote (JBp.86):

"*I was summarily dismissed with effective 21 November 2018. This was on the grounds of gross misconduct due to high level of absence.*

*Please consider this correspondence to constitute a formal appeal against the decision to dismiss me.*

*My reason for appeal is I feel the manner in which the whole investigation was conducted and concluded did not seem fair. Fact finding was not used with permissions given by myself to contact GP. This leaves me to believe that all options were not investigated fairly. My dismissal was due to consequence of my disability. The Equality Act 2010 states I am protected against unlawful discrimination in the workplace. Many options were appropriate to consider firstly, instant dismissal cannot be deemed as fair until other reasonable adjustments have been made or implemented.*

*As an employee of 5½ years. My previous years should be shown that the high absence and my mental health diagnosis were confirmed in the investigation timescale. Previous to this my attendance at work had never been an issue.*

*I hope to have a meeting to go over in detail all the findings and facts which has lead me to believe my dismissal was unfair. Legal advice has been sought and will continue throughout the appeal.*"

43. The claimant had submitted Fit Note to his employers dated 4 July 2018 covering the period 2 July 2018 to 8 July 2018. This was wrongly recorded by the respondent company as a ''personal'' absence (JBp.52) The Fit Note recorded the reasons for the absence as "depressed mood".

44. The claimant was unwell after his dismissal. He became depressed and lacked motivation. He was upset at the way he had been treated. He was upset that his depression did not seem to have been recognised by the respondent company and he had not been supported by them. The symptoms of his depression and anxiety returned. He applied for and received Universal Benefit. This included him requiring to co-operate with a job coach. He kept a look out for jobs and applied for a job at the Kings Golf Club in Inverness on 23 April 2019. He did not make any other applications. He continued to be unwell with underlying depression.

45. The claimant attended his GP in February 2019 regarding chest pain. He failed to attend appointments in March and April (JB129) He contacted his GP on the 24 July and it was noted that he was 'more stressed and anxious. Mood dropped'' He was restarted on Sertraline.

46. The claimant applied for and received Universal Credit from 1 July 2019.

47. After the claimant had raised proceedings he tried to get former employees to give evidence on his behalf at the final hearing. In about August 2019 he texted a colleague (JBp31) about contacting his solicitor*: ''Hi are you able to give me a statement if needed I won the first hearing ….i need email/phone number/address and think they will contact you if needed for information this will be to see when they knew who knew about my depression…''* He

indicated that he might invest in a business if he won and closed: *''will speak so bro don't let anyone know please I know you won't big bag off bud coming your way…*'' The texts were passed to the respondent's management who believed the claimant was offering marijuana as an inducement to give evidence.

48. Mr Kent had failed at the last minute to attend the hearing arranged to consider the claimant's disabled status. The claimant's partner Ms McKay contacted Mr Kent before the hearing in and asked him if he would appear as a witness . She wrote (JB38) : *''really I'm asking if you would be able to help in way of saying you knew Donald was suffering with depression and how you had discussed openly with him……I know this is a big ask, but I believe what happened with hearing way back showed that you are a respectable man who wasn't going to be put in a position of lying for a company"* Mr Kent passed the message on to Mr Cameron and provided him with a statement.

**Witnesses**

49. We found the claimant generally an honest witness although a somewhat erratic one. In relation to one of the essential elements of his case, namely his employers knowledge of his condition, we accepted that he had disclosed his depression both to Mr Kent and to Mrs Lloyd. Neither of the two managers gave evidence ( and could not be cross examined) but produced statements (JB4 and 38). This was highly unsatisfactory for the Tribunal. Mrs Lloyd makes no reference in hers to being consulted over the claimant's dismissal although that was their position and Mr Kent's makes no reference to being the person who apparently made the decision to dismiss according to Mr Cameron's evidence.

50. We found Ms Mackay and Mrs Gregory to be honest and straightforward witnesses who were both generally credible and reliable in their evidence. Our one caveat related to how unwell the claimant remained in 2019 which was less convincing when the medical records were considered.

51. Mr Cameron tried to assist the Tribunal but we wondered whether he actually grasped much of what was happening at the time of these events. Our suspicion was that he had instructed the dismissal perhaps on the recommendation of Mr Kent or Ms Grant. The exact circumstances were opaque. He was not at any of the meetings. He couldn't recall that another member of staff had been dismissed on the same day (apparently either by him or with his say so). He was certain that if the claimant's health condition had been known about he would have been fully supported by the company. We found his evidence rather vague and he relied on the formula ''We would have..'' or ''I would have..'' a little too often for us to place much reliance on his evidence which was not particularly credible or reliable overall.

**Submissions**

52. Mr Smith first of all outlined the claims being made namely for unfair dismissal and for a breach of Section 15 of the EA. He then set out the findings in fact that he wanted the Tribunal to make. These dealt first of all with the disciplinary process and the various flaws in that process that he had identified. He referred to the ACAS Code and its relevance here. He then took the Tribunal though the evidence which included both the claimant's illness and absences and how the disciplinary process began. It was he said important to note that when he attended the disciplinary hearing the claimant had raised the issue of not being given the "fact-finding information" by the respondent. He was not aware of which absences were being relied on. He was also asked questions about various absences by Ms Grant and gave explanations. Among these were a number of references to further medical advice he had received, that "*his head was all over the place"* (p62), that he had *"been unwell and had hit a dull place"* (p63), that his partner was now receiving treatment which was helping with his depression, and that he would in future tell the respondent when he was feeling down, and comply with the respondent's absence management procedure in future (p63). He was asked

if he had any objection to the respondents obtaining a medical report from his GP and he said he did not (JBp62).

53. Mr Smith noted that at the conclusion of the meeting the claimant was informed by Ms Grant that she would discuss the situation with their Director Rory Cameron before a decision was made. The claimant was dismissed a short time later. He was not informed who had made this decision or of his right of appeal. He appealed. One of his grounds of appeal were that the dismissal was a consequence of his disability, and there had been a failure to make reasonable adjustments No appeal was heard. The claimant also requested the absence records that were relied upon.

