EMPLOYMENT TRIBUNALS

Claimant: Mr A Jones

Respondent: Pilkington UK Limited

HELD AT: Manchester (by CVP) **ON:** 2, 4, 5, 6 and 9 (with 3 being non sitting/reading) August 2021

BEFORE: Employment Judge Johnson

MEMBERS: Ms C Jammeh
Mr B J McCaughey

REPRESENTATION:

Claimant: Mr B Henry (counsel)

Respondent: Ms C Urquhart (counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is well founded, which means that the claimant was unfairly dismissed.

2. The claimant was disabled in accordance with section 6(1) Equality Act 2010 by reason of the condition of depression and anxiety.

3. The complaint of discrimination on grounds of disability contrary to section 15 Equality Act 2010 is well founded to the extent described within the reasons given in this judgment. This means that the complaint of disability discrimination is successful.

4. The complaint of breach of contract is well founded. This means that the complaint is successful.

5. The question of remedy will now be determined at a remedy hearing on a date to be advised.

REASONS

Background

1. The claimant was employed by the respondent from 1 November 1983 until 14 October 2019 and at the date of his dismissal was a Team Leader (Hot End).

2. He presented a claim form to the Tribunal on 19 February 2020 following a period of early conciliation from 6 January 2020 until 21 January 2020 and brought complaints of unfair dismissal, disability discrimination and breach of contract.

3. The respondent presented a response on 18 March 2020 resisting the complaints and not accepting that the claimant was disabled within the meaning of the Equality Act 2010.

4. The case was the subject of case management and considered by Employment Judge Allen at a preliminary hearing on 21 April 2020, when a list of issues was identified, the case was listed for a final hearing and case management orders made. Specific orders were made concerning the question of whether or not the claimant was disabled including the provision of an impact statement and relevant medical evidence. The relevant period for the disability for the purposes of determining the complaint of disability discrimination was recorded as being from 1 May 2019 until 12 December 2019.

5. Upon the provision of the impact statement and medical evidence by the claimant, the respondent confirmed its acceptance that he was disabled at the relevant time by reason of his long-standing radiation induced neuropathy (also known as fibrosis radiation syndrome), but not by reason of depression and/or anxiety. Accordingly, the question of disability remained in issue between the parties insofar as it related to the asserted impairments of depression and/or anxiety.

6. The hearing was originally listed for 6 days, but due to Employment Judge Johnson having to attend an unavoidable medical appointment, it was necessary for day 2 of the final hearing to be a non-sitting day, with the Members and the Judge using the time that they had available to carry out further reading of the hearing bundle. However, the Tribunal was able to read the relatively short witness statements quickly on day 1 and it was possible to start the hearing of the claimant's evidence before lunch.

7. Ms Urquhart did suggest that the question of disability could be dealt with as a preliminary issue given the non sitting day. However, Employment Judge Johnson determined that this would not result in a saving of time as

there would be a need for additional submissions on this discrete issue and there would be the risk of evidence having to be heard twice in relation to disability and then in relation to discrimination, unfair dismissal, and breach of contract. It was noted it had not been determined in case management that this was a case suitable to have disability dealt with as a preliminary issue and under these circumstances, all issues relating to liability would be dealt with together during the 5 sitting days of the case.

Issues

Disability

8. Did the claimant have a disability at the relevant time, pursuant to section 6 Equality Act 2010 ('EQA')? The impairments relied upon are: radiation induced neuropathy; fibrosis radiation syndrome; and/or depression and/or anxiety. The relevant time is 1 May to 12 December 2019. [The respondent has already conceded that the claimant had a physical impairment which amounts to a disability of radiation induced neuropathy/fibrosis radiation syndrome during the relevant time]. The Tribunal must decide:

a) Did the claimant, during the relevant time, suffer from depression and/or anxiety?
b) If so, did the depression and/or anxiety have an adverse effect on his ability to carry out normal day to day activities during the relevant time?
c) If so, was such effect, during the relevant time, substantial?
d) If so, had such effect lasted for at least 12 months, or was it likely to last for at least 12 months, or was it likely to last for the rest of the claimant's life?
e) Did the respondent have knowledge of the claimant's disability at the relevant time?

Discrimination arising from disability (section 15 EQA)

9. Was the dismissal of the claimant unfavourable treatment?

10. Was one or more of the following 'something arising in consequence of the claimant's disability':

a) His sickness absence and/or incapacity to attend work;
b) His attendance at the farm the claimant says it was to aid his mental health and therefore arose directly as a consequence of his mental impairment and/or because the deterioration of his mental health arose in consequence of his physical impairment);
c) The respondent's belief that the claimant was undertaking physical activity at the farm whilst off sick, and/or
d) The aggregate effect of (a) to (c)?

11. Did the respondent dismiss the claimant because of any of those things?

12. Was dismissal of the claimant a proportionate means of achieving a legitimate aim? The legitimate aim relied upon by the respondent is: 'to ensure the sickness absence procedure is adhered to in order to try to ensure employees have a reasonable period of recovery time, and to safeguard employees during this recovery time by preventing them from undertaking activities which could further exacerbate their alleged symptoms, hinder their recovery and increase their length of time off work'.

Unfair dismissal

13. What was the principal reason for the claimant's dismissal? Was it a potentially fair reason in accordance with section 98 Employment Rights Act 1996 ('ERA')? The respondent relies upon conduct.

14. Was the dismissal fair in all the circumstances in accordance with section 94 ERA and in accordance with equity and the substantial merits of the case? Relevant to this will be:

a) Did the respondent act reasonably in treating the relevant conduct as sufficient grounds for dismissal?
b) Did the respondent follow a fair process to determine whether it was reasonable to treat the relevant conduct as sufficient grounds for dismissal?
c) Did the decision to dismiss fall outside the range of reasonable responses in the circumstances?

15. Did the claimant contribute to his own dismissal and, if so, to what extent?

16. If the dismissal is found to be procedurally unfair, would the claimant have been fairly dismissed had a fair procedure been followed?

Wrongful dismissal

17. The claimant was dismissed without notice. Can the respondent prove that there was a repudiatory breach in order to justify dismissing the claimant?

a) Is the Tribunal satisfied that the claimant committed the misconduct?
b) Was the alleged misconduct sufficiently serious to amount to a repudiation?

Remedy

18. If the claimant is successful in any of his claims, what, if any, remedy is he entitled to?

19. Relevant to remedy is the following issue (which will be determined at the same time as the liability issues): did the respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures and, if so, would it be just and equitable to increase any award and by what percentage? The claimant alleges that he was dismissed for something which differed from the matter investigated/alleged, that is,

there was a change of allegation, and that is the way in which the respondent did not comply with the ACAS Code of Practice.

Evidence used

20. The claimant gave witness evidence and did not call any other witnesses. His physical disability meant that he could become uncomfortable from time to time, and he was allowed regular breaks and the opportunity to stand up when he needed to do so. Additionally, regardless of whether or not his mental condition amounted to a disability, there were occasions when he found the giving of evidence emotionally stressful, and breaks were allowed in order that he could reflect and compose himself. In this respect, the Tribunal considered the relevant provisions of the Equal Treatment Bench Book and the overriding objective at Rule 2 of the Tribunal's Rules of Procedure.

21. The respondent relied upon the witness evidence of those managers who would normally be expected to give evidence in a case of this nature. Greg Clarke who was the investigating manager in the disciplinary process which led to the claimant's dismissal, Sam Cooke who was the disciplinary hearing manager and 'dismissing officer, Neil Syder the appeal hearing manager and Andrea Manley who was the relevant Human Resources ('HR') manager.

22. An agreed hearing bundle was provided, and it comprised of a little under 300 pages. There was also a cast list provided and chronology of events, which were agreed by the parties.

23. There were also 2 covert surveillance video clips which the Tribunal was requested to view and following some initial technical difficulties, Mr Henry was able to share with those present using the share facility on the CVP platform. The Tribunal was provided with copies to watch during deliberation

24. Everybody attending the hearing did so remotely using CVP, apart from Mr McCaughey, who viewed the hearing from the Tribunal at Alexandra House, using the available large screen technology.

