EMPLOYMENT TRIBUNALS

Claimant: **Mr L Lawson**

Respondent: **Costco Wholesale UK Limited**

Heard at: London South **On: 20-22/09/2021**

Before: **Judge McLaren**
Members: **Mr. G Anderson**
Mrs. N Beeston

Representation
Claimant: In Person
Respondent: Ms. G Rezaie, Counsel

JUDGMENT

The unanimous decision of the tribunal is that

1. The complaint of unfair dismissal is not well founded. This means that the respondent fairly dismissed the claimant.
2. The respondent has not contravened section 13 Equality Act 2010 either by failing to get in touch with the claimant during his sickness absence, in particular in relation to contact regarding possible dismissal, or by dismissing him.
3. The respondent has not contravened section 15 of the Equality Act 2010 either by failing to get in touch with the claimant during his sickness absence, in particular in relation to contact regarding possible dismissal or by dismissing him.
4. The claim for breach of contract does not succeed. The claimant was not entitled to payment in lieu of notice.

REASONS

Background

1. We heard evidence from the claimant on his own account and from his partner, Ms Emylly Ombok and from Ms Susan Knowles, Marketing Director, and Mr Everton Green, Merchandise Manager, on behalf of the respondent. We were provided with a bundle of 364 pages. It seemed from the correspondence that there had been some issues raised by the claimant about incomplete disclosure, but he confirmed that he was

satisfied with the documents in the bundle and did not wish to raise any further points on this. He was content to proceed with the documents that have been disclosed.

2. In reaching our decision we have considered all the evidence we heard and those parts of the documents in the bundle to which we were directed. We were assisted by helpful submissions from both parties.

Issues

3. There had been a number of preliminary hearings on this case and the issues had been set out in a Case Management Order of 14.02.21. They had then been confirmed by the respondent in its amended grounds of response and we took the claimant to this issues list to confirm that they were agreed.
4. In particular it was explained to the claimant that the tribunal was not dealing with any complaints of race discrimination or harassment in relation to any protected characteristic. The tribunal was also not dealing with any claim for reasonable adjustments. The claimant's witness statement addressed all these matters, although they were not claims that he had brought, and the claimant confirmed that he accepted that this was the case.
5. We clarified and confirmed that there were three claims brought, unfair dismissal, discrimination (direct discrimination and discrimination arising from disability on the ground of the protected characteristic of disability), and breach of contract i.e. failure to pay notice pay.
6. We explained the importance of an issues list and parties confirmed that the issues set out below properly reflected the pleaded case and were the issues to be determined in this matter.

Unfair Dismissal

(i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996("ERA")? The respondent says the dismissal was for conduct or some other substantial reason.

(ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

(iii) if the claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed?;
b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
c. did the claimant, by blameworthy or culpable actions,

cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section.123(6)?

Direct Disability Discrimination (s13 Equality Act 2010)

(iv) Has the respondent subjected the claimant to the following treatment:

a. Failing to get in touch with him during his sickness absence, in particular in relation to their failure to contact him regarding his possible dismissal;
b. Dismissal

(v) Was that treatment "less favourable treatment", i.e., did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant compares himself to Mr Lee Tucker.

(vi) If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

EQA section 15: discrimination arising from disability

(vii) Did the following things arise in consequence of the claimant's disability?

a. Failing to get in touch with him during his sickness absence, in particular in relation to their failure to contact him regarding his possible dismissal.
b. Dismissal

(viii) Did the respondent treat the claimant unfavourably as follows:

a. Failing to get in touch with him during his sickness absence, in particular in relation to their failure to contact him regarding his possible dismissal.
b. Dismissal

(ix) Did the respondent treat the claimant unfavourably in any of those ways because of his sickness absence?

(x) If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the legitimate aims set out at paragraph 22 of the amended grounds of resistance.

(xi) Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

Breach of Contract

(xii)To how much notice was the claimant entitled?
(xiii) Did the claimant fundamentally breach the contract of employment? The respondent relies upon a breach of the implied term of trust and confidence.

Finding of facts

7. The respondent is a cash and carry membership warehouse club operating a network of 28 warehouses in the UK. The claimant started work on 6 October 2008 and was employed in the Croydon warehouse.
8. From June 2012 the claimant held the role of receiving supervisor which meant that he had key responsibilities for unloading, intake, storage and distribution of merchandise throughout the warehouse.

