EMPLOYMENT TRIBUNALS

Claimant: Mr A Stuchbury

Respondent: TVD (NW) Limited

HELD AT: Manchester **ON:** 20-22 October 2021

BEFORE: Employment Judge Slater
Mrs C Linney
Ms H Fletcher

REPRESENTATION:

Claimant: In person
Respondent: Ms Cornaglia, Counsel

JUDGMENT having been sent to the parties on 1 November 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The issues remained largely as identified at the case management preliminary hearing. Since that hearing, the respondent conceded disability in relation to osteoarthritis, having already conceded disability in relation to diabetes, so there was no disability issue remaining for the Tribunal to be decided.

2. The claimant withdrew the complaint of failure to make reasonable adjustments in relation to the provision, criterion or practice ("PCP") of the annual leave bonus policy. The suggested reasonable adjustment 24.2 in the List of Issues identified at the case management preliminary hearing has been deleted from the issues to be determined because that related to the PCP which has been withdrawn.

3. After discussion at the start of the hearing an additional PCP was identified, being a requirement to maintain a certain level of attendance to avoid disciplinary sanctions.

4. The issues to be determined by the Tribunal were as follows:

EQA section 15: *EQA, section 15: discrimination arising from disability*

5. Did the respondent treat the claimant unfavourably by giving him a verbal warning under the sickness absence procedure?

6. If so, did the treatment arise from the claimant's disability?

7. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

8. 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?

Reasonable adjustments: EQA, sections 20 & 21

9. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person in relation to each of the physical impairments?

10. A "PCP" is a provision, criterion or practice. The respondent accepts that it applied the following PCP(s):

    a. [withdrawn];

    b. The sickness absence policy

    c. A requirement to maintain a certain level of attendance to avoid disciplinary sanctions.

11. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that his disabilities led to increased absence from work.

12. If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage?

13. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

    a. Discounting all absences related to the claimant's disabilities;

    b. [no longer relevant, since it related to the withdrawn PCP];

c. Increasing the trigger point for the claimant before conducting any action against the claimant under the sickness absence policy;

d. Reviewing the policies to exclude disability related absences from any application of the policies.

14. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

15. During the course of the hearing, it was clarified that the relevant time to consider for the complaint of failure to make reasonable adjustments was the period from the beginning of 2019 until presentation of the claim on 11 May 2020.

Evidence

16. We heard evidence from the claimant and from Lucia Maguire, Head of Strategy and Efficiency, and Andrew Greaves, Head of Commercial Sales, for the respondent. There were written witness statements for all the witnesses. We also had a bundle of documents of 128 pages.

Findings of Fact

17. The Tribunal made the following findings of fact.

18. The respondent is involved in the provision of audio visual solutions across a variety of industries. Their Head Office is in Bolton and they have a showroom at Preston docks and a retail shop in Leigh called Electrical Experience. They currently employ 43 staff.

19. The claimant began his employment with the respondent on 27 August 2002 and he remains employed by the respondent. The claimant is an Assistant Manager at the respondent’s Electrical Experience retail shop in Leigh.

20. The claimant's role as Assistant Manager involved dealing with customers, showcasing products instore, processing sales orders and dealing with enquiries received instore by telephone and online. In addition, the claimant looked after merchandising instore, ensuring that products are well presented.

21. Until February 2021, there were three people employed at the Leigh shop, including the claimant.

22. In June 2019, Lucy Maguire joined the respondent as Head of Strategy and Efficiency. Since September 2020 she has also been looking after Human Resources following the departure of Natalie Goodall. Natalie Goodall also joined the respondent around June 2019 as HR Manager.

23. Mrs Maguire has a background in HR. She did a postgraduate degree in Personnel Development and Management and worked in HR until around ten years ago. Her studies included laws relating to disability discrimination and the duty to make reasonable adjustments. She did not have practical experience of dealing with cases relating to this prior to dealing with the claimant's case.

24. From at least 2016, the respondent had an absence management policy, which is included at page 72 in the bundle. This provided that individual sickness absence would be monitored over a rolling 12 month period. A table set out the process to be followed. This had steps in relation to first, second and third sickness absences. The third sickness absence, according to the table, would normally be addressed via the company's disciplinary policy, depending on the reason for absence.

25. The claimant has Type 1 Diabetes. The respondent knew this from at least 2014 when the claimant completed a health questionnaire giving information about that condition. There was no mention in the completed health questionnaire of arthritis or back pain.

26. The claimant was diagnosed in September 2019 with osteoarthritis, but he suffered from back pain for some time before this condition was diagnosed. A 2016 medical letter refers to intermittent arthralgia joint pain starting in his lower back from March 2015.