Findings of fact

Introduction

25. The respondent ('Pilkington') is a major UK company involved in the production of glass using highly technical processes. It employs a significant number of people in the UK. As a large company, it has access to significant in house OH and HR support together with detailed policies and procedures.

26. The claimant ('Mr Jones') started his employment with Pilkington as an apprentice on 1 November 1983. He completed his apprenticeship in

1986 and in 2002 became a team leader, which was the job he held until his dismissal.

27. He confirmed that he was obliged to join a trade union as was often the case in industrial workplaces in the early 1980s and became a member of the GMB. He later transferred his membership to Unite. He became a trade union official and was a steward from 1993 and was ultimately elected as branch secretary for the GMB. He acknowledged that he was well aware of Pilkington's policies and procedures and in particular, the sickness and disciplinary policy.

Disability

28. Mr Jones had undergone a high dose of radiotherapy in the 1980s because he developed Hodgkin's Lymphoma, and this treatment fortunately enabled him to go into remission. Understandably, Mr Jones remains anxious about the illness returning, but the radiotherapy appeared to be successful and for several years the tribunal understood that he was able to live his life normally.

29. Unfortunately, in or around 2006 he began to develop a problem with his shoulder pain which was ultimately diagnosed by Dr Williamson consultant neurologist in September 2019 as being a side effect of the radiotherapy drugs used at the time of his treatment and which caused a chronic and progressive condition called radiation induced neuropathy and was also known as fibrosis radiation syndrome. He identified a loss of muscle in his right shoulder area (his dominant arm was his right) and was of the view that Mr Jones would not be able to recover the damage already sustained and management was all that could be done.

30. In terms of symptoms, this condition resulted in a weakness in his right arm and extreme sensitivity which meant he could suffer pain from the 'slightest touches'. This condition was degenerative, and long term in nature. He was awarded a Personal Independence Payment ('PIP' payment) by DWP in 2019 which presumably related to his impaired function. The respondent accepts this physical condition was a disability at the material times within the meaning of s6 EQA.

31. From September 2018, there was clear evidence that Mr Jones was suffering from mental health issues which he said arose from the uncertainty of his physical disability and associated pain. He saw his GP on 24 October 2018, and he was referred to 'Mind Matters', whom the Tribunal understand to be a therapeutic service which is part of Lancashire Care NHS Foundation Trust. Inevitably, as is often the case with mental health referrals, there was a wating list and Mr Jones was not seen until January 2019. He was asked to complete a questionnaire relating to depression and anxiety at this appointment. The scores from the questionnaires produced an outcome which indicated that depression was 'severe' and anxiety was 'moderate to severe'.

32. He then received several CBT sessions, which the Tribunal understood to involve 6 sessions interrupted by a holiday to Australia followed by a further 2 sessions. He then completed the same questionnaires at the end of this treatment and in a letter dated 3 April 2019, Mind Matters indicated that both the depression and anxiety scores had dropped to a normal level with no depressive or anxiety symptoms being identified. Mr Jones attributed this improvement to his holiday to Australia which would have no doubt provided him with a welcome distraction, especially as he was on long term sickness absence at this point.

33. He remained asymptomatic until he learned of the disciplinary investigation into his activities while on sick leave. He was first notified of this investigation by Pilkington HR's letter dated 23 July 2019 and by 2 August 2019, he had been invited by Mind Matters to an appointment on 7 August 2019. This telephone assessment then recommended that Mr Jones be referred to a Psychological Wellbeing Practitioner. The Tribunal did not hear any further evidence regarding this process, and it does not appear that any further questionnaires were completed with subsequent treatment taking place. However, it did note that a letter was provided to Mr Jones by Minds Matter on 9 August 2019, which described his *'negative thought patterns'* and they mentioned recommending *'increasing activity levels to improve mood. One activity which was discussed and encouraged was your involvement with a community farm, as this appeared to help with feelings of isolation due to the social contacts that you have made there'.*

34. On 9 September 2019, he was referred to adult mental health services by his GP Dr Shaikh, but it was rejected because of his pre-existing referral to Mind Matters.

35. A letter was sent by Dr Shaikh to Pilkington's on 13 September 2019 which stated *'[o]f recent he has struggled with anxiety and depressive symptoms; he attends for regular reviews with his wife. He has been trialling different anti-depressants to help with his affective symptoms'*. Dr Sheikh asked that *'empathy and support can be shown towards his recent request'*. Although it was not clear from the documents what this request was, the Tribunal understands that this statement was made in response to the ongoing disciplinary process and was suggesting to Pilkington's that they should take account of Mr Jones' mental health issues.

36. His consultant oncologist Dr Thorp wrote to Mr Jones' GP on 27 September 2019 primarily discussing the physical condition, but also stating that the condition had:

    'a significant impact on his ability to continue with his usual employment which is a manual job for Pilkington's and this has had a knock on effect on his mental state resulting [in] anxiety and depression and also his financial situation'.

    She added that:

'*he genuinely is unable to continue in his manual post but unfortunately, he is even less fit for employment because of his overlay of his anxiety.*

She concluded by making the following observation: *'…his main issue is with his employer. I am hopeful that there is a satisfactory resolution to the situation in the near future as I am concerned for Alan's [Mr Jones'] ongoing mental health'.*

37. Finally, the Tribunal was taken to a letter from Dr Tsang of the Department of Pain Medicine at Broadgreen Hospital on 20 November 2019 which included in the diagnosis section a reference to depression and although it was not discussed in the body of the letter, it was clearly identified as a continuing factor as part of Mr Jones' overall health.

38. The Tribunal appreciates that while mental health is something that arose as a result of the long term physical health issues that he had, they nonetheless had the capacity to impact significantly upon his day-to-day life. They were intermittent and could be ameliorated by support from Mind Matters, although distraction seemed to be a significant factor as was the case with the holiday to Australia. But nonetheless he remained vulnerable to relapses whether in relation to his physical symptoms or external events such as the disciplinary process.

Light duties

39. As a result of his physical symptoms, Mr Jones was moved to light duties from 22 January 2018 and he continued with these until November 2018, when he went off sick. The Tribunal was not provided with any contemporaneous documentation relating to this move and it was only referenced in the disciplinary hearing notes and was discussed during the disciplinary hearing

40. Mr Jones said that his role became 'predominantly' sitting and he referred to an occasion where due to staffing absences, he had to step in as team leader and carry out the more physically demanding work carried out by team members.

41. Mr Cooke described Mr Jones' role at the time of his absence as being *'one of our most sedentary roles'.*

42. The Tribunal understood that these light duties remained in place while Mr Jones was on long term sick leave and that once declared fit to return to work, he could continue to work on this basis. However, as will be discussed below, this adjustment was overtaken by events concerning his pain management.

Sickness policy and Mr Jones's sickness absence

43. The Tribunal recognised that Pilkington's had a particularly generous sickness absence policy which provided for extensive periods of paid

sickness absence – 56 weeks in the case of Mr Jones, due to his length of service.

44. The Tribunal recognises that as an experienced employee, Mr Jones was well aware of these procedures and how they operated.

45. Sick leave was managed under the Sickness Procedure and the Tribunal heard evidence from Ms Manley with regards to its application. The version in use at the time of Mr Jones' disciplinary process was Version No: 2 created on 1 June 2003. Section 4.3 dealt with regular sick review meetings and reference to the designated medical advisor after 3 months continuous absence.

46. A particularly relevant section in this procedure related to section 4.4:

'Employee Conduct Whilst Absent

During any period of absence a major objective will be a speedy return to fitness and work. Therefore, employees will be required to conform to the following guidelines:-

a. Not to participate in any sports, hobbies or social activities that are in any way inconsistent with, or could aggravate the illness or injury, which could delay recovery.
b. Not to undertake any other employment, whether paid or unpaid.
c. Not to engage in any work around the home in terms of home improvements which could aggravate their illness or injury.
d. Not to engage in any activity which is inconsistent with the nature of the illness or injury.'

