5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4104199/2020

Hearings Held remotely by Cloud Video Platform on 26, 27 and 28 May 2021
10 **and 17 June 2021 and Members' Meeting on 18 June 2021**

Employment Judge S MacLean

Tribunal Member G Doherty

Tribunal Member M McAllister

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Mr A Sharma	**Claimant** **In Person**
20 **Serco Group Plc**	**Respondent** **Represented by:** **Mr Ian Moss,** **Employee Relations Partner**

25 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is (1) the respondent has made an unauthorised deduction from the claimant's wages; (2) the respondent is ordered to pay the claimant the sum of £310.26 in respect of unpaid wages for the week commencing 20 April 2020; the claims of unfair dismissal and disability
30 discrimination are dismissed.

REASONS

Introduction

1. The claimant sent a claim form to the Employment Tribunal claiming unfair dismissal, discrimination and unlawful deduction from wages. He seeks reinstatement/re-engagement and compensation as a remedy. The respondent resisted the claim.

2. The parties participated in a case management preliminary hearing on 2 October 2020 at which it was clarified that the claimant was complaining of discrimination on the grounds of the protected characteristics of race and disability. The complaints in the claim form were under sections 19 and 20 of the Equality Act 2010 (the EqA). However in his agenda prepared for that hearing he referred to a section 15 complaint. The claimant was invited to clarify his position as soon as possible before submitting an updated agenda.

3. The claimant provided an updated agenda in which he referred to disability discrimination complaints under sections 13, 15 and 20 of the EqA. He confirmed that he was also claiming unfair dismissal and unlawful deduction of wages. The claimant advised that he wished to withdraw the discrimination complaint on the grounds of the protected characteristic of race.

4. On 10 December 2020 a judgment was issued under rule 52 of the Tribunals Rules of Procedure dismissing the race discrimination claim. The judgment stated that the remaining parts of the claimant's claims against the respondent, complaining of unfair dismissal by the respondent, direct discrimination on grounds of disability, discrimination arising from disability, failure to make reasonable adjustments and unlawful deduction of wages were unaffected by the part withdrawal.

5. At the case management preliminary hearing on 6 January 2021 the respondent conceded that the claimant who was a type 1 diabetic was disabled at the relevant time and the claimant's disability was within the respondent's knowledge. It was agreed that the case be listed for a final hearing and various orders were issued.

6. For reasons that were not entirely clear to the Tribunal most of the orders in relation to production of witness statements and documents were not complied with timeously which resulted in a delay at the start of the final hearing.

7. The final hearing was conducted remotely by Cloud Video Platform. The parties agreed that the Tribunal would first hear evidence from the claimant's witness, Mary Jane Baxter. The claimant then gave evidence on his own account. For the respondent the Tribunal heard evidence from Annette MacDonald, Central Support Manager, Heather Bryson, Regional Services Excellence Manager and Fiona Hamilton, Patient Catering Manager. The witnesses provided witness statements that were treated as their evidence-in-chief. They were cross-examined and re-examined in the usual way. The Tribunal was referred to a joint set of productions.

8. In the Tribunal's view there was no direct discrimination claim in the claim form. It appeared to have been raised in the agenda but there was no application to amend. The respondent does not appear to have taken issue with this and the direct claim is referenced in the rule 52 judgment.

9. From the claimant's witness statement the direct discrimination claim was that he had applied for numerous vacancies with the respondent since 2016 and despite attending for interview on some occasions he had not been successful. It was undisputed that the claimant was disabled and that had not been appointed to these positions. Beyond that there was no further evidence offered by the claimant inferring that his disability was the reason for this. There was no evidence about the successful candidates. The claimant accepted that he was unable to provide evidence which showed or tended to show that the reason for not being appointed was because of his disability. The claimant did refer to one application where the claimant said that sick absence was taken into account in the selection of the successful candidate. The Employment Judge indicated that if the claimant's evidence was that he did not get offered that job because of his sick absence record and those absences were related to his disability that may be a claim under section 15

rather than section 13 of the EqA: the claimant's sick absence arose from his disability and because of the sick absence record he suffered a detriment (not being offered the post).

10. It is not the function of the Tribunal to record all the evidence presented to it. The Tribunal has set out the facts as found that are essential to its reasons or to an understanding of important parts of evidence.

11. When the evidence was complete the claimant and Mr Moss provided written submissions on which they addressed the Tribunal. The submissions were carefully considered by the Tribunal and are summarised below.

12. After hearing the evidence the respondent agreed that there had been an unauthorised deduction of wages from the claimant and that the final weeks' wages not been paid to the claimant. In the absence of receiving confirmation that this payment has been made the Tribunal had therefore issued a judgment in this respect.

The Issues

13. The following are the issues that the Tribunal had to determined:

    a. What was the reason or principle reason for the claimant's dismissal?

    b. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

    c. Did the PCP (requiring the claimant to work in the chilled food preparation area) place the claimant at a substantial disadvantage in relation to being able to administer his medication in comparison with persons who are not disabled?

    d. Did the respondent fail to make a reasonable adjustment to avoid any disadvantage caused to the claimant?

e. Has the respondent treated the claimant unfavourably (dismissal/or in relation to any job application) because of something arising in consequence of his disability (taking insulin or sick absence).

f. Was any such treatment a proportionate means of achieving a legitimate aim (enforcement of food hygiene procedures in areas of risk to manage/eliminate contamination or bacterial infection in food to be consumed by vulnerable patients and others)?

g. Did the respondent treat the claimant less favourably because of his disability than he treats or would treat other in the same circumstances either in relation to his dismissal or in relation to any job application he made.

h. Was the claimant entitled to wages for the period to 27 April 2020 and did the respondent pay the claimant in respect of those wages?

i. What if any remedy should be awarded?

Relevant Law

14. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (the ERA). Section 98(1) provides that in determining whether the dismissal of an employee is fair or unfair it is for the employer to show the reason for dismissal and, if more than one, the principal one and that is for a reason falling within section 98(2) of the ERA or some other substantial reason of a kind to justify dismissal of an employee holding the position which the employee held. Conduct is one of the potentially fair reasons of a dismissal.

15. Section 98(4) provides that where the employer has fulfilled the requirements under section 98(1) the determination of the question whether the dismissal is fair or unfair, having regard to the reasons shown by the employer depends on whether in the circumstances, including the size and administration of resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for the dismissal and this has

to be determined in accordance with the equity and substantial merits of the case.

16. In considering the reasonableness of the dismissal, the Tribunal must consider whether the procedure followed, and the penalty of dismissal were in the band of reasonable responses (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439*).* The Tribunal must be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore acts unreasonably. One reasonable employer may act one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to the dismissal falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair. In relation to the conduct dismissal as set out in the leading case *of British Home Stores Ltd v Burchell* [1980] ICR 303*.*

17. Section 20 of the EqA sets out the employer's duty to make reasonable adjustments to address disadvantages suffered by disabled people. This duty broadly arises when a disabled person is placed at a substantial disadvantage by the application of a provision criterion or practice (PCP), by a physical feature, by the non-provision of an auxiliary aid. A failure to comply with the duty amounts to discrimination under section 21(2). In this case the relevant requirement is to take such steps as is reasonable to avoid the disadvantage where a PCP puts a disabled person at a substantial disadvantage.