Contractual documentation

9. The claimant accepted that he had signed the respondent's employee agreement and had read the agreement and knew that he was responsible for complying with its policies. His signed acknowledgement was at page 106 of the bundle.
10. The employee agreement contains a number of clauses that are relevant to the issues in this case. At paragraph 4.3 the agreement sets out that the respondent had the right to demote an individual where that demotion was preceded by serious misconduct which could result in termination of employment.
11. The claimant also accepted that the respondent had the right under the terms of the employment agreement to terminate employment without notice or payment in lieu in the event of gross misconduct.
12. The employee agreement contained a disciplinary policy and procedure which at page 93 of the bundle set out some non-exhaustive examples of matters where employment may be terminated without notice. This included job abandonment, which was defined as "*failure to report to work for three consecutive days without notifying management or un authorised absence for three consecutive days, including incarceration*." It also included violation of the respondent's policies including unauthorised leave of absence or failure to provide required documentation for a leave of absence.
13. The employee agreement also contains terms related to sickness and at page 113 provided that if an individual was off sick they should notify their supervisor or duty manager of absence one hour before the start of the shift. The agreement also specified that the individual must keep their supervisor advised on the progress of illness and likely date of return to work. Absence of more than seven days required an original medical certificate signed by a doctor.
14. The agreement provided at page 114 under the heading "release to return to work", that after an absence of serious illness an individual must present a release from the doctor before returning to work. Ms Knowles explained that the policy did not mean quite what it said, and that there was no requirement for someone in the claimant's circumstances to bring a release from the doctor before returning to work. We find that he was expected to return to work after the expiry of his fit note unless he had had conversations with his line management to the contrary.
15. Ms Knowles was asked by the claimant about where a policy on consulting with staff was. This was in response to her witness statement

which said that in all instances of sickness absence the appropriate course was determined in consultation with the employee. Her witness evidence appeared to refer to a policy within a risk management document. We accept her evidence that there is no obligation on a line manager to contact the employee. The obligation is on the employee. However, conversations were encouraged and any long-term sickness absence and return to work would usually be dealt with in a consultative way via communications between the two parties.

16. Ms Knowles was unaware of whether, in the claimant's case, there had been any such communication. Mr Green and the claimant were able to answer this point and we accept that there was no communication until after 30 June 2018.

Events leading up to the employee's absence and change of departments.

17. In September 2017 an incident was identified where the claimant had taken a personal shopping trolley filled with unpurchased merchandise beyond the cash desk and left it unsupervised in an unauthorised area of the warehouse not covered by CCTV.
18. The bundle contains, at page 167, a note from Kevin Ager describing a review of CCTV on the morning of 17 August seeing the claimant picking up two pairs of Armani jeans and polo shirts and other items. The CCTV shows him leaving the exit after clocking out.He does not leave with anything nor does he purchase these items.
19. Following this report, the claimant was invited to attend an investigative meeting on 18 September 2017. A letter to that effect was given to the claimant at work addressed to him at 215 Pampisford Road. The claimant attended the investigation meeting (the notes are at pages 169 – 171). In these notes the claimant indicates that this is an incorrect address. The claimant confirmed that during the meeting, as the notes show, his address was checked with him and the notes confirm that a follow-up letter will be sent in the post as well as being delivered by hand to the claimant. The notes also show that the claimant confirmed that he had made a mistake and had taken items past the point of sale but he had simply forgotten and left them there. When he remembered it was too late to do anything and he assumed that it will be okay and the items would be put back.
20. At page 172 the follow-up letter that is promised is then sent, and that is sent to an address at 24 Deans Walk. We find that this is the address the claimant has identified as his correct address.The letter confirms that there would be a disciplinary process following the investigation meeting. That meeting takes place on 21 September and the notes (page 173 – 176) show the claimant confirming that he has received his letters, all sent to the Deans Walk address.
21. The claimant was given a counselling notice in which, rather than his employment being terminated without notice, he was to be moved to the front end as an assistant with immediate effect. This notice is dated 21 September 2017.The claimant was unhappy with this and did not want to move to the front end. He considered this was a punishment for him and his family because the shift pattern was also different and less accomodating to his family needs.
22. The following day the claimant agreed that he telephoned Mr Ager and asked for seven days holiday so that he could arrange an appeal. This was agreed and the claimant duly sent in a letter of appeal on 29 September. The appeal meeting was arranged for 7 October 2017. The

outcome letter dated 9 October 2017 confirmed that the decision to demote him was upheld.