54. The absence records provided divided absences into "personal days" and "sick days". The respondent had a practice of allowing unpaid leave to be taken depending on workload. This time off could be at the request of the employee or suggested to the employees by their managers. The records of "personal days" included both days when employee had requested unpaid leave and days when it was suggested to employees by the employers that they take unpaid leave. The records relied contained errors. At least one period of vouched sickness absence was wrongly recorded. The claimant had both requested unpaid leave, and had been offered days of unpaid leave by his manager, Peter Kent. There were apparent contradictions between these records and other records, in terms of whether days were recorded as sick leave or personal leave. He suggested that had the claimant been provided with the absence records at or prior to the disciplinary hearing, it is likely that other dates within these records would have been challenged. There were no references made to any prior warnings to the claimant. Any alleged warnings and the surrounding circumstances were not recorded.

55. Turning to the circumstances of the dismissal Mr Smith observed that Mr Cameron denied he made the decision to dismiss, but said he had discussed it with Mr Kent. Significantly in Mr Smith's view Mr Kent did not give evidence.

He did not say in his 'statement' that he had dismissed the claimant or spoken to Mr Cameron. Mr Cameron said he was not in favour of the claimant being allowed to remain in employment and being given more time to follow medical advice in order to improve his attendance. He relied on the absence records and the prior warning being given.

56. The claimant he submitted had made no secret of his depression. He had spoken to Mr Kent about it. He had also spoken to Sheena Lloyd and his mother has spoken to them too. Although Mr Cameron denied he was aware that the claimant suffered from depression and treatment, he had seen the minutes of the Disciplinary hearing and discussed the claimant's absence record situation with Mr Kent prior to the decision to dismiss.

57. The claimant was not provided with the absence records that led to him being the subject of investigation, disciplinary action, and dismissal. It is submitted that this put him at a disadvantage, and it resulted in him being asked about specific absences with no fair opportunity to comment on this.

58. While the ACAS Code (which the respondent said they were working to) does not make specific reference to documents being provided, it does he ,suggested, set out a fair process at Paragraph 12: "At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses." It was submitted that *''a reasonable opportunity to … present evidence''* included being given the very records that have led to the situation and are being relied upon. In any event, at page 14 of the ACAS Guide to Discipline and Grievances at work, it states that*: "employees should be informed of the*

*allegations against them, together with the supporting evidence, in advance of the meeting."*

59. While it was submitted that the was no duty on the claimant to ask for these, the claimant gave evidence that in fact he did so, by telephone, but they were not provided. This evidence was unchallenged. Even if the Tribunal does not accept this, the minutes of the disciplinary hearing record that he had asked for the respondent's evidence to be passed to him, and no documentation of any sort was disclosed, beyond the minutes themselves.

60. As well as being an important procedural safeguard, he submitted that in this case it makes a real difference. Now that the figures have been produced, a witness has been able to give evidence to contradict these. Gillian Mackay, the claimant's partner, was able to speak with some conviction about periods, such as when she gave birth, when she disputed that the claimant was on sick leave, as the records for 2018 had recorded. (She said it was more difficult to examine the records for 2017 produced as they did not give specific dates). Ms Mackay's oral evidence querying the records was not contradicted by any further records produced by the respondents. In addition, the Tribunal heard that there was some uncertainty regarding what are recorded as 'personal days' consist of – whether unpaid leave at the request of the employee, or at the suggestion of the manager, during quieter periods in the bakery.

61. This gives rise to the possibility that the "50 absences" that were quoted to the claimant at both the investigation meeting (JBp56) and the disciplinary hearing (JBp61) may have included days when the claimant was on some other form of leave (e.g paternity) or when it suited the respondent for him to be off on unpaid leave.

62. It was submitted that, had the records available now been produced in October 2018, then the claimant would have challenged these, and the levels

of absence which the respondent company was relying upon would have had to be looked at again before any decision to dismiss could have been taken.

63. Neither was the claimant given prior notice of what the ‘‘allegations of gross misconduct’ were that had led to him being invited to the disciplinary hearing. The invite letter to the hearing said this ‘‘related to your high levels of absence’’, but as set out already, went no further than that.

64. Mr Smith pointed to the invitation letter which did not seem to contemplate or give any warning that dismissal could result. This was in apparent breach of the respondents’ Disciplinary Policy and Procedure, which states (JBp88) that the invite “will set out … the potential consequences….”

65. Mr Smith advised that the dismissal letter gave the reason for dismissal as “both your excessive level of absence as well as your repeated failure to notify the Company adequately in advance of a planned absences. Your managers have spoken with you on several occasions about your absences and have reminded you of the absence procedure you are required to follow.” The letter went on to make reference to the claimant having ‘accepted’ that had been absent when he could have worked for at least part of a shift, and admitted failing to follow absence management process.

66. No specific information was provided in respect of either: i) which managers had spoken to him, ii) when, iii) which absences the claimant had accepted he could have worked during, or iv) when he had failed to follow the absence process. It was accepted that the claimant made admissions during the investigatory hearing regarding some of the specific absences raised (a total of 6 out of the total of 50 alleged), so to that very limited extent, he did have notice. The evidence he gave was that largely the same information was discussed at the disciplinary hearing.

67. In the light of the evidence it appeared that the respondent company was of the view that the claimant had previously been issued with a formal warning

(although no records were produced and the claimant said this was an informal "slap on the wrist"). On this point, there was no discussion at all at the disciplinary hearing.

68. It was submitted that this was a breach of the ACAS Code in terms of the duty on the respondents to be 'transparent', as referred to in Paragraph 2.

69. The respondent had a duty to consider alternatives to dismissal, and failed to do so. It was submitted that this was duty both in terms of any reasonable disciplinary process in terms of s.98(4), but also from their own policies which provided for warnings and improvement (JBp87). The Absence Policy (150) provides that: "*If you are issued with a formal disciplinary warning, you will be advised as to the level of attendance which the Company expects of you. If you fail to achieve this level of attendance further disciplinary action may be taken."*

70. At the disciplinary hearing, the claimant was asked for an update on his medical status, and provided this. He was asked to consider to records being obtained, and provided this. He was asked that he could do to reassure the respondent's managers that his absences would significantly decrease, and that he would follow the absence management process. He provided information about changes to his home life, his partner's and his own medical treatment, and said he would do things different in future in terms of communicating with his manager. The dismissal letter stated that they did not feel he had given them "sufficient reassurance that this will not happen again." They have not sought to confirm his medical evidence, nor that of his partner, but they do not appear to have disputed it. By summary dismissal, they have not allowed him any opportunity to improve.