The Tribunal notes that these activities were described within the section as being *'guidelines to reduce the possibility of difficulties or embarrassing situations arising'*. But nonetheless it went onto say *'[b]y not following these guidelines employees may make themselves liable to disciplinary action'*. The Tribunal accepts that if the relevant parts of section 4.4 were triggered, they could result in the involvement of the disciplinary procedure.

47. The Sickness Policy was also relevant and in respect of section 4.3 (f) Abuse. Which provided the following:

'Abuse
Entitlement to Company Benefit may cease if the employee behaves in a way, which, in the opinion of a designated Medical Adviser, may hinder recovery or if they refuse suitable employment. Abuse of the scheme may lead to disciplinary action and restrictions on the benefits available.'

There was considerable discussion during the hearing of witness evidence as to the meaning of this section and in particular, the respondent's witnesses (apart from Mr Syder), expressed a belief that the question of involving the designated medical advisor was a matter for discretion.

However, the Tribunal disagrees and finds that the section should be read as whole. It clearly indicates that inappropriate behaviour while sick (which we understand to be regulated by section 4.4 of the sickness procedure), required the involvement of the designated medical advisor in order that the question of abuse could be considered. If having referred the matter to the advisor, it was felt that abuse had taken place, management could then consider whether or not they should restrict benefits or in addition, commence disciplinary action. The Tribunal finds it was perhaps understandable that the respondent adopted the approach of not seeking a medical opinion because it initially thought it was looking into the question of secondary employment *(being 4.4. (b)) rather than (a), (c) and (d)),* which did appear to a question of fact rather than medical opinion. However, once an investigation moved into areas involving issues relating to (a), (c) or (d), the involvement of medical opinion was clearly necessary as it involved an assessment of a medical nature.

48. The third relevant policy or procedure was the disciplinary agreement which was a procedure that applied to all employees in 'Float Manufacturing', which was where Mr Jones worked.

49. A section which was of particular relevance included the reference to gross misconduct at 2(i)(a) which included conduct *'serious enough to destroy the employment contract between employer and employee and make any further working relationship and trust impossible'.*

50. The Tribunal also noted the procedure to be followed in relation to the investigatory stage and the need to ensure that evidence from witnesses should be obtained '*quickly before recollection fades'*.

51. Mr Jones began a period of sick leave on 5 November 2018 due to right shoulder pain. Fit notes were provided at regular intervals and the condition keeping him off work was identified with reference to shoulder symptoms/pain with reference to hospital review. He was subject to ill health review meetings on 3 December 2018, 1 February 2019, 8 April 2019, 23 May 2019 and then 30 July 2019, (which was same day as the investigatory meeting). Apart from the final meeting, these meetings were conducted by HR manager Jenny Liston and Mr Cooke. Ms Liston completed an email following each meeting and copied in Pam Cooper in OH. But it was noticeable that Mr Jones was not provided with a copy or note of what had happened.

52. Mr Jones was referred to OH and Group Medical Advisor Dr Shackleton on 7 February 2019. He produced a short email rather than a report or letter and focused upon pain and loss of function in Mr Jones' right arm. He said:

'[t]his is very disabling and he is not currently fit for any work'.

He went on to say:

'[o]n balance I think the problem will remain or get worse and it will permanently prevent him returning to manual work'.

A return to work was considered possible once he was able to manage/control pain better, but even then, he would only be fit enough for a non-manual role. The Tribunal acknowledges that the respondents would have concluded that Mr Jones had a significant reduction in physical function at this point in time.

The farm and Surveillance

53. At some time during March 2019, management received information from an unnamed employee who reported seeing Mr Jones in a local cycle shop wearing work boots, which were understood by the Tribunal to be the heavy-duty tan-coloured boots used in manual work settings. Management became concerned that Mr Jones might be involved in secondary employment contrary to section 4.4 (b) of the sickness procedure described above and decided it required investigation.

54. The Tribunal heard no evidence of any discussions taking place between management concerning the least intrusive ways of investigating this matter. They decided to instruct a surveillance company with the somewhat hubristic title of 'Mike India 5 agents' to look into Mr Jones activities. There was a discussion between Emma Neil of HR and Mr Syder concerning the instruction of this company, whose activities were charged at a daily rate of £950. A *Surveillance Process Form* was referred to in the bundle, which instructed surveillance on 8 May and 10 May 2019. The form was signed by Ms Manley on 6 May 2019 and in addition to her, Ms Neal, Mr Syder and Mr Cooke were identified as having knowledge of the instructions. As it turned out the Tribunal understood that there were four days of surveillance, although one tape was lost, and another was very short. In terms of the investigation, only the two days surveillance on 8 and 10 May 2019 were used by Pilkington's in their deliberations.

55. The Tribunal acknowledges that in terms of cost, the outlay for these investigators was believed to be proportionate when taking into account the generous sick pay being received by Mr Jones. However, it appears that little consideration was given concerning the proportionality of the investigation and the extent to which Mr Jones' privacy should be interfered with. As it turned out, the surveillance company appeared to go way beyond what Pilkington's expected, investigating Mr Jones' property ownership and credit referencing. While it is acknowledged that as a private company, Pilkington's were not subject to the provisions of the Regulation of Investigatory Powers Act 1996 (commonly known as 'RIPA'), the Tribunal does find it surprising that a more nuanced and measured approach was not considered when commencing this investigation. After all, this sort of activity does involve interference with human rights and an individual's reasonable expectation of privacy. An employer should naturally carry out these activities in a limited, necessary and proprotioante way. However, the Tribunal accepts Ms Manley's evidence that the use of covert surveillance was rarely used and acknowledges Mr Syder's

evidence that the company would take steps to ensure that the instruction of these businesses would be carried out more carefully in future.

56. The Tribunal watched the two days of surveillance relied upon, on a number of occasions. What was noticeable about their content, was how unremarkable they were. Effectively, there was footage of Mr Jones sharing a transit van belonging to Cronton Farm and where he accompanied ('chaperoned' to use his words), his friend the farmer and the farmer's son on a delivery of produce such as potatoes to nearby houses in Knowsley and St Helens on 8 May 2019 and 10 May 2019. It was understood that Mr Jones was picked up en route and at its highest, the physical effort that the Tribunal could see was his handling of a small plastic bag in which appeared to be placed a normal retail sized bag of potatoes. The actual deliveries appeared to be carried out by the farmer or his son. On 8 May 2019, there was also footage of Mr Jones and the farmer in a greenhouse in the farm. The tribunal accepts Mr Jones' evidence that he was holding the tap open with his right arm outreached for a few minutes while the farmer watered flowers which were apparently being grown for use at Mr Jones' daughter's wedding. While his statement referred to him using a hose, he appeared to simply pass the hose to the farmer. The Tribunal did not see it as a particularly physical activity.

57. Nonetheless, management felt concerned that taking into account the available OH evidence, his light duties pre sickness and the contents of the surveillance, an investigatory meeting was appropriate to consider his activities and whether they amounted to a breach of the sickness procedure.

Investigation meeting

58. Linda Zocek from Pilkington's HR sent a letter on 23 July 2019 to Mr Jones inviting him to meeting on 30 July 2019 to *'discuss reasonable belief that you have undertaken secondary employment during sickness absence, whilst in receipt of Occupational and Statutory sick pay.'* The letter was short and explained that the meeting was a *'fact-finding exercise'* that no decision would be taken as to whether the formal disciplinary procedure should be started until the investigation is concluded. Mr Jones was reminded that he could have a trade union representative present. The reason given for the meeting bore close resemblance to the wording of 4.4(b) of the Sickness Procedure and following the receipt of the surveillance, this was clearly what was in the mind of management when deciding to commence the investigation. There was no suggestion that they were concerned Mr Jones was doing things inconsistent with his injury contrary to the wording of 4.4(a), (c) or (d) at this stage and it is reasonable to conclude that Mr Jones would have expected questioning to be about whether or not he had taken another job during sick leave. There was no reference to the surveillance within this letter.