23. This meant that the claimant was to move departments and therefore line mangers. Mr Green confirmed that the Receiving area was able to, and did, recruit a replacement for the claimant who started a couple of weeks after the claimant's transfer.
24. While the claimant was told which shifts he would be working in the new department at the outcome meeting, Ms Knowles confirmed that the transfer had not been concluded. The HR system was not updated with this change. The intention was for the claimant to meet his new manager on his first day and to sign any paperwork on the new role and reduced pay.This did not occur because the claimant did not attend for work, being unwell.
25. One consequence of this is that the former manager, Mr Green, ceased to have line management responsibilty just before the claimant's absence and his new manager did not pick this up actively because the claimant did not actually transfer to his area.In effect no manager was responsible for the claimant.
26. Ms Knowles told us that managers are empowered to address staff issues , contact staff and refer to Occupational Health. That is not done by HR.In her evidence, while the onus is on the employee to contact work, it was up to the warehouse management to manage the claimant's absence. As no one proactively contacted the claimant no conversations took place and no referral to occupational health.

<u>Motivation for the disciplinary action</u>

27. The claimant's letter of appeal stated that he is being harshly and severely punished for reasons best known to the decision maker. He feels it is unfair and makes reference to the fact that he supported colleagues in racial disciplinary issues. The claimant's witness statement also made reference to his working relationship with the respondent's management breaking down because he raised issues about what he said was the respondent's racially biased hiring and promotion policy.
28. The claimant's witness statement also made reference to the fact that he was an unofficial shop steward and supported other colleagues as a witness and attended meetings for them. The claimant expressly referred to his actions in seeking to have a petition signed and sent to the respondent's management following what he described was a racial incident within the workplace.
29. In cross-examination the claimant suggested that the motivation for the disciplinary was not just his support for colleagues in racial or disciplinary issues, but was also in part his disability, which he said the respondent was aware of.
30. Ms Ombok was also asked if she recalled discussions at the time with the claimant as to why he thought he was subjected to a disciplinary procedure. She also made reference to his support of others with grievance and racist comments, but suggested that they had also talked about disability and she thought that was probably part of it.
31. We find that this was not what the claimant believed at the time. Had he done so he would have raised it in his letter of appeal. He does not do so, but only makes reference in his letter of appeal to the motivation of the disciplinary being his involvement in other people's grievances and discrimination complaints. We prefer the written contemporaneous evidence to the recollection of individuals some considerable period later

and find that the claimant's medical condition played no part whatsoever in this disciplinary action, nor did the claimant think it did.

The claimant's address

32. The claimant confirmed that he has lived at a number of addresses. At the preliminary hearing and in his evidence to this tribunal he told us that he had lived at Pampisford Road before 2010, Violet Lane from 2010 to 2013, Croindene Court at some point in 2013 to October 2015. He then moved to the address in Deans Walk in October 2015 -10 October 2017 and from there to the address in Elm Road where he continues to reside.
33. The claimant was adamant that he had continuously updated the respondent's payroll department by telephoning them to tell them of any change of address.
34. The respondent's HR records for the claimant do not show this. We were taken to pages 230 and 231. This shows that the claimant notified a change of address on two occasions. The first on 6 October 2008 when he moved to an address in Dalton Road and the second was on 8 October 2011 when he moved to the Pampisford Road address.
35. The HR records are inconsistent with the claimant's evidence given at the preliminary hearing and confirmed again in this hearing as to when he lived at this latter address. As we accept his account that he lived in Pampisford Road from 2010, we find that the claimant did not update his employment records in a timely fashion.On his own evidence he did not update the move to Pampisford Road until a year after it happened.
36. We find that the letter inviting the claimant to the investigation meeting on 18 September 2017 was sent to the address on record for him. While the claimant did not amend the central records, local managers then used the address the claimant had provided in the meeting as his current address and the letters dealing with the rest of the disciplinary and appeal outcome were sent to the Deans Walk address. The claimant's personnel records therefore contained a number of addresses for him over and above the official address registered on the HR system as a result of correspondence sent to him and fit notes being received.
37. We accept Ms Knowles' evidence that a change of address must be notified to payroll in writing on a change of address form which an employee can request from payroll.We find that the claimant did not update his address.There is no reason why the company would not amend its records if it was properly provided with the information.We therefore do not accept the claimant's evidence on this point and find that the claimant did not update the respondent about any other changes of address as these are not recorded on the central record.
38. We are suported in this belief because of the address used on the fit notes.There are a number of fit notes in the bundle. They are produced for the period 9 October 2017 to 30 June 2018 and they show the same address for all, that is Croindene Court. That is an address the claimant says he had not lived at since October 2015. He explained that he had discussed this with his GP and had agreed that, because he needed ongoing care for his shoulder which had arisen in 2016, he would keep this address registered with the GP surgery so that there was no question of him having to move to a different practice.We find this unlikely since the shoulder issue arose when the address on the medical records was already incorrect and before there was any issue of ongoing care. We find that the claimant had simply not updated his

address with the GP, which is consistent with his failure to update his employer.