71. It was also submitted that any fair and reasonable disciplinary process would necessarily entail the claimant being aware of who was taking the decision to dismiss him. The respondents' position was that Mr Kent was the decision-

maker, although the Tribunal did not hear from him on this. The minutes do not record Mr Kent as having spoken to the claimant during either the investigatory or the disciplinary hearings or considered why dismissal was appropriate. The claimant's understanding, supported by the minutes of the disciplinary hearing, was that Mr Cameron was to make the decision. This was denied by Mr Cameron, although he said he had discussed the situation with Mr Kent and agreed with the decision. The dismissal letter was written by Ms Grant and referred to a decision having been taken by the respondents, but not whose decision this was. The letter did go on to say that any appeal was to be sent to Mr Cameron.

72. As was conceded by the respondents at the outset of the Tribunal, no appeal hearing took place, despite the efforts by the claimant to have various matters looked at by Mr Cameron, including the provision of the absence records. This was a fundamental breach of the ACAS Code, paragraph 4.

73. In light of these points, individually and cumulatively, it was submitted that the respondents have not, and cannot, discharge the burden on them to show that this was either a fair process. For the avoidance if doubt, this is in terms of both the substance of the decision, or the process which they undertook.

74. Turning to discrimination the claimant was discriminated against due to his protected characteristic of disability. Before any discrimination claim can succeed, the onus is on the claimant to show that the Respondents knew he had the impairment of depression, prior to them taking the decision to dismiss him. The Fit Notes produced (JBp103-106) record one absence due to "depressed mood" and three due to "stress at home."

75. The claimant gave oral evidence of how the that he had depression had been communicated to Rory Cameron. Peter Kent and Sheena Lloyd in a number of conversations prior to any disciplinary action being taken. This was resisted by the Mr Cameron who said that he was not aware of this and that Mr Kent and Mrs Lloyd would have told him if this had been the case. Neither manager

attended to give evidence. A statement was produced which was purported to be from Mr Kent in the form of an email to Mr Cameron who explained that he remained on good terms with Mr Kent. A signed statement was produced from Mrs Lloyd who remains employed by the Company. It was not possible for the claimant's evidence about these conversations to be tested before the Tribunal with these witnesses.

76. Support for the claimant's version came from Anne Gregory, who is his mother but also an employee of the respondent . She spoke to a number of conversations that she also had with both Mr Kent and Mrs Lloyd about her son's impairment. This would be entirely unsurprising if the respondent's managers were unhappy at his frequent absences. Ms Gregory also referred to Mrs Lloyd's background in nursing giving her a particular interest and the mental health problems of a close relative.

77. Even if it the Tribunal is not prepared to accept that the respondent knew about the impairment before the disciplinary process began, it is submitted that they must have known prior to the decision to dismiss. This is based on the information which the claimant disclosed at the investigatory meeting and then the disciplinary hearing, where he spoke freely about the symptoms of this, and also said that he had been receiving medication. It is submitted that the prescription of anti-depressant medication by a GP must give rise to an inference that there has been a diagnosis of depression. It was open to the Respondents, if they wished to find out more or were not satisfied to take the Claimant's word for it, to approach the GP. They asked the Claimant about this, and he consented. But the respondent's managers did not take him up on this.

<u>s.15 of Equality Act:</u>

78. The claimant says he was treated unfavourably by being dismissed due to "something arising" from the disability, namely his difficulty in maintaining

regular attendance at work, and also in informing the Respondents of his absences.

79. The claimant accepted that his absence record was not a good one. However, he set out the reasons for this, which included the effect that the depression had on him. At the investigatory hearing, when asked about his most recent absence, the claimant made reference to not contacting his manager because "he didn't know where his head was at" and then being "stressed" two days later which led him to call his manager to say he wouldn't be in (56).

80. At the disciplinary hearing, when questioned further, he also made reference to his mental state: (JBp62/63) *"ELG noted that DM had phoned in absent on several occasions on the basis he needed to take time off to look for accommodation due to personal problems but that he had never actually gone and looked for the same. ELG asked whether he felt he should have gone back to work when he decided he wasn't going to be looking for somewhere that day. He accepted he should have contacted work to advise he could now come in but hadn't under explanation that he had been unwell and had 'hit a dull place."*

81. As mentioned earlier the claimant went on to discuss his prescription of anti-depressant medication, and had already agreed to his GP being consulted and records provided. He said he would do things different in future in terms of notifying his managers, and he was fit to return to work. No further medical information was sought.

82. The level of absences, including those caused by depression, are central to the decision to dismiss. The reasons given for the claimant's actions in failing to notify his managers, is also central to this. It is submitted that, based on the foregoing, the claimant has set out a 'prima facie' case that there has been unfavourable treatment due to discrimination. If this is accepted, it is

submitted in terms of the onus of proof (***Hewage v Grampian Health Board [2012] UKSC 37, Ayodele v Citylink [2017] EWCA Civ 1913***) passes and it is for the respondents to show either:

- There was no such treatment, or
- The treatment was a proportionate means of achieving a legitimate aim.

83. The respondent company have deviated so far from what could be objectively regarded as a fair procedure here that this must count against them in assessing their actions. The claimant also relies in particular on the claimant's appeal, which did not proceed. While this is clearly of limited relevance in analysing the possible motivation for dismissal (as it occurred after it), we submit that it may say well something about the respondents' attitude to allegations of discrimination generally, and so formed part of 'treatment' of the claimant.

84. Although the appeal/complaint was acknowledged by the company, no steps were taken between then (28/11/18) and the concession offered at the ET on 23/2/2021. The respondents did not take it 'seriously' indeed they completely ignored it.

85. Finally, in terms of s.15 (1)(b), it was submitted that the dismissal due to the absences/misconduct, following the process used cannot be a proportionate means of achieving a legitimate aim.