27. The claimant had a substantial sickness absence record prior to any action being taken. Although his level of absence could have triggered possible action considerably earlier, no action was taken until shortly before the disciplinary hearing in February 2020.

28. The information known to the respondent included that, in September 2018, the claimant had an absence attributed to osteoarthritis. Many of his absences were recorded as being due to back pain. The claimant questioned in the disciplinary process the accuracy of some of the respondent's recording of reasons for absence, but it is common ground that he had substantial absences for back pain.

29. The decision to take formal action against the claimant was part of a new approach by the respondent. Mrs Maguire was charged, on starting her employment, with carrying out a business review of the Leigh store which was making a loss. Natalie Goodall implemented a new attendance reporting system and introduced this across the group in late September 2019, populating it with data in October 2019. Mrs Maguire reviewed the details relating to staff at the Leigh store and noted the claimant's high levels of sickness absence.

30. There was a meeting on 4 November 2019 between the claimant and Matt Brown, the Managing Director. This was instigated by the claimant. We do not find that the claimant raised a grievance in this meeting, as suggested in Mrs Maguire's witness statement. There was some discussion about the claimant's level of absence and the impact on the business but there are no notes of the meeting and we did not hear any evidence about what specifically was said at this meeting.

31. The claimant was again absent from work in the period 15 November 2019 to 4 December 2019 and he was signed absent from work with fit notes referring to the reason for absence as being arthralgia of multiple joints. There was no suggestion on the fit notes that, with any adjustments, the claimant would have been fit to work in that period.

32. There was a telephone welfare meeting on 3 December 2019 between the claimant, Mrs Maguire and Natalie Goodall. The claimant said in this conversation that his latest absence was due to arthritis. Mrs Maguire is mistaken in believing that this was the first time the claimant had referred to suffering from arthritis, given the reference in the sickness record in 2016. The claimant requested changes to his workstation and said he would struggle to carry heavy objects. There were some changes made to the claimant's workstation and adjustments made so that he did not need to carry heavy objects.

33. On 6 January 2020 the claimant was absent due to pain following a tooth extraction.

34. On 9 January 2020 the claimant was invited to a disciplinary hearing. The invitation letter referred to the claimant having an unacceptable level of absence and wrote about 16 absences for a total of 57 days in the previous 12 months. The list of absences in the invitation to the disciplinary hearing does not give the reasons for the absences. The claimant was informed that this hearing could result in a verbal or written warning. Perhaps because the letter was a standard one used for disciplinary proceedings, it referred, incorrectly, to alleged misconduct. There has never been any suggestion that the claimant was not honest about his absences and was not genuinely sick when he was absent.

35. At the time, the respondent did not have a separate capability procedure and dealt with sickness absence management by using its disciplinary procedure. The respondent has, subsequent to events giving rise to this case, introduced a capability process.

36. The claimant asked for information about the recorded reasons for absence on receiving the invitation to the disciplinary hearing. He wrote that this had been on the previous system. He wrote that he was sure that the majority of his absences were due to lower back pain before his diagnosis and treatment started. Natalie Goodall replied to his letter saying that all absences in the last 12 months, other than 6 January 2020 for dental pain, were due to back pain. The claimant replied saying the information was inaccurate.

37. The claimant had a further sickness absence from 30 January to 1 February 2020 with chest pains.

38. The disciplinary hearing took place on 7 February 2020 and was conducted by Mrs Maguire. Notes were taken by another manager. Natalie Goodall should have been the notetaker, but she was ill on the day. The claimant was allowed to be accompanied, at his request, by a friend rather than by a trade union representative or colleague. The claimant provided Mrs Maguire, at this meeting, with various medical documents which she did not have, at least some of which had been provided to the respondent previously. Mrs Maguire did not have a list of the claimant’s absences and reasons for absence prior to 2019.

39. The notes of the meeting record that the claimant stated that his absences were not all related to back pain. He stated that the dates of some of the absences on the disciplinary invite letter received were inaccurate. The claimant said that he felt this was a personal attack on him and Mrs Maguire assured him that it was not

and stated that this level of absenteeism would trigger a formal process. She said that his high level of absenteeism had come to light when Natalie Goodall introduced the People HR system in October 2019. The claimant said that when he had returned to work his monitor had been moved which was of assistance to him.

40. Mrs Maguire said that the claimant's high levels of absence was making it difficult to resource the Leigh store appropriately and was putting pressure on colleagues. She said the department was not making a profit currently and recruitment was not financially viable. This was in response to a suggestion from the claimant that another person should be employed to cover for absences. She noted that the unpredictability of the claimant's absences meant it was difficult to provide adequate cover at short notice.