The claimant's disability and sickness absence

39. It was agreed that following the disciplinary incident the claimant never returned to work. He submitted a number of fit notes, the first covering the period from 9 October to 16 October 2017. This is at page 186 and identified that the claimant was suffering from left shoulder pain. This fit note, as indeed did all the others, identified that the GP would not need to assess the claimant's fitness to work at the end of the period.
40. The next fit note covers the period from 17 October to 30 November 2017 and refers to the GP assessing the case on 19 October. It records the same, that is left shoulder pain. The third fit note covers the period 28 November 2017 to 31 January 2018. The next fit note was for the period 31 January to 31 March 2018 and at page 190 there is a fit note for 1 April to 30 June 2018.
41. It is agreed that the claimant's partner hand delivered these fit notes to the respondent's premises and that there was no other contact between the parties during this time. The claimant did not telephone the respondent and no manager from the claimant or anyone from HR made any contact with the claimant prior to July 2018.
42. Mr Green explained to us that after the fit note expired on 30 June 2018 the respondent did not immediately receive another fit note from the claimant. Because the claimant did not attend work or report in sick for the first 3 shifts in July,payroll then notified Mr Green that the claimant was potentially absent without leave.
43. This triggered the "abandonment of role" process. Ms Knowles explained that payroll would attempt to telephone an employee who was absent in this way on three consecutive days. If they were unable to make contact, payroll then passed this information onto the appropriate line manager and asked them to send out a warning letter. She was unable to give evidence as to whether this telephone communication had been attempted by payroll. The claimant said there was no such attempt to reach him. Mr Green's evidence was that payroll had told him they had complied with this part of the process.
44. On the balance of probabilities, we accept Mr Green's evidence. The claimant and his partner had identified that during this period he did not have ready access to his phone and therefore is unlikely to have been aware if the calls had been made or not. There is no reason for payroll to abandon its usual process, particularly when the action it was starting was so significant, potentially involving loss of employment. We are satisfied therefore that payroll did attempt to make this contact on each occasion prior to the abandonment of role letter being sent to the claimant.
45. Accordingly Mr Green wrote the letter at page 191 of the bundle which was addressed to Croindene Court, being the address on the fit notes. Mr Green explained that he had a brief discussion with the individual who would line manage the claimant in his new role and it was agreed that, because that individual had never had any contact with the claimant, line management responsibility for sending out these letters should remain with Mr Green. He sent the letter to the address that payroll identified to him as appropriate, that is the address on the fit notes. We find it is reasonable for the respondent to conclude that an

address on a fit note is a current address, even where this is different from the address recorded on the central HR system.

46. This letter identifies that the claimant had not contacted the warehouse to update anybody on his current circumstances. He was advised that his employment could be terminated where there was no contact or attendance for three consecutive days and he was asked to update the warehouse on his current circumstances within three days of receipt of the letter which is dated 6 July. The letter explained that if he did not make contact, the respondent would have no alternative but to conclude that the claimant had left employment with the company and that termination would be processed.
47. The claimant's partner then delivered a further fit note (page 103 of the bundle) which was provided by the doctor on 6 July and which signed the claimant off from 1 July to 31 July. It later transpired that the letter sent to Croindene Court was returned to the respondent but this did not happen until some two weeks later. At the time Mr Green believed that his letter had been received and had resulted in appropriate action, that is a fit note had been put in.
48. The same thing occurred again on 31 July. No further fit note was received and the claimant was therefore expected back to work on 1 August. When he did not turn up for work on the first three days and failed to make contact, Mr Green recollects that he was chased by payroll to contact the claimant again. He therefore wrote a letter dated 6 August (page 198) which again said that because there had been no contact the claimant was asked to give an update on current circumstances within three days of the receipt of the letter and if he did not do so his employment would be terminated. This letter was sent to the Croindene Court address.
49. The letters were returned to the respondent and by 15 August there had still been no response from the claimant. Mr Green therefore sent a further copy of the letter on 15 August and this was sent to 3 different addresses. Ms Knowles explained that where such a serious letter is to be sent out her instructions to payroll are to search the personnel records and use all and any addresses that can be found in the hope that contact can be made. We accept that this is the reason why the letters were sent to 3 addresses. We also accept that these were the only addresses which payroll could find. All had all been used at various times on documentation either received from or sent to the claimant.
50. The three addresses were the Pampisford Road address shown on the HR system, the Croindene Court address shown on the GP's fit note and the Deans Walk address the claimant had provided prior to his going off sick. All three letters were sent by Royal Mail signed for delivery. The letter sent to the Deans Walk address was signed for. A copy of the proof of delivery was at page 211 of the bundle and it shows a signature which is said to be signed for by Lawson. The claimant says that it is not his signature and he did not receive any of the letters.
51. The proof of receipt slip as well as showing a signature also shows that Royal Mail identified that it was signed for by Lawson as that name is printed on the slip as the identity of the individual who signed for it. Mr Green confirms that he saw a copy of this proof of delivery and formed the view that it had been signed for by Lawson. We find that it was reasonable for him to reach this conclusion based on the evidence in front of him. Whether or not the signature is Lawson, Royal Mail have informed the respondent that that is the identity of the person who signed for the letter.