18. The duty only arises in respect of those steps that is reasonable for the employer to take to avoid such disadvantage experienced by the disabled person. What is reasonable in any given case will depend on the individual circumstances of the disabled person. The test of reasonableness in this context is an objective one (*Smith v Churchill Stairlifts Plc* [2016] ICR 524 CA) and the focus is on whether the adjustment itself can be considered reasonable, not whether the employer's process for determining that question was reasonable. An adjustment from which the disabled person does not benefit is unlikely to be a reasonable one (*Romek Ltd v Rudden*

EAT/0067/07*)*. However there does not have to be a good prospect of an adjustment removing a disadvantage for that adjustment to be reasonable *(Moore v Forman Office* [2011] ICR695 EAT).

19. Section 15 of the EqA states that if a person discriminates against a disabled person if he treats a disabled person unfavourably because there is something arising in consequence of that person's disability; unless it can be shown that the treatment was a proportionate means of achieving a legitimate aim.

20. Section 13 of the EqA provides that if there is less favourable treatment because of a protected characteristic there is direct discrimination. There must be less favourable treatment than an actual or a hypothetical comparator whose circumstance are not materially different from the claimant (section 23 of the EqA).

21. Section 39 of the EqA provides that an employer must not discriminate against an employee subjecting the employee to any detriment including dismissal.

Findings in fact

22. The respondent is a company which provides services for public sector organisations. As part of its activities the respondent provides support services to Forth Valley Royal Hospital.

23. From 20 June 2016 the respondent employed the claimant as catering assistant on a 24 hour week contract. He regularly worked overtime. The claimant was qualified on food hygiene to an intermediate level and he obtained credit when getting that qualification.

24. The respondent operates a catering local operating procedure 009 personal hygiene at Forth Valley Royal Hospital which states, "food handlers have a moral and legal responsibility to endure that food poisoning organisms and other contaminates are not introduced into the food chain. Failure to observe the basic principles of good personal hygiene may result in direct contamination of food."

25. The respondent also operates a code of conduct which applies to all employees and requires that they: "Do not behave in ways that might put others at risk; understand their personal responsibilities in maintaining a safe workplace; exercise proper care for the health of everyone who might be affected by what they do; stop work if they are unable to do their work safely and report it."

26. The respondent operates the NHS Scotland workforce conduct policy and its associated guide to expected standards of behaviour at Forth Valley Royal Hospital. These documents define certain conduct as gross misconduct including wilful failure to adhere to safety rules where this would create a measurable danger of risk to others and gross negligence or responsibility.

27. The claimant has been diagnosed with type 1 diabetes since around 2004. He requires to take insulin twice a day which he takes in the morning and evening. The claimant has well managed his condition and medication. Depending on when his shifts started, he would take his first dose of insulin before going to work or at his break around 8 - 8.30am.

28. Around August 2018 Fiona Hamilton was a team leader in the catering team. She had a good working relationship with the claimant. Ms Hamilton knew about the claimant's medical condition and his need to inject insulin daily.

29. On two occasions Ms Hamilton spoke to the claimant about how he was managing his diabetes at work. The first was following a report that the claimant was injecting insulin in the restaurant area when at lunch. Ms Hamilton spoke to the claimant explaining that this was inappropriate and that like others when injecting insulin he would need to move to a more private area such as a changing room. The other occasion was about the number of long shifts the claimant was working and Ms Hamilton was concerned that this was not helpful in him taking his medication properly. Ms Hamilton spoke to the claimant to remind him that he must manage his breaks so that he could take his medication appropriately and that if he needed time during working hours to take medication then he could do so without a problem. Ms Hamilton trusted the claimant to act responsibly and take his medication appropriately.

30. Throughout the claimant's employment with the respondent he applied for numerous roles through the respondent's career website. While the claimant had disclosed disability on a pre interview questionnaire, in respect of those applications made by him following his appointment, he did not disclose information about a medical condition or disability. The types of role applied for by the claimant was diverse. The claimant seemed to provide the same CV in respect of each application he made. For some of the posts he did not have the required key skills or qualifications (maintenance, security and payroll) and for others although shortlisted he was not selected for interview. For some posts he was interviewed but was unsuccessful. There were a number of candidates for the job roles.

31. Around 13 September 2019 the claimant applied for a catering assistant (retail) post. He was interviewed by Steven McGregor. The feedback referred to the claimant giving a positive interview but could have been more on point with needs and parameters of the job role applied for and adding more relevant experience relating to the position.

32. On Sunday 20 October 2019 there was a minor fire in the kitchen area at Forth Valley Royal Hospital which disrupted hot food preparation. As a result all stocks of sandwiches from the fridges were used to feed patients.

33. Some catering assistants agreed to start work early on 21 October 2021 to prepare sandwiches while the kitchen was being brought back into service.

34. The claimant started his shift at 6.00am. Usually on this shift he would be working on trolleys and would have a break around 8.30am. In the circumstances the claimant was asked to work in the kitchen area and chilled food preparation area. The claimant was surprised as he had previously only worked in this area about four or five times. He had also been unsuccessful when he had applied to work in that area. The other catering assistants, Linda Snow and Denise Douglas who were working with the claimant started their shift around 7am. Ms Hamilton was on duty. She visited the kitchen early in the shift and spoke with the claimant. There was no discussion about breaks.

35. The chilled food preparation area is a critical control point for the sandwiches as after that they are stored for distribution or may go straight out for consumption. It is the last point where there is control of the food. A breach of food safety or hygiene at this point cannot be rectified which is why it is serious. Within the hospital environment there are many factors to consider in protecting safety of food and diet is carefully specified for many patients. The failure of food hygiene may have serious consequences for anyone eating the food who may be ill by contaminated food.

36. On 22 October 2019 Ms Douglas informed Ms Hamilton that the previous day she had seen the claimant injecting himself with insulin using an epi-pen in the chilled food preparation area. Ms Douglas said that she had to tell the claimant to wash his hands and change his gloves. Ms Hamilton was shocked as it was a high risk area. She was surprised that the claimant did this given his knowledge of food hygiene. Ms Snow joined the conversation and supported what Ms Douglas had said. They were concerned about disclosing what the claimant had done.

37. Ms Hamilton spoke to her manager and HR. Ms Hamilton was informed that the matter was to be investigated. Suspension was a last resort; the claimant would be allocated other work which avoided potential risks during the disciplinary process.

38. An investigation into the alleged misconduct was undertaken by Lynn Morrison and Patrice Ketterick, Catering Team Leaders. Ms Snow and Ms Douglas provided written statements (the original investigation written statements).