59. The investigatory interview with Greg Clarke took place on 30 July 2019. Mr Jones, his trade union representative Danny Cheetham and Jenny Liston from HR were in attendance.

60. The meeting first of all took the form of a review of Mr Jones' health. Effectively, the Tribunal noted that this was a sickness absence review and a disciplinary investigation were being dealt with at the same meeting, albeit consecutively. Importantly, it was not made clear to Mr Jones that this was what was going to happen and the failure to separate these two matters, could easily leave a perception that the health review, was being used as a means to find information that contradicted evidence given in the investigation, especially as the details of the surveillance had not been disclosed to Mr Jones or his union representative at this stage. Regardless of whether that was the intention of management, the Tribunal finds this to be poor practice by an employer.

61. The Tribunal also noted that this investigation took place some months after the surveillance had taken place and Pilkington's explained that Ms Manley was unwell, hence the delay. While this might be the case, it does seem surprising that a company the size of Pilkington's' could not continue with this matter in her absence with her colleagues taking over. This would be especially the case, taking into account the discipline agreement at 2.2 which stated the importance of obtaining evidence quickly before recollection fades.

62. In terms of his present health, Mr Jones said to Mr Clarke that he '*Continued to have good days and bad days, but not getting any better'*. He acknowledged that he could still lift things, but knew his condition meant that he shouldn't. It very much appeared that Mr Jones' health was in process of being understood by his doctors and indeed himself and he was coming to terms with his physical limitations: he was starting to receive pain management.

63. The meeting then moved to the investigatory part of the meeting. Mr Clarke questioned Mr Jones about whether he was doing anything that could be part- or full-time work, paid or unpaid and he said no, he had not. He was then asked about any activity that could be deemed as work and again Mr Jones said no. Mr Clarke then explained that he was asking these questions because Mr Jones had been seen wearing safety boots. Mr Jones acknowledged that he had been wearing safety boots because he was expected to wear them when attending his friend's farm Almond Brothers, Cronton. He said that he was a long term friend and had been helping out for five years or more.

64. Mr Jones said that he had been encouraged to continue going by his mental health advisors 'Mind Matters', because it would be to his benefit of 'social inclusion'. While the Tribunal is not sure that this was the correct terminology to use, it understood this to mean that as a man with a physical impairment which restricted his function and who was spending a lot of time at home, it was to his benefit to go out and socialise with others so as not to become isolated and dwelling upon his health issues. Mr

Clarke was told that he would attend to 2 to 3 times a week but had not been for last 2 to 3 months due to personal reasons. He added that his friend the farmer, would stop him doing strenuous things.

65. Ms Liston did suggest to Mr Jones that he had not mentioned the attendance at the farm during previous sickness review meetings and noted that he would not be allowed to undertake any physical activity which was detrimental to his health. This was the first time during the investigation that a suggestion was made that management's concerns went beyond the question of secondary employment. She also mentioned that Mr Jones had asked to volunteer to work at the office based Honeyrose Foundation while off sick, so she implied that it was surprising that the farm had not been mentioned. Despite Mr Jones' suggestion that he had mentioned the farm previously, there was no documentary evidence that he had done so from the welfare meeting emails in the bundle. But importantly, the Tribunal noted that management held a belief that there were too many contradictions between their perception of Mr Jones' health while off sick and what they saw on the surveillance.

66. Mr Clarke produced a note of the meeting and added some additional comments provided by Mr Cheetham following a WhatsApp message. He explained that the farmer was a friend from pre diagnosis of his shoulder injury, he continued to see him for social inclusion and as a hobby, and gave assurance no work was being carried out likely to hinder his return to work and if anything, suggested that it helped with his rehabilitation and return to work.

67. Mr Clarke gave his evidence in a very reasonable way and was willing to make concessions or acknowledge occasions where upon reflection, he would have done things differently. However, the Tribunal believes that an early mistake in this process was to focus heavily upon his perception of Mr Jones being seen wearing work boots and his attending a farm – being a workplace as well as his friend's residence while being off work sick. Given that Mr Clarke quite reasonably approached the investigation meeting as a fact-finding exercise, it is unfortunate that he did not appear to explore Mr Jones' alternative explanation as to what he was doing while on sick leave and to look into the health-related issues which were identified. The difficulty was that Mr Jones was not shown the surveillance evidence and had this happened, it may well have been possible to get a clearer picture of what he was doing as was shown on the surveillance pictures and in any event, he should have been shown these films so he could understand why he was subject to management concerns that he was working while off sick.

Disciplinary process and dismissal

68. In any event, Mr Clarke felt that there was sufficient concern to justify this case being referred to a disciplinary hearing under the disciplinary process.

69. Mr Jones was invited to disciplinary hearing by letter dated 16 August 2019. The reason given remained '*to consider disciplinary action in accordance with the disciplinary procedure in relation to allegations of reasonable belief you have undertaken secondary employment during sickness absence, whilst in receipt of occupational and statutory sick pay'.* He was reminded that this conduct was being treated as a disciplinary matter and could result in his dismissal.

70. The original August 2019 meeting date was amended to 12 September 2019 at Mr Jones' request. But before the meeting took place, Mr Jones and his union representative expressed concern about the stills of the covert surveillance which were contained within the investigation pack. It was not clear when the pack was received by them from management, but it did not appear to have been sent with the invitation letters to the disciplinary meetings.

71. The hearing was adjourned to 26 September 2019. In addition to the hearing officer Mr Cooke and Mr Jones, Ms Manley was present as HR Manager and note taker and unusually, Mr Jones was supported by two union representatives, with Paul Hatton representing him and Mark Arnold taking notes. Management's note of the meeting provided a clear heading that the issue to be considered was whether Mr Jones was engaged in secondary employment while sick.

72. The Tribunal noted that during the questioning, Mr Jones was less than helpful, diverting questions and not answering them directly. However, he did mention his sessions with Mind Matters and the benefit of attending the farm for 'social inclusion'. Mr Cooke acknowledged the importance of mental wellbeing but was recorded as saying that he was off work with a physical impairment. The meeting appeared to be quite ill tempered on 26 September 2019 and the Tribunal believes that this was not assisted by the late disclosure of the video stills and had the actual videos themselves had been shown at this stage, this would have assisted the smoother running of the hearing. Mr Hatton requested an adjournment to consider procedure. The meeting was adjourned to 2 October 2019.

73. Ms Manley opened the meeting on 2 October 2019 with a reminder that the purpose of the meeting was to establish whether Mr Jones was working whilst off sick. However, the questioning began to move from the issue of secondary employment and instead, focused upon whether Mr Jones was carrying out physical activity? contrary to what medical evidence suggested. No variation of the issues, however, took place at this stage. It is understood that Dr Shackleton's OH report of 8 August 2019 was available to those present at the hearing, which gave a pessimistic view as to when a return to work could take place. The ill-tempered feeling of the meeting was apparent, little active listening appeared to be taking place and Mr Hatton and Mr Jones were countering questions with reference to mental health, vague suggestions of bullying and ill health retirement. The Tribunal noted that Mr Cooke gave evidence to say this was his first disciplinary hearing where he had to consider

dismissal. The outcome was inconclusive and again the meeting had to be adjourned as Mr Jones had to take medication.

74. The meeting resumed on 9 October 2019, and it began with Mr Jones confirming that he would give consent for OH to disclose his records to management. Mr Hatton requested sight of the surveillance video footage and Ms Manley said she would need to speak with Pilkington's legal advisors. Consequently, a further adjournment was required, although she stressed that Mr Cooke would need to give a decision at the next meeting. Given that Mr Cooke was the appointed hearing manager and decision maker, the Tribunal did feel that these comments by Ms Manley would have placed Mr Cooke under some pressure to reach a decision quickly.