41. Mrs Maguire said that they could not set a precedent of letting high levels of sickness absence go unaddressed. The claimant queried whether other employees would be disciplined after sickness absence, and Mrs Maguire assured him that, in accordance with company policy, all employees would go through a similar process as outlined in the company handbook.

42. Mrs Maguire asked if there was anything they could do to assist the claimant and the claimant replied, “well you tell me”. Mrs Maguire said that he was best placed to tell her if there was anything he needed.

43. The claimant said that, since his diagnosis in September, the pain management for the back pain had improved through being on improved medication and physiotherapy and he felt he was getting stronger.

44. The claimant asked why he was only now being brought in about sickness and Mrs Maguire explained that, since the introduction of the new HR Manager and subsequent introduction of the HR system, his absence had been highlighted.

45. It is common ground that, at this meeting, Mrs Maguire asked the claimant about adjustments and the claimant did not make any suggestions of adjustments that would assist him. It is also common ground that the claimant talked about the impact diabetes can have on other conditions making absences longer. There was some discussion about disability. The notes suggest that this was in relation to diabetes and arthritis, although Mrs Maguire said in oral evidence it was only about diabetes as a disability. We find, on the basis of Mrs Maguire’s witness statement (paragraph 17(f)) and the notes of the meeting, that the claimant did suggest that both diabetes and arthritis were disabilities.

46. The notes record the following, “AS reiterated that his absences were unrelated and that he cannot predict when he is going to be ill”. The claimant disputes that the term “unrelated” was used. We do not find it necessary to make a finding of fact on exactly what was said, but we accept that Mrs Maguire formed the understanding that the claimant was not saying that all the absences were related to each other.

47. After a 15 minute adjournment, Mrs Maguire issued the claimant with a verbal warning which she told him would be held on his file for six months. She advised

him of the right of the appeal. During the adjournment, Mrs Maguire photocopied medical documents and reviewed the notes as well as making her decision.

48. Mrs Maguire recognised that the claimant was stressed at the hearing. When asked by the Employment Judge why she did not pause to get advice from Occupational Health before deciding whether to issue a warning, Mrs Maguire said that the claimant was feeling a level of stress and she did not want to prolong that.

49. The verbal warning was confirmed in writing on 10 February 2020. In error, the letter also referred to this being a final written warning. It also referred to what would happen if there was "further misconduct". Mrs Maguire reiterated in her letter that, if the claimant thought of any adjustments or support that would help, he should contact Natalie Goodall.

50. The claimant appealed against the issue of the verbal warning by a letter which is not dated. He raised a number of matters of concern: some of these are not relevant to the issues we need to decide so we do not refer to those further.

51. One of the matters that the claimant raised was that, under the Equality Act 2010, employers are under a duty to make reasonable adjustments for disabled persons. He wrote:

> "I currently find that company policy (in more than one area) is putting me at a substantial disadvantage in comparison with persons who are not disabled, and that the company have failed to offer steps as is reasonable to avoid those disadvantages. A change to a provision, criterion or practice in relation to absences for disabled employees would have seemed more appropriate in this instance."

52. The claimant also informed them that he felt he had no alternative but to raise a discrimination case at the earliest opportunity.

53. On 24 February 2020 the claimant contacted ACAS under the early conciliation procedure.

54. On 28 February 2020, the claimant was sent a letter requesting his attendance at an appeal hearing which was to be held off-site on 5 March 2020. This appeal hearing went ahead on that date with Andy Greaves. During that meeting, the claimant made a point that the procedure in the company handbook made no provisions for disabled people. He said he thought he had been given a warning for having a disability. He clarified that the disability he relied on was Type 1 Diabetes and osteoarthritis. He said that the problem with diabetes was that it reduced his immune system which led to his other conditions. He was asked whether a particular condition related to diabetes and he said, "yes it could be, as was the back pain".

55. Mr Greaves told the claimant that they had now amended his records to correct the reasons for his absence and what they needed to do now was to identify if all the instances of absence were related to his diabetes. The claimant said they needed to speak to an Occupational Health person. Mr Greaves said he would take

the time to give the case some thought and would feed back as soon as reasonably possible.

56. Mr Greaves made a decision to revoke the warning in light of the claimant's suggestion that all absences were related to diabetes and the need for medical information to understand whether there was a link. Natalie Goodall provided an explanation to the claimant as to Mr Greaves' thought process following the outcome letter that was issued. Natalie Goodall wrote to the claimant that the change of decision was based on the claimant's belief that the reasons for absence may all be linked to a disability. She wrote that, with this new information in mind, Mr Greaves had decided that it was more appropriate to liaise with the claimant's GP to establish if there was an underlying link and, if so, what adjustments could be considered to assist him in carrying out his duties. The outcome letter dated 11 March 2020 informed the claimant that the warning was revoked.