86. Mr Smith then directed the Tribunal to the Schedule of Loss and to the mitigation documents at pages 94-96. The claimant gave oral evidence in support of these. It was broadly his position that he was ready and fit to return to work at the point of dismissal. Had he been able to do so, then it is submitted that he would have been able to continue in that employment at least until the summer of 2020, when he may well have been made redundant, in line with other employees. The Schedule of Loss is calculated

on the basis of continued employment until December 2020, although the operation of the statutory cap makes this somewhat academic.

87. Similarly, the issue of an uplift of 25% for the respondents' various failures in terms of the ACAS Code is not something that will ultimately benefit the claimant, although we would ask that the Tribunal retain it in their calculation of any award on a point of principle. The uplift may also become more relevant should the respondents seek any reduction in either the basic award or compensatory awards in respect of the claimant's contribution. Our submission in relation to this is that, while he accepted his absence record was not good, he presented to the respondents a number of reasons for optimism that factors which had led to previous absences had been or were being tackled.

88. It was submitted that it would be highly speculative for the Tribunal to make any assumptions that the claimant would not have been able to keep up a level of attendance that would have seen him remain in employment. It is true that his GP records (129-133) show that his depression was exacerbated post-dismissal but we would seek to rely on the evidence of Gillian Mackay that it was the dismissal itself which caused this.

89. The claimant's solicitors resisted any 'Polkey' argument that, had the respondents used a fairer procedure, that the dismissal would still have occurred. Had the absence records been made available, we submit that Ms Mackay would have made the same points about the accuracy of these, and that, in any fair process, the respondents would have had to at least 'pause' their procedure. In the absence of verifiable, agreed dates of absence, we submit that 'Polkey' should not apply, relying on the Court of Session case of *Eaton Ltd v King (No 2) 1998 IRLR 686* and the warning of Lord Prosser against embarking on "a sea of speculation."

90. Their position was that after he recovered, the claimant has sought to mitigate his loss by obtaining new employment, and for obvious reasons he cannot be marked down for being unable to obtain new employment over the past 12 months.

91. They assessed injury to feelings at £17,000, based on the evidence of the claimant, Ms Gregory, and Ms Mackay about the setback the loss of employment caused and the effect that this had. In terms of updated Vento guidance, as at April 2020, this is right in the middle of mid-band. We accept that this not a 'top-band' case or approaching it. However, we submit there are elements, in terms of the treatment of the claimant, in light of his disclosure of impairment by depression, that elevate it above the lower-band threshold.

**Respondent's Submissions**

92. Ms Grant first of all turned to Section 98 of the act observing that it had been accepted that the claimant had been dismissed for his conduct and that this was a potentially fair reason in terms of Section 98(1). She then turned to whether the respondent had acted reasonably in dismissing the claimant for that reason and in doing so did they follow a fair procedure and act reasonable in treating the reason as sufficient reason for dismissal Section 98(4) of ERA 1996.

93. She noted that the Tribunal was only now concerned with Section 15 of the EA and no longer with a claim for reasonable adjustments.

94. Ms Grant addressed the issue of whether the respondent company had knowledge of the claimant's disability and the effect of Section 15(2). If that knowledge was demonstrated (and the respondent disputed that) then then the statutory test under Section 15(1) EA 2 was that "discrimination arising

from disability" occurs where both the claimant was treated unfavourably because of something arising in consequence of his disability and the employer cannot show that the treatment was a proportionate means of achieving a legitimate aim. (Ms Grant then turned to her proposed findings in fact which we shall not rehearse here). She took the Tribunal though the circumstances leading to the disciplinary hearing and the background which was the claimant's high levels of absence concluding with his dismissal and accepting that the claimant's appeal was not heard explaining that Mr Cameron in evidence explained he had understood this was being dealt with by Mr Kent. He had accepted that the appeal should have been heard.

95. The respondent asked the Tribunal to take into account their policy which was:

"*The Company cannot sustain frequent short-term absences, even if the reasons for the absence are genuine. Therefore, unacceptable levels of absence will be subject to disciplinary proceedings"*, (JBp149).

96. The claimant had accrued 20 personal days and 26 sick days in 2018(JBp52). He had accepted in evidence that the absences were excessive. In addition, he accepted that he had been given verbal warnings about absence levels. The absences had meant the business had at times been unable to fulfil customer orders due to a shortage in staff. The claimant had not advised he was taking prescription medication. He did not advise he was disabled.

97. The respondent submitted that the claimant was untrustworthy. He had attempted to bribe Michael Paszek with a "big bag of bud" (marijuana) in exchange for giving evidence at the Tribunal. He told Michael Paszek he planned to use the proceeds of any tribunal award to invest in a business.

98. It was submitted that the respondent, for the most part, followed their Disciplinary procedure (JBp 85-87) and the ACAS Code of Practice on Discipline and Grievance. The claimant had been invited to attend an

investigatory meeting. The letter advised that the purpose of the meeting was to investigate the claimant's high levels of absence and give him an opportunity to comment on the same. The claimant was advised that he could provide documents, witnesses or other information which might be relevant to the matters under investigation. An investigation meeting took place on 24 October 2019. The claimant accepted the minutes as accurate.

99. During the meeting the claimant was advised that after the conclusion of investigations disciplinary action might commence. At the meeting a number of absences were discussed. The claimant was readily able to comment on each absence and did not raise concerns about not having been provided with specific absence records. It was accepted that during the meeting he said that one of his absences (having lied to his employer about not being able to attend work due to him looking for accommodation had been because he had "hit a dull place") however he did not seek to attribute other absences to his mental health. He had been untruthful about these absences.(

100. The claimant was invited to attend a disciplinary hearing (JBp59-60) and was advised that the purpose of the hearing was to consider allegations of gross misconduct relating to his high levels of absence. The hearing would be held in accordance with the respondent's disciplinary procedure. Prior to the hearing, the claimant did not request copies of absence records. Furthermore, he did not ask for these during the disciplinary hearing. It was submitted that the claimant was comfortable discussing specific incidents of absence without the need for these records. The claimant was given the opportunity to call his partner Gillian Mackay as a witness but chose not to do so. It is therefore submitted that at the time of the disciplinary hearing the claimant did not regard Miss Mackay to be a "relevant witness". The claimant advised that, subject to a few minor changes, the minutes of the investigation meeting accurately reflected events. The respondent's managers were entitled to proceed on the basis of the reasons the claimant had previously

given for absences. The claimant did not seek to attribute these absences to reasons of mental health.