39. On 10 December 2019 Ms Hamilton sent an email to Annette MacDonald, Central Support Manager, who had been asked by HR to conduct the disciplinary hearing. Ms Hamilton advised in the email that an investigation had been carried out and that two witnesses had observed the claimant acting in a manner that breached the food hygiene regulations as per the respondent's policy – Personal Hygiene v6.0 that states, "1.1 Food handlers have a moral and legal obligation to ensure that food poisoning organism's

and other contaminants are not introduced into the food chain. Failure to observe the basis principals of good personal hygiene may result in direct food contamination." Ms Hamilton recommended that the matter be progressed to disciplinary proceedings.

5 40. The disciplinary hearing was rescheduled to 9 January 2020 so that the claimant could be accompanied by his trade union representative. Ms MacDonald considered that the investigation had not been thorough; no investigation report had been produced as part of the investigation stage. She and proposed that the disciplinary hearing be postponed and that another
10 manager be instructed to conduct the investigation. This claimant's trade union representative agreed to this proposal.

41. Adele MacSorley, Performance Manager undertook a further investigation and completed the investigation report on 28 February 2020 (the Report).

42. The Report sets out the methodology which involved interviewing Ms
15 Hamilton, separately interviewing Ms Snow and Ms Douglas; reviewing the original investigation written statements and having separate investigation meetings with them; interviewing a possible witness Linda Hughes; interviewing the claimant; and reviewing key documentation.

43. The Report sets out the investigation and findings. It concludes that by
20 administering his medication in the chilled food preparation area the claimant had breached the Serco Code of Conduct, the Catering Department Local Operating Procedure on Personal Hygiene and the Elementary Food Hygiene training course. There was additional concern about the claimant's use of gloves, with witnesses claiming that he would have gone on to touch the food
25 wearing the same gloves without washing his hands although the claimant denied this.

44. The recommendations of the Report were:

    a. There should be a disciplinary hearing.

b. The correct process for staff who required to take medication during their shift is added to the staff induction training for future catering new starts.

c. The correct process for staff who required to take medication during the shift is communicated in writing to all existing staff.

d. That the signage displayed in the chilled food preparation area of the kitchen to inform staff that they are entering a high risk area and a critical control point.

e. The claimant's concerns regarding behaviours within the high risk chilled area had been passed directly to the general manager for consideration.

45. The arrangements for the disciplinary hearing were delayed due to the COVID-19 pandemic. On 2 April 2020 the claimant was sent the NHS Scotland Workforce Policy setting out the disciplinary procedure.

46. The disciplinary hearing was convened on 21 April 2020. The claimant was present with his union representative, Karren Morrison. Ms MacDonald and a note taker were also present. Participating by Skype were, Steven McGregor, Retail Catering Manager and Gordon Swan, Technical Manager (the other members of the disciplinary panel; Ms MacSorley (Investigation Manager) and Ms Hamilton (Witness) participated by Skype.

47. The claimant confirmed that he understood the purpose of the disciplinary hearing and had all the relevant documents including the Report. Ms MacSorley and Ms Hamilton were questioned by Ms MacDonald and Ms Morrison. The claimant then presented a personal statement.

48. The investigation established that the chilled food preparation area was a high risk area as no food was heated there so there was a risk of bacterial growth in the food if strict hygiene and food safety protocols were not followed. The area was also a critical control point for sandwiches as they leave the kitchen area after preparation.

49. Ms Hamilton confirmed that she knew that the claimant was diabetic. There was no documentation of their discussions about his condition. She had previously spoken to the claimant about administering his insulin in the restaurant area and she had previously raised with him a concern that he took proper breaks as to administer his medication and that if he needed to take time away from the work he could do so. There was no formal training about taking medication but that it would be covered in the principles of food hygiene training in relation to risk and potential contamination. Ms Hamilton said that there were risks of contamination to the food due to the claimant's actions due to the potential contact with skin and gloves and that a foreign body had been introduced to the area which should not have been there.

50. At the disciplinary hearing the claimant agreed with the definition about the critical control point. He usually took his medication in the changing room or toilet which are a few metres away from the chilled food preparation area. The claimant accepted that he had injected insulin while working in the chilled food preparation area; and that it was a wrong act which could have had severe consequences. The claimant said that the incident took place because of his desperate need of mediation. He disputed that he intended to restart food preparation without washing his hands and changing his gloves. The claimant explained that he thought he would get a break about 8am but he did not and had been working too long without a break. The claimant had not raised this issue with the team leader or Ms Hamilton. When asked why he had simply not left the area to take his medication the claimant said he could not do so for safety reasons. The claimant confirmed that he had successfully managed his medication for 15 years and had never collapsed or had a sudden need to take medication before this event.

51. Ms MacDonald adjourned to discuss matters with the other members of the disciplinary panel. It was agreed that the matter was a very serious breach of food hygiene policy as the chilled food preparation area was a high risk area for the preparation of food. It was unacceptable to take medication in that area with potential risks of contamination. There was evidence from the witnesses that the claimant had placed on the top of his epi-pen on the work trolley when

they challenged him and that they believed that he intended to carry on working without changing his gloves or washing hands. The disciplinary panel accepted that the claimant needed to take his medication but he could have easily gone to the changing room which was very close to his work area and taken his medication quickly and safely. The claimant had long experience of managing his medication and had never had to take medication at short notice previously. He was also well trained with a higher level of food hygiene qualification than the catering assistants with whom he was working that day. The claimant also accepted that his actions were bad practice, wrong and with potentially catastrophic consequences.

52. The disciplinary panel concluded that the breach in the food hygiene policy in a high risk area and the Serco Code of Conduct was gross misconduct. They then considered the appropriate outcome. Although the claimant was administering medication the disciplinary panel did not believe that he had done so in a safe and reasonable way and that his actions had put others at risk. They did not consider that this was mitigation from imposing a different sanction from summary dismissal.

53. On 27 April 2020 Ms MacDonald wrote to the claimant advising of the decision and the reasons for it. The claimant was also advised of his right to appeal the decision to Heather Bryson.

54. The claimant appealed the decision on the following grounds:

    a. No consideration was given to his disability and his protection under the EqA.

    b. The respondent failed in its duty to provide a written risk assessment to include reasonable adjustments for him and appropriate training in this regard.

    c. The respondent failed to follow the correct procedure and their duties per NHS conduct policy.

d. Due to COVID-19 the claimant did not get an opportunity to question the witnesses.

55. The appeal hearing on 25 May 2020 was conducted by Heather Bryson, Regional Services Excellence Manager. The other appeal panel members were Holly Begley, HR Business Partner and Lorna McKay, General Manager. The claimant was present and represented by Ms Morrison. Other than Ms McKay they were in person along with a note taker. Ms McKay participated by Skype along with Ms MacDonald (Disciplining Manager), Ms Hamilton (Witness) and Ms Snow (Witness).

56. The claimant and Ms MacDonald had sent statements before the appeal hearing. The claimant presented his appeal. He said that he had received a copy of the disciplinary policy and knew he had the right to be accompanied. He was not accompanied at his interview with Ms MacSorley. He was not suspended despite the allegation of gross misconduct. He did not know when his break would be. There was no one to ask. He felt under pressure and did not want to leave without permission. Ms MacDonald confirmed that she did not make an occupational health referral or take advice from a disability advisor. Ms MacDonald who provided copies of the emails that had been sent by the claimant saying that he did not want to talk to the witnesses at the disciplinary hearing.