57. The claimant commented, during the course of this Tribunal hearing, that Mr Greaves dealt with him very fairly.

58. Mr Greaves wrote that they wanted to obtain information about the claimant's medical condition to allow them to make an informed decision about his capability to carry out his duties in the future and to consider reasonable adjustments. He enclosed a letter seeking consent to ask the claimant's GP for a full medical report. The claimant refused consent for medical records to be sent but, in a letter dated 13 March 2020, he said he was willing for the respondent to speak to his GP.

59. In a letter dated 24 March 2020, the claimant said he had decided not to authorise the company to have any access to his medical records. He did not reiterate that they could speak to his GP.

60. Some time in March 2020, due to the COVID-19 pandemic, the claimant was advised to shield, and he was subsequently put on furlough from 3 April 2020.

61. The ACAS early conciliation certificate was issued on 24 March 2020. The claimant presented his claim to this Tribunal on 11 May 2020. In its response the respondent conceded disability in relation to diabetes but not arthritis.

62. A case management preliminary hearing was held on 30 September 2020. Following discussion at that preliminary hearing the claimant agreed to release of medical records and to an Occupational Health assessment, which then took place.

63. A letter from the claimant's GP dated 23 December 2020 referred to back pain as being the main issue stopping the claimant from working. The GP wrote that, because of his Type 1 Diabetes, the claimant may be more predisposed to picking up infections and it may also take him longer to recover from illness. This is because of his poor blood sugar control and the long-term substantial adverse effects of his condition.

64. In the bundle is a table which the parties agree was completed by the claimant's GP. We are not clear whether this was an attachment to the letter dated 23 December 2020. In any event, in this table, the GP was asked to indicate, in relation to various absences, whether they were linked to disability, and, if so, to

which disability. Initially, the GP completed the column saying that there was no link to disability but then changed their view in relation to all but the absence for dental pain and chest pain. In all cases where the GP indicated there was a link to disability, the GP wrote "OA" (which we understand to be a reference to osteoarthritis).

65. On 26 February 2021, there was an Occupational Health report. This expressed the view that the claimant was disabled by reason of diabetes and arthritis of the spine. The adviser drew a connection between testicular pain and back pain. The Occupational Health report does not expressly draw any connection between diabetes and the absences for back pain. The opinion does not expressly answer the question about whether all the absences are related to disability.

66. The claimant has said in evidence that there is a link between his osteoarthritis and diabetes. We do not doubt the honesty of his belief that that is the case, but we do not have any medical information that will assist us as to whether, in fact, there is such a link.

67. Following provision of medical information, the respondent conceded disability in relation to arthritis.

68. The respondent currently employs two people on temporary contracts to assist the remaining permanent employee in the Leigh shop.

69. The respondent has adjusted the trigger points for the claimant. This is now five separate absences or one absence of eight weeks in a 12 month rolling period.

Submissions

70. We heard submissions from both parties. Ms Cornaglia very helpfully produced thorough written submissions and then spoke to these. The submissions referred to a number of legal authorities of which we have taken note. We do not seek to summarise Ms Cornaglia's submissions, since her written submissions can be read, if required, but we address the principal submissions in our conclusions.

71. Mr Stuchbury made oral submissions at the hearing. He submitted that the respondent had not followed its own 3 point procedure and that the handbook at the time did not have triggers for disability. He submitted that the respondent had failed to make reasonable adjustments. No trigger points were in place until the middle of 2021 when he returned to work.

72. Mr Stuchbury submitted that the respondent had known from day one that he had type 1 diabetes and osteoarthritis was noted prior to the disciplinary hearing and discussed at the disciplinary hearing as being a disability. He felt the verbal warning was discriminatory. The decision was rushed and he felt the evidence was not considered.

The Law

The law that we have to apply is as follows:

73. Section 15 of the Equality Act 2010 contains the provisions relating to discrimination arising from disability. This provides:

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability; and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had the disability."

74. Unfavourable treatment is not defined in the Equality Act 2010 but the EHRC Code on Employment states that it means that the disabled person must have been put at a disadvantage. The "something arising" must be an effective cause of the treatment but does not need to be the only or main reason.

75. Consideration of the defence contained in section 15(1)(b) requires a weighing of the employer's justification against the discriminatory impact of the treatment on the employee. It requires a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it. "Proportionality" means that the treatment must be appropriate and necessary but does not mean that it must be the only possible way of achieving the aim.