75. The meeting resumed on 14 October 2019. Surprisingly, the OH records had not been obtained and there appeared to be confusion as to what Mr Jones should have done. However, Ms Manley did not appear to resolve this matter at the meeting. She also said that the Legal advice she had obtained was that HR did not need to show the video because the photographs had been disclosed and it was management's choice whether to do so. It is therefore surprising to the Tribunal, that if this was the case, why the videos were simply not disclosed by management before the resumed hearing. It was clear that their continued unavailability was an issue for Mr Jones and his union representatives. Instead, Ms Manley expressed concern about the number of adjournments, that disclosure of the footage would add further delay and, once again, she stressed that Mr Cooke had to deliver his decision at the hearing today. This matter continued to be a source of dispute as the hearing progressed and eventually, Ms Manley relented and allowed the videos to be disclosed. She added however, that the viewing '*cannot detract from the purpose of today. We are here for Sam [Cooke] to give a summary and deliver an outcome to the meeting. The decision will be delivered today, irrespective of time*.' We felt that regardless of whether or not Mr Cooke decided this case without any influence from Ms Manley, the way in which the notes described her interventions, made it difficult for the Tribunal to accept his decision was truly independent.

76. Following the viewing of the surveillance videos, Mr Hatton asked Mr Cooke whether he accepted that Mr Jones had not carried out paid employment. Mr Cooke then said that *'[t]he core issue is that he's undertaken physical activity elsewhere when he could have come into his place of work and carried out his role'.* While Mr Cooke did not appear to appreciate this at the time, he had moved the issue under consideration in the disciplinary from 4.4 (b) to 4.4 (d) of the sickness procedure In his evidence, Mr Cooke said that he believed in terms of (b) and (d) there were, *'connections between the two'.* However, this view was not expressed in the hearing notes and the Tribunal believes this evidence was given with the benefit of hindsight and does not accept that he appreciated the potential implications of this changed issue at the time.

77. Had he done so, the Tribunal finds that either Mr Cooke would have considered whether to adjourn the hearing to allow a review of the issues

under consideration and to allow Mr Jones and his union representatives to consider how they wished to present their case. All of the individuals present at this meeting should have been aware of the relevant elements of the sickness procedure, but it appears that Mr Cooke did not recognise management's new position and Ms Manley either failed to appreciate it too or was by this stage so focused upon reaching a conclusion that she was unwilling to countenance further delays.

78. The remaining discussions during the disciplinary hearing appeared from the notes to be repetitive and inconclusive and dealt with the conflicts between management and Mr Jones, rather than producing any clarity as to Mr Jones' health and what he could do or could not do. In summary, neither side appeared to be listening to the other's arguments.

79. Eventually, Ms Manley called a halt to the meeting at 4.20pm and no objection was recorded from Mr Jones or the union. Management retired so that Mr Cooke could consider his decision and they returned 15 minutes later at 4:35pm. Mr Cooke was then recorded in the hearing note as providing a full decision (as opposed to a summary decision) and which he concluded by saying that:

'*I have established to my reasonable satisfaction that you have undertaken physical activity whilst helping at your friends farm. You may not have received payment whilst at the farm, but I am confident that you have undertaken physical activity during your sickness absence whilst being paid both occupation and statutory sick pay, when you deemed that you were not capable of attending work'*.

80. It was a lengthy oral decision, and it is doubtful that it could have been prepared and concluded within the limited time available during the 15-minute adjournment given Mr Cooke's limited experience of disciplinary hearings involving dismissal. But additionally, he incorrectly decided that Mr Jones' desire to return to work was motivated by the investigation and during the Tribunal hearing acknowledged that this was contrary to what Mr Jones had said during the earlier sickness reviews at which Mr Cooke had been present

81. He also concluded that Mr Jones':

'personal conduct during your sickness absence contravenes the sickness policy and irreparably damages the employment contract between yourself and company. This makes any future working relationship and trust questionable.'

He clearly described circumstances where he believed gross misconduct had taken place. He acknowledged that he had considered mitigating circumstances to justify a lesser sanction than dismissal but said he could not find any. He confirmed in his evidence to the Tribunal that he took into account Mr Jones' unblemished record and length of service and considered whether a final written warning could be imposed, but he said that he felt Mr Jones had been too evasive during the process to warrant

this leniency. This apparently was all done within a 15-minute conversation with Ms Manley, the timing of which was indicated by the hearing note, and which was not disputed by these witnesses during their evidence.

82. Reference was made to a right of appeal within 7 days of the decision being given. A letter was sent from Mr Cooke to Mr Jones on 15 October 2019 confirming the decision at the disciplinary hearing. It was signed by Ms Manley without the customary 'pp' being inserted. Mr Cooke said it had been drafted by him (but with her consultation), and it simply summarised his oral decision given at the hearing and provided no further details.

Appeal

83. Mr Jones raised an appeal by letter on 21 October 2019 and the case was allocated to Mr Syder as appeal hearing manager. The letter raised a number of issues, but importantly he noted that the original allegation of '*secondary employment'* had been changed during the progression of the hearing to '*undertaking physical activities'.* While he did not request that the appeal should take the form of a rehearing, the notice given in the letter that a change of issues had taken place, should have suggested to management that this would be an appropriate step to take in this case. This did not happen however, and instead, he was invited to a meeting on 19 November 2019 with Mr Syder.

84. At the appeal hearing, Mr Syder was supported by Ms Neil and Mr Jones was supported by his union representative Pat Coyne. There was a discussion with Mr Jones and Mr Coyne about the appeal being brought and Mr Syder sought to identify the relevant issues which he was being asked to consider.

85. Mr Syder retired to consider the appeal and his decision letter was produced on 12 December 2019. He said that 3 issues for the appeal had been identified, although the first issue effectively included two grounds:

Issue 1 – this was that management's actions had been discriminatory because of Mr Jones' disability and that the company had built a case against him using entrapment. Mr Syder gave evidence that he looked at the question of disability in terms of reasonable adjustments provided to Mr Jones such as light duties and getting back to work, rather than a consideration as to whether the disciplinary process had been discriminatory. In terms of the question of entrapment, he disputed that this was the case without explaining in any detail why he reached that decision.

Issue 2 – was that Mr Jones felt Pilkington's had not adequately dealt with the issue of complaint of bullying by another employee. Mr Syder felt that no details had been provided of the incident, despite Mr Jones having mentioned this matter to Mr Syder and Mr Cooke prior to going off sick.

He said very little information was given about this matter at the appeal hearing and he invited Mr Jones to provide him with further information by 20 December 2019, failing which this issue could not form part of the appeal. The Tribunal understands that this further information was not provided by Mr Jones.

Issue 3 – was that the company should not have dismissed Mr Jones for undertaking physical activity while on paid sick leave as this was unfair. We accept Mr Syder's evidence that he had not seen the surveillance video footage until the appeal, despite knowing of the original instruction of the surveillance company '*Mike India 5'*. He did view them as part of the appeal and concluded that the footage did show activities taking place which were contrary to the physical restrictions which he believed Mr Jones had told the company were preventing him from returning to work.

86. He did not mention anything in his decision letter about the change of issue during the disciplinary hearing and the appeal hearing notes do not indicate that he raised this as a matter with Mr Jones. This was despite it being mentioned in the notice of appeal letter which Mr Jones had provided. In any event he dismissed the appeal and explained that his decision was final.

87. Mr Syder confirmed in evidence that he had not read the sickness policy prior to the appeal, although said that he was aware of the policy. However, during his consideration of the appeal, he appeared to focus upon the disciplinary action under the disciplinary agreement and did not consider sections 4.4 (a) to (d) of the sickness procedure and their different types of behaviour. Similarly, he did not appear to consider 4.3(f) under the sickness policy relating to abuse of the company sickness scheme. Consequently, he failed to understand how they interacted, the differences between the behaviours described in 4.4 and the effect this had on the change of issues during the disciplinary hearings and also the question of whether a medical opinion should have been sought under 4.3(f) of the policy in relation to alleged abuse.