57. The appeal hearing was adjourned. The appeal panel considered the grounds of appeal.

No consideration was given to his disability and his protection under the EqA.

- The claimant was screened by NHS Forth Valley Occupational Health team for pre-employment check on 7 December 2016. A fit slip was sent to the respondent that noted that no additional support was required for the claimant in post.
- The claimant had been post for last three and a half years. There had never been any concerns raised about the issues regarding his

inability to manage his diabetes within the work structure around him or that he did not have a safe place to administer his medication.

- The claimant was able to take time away from work to take his medication but could also take regular breaks if required. The claimant had managed successfully with no workplace adjustments over this time and had given no reason for the respondent to carry out a further risk assessment.

The respondent failed in its duty to provide a written risk assessment to include reasonable adjustments for him and appropriate training in this regard.

- The claimant had not changed job roles nor had he raised any concerns about being able to manage his diabetes with the current arrangements.
- The training certificates held by the claimant while not explicitly covering his diabetic medication the claimant received training clearly states that he had a duty to protect food from any foreign bodies. There also no evidence to suggest that he did not have a correct level of training which would have prevented him from administering diabetic medicine via an injection into his skin within a high risk food preparation area which was in direct breach of the food hygiene policies and had a potential to cause harm to patients.

The respondent failed to follow the correct procedure and their duties per NHS conduct policy

- There was no referral to occupational health in this case as it was not deemed necessary.
- In serious cases management have the option to deal with cases formally rather than informally.
- The letter inviting the claimant to the investigation interview did not state that he had the right to be accompanied. The claimant did receive a copy of the disciplinary policy and was aware of this. He

did not raise the matter with Ms MacSorley until after the meeting. The claimant was represented at the disciplinary and appeal hearings.

- While the claimant was not told verbally about the investigation he was informed in writing about the allegation the had been made, the subsequent investigation and inviting him to a meeting.
- The disciplinary panel considered that dismissal was considered the appropriate sanction in this case.
- Although the minutes were not signed. They were no verbatim. The minutes were enclosed with the letter of dismissal. The claimant did not challenge any of the content at the time. The claimant accepted that there were no points within the minutes that would make a material difference to his case. He only challenged the decision to dismiss.
- The claimant was not suspended. He continued to work within the catering department. The respondent tries to retain staff rather than suspend due to the perception of suspension in trying to retain employees within the workplace during the pandemic.

Due to COVID-19 the claimant did not get an opportunity to question the witnesses.

- Ms MacDonald had emailed the claimant on 16 April 2020 asking if he wished to speak to any witnesses or forward questions to be asked of them and she would endeavour to arrange this. The claimant responded that indicating that he did not wish to speak to any of the witnesses were no questions to be asked.

58. Ms Bryson wrote to the claimant on 27 May 2020 dealing with each of ground appeal setting out the reasons for upholding the decision to dismiss. A copy of the note of the appeal hearing was enclosed.

59. The claimant received his final salary but it did not include payment for the week of 20 April 2020 to 24 April 2020.

60. At the date of termination the claimant was 58 years of age. He had been continuously employed by the respondent for three years. His gross weekly wage was £384.60. His net weekly was £310.26.

61. The claimant received Job Seekers' Allowance. On 11 September 2020 the claimant found new employment with NHS Lothian. He earns £12.25 per hour and has travelling costs.

Observations on Witnesses and Evidence

62. With the parties' agreement the first witness to give evidence was Mary Jane Baxter who was very candid and forthright. Miss Baxter was very experienced having worked in catering for the NHS for over 42 years. She had also been a Shop Steward and Health and Safety Officer for Unison for around 13 years. The Tribunal was however mindful that Miss Baxter worked in the restaurant area and was not present when the incident that lead to the claimant's dismissal took place. While she did not consider that the respondent followed its policies Miss Baxter was not involved in the disciplinary process. The Tribunal felt that it was significant that Miss Baxter, who was not a supervisor, would cover for a colleague if they needed a break and would be willing to deal with management if there were any consequences.

63. The Tribunal considered that the claimant gave his evidence based on his recollection and perception of events. The Tribunal had no doubt that the claimant was well qualified for the role that he undertook and was conscientious. He was ambitious and made numerous applications for a variety of positions as and when they arose. It appeared to the Tribunal that in the claimant's understandable desire to advance in the organisation he applied for a broad spectrum of jobs using a generic CV and may have failed to focus on the particular skills required for the position for which he was applying. The Tribunal also considered that the claimant had successfully managed his diabetes until this incident on 21 October 2019; and he had no difficulty in administering his medication at the appropriates times.

64. Ms MacDonald was in the Tribunal's view an experienced manager whose role involved conducting disciplinary hearings and appeals in relation to the respondent's employees in the hospital. The Tribunal was therefore surprised that if she was concerned about the level of investigation carried out before the disciplinary hearing scheduled for January 2020 she did not direct further investigation beforehand. She gave the Tribunal the impression that she did not have a grasp of the methodology of the Report or the disciplinary procedure that she was following. For example Ms MacDonald's evidence was that the original investigation written statements were not part of the Report. However the Report states that the original investigation written statements were used at interviews with Ms Snow and Ms Douglas. Ms MacDonald also did not consider whether her continued involvement in the process after the disciplinary hearing in January 2020 was appropriate under the procedures or whether the disciplinary panel was property constituted. She also appeared to be confused which disciplinary procedure she was following.

65. Ms Bryson in the Tribunal's view, was a more impressive witness who gave her evidence in a credible and reliable manner.

66. The Tribunal considered that Ms Hamilton was also credible and reliable witness. She was rigorously cross-examined by the claimant and remained calm and reasoned throughout. The Tribunal's impression was that Ms Hamilton had no animosity towards the claimant. It appeared that she recognised that he had potential to advance in the organisation and sought to provide guidance and support for him to do so. Ms Hamilton did in the Tribunal's view appear genuinely surprised at the claimant's conduct. While she felt that in the circumstances there was no alternative to having the matter investigated and for there to be disciplinary proceedings. The Tribunal did not detect that there any desire on Ms Hamilton's part for the claimant's employment to be terminated and it was not she who took the decision.

67. In relation the various job applications there was no dispute that the claimant had applied for a variety of posts and had been unsuccessful. The claimant

accepted that he was not the only applicant for the posts but maintained that for some (although not all) he was most qualified. The claimant was not in a position to say that the reason why he did not get the jobs because of his disability. Given that when he made the applications he did not disclose his disability the Tribunal considered that it most unlikely that disability was the reason the claimant had not been appointed.