76. The provisions relating to the duty to make reasonable adjustments are included in section 20 of the Equality Act 2010 and schedule 8 to that Act. Schedule 8 imposes the duty on employers in relation to employees. Section 20 subsection 3 imposes a duty comprising a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage.

77. Paragraph 20 of schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant had a disability and was likely to be placed at the relevant disadvantage. For an adjustment to be reasonable it is sufficient that there is a prospect of alleviating the disadvantage.

78. Section 136 of the Equality Act 2010 contains provisions about the burden of proof. This says that if there are facts from which the court could decide in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred, but subsection (2) does not apply if A shows that A did not contravene the provision.

Conclusions

79. Our conclusions, applying the law to the facts we have found, are as follows.

Section 15 Claim – Discrimination arising from disability

80. We considered first the issue of whether the respondent treated the claimant unfavourably by giving him a verbal warning under the sickness absence procedure. Unfavourable treatment means putting someone at a disadvantage. On the face of it, it appears that giving someone a verbal warning would be putting them at a disadvantage and would therefore be unfavourable treatment. However, the respondent argued (based on the case of **Little v Richmond Pharmacology Limited UKEAT/0490/12/LA**) that there was no disadvantage because of the successful appeal.

81. We consider a distinction can be drawn between the **Little** case and the situation in this case, and we note that the EAT in **Little** emphasised that the case was particularly fact and claim sensitive. The **Little** case involved a complaint of indirect discrimination, about a refusal of an application for part-time working. The application was made by an employee on maternity leave in respect of her work pattern when she returned to work after maternity leave. The refusal of the application and the appeal both occurred during the course of her maternity leave. The EAT upheld the decision of an Employment Tribunal dismissing her claim. In paragraph 34 of the analysis, the EAT concluded that the claimant did not suffer personal disadvantage or any detriment short of dismissal under Sex Discrimination Act, which contained the provisions they were dealing with at the time. They wrote that the provision, criterion or practice of full-time working was not to be applied to her when she completed her maternity leave, having succeeded in her appeal.

82. Whilst we accept that an internal appeal process consensually pursued forms part and parcel of the employer's decision making process, we do not consider that this means that someone who is subjected to a warning which is subsequently overturned on appeal is not put at a disadvantage in relation to the period prior to revocation of the warning. The situation is distinct from that in **Little**, where the claimant in **Little** was not subjected to the requirement to work full-time in any period between rejection of her application and successful appeal, because she was not at work at the time. We conclude that the claimant was treated unfavourably by the imposition of the verbal warning until its revocation.

83. We turn next to the question of whether the treatment arose from the claimant's disability. The claimant relies on two disabilities – diabetes and osteoarthritis. The "something arising" is the claimant's history of sickness absence in the 12 months prior to the disciplinary hearing. We conclude that an effective cause of Mrs Maguire deciding to issue the claimant with a verbal warning was the claimant's history of sickness absence. We conclude that a large number of these absences were related to the disability of osteoarthritis, and we have medical evidence from the GP that assists us in that respect.

84. We do not, however, feel able, without medical evidence to this effect, to draw a connection between the claimant's absences in the relevant 12 month period and diabetes. Although the claimant asserted that there was a connection between diabetes and osteoarthritis, we have seen no medical evidence to support this. The reasons for absence on the records we have seen do not obviously suggest a link with diabetes and his GP attributed them to osteoarthritis rather than to diabetes.

85. We conclude that sickness absence related to osteoarthritis was an effective cause of the verbal warning being issued. It does not matter that not all the absences were related to osteoarthritis. Other motives for Mrs Maguire's decision making, as referred to in the respondent's submissions, do not mean that the disability related absence was not an effective cause of her decision.

86. We consider next the issue of knowledge. Has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant had the disability? Given our decision that the relevant disability for the disability related absence was osteoarthritis and not diabetes, we need to consider the issue of knowledge in relation to osteoarthritis.

87. In the disciplinary hearing on 7 February 2020, the claimant was asserting that he was disabled by reason of arthritis. Mrs Maguire was shown the document dated 17 September 2019 which the claimant says was the diagnosis of osteoarthritis. She also had the letter of 28 June 2016 about pain in the claimant's lower back. Although Mrs Maguire did not have the list of absences prior to 2019, the respondent organisation had the knowledge that, in September 2018, the claimant had had an absence which was attributed to osteoarthritis. The respondent had the information that absences in 2019 were largely attributed to back pain.

88. We accept that the respondent did not have actual knowledge at this time that the claimant was disabled by reason of osteoarthritis, but there were the many indicators we have referred to that this could be the case. These indicators were sufficient to put the respondent on enquiry as to whether the claimant might be disabled by reason of this condition. Had the respondent conducted that enquiry, they would have then obtained the information which they later obtained and which caused them to concede disability by reason of osteoarthritis.

