EMPLOYMENT TRIBUNALS

Claimant: Mr D Rowe

Respondent: David Wood Baking Ltd

Heard at: Cardiff via CVP **On:** 1, 2 & 3 June 2021

Before: Employment Judge S Jenkins
Members: Mrs H Hinkin
Ms S Atkinson

Representation:
Claimant: Ms L Rowe
Respondent: Mr A Willoughby (Counsel)

JUDGMENT having been sent to the parties on 9 June 2021, and reasons having been requested by the Respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The hearing was to consider the Claimant's claims of unfair dismissal, direct disability discrimination, and failure to make reasonable adjustments. It took place entirely remotely, by video. We heard evidence from the Claimant on his own behalf and from Mr Brett Podmore, Site Manager; Mrs Kayleigh Taylor, HR Coordinator; and Mr Mick Anslow, Continuous Improvement Manager; on behalf of the Respondent. We considered the documents in the hearing bundle spanning 208 pages to which our attention was drawn, and we took into account the submissions of the representatives.

Issues

2. The issues had been set out in an annex to the record of a Preliminary Hearing before Employment Judge Ward on 21 December 2020. They

included the need to assess whether the Claimant was disabled for the purposes of Section 6 of the Equality Act 2010, and the Respondent's position remained that it did not concede that the Claimant was disabled at the relevant times.

3. We noted that the Claimant's disability related claims involved direct discrimination and failure to make reasonable adjustments, with the act complained of in relation to the former claim being the dismissal of the Claimant. We explored at the outset of the hearing whether that claim should perhaps have been brought under Section 15 of the Equality Act 2010 (discrimination arising from disability) instead of, or in addition to, Section 13 (direct discrimination), but the parties confirmed that the matter had been discussed at the hearing before Judge Ward and that it had been concluded that only a direct discrimination claim would be brought by reference to the act of dismissal. We also noted that Judge Ward had made clear in her Case Management Summary that if a party considered that her List of Issues was wrong or incomplete then the Tribunal was to be notified of that by 4 February 2021, and no contact had been made by either party in that regard.

4. We also sought clarification of the reason for dismissal in relation to the unfair dismissal claim. We noted that the reason recorded in the List of Issues, and indeed that set out in the Respondent's Tribunal Response, was capability, relating to long term absence, and/or some other substantial reason. Our preliminary reading of the Respondent's witness statements however, suggested that the reason being advanced was conduct. Mr Willoughby however confirmed that the reason for dismissal being advanced was capability, with the alternative, some other substantial reason, encompassing some matters of conduct.

5. We proceeded on the basis that we would initially reach conclusions on liability, i.e. on whether any of the Claimant's claims succeeded, and on two general aspects of remedy; whether any compensation should be reduced to reflect the chance that the Claimant would have been fairly dismissed in any event, and/or whether any compensation should be reduced to reflect any contributory conduct on the part of the Claimant. If appropriate we would then go on to consider remedy and what compensation to award at the end of the hearing if time allowed, or at a subsequent hearing. In the event there was insufficient time to deal with compensation at the end of the hearing and therefore a subsequent Remedy Hearing will be listed.

Relevant Legal Principles

6. Much of the relevant law was included within the List of Issues produced by Judge Ward. However, we bore in mind a number of additional principles.

Disability

7. We considered the Government Guidance on matters to be taken into account in determining questions relating to the definition of disability. We noted that the question of mental impairment is to be given its ordinary meaning and can include mental health conditions such as anxiety, and mental health illnesses such as depression.

8. The Equality Act itself provides that "substantial", in terms of the effect of any impairment, means "more than minor or trivial" and that long term means that the impairment must have lasted for twelve months or have been likely to have lasted for at least twelve months. The Act also provides that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if it is likely to recur. Those matters are to be determined at the date of the alleged discriminatory act or acts and not at the date of the hearing.

9. The Guidance, echoing the House of Lords decision in ***SCA Packaging -v- Boyle*** **[2009] ICR 1056**, notes that "likely" should be interpreted as meaning that it "could well happen" rather than as something which is "probable" or "more likely than not". It also notes that the same test for "likely" applies in relation to the question of whether adverse effects are likely to recur.

10. The Guidance also notes that account should only be taken of the circumstances at the time the alleged discrimination took place and that anything which occurs after that time will not be relevant, echoing the Court of Appeal decision in ***Richmond Adult Community College -v- McDougall*** **[2008] ICR 431**.