68. The claimant and Miss Baxter both referred to the claimant applying for a position a catering assistant and "sick absence" being taken into account as part of the decision-making process. The claimant suggested that he had less sick absence than others who were appointed or "moved". They said Ms Hamilton was present at the interview. Ms Hamilton said that she was not involved with this interview which appeared to be consistent with the note of the feedback interview on 13 September 2019 which refers to the interview being with Steven McGregor and Jack Wooton. In any event it was not the claimant's evidence that he was not appointed to job this because of his disability. There was insufficient evidence before the Tribunal to make any findings as to what weight if any, sick absence had in selection procedure; whether any of the claimant's sick absence was disability related or for some other reason; and to what extent any other candidate's absence may have been related to their disability and therefore discounted.

69. There was conflicting evidence about the timing of the claimant's break during the shift on 21 October 2019. The claimant's evidence was that his shift started at 6am. Normally on this shift he would be allocated to the trolleys and that he would have a break around 8.30 am. On 21 October 2019 although his shift started at 6am he was allocated to the kitchen area. The other catering assistants did not start their shift until 7am. The claimant asked them when they took their break and they said about 11am. Ms Hamilton's evidence was that she would have expected the claimant to take his break at the same time as he would any shift that started at 6am and that he did not raise this matter with her at any point during his shift on 21 October 2019.

70. Given the circumstances surrounding the claimant and others being asked to work on 21 October 2019 the Tribunal was not surprised that the rota had not been produced detailing allocated breaks. What was not in dispute is that the claimant and Ms Hamilton had spoken to each other at the start of the shift and the issue of timing of breaks was not discussed. The Tribunal also considered that it was highly likely that following that interaction the claimant did not have any contact with team leaders. The claimant appeared to have assumed that his break would be the same time as his colleagues. The Tribunal had some difficulty understanding why that would be the case given that his shift started earlier and it would be have been appropriate for breaks to have been staggered. There was no suggestion that the claimant was not entitled to have a break or that his colleagues prevented him from doing so. The Tribunal also mindful of the evidence from Miss Baxter and Ms Hamilton which was not challenged by the claimant that employees were able to take comfort breaks never appropriate.

71. In relation to postponing the first disciplinary hearing Ms MacDonald's evidence was that this was done with everyone's agreement. The claimant said that he had not agreed but was told this was happening. The Tribunal was surprised that Ms Morrison would have acted without taking instructions from the claimant. The Tribunal accepted that the claimant may not have understood that he could have objected to this. However given there was concern about the investigation the Tribunal was at a loss to understand why the claimant would not have wanted the first disciplinary hearing to be postponed in these circumstances.

Submissions for the Claimant

72. The claimant said that he claimed unfair dismissal, discrimination on grounds of disability, failure to make reasonable adjustments and unlawful deduction of wages.

73. Having heard the witnesses the claimant invited the Tribunal to note that Ms MacDonald's evidence was that she was not aware of the previous disciplinary hearing document and order that is to be reinvestigated. This

which allowed key witnesses to modify their statements. The respondent did not follow their own policy and procedure and provided outdated policies for the claimant to rely upon. The claimant felt that by reinvestigating the respondent was trying to hide its own shortcomings.

74. The claimant said that Ms Hamilton rushed into organising an investigation with an inexperienced team leader who did not follow the correct procedure. Ms Hamilton recommended the case for disciplinary without proper documentation. She did not consider whether other witnesses were in breach of their own legal and moral duty by not reporting the incident immediately. The claimant also asserted that Mis Hamilton did not follow Scottish Food Safety Law in relation to temperatures in high risk area.

75. The respondent accepted that the claimant is disabled. The incident only happened because the claimant was in desperate need of medication at the time. The respondent was aware of the medical condition and he was at risk of collapsing. The respondent failed to consult a diabetic expert about the incident and what the consequences would have been for the claimant without medication.

76. The claimant said that the respondent should have carried out a risk assessment and they were in breach of section 20 of EqA for failing to making any reasonable adjustments to accommodate the claimant taking medication in the working schedule or area of work.

77. The claimant also submitted that the respondent had directly discriminated against him as colleagues breached their duty not reporting the incident immediately and putting others at risk. They also discriminated against him by stopping him bringing an epi-pen into the area, while writing pens and mobile phones were allowed in that area.

78. The claimant referred to an indirect discrimination claim in relation an incident involving disposable glove. The Tribunal noted that while this point was put to Ms Hamilton it did not form part of the claim form, the agenda or indeed the claimant's evidence in chief.

79. The claimant said that the respondent had not followed ACAS guidance because the disciplinary hearing should be held without unreasonable delay.

80. The respondent put him in a situation by calling him to work at 6am without considering his health and wellbeing while at work in an area (where he had not been offered a job) which starts at 7am.

81. The claimant considered that gross misconduct and a fundamental breach of trust suggests that if an employee was putting people in danger they should not be allowed to continue to work for a further six months. The claimant asserted that he had not previous warnings of any type in his service record so how could it become gross misconduct. In the claimant's submission the respondent had not followed their own policy and procedure providing the claimant with outdated policies.

82. The respondent had unlawfully deducted wages from him.

83. The claimant had produced a schedule of loss which he had updated. He said that he sought reinstatement because there were many jobs available in the respondent's business for which he was qualified. He referred to his schedule of loss.

Submissions for the Respondent

84. Mr Moss asserted that the reason for the dismissal was conduct; the claimant breached food safety and hygiene standards by injecting himself with insulin in proximity to high risk food thereby introducing and creating a serious potential risk.

85. The Tribunal was referred to the guest in *British Home Stores Limited* (above) Mr Moss said that the respondent carried out a reasonable investigation and had reasonable belief in the claimant's guilt. There was a second investigation to establish further facts as the initial investigation was not properly completed. The investigation identified serious misconduct by the claimant in respect of food hygiene and safety. The claimant accepted that he had injected this insulin the chilled preparation area. The claimant accepted his

act was wrong with potentially sever consequence if good management is not practised in the food preparation areas. Disciplinary investigation identifies serious misconduct in respect of breaches of food hygiene and safety procedures by the claimant.

5 86. Mr Moss said the respondent acted reasonably in dismissing the claimant and that decision was in the band of reasonable responses. The misconduct was identified as serious in the context of a hospital environment where the claimant worked. The claimant had training in food hygiene and safety with intermediate certificate in food hygiene which exceeded the knowledge required for this role. Food Hygiene training was refreshed in August 2019, two months before the incident.

87. The respondent's disciplinary policy defines gross misconduct as including wilful failure to adhere to safety rules where this would create a measurable risk to or danger to others; gross negligence or irresponsibility. It was within the band of reasonable responses to dismiss for admitted misconduct that amounted to gross misconduct within the above definitions.

88. The process that was followed in relation to the dismissal was fair. An initial investigation into the misconduct was not properly conducted and Ms MacDonald, the disciplinary panel chair decided with the agreement of the claimant's representative to request a further investigation report by a different manager. The claimant was aware of this decision and raised no objection to it.

89. It was intended that the previous material gathered in the investigation would not be used for the second investigation. Ms MacSorley did review some previous material but conducted interviews with all the relevant witnesses and obtained all the relevant documents.