89. We conclude that the respondent, at the time of the issue of the verbal warning, ought reasonably to have known that the claimant was disabled by reason of osteoarthritis.

90. If we had found that diabetes related absence was an effective cause of the issue of the verbal warning, we would have found that the respondent had actual knowledge or ought reasonably to have known that the claimant was disabled by reason of diabetes. The respondent knew, at the very latest, from the claimant's health questionnaire completed in 2014 that he had Type 1 Diabetes.

91. Finally, in relation to the section 15 claim, we consider the issue of whether the respondent had shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim. This requires a balancing exercise between the reasonable needs of the employer and the discriminatory effect on the employee of the issue of the verbal warning. The aim relied upon is the aim of dealing with absenteeism to ensure that the respondent business could be run properly. We conclude that this was a legitimate aim. There was a discriminatory effect on the claimant of having a verbal warning hanging over him. This caused him upset and could potentially have led to further disciplinary action had he had further absences.

92. We conclude that issuing the verbal warning on 7 February 2020 was not a proportionate means of achieving the legitimate aim. It was not proportionate to

issue the warning without seeking information as to whether the claimant's absences were wholly or largely related to disability. Although we accept that the respondent had difficulties in covering the branch where the claimant worked due to his many and unpredictable absences in 2019 and further absences in early 2020, the respondent had coped with his absence pattern for a lengthy period without taking any formal action. The approach of investigating before deciding on further action was subsequently the approach Andy Greaves took when revoking the verbal warning. The fact that the verbal warning was the lowest sanction available does not prevent it having a discriminatory effect on the claimant, and he gave evidence that it did cause him considerable concern. The respondent has not persuaded us that the need to issue a warning was so urgent on 7 February 2020 that time could not have been taken to obtain, for example, an Occupational Health report to inform the respondent's decision making, both in relation to whether any sanction was appropriate, and as to any reasonable adjustments which might be made which might assist the claimant to improve his attendance record. Carrying out the balancing exercise, we consider that it falls in favour of the claimant and we consider that issuing the warning was not a proportionate means of achieving the legitimate aim.

93. We conclude for these reasons that the complaint of discrimination arising from disability is well-founded in relation to the disability of osteoarthritis.

Claim of failure to make reasonable adjustments

94. For the same reasons as we gave when considering the question of knowledge in the context of the section 15 claim, we conclude that the respondent had actual or constructive knowledge that the claimant was disabled by reason of diabetes and had constructive knowledge that he was disabled by reason of osteoarthritis.

95. The claimant relies on two provisions, criteria or practices. The first is the sickness absence policy itself. The second is the requirement to maintain a certain level of attendance at work to avoid disciplinary sanctions. We conclude that both of these PCPs were applied by the respondent.

96. The respondent has argued that the sickness absence policy itself was not appropriately framed as a PCP based on the case of **Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265**. The argument is that the sickness absence policy cannot put the claimant at a substantial disadvantage in comparison with persons who are not disabled because the policy allows for special treatment for people with a disability.

97. In **Griffiths,** the policy in question made explicit reference to the duty to make reasonable adjustments for disabled employees and stated that, where appropriate, managers will allow a reasonable amount of additional sickness absence for a disabled employee when such absences are disability related. The Court of Appeal in **Griffiths** considered that the relevant PCP was not the general policy itself because, if that was the correct formulation, the conclusion that the disabled are not disadvantaged by the policy itself was inevitable given the fact that special allowances could be made for them.

98. A distinction can be made in this case from the situation in **Griffiths**. The respondent's policy made no explicit reference to disability. The parts of the policy relied upon to support the respondent's argument are that each case will be assessed on its merits and decision making is depending upon the reason for the absence. We do not consider that these general provisions, without any explicit reference to disability, in particular any reminder to managers of their legal duties under the Equality Act 2010 in relation to disabled employees and information to employees about these duties, are sufficient to prevent the sickness absence policy itself having a discriminatory effect.

99. We conclude that both PCPs put the claimant at a substantial disadvantage in comparison with persons who are not disabled. This was because of the likelihood that his disabilities of diabetes and osteoarthritis would cause him to have more frequent and longer absences than someone without those disabilities. We consider that this conclusion is supported by the Occupational Health report where the respondent was advised, in relation to both disabilities, to consider any absences related to these long-term medical conditions when setting and discussing his attendance and target triggers. There would have been no need to make this suggestion had the Occupational Health adviser not considered that the claimant's disability could have an adverse impact on his ability to maintain a certain level of attendance at work.