11. The question of what are "normal day to day activities" must also be assessed by reference to the ordinary meaning of those words, the Guidance noting that they are "things people do on a regular or daily basis".

Direct Discrimination

12. Section 23 of the Equality Act notes that, for the purposes of the comparison required in a direct discrimination claim, there must be no material difference between the circumstances relating to each case, and that includes the Claimant's and any comparator's abilities.

13. The House of Lords in ***London Borough of Lewisham -v- Malcolm*** **[2008] IRLR 700** (confirmed by the Court of Appeal to apply in the employment field in ***Stockton on Tees Borough Council -v- Aylott*** **[2010] ICR 1278**) noted that the appropriate comparator in a disability claim was a non-

disabled person who was otherwise in the same circumstances as the disabled claimant.

Reasonable Adjustments

14. The question of whether a disabled person has been put at a substantial disadvantage by a provision, criterion or practice ("PCP"), and what steps are required to be taken by virtue of the duty to make reasonable adjustments, must be objectively assessed by the Employment Tribunal. The EAT in ***Environment Agency -v- Rowan*** **[2008] ICR 218** identified that the Tribunal should identify the nature and extent of the substantial disadvantage caused by the PCP before considering whether any proposed step was a reasonable one to have to take.

15. In order for a reasonable adjustments claim to succeed, there must be some causative connection between the disability relied on and the "substantial disadvantage". The EAT in ***Project Management Institute -v- Latif*** **[2007] IRLR 579** noted that the Tribunal should look at the "overall picture" when considering the effects of any disability, and that there must be evidence of some apparently reasonable adjustment which could be made.

16. In assessing the reasonableness of any step, regard should be had to its likely efficacy, practicability and cost. So far as the efficacy of any step is concerned, it is only necessary to establish that there was a real prospect of the step avoiding or reducing the relevant disadvantage.

17. In addition, we had to be satisfied, in relation to the reasonable adjustments claim, that the Respondent knew, or could reasonably have been expected to know, that the Claimant had a disability and was likely to be placed at a disadvantage by the PCP or PCPs.

Unfair dismissal

18. As noted in the List of Issues, the first step for us to take would be to consider whether we were satisfied that the Respondent had demonstrated a potentially fair reason for dismissal. As we have noted, there appeared to be some confusion as to the Respondent's reason for dismissing the Claimant. The long-established Court of Appeal decision of ***Abernethey -v- Mott, Hay and Anderson*** **[1974] ICR 323** noted that the reason for dismissal is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. The label applied by an employer to its reason for dismissal is not determinative and our approach therefore was to identify the reason for dismissal by examining all the facts and beliefs that appeared to cause it.

19. If we considered that the principal reason for dismissal was capability, as advanced by the Respondent in its Response, we would need to consider whether dismissal for that reason was fair in all the circumstances. The Court of Session, in ***BS -v- Dundee City Council*** **[2014] IRLR 131**, noted that this encompassed assessing whether the respondent could reasonably have been expected to wait longer before dismissing, the steps taken by the respondent to discover the claimant's medical position, and the extent to which it consulted with the claimant about their position. If we considered that the principal reason was conduct, we would need to apply the well-known test set out in ***BHS -v- Burchell*** **[1978] IRLR 379**. This would involve considering whether the Respondent had a genuine belief in the Claimant's guilt, whether that was based on reasonable grounds, and whether those grounds were drawn from a sufficient investigation.

20. If we considered that the principal reason for dismissal was "some other substantial reason", we had to be satisfied that the reason was indeed "substantial", and the Respondent was not relabelling capability or conduct as some other substantial reason for convenience.

21. In all cases, we had to assess whether dismissal fell within the range of responses open to a reasonable employer acting reasonably in the circumstances, taking care not to impose our own view of what may or may not have been appropriate.

Findings

22. Our findings, on the balance of probabilities where there was any dispute, on the factual matters relevant to the issues in this case were as follows.

23. The Claimant, aged 40 at the time of dismissal, asserted that he had suffered issues with his mental health for many years, since being a teenager. There was no direct evidence before us to support that, as the Claimant's disability impact statement did not go into detail and his medical records in the bundle only went back as far as March 2016, as he had changed surgeries at that time.

24. However, we noted that those records indicated that the Claimant had been on anti-depressant medication for some time, and that, in November 2016, he had had suicidal thoughts and had self-harmed. We saw no reason to doubt therefore that the Claimant had suffered from anxiety and depression for many years.