The law

Disability (section 6 EQA)

88. Section 6 of the Equality Act 2010 provides that a person has a disability if he has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out day-to-day activities. Section 212 provides that 'substantial' means 'more than minor or trivial'. Schedule 1 of the Act provides that the effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to correct it and but for that it would be likely to have that effect.

89. Ms Urquhart also referred to Schedule 1 in her final submissions and reminded the Tribunal that the burden of proof is on the claimant to satisfy the Tribunal that he has met the test in section 6 EQA.

90. Ms Urquhart referred in her submissions to the Secretary of State's Guidance on the Definition of Disability 2011 and in particular section C6 concerning the recurrence of fluctuating events and the example provided within that section. Mr Henry also referred to this guidance in his submissions.

Discrimination arising from a disability (section 15 EQA)

91. Section 15 of the Equality Act 2010 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. However, this kind of discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.

92. In City of York Council v Grosset 2018 ICR 1492 the Court of Appeal held that where an employer dismisses a disabled employee for misconduct caused by his or her disability, the dismissal can amount to unfavourable treatment under S.15, even if the employer did not know that the disability caused the misconduct. The causal link between the 'something' and the unfavourable treatment is an objective matter that does not depend on the employer's knowledge. The Scottish EAT in Sheikholeslami v University of Edinburgh 2018 IRLR 1090 clarified the S.15 causation test. It held that an employment tribunal had erred in rejecting a S.15 claim on the basis that the reason for the claimant's dismissal – her refusal to return to her existing role – was not 'caused by' her disability. The test is whether the reason arises 'in consequence of' the disability, which entails a looser connection than strict causation and may involve more than one link in a chain.

93. Unfavourable treatment will not be unlawful under S.15 if it is objectively justified. In Awan v ICTS UK Ltd EAT 0087/18 the EAT overturned an employment tribunal's decision that the dismissal of a disabled employee on the ground of incapacity during a time when he was entitled to benefits under the employer's long-term disability plan was a proportionate means of achieving the legitimate aim of ensuring that employees attend work. The tribunal had wrongly rejected the employee's argument that an implied contractual term prevented his dismissal on the ground of incapacity while he was entitled to such benefits.

94. Ms Urquhart referred to the case of *Pnaiser v NHS England and Coventry City Council* [2016] IRLR and the correct approach set out by Simler J, to be adopted by Tribunals when determining section 15 claims. In particular, she referred to the question of whether the *links in the chain of causation* where too numerous to show a connection if Mr Jones was not

considered by the Tribunal to be disabled by reason of his mental health and that he was attending the farm to support his mental health because of the distress caused by the physical disability. Mr Henry noted to the Tribunal that *Pnaiser* had been followed by the Court of Appeal decision in *Grosset* as referred to above and the Tribunal should note this higher court decision.

Unfair dismissal (ERA)

95. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

96. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.

97. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.

98. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, as explained in Sheffield Health & Social Care NHS Foundation Trust v Crabtree [2009] UKEAT 0331, the Tribunal must consider a threefold test:

    a. The employer must show that he believed the employee was guilty of misconduct;
    b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
    c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

99. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of

reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

100. It is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.

101. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.

102. In respect of certain claims, such as unfair dismissal and breach of contract, Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer or employee has unreasonably failed to comply with the Code of Practice, it may, if it considers it just and equitable in all the circumstances to do so, increase or reduce compensation awards by up to 25% (this does not apply to any Basic Award for Unfair Dismissal).

103. The Polkey principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Guidance as to the enquiry the Tribunal must undertake was provided in Ms M Whitehead v Robertson Partnership UKEAT 0331/01 as follows:

(a) what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?

(b) depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct?

(c) even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?

104. In Hill v Governing Body of Great Tey Primary School UKEAT/0237/12/SM the Employment Appeal Tribunal held that a "Polkey deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. The question as to what a hypothetical fair employer would have done is not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.

105. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.

106. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

Breach of contract/wrongful dismissal

107. Contract complaints can be considered by the Tribunal in accordance with the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1984, if the claim arises out a termination of contract of employment. Statutory rights to notice pay upon termination are provided by section 86 Employment Rights Act 1996. If there is a breach of contract in respect of notice pay, a claimant may be able to recover the payment he should have received, unless he has committed gross misconduct, in which case a dismissal can usually be effected by the employer summarily.

Discussion

The question of disability

108. For the avoidance of doubt, there has been no dispute throughout this hearing that Mr Jones was disabled within the meaning of section 6 by reason of his physical impairment arising from his right shoulder injury. While there was some suggestion by Mr Cooke in his witness evidence that the surveillance footage of Mr Jones using the tap at the farm, gave the impression of greater movement in his right shoulder than the medical

evidence of Dr Shackleton had suggested, the question of him being disabled by reason of his shoulder condition was not challenged. Mr Cooke accepted that he was not medically qualified and did not seek further medical advice concerning the surveillance and this matter was not pursued by Pilkington's.

109. Consequently, in terms of disability, the Tribunal is left to consider whether Mr Jones was disabled by reason of the mental impairments of depression and anxiety.

110. The Tribunal is under no doubt, that Mr Jones had a long-term physical condition which has been deteriorating over the years since it was diagnosed by his medical experts. He has had to live with the legacy of his treatment for Hodgkin's lymphoma as a young man and although it was successfully treated, there can be no doubt that this will have left him a *'mental load'* over his lifetime. This is likely to be in addition to the inevitable concern that a condition which is in remission, may return. However, the Tribunal notes that Mr Jones appeared to manage the aftermath of this illness with some fortitude, and it was the later physical legacy of this condition which affected his mental health.

111. It must have been heart-breaking for Mr Jones to develop the difficulties with his right shoulder, with the consequential discovery that it arose from his radiotherapy treatment many years ago, that this physical legacy could not be cured and that the only option was management of the problem. It is not surprising that this will have had an impact upon his mental health, especially for a man working in an industry where physical work is important, even if lighter duties can be offered.

112. The relevant period for considering whether Mr Jones was disabled by reason of his mental health is from 1 May 2019 until 12 December 2019. However, it is of course necessary to consider Mr Jones' mental health prior to this period and the Tribunal was assisted by his impact statement and the medical evidence which was included within the hearing bundle.

113. The Tribunal accepts that when Mr Jones was placed on light duties in early 2018, this was a distressing time for him, given the shoulder pain and the uncertainty of his physical condition at this stage. However, there was no firm evidence of any mental impairment at this point.

114. What becomes clear however, is that as the year progresses, his mental health deteriorates and by September 2018, he had been referred to Mind Matters by his GP and inevitably there was a period of waiting before he could be assessed by a mental health practitioner. His assessment in January 2019, produced an outcome which clearly indicated significant symptoms of depression and anxiety.

115. Following counselling sessions and a holiday to Australia, these conditions effectively became asymptomatic. However, by the end of July 2019, he was trying out different anti-depressants under the guidance of his doctor, followed by a referral once more to Minds Matter, (although this

referral had not resulted in an assessment by the conclusion of the appeal process).

116. Depression and anxiety are clearly mental impairments which can have a substantial effect on day-to-day activities and can often be long term in their nature. However, they can also fluctuate over time, even if the underlying risk of the condition remains in place.

117. In relation to Mr Jones' mental health, his assessment in January 2019, undoubtedly described symptoms of depression and anxiety of a significant nature. Their subsidence by April 2019 does of course mean that the question of whether the impairment was likely to be long term in nature, was an issue between the parties.

118. There was no evidence of previous depression and anxiety before the 2018 referral, other than an episode in 2008 which had resolved. The 2018/19 symptoms had similarly resolved and had not lasted for a period of at least 12 months.