100. In relation to the period 2019 up to presentation of the claim in May 2020, which is the period we have ben invited to consider, the claimant had a substantial number of absences which we have concluded were related to the disability of osteoarthritis. The claimant had fit notes supporting his absence from work from 15 November 2019 to 4 December 2019 with the reason given being arthralgia of multiple joints. The claimant's GP confirmed that this absence was related to osteoarthritis in the table where the GP was asked to say whether absences were linked to a disability and, if so, which disability.

101. The fit notes relating to this absence declare the claimant as unfit for work and do not suggest that he would have been fit for work if any adjustments were made. Not all periods of work attributed to back pain were supported by fit notes, but there has been no suggestion that the claimant did not obtain fit notes for absences of a length which required this, and there was never any suggestion that the claimant was not being honest about not being fit for work when he was absent.

102. We do not agree with the respondent's submission, based on the case of **Chief Constable of West Midlands Police v Gardner EAT 0174/11,** that more detail is required of why the claimant says he was disadvantaged by the PCPs, for example what type of pain he suffered because of his disabilities and how this rendered him unfit for work. The reasons recorded by the respondent for his absences explicitly refer to back pain and the fit notes, where they were required by the length of absence, support that the claimant could not attend work because of pain.

103. Although we have not been able to identify on the evidence that absences in the relevant period were related to diabetes, we note from the GP's letter dated 23 December 2020 that, because of the claimant's Type 1 Diabetes, he may be more

predisposed to picking up infections and it may take him longer to recover from illness.

104. If the claimant had or was more likely to have greater absences because of his disabilities than someone without those disabilities, the claimant was more at risk of having the sickness absence policy applied to him, potentially resulting in warnings and ultimately dismissal. The likelihood of disability related absence would make it more difficult for the claimant to maintain the level of attendance which was required to avoid disciplinary sanctions.

105. We conclude that both PCPs put the claimant at a substantial disadvantage in comparison with persons who were not disabled in the relevant time, which, for our purposes, is 2019 to presentation of the claimant's claim in May 2020.

106. We conclude that the respondent knew or could reasonably be expected to know that the claimant's disabilities were likely to result in greater sickness absence than would be expected from someone without those disabilities, and, therefore, the claimant would be more likely to have the sickness absence policy applied to him to his disadvantage and to be subject to disciplinary sanctions because of not being able to maintain the requisite level of attendance at work. We conclude that the respondent knew or could be expected to know that the claimant was likely to be placed at the disadvantage by these PCPs. For these reasons we conclude that the duty to make reasonable adjustments arose.

107. We consider then the adjustments suggested by the claimant. To be a reasonable adjustment, the adjustment must have a chance of alleviating the disadvantage and be reasonable in the circumstances for the respondent to make. We conclude that discounting all absences related to the claimant's disabilities and reviewing the policy to exclude disability related absences from any application of the policies would not be reasonable adjustments. We agree with the respondent's submission that, just as in **Griffiths,** this was likely to lead to the perpetual extension of sickness absence. We agree that, since the objective of the reasonable adjustments provisions is to keep employees in work, an adjustment that would lead to employees remaining out of work on perpetual sick leave is not a reasonable one.

108. The proposed adjustment of allowing the claimant a certain number of days absence before losing the annual leave bonus related to the PCP has been withdrawn so we do not need to consider that suggested adjustment.

109. The remaining proposed adjustment is increasing the trigger point for the claimant before conducting any action against the claimant under the sickness absence policy. This has, in fact, been done subsequent to the claimant bringing these proceedings. We conclude that increasing the trigger point is a reasonable adjustment; it has a chance of alleviating the disadvantage caused by the PCPs. We have considered when it would have been reasonable for the respondent to take that step. We conclude that it would have been reasonable to take the step of adjusting the trigger point at an earlier stage than the time of the disciplinary hearing, after first taking medical advice or advice from Occupational Health to inform the respondent's decision.

110. We conclude that the claimant's pattern of absence from early 2019, with a sequence of absences attributed to back pain, should have put the respondent on enquiry at that point. By September 2019 at the very latest, when the claimant was diagnosed with osteoarthritis, we consider the respondent should have sought Occupational Health advice and, following that advice, we conclude that the respondent should have made the adjustment to trigger points.

111. We conclude for these reasons that the complaint of failure to make reasonable adjustments in relation to both PCPs is well-founded in relation to the adjustment of trigger points under the sickness absence policy.

Remedy

112. After giving our judgment and reasons on liability, we went on to hear further evidence and submissions relevant to remedy and then delivered our judgment on remedy. The reasons given for our judgment on remedy were as follows.