25. At some point in the past, the GP records suggested 2016, but that was not entirely clear, the Claimant was homeless for a short time, but he then obtained assistance from various agencies which allowed his condition and

circumstances to improve, and which led to him obtaining his job with the Respondent in January 2018.

26. The medical records record that the Claimant stopped being prescribed anti-depressant medication in September 2017 and that he only recommenced taking that medication in April 2020. At that point the Claimant was prescribed Mirtazapine at a dosage of 15mg, with that being increased to 30mg in June 2020. The dosage in 2016 and 2017 had been 15mg at all times.

27. The Claimant started work with the Respondent, a company which produces bread products for retail customers, in January 2018. He was initially recruited to work on the production line, but was swiftly promoted to Production Line Leader and, after a period on secondment to the role, became Health and Safety Coordinator.

28. The Claimant indicated that, whilst undertaking that role on secondment, he discussed his mental health issues with the Respondent's then HR Coordinator. We heard and saw no evidence relating to that and considered that, whilst the Claimant may well have discussed his mental health with the HR Coordinator, it did not reach the level of putting the Respondent on notice of the Claimant's condition as there was no onward discussion of it at the time. Mr Podmore and Mrs Taylor who both joined the Respondent later, were unaware of any such conversation, and we were satisfied that they had no knowledge of, and could not reasonably have had knowledge of, any possible disability of the Claimant's prior to March and April 2020 and subsequently. As we have noted, the Claimant was not on any medication during that period and nor did he have any material sickness absences during that period.

29. No issues arose in relation to the Claimant's conduct or performance until 25 March 2020. On that day, the Claimant, who was to deliver health and safety training, did not arrive at work on time and could not be contacted. When he did arrive, he told the Respondent's managers that he had visited his father, a resident in a care home, and whilst there his telephone, wallet and keys had been stolen, and that he had subsequently been at home waiting for a locksmith to arrive. However, when Mrs Taylor rang the Claimant's mobile telephone number to see if it would be answered, it was found to be in the Claimant's pocket, along with his keys and wallet. It was also noted that care homes had, by then, been closed to visitors. In the circumstances, the Claimant was suspended and directed to attend an investigatory meeting the following afternoon.

30. During that meeting, the Claimant provided a convoluted explanation for the events of 25 March, essentially revolving around a practical joke having been played on him by his father and another resident at the care home. It

was decided that the matter should proceed to a disciplinary hearing, which was scheduled for 1 April 2020, with Mr Podmore being the decision-making manager.

31. During that hearing, the Claimant again maintained his story about the events on 25 March. During an adjournment, Mr Podmore and Mrs Taylor telephoned the care home and were told that no visitors had been allowed for the previous two and a half weeks, and also that they did not have a resident by the name of the Claimant's father. Mr Podmore also noted that a document that the Claimant had brought into evidence the change of locks was simply a generic letter from the Claimant's Housing Association.

32. Mr Podmore pointed out that none of what the Claimant was telling him made any sense. He suggested a further adjournment and asked the Claimant how his mental health was. Following the adjournment, the Claimant confirmed that there had been no robbery and apologised for wasting everyone's time. He confirmed that he had drunk heavily and then made up a story to explain his absence, which had then snowballed to a point where he had felt unable to own up to the truth.

33. The Claimant noted that, for months, he had been putting on as much bravado as he could, putting his head down and ignoring the stuff going on outside of work. He also referred to trying his hardest to get back, and that he had "been down that road before". Mrs Taylor confirmed that there were numbers of helplines on the Respondent's notice board, and she later provided the Claimant with those numbers by email. The Claimant also referred to having been offered to go back on anti-depressant medication.

34. Mr Podmore confirmed that he would issue the Claimant with a final written warning and that he would move him back to factory work, commencing on 4 April 2020. He also confirmed that he would keep the reason for the move confidential and that he hoped that the Claimant could rebuild and work his way back to the health and safety role. He confirmed the outcome by letter of the same day.

35. The Claimant however did not attend work on 4 April 2020, and indeed never returned to work again. He was certified as unfit for work, due to anxiety and depression, initially in April, and then again in May and June.