101. Referring to ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439***.Ms Grant submitted that dismissal was within the range of reasonable responses. The Tribunal should be beware of substitution mindset (***Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82***). The tribunal may only take into account facts known to the employer at the time of the dismissal, ***W Devis and Sons Ltd v Atkins [1977] IRLR 314***. At the time of dismissal, the claimant had accepted that he had been dishonest about the reasons behind a number of individual absences he did not seek to justify these reasons as being due to mental health. He acknowledged that he had caused significant disruption to the business and that he realised it was "the final straw". He also acknowledged that the respondent had previously given him numerous chances to improve his attendance.

102. The claimant produced Fit Notes (JBp103-106). Three Fit Notes (JBp105-106) cite "stress at home" and refer to periods in 2017 only. Within the Fit Note there is a section for the GP to provide comments including "functional effects of your conditions". This section was left blank on each occasion. The Fit Note on page 103 stated "depressed mood". This was the only Fit Note produced by the claimant that made reference to such moods. Again, the section for the GP to complete relating to "functional effects of your condition" was left blank. It is submitted this reason for this section not being completed in any of the Fit Notes is because the claimant's condition was unlikely to affect his ability to work. The respondent's managers were entitled to rely upon the information contained within the Fit Note and in the absence of any other information, they did not and could not have known that the claimant was disabled. The respondent's witnesses denied he had ever mentioned anti-depressants.

103. It was the respondent's position that Mr Rory Cameron was a credible witness who, even the claimant and his mother Anne Gregory, regarded as "trustworthy". It is therefore submitted that in the event of conflicting evidence from the claimant or his witnesses, Mr Cameron's evidence should be preferred. A signed statement from Sheena Lloyd was produced. Within this statement Sheena states "*Donald did not advise me he was taking prescription medication of any sort. He did not make me or Peter aware that he regarded himself as being disabled nor did he ask for any adjustments to help him with his return to work after periods of absence*".

104. During the hearing both Rory Cameron and Anne Gregory that Sheena Lloyd was regarded as an "honest person". An email from Peter Kent was produced he stated, "I *feel this would not be appropriate as I do not believe that I could support or provide an assurance of character or that at any time he was transparent with regard to his claimed mental health issues*".

Section 15(1) of the Equality Act 2010

105. The claimant alleged that he has been discriminated on the basis of Section 15(1) of the EA 2010. In ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14***, the President of the EAT, Mr Justice Langstaff held that there were two distinct steps to the test to be applied by tribunals in determining whether discrimination arising from disability has occurred:-

1. Did the Claimant's disability cause, have the consequence of, or result in, "something"?
2. Did the employer treat the claimant unfavourably because of that "something"?

106. It was accepted that the claimant advised the respondent that one of his absences (having lied to his employer about not being able to attend work due to him looking for accommodation had been because he had "hit a dull

place") however during the investigation meeting, disciplinary hearing and at the Tribunal, he did not seek to attribute other absences to his mental health. The position in both ***Robinson v Department for Work and Pensions [2020] EWCA Civ* 859 and *Dunn v Secretary of State for Justice [2018] EWCA Civ 1998*** serve as a helpful reminder that whilst a delay or other unfortunate consequence for a disabled person (in this case dismissal) might have unfortunate consequences, this does not necessarily mean that it is discriminatory. It is the respondent's position that the claimant's behaviour in relation to the incidents above were unrelated to the claimant's mental health. Therefore, there is no need to consider further the issue of whether the dismissal was a proportionate means of achieving a legitimate aim.

107. In oral evidence, we heard that the claimant was actively seeking alternative employment prior to dismissal It is therefore submitted that the claimant would not have remained in the respondent's employment beyond November 2018. Even if the claimant had remained in employment, we heard in oral evidence from Rory Cameron, that the pandemic meant he would have been made redundant by March 2020 at the latest.

108. In mitigation, the claimant produced a copy of one job application. No other mitigation documents post dismissal were submitted. The claimant in his submissions, states "that for obvious reasons he cannot be marked down for being unable to obtain new employment over the past 12 months", It is assumed this comment relates to the recent COVID-19 pandemic. if that is correct and his position is that he has been unable to mitigate his losses further, the Respondent does not accept this.

109. In the event that the tribunal find the dismissal was unfair due to a procedural error, it is submitted the reasons identified at (a)-(g) were sufficient to dismiss and as such there would have been a fair dismissal had it not been procedurally unfair. It is therefore appropriate that a *Polkey* deduction be applied in reflection of the same, ***Polkey v AE Dayton Services Ltd {987]***

***IRLR 503 (HL)***. There are no formal limits when applying a *Polkey* reduction. Instead a tribunal must award what is just and equitable. Rory Cameron stated in oral evidence that even if an appeal had been heard the Claimant would have been dismissed for misconduct. Allowing time for an appeal to be held, it is submitted there is a 100% chance that the Claimant would have been dismissed by the end of December 2018.

110. Furthermore, in both written (pg. 96) and oral evidence we heard that the claimant was actively seeking alternative employment in November 2018 prior to dismissal. It is therefore submitted even if he had not been dismissed, there was an 80% chance that the claimant would have ceased to have been employed by 1 December 2018.

111. It is the respondents position that the claimant was not discriminated against for the reasons detailed above and as such no award should be made in respect of this claim. If the Tribunal disagree with this submission, it is submitted that any discrimination fell within the lower end of the *Vento* bands.

112. In the leading case of ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102***, the Court of Appeal set clear guidelines for the amount of compensation to be given for injured feelings and set out three bands of potential awards. We would submit that the evidence of the claimant in relation to injury to feelings is not credible. We heard in evidence that the claimant has a history of being untruthful. This was accepted by the claimant.

113. Ms Grant pointed out that in evidence the claimant and Ms Mackay said that the claimant felt unable to work until August 2019, however, the job application (JBp 95) dated 4 April 2019 directly contradicts this evidence.