113. We accept the claimant's evidence as to how he felt when he was invited to the disciplinary hearing and then subsequently with the issue of the written warning. The claimant told us that he was stressed, sweaty and shaky; that he was shocked and could not believe that it was happening, that these proceedings were taking place; when he was issued with a warning he was in a state of unbelief and was particularly upset that things went so fast and a decision made on the day. This affected his sleep.

114. The claimant told us that his blood sugar control was adversely affected. We note from the claimant's evidence that COVID, which it seems likely that he had towards the end of November 2019, could possibly have been a factor in the blood sugar control. However, it had not been an issue until a few days after the verbal warning was issued so we think it more likely, on a balance of probabilities, that it was the verbal warning that tipped the balance and was a material factor in the blood sugar control being adversely affected.

115. We accept the evidence given by the claimant in the liability part of the hearing that he found the warning mentally stressful and upsetting. When his blood sugar control was not good, he was lethargic, confused and sweaty. He had intrusive thoughts; he kept replaying what had gone on. When the verbal warning was revoked, he felt better to some extent but still felt that it was hanging over him and that he would always remember it and felt that it should not have been made in the first place. He had continuing concerns that other action would be taken against him because of disability related absences.

116. When considering the amount of an award for injury to feelings, we take account of the Presidential Guidance which updates the **Vento** bands to take account of increases in the cost of living. The relevant Presidential Guidance for claims presented on or after 6 April 2020 tells us that the lower band is between £900 to £9,000. The lower band is for less serious cases and this is the band which Mr Stuchbury has suggested should be applicable to his claim. We agree with that.

117. In deciding on an appropriate level of award, we have taken account of the facts that we have found as to the effect on the claimant of the acts of discrimination.

We award a global amount for the acts of discrimination of discrimination arising from disability and failure to make reasonable adjustments. We take account of the fact that there were some things which caused Mr Stuchbury concern which were not acts of discrimination found by us; our award is based on the injury that we consider he suffered by reason of the application of the formal process to him, not having any adjustment to the triggers and the verbal warning with which he was issued.

118. We take account of the cases which were shown to us by Ms Cornaglia, but note that they are not authorities, but the views of particular Tribunals as to what were appropriate awards in the particular factual circumstances before them. Some of the awards were made quite a considerable time ago, probably under previous **Vento** bands. We have a wide discretion as to what to award within the **Vento** guidance as updated by the Presidential Guidance. Taking account of that, and the injury that we consider Mr Stuchbury suffered because of the acts of discrimination, we consider that the appropriate award falls within the middle part of the lower band of **Vento.** We consider £4,000 to be an appropriate amount, taking account of current values and the injury suffered by Mr Stuchbury.

119. In relation to the two matters of financial loss claimed in the Schedule of Loss, the first one is a cost of £25 for a doctor's letter which Mr Stuchbury obtained dated 29 January 2020, which appears to be in anticipation of the disciplinary hearing. We consider that this is loss which flows from the act of discrimination of the failure to make reasonable adjustments. If the respondent had made reasonable adjustments, as part of the process of doing that, they would have obtained and paid for medical information so that there would have been no need for Mr Stuchbury to obtain and pay himself for the doctor's letter. We, therefore, consider it is appropriate to make the award of £25 to compensate the claimant for that financial loss incurred.

120. We do not consider we have enough information to be satisfied that the £90 claimed for a medical report flowed from any of the acts of discrimination found, so we make no award for that.

121. In accordance with the relevant regulations we would normally award interest on compensation for injury to feelings and financial loss. No argument has been put to us that we should not make such an award in this case and we see no circumstances which should lead us to do anything other than make the normal type of interest award.

122. For injury to feelings, interest is awarded at 8% from the date of the act of discrimination, which was 7 February 2020 until the calculation date, which is today (22 October 2021). For financial loss, the normal provisions are that interest is awarded from the mid point between the date of the act of discrimination and the date of calculation. The act of discrimination in that case is the failure to make reasonable adjustments which continued over some period from September 2019 (we found at the latest) up until today, 22 October 2021. We have discretion as to exactly how we do the calculations so we consider that a fair outcome would be to award interest from the same date as we do on the other amount, so from 7 February 2020.

123. We calculate interest on £4,025 from 7 February 2020 until today (22 October 2021). That is a period of 624 days. 624 days at 8% interest on £4,025 gives

interest of £550, so that is the amount of interest that should be paid on top of the global award of £4,025.

_____

Employment Judge Slater

Date: 19 November 2021

REASONS SENT TO THE PARTIES ON

22 November 2021

FOR THE TRIBUNAL OFFICE