52. We find that the signature was in fact Lawson in block capitals and find that the claimant did therefore sign for the letter.This is contrary to the finding made at the preliminary hearing,but we make this finding on facts that were not before the previous Employment Judge.
53. As there had been no communication with the claimant on 20 August, the respondent therefore wrote to the claimant at all three addresses notifying him that his employment was terminated with effect from 20 August. He was told that he could appeal that decision in writing within seven days of receipt of the letter. The letters were returned from all three addresses.
54. While Mr Green was aware that a number of letters had been returned to the respondent, he believed that the claimant had signed for one of these letters and was therefore aware of the need to be in touch with the respondent. Mr Green took no steps to telephone or email the claimant. He accepted that he had telephoned the claimant once or twice during his employment in relation to shift changes. We have already found, however, that payroll attempted to call the claimant on three consecutive days on two occasions prior to the letters being sent out and therefore find that the respondent had taken reasonable alternative steps, beyond relying on post, to get in touch with the claimant.
55. Mr Green had worked with the claimant for some time and considered him to be outstanding on paperwork, doing all that was needed in terms of managing his team, as well as, for example, driving a forklift. He clearly respected the claimant's work performance and valued him as a colleague and member of his team. He told us that he knew the claimant to be a proactive individual and he was very surprised by the lack of contact. In his own mind he concluded that the claimant had been so unhappy about the demotion he no longer wanted to work for the respondent and that was why he had not been in touch. He considered that the claimant was making a conscious and deliberate decision and this is an act of gross misconduct for failing to report his absence.
56. Mr Green also considered that the claimant's behaviour undermined the trust and confidence which the respondent would have in the claimant because he was acting in complete disregard for his employment.We find that Mr Green in writing the letters was following the respondent's process and that he had a genuine belief that the claimant was absent without leave and had not responded to requests for contact.
57. Ms Knowles' evidence made reference to a number of other employees who had been dismissed as part of the job abandonment process. She referred to employee X and employee Y and documents relating to their employment and its termination are pages 88A to E for employee X and 88F to J for employee Y. We can see that the process used for these two individuals is the same as that used for the claimant and we accept that the respondent used the job abandonment process for unauthorised absence where there was a lack of contact. The claimant was not singled out in this way.
58. Ms Knowles also set out the business rationale for the job abandonment process being in place and we accept the evidence she gave on this. In summary the respondent is a membership warehouse club and therefore each warehouse needs to be appropriately staffed to ensure high levels of member service are maintained. The business model means there is no spare capacity and temporary work agencies are not used to plug any gaps and therefore the absence of an employee can be significant. She also explained that the company needed to know the reason for employee absences in order to effectively manage its

workforce and to predict and plan potential staff shortages. Managing employee absences was also about maintaining appropriate standards of behaviour.

59. We accept that the respondent had good business reasons to run such a process.

Knowledge of disability

60. Mr Green is clear that he did not know that the claimant considered himself to be disabled. He was aware the claimant suffered shoulder discomfort from time to time but said that the claimant never asked for any changes to his work and was able to carry out the full range of his duties. The claimant in his witness statement explained his role had a manual handling component, loading trucks, delivering bulk goods and putting them on shelves. He also had to deal with rubbish and recycling which included a lot of manual work. Feeding a baler with rubbish needed a lot of physical force to compress the rubbish and recycling. At no time did he ask for any adjustment to these duties and we find that he gave no indication that he needed any adjustments. While we accept that he mentioned a bad shoulder, we find that this is insufficient for Mr Green to understand that the claimant had a disability at the time of the dismissal in 2018.
61. The claimant was never referred to occupational health because no conversations ever occurred, due to the lack of contact. The company did not have any professional input suggesting that disability was the case. While it had the fit notes, the GP did not identify that the claimant was in his/her view disabled under the Equality Act or suggest any adjustments. To the contrary everything suggested that upon expiry of the fit note the claimant would be able to return to work without any further checking from the GP.
62. We also note that at the time of his appeal, which was the last contact from the claimant before he was dismissed,while the claimant sets out a rationale for why he was treated in the way he was, he makes no reference to being disabled. There is no reference to disability or his physical condition in any of the disciplinary notes. We find that there is simply nothing on record that would alert the respondent to the claimant's shoulder problems amounting to a disability.