90. Mr Moss said that it was reasonable for the respondent to rely on the evidence of the witnesses which was consistent and credible. Although Ms MacSorley reviewed evidence from the previous investigation she did not simply accept

but conducted a thorough investigation. No prejudice occurred to the claimant from further investigation.

91. Mr Moss said that the disciplinary investigation was within the band of reasonable responses.

5 92. The disciplinary hearing was conducted under the NHS Scotland Workforce Policy which was sent to the claimant on 2 April 2020. There was incompliance with this policy in that the disciplinary panel did not contain an HR representative as one of the three panel members due to the unavailability of one HR Business Partner onsite. An HR Business Partner was a member
10 on the appeal panel which held the decision to dismiss. The variation to the disciplinary panel members was not unfair as they had not been previously involved in the case. Although Ms MacDonald continued to chair the disciplinary hearing panel she had not been previously involved in taking any decision in respect of the process.

15 93. The claimant was not suspended during the disciplinary process as the respondent tries to avoid suspension if at all possible. During the period from the misconduct to the disciplinary hearing the claimant was on very restricted duties and not allowed to be involved in food preparation. This was not a sustainable position for the respondent who required the claimant to fulfil all
20 the duties of his role. Although the claimant had a good disciplinary record his service was relatively short and the misconduct he was accused was serious and merited dismissal. The disciplinary process was extended by the effect of COVID-19 pandemic and the claimant's unavailability to attend meetings which the respondent accommodated. The claimant had the benefit of a full
25 appeal process which held the decision to dismiss.

94. In relation to the reasonable adjustments claim, the respondent denies that it applied a PCP which put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled or are that it failed to take steps as was reasonable to have to take to avoid the
30 disadvantage. The PCP of the respondent was that the claimant worked in the chill preparation area in accordance with the food hygiene and safety

standards. This did not create substantial disadvantage for the claimant. He was entitled to a break at 8.30 due to his start time on 21 October 2020 which he could have used to take his medication as he often did. The claimant was able to take time out from the area if required for breaks or the toilet. He was not prevented from leaving the chilled preparation area at any time. The claimant usually went to a changing room to administer his medication which was about 15 metres away from the chilled preparation area. Alternatively, the claimant only had to move a few metres out outside the chilled preparation area.

95. The claimant had previously managed his medication for long periods of time without incident. The claimant had not previously requested any other adjustments to assist with the management of this condition. The claimant's disadvantage was caused by his own inattention to taking his medication in a timely and responsible manner which the respondent could not reasonably have avoided. It would not be reasonable for the claimant to be individually placed or reminded to take a break.

96. The claimant also contends that he was treated unfavourably because of something arising in consequence of his disability. The unfavourable treatment would be that he was subjected to disciplinary action and/or being dismissed arising from the act of injection insulin in an area in proximity to high risk food in breach of food hygiene and safety standards. There was no unfavourable treatment in consequence of disability. The treatment was caused because of the claimant breaching hygiene and safety standards not in relation to his disability. Alternatively the respondent submits that any unfavourable treatment was a proportionate means of achieving a legitimate aim; the enforcement of food safety and food hygiene procedures in areas of risk to manage or eliminate risk or contamination or bacterial infection in food that was to be consumed by vulnerable patients and/or others.

97. The pursuance of the disciplinary proceedings against the claimant where such conduct occurred is a proportionate means of achieving legitimate aim. Such conduct was stated to be gross misconduct under the respondent's

disciplinary policy. The dismissal of the claimant was a proportionate to the act of gross misconduct the claimant had committed: the potential risk was a serious risk to others he had created. As a catering assistant the claimant was required to undertake a range of tasks involving food preparation in accordance with the training and guidance with food hygiene. The failure to comply with these requirements in such a serious way lead the respondent to conclude that it would not be safe to allow him to remain in a hospital environment.

98. The respondent denies that it treated the claimant less favourably because of his disability. No comparator or hypothetical comparator has been produced by the claimant to establish less favourable treatment in the same circumstances. The less favourable treatment of the claimant remains to be disciplinary procedure and dismissal from employment. Mr Moss submitted that any treatment of the claimant as a result of the breach of food hygiene and safety policies by the claimant was not because of his disability.

99. The respondent accepts that it made an unlawful deduction from the claimant's wages in respect of his final salary.

100. The respondent contends that it is not appropriate to reinstate or re-engage the claimant. His act of misconduct was a serious breach of basic food safety and hygiene which is a fundamental ailment to working responsibility in a hospital environment. Breach of these standards creates serious risk to others especially vulnerable patients. The respondent does not have trust and confidence in the claimant to allow him to work in a hospital environment which extends to other roles where he would be subject to restrictive health and safety requirement. It is not possible to allow the claimant to work in a restricted role that he worked in before dismissal as an alternative to suspension as that is not a role that exists with the respondent. The return to the role as a catering assistant would require to undertake a full range of tasks within that role.

101. In relation to compensation for unfair dismissal the basic award would be a year's service at 1.5 weeks' gross pay is £948.42. The claimant's average net

pay in the 16 weeks before dismissal was £310.26. Any loss of earnings should be limited to a maximum of 26 weeks' pay that is £8,066.76. The claimant received 2.19% employers pension contribution and gross earnings to the year 5 April 2020.

5 102. Mr Moss said contends any award for unfair dismissal should be reduced to reflect the blame and uncapable behaviour of the claimant and submits that it should be reduced by 50 percent. The relevant conduct is the claimant injecting himself with insulin in an area in close proximity to high risk food and breach of food hygiene and safety requirements.

10 103. Mr Moss also submitted that there should be a reduction of 100 percent if there is an unfair dismissal finding on procedural grounds. The claimant's misconduct was so serious that aside from any procedural failure he would have been dismissed within the time timescale.

104. In relation to disability the extent the loss of earnings being attributable to any
15 disability discrimination should be reduced on a just and equitable basis to reflect the claimant being dismissed in the same timescale aside from any discriminatory act of the respondent.

105. In relation to injury to feelings the claimant assessed this £1,500.00 to which the respondent agreed. Mr Moss said that any compensation should be in the
20 lower band as any discrimination was a consequence of the claimant's conduct and the claimant had the ability to avoid any discrimination by simply removing himself from the chilled preparation area to take medication which he failed to do. The claimant was also responsible for managing his medication which he failed to do.

25 106. Ms Moss argued that the claimant has been treated fairly and there has been no breach of the ACAS Code of Practice.

Discussion and Deliberations

Unlawful Deduction from Wages

107. The respondent accepted that the claimant had not been paid for the week that he worked before his dismissal. The Tribunal was satisfied that the respondent had made an unlawful deduction from the claimant wages of £310.and ordered the respondent to pay to the claimant the sum of £310.26.

Unfair Dismissal

108. The Tribunal then considered what was the reason or principal reason for the dismissal. It is for the respondent to show the reason for the dismissal and that it was for the one of the potentially fair reasons. The reason it is a set of facts or belief held by the employer which cause the employer to dismiss the employee.