36. The Respondent's rules provide that absences of over five working days require a medical certificate, the original of which must be handed in to enable payment of statutory sick pay. At this point however, soon after the initial Covid-19 lockdown, there were delays and difficulties in getting Fit Notes and in the postal system. The Claimant therefore scanned or photographed his Fit Notes, and sent them by text or email to Mrs Taylor, before sending the originals to her by post. She was, at least initially, happy

to proceed on that basis, and to process the Claimant's SSP payments on receipt of the scanned or photographed Fit Notes, relying on the Claimant to send them in through the post subsequently.

37. The Respondent consciously did not contact the Claimant during his initial period of absence, other than to chase up his Fit Notes. By the end of May however, Mrs Taylor wrote to the Claimant, on 29 May, noting that he was being invited to an informal wellness meeting with her and Mr Podmore on 1 June 2020.

38. In that regard, we noted that the Respondent did not have any developed absence or attendance policies, with its company rules only saying that where an employee has been absent for a long time, the company may require them to undergo a medical examination, and may also contact the employee's doctor for information regarding their health, which would not be done without their written consent. Mrs Taylor however confirmed that her first step would always be to arrange an informal wellness or welfare meeting with an absent employee, before taking any further steps. She confirmed that in her time with the Respondent (she started in October 2019), the point had not been reached in any case where there had been a referral for a medical examination.

39. The Claimant swiftly replied to Mrs Taylor's email noting that he was unsure if he would be able to attend the meeting commenting, "I'm really struggling mentally at the moment and spent most days isolated and alone in my flat as have been experiencing massive panic attacks when I try to go out". He went on to say that he would do his very best to arrange transport for the following Monday, but could not guarantee he would be able to leave. He concluded by asking if a telephone or video call was an option to conduct the meeting.

40. Mrs Taylor replied soon after to the Claimant, telling him not to worry as she and Mr Podmore could visit him. She asked him to let them know a convenient time for that. She did not comment on the Claimant's suggestion of a telephone or video call, but did confirm in her evidence before us that the Respondent, in common with many organisations, was getting to grips with video technology at the time and that a video call would have been feasible.

41. We observed that Mrs Taylor and Mr Podmore in their evidence indicated that they felt that a visit to the Claimant's home would have been permissible as they, as a food producer, were allowed to travel. Whilst we did not doubt the sincerity of that belief, we doubted that such travel would have been viewed as permitted at the time as it was not for the purposes of food production.

42. Mrs Taylor then sent a further email to the Claimant on 1 June 2020 enquiring if it was still ok for she and Mr Podmore to visit that day. The Claimant replied the following day saying that he was in no position to leave the flat or see visitors. Mrs Taylor replied shortly after, saying that there were no worries, that she just wanted to check in to see how the Claimant was, and that she would speak to him in a few weeks to see how he was feeling then.

43. The Claimant then sent a further email later on 2 June 2020 in which he said, "To be honest, I'm not well and I'm not coping. I'm struggling to find a reason to get out of bed each day and suicide is a regular contemplation. I'm in regular contact with my GP but all they can do is keep increasing my dosage of Mirtazapine which I'm not even sure is doing any good anyways. I just can't get my head straight but I'm really trying."

44. After some further emails between the Claimant and Mrs Taylor around his Fit Notes, SSP, and the fact that he had been placed on furlough in error, the Claimant, in one of those emails, volunteered that he would be available for a meeting on Friday 19 June if convenient, and that he would like to go to the Respondent's premises as he needed to start trying to go out.

45. Mrs Taylor responded suggesting 2pm on 19 June for the meeting, but the Claimant emailed in response the following day, noting that that would not be possible as he had forgotten that his Housing Association was due to visit for an annual boiler inspection between the hours of 10am and 3pm. He concluded by saying that on Tuesday 23 June he should be able to meet, if that was acceptable for Mrs Taylor. She replied, suggesting 12.30pm on that day.

46. The Claimant did not respond immediately, but on Monday 22 June, he emailed Mrs Taylor raising a concern about being furloughed without his agreement. He noted that that would have an impact on his Universal Credit, which was covering his rent, and that his anxiety levels were "through the roof". Mrs Taylor replied later that day, noting that there appeared to have been an administrative error and that the Claimant would be returned to SSP immediately. In her email, Mrs Taylor also noted that Mr Podmore had tried to call the Claimant twice with no response, and that the Claimant had not replied to her earlier messages about a welfare meeting on 23 June. She concluded by saying that they needed to get this (we presumed the welfare meeting) resolved that week, and asked the Claimant to confirm if he would be attending on 23 June or, if not, what alternative arrangements he was planning. The Claimant replied on 23 June 2020, suggesting that he go in for the welfare meeting at 2pm on Friday 26 June 2020.