The claimant's account of the lack of contact

63. The claimant's partner was out of the country for the whole of August and the claimant was on his own in his home. He told us that from 1 July onwards, whilst he did not realise it at the time, he was in fact suffering from sepsis. The effect of this infection was to make him severely ill to the extent that he felt he was dying. He explained that while his partner was away he had some limited assistance from a neighbour but no other help. His partner called him on a few occasions but those were the only calls he received and he was unable to make any mobile calls himself.
64. Ms Ombok told us that on her return at the beginning of September she also identified that the claimant was extremely ill. She confirmed the description the claimant had given us of what he was unable to do when she returned and told us, as the claimant did, that what she saw on her return in September had also been his condition in July. We were told that the claimant was unable to walk, leave his bed, feed himself, dress

himself or take care of his personal hygiene needs. He required assistance with all these tasks.

65. Ms Ombok did not take any medical advice until she says she called the GP on 18 September. The GP notes were at page 83 and they make no reference to the condition of the claimant as both he and his partner have described it. Ms Ombok said that she had told the doctor about this and he had simply suggested that the claimant rested and took fluids. She treated the claimant by providing him with antibiotics that had previously been prescribed for her, presumably for some other condition. She explained that he had good days and bad days and it was not until 24 October that he became so unwell that he required hospital admission. He was in hospital from the 24 to 29 October and was identified as having sepsis during that period.
66. Both told us that the claimant was physically incapable of using his mobile phone to contact the respondent during July and August because of his, at that point, undiagnosed sepsis.On the balance of probablities we find it unlikely that the claimant was as incapable as he describes during July and August as it is not credible that no medical help was sought before 18 September when on their account the claimant is bed bound and unable to even feed himself. While we do not doubt the claimant was unwell,we find that he was not as ill as he decribed and was not so unwell that he could not have contacted the respondent or asked his neighbour or partner to do so. He is of course able to provide a fit note on 6 July during this period of incapacity.On the claimant and his partner's account he had good days and no explanation was given as to why he could not make contact on these days.We do not accept the claimant's illness prevented him from following the respondent's processes and submitting fit notes, a process he well understood.

Last fit note

67. While the claimant and his partner were aware that his sicknote had expired, Ms Ombok explained that on her return in September she had other priorities that took immediate attention such as dealing with an unwell child and getting her family ready to return to school. Despite what she describes as the claimant's very alarming condition, she was unable to telephone the GP before 18 September. She tells us that the GP issued another sicknote which he backdated to 1 August to cover the period to 30 September based on her contact with him.
68. The GP records show that the fit note again diagnosed chronic left shoulder pain. This was delivered by the claimant's partner on 19 September. At that point it was agreed that Mr Ager advised her that the claimant's employment had been terminated and that he should get in touch with either Mr Ager or with the general manager if he wanted to have his job back. The claimant accepted that his partner told him that he should make this contact. He did not do so.
69. There was no response from the claimant until 15 October when the claimant sent a text to Mr Ager which identified for the first time his new address as 17 Elm Rd. There was no other communication from the claimant until the claim form was received. We find that the claimant therefore continued to fail to respond to requests from the respondent to get in touch with him as he was fully aware that if he wanted to discuss getting his job back he should have made contact shortly after 19 September and he left it until 15 October to make any contact at all. That contact on 15 October didn't make any request for the job back at the

point when he knew he had been dismissed. He did not issue any appeal or take any further action after 15 October. We find that this is consistent with the claimant having, in fact, decided not to return to work.

Sepsis as a disability

70. On the claimant's evidence he was suffering from undiagnosed sepsis from 1 July until the end of October. He was nonetheless able to submit a sicknote on 6 July and to make contact with the respondent on 15 October.
71. There is no medical evidence to show how, or if at all sepsis is connected to the claimant's osteoarthritis. Ms Ombok suggested it could have been a result of steroid injections but the medical records in the bundle show that he had a steroid injection on 30 June 2017 and there is reference in the letter of 30 May 2017 to a previous steroid injection. There is no evidence of any later steroid injections which could account for sepsis.
72. In the absence of any medical evidence and the lack of comment on the GP record we find that the sepsis is unrelated and so,to the extent, if at all,that prevented contact, that was not connected to disability.