109. At this stage the Tribunal was not considering the question of reasonableness. The disciplinary panel conducted a disciplinary hearing and decided to dismiss the claimant. Ms MacDonald's evidence was that at the time of the dismissal the disciplinary panel believed that the claimant was guilty of gross misconduct: the claimant had injected insulin in the chilled food preparation area. The claimant knew that this was wrong and of the potentially severe consequences of his action. The disciplinary panel believed that the claimant knew he could leave the area to go to the toilet and have a break. The claimant was well qualified for his role and knew consequences of his actions. Ms MacDonald said that the disciplinary panel considered that the claimant's actions amounted to gross misconduct.

110. The Tribunal did not understand the claimant to be suggesting that conduct not the reason for his dismissal rather that the sanction was too severe in the circumstances. The Tribunal was satisfied that the respondent had shown that the claimant was dismissed for misconduct which is a potentially fair reason under section 98 of the ERA.

111. The Tribunal then considered if the dismissal was fair or unfair in accordance with section 98(4) of the ERA. It noted that it had to determine whether the dismissal was fair or unfair having regard to the reason shown by the employer and the answer to that question depends on whether in the circumstances (including the size and administrative resources of the undertaking) the employer acted reasonably in treating the reason as a sufficient reason for dismissing the employee; and that this should be determined in the accordance with the equity in substantial merits of the case.

112. The Tribunal considered the reasonableness of the respondents conduct. The Tribunal noted that it must not substitute its own decision as to what the right course to adopt for that with the respondent.

113. First the Tribunal considered whether the respondent had carried out a reasonable investigation and had reasonable grounds for its belief that the claimant was guilty of gross misconduct.

114. The initial investigation was prompted by an allegation by Ms Douglas and Ms Snow. While there was a delay in reporting the allegation to Ms Hamilton, other than Ms Hamilton's evidence that Ms Douglas and Ms Snow were slightly intimidated by the claimant, there was no evidence of animosity towards the claimant on their part. Ms Hamilton appeared surprised at the allegation but given the potential consequences considered that it ought to be investigated.

115. The Tribunals impression was that in relation to formal disciplinary proceedings Ms Hamilton was guided by her manager and HR. She did not appoint the investigators or the disciplinary chair/panel. In the Tribunal's view there was a lack of clarity why those providing guidance to managers involved in the disciplinary process did not realise before the disciplinary hearing that there was no investigation report. In any event the claimant through Ms Morrison agreed to the first disciplinary hearing being postponed for further investigation.

116. The Tribunal appreciated that given the lapse of time there may be some concern about witnesses' recall and possible collusion. However as indicated there was no evidence to suggest that either Ms Snow or Ms Douglas had any animosity towards the claimant and in the investigation taken by Ms MacSorley the original investigation statements were clarified. The Tribunal also appreciated that their statements were different but that was more reassuring as it suggested that they had not collaborated and were recalling events as they remembered them at the time. The claimant did not suggest there was any partiality on Ms MacSorley's part. The investigation appeared to be thorough and it was in the Tribunal's view reasonable to look at the original investigation statements which were handwritten and prepared at the time of the incident.

117. As part of the preparation for the disciplinary hearing, the disciplinary panel, considered the Report. The disciplinary panel also conducted an investigation during the disciplinary hearing in that questions were asked of the claimant, Ms MacSorley and Ms Hamilton. The claimant also provided a statement in which he admitted injecting with insulin in the chilled food preparation area while at work. He acknowledged that the act was wrong and it should not have been done in a situation he also said that he understood how severe the consequences could be. The area of dispute between the claimant and Ms Douglas and Ms Snow was whether or not the claimant started preparing food without washing his hands and changing his gloves. The claimant disputed that and said that he would have always intended to wash his hands and change his glove without having been prompted to do so and that is what he did.

118. While the Tribunal appreciated that there was conflicting recollection about washing hands and changed gloves the Tribunal did not consider that there was any more investigation that the respondent could have carried out in that regard.

119. The claimant maintained that he had to take his medication when and where he did. The Report and disciplinary panel considered this. The view was that

claimant was able to take time out from the area if required for breaks or comfort breaks. He was not prevented from leaving the chilled food preparation area at any time. He delayed taking his medication. He could have administered his medication outside the chilled food preparation area or in the changing room as usual.

120. The Tribunal considered that the respondent had carried out a reasonable investigation and had reasonable grounds for believing that the claimant knew that he should not have injected insulin in the chilled food preparation area and could have avoided doing so.

121. The Tribunal then asked if the respondent acted reasonably in treating the claimant's conduct as gross misconduct.

122. The respondent's position was the claimant's conduct fundamentally breach his employment contract. The respondent's disciplinary policy defines gross misconduct as including wilful failure to adhere to safety rules where this would create a measurable risk to or danger to others; gross negligence or irresponsibility. The Tribunal did not understand the claimant to dispute this. His position was that he had to take his medication. The respondent accepted that but considered that he could had done so sooner or in an area away from the chilled food preparation area.

123. The Tribunal considered that there were reasonable grounds for the respondent concluding that the conduct amounted to gross misconduct. The Tribunal then applied the range of reasonable responses to the decision the procedure by which that decision had been reached.

124. As regards the investigation and disciplinary hearing for the reasons previously indicated the Tribunal was satisfied that there had been a reasonable investigation. The Tribunal considered that the wording of the letter inviting the claimant to the disciplinary hearing lacked clarity as to what exactly being alleged. That said there was no suggestion by the claimant that he was unaware of the allegation against him. To the contrary, the claimant's response at the disciplinary hearing demonstrating that he understood the

allegation and was able to state his position. The claimant was accompanied at the disciplinary and appeal hearings by Ms Morrison.

125. The Tribunal observed that the letter inviting the claimant to the disciplinary hearings refer to gross misconduct. While the respondent's policy allows for dismissal on the grounds of gross misconduct the Tribunal considered what the reaction of a reasonable employer would be in the circumstances. The Tribunal did not understand the claimant to be suggesting that the decision was in any way pre-determined or automatic. The Tribunal's impression from Ms MacDonald evidence was that the disciplinary panel approached the disciplinary hearing with an open mind. She was willing to postpone the disciplinary hearing to ensure that a proper investigation took place while other disciplinary panels may have proceeded with the disciplinary hearing and then adjourned it for further investigation the Tribunal did not consider that Ms MacDonald's approach suggested that it was pre-determined or an attempt to "hide the respondent's own shortcomings". While the Tribunal concluded that there were reasonable grounds for a finding of gross misconduct the Tribunal went on to consider whether it was within the band of reasonable responses for the respondent to dismiss the claimant for that gross misconduct.

126. The Tribunal was satisfied from Ms MacDonald's evidence that the disciplinary panel did not automatically impose the sanction of dismissal. The disciplinary panel knew that lesser sanction could be imposed. The Tribunal did not get the impression that the disciplinary panel took the decision to dismiss the claimant lightly. The disciplinary panel was aware that the claimant had a clean disciplinary record and that he had acknowledged that his conduct was wrong.

127. The Tribunal was also satisfied that the disciplinary panel understood that the claimant had a disability and needed to take insulin to regulate blood sugar levels. There was no issues about the claimant doing so. The disciplinary panel's concern was that the claimant did not take a break when he would

normally do so starting a shift at 6am nor did he have a comfort break to ensure that his medication was taken when required.