119. The question was therefore whether this condition was likely to recur or not in accordance with section 2(2) of Schedule 1 EQA. The medical evidence of Dr Shackleton dated 8 August 2019 said that Mr Jones was feeling increasingly anxious because of the disciplinary allegations being made against him. This would be consistent with Mr Jones receiving anti-depressants in July, together with his GP referring him again to Minds matter in August 2019. Moreover, reference is made within the disciplinary hearing both by the union representative and Mr Jones to his mental health and indeed Ms Manley referred to the impact the delayed hearings would have upon Mr Jones' mental state. Mr Cooke acknowledged concerns about mental health as well, although his view that the sickness absence arose from a physical rather than a mental impairment.

120. While Mr Jones by April 2019 was asymptomatic in terms of his depression and anxiety, the Tribunal believes that when it was symptomatic, it had a significant impact on his day-to-day activities. Following the diagnosis of the long-term shoulder condition with its consequential impact upon his physical capacity to work, it remained highly likely that the effects of these mental health conditions could return, even if they could be managed from time to time through counselling or medication.

121. The Tribunal acknowledges the reference made by Ms Urquhart to Secretary of State's Guidance on the Definition of Disability 2011 at C6 concerning the recurrence of fluctuating events and the example provided within that section. However, unlike the hypothetical woman described in the example, Mr Jones did not suffer mental health issues arising from 2 acute and unrelated events and without an underlying condition of depression. In his case, his mental health issues had arisen from the difficulties which he experienced from his shoulder injury which was a lifelong condition and one which was likely to deteriorate. There was clear evidence that this undermined his mental health following its diagnosis and

his reaction in late 2018 and early 2019 reveals that to be the case. Whether it was the threat of disciplinary action or a further physical decline, Mr Jones had reached a point where his self-esteem was severely affected by his physical injury, and it made it him vulnerable to further episodes of depression and anxiety which would require counselling and/or medication. Indeed, section B14 of the Secretary of State's guidance refers to a similar hypothetical example and it notes that if treatment is required to ameliorate a long-term mental health condition, the effect of the treatment is disregarded as the impairment could still return.

122. Accordingly, Mr Jones was disabled at the material time, not only in relation to his physical shoulder injury, but also in respect of his mental condition of depression and anxiety.

Discrimination arising from disability (section 15 EQA)

Unfavourable treatment?

123. There can be no doubt that the dismissal relied upon by Mr Jones amounts to unfavourable treatment

Something arising in consequence of the claimant's disability?

His sickness absence and/or incapacity to attend work

124. Mr Jones had been absent on sick leave for a lengthy period from 5 November 2018 and this continued until his dismissal. Although he experiences mental health issues during this time, the reason for his absence were his physical symptoms. This was evidenced by the description given by his GP on the fit notes, his ongoing efforts to return to work expressed at welfare meetings and the view of Dr Shackleton that he remained unfit because of those physical symptoms. Ultimately, without the disciplinary process, what was preventing Mr Jones' return to work was his continuing problems arising from his shoulder injury and the need for the pain and discomfort to be managed to an acceptable level. As a consequence, his sickness absence and incapacity to attend work related to the physical disability and not the mental disability.

His attendance at the farm

125. Mr Jones' attendance at the farm initially appeared to arise from his friendship with the farmer and several shared interests. His health did not play an obvious part in this activity. It may have had positive mental health outcomes, but in the way that many people derive from friendship and activities and the overall feeling of wellbeing. This began when he was able to work full time, he then went off sick and the Tribunal heard evidence that he found himself to be sat at home feeling fed up. We accept his evidence that he was encouraged to attend the farm by Mind matters, but that this did not involve a systematic attendance and by the time of the investigation, he said that he had not been attending for a few months due to unidentified personal reasons. These were not indicated to

be associated with his health whether physical or mental. The Tribunal was therefore not able to conclude that his attendance at the farm was sufficiently connected to his mental health to amount to something connected with his disability in accordance with section 15 EQA.

The respondent's belief that the claimant was undertaking physical activity at the farm whilst off sick

126. The respondent did not initially believe Mr Jones to be undertaking physical activity while on sick leave. Their concerns originally arose from the 'tip off' about him wearing work boots and concerns about a second job following their viewing of the surveillance videos. They then commenced a disciplinary process which resulted in an acceptance that he was not engaged in secondary employment but was carrying out physical work contrary to the sickness procedure at section 4.4(d). It was at this point they considered what *they* believed the medical evidence said that Mr Jones could or could not do. They then decided that what the video showed was inconsistent with that and as a consequence, concluded that a breach of 4.4 (d) was taking place.

127. What they failed to do, was to seek the view of an appropriate medical expert and therefore rashly made assumptions about perceived inconsistencies between what they had been told was Mr Jones' physical condition and the limited activities revealed on the film.

128. In other words, they decided he was not as ill as he said he was and was more fit for work than they felt they had been led to believe by him previously.

129. Accordingly, the Tribunal finds that the respondent's belief of physical activity does amount to something connected with his physical disability rather than his mental health disability.

The aggregate effect of the above 'things'

130. This means that only the sickness absence/incapacity to attend work and the belief of physical activity while sick are relevant when considering section 15 EQA. Even then, this is only in relation to the physical disability.

Did the respondent dismiss the claimant because of any of these things?

131. The respondent clearly dismissed the claimant because of undertaking physical activity at the farm while off sick rather than because of his sick leave or incapacity to attend work. They knew at the disciplinary hearing that he remained unfit to return to work and was likely not to be able to return if at all, for some time. As such his sickness absence was not a reason for his dismissal and there was no evidence that this was an underlying reason for the dismissal.

Was the dismissal a proportionate means of achieving a legitimate aim?

132. The legitimate aim was '*to ensure that the sickness absence procedure was adhered to in order to try to ensure that employees have a reasonable period of recovery time and to safeguard employees during this recovery time by preventing them from undertaking activities which could further exacerbate their alleged symptoms, hinder their recovery and increase their length of time off work.'*

133. The Tribunal accepts that this is a legitimate aim. It is an essential aim for any employer, but it is particularly acute when you have an employer such as Pilkington's with a very generous company sick pay scheme which is inevitably vulnerable to abuse.

134. This was anticipated by the sickness policy at paragraph 4.3(f) and guidance was given to management as to how to deal with suspected abuses. Unfortunately, in this case, managers did not consider this provision properly and failed to take account of the need to obtain advice from a designated medical advisor. This was a proportionate measure to ensure a fair consideration of abuse and to avoid circumstances arising where managers who are medically unqualified might reach a wrong conclusion where an abuse was discovered.

135. A failure in this case was not to involve a designated medical advisor once the video evidence became available to assess whether it revealed Mr Jones doing things which he had said he could not do and whether his symptoms could fluctuate. Mr Jones himself had said at the beginning of the investigatory hearing that he had had good days and bad days and given that Dr Shackleton was asked to produce a further medical report, in August 2019, it is unfortunate that he was not asked to consider the video evidence at the same time and before the disciplinary hearing concluded.

136. There were of course other failings in the management of this disciplinary process, and these will be considered below. However, the Tribunal finds that while the respondent did have a legitimate aim as described above, it failed to apply it in a proportionate way when it managed the disciplinary process.

Unfair dismissal

Initial matters

137. There was no dispute that Mr Jones was an employee with Pilkington's and presented his claim in time in accordance with section 108 of the ERA following an explicit dismissal by his employer.

The principle reason – was it potentially fair?

138. Pilkington's have clearly shown that the reason for dismissal is *'conduct'* and this a potentially fair reason under the ERA. The Tribunal is therefore left to decide whether the dismissal was fair in all the

circumstances taking into account the well-established questions to be determined in conduct dismissal cases and as described in the case of *Birchall*.

Was the dismissal fair in all the circumstances?

139. The Tribunal would firstly note that the respondent's management of its disciplinary process was confused and allowed little time for reflection.

140. There was understandable alarm caused by the suggestion that Mr Jones might be working while off sick and that was the original basis of the investigation. However, as is often the case with video surveillance, there was a failure to question what could be seen in the video and to ensure that what they suspected might be happening was actually the case.

141. Mr Cooke was clearly faced with a case which had not begun well because the investigation had not involved the disclosure of the surveillance evidence. Mr Jones and his advisors were at a clear disadvantage and not only did this make the hearing process more convoluted, it also made for a more belligerent hearing as well because of that perceived disadvantage.