47. However, on Thursday 25 June 2020, the Claimant emailed Mrs Taylor again, apologising and noting that 26th was the day on which he needed to sort out his next Fit Note. He also said, "Without sounding like a moan, the thought of going anywhere (apart from the shop just up the road preferably after 10.30pm so it's dark) is still a little daunting and tomorrow is going to be a tough day for its 3 years my brother buggered off and even though my sister and I are not speaking at the moment…. I'd be very surprised if she doesn't show up on my doorstep at some point in the day". He concluded by asking if the meeting could be arranged for the following Monday or Tuesday, 29 or 30 June 2020. Mrs Taylor replied on 26 June asking if the Claimant could make Tuesday 30 June at 1.30pm, and the Claimant confirmed that he could.

48. On Monday 29 June, the Claimant emailed his latest Fit Note to Mrs Taylor, and she replied asking him to bring the original with him the following day as the Respondent's Head Office would not accept photos via a phone.

49. On Tuesday 30 June 2020 at 12.42pm, Mrs Taylor emailed the Claimant asking him to confirm that he was going in at 1.30pm that day. The Claimant replied at 1.11pm, saying, "My intention was to come in today for meeting but I can't leave the flat. I know it sounds like a completely feeble excuse but I've worked myself up into a state and now I'm frantic I don't know why as I've been ok this morning but the last hour I've been going out of my mind. I've booked and cancelled 3 taxis now and feel like I just need to go back into bed and hide. I'm truly sorry to mess you all around I wish I could leave as planned".

50. Mrs Taylor did not communicate further with the Claimant in relation to the meeting, his health, or any other matter. Instead, the next step taken by the Respondent, on the following day, was for his new manager to write to him confirming that he was being dismissed. This was stated to be further to the Claimant's continuous absence and his inability to fulfil his contractual obligations, and his failure to attend agreed wellness meetings on 1 June, 26 June and 30 June 2020. The manager confirmed that he had made the decision to terminate the Claimant's contract of employment with immediate effect, although he went on to say that the letter served two weeks' notice effective from that date.

51. We did not hear from the manager about his decision, but Mr Podmore, in his witness statement, confirmed that he was in agreement with the decision, noting that the Claimant was already on a final written warning. In his statement, Mr Podmore indicated that he now understood that the dismissal was procedurally flawed due to the lack of a disciplinary meeting, but that he did not think that that would have made a difference. He noted that the Claimant had failed to keep in contact with the Respondent, had

failed to provide Fit Notes, even after being told to do so, and had been actively working on his own venture when signed off sick.

52. In that regard, there were, in the bundle, several screen shots from the Claimant's Facebook page, noting that various vaping products were available. However, the Claimant confirmed in his evidence before us, that that only involved swapping products, many of which he had obtained via raffles, between like-minded members of a Facebook community, and did not involve any business. We saw no reason to doubt that evidence and therefore accepted it.

53. With regard to Mr Podmore's other contentions, we noted that, whilst the Claimant had failed to meet with the Respondent, he had been in regular contact with Mrs Taylor once she had initiated contact with him at the end of May 2020, and that she was aware of his various reasons, medical and non-medical, for not attending. We also noted that the Claimant had been providing Fit Notes, both photographed or scanned by email and as hard copies in the post, and that Mrs Taylor had appeared to accept that. Indeed she had reminded the Claimant to bring the original Fit Note dated 26 June 2020 with him when he attended on 30 June.

54. The manager's letter informed the Claimant of his ability to appeal the decision and the Claimant did appeal by letter dated 7 July 2020. In that, he noted that the reasons for dismissal were not altogether clear, but that he understood them to be his continuous absence, his inability to fulfil his contractual obligations, his failure to attend wellness meetings on 1, 26 and 30 June, and his failure to submit sick notes on time. He addressed each of those points.

55. The appeal hearing was initially scheduled for 16 July 2020, but was rearranged to 23 July 2020 due to the unavailability of the Claimant's companion. The hearing was conducted by Mr Anslow, who provided his decision by letter dated 31 July 2020.