Appropriate comparators

73. The claimant believed that he had been treated differently from a named employee, LeeTucker. It is certainly the case that Mr Tucker's employment was not terminated after absence and we understand that he remains on critical illness insurance cover. Ms Knowles explained that Mr Tucker is a salaried employee and therefore eligible for a range of insured benefits which do not apply to hourly paid employees such as the claimant.
74. The claimant did not dispute that he was hourly paid, although he contended that as the only hourly paid supervisor this was in itself wrong, but he accepted that it was the case.Mr Tucker's circumstances are not therefore comparable.
75. The claimant referred to two other individuals as comparators and in his witness evidence said that they were comparators because of a refusal to transfer him from an hourly wage to a salaried status. This is not part of the claimant's case. Ms Knowles gave evidence as to the absence history of these two individuals which the claimant did not challenge. We accept therefore that one of these individuals only had one day's unauthorised absence, which is not long enough to trigger the job abandonment process, and that the second has no unauthorised absence, instead providing appropriate fit note's for the whole of the period. In both cases the absence was properly reported and/or did not last long enough to trigger the job abandonment process.

Relevant Law

Direct discrimination

76. S.13(1) of the Equality Act 2010 (EqA) provides that 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

77. A successful direct discrimination claim depends on a tribunal being satisfied that the claimant was treated less favourably than a comparator because of a protected characteristic. There must be no material difference between the circumstances relating to each case.
78. It is for the tribunal to decide as a matter of fact what is less favourable. The test posed by the legislation is an objective one — the fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment.
79. A claim for direct disability discrimination can only succeed if A has actual or constructive knowledge of the employee's disability at the relevant time, as the disability must form part of A's "conscious or subconscious reason" for the less favourable treatment.

S 15 discrimination arising from disability

80. Section 15 EqA, which is headed 'Discrimination arising from disability', provides that a person (A) discriminates against a disabled person (B) if:

> *A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *'[S.15(1)] does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.'*

81. Pnaiser v NHS England summarised the proper approach to establishing causation under S.15. First, the tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
82. Any allegation of discrimination arising from disability will only succeed if the employer (or other person against whom the allegation is made) is unable to show that the unfavourable treatment to which the claimant has been subjected is a proportionate means of achieving a legitimate aim.

Burden of proof

83. Igen v Wong ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

84. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.
85. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, Madarassy v Nomura International [2007] IRLR246 CA para 54-57.

Unfair dismissal

86. There are five potentially fair reasons for dismissal under section 98 of ERA 1996: capability or qualifications, conduct, redundancy, breach of a statutory duty or restriction and "some other substantial reason" (SOSR).In this case the parties agree that the reason was conduct and it was the respondents position that the conduct included dishonesty.
87. Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.
88. Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

> *"... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -*
>
> > *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> >
> > *(b) shall be determined in accordance with equity and the substantial merits of the case.*

89. By the case of Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23 tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer. In this case the Court of Appeal decided that the subjective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. The tribunal is not required to carry out any further investigations and must be careful not to substitute its own standards of what was an adequate investigation to the standard that could be objectively expected of a reasonable employer.

Conclusion

90. We have considered the relevant law as we have set it out, together with our findings of fact and have reached the following conclusions when considering the agreed issues list.

Unfair dismissal

91. We have considered the claim of unfair dismissal. We have found that the respondent operated a job abandonment process where an individual was absent for more than three days. We have also found that these circumstances applied to the claimant, as on two occasions he did

not submit a fit note until significantly after three days from the expiry of the prior fit note. We conclude that the reason for dismissal was the claimant's failure to provide a fit note and/or contact the respondent after the expiry of his fit note on 31 July 2018. We conclude that the reason for dismissal was conduct.

92. We have found that Mr Green, who was the decision-maker, had a genuine belief that the claimant was absent without leave. We have found that he genuinely and reasonably believed that the claimant was aware of the process and had chosen not to communicate. We conclude that he had a genuine and reasonable belief that the claimant had committed this misconduct.
93. We have found that the respondent, via payroll, tried to make telephone contact with the claimant on 3 consecutive days after his fit notes expired. The respondent then sent warning letters that it was likely to terminate employment under the job abandonment process to the claimant twice and to multiple addresses. The claimant had failed to update his employer about his address. In the circumstances we conclude that the respondent's action was reasonable. Based on our findings of fact we also conclude that the claimant was aware of the process because the letter sent to Deans Walk was signed for. We conclude that the respondent therefore carried out a reasonable investigation and a fair process.
94. The claimant was dismissed for this conduct which was classified by the respondent as an act of misconduct which resulted in termination of employment. We conclude that this response was within the reasonable range of responses open to an employer in the circumstances described by Ms Knowles in relation to its need to monitor absence. We also found that the treatment of the claimant was consistent with other individuals who had failed to respond to communication during the job abandonment process.
95. We conclude that the respondent had a genuine belief that the claimant had abandoned his role by choosing not to contact the respondent when he had been made aware of the consequences. The respondent had carried out a reasonable investigation in the circumstances by attempting to contact the claimant and believing that it had done so and dismissal was within the reasonable range of responses. On that basis the claim for unfair dismissal does not succeed.