114. During the hearing Ms Grant reminded the Tribunal that they had heard oral evidence from Mr Cameron about an attempt by the claimant to bribe another

employee with illegal substances in exchange for him giving evidence at tribunal. This was supported by copy text messages (JBp31). This evidence was not challenged by the claimant. It is submitted that this evidence demonstrates the true nature of the claimant and as such little weight should be given to his evidence in relation to injury to feelings. Notwithstanding this, if the Tribunal is so minded to make an award, then the respondent would submit that an award at the bottom end of the lower band (being £500) would be more appropriate.

115. After his dismissal the claimant applied for and received Universal Credit

**Discussion and Decision**

116. We will deal with the issue of unfair dismissal at the outset. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act"). If the reason demonstrated by the employer is not one that is potentially a fair reason under section 98(2) of the Act, then the dismissal is unfair in law.

117. Conduct is a potentially fair reason for dismissal. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined by section 98(4) of the Act which states that it: "*depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in 30 accordance with equity and the substantial merits of the case."*

118. That section was examined by the Supreme Court in **Reilly v Sandwell Metropolitan Borough Council** [2018] UKSC 16. In particular the court considered whether the test laid down in **BHS v Burchell [1978] IRLR** 379 remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case,

although it was not concerned with that provision. He concluded that the test was consistent with the statutory provision. Tribunals remain bound by it.

119. The Burchell test remains authoritative guidance for cases of dismissal on the ground of conduct. It has three elements (i) Did the respondent have in fact a belief as to conduct? (ii) Was that belief reasonable? (iii) Was it based on a reasonable investigation?

120. Tribunals must also bear in mind the guidance in **Iceland Frozen Foods Ltd v Jones** [1982] ICR 432 which included the following summary: *"in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer…….the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.*"

121. The way in which an Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was also considered and the law summarised by the Court of Appeal in **Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387.

122. Lord Bridge in **Polkey v AE Dayton Services** [1988] ICR 142, a Judgment of the House of Lords, referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct: *"in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation*."

123. A fair investigation should be even-handed and take into account evidence that could be in the employee's favour (**A v B** [2003] IRLR 405, EAT), **Leach v OFCOM** [2012] IRLR 839). 67.

124. The Tribunal also had regard to the ACAS Code of Practice on disciplinary and grievance procedures.

125. We accepted that the claimant had been dismissed by the respondent company on the grounds of alleged misconduct. This is a potentially 'fair' reason for dismissal. We then considered whether the dismissal was fair or unfair in terms of Section 98(4) of the Act.

126. The disciplinary process followed had a number of deficiencies. The matters that had to be considered by the respondent's managers should have been quite straightforward. However, their apparent failure to keep accurate records of absences and explanations given for those absences and the relaxed attitude to staff taking ''personal'' days absence (including tolerating some retrospectively agreed days) complicated the situation from the outset. No attempts were made to investigate these matters and ''fill in the gaps''. The respondent's managers were also handicapped by their failure to disclose the dates at issue to the claimant to allow him to properly comment on the reasons for particular absences.

127. It should be remembered that it was shown in evidence that the company was often quite content for staff to take unpaid time off during periods when they were quiet mostly over the winter. The claimant came in their eyes to over use or abuse this system but there was no record kept of any warnings made either formal or informal although the claimant accepted that he had been talked to about them and given what he described as a 'slap on the wrist'. There is no evidence that the seriousness of the situation that had developed had been imparted to him and he was unaware of the peril he was in regarding his future employment.

128. The records that were kept were suspect as evidenced by the mis-recording as ''personal'' of some sickness absences and possibly some periods of absence as paternity leave. This then should have then alerted the

investigating and disciplining manager that the company had these issues to deal when considering what action to take and what investigation should be undertaken.

129. The Tribunal had some initial sympathy with the respondent's managers in that the claimant accepted at the investigatory meeting that he had failed to report absences properly and misled the company by not using some personal days given for the purposes he had asked for them. It was submitted that he accepted lying about the reasons he had given but as there was no first hand record and as we shall see the managers involved did not attend to give evidence it is unclear whether the claimant misled the managers by claiming personal days (in retrospect) and lying about the reason or lying about the reason when asking for one. We did not think that the claimant could be accused of lying when he asked for and was given permission for an absence which he genuinely intended using for that purpose but later did not use for that purpose because he was unwell. His depressive condition meant that while he often intended to do something he was often unable to bring himself to actually do it when the opportunity arose.

130. In addition, the claimant raised the issue of which absences were being relied on by the employers as he had believed some had been mis-recorded, and he had explanations and mitigation for others. He was never provided with these records and it featured as an issue in this appeal. It was undoubtedly unfair that by the time of the disciplinary hearing he was still unaware of the dates/incidents that the company were relying on despite requesting them.

131. We suspect that because of poor recordkeeping ( and they did seem to carry out some form of return to work meetings although they were not recorded) the company did not have accurate records or sufficient records of the circumstances of each absence. There was some evidence that the claimant had received an informal warning at some point but this had not been recorded neither were the circumstances leading up to it. In passing if the respondent company had recorded even informal warnings it would have both

alerted the claimant to the fact that the company was tightening up on these matters, including the reporting of absences, and it would also have alerted managers to keep records and to monitor the situation. The approach was lax and while we understand Mr Cameron's ethos that the company is a friendly, supportive and relaxed place to work where everyone knows each other there are clearly limits to tolerance and it is only fair for staff such as the claimant to know where these limits are.

132. The claimant was also not given notice of the allegations that could amount to gross misconduct before the disciplinary hearing. The letter refers only to high level of absences but the questioning seems to indicate that the concern seems to have been more as to whether the absences were justified or not rather than there total number. Mr Cameron's evidence was that if the company was made aware of personal difficulties or illness that impacted on attendance the approach would have been supportive. Although he says he read the Minutes of the disciplinary we find that difficult to accept as it was peppered with clues that would have alerted any reasonable employer to some underling personal and health issues. It is also concerning that the respondent's managers seem to have proceeded to dismissal without the claimant being aware, even after the hearing that is was being contemplated and their apparent failure to consider alternatives such as removing the claimant's entitlement to take personal days off or issuing a warning even a final warning.