56. In that, he noted the Claimant had identified five concerns:

> "1. You have struggled with your health since your previous disciplinary in April 2020, which resulted in your demotion and removal from the role of H & S Coordinator;
> 2. You suggested that you have been unable to attend any meetings with us because of your health;
> 3. You indicated you have not received a copy of the Company handbook, so unaware of the rules requiring you to submit Fit Notes and to keep in touch;
> 4. You believe the Company have failed in its duty of care as your employer and failed to provide assistance to you;

5. You raised concerns about the admin error relating to being put on furlough, when you were in fact on sick leave;"

Mr Anslow responded to each of them and then concluded, "you have unfortunately failed to ensure the Company received your sick notes in a timely manner, and in accordance with the Company Rules. The email communication between yourself and HR, and Payroll demonstrates there were occasions when the Fit Notes (MED3) were not provided, or not sent to HR as requested. I appreciate that on one occasion you explain that your internet was disconnected, but it is your responsibility to ensure the Company receive the Fit Notes".

57. Mr Anslow concluded by saying that he had decided to uphold the original decision to dismiss the Claimant with notice. In his witness statement, Mr Anslow noted that, "the reason for his dismissal was that he had failed to provide his sick notes, which is a requirement of the Company's Rules. Dale had also failed to comply with the Absence Reporting procedure and it is made clear to staff that failing to follow these processes will lead to discipline. Dale was already on a final warning following his discipline in April 2020".

58. Following his dismissal, the Claimant's mental health appeared to deteriorate further. The GP notes indicated that, in late July, he was referred to the Primary Care Mental Health Support Service and that, in August, he was admitted to hospital. In his evidence, which we had no reason to doubt, the Claimant indicated that he had, in fact, been sectioned following more than one suicide attempt.

Conclusions

59. Applying our findings to the issues identified at the outset, and taking into account the prevailing law, our conclusions were as follows.

Disability

60. First, with regard to the issue of disability, we noted that the Claimant had been suffering from anxiety and depression for many years, which, in 2016 had led him to self-harm and to thoughts of suicide, and to being homeless. We considered that at that time the impact of the Claimant's condition on his day to day activities was obvious.

61. We noted that the Claimant had not sought medical advice, albeit he had had support from organisations such as MIND, between September 2017 and April 2020, and had not taken anti-depressant medication during that period. During that period the Claimant had successfully held down his job with the Respondent and therefore his condition could reasonably be

considered to have ceased to have had a substantial adverse effect on his ability to carry out day to day activities at that time. However, we noted that paragraph 2(ii) of Part 1 of Schedule 1 of the Act provides that if an impairment ceases to have the required adverse effect it is to be treated as continuing to have that effect if it is likely to recur, likely meaning "could well happen".

62. In that regard, we noted that the Claimant had suffered from the condition for over 20 years, had been severely impacted by it in the past, and was again severely impacted by it in May 2020 when he was unable to leave his flat to attend an informal meeting with the Respondent and had thoughts of suicide. We were therefore satisfied that the adverse effect had been likely to recur at all times and therefore that the Claimant was disabled at the relevant times.

63. In any event, we were satisfied that even if we looked at the Claimant's position afresh from March 2020 onwards, i.e. on the basis that we did not consider that the adverse effect had been likely to recur after September 2017, we would still nevertheless have considered that the Claimant was disabled at the relevant times, i.e. between March and July 2020.

64. In that regard, we noted that paragraph 2(i) of Part 1 of Schedule 1 of the Act notes that an impairment is long term if likely to last, and have the required adverse effect on day to day activities, for at least 12 months, even if it has not, in fact, lasted for 12 months at the time. Again, we noted that "likely" in this context means "could well happen". We noted that the Claimant was severely affected by his condition during the months of March to July 2020. It had caused him to fabricate a bizarre story around the events of 25 March 2020 which had led Mr Podmore to question whether the Claimant had a mental health problem, and to Mrs Taylor providing the Claimant with details of mental health advice services. In May and June, the Claimant had then been unable to leave his flat, even to attend an informal meeting with the Respondent, was suffering with panic attacks, and had contemplated suicide. He was also re-prescribed anti-depressant medication, with the dosage being increased.

65. In our view, particularly when the impact of medication is discounted, as it must be, it was likely that the Claimant's condition and its adverse impact on his day to day activities, would last for at least 12 months from March 2020 onwards.

66. By either route therefore we were satisfied that the Claimant was disabled for the purposes of the Equality Act 2010.