Breach of contract

96. It was agreed that the claimant was entitled to 9 weeks notice pay should that be payable. We are satisfied that the respondent's procedure identifies abandonment of job process as an act of gross misconduct which entitles it to dismiss without notice.
97. In the alternative we also conclude that the claimant's failure to contact the respondent amounts to a fundamental breach of trust and confidence. It was reasonable for the respondent to conclude that the claimant simply did not wish to attend work as he had made no contact with them and had been warned of the consequences of this lack of action. In the circumstances there is no entitlement to payment in lieu of notice and this claim does not succeed.

Disability

98. The question of disability was considered at a preliminary hearing on 8 February 2021. At that hearing Employment Judge Webster concluded

that in August 2018 the claimant was suffering from osteoarthritis that prevented his left arm/shoulder from having a full range of movement. She accepted his statement that he had difficulties dressing, in particular putting on socks, washing his back, carrying the shopping and experienced pain that sometimes interrupted his sleep. She concluded that the impact of the impairment on the claimant's ability to carry out activities was more than minimal as at August 2018. She concluded that this was a long-term impairment as it had lasted more than a year by the relevant time and she concluded that the claimant was disabled for the purpose of the Equality Act 2010.

99. The question of whether the respondent knew or ought to have known of the disability was identified as an issue to be determined by this employment tribunal.

100. We have found that Mr Green, who was the decision-maker in relation to dismissal and who, as the line manager, is presumably the individual the claimant considers should have been contacting him about his sickness absence, was unaware that the claimant's shoulder injury amounted to a disability. We have found that there is no action taken by the claimant ,or any documentary evidence in front of the respondent at the relevant time which could have alerted it to this fact.

101. We conclude that Mr Green who was the decision-maker neither knew nor ought reasonably to have known that the claimant was disabled at the relevant time. The claims for disability discrimination fail on this basis.

102. While we do not need to,we have nonetheless gone on to consider the claims under section 13 and under section 15.

Direct discrimination s.13

103. Under section 13 the complaint is that the respondent failed to get in touch with the claimant during his sickness absence, particularly in relation to contacting him regarding his possible dismissal and the dismissal itself.

104. We have found that the respondent did attempt to get in touch with the claimant during his sickness absence both by telephoning him on days 1, 2 and 3 of his unauthorised absences on two consecutive months and by writing to him at all addresses they recently had for him. We have found that one letter was received by the claimant. We conclude that there was therefore no failure to get in touch with the claimant regarding his possible dismissal.

105. While we asked the respondent's witnesses why they did not themselves try to contact the claimant either by phone or email, we accept that there is no obligation on them to do so. The respondent followed its written policy which had been clearly communicated and understood and accepted by the claimant. Any failure to go above and beyond that policy cannot amount to a failure to get in touch with the claimant. We also found that the claimant was perfectly able to contact the respondent himself during both August and September and it was his responsibilty to do so. He did not do so.

106. We also understand that the claimant effectively fell between two managers because his sickness absence immediately followed a demotion and the process of transferring him from one manager to another had not been completed. Neither line manager understood that they were responsible for the claimant until Mr Green was informed that

the responsibility remained his at the point the job abandonment process was triggered.

107. The second complaint under this heading is that the claimant was dismissed because of his disability. We have concluded that he was dismissed because he had failed to communicate with the respondent after the expiry of fit notes. We conclude that is not because of his disability but was because of his conduct.

108. Further, there was no less favourable treatment. The claimant has referred to Mr Tucker as a comparator and have found that his circumstances were materially different and he is not an appropriate comparator. We conclude that employee X and employee Y are appropriate comparators and we are satisfied that the claimant was treated in the same way as others with unauthorised absence.

Discrimination arising from disability section 15

109. There are two things that are said to arise in consequence of the claimant's disability which amount to less favourable treatment. The first is said to be a failure to get in touch with the claimant during the sickness absence, particularly regarding his possible dismissal. We have already made findings of fact that this was not the case. There was no such failure.

110. We have also found that the claimant was dismissed, not because of disability, but because of his conduct in not responding to attempts to contact him. We conclude that there was no unfavourable treatment because of sickness absence. The respondent was following its established process and the claimant was dismissed because he was absent without leave and had failed to respond to requests to contact the respondent.

111. The respondent had no knowledge of the claimant's disability and, further the claimant has not proved facts from which, if unexplained, the tribunal could infer that discrimination has taken place.For all these reasons the claims for discrimination do not suceed.

Employment Judge **McLaren**

Date 10/10/21