133. One of the issues that arose was who had made the decision to dismiss. The correspondence seems to suggest that it was Mr Cameron who was expected to make the decision but he denies having done so. His position was that it was really Mr Kent who made the decision but he authorised it after having spoken to him. If that was true then it makes it very difficult to understand why Mr Kent was not called on to give evidence. We heard from no one first-hand about the various absences not did we hear evidence about the impact the claimant's absences had on other staff or on production. This evidence

we believe would have come from Mr Kent. The reason given was that he had left the respondent's employment and was in England. We heard no good reason advanced as to why he could not have given evidence over the CVP system or by video link as Mr Cameron did.

134. Finally, the letter dismissing the claimant made no reference to an appeal but nevertheless he appealed as we have seen. No appeal was given. This is not some technical failure but an important safeguard to allow the decision to dismiss to be reviewed. If allowed and granted it might have prevented the finding of unfair dismissal which we make. In the present case we agree with Mr Smith's submission that all these various these failures were important and alone rendered the process and dismissal unfair.

**Remedy**

135. We then went on to consider whether the respondent could show that a fair process would inevitably have led to dismissal as Ms Grant submitted. We had no difficulty in rejecting this submission for a number of reasons. The first is that even standing the number of absences, which was a substantial number, we do not know how the respondent's managers would have reacted to the true position as detailed records had not been kept of absences or warnings and the claimant not given the information to properly comment. More significantly here there was a complete failure to recognise that the claimant's mental health might have played a part in his behaviour although it is interesting to note that he was asked for permission to allow the employers to get a medical report but they did not proceed to do so. Finally, we take at his word the evidence of Mr Cameron that if it had been clear to the company that the claimant had a health condition that impacted on his absences the company would have supported him and worked with him to improve the situation. In the Tribunal's view this is the sort of case where suggesting that a fair process would have been likely to lead to dismissal is the sort of exercise envisaged in King v Eaton in that it would lead to a sea of

speculation especially that at the stage of the Tribunal hearing the evidence of these matters was largely missing.

136. We did, however, come to consider that there were issues that concerned us about the claimant's behaviour which would lead us to consider whether in any way he contributed to his dismissal. The claimant's depressive condition in layman's terms is underlying but 'flares' up at times of stress and difficulty. He is not so unwell all of the time and to lose insight into what he should be doing. He accepted that he had been lax about reporting absences including on one occasion after a row with his partner when they went to Glasgow. While we accept that in situations like this the claimant might become anxious or unwell we were not convinced that he was not able to either contact his employers to report his absences or ask his mother or partner to do so on every occasion. He must have realised that he was accruing considerable absences and that it was not fair on his colleagues for him not to turn up and give no notice of the absence or how long it would last. Even allowing, as we do for his condition, there was no evidence that he was in some way completely incapacitated. He was able to apply for a new job in April and must have felt able to work before doing so.

137. We also noted that on at least two occasions contrary to medical advice he seems to have stopped taking Sertraline of his own volition. In these circumstances we take the view that it would be just and equitable to reduce the compensation awarded to him by 20% to reflect his own contribution to his dismissal. We considered an uplift for the employer's failure to follow the ACAS Code. The various failures were serious particularly the failure to allow the claimant an appeal despite one being provided for in their policies and one being made by the claimant. We concluded that an uplift of 20% would be appropriate in effect this offsets the claimant's contribution.

138. We also had to consider how long the award for future loss would be. There was agreement that the claimant would not have been likely to have remained

in employment after March 2020 when there were redundancies following the outbreak of Covid. Mr Smith suggested that the claimant would have remained in employment until then. We do not disagree that that was a possible or even likely outcome if the claimant had been given support by his employer. The problem we have is that we do not accept that the claimant has mitigated his loss. He was able to apply for work in late 2018 for a job nearer his home in Inverness but the only other vouched application is in April 2019 after his dismissal. As we noted earlier it is likely that he must have felt able to work before making such an application. This also appears to coincide with him stopping taking Sertraline. The question arises why he made no other applications for work. There was no evidence from his medical advisers that he was unfit for any work throughout this whole period or that he was so unwell he could not apply for full time or even part time work.

139. The matter is not an easy one for the Tribunal given that it accepts that a lack of motivation is a symptom of his depression that comes and goes with it's severity. We had to take a broad view as to what the correct point was at which the claimant could be said not have taken reasonable steps to mitigate his loss against the factual background we have outlined. As recorded above the claimant did not do himself any favours as by his consultation in July he tells his GP that he had stopped taking Sertraline of his own volition. The medical records also show no consultations with his GP after the date of his dismissal that relate to any recurrence of depression until 28 July although he saw his GP on a couple of occasions in February about chest pain. No discussion is noted about depression which we would have expected if it was still a prominent feature of his health. It could be inferred from this that not only was he feeling well enough to stop taking Sertraline he did not feel the need for medical assistance in relation to his depression. We are prepared to accept that he was upset and suffered from low mood for some months after the dismissal but we see no reason why he should not have made further applications from the end of April 2019 onwards. Accordingly, that will be the cut off point for future loss.

140. No issue was taken about the way in which the claimant's Schedule of Loss was calculated (JBp101/102). We noted that he did not apply for benefits until July and accordingly the Recoupment Regulations do not appear to apply as compensation for loss ends at the end of April.

141. He is entitled to a basic award of £1887.50 based on his age and service (£377.50 x 1 x 5). The loss of waged to April 2019 amounts to £7200 (£300 x 24 weeks) and loss of pension contributions of £110.88 (24x £4.62).

142. We will award the claimant £500 for loss of statutory rights. There was no evidence that the claimant did not know the basis terms of his employment and no dispute had arisen over any particular alleged term. In these circumstances the Tribunal will award £600 for failure to provide him with the necessarily statement of terms and conditions as required by statute. The total monetary award amounts to £9698.38.

**Discrimination**

143. Before any discrimination claim can succeed the claimant must demonstrate both that he is disabled in terms of the EA and that the respondent company became aware of the disability thus triggering their rights under the EA. As the recent EAT Judgment in **Lamb v The Garrard Academy UKEAT/0042/18/RN** makes clear the issue is when the employer knows about the disability either through actual or constructive knowledge or should reasonably have become aware of it. In that case it was only at the appeal stage of a disciplinary process that a claimant began speaking about her mental health and it's possible impact on her behaviour.