67. Whilst knowledge of disability is not relevant for direct discrimination claims, it is a relevant matter in relation to reasonable adjustment claims, as Part 3

of Schedule 8 of the Act provides that an employer is not subject to a duty to make reasonable adjustments if it does not know and cannot reasonably be expected to know that the employee is disabled and is likely to be placed at the required disadvantage.,

68. In that regard, we accepted that the Respondent, in the form of Mr Podmore and Mrs Taylor, did not have the required knowledge before March 2020. We did not consider that the Claimant had raised any issue regarding his condition with the Respondent generally or with Mrs Taylor and Mr Podmore specifically, and the Claimant had been at work throughout. There was therefore no reason for the Respondent to consider the Claimant to have been disabled at that time.

69. However, we considered that that state of affairs changed from late March 2020 onwards. The Claimant's behaviour at the meeting on 1 April 2020 was, as noted by Mr Podmore, out of character, and he himself raised the question of the Claimant's mental health. Mrs Taylor also provided details of mental health support to the Claimant after that meeting. Simply from our reading of the minutes of the meeting, the Claimant comes across as incoherent. One of our number described being in a position where the Claimant's anxiety could be felt coming through from the meeting notes.

70. The email exchanges with Mrs Taylor in May and June 2020 then indicated the Claimant was someone who was more than "a bit down". He described massive panic attacks, that suicide was a regular contemplation, and that he was going out of his mind and felt like going back into bed and hiding.

71. Mr Podmore confirmed that Mrs Taylor had kept him advised of those exchanges, and that he had informed the Claimant's manager of them. Mr Anslow also confirmed that he was aware of the email exchanges. In our view, anyone reading them should reasonably have concluded that the Claimant was someone who was suffering from a disability, and therefore that the continued application of the Respondent's procedures without adjustment could put him at a substantial disadvantage.

<u>Direct discrimination</u>

72. Turning to the direct discrimination claim, we were not satisfied, because of the strict comparison requirements, that there had been direct discrimination. As we have noted, the comparison was between the Claimant and someone presenting in exactly the same way as the Claimant, but who was not classed as disabled. We saw nothing to suggest that the Respondent would have treated such a comparator any differently to the Claimant, and did not therefore consider that he had been treated less favourably than a hypothetical non-disabled comparator would have been treated. His claim of direct discrimination therefore failed.

Reasonable adjustments

73. Turning to the reasonable adjustments claim, we noted the issues for us to consider, as set out in paragraph 5 of Judge Ward's List of Issues. The first matter for us to consider was whether any PCPs were applied by the Respondents. The stated PCPs were; attendance at work, attendance at wellbeing meetings under the Respondent's capability procedure, and submitting sick notes.

74. The Respondent did not contend that these matters were incapable of amounting to PCPs, and we were satisfied that they were.

75. We then had to consider whether the PCPs put the Claimant at a substantial disadvantage compared to someone without his disability, and we were satisfied that they did. The requirement to attend work is fairly clearly something which would impact more disadvantageously on the Claimant or someone with the Claimant's condition, as they would be more likely to be unable to work due to their illness.

76. Similarly, the requirement to attend wellbeing meetings would be more disadvantageous to someone with the Claimant's condition as they would be less likely to be able to leave their flat or house to attend such a meeting.

77. Similarly, whilst perhaps not as clear, the requirement to submit sick notes was something which could potentially put someone with the Claimant's condition at a disadvantage compared with others, as they would be less likely to be able to attend at their surgery to obtain sick notes than others.

78. Turning to the steps that could reasonably have been taken to avoid any disadvantage, we noted that six were set out in List of Issues. The first two could be taken together, as they largely involved the same thing, i.e. providing extra time to recover from ill health and delaying applying the capability procedure.

79. We considered that these were steps that the Respondent could, and should, have taken to reduce the disadvantage experienced by the Claimant. They were relatively straightforward steps to be taken in circumstances of long-term sickness absence. Indeed, they were steps which the Respondent's own rules suggested would be taken, and, had they been taken, the Claimant's condition and its impact on him could have been more clearly identified, together with possible sources of treatment the Claimant could have followed. Whilst we could not say with certainty that the Claimant would have recovered sufficiently to be able to return, had he been given more time to recover and had the Respondent delayed in

applying its capability procedure, indeed had it even applied its capability procedure, there was at least a decent chance that he would.

80. With regard to the third asserted reasonable adjustment, that of being allowed to attend meetings by remote access, bearing in mind that the Claimant at the time had indicated his inability to leave his flat to attend the required informal wellness meeting, allowing a video hearing would, in our view self-evidently, have removed the disadvantage experienced by the Claimant as a result of the expectation that he attend a face-to-face meeting. Whilst we could understand the Respondent's preference for such a meeting, in the circumstances it would have been a reasonable adjustment to hold it by video, which both Mr Podmore and Mrs Taylor confirmed had been feasible.