142. Mr Cooke genuinely believed that there was a conduct issue at stake and that Mr Jones had behaved inappropriately while on sick leave, but he was not clear as to the issues being advanced under sickness procedure at 4.4. Instead, he appeared to place great reliance on what he perceived to be evasive behaviour from Mr Jones rather than considering whether there were alternative explanations as to what was shown on the video evidence.

143. There was also clear evidence that he was being rushed by Ms Manley. While she was understandably concerned that the adjournments were prolonging the case, as the HR advisor to the hearing, she should have been aiming to ensure that Mr Cooke had sufficient time for deliberation. Ultimately, the case notes suggest that the process had become overly argumentative with Mr Manley frequently stressing the need for a conclusion to the case. The final fifteen minutes deliberation, (even allowing for preparation that might have taken place beforehand), does not persuade the Tribunal that the decision of summary dismissal by reason of conduct was reasonably reached by Mr Cooke.

144. He was aware from his previous knowledge of the welfare meetings and the available medical evidence that Mr Jones wished to return to work and was prevented from doing so by reason of his physical ill health. He was also given alternative explanations as to why he had been attending the farm. The video when it was eventually played (at far too late a stage of the dismissal), revealed very little physical activity. Without the opinion of a designated medical advisor it was unreasonable to reach the conclusion that there had been activities contrary to section 4.4 (d) of the sickness procedure and that these could amount to gross misconduct under the disciplinary agreement.

145. This was not helped by an investigation process which took too long to be commenced, which did not involve early disclosure of the video evidence. This was exacerbated by the decision to effectively hold a welfare meeting at the same time as the investigatory meeting and which could potentially cause an employee some confusion as to which part of the meeting was which.

146. Therefore, the decision fell outside the range of reasonable responses and at its highest, any conduct issues related to a failure by Mr Jones to explain at his welfare meetings that he wished to attend the farm in order that management could considered whether there were any issues that needed to be discussed. This failure may have made it more likely that the disciplinary process would be commenced, but it was not the ultimate reason given to support the finding of gross misconduct and would not in itself have amounted to a matter of gross misconduct.

Procedural fairness and 'Polkey'

147. The Tribunal has found that there are clear failures of procedure in terms of the speed of the investigation, the failure to disclose evidence, the unwillingness to adjourn the hearing when the issue under investigation changed, the constant pressure to conclude the hearing and the speed at which the decision was reached.

148. However, even if the process had been carried out in a more measured and thoughtful way considering the need for Mr Jones and his advisors to fully understand the case against him, the Tribunal does not think that he would have been dismissed in any event.

149. Mr Jones had worked for 36 years and had an unblemished disciplinary record and before his sickness absence arising from his shoulder injury, his attendance was understood to have been good. There was insufficient evidence available to support a finding of gross misconduct and any conduct under investigation if properly subject to a fair procedural process would have produced an outcome where dismissal was within the range of reasonable responses.

150. It might be considered that this was a case where in reality, the underlying concern for Pilkington's, was Mr Jones' medical capability. The evidence suggests however, that he was keen to return to work and a proper consideration during investigation with an early disclosure of the surveillance evidence may well have avoided a disciplinary hearing being considered necessary.

151. There is some suggestion that the physical condition suffered by Mr Jones may have continued to preclude his return to work in the foreseeable future but at the time of his disciplinary process, there was no indication that the respondent intended to proceed to a medical incapability process. As such, it was likely that Mr Jones would have been able to

return to some sort of light duties or at least would have continued to remain on sickness absence until pain management had been concluded.

Uplift/reduction for an unreasonable failure to comply with the ACAS Code of Practice?

152. The Tribunal also considered the question of an uplift to reflect failure by the respondent to comply with the ACAS Code of Practice Disciplinary and Grievance Procedures contrary to section 207(A) Trade Union & Labour Relations (Consolidation) Act 1992 ('TULRCA').

153. This related to a number of matters. There was the delay in holding the investigatory meeting. There was the non-production of the video evidence during the investigatory meeting and the continued failure to disclose it, only disclosing stills of images from the videos on 12 September 2019 and then only disclosing the actual videos on 14 October 2019 despite persistent requests. There was the failure at the end of the disciplinary hearing to allow sufficient time during the adjournment before the decision was reached. Finally, there was the change of issue under investigation relating to section 4.4 of the sickness procedure, without allowing an adjournment and thereby enabling Mr Jones sufficient time to consider whether he needed to review his arguments.

154. The number of failures identified means that the Tribunal feels that Mr Jones was prejudiced and there was an unreasonable failure by Pilkington's management to comply with the ACAS Code. An uplift is therefore necessary and taking into account their impact the Tribunal feels that a 15% uplift to the compensatory award is appropriate.

Did the claimant contribute to his dismissal?

155. Mr Jones had failed to tell his employer about the farm at his welfare meetings and while it may have involved visiting a friend, as an experienced employee and former trade union representative, the Tribunal believes that he should have considered checking with his employer whether it caused them any concern.

156. There was also evidence during the disciplinary hearing that Mr Jones behaved in an evasive way and a failure to answer questions directly and the notes reveal an obstructive approach. However, this needs to be balanced against the way in which his employer held onto the surveillance evidence, and which was not disclosed until the last meeting.

157. It should be noted that the earlier investigation hearing was much more open, and this was at a point when Mr Jones was oblivious to the existence of the surveillance evidence. Had this been disclosed at this early stage, it is likely that the suspicion and evasive answers could have been avoided during the disciplinary process.

158. Nonetheless, being supported by two union advisors, it was reasonable to expect a less belligerent and more cooperative approach from Mr Jones and his advisors. Their actions did not help the decision-making process and left Mr Cooke with concerns that Mr Jones was hiding something.

159. The tribunal therefore concludes for the reasons given above, there was contributory conduct by Mr Jones, which was culpable or blameworthy and which caused or contributed to his dismissal. Accordingly, there should be a deduction for contributory fault assessed at 20%.

Wrongful dismissal/breach of contract

160. By deciding to dismiss Mr Jones for gross misconduct by reason of conduct, he was dismissed summarily and without notice.

161. Taking into account the Tribunal's decision concerning the complaint of unfair dismissal, the Tribunal finds that his conduct was not sufficiently serious to amount to a repudiatory breach and he should not have been dismissed without notice

162. His claim of wrongful dismissal/breach of contract succeeds. Although it should be noted that this decision is concurrent to the finding of unfair dismissal. Accordingly, the question of avoiding double counting in respect of remedy for wrongful dismissal and unfair dismissal must be taken into account at the remedy hearing.

Conclusion

Judgment

163. Accordingly, the Tribunal finds:

a) The claimant was disabled in accordance with section 6(1) Equality Act 2010 by reason of the condition of depression and anxiety.
b) The complaint of discrimination on grounds of disability contrary to section 15 Equality Act 2010 is well founded to the extent described within the reasons given in this judgment. This means that the complaint of disability discrimination is successful.
c) The complaint of unfair dismissal is well founded, which means that the claimant was unfairly dismissed.
d) The complaint of breach of contract is well founded. This means that the complaint is successful.

Case management orders

164. The question of remedy will now be determined at a remedy hearing on a date to be advised, but not to be listed on a date before 1 November 2021. The hearing will be listed for 1 day before the same Tribunal

165. Upon being given details of the remedy hearing, the parties will have 7 days from the date of receiving the Notice to inform the Tribunal if this date is inconvenient. If so, dates to avoid should be provided and the other party should be notified accordingly.

166. The parties will also discuss appropriate case management orders to ensure that the case is ready to be heard at the remedy hearing and will provide a proposed list for consideration by Employment Judge Johnson by no later than **16 August 2021.**

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Employment Judge Johnson

Date: 13 December 2021

JUDGMENT SENT TO THE PARTIES ON

25 January 2022

FOR THE TRIBUNAL OFFICE