144. We accept that at some point after the claimant's mental health deteriorated in 2017 and that the two managers Mr Kent and Ms Lloyd became aware of his health difficulties. It would frankly be inconceivable that they would not

have asked him about the reasons for his absences at the return to work interviews. Neither gave evidence. No records were produced of the meetings. No details of any warnings were recorded. The claimant also said he had told Mr Cameron about his depression but he could not recall that.

145. There were details on the claimant's evidence and those of the other two witnesses that had the air of authenticity such as Mr Kent offering the claimant a self-help book ( although this may have been more related to his difficulties sleeping at the time it shows discussions took place about his health) and Mrs Lloyd speaking about a close relative who had depression.

146. In any event we accept the evidence that Mrs Gregory discussed these matters ( mentioning on at least one occasion that he was suffering from depression with her two managers) when they enquired. If this was not enough, and we think it was sufficient to put the employer on notice that the claimant might be suffering from depression and thereby disabled then the Fit Note in July 2018 citing his absence as ''depressed mood'' puts the matter beyond any doubt. We would add that most employers would have looked at the claimant's record which showed that he was a good reliable worker and how that had changed to someone who missed many days of work and wondered if there was some underlying issue such as depression at the root of it. It is not an uncommon condition. What this means is that is that a couple of months before the disciplinary action was contemplated the respondent's managers should have made enquiries about the claimant's health. His depression had led to an absence in the past and it could have been reasonably assumed by them as possibly being a factor in the more current absences long before he began making comments such as that his head was ''all over the place'' and he had ''hit'' a dull place during the disciplinary process. Why when he had agreed to a medical report being obtained this was not proceeded with remains a mystery to us as we have no doubt that the behaviour complained about namely absences, failing to report absences and not using personal days for the purposes they were asked for seem intimately connected to his condition and symptoms. It seems that the employers simply ran out of patience.

147. We were told that the claimant posted on Facebook various picture of himself apparently enjoying life and that this undermined the truthfulness of his stated condition. Not surprisingly perhaps he did not post about his depression or other difficulties. It is a pitfall into which some employers fall which is to assume that some such apparently ‘‘normal’’ behaviour necessarily undermines the underling and often hidden disability at issue.

148. We now turn to the statutory basis for the claims:

“*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*.”

149. The background facts are clear in this case namely that the employers seem to have turned a blind eye to the claimant’s absences and other behaviour such as not reporting absences properly being caused by the symptoms of his depression. We refer to a recent English Court of Appeal case **Dunn v The Secretary of State for Justice & Anor [2018] EWCA Civ 1998**.

150. It sets out the task for the Tribunal in these terms:

*‘‘16. One potentially significant difference between the language of section 13 and section 15 is that the former explicitly involves a comparison between how the claimant and other persons without the protected characteristic are treated – "less favourable treatment" – whereas the latter refers only to "unfavourable treatment". That distinction was considered in this Court in Williams v Trustees of Swansea University Pension & Assurance Scheme [2017] EWCA Civ 1008, [2018] ICR 233, in which the Supreme Court has given permission to appeal. However, the present case does not directly involve the issue of law raised in that case, and we were not invited to adjourn it to await the decision of the Court.*

*17. Burden of proof. Section 136 of the 2010 Act reads (so far as material):*

*"(1) This section applies to any proceedings relating to a contravention of this Act.*

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

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

*(4)-(5) …*

*(6) A reference to the court includes a reference to—*

*(a) an employment tribunal;*

*(b)-(f) …"*

*The effect of the condition in sub-section (2), the satisfaction of which places the burden of proof on the employer, was discussed in this Court in Madarassy v Nomura International Plc [2007] EWCA Civ 33 [2007] ICR 867, where Mummery LJ used the shorthand of establishing a "prima facie case".*

*18. "Because of". It is a condition of liability for disability discrimination both under section 13 and under section 15 that the complainant should have been treated in the manner complained because of either (under section 13) his or her disability or (under section 15) the "something" which arises in consequence of that disability. That will typically, though not invariably, involve establishing (with the benefit of section 136 if required) that the disability, or the relevant related factor, operated on the mind of the putative discriminator, as part of his or her conscious or unconscious "mental processes". Establishing an employer's "motivation" (as it is often put – NB that this is not in this context the same as "motive") is of course a familiar exercise in discrimination law generally. The most recent authoritative exposition is in the judgments of the majority in the Supreme Court in* ***R (E) v Governing Body of JFS*** *[2009] UKSC 15, [2010] 2 AC 728: see in particular per Lady Hale at paras. 62-64 (pp. 759-760).''*

151. We do not need the assistance of Section 136 ( burden of proof) here. The facts of the case are clear that the claimant was dismissed principally for his absences and to a lesser extent a failure to report these and for a failure to use personal days for the purposes that he had sought them. The dismissal letter refers to *'' your excessive level of absence as well as your repeated failure to notify the Company adequately in advance of a planned absence''* This behaviour we find arises from his depression and in particular the symptom of him lacking in motivation and ability to ''do'' things. The

''something'' that pertains here arises in consequence of that disability. This was the factor that operated on the minds of the dismissing employer or discriminator in dismissing him.

**Remedy**

152. The claimant is entitled to an award for injury to feelings to reflect the effect the discriminatory act, in this case his dismissal, had on him. We heard that he felt worthless and a failure. His mental health was impacted by the shock of his dismissal and we accepted that this upset him greatly and exacerbated his depression for some months. It was a feature of his condition that he would withdraw and isolate himself from family and social ties as set out in our Judgment at finding number 13. However, he was not so badly affected as to require further medical assistance. We had regard to the 2018 Presidential Guidance on the up rated 'Vento' bands. We considered that this case fell just within the middle Vento band which at the time of dismissal in November 2018 was £8500 to £25.700. We concluded that an award of £10,000 was the appropriate sum to award.

**Employment Judge** **JM Hendry**

**Dated** **24th of May 2021**

**Date sent to parties** **26th of May 2021**