81. With regard to the fourth asserted reasonable adjustment, allowing for an alternative method of receiving sick notes, we noted that the Respondent had informally operated such a procedure which appeared to have operated smoothly, with any potential impact actually falling on the Claimant due to a delay in him receiving SSP. We saw no reason why that practice could not have continued, and concluded that it would have been a reasonable adjustment to have done so.

82. Turning to the fifth asserted reasonable adjustment, obtaining access to the Claimant's full medical notes, this tied in, to a degree, with the first two. If the Respondent had in fact applied its capability procedures, limited as they were, they would have obtained an Occupational Health Report and/or obtained the Claimant's medical records. That would then have provided them with more information on the Claimant's health and ability to return, which would potentially have opened up discussions about ways in which the Claimant could have returned.

83. We did not however consider that attempting to find an alternative role for the Claimant would have been a reasonable adjustment in the circumstances. The Claimant was, at the time, unable to engage with the Respondent as requested, and we did not consider that a discussion of an alternative job would have led to any improvement in his circumstances at the time.

84. Overall therefore, the Claimant's claim of failure to make reasonable adjustments succeeded.

<u>Unfair dismissal</u>

85. Turning to the unfair dismissal claim, as we have noted, the Respondent's position in relation to its reason for dismissing the Claimant was unclear and confused. Ultimately, considering the evidence, in particular the clear

statements of Mr Podmore and Mr Anslow, that the dismissal was fair by reference to the Claimant's final written warning, i.e. related to his conduct, we concluded that the actual reason for dismissal was the Claimant's conduct.

86. Considering whether dismissal for that reason was fair in all the circumstances, we concluded that it was not. No investigation was undertaken in relation to the question of whether the Claimant had committed an act of misconduct. Had one been undertaken it would have been made clear that the Claimant was suffering from ill health and that any misconduct, in the form of failing to maintain contact and/or provide Fit Notes in the required manner, had been impacted by that ill health.

87. We also noted that no hearing took place, the Claimant was not told the case that he had to meet, and therefore had no opportunity to respond. Whilst those aspects were, to a limited degree, rectified on appeal, the appeal did not amount to a re-hearing and we therefore did not consider that it cured the defects at the earlier stage.

88. We did not therefore consider that any employer acting reasonably in the circumstances as they prevailed would have considered that the Claimant had committed an act of misconduct, and would therefore have dismissed the Claimant, even in the circumstances where he was subject to a final written warning.

89. For completeness, we also considered whether dismissal by reason of incapacity would have been fair and concluded that it would not.

90. We noted that key aspects of establishing a fair dismissal on the ground of incapacity arising from ill health are to take steps to evaluate the medical position and to consult with the employee on that and on the steps that might then arise. Neither of those took place, and therefore, had the reason for dismissal been incapacity, we would nevertheless have found it unfair.

91. For clarity, we did not consider that a reasonable employer would also have concluded that dismissal should ensue on some other substantial reason grounds. There was nothing to suggest that anything "substantial" had arisen over and above the asserted conduct issues or the Claimant's ill health.

Adjustments to compensation

92. Finally, turning to the question of whether any financial award to the Claimant arising from a successful claim should be reduced, either on the basis of the ***Polkey*** test, i.e. that a fair dismissal could have ensued in any event, or on the basis of contributory conduct, we did not consider that any

deduction should be made on account of the latter. We did not consider that the Claimant had been guilty of any culpable or blameworthy conduct which justified such a reduction.

93. We did however consider that a deduction should be made on account of the former. We noted that the Claimant was severely unwell by the end of June 2020, and, notwithstanding that the dismissal itself would be likely to have led to a deterioration in his condition, we considered that, even had the Respondent applied a capability procedure and obtained medical advice, it may have been the case that the Claimant would not have recovered sufficiently swiftly to be able to return to work within a reasonable time period.

94. Overall, assessing matters as best we could, we felt that it was as likely that the Claimant would not have been able to return in those circumstances as it would have been that he would, and therefore that a 50% reduction to the compensatory element of any award would be appropriate.

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Employment Judge S Jenkins
Dated: 3 August 2021

REASONS SENT TO THE PARTIES ON 6 August 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche