THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**
MEMBERS: **Ms N Styles**
Mr P Adkins

BETWEEN:

Mr R Rasavallavan

Claimant

and

Sainsbury's Supermarkets Ltd

Respondent

ON: **22-24 & 26 March 2021**

Appearances:
For the Claimant: **In person**
For the Respondent: **Mr S Liberadzki, Counsel**

WRITTEN REASONS
FOR THE JUDGMENT DATED 29 MARCH 2021

1. In this matter the claimant complains that he was subjected to race, age and disability discrimination as well as a failure to pay him notice and holiday pay. Despite three preliminary hearings there was no agreed list of issues available for this hearing but at the Tribunal's request the respondent provided a list reflecting the various matters raised at the preliminary hearings and in the claimant's claim form plus further particulars. This was provided to the claimant on the first day of the hearing and he confirmed that it properly described the position. The fact of disability (diabetes) was conceded by the respondent but not knowledge.

2. The claimant was physically present during the Hearing as was the Tribunal panel. The respondent and its witnesses attended by video link throughout.

Evidence & Submissions

3. We heard evidence from the claimant and for the respondent from:
   a. Ms Y Redman, Area Manager;
   b. Ms J Adsoy, former Store Manager;
   c. Mr A Turner, Employee Relations Case Manager, former Convenience Area HR Manager; and
   d. Mr P Willmott, Store Manager, former Area Manager,

4. We also had an agreed bundle of documents and received written submissions from the respondent supplemented orally and oral submission from the claimant.

Relevant Law

5. Direct discrimination: section 13 of the Equality Act 2010 (the 2010 Act) provides that a person discriminates against another if, because of a protected characteristic, he treats that person less favourably than he treats or would treat others. Race and age are protected characteristics.

6. To answer whether treatment was "because of" the protected characteristic requires the Tribunal to consider the reason why the claimant was treated as he/she was. The Equality and Human Rights Commission Code of Practice states that whilst the protected characteristic needs to be a cause of the less favourable treatment it does not need to be the only or even the main cause.

7. It is a matter for the Tribunal to determine what amounts to less favourable treatment interpreting it in a common sense way and based on what a reasonable person might find to be detrimental.

8. Discrimination arising from disability: section 15 of the 2010 Act states:

> (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.

9. No comparator is needed.

10. The EHRC Code advises that there must be a connection between whatever led to the unfavourable treatment and the disability. Further that the 'consequences' of disability include anything which is the result, effect or outcome of the disability. It also sets out guidance on the objective justification test.

11. The Court of Appeal decision in City of York Council v Grossett ([2018] EWCA Civ 1105) confirms that section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) 'something'? and (ii) did that 'something' arise in consequence of B's disability.

12. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of

A's attitude to the relevant 'something'. The meaning of 'unfavourable' in section 15 was considered in Trustees of Swansea University Pension & Assurance Scheme & anor v Williams ([2015] IRLR 885) and described as having 'the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person…'.

13. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant 'something'. There is no requirement that A be aware that the 'something' has occurred in consequence of B's disability.

14. Breach of the duty to make reasonable adjustments: section 20 and schedule 8(20) of the 2010 Act set out the duty to make adjustments. If an employer applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial (more than minor or trivial) disadvantage in comparison with persons who are not disabled, that employer has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not arise if the respondent did not know, and could not reasonably be expected to know, that the claimant was disabled and was likely to be placed at that disadvantage (Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10).

15. PCP is not defined in the legislation, but is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability. It includes formal and informal practices, policies and arrangements and may in certain cases include one-off decisions. It has been confirmed however in Ishola v TFL ([2020] EWCA Civ 112) that PCP carries the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again and although a one-off decision or act can be a practice, it is not necessarily one.

16. Interpreting the duty does not contain a strict causation test but requires a comparative exercise to test whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others who do not have any disability. If so, the test whether it was reasonable to make a particular adjustment is an objective question for the Tribunal to answer (Tarbuck v Sainsbury's Supermarkets 2006 UKEAT).

17. In the case of Environment Agency v Rowan ([2008] IRLR 20), the Employment Appeal Tribunal held that in a claim of failure to make reasonable adjustments the Tribunal must identify:

    a. the provision, criterion or practice applied by the employer;

    b. the identity of the non-disabled comparators where appropriate; and

    c. the nature and extent of the substantial disadvantage suffered by the Claimant.

18. Burden of proof: the provisions regarding burden of proof are at section 136 of the 2010 Act which, in summary, are that if there are facts from which the Court could decide in the absence of any other explanation that the claimant has been discriminated against, then the Court must find that that discrimination has happened unless the respondent shows the contrary.

19. It is generally recognised that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in Igen v Wong and others ([2005] IRLR 258) confirmed by the Court of Appeal in Madarassy v Nomura International plc ([2007] IRLR 246). A simple difference in status and a difference in treatment is not enough in itself to shift the burden of proof; something more is needed.

20. At the first stage the Tribunal has to make findings of primary fact. It is for the claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. At this stage the outcome will usually depend on what inferences it is proper to draw from those primary facts. The Court of Appeal reminded Tribunals that it is important to note the word "could" in respect of the test. At this stage the Tribunal does not have to reach a definitive determination. The Tribunal must assume that there is no adequate explanation for those facts. It is appropriate to make findings based on the evidence from both the claimant and the respondent, save for any evidence that would constitute evidence of an explanation for the treatment.

21. If the Tribunal is satisfied that there is evidence to suggest that there was an act of unlawful discrimination, the burden of proof shifts to the respondent. To discharge that burden the respondent must prove, on the balance of probabilities, that they did not commit such an act. The Tribunal is entitled to expect cogent evidence to discharge that burden because the facts necessary to prove an explanation will normally be in the possession of the respondent.

22. Time limits: Any complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act complained of or such other period as the Tribunal thinks just and equitable (section 123 of the 2010 Act). The burden is on the claimant to convince the Tribunal that that discretion should be exercised (Robertson v Bexley Community Centre [2003] IRLR 434 and O'Brien v Department for Constitutional Affairs [2009] IRLR 294 CA). In deciding whether to do so, the Tribunal has a very wide discretion and is entitled to consider anything that it considers relevant subject however to the principle that time limits are exercised strictly in employment cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so.

23. Where there is a series of distinct acts of alleged discrimination the time limit begins to run when each act is completed, whereas if there is conduct

extending over a period the time limit begins at the end of that period (section 123(3)(a)). (This is distinct from an act with continuing consequences where time runs from the date of the act as above.) Where an employer operates a discriminatory regime, rule, practice or principle then that will amount to an act extending over a period (Barclays Bank plc v Kapur ([1991] ICR 208 HL). When deciding if there is such conduct, it is the substance of the complaints in question - as opposed to the existence of a policy or regime - that is relevant and whether they can be said to be part of one continuing act by the employer (Hendricks v Commissioner of Police for the Metropolis [2002] EWCA Civ 1686). In considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents (Aziz v FDA [2010] EWCA Civ 304, CA).

Preliminary Matter

24. A number of the claimant's complaints of discrimination relate to events that took place before 19 February 2017. Accordingly, unless they formed part of a continuous act which ended after that date, they are all prima facie out of time and can only proceed if it is just and equitable to extend time in the claimant's favour.

25. As to whether they were part of a continuous act, we note that the claims relate to a number of alleged perpetrators, including potentially four store managers, and cover a disparate collection of issues, including policy on break times, the training programme, rotas, time off for medical appointments and the dismissal. The time period is wide, ending in February 2017 and going back to early 2016 if not 2015, and covering one-off events as well as some regularly applied polices. In addition there is a clear gap between the matters complained of pre-November 2016 while the claimant was still working, and from January 2017 when he was investigated and dismissed for failing to return to work. The claims cover both direct race and age discrimination and three types of disability discrimination. In these circumstances, save as described below, we do not find that there was conduct extending over a period.

26. In those circumstances, then, is it just and equitable to extend time to allow the claimant to bring those complaints in any event? We conclude that it is not. On 10 April 2016 the claimant sent an email to Mr Johnson, his then store manager, copied to Ms Redman setting out his dissatisfaction with not having had a return to work meeting following a recent period of sickness related to his diabetes and also concerns about pay and the fact that he had not been signed off as a store lead. In this email he expressly talked about his health issues and it is clear that he was at that stage willing and able to raise complaints with both his immediate line manager and the area manager. On 15 November 2016 he emailed various other members of the respondent's management including its Chief Executive making various serious complaints. He did not in that email mention any of the specific factual matters pre-November 2016 about which he now complains or indeed discrimination generally. The claimant's explanation of that is that he says he joined the respondent in order to advance his career and he did

not want to make complaints or antagonise managers. That answer, however, does not sit well alongside the contents of that email in which he expressly does make complaints. It is clear, therefore, that the claimant was perfectly capable of complaining about matters if he wished to do so. Further, in that email he positively said that the reason for his alleged mistreatment was 'external events'.

27. The claimant says that it was not until the first preliminary hearing in this matter that he understood what discrimination was. We do not find that to be credible - he ticked the boxes on his claim form stating that he wanted to bring claims of age, race and disability discrimination. We also find it highly unlikely that the claimant, who is clearly an intelligent and capable man, did not understand even the most basic concepts of discrimination. In any event ignorance of his legal rights is not in itself sufficient reason to extend time. The claimant also referred us to his ill-health and undoubtedly he had significant health issues but there was no evidence of any specific aspects of his ill-health that would have impacted upon his ability to raise a complaint of discrimination within the relevant time limit. In particular there was no evidence of him going to his GP after 16 November 2016.

28. Accordingly we conclude that the complaints that arise out of the discrete factual allegations that pre-date 19 February 2017 were brought out of time and it is not just and equitable in all the circumstances to allow them to proceed. The underlying matters may however still be relevant background and form part of the reasonable adjustments claim.

29. The exception is in respect of the reasonable adjustments claim. The relevant PCPs that we find to be proved (see below) did amount to a continuing act throughout the claimant's employment. Even if we are wrong about that, in light of his specific complaint about them in his email of 15 November 2016, we would find it just and equitable to extend time in his favour.

Findings of Fact

30. Having assessed all the evidence, both oral and written, and the submissions made by the parties we find on the balance of probabilities the following to be the facts relevant to the remaining claims.

31. The claimant, who is Sri Lankan Tamil and at the relevant time aged 42/43, commenced employment with the respondent as a convenience store leader-in-training (SLIT) at their Wimbledon South store on 11 March 2015. On joining the claimant did not disclose his diabetes or state that he had a disability. His evidence was that at that stage he did not regard it as a disability as it did not affect his ability to carry out day-to-day activities. He clarified that he believed it did reach that point from around June/July 2015. When he first joined he had one store manager, possibly Mr Rees, then Mr Johnson from about July 2015, Mr Bayliss for about 6 weeks in summer of 2016 then Mr El-Riche. Ms Redman became the area manager and line manager of the store managers from about March 2016.

32. The Leader in Training programme is the formal training programme to assess the competency of store leaders (or supervisors) appointed to that role. On successful completion of the programme the employee will automatically be confirmed in the role with a related increase in pay. The claimant's contract of employment also provided for a probationary period of six months which was separate to the period of formal training.

33. The training programme comprises a number of modules that the employee is responsible for completing themselves and maintaining a file of paperwork accordingly. Once the modules are completed and countersigned by their store manager, an assessment takes place with an independent store manager who carries out a further assessment. It is only on completion of that that the training can be fully signed off and the employee confirmed in the role.

34. The claimant completed his probationary period but did not complete the training programme (see below). He was part of a cohort of SLITs of a variety of ages and ethnicities. Some of the claimant's cohort completed their training and were signed off. This included an individual who was almost exactly the same age as the claimant. Some had not been signed off by the time of the claimant's termination.

35. Mr Johnson raised issues with the claimant in October 2015 regarding his timekeeping and an investigation meeting was held. We have notes of that meeting made by Mr Johnson but do not have him as a witness to testify to their truth. There was no evidence that they had been copied to the claimant at the time for counter signature. According to the notes the claimant firstly disputed that he had been late on all of the occasions and further gave various reasons for his lateness. None of those reasons related explicitly to his health and diabetes was not mentioned. Mr Johnson recommended the matter proceed to disciplinary action and the claimant was invited to a meeting accordingly. That meeting appears not to have taken place although it is not clear why. The claimant's evidence was that he had told Mr Johnson about his diabetes at that meeting and that is why no further action was taken. We agree that that seems the likely explanation and find that therefore the respondent had knowledge of the claimant's disability from October 2015.

36. In January 2016 Ms Adsoy invited the claimant to an investigation meeting regarding an unauthorised absence. The notes of that meeting show that the claimant referred to his health, diabetes, blood sugar levels and stress. Again no further action was taken at this stage principally because of issues the claimant had raised regarding the schedules only being put up seven days previously.

37. On 10 April the claimant sent the email to Mr Johnson referred to above setting out his concerns on various matters.

38. on 27 June the claimant was invited to a disciplinary meeting in respect of his failure to attend work. That invitation was later cancelled when he produced a fit note for the relevant period.

39. The claimant reduced his hours from July due to his health issues.

40. On 30 October the claimant was notified by Mr El-Riche that his supervisor sign off had been scheduled for 15 November to be conducted by Ms Adsoy. He was informed that it was his responsibility to ensure his workbooks and any outstanding training were completed beforehand.

41. On 1 November at 08.56 the claimant emailed Ms Redman and Mr Turner – a manager at a nearby store - asking for cover as he had a consultant's appointment at 11am that morning but could not leave the store as there were not enough managers present. He stated that he had arranged the time off with Mr Bayliss. Mr Turner replied at 10.52 confirming that he was not in position to help. Ms Redmond's did not see this email until after 11am. Cover was not provided.

42. Also on 1 November Ms Clark, Learning and Development Manager, visited the claimant's store. She confirmed in an email on 14 November to Mr El-Riche that following that visit she had concerns about the claimant. She had attended to follow up on his training but found that much of it that should have been completed was not including module T25 (which relates to the licensing requirements for the sale of alcohol). She had spoken to the claimant and asked him to complete it before he went home but he had had to leave on time to collect his child and agreed that he would complete it on his next shift i.e. the following Thursday 3rd with the utmost urgency. She then visited on the evening of Friday 4th and checked how the training was going with another SLIT (Mr Osborn who was due for sign off later that month). He said that it had all been done with the exception of the claimant's. The claimant's evidence was that he had in fact completed module T25 but it was still awaiting counter-signature by the store manager.

43. On 10 November Mr El-Riche wrote to the claimant inviting him to an investigatory meeting on the same day in respect of unsatisfactory timekeeping. It is more likely than not that this letter was not given to the claimant and that accords with the claimant saying he was not aware of the meeting. In any event the meeting was rescheduled to 17 November. A letter of that date was prepared and referred to an unexplained absence on 10 November and lateness on the 15th. The claimant says that the first time he saw this letter was in the bundle. It seems quite possible that it was not in fact issued to him.

44. The claimant's sign off meeting on the 15th was cancelled by Mr El-Riche on the day. The claimant had attended at the beginning of his shift and but asked Mr Osborn if he could go home for a few hours and then return. Mr Osborn had called Mr El-Riche who then called the claimant and cancelled their meeting. The notes of Mr Turner made later that month show that the claimant said this cancellation was part of a concerted effort by management to get rid of him and that Mr El-Riche said he had cancelled because he was concerned about the claimant's state of mind especially in light of his unexplained absence on the 10th. We accept the respondent's explanation.

45. At 09.19 on 15 November the claimant sent the email to Mr Turner and others including Mr Coupe, the Chief Executive of the respondent already referred to above. That email said:

> 'Dear All
>
> I am working as a store supervisor in training at south Wimbledon store since March 2015. I have been treated very unfairly by the company ever since. I was ready to be signed off by June 2015. However, my line management deliberately prevented me from getting signed off. Under the management of Sean "Johnson, I have been put through a great deal of stress and was very unfairly treated. I sad to note that it is still continuing and once again my signed off is cancelled, which is supposed to take place at 2pm today (15/11/2016). I have very reliable evidence to support that certain individuals in the company is trying to get rid of me from Sainsbury's. this is due to the external events in which Sainsbury's are part of. I have been doing the same job as my signed off colleague, however I am getting paid less. I have brought all these wrongdoings to my line and area management's attention, as and when it happened. I am suffering financially and my health suffered detrimentally due to stress created by the company' actions. I desperately asking for time off to manage my stress levels and to control my diabetic . I had to miss my consultant's appointment couple of weeks ago due to not given time off. This further complicates my health issues. I sadly note that I was purposefully denied enough manpower during my shifts. I had to accept deliveries on my own very recently, which is against the company's health & safety policies. It's quite normal practice in south Wimbledon store that we need to run the store with just one colleague often. I have run shifts with just one colleague on several occasions since march 2015. This is not only put pressure on us, but also denying us from providing a good service to our customers. This practise has made my health conditions got worse. I know that writing to you will put me in a situation worse than what I am currently in. I expect bullying will get even worse. But these situations must change and put a stop to my sufferings. Otherwise I continuing to feel like coming to hell, to work. I sadly note that company's internal culture allowing managers to do whatever they like without accountability and consequences for their actions, had facilitate this kind of behaviour. Every time I speak about these issues, I was told to forget about the past. I am asking you to put yourself in my position and see whether you can bring back my precious 2 years of my life? Can you bring back my health to where it was 2 years ago? Or can you bring back my financial situation where it was 2 years ago? Please deal with these issues and provide the justice that I deserved!
> Thank you.
>
> Yours sincerely
> R.Rasavallavan'

46. In response to that email Mr Turner, Ms Redman and Mr El-Riche met the claimant on 17 November and agreed that he should take 7 weeks of extended paid holiday. The possibility of arranging a 'technical' sign off for the claimant was also discussed. Both Mr Turner and Mr El-Riche described this meeting in later notes and both clearly state the extended break was at the claimant's request for him to deal with an impending court case (which the claimant vehemently denies existed) and to consider whether continuing with the SLIT programme was the right thing for him to do. Mr El-Riche did not mention the claimant's health issues in his note but Mr Turner did. He said:

> '…[the claimant] claims his health was suffering. He refers to problems with his legs, and having diabetes, which is exacerbated by stress, resulting from both his work situation (his sign off etc) arid all his issues about bringing a criminal conviction against individuals trying to 'persecute' him over handing back his convenience stores (ie Tesco / Sainsbury's people employed to make his life as difficult and uncomfortable as possible).'

In his evidence Mr Turner accepted that the claimant's health was one of the reasons for the break.

47. Mr El-Riche met the claimant on 22 November and confirmed that the break had been agreed and that they would meet on his return to discuss his options going forward. This was confirmed in writing to the claimant on the same day in a letter which stated:

> 'We appreciate your time that day talking to us and giving us a detailed background and the history behind the concerns you expressed.
>
> Please accept this letter to confirm the resolution that we have agreed moving forward, the agreed points are as follows:
>
> 1) To take 7 weeks of holiday from the store and to return to work on Tuesday 17th Jan 2017.
>
> 2) During this time away from work you wanted to think about if the supervisor role is right for you and let us know your thoughts upon return to work.
>
> 3) Based on your decision after your time off, a 'sign off' date would be agreed.
>
> 4) We would look to issue you with any back pay you are entitled to.
>
> I would like to say that we would support you in your decision(s) and we take your concerns very seriously.
>
> Please feel free to contact me at any time during your time away from the store to talk about anything you wish and look forward to seeing you in January.

The claimant countersigned a copy of the letter on the same day.

48. The claimant's evidence was that this period of absence was sick leave and not holiday however he did confirm his understanding that it had been recorded by the respondent as holiday at his request because he had exhausted his paid sick leave entitlement. The respondent's position is that the claimant requested to take a block of holiday and that is what was exceptionally agreed. The medical evidence from the time shows that the claimant did not visit his GP throughout this period although it is clear that his underlying diabetes remained and was controlled by medication. We find that the absence was holiday but in circumstances where the claimant clearly was struggling to do the job because of its impact on his health but he chose to take holiday rather than unpaid sick leave.

49. On 17 January 2017, the date the claimant was due to return to work, he attended the store to see Mr El-Riche who was absent on bereavement leave. The claimant was told that Mr El-Riche was not there so he left and returned on the 19th. Mr El-Riche was still absent and the claimant telephoned Mr Turner. The claimant's evidence was that Mr Turner said that he could not make any decision on behalf of the store manager and that therefore he should wait for his store manager to call him. Mr Turner's evidence was that he did not specifically recall that conversation with the claimant but that he would have said that the decision was that of the store manager and he should discuss it with him. We find therefore that the claimant understood that he should wait for Mr El-Riche to call him.

50. Mr Turner asked Ms Adsoy to chair a disciplinary meeting with the claimant as he had failed to return to work and there had been no contact with him since 19 January. She wrote to the claimant accordingly on 31 January inviting him to a meeting on 3 February.

51. The claimant did not attend that meeting at the time given but did attend slightly later when Ms Adsoy met with him, albeit informally. She confirmed what had been said in an email to Mr Turner on the same day and that the main outcomes of the meeting were:

> '- [the claimant] to report to work in his uniform on the Thursday 9th of February at 11am till 8pm. He will have a meeting with [Mr El-Riche] at 11am and once the meeting is concluded he will carry on his shift
>
> - [the claimant] to call [Mr El-Riche] to find out what other shift he will be working next week. I have provided [the claimant] with [Mr El-Riche's] number
>
> - [the claimant] to contact HRSS as a matter of urgency to update his contact details. I have provided [the claimant] with the number for HRSS'

52. Unfortunately this was not confirmed in writing to the claimant whose evidence was both that Ms Adsoy told him to wait for Mr El-Riche to return and that she told him to return to work on 9 February but he did not as he believed what Mr Turner had told him still applied and he did not need to call Mr El-Riche as he (the claimant) knew what his shifts were. The claimant's evidence was unconvincing.

53. In any event he did not attend work on 9 February. In fact Mr El-Riche was away until 6 March but the claimant did not know that when he failed to attend.

54. Mr El-Riche was doing some work from home and he wrote to the claimant on 13 February (posted on the 14th) inviting him to a disciplinary hearing with Ms Adsoy on 16 February in respect of his failure to attend work. The claimant did not attend that meeting. Mr El-Riche wrote again rearranging the hearing for 21 February but again the claimant did not attend.

55. The respondent's case is that both these invite letters were sent by first class post as well as recorded delivery. The claimant says that he did not get the first class versions and received the first 'something for you' card from Royal Mail on 15 February and only received both the recorded delivery letters when he collected them from the post office on 22 February.

56. Mr El-Riche wrote to the claimant on 21 February advising him that he was dismissed in his absence. He said:

> 'Further to my two previous invite letters you were required to attend scheduled disciplinary meetings on Thursday, 16 February 2017 and Tuesday, 21 February 2017. These letters were sent to your home address.
>
> You have failed to attend both scheduled disciplinary meetings without any contact to the company to explain your reasons. I therefore decided to proceed with the disciplinary meeting in your absence. After careful consideration I took the decision to terminate your employment with immediate effect on the grounds that you have been absent without authorisation and have provided no reason to me for that absence nor have you kept the

company notified about your absence in accordance with your contractual requirements to do so. As this is a matter of gross misconduct you are not entitled to notice of termination or payment in lieu of notice.

You will receive full pay up to the first day of your absence, together with any holiday monies and variable payments due. Any outstanding loans and overtaken holiday will also be recovered from these payments. This will be paid direct into your bank account and a pay slip and P45 will be sent to your home address.

You will not be entitled to any bonus payment for those periods worked as detailed in the rules of our scheme.

If you feel that this decision is unfair, you are entitled to appeal the decision by writing to Yash Redman - Area Manager, within 7 calendar days from receipt of this letter stating your reasons for appeal.'

57. On 27 February the claimant appealed against his dismissal and an appeal hearing was held on 11 March with Mr Wilmott who, having heard the claimant's representations, adjourned for 15 minutes. On resumption the claimant was informed that his appeal was dismissed and Mr Wilmott read from an already prepared decision making summary. The appeal was dealt with very quickly and was limited to the narrow issue of the claimant failing to attend work. The wider points the claimant was making about his other issues were not considered or pursued.

Conclusions

58. Direct race and age discrimination: The in-time allegations are that the respondent (a) did not want the claimant in its junior management team and/or (b) signed other colleagues off on the SLIT programme much more quickly than him.

59. We do not find on the facts that allegation (a) is proved. To the contrary we find that the respondent gave the claimant every opportunity to get signed off including the possibility of a technical sign off being offered at the meeting on 17 November 2016.

60. As to allegation (b), it is factually correct that some colleagues were signed off more quickly than the claimant but equally there were others that were not and were in the same position as the claimant. We are satisfied that not signing off the claimant was not because of his race nor his age. There was insufficient evidence even for the burden of proof to pass to the respondent in these respects as there simply was no evidence adduced by the claimant to support the allegations. In any event, particularly in respect of age, it is clear there were a variety of ages represented in that training cohort and specifically one individual who was almost exactly the same age as the claimant who had already been signed off. Therefore the claims of direct discrimination fail.

61. Discrimination arising from disability: We have found that the respondent had knowledge of the claimant's disability from October 2015.

62. As for the in-time matters that the claimant says arose in consequence of his disability (listed in para 4.2 of the list of issues), the only one proved is

the need to take breaks including needing toilet breaks and to leave the store during breaks on occasion to get access to diabetic foods not stocked by the store. None of the other things alleged to arise in consequence of the disability have been proved.

63. As to whether the respondent treated the claimant unfavourably (listed in para 4.3 of the list of issues) we only find the allegations of other colleagues being signed off more quickly and dismissal as proved.

64. The question then to be answered is whether that unfavourable treatment was because of the claimant's need to take breaks as described above and we do not find that to be the case. There was no causal link established and indeed other explanations for the unfavourable treatment were more than established by the respondent (his failure to complete training was the reason for the failure to sign off and his failure to attend work was the reason for the dismissal). Therefore the discrimination arising from disability claims fail.

65. Failure to make reasonable adjustments. Again the starting point is that the respondent had knowledge of the claimant's disability from October 2015.

66. We conclude that the only alleged PCPs (listed in para 5.2 of the list of issues) applied to the claimant were (a) the respondent operating its standard policy in respect of breaks and (b) placing the claimant on a rota to work with fewer than three other staff. We have carefully considered whether dismissal could be a PCP in light of the decision in Fox and British Airways (EAT0315/14) which is clear that dismissal in itself cannot be a PCP unless it is the result of the application of a policy. However, that is not how the claimant's case was put and even though he is a litigant in person with no legal knowledge, he had the benefit of three preliminary hearings. The Tribunal cannot now rewrite the issues to suit the claimant. Therefore he cannot rely on the dismissal as a PCP.

67. Turning to whether the proved PCPs placed the claimant at a substantial disadvantage, we are not satisfied that the policy with regard to breaks put the claimant to a substantial disadvantage notwithstanding his evidence orally and what appeared in his further particulars. We are however satisfied that scheduling the claimant to work with fewer than three other staff did put him at a substantial disadvantage. In that respect we refer to the information he provided in the further particulars that this resulted in severe foot problems as well as stress levels. We also note that the claimant's GP notes record in relation to a period between 27 June and 11 July 2016 that he was not fit for work due to foot pains and his diabetes and that he was asking for a sick note as he was struggling to work and standing up for long periods. Further the claimant specifically referred to this aspect of his complaint in his email of 15 November 2016.

68. Because of that email (and potentially because of the fit note issued by the GP in June 2016 although we have not seen that) the respondent certainly was on notice and could reasonably have been expected to know that he was placed at this disadvantage.

69. The final question then is were there steps that reasonably could have been taken by the respondent to alleviate that disadvantage and the answer to that must be yes i.e. to organise the rota with sufficient staff or to change the claimant's shift or consider alternative roles. Therefore in that limited respect we do find there was a failure by the respondent to make reasonable adjustments and a remedy hearing will be required in that respect.

70. Having come to that decision the claim of indirect disability discrimination does not need to be considered as the corresponding reasonable adjustment claim has succeeded.

71. Notice pay: We remind ourselves that this is a decision for the Tribunal to make having come to its own conclusions as to whether the claimant was guilty of gross misconduct. Clearly the claimant did not attend work when he was instructed to and on the face of it that could be a fundamental breach. In addition he had previously failed to attend work on time or at all, he had previously failed to report absences and previously failed to keep in contact when absent and provide up-to-date contact details. However, in all the circumstances, particularly:

    a. the claimant's email of 15 November 2016 in which he raised significant health issues relating to his disability arising from his working environment and arrangements and a failure by the respondent to make a reasonable adjustment; and

    b. there had been no previous disciplinary hearing nor any warnings issued to him in respect of his attendance, plus he did attend at work, albeit not to work, on both 17 and 19 January 2017, and a les than full consideration of his case at appeal stage;

    we find the claimant was not guilty of gross misconduct and he is entitled to receive his notice pay of 4 weeks.

72. Holiday pay: The respondent has conceded that this is due in the sum of £762.33.

73. A remedy hearing has been listed for 9 July 2021.

Employment Judge K Andrews
Date: 25 June 2021

Judgment sent to the parties and entered in the Register on: **28 June 2021**

For The Tribunal Office