128. The impression of the Tribunal was that the concern of the disciplinary panel was that the claimant did not accept any responsibility for not taking a break when he required to do so but rather continued working knowing that his insulin level would be affected and that he was putting himself and potentially others at risk in so doing. It was this lack of awareness had caused the disciplinary panel to believe that the claimant was unwilling and unlikely to change his behaviour.

129. The Tribunal concluded that decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

130. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage is relevant to the reasonableness of the dismissal process.

131. The Tribunal then considered the process. The Tribunal considered that by the time the claimant was investigated by Ms MacSorley he was represented by Ms Morrison. He was accompanied at the disciplinary hearing and he was aware of the procedures that were to be adopted. Neither the claimant nor Ms Morrison raised any issue about the constitution of the disciplinary panel despite knowing about that in advance of both disciplinary hearings. The claimant was given an opportunity to interview witnesses although he declined to do so.

132. The Tribunal considered that if the respondent has elaborate procedures and for whatever reasons the respondent departs from them (for example, due to the unavailability of a HR business partner) then best practice would be either delay the proceedings until they were available and seek agreement of those attending to the disciplinary hearing proceeding on that basis. In any event the Tribunal did not consider that this made any difference to the outcome

particularly as an HR Business Partner was a member of the appeal hearing panel.

133. Taking all these factors into account the Tribunal concluded that the decision to dismiss the claimant in all the circumstances which it did was not one which no reasonable employer would make and therefore it could not be said to fall out with the band of reasonable responses. Accordingly, the respondent acted reasonably in all the circumstances on treating that as sufficient reason to dismiss the claimant.

Disability Discrimination Claims

134. Turning to the disability discrimination claims it should be emphasised that the legal test for determining discrimination are different from the test of determining unfair dismissal. While the latter allows for an employer a range of reasonable responses, the former is an objective test that required the Tribunal to consider whether the dismissal or any acts which could be said to be discriminatory were in breach of the respondent's obligations under the EqA.

Section 20 – breach of duty to make reasonable adjustments

135. The Tribunal first considered the reasonable adjustment duty. The claimant relied on the provision that the respondent required him to work in the chilled preparation area. The respondent accepted that this was a PCP. The Tribunal noted that a PCP is construed widely and the claimant's contract of reemployment required him to work various locations.

136. The Tribunal then considered the identity and non-disabled comparators. The Tribunal accepted that the comparator identified was a catering assistant with no disability who is required to work in the chilled food preparation area.

137. Next the Tribunal considered whether a requirement to work in the chilled food preparation area put the claimant at a substantial disadvantage in comparison to a catering assistant with no disability being required to work there. The Tribunal noted that a substantial disadvantage means "more than minor or

trivial". The Tribunal also noted a substantial disadvantage represents a relatively low threshold. Although the Tribunal should not assume that simply because an employee is disabled the employer is required to make reasonable adjustment.

5 138. The claimant's position was that he required to take insulin twice a day. He is unable administer insulin the chill food preparation area and therefore he said that the PCP placed him at a substantial disadvantage in comparison where catering workers of the respondent were not disabled.

139. The Tribunal accepted that the claimant required to administer insulin twice a
10 day. He was accustomed to managing his diabetes effectively and knew when his insulin ought to be taken. While the claimant was not able to inject insulin the chilled preparation area he was also dissuaded from doing so in the restaurant area. The claimant was encouraged to administer his medication in the changing rooms or toilet. While the claimant did not have clarity as to
15 when his break would take place on 21 October 2019 there was no evidence that he could not have taken it when he would normally do so on a 6.30 shift. Further, there was no evidence that he could not the leave the chill food preparation area at any point for a comfort during which he could have administered his insulin.

20 140. The Tribunal was not satisfied that the claimant had established that he been placed at a substantial disadvantage in being required to work in the chilled preparation area. Accordingly the discrimination claim under section 20 of the EqA is dismissed.

Section 15 – discrimination arising from disability

25 141. Turning to claim of discrimination arising in consequence of disability Mr Moss did not concede that the claimant had been treated unfavourably for a reason arising in consequence of his disability. The Tribunal considered that the claimant was dismissed for administering insulin in a chilled food preparation area. The requirement to take insulin arises a consequence of him having

diabetes. Accordingly, the Tribunal concluded that there was unfavourable treatment by arising consequence of disability.

142. The Tribunal then focused on the question of whether the respondent could objectively justify the treatment. The Tribunal was satisfied that the respondent had to enforce food safety and hygiene procedures in areas of risk to manage or eliminate risk of contamination or bacterial infection in food that was to be consumed by vulnerable patients and others. The claimant had received training; he was aware that he had a duty to protect food from any foreign bodies; and was aware of the respondent's food hygiene policies. The Tribunal considered that it was proportionate to pursue disciplinary proceedings to ascertain why the claimant had acted in the way he did and if there were any mitigating circumstances.

143. The claimant's position was that he administered his insulin because of medical need. However the claimant was entitled to breaks during his shift and would normally take them at 8-8.30am. He also had the opportunity to leave his workstation for comfort breaks. The claimant was aware of this. He knew that he had to administer his insulin at certain times of day and of the consequences to his blood sugar level of not doing so. The claimant did not use his own initiative which he had done in the past and administer his insulin when appropriate to do so.

144. The Tribunal acknowledged that the respondent's decision to dismiss a discriminatory effect on him. The Tribunal considered whether the respondent could have put in place a proportionate means of achieving the respondent's legitimate aim. The claimant had worked for three years without any incident. On this occasion the claimant did not appear to accept that there was any responsibility on his part to ensure that his medication was taken timeously. Despite being trained in food hygiene the claimant appeared to consider that it was appropriate to administer the insulin in the chilled food preparation area rather than excuse himself and administer the injection in a less high-risk area. The lack of awareness on the claimant's part suggested that it would not be safe to allow the claimant to remain in a hospital environment.

Accordingly, the Tribunal concluded that there was no breach of section 15 of the EqA.

Section 13 - direct discrimination

145. Turning to the direct discrimination claim, the Tribunal did not consider that there was any evidence which tended to show that the reason for the claimant's dismissal and/or his appointment to any of the jobs for which he applied were on the face of it due to his disability. The claimant's direct discrimination claim did not succeed claim.

146. In his submissions the claimant said that the respondent also submitted that the respondent had directly discriminated against him as colleagues breached their duty not reporting the incident immediately and putting others at risk. They also discriminated against him by stopping him bringing an epi-pen into the area, while writing pens and mobile phones were allowed in that area.

147. The evidence before the Tribunal did not support these submissions on direct discrimination which did not in the Tribunal's view appear to be foreshadowed in the claim form. There was no restriction in the claimant having an epi-pen in the chilled preparation area. The issue was administering insulin in that area.

Employment Judge: Shona Maclean
Date of Judgment: 29 July 2021
Entered in register: 04 August 2021
and copied to parties