EMPLOYMENT TRIBUNALS

Claimant: Mr B Nimmo

Respondent: Jaguar Land Rover Limited

Heard at: Liverpool **On:** 11-15 October 2021

Before: Employment Judge Benson
Mrs L Heath (CVP)
Mr P Dobson (CVP)

REPRESENTATION:

Claimant: In person
Respondent: Mr R Santy, Solicitor

JUDGMENT having been sent to the parties o 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 claimant has brought two sets of proceedings before this Tribunal, which were combined at an earlier preliminary hearing. There have been two preliminary hearings for case management during the process of these claims, being on 27 June 2019 before Employment Judge Barker and on 16 August 2019 before Employment Judge Shotter. During those hearings, the parties' cases were clarified and as a result, an agreed List of Issues was prepared. The claims are:

(1) A claim of discrimination arising from disability (contrary to section 15 of the Equality Act 2010);

(2) A failure by the respondent to make reasonable adjustments (sections 20 and 21 of the Equality Act 2010);

(3) A claim of victimisation (contrary to section 27 of the Equality Act 2010);

(4) A claim of unfair dismissal (contrary to section 98 of the Employment Rights Act 1996).

2. The respondent admits disability, being the claimant's mental health impairment with effect from 1 October 2018. It does, however, dispute that it knew or ought reasonably to have been aware that the claimant was a disabled person. That is therefore an issue which needs to be decided in these proceedings.

3. The List of Issues was agreed, however at the outset of the hearing I discussed with the parties that in respect of the discrimination arising from disability claim there was one question which should be added after point 4, being: Did the unfavourable treatment (if any) arise as a consequence of the claimant's disability?

4. Subject to that amendment, which is included below, the issues were agreed as follows:

Discrimination arising from Disability – section 15 Equality Act 2010

(1) Did the respondent treat the claimant unfavourably by subjecting him to disciplinary proceedings in October 2018?

(2) Was the respondent's imposition of a final written warning, later reduced to a written warning, unfavourable treatment?

(3) Did the disciplining manager, having viewed data in respect of the claimant's medication, make a decision to discipline him without seeking or obtaining a medical report on the claimant? Was this unfavourable treatment?

(4) Did the respondent treat the claimant unfavourable by subjecting him to the Halewood absence management procedure "(HAMP") by the imposition of a disciplinary sanction and by dismissing him?

(5) Did the unfavourable treatment (if any) arise as a consequence of the claimant's disability?

(6) Was the respondent objectively justified in its treatment of the claimant? The respondent argues the following:

(a) Legitimate aim: to maintain full attendance in the workplace by use of HAMP and, where necessary, the disciplinary procedure, to remain aware of the welfare of its absent employees and to provide a clear and fair process to manage absences, grievances, investigation and disciplinary hearings and facilitate, where possible, a return to work for the employee, in order to fulfil the respondent's order book.

(b) As to the reasonable necessity of the treatment: to support employees and assist them to return to work to enable the

business to ensure that managers can plan for shifts to be covered appropriately to maintain vehicle production.

(c) As to proportionality: the respondent requires the employees to engage with the HAMP when absent and, where necessary, the disciplinary procedure. This enables the respondent to assess and support the employee in respect of their medical issues and make necessary plans to cover their work whilst they are absent and put into place arrangements which would facilitate a return to work. The alternative is that employees are not required to follow policies and processes in which instance the respondent submits that it would not be able to continue operating effectively.

Reasonable Adjustments – sections 20 and 21 Equality Act 2010

(7) Did the respondent have the following PCPs:

(a) Requiring its employees to work full time or to work part-time on non-consecutive days?

(b) Requiring employees from the Trim and Final area to remain in the Trim and Final area and forbid them to move to an alternative area within the Halewood plant?

(c) Subjection to the HAMP?

(d) Subjection to the disciplinary procedure?

(8) Did any of the PCPs above put the claimant at a substantial disadvantage when compared to persons who are not disabled at any relevant time in that the respondent required the claimant to:

(a) Return to work on a full-time basis or to work on a part-time basis on non-consecutive days?

(b) Remain in the Trim and Final area and forbid him to transfer elsewhere?

(c) Be subjected to HAMP should he be absent in the future because of the above requirements?

(9) Were there any steps that the respondent should have put in place to avoid such disadvantage to the claimant? Should the respondent have:

(a) Allowed the claimant to transfer to another area away from Trim and Final to a slower paced environment?

(b) Made adjustments for the negative effects of the claimant's medication on his consequent ability to work in a fast-paced role?

(c) Made adjustments to its HAMP so that if the claimant had to take time off in the future, he would not have been disadvantaged by his absence by subjection to HAMP and the disciplinary procedure?

(d) Checked to see if the claimant was covered by section 6 of the Equality Act 2010 when he sought reasonable adjustments?

(e) Allowed the claimant to participate in disciplinary proceedings by email or by phone?

(10) Would it have been reasonable for the respondent to have taken those steps after October 2018?

(11) Would such adjustments have removed the substantial disadvantage faced by the claimant?

Victimisation – section 27 Equality Act 2010

(12) The claimant's complaint of disability discrimination to the Employment Tribunal in March 2019 is accepted as a protected act by the respondent.

(13) Did the respondent subject the claimant to a detriment by dismissing him?

(14) Was this because he did a protected act or was there another reason for his dismissal?

Unfair Dismissal – section 98 Employment Rights Act 1996

(15) What was the principal reason for the claimant's dismissal on 7 May 2019?

(16) Was that reason a fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996?

(17) Was the dismissal fair or unfair in accordance with section 98(4) and did the respondent act within the band of reasonable responses?

5. At the outset of the hearing, I identified with Mr Santy the respondent's reason for the claimant's dismissal. Mr Santy confirmed that that reason was the claimant's conduct (as set out at paragraph 31 of the amended response) in that the claimant refused to engage or return to work, when he was fit to do so, and his refusal to return to work in the circumstances was a refusal to comply with a reasonable instruction and a misconduct offence.

Evidence and Submissions

6. The claimant gave evidence on his own behalf and his father, Mr P Nimmo, also gave evidence.

7. The respondent called:

- Mr Andy Evans, the claimant's manager from January 2018 until the claimant's dismissal and who conducted the claimant's absence review meetings;
- Mr George Gresty, a Production Manager, who conducted the disciplinary hearing and was the dismissing officer;
- Mr Darren Morrison, a Production Manager who dealt with the appeal at stage one;
- Mr Ian Holohan, the Technology Manager in Trim and Final, and the final stage appeal officer.
- Ms J Harkin – Senior Case Manager (HR)

8. The parties had agreed a bundle of documents consisting of 464 pages. The claimant brought some additional documents, being fit notes for the relevant periods which the respondent had no objection to including as documents for this hearing. During the course of the hearing we were also provided with missing OHP notes and correspondence.

9. Both parties provided the Tribunal with both written and oral submissions, for which we are grateful.

Findings of Fact

10. Most of the facts in this case were agreed, however where there was a dispute we have considered the evidence in the form of witness statements, together with the evidence given under cross examination and the documents to which we have been referred, many of which were contemporaneous. We have come to any findings of fact which were in dispute on the balance of probabilities, being what was more likely to have happened.

11. The claimant commenced employment on 13 June 2016 as an operator in the Trim and Final department. He had previously worked on an agency basis.

12. The respondent is a premium automotive manufacturer and retailer. The claimant worked at its site in Halewood, Liverpool.

13. The claimant suffers with anxiety and panic attacks. The respondent has accepted that the claimant was a disabled person from 1 October 2018 by reason of his anxiety, panic attacks and OCD, though we were unable to see any evidence of a diagnosis of OCD.

14. The respondent operated the Halewood Absence Management Procedure ("HAMP"). This was a recently introduced procedure aimed at driving good attendance. The respondent had problems with sickness absence within its workforce and the policy dealt with both short and long-term absences. It was a robust procedure which contained three stages before a move on to an Employment Review which could result in an employee's dismissal. Employees on long term

sickness absence had regular absence review meetings and meetings with the respondent's internal Occupational Health Practitioner ("OHP") in their Occupational Health ("OH") department. There was an appeal procedure at each stage within the HAMP where a manager had more discretion than at the initial stage. The procedure has a questions and answer section. In response to the question: Are there any absences that would not be included in this procedure? It says, "Disability Related Sickness Absence: If an absence meets the definition of disability under the Equality Act, reasonable adjustments as to how the procedure will be applied will be considered".

15. The claimant first reported sick with anxiety on 25 May 2017, he was absent for five days. The respondent had a further absence for 29 days from 21 September 2017 to 2 November 2017, due to anxiety. The next episode of anxiety related absence commenced in October 2018.

16. The claimant has had the following absences:-

a. 14 July 2016 to 15 July 2016 for an upset stomach

b. 23 August 2016 to 16 September 2016 for post-operative recovery

c. 25 May 2017 to 2 June 2017 for anxiety

d. 21 September 2017 to 2 November 2017 for anxiety

e. 8 February 2018 to 26 February 2018 with sciatica

f. 5 days from 28 February 2018 to 21 March 2018 for sciatica. 17 days from 26 March 2018 to 30 April 2018 for sciatica. The Claimant had returned to work in between these absences for one day on 22 March 2018;

g. 103 days from 2 May 2018 to 1 October 2018 for a prolapsed disc in his back;

h. 5 November 2018 to his dismissal for work related stress.

17. The claimant attended an absence review meeting on 30 April 2018, he was placed on stage two of the HAMP. The claimant requested an appeal hearing, he believed that the recent periods of absence should be linked and considered as a single period. The claimant had commenced a further period of absence and requested that the appeal be placed on hold until his return to work.

18. The claimant attended a further absence review meeting on 15 May 2018. At the meeting the claimant reported that he had been suffering with pins and needles in his leg and that he had a prolapsed disc in his back. The claimant had a further appointment with a specialist on 25 May 2018 to determine his future treatment. It was confirmed at the absence review meeting on 20 June 2018 that the claimant would undergo surgery on 6 July 2018. There would be a six-week post-operative recovery period, which was agreed by the respondent. An OHP appointment was arranged to take place on 15 August 2018; following this a review meeting was

scheduled to take place on 17 August 2018 to begin a discussion for the claimant to return to work.

19. At the review meeting on 17 August 2018 the claimant did not feel that he was ready to return to work, he was engaged with external physiotherapy services to increase his strength. The claimant reported that he had an appointment with his consultant on 7 September 2018. On 11 September 2018 the claimant attended a further appointment with OH. It was determined that the claimant could return to work in the week commencing 1 October 2018 on a phased return with adjustments in place.

20. The claimant attended a return to work meeting on 1 October 2018. The claimant reported that he was "feeling ok". He was not taking any medication for his sciatica and that the OHP would continue to monitor and review. The claimant attended an appointment with the OHP on 5 October 2018, it was confirmed that the claimant was fit for work and that he should continue with a phased return to work over four weeks. This was in addition to adjustments that were put in place to take into account the claimant's limited ability to bend and that the claimant was unfit for heavy lifting.

21. As the claimant had returned to work, the respondent revived the appeal that had been placed on hold following the decision of the absence review meeting on 30 April 2018. The claimant was invited to an appeal hearing on 17 October 2018. The claimant's absence was reviewed and there was a lengthy discussion regarding the days that the claimant had returned in between absences and how this had triggered the stages of the HAMP. The meeting was adjourned to allow the hearing manager to obtain clarification of the disputed days and time that the claimant had clocked in and out.

22. The meeting was reconvened on 22 October 2018. It was decided that there would be a formal adjustment to link the absences from 28 February 2018 to 27 April 2018 and that the claimant would remain on stage two of the HAMP. It had been observed that the claimant's behaviour had erratic during the meetings. It was suggested to the claimant that he needed to undergo an assessment on his mental health to get the treatment he needed. The claimant was also informed that he had the option of being referred for further Cognitive Behavioural Therapy via OH if this would be helpful for him.

23. The claimant returned to the production line after the meeting. Later that day an incident was reported by Sarah Beddows, an associate, concerning the claimant. It was alleged that the claimant had grabbed Ms Beddows earlier in the day; she said that the claimant had put his arm around her neck over her shoulders and imitated a biting action to demonstrate a threat he was making towards his Production Leader, Tommy Whitehead. Ms Beddows was concerned about the claimant's behaviour. The claimant had already finished his shift and as a result he was not spoken to about the incident until the following day.

24. When the claimant returned to work the following day, he was required to undertake a drug and alcohol test, this was standard procedure following incidents of this nature. The claimant was suspended, on full pay, pending further investigation of the alleged threatening and aggressive behaviour and the outcome of the drug

and alcohol test. Ms Beddows attended an investigation meeting on 24 October 2018. She explained that the claimant had returned from a meeting with HR and that he had said that he wanted to kill Mr Whitehead, and rip his face off; the claimant referred to Hannibal Lector. She said that the claimant had been making similar comments on a daily basis since he had returned to work. Ms Beddows said that the comments included that "if he had a shotgun he would go for him (referring to Mr Whitehead)".

25. The claimant was invited to attend an investigation meeting on 25 October 2018. At the meeting the claimant denied the allegation that he had grabbed Ms Beddows around the neck. He said that he returned from the meeting with HR stressed and made comments that he thought everyone was trying to get him sacked and that he wanted to go to sleep and not wake up. After an adjournment the claimant said that he had made some stupid comments about his supervisor, but he could not remember what he had said.

26. The drug and alcohol test results were returned on 26 October 2018. The results confirmed a positive result; however, this was consistent with the Claimant's use of diazepam which he had been prescribed. The results were not considered any further and were regarded as negative for the purposes of the disciplinary process.

27. The claimant attended OH appointments on 1, 12 and 20 November 2018. A long-term absence case management meeting took place on 27 November 2018. At that meeting the claimant confirmed that he was engaging with external support services via the NHS and that he was on a new treatment, Propranolol, to relieve physical symptoms of anxiety and manage his blood pressure. In respect of the outstanding work issues it was explained to the claimant that he would need to proceed to a Final Counselling meeting as this was the process in line with the HAMP; the trigger was the claimant's absence from May 2018. It was confirmed that there would be a meeting on 29 November 2018.

28. At the meeting on 29 November 2018 the claimant was progressed to the Final Counselling stage of the HAMP. The claimant confirmed that he would appeal that decision.

29. The claimant was informed on 4 December 2018 of the outcome of the disciplinary investigation. He was informed that the suspension would be lifted and that there was a case to answer. The claimant was invited to attend a disciplinary hearing on 19 December 2018 before Mr A Booth. The allegations against the claimant were that he had used threatening language and threats against his supervisor and an associate.

30. At the disciplinary hearing on 19 December 2018 the claimant maintained that he had not grabbed Ms Beddows. He confirmed that he was in a poor emotional state and probably had made inappropriate comments about his supervisor. The claimant could not recall if he had made comments in relation to Hannibal Lector and accepted that he had probably made comments in respect of a shotgun. The claimant said that he believed that there was a plan to get him sacked.

31. A letter was sent to the claimant on 20 December 2018 asking him to confirm his grounds for appealing the decision of the absence management review meeting on 29 November 2018. He was asked to provide his grounds by 4 January 2019.

32. The claimant confirmed his reasons by letter dated 2 January 2019. He stated that he wanted the Respondent to consider the medical evidence and to reconsider the stages of the HAMP as he had tried to return to work on two occasions; he said that if he had remained absent from work for the full duration then he would have remained on stage one of the HAMP.

33. The claimant attended an appointment with the OHP on 2 January 2019. The advice following that appointment was that the claimant remained unfit for work but that his ongoing absence from work was due to his perception of work-related issues rather than a primary medical condition or symptom. It recommended outstanding work-related issues be addressed by management as that would make a return more likely.

34. The claimant was invited to a reconvened disciplinary hearing on 10 January 2019.

35. The claimant was given a Final Written Warning and a five-day suspension, without pay. The claimant was informed that his actions would ordinarily have resulted in dismissal for gross misconduct; however, Mr Booth took into account the claimant's situation in respect of his emotional wellbeing and made the decision not to dismiss him. The claimant appealed the decision.

36. An appeal hearing was arranged to take place on 16 January 2019 before Mr Teasdale. At that hearing the claimant confirmed that he had been through a difficult period, he had experienced a breakdown, he was on medication which could exhibit negative side effects and he had been informed that he had OCD which may have contributed to his inappropriate reactions. The appeal hearing was adjourned to 24 January 2019 to enable the claimant to provide medical evidence for Mr Teasdale to consider.

37. A further absence review meeting with Mr Evans took place on 18 January 2019. At that review, the claimant's absence was discussed at length and attempts were made to ascertain how the respondent could facilitate a return to work. It was noted that at the last OH review the recommendation was that the claimant could return to work but the claimant walked out of that meeting before any discussions could take place regarding any restrictions. The claimant asked if he could reduce to part time hours. Mr Evans acknowledged this request and advised the claimant to make a request for flexible working. Mr Evans confirmed that the claimant would be required to return to work on 21 January 2019 on a phased return starting on day shifts for four hours on each shift and then increasing to six hours and finally back to full duties. The claimant indicated that he would not be returning to work as he wanted the appeal hearing for his attendance review to be out of the way following the outcome of his disciplinary. The claimant did not return to work and did not communicate his absence to the respondent.

38. On 18 January 2019 the claimant raised a grievance against the OH department saying that they had incorrectly said that he was fit to return to work

whilst on medication. The respondent sent a letter to the claimant on 30 January 2019 confirming that the claimant had walked out of the appointment before it had fully concluded as he disagreed with the advice given. It was confirmed that the claimant had since agreed to attend a further OH appointment accompanied by Mr McGravie, his union representative for support. The grievance was closed.

39. On 24 January 2019 the claimant attended the reconvened appeal hearing in respect of his disciplinary. It was considered that the original sanction was not helping the claimant's anxiety and, as an adjustment to recognise the claimant's mental state, the sanction would be reduced to a Written Warning. Immediately after his appeal hearing, the claimant attended an absence review meeting. The claimant explained that he was relieved and calmer following the outcome of the appeal. The claimant felt positive about a return to work and stated that his counsellors had recommended a reduced working week. Mr Evans clearly explained to the claimant that he needed to return to work to demonstrate a commitment to the business.

40. The Claimant was invited to attend an appeal hearing in relation to the outcome of the attendance review meeting held on 29 November 2019. The meeting took place on 28 January 2019. At that meeting Mr Kelly went through the periods of absence and after considering these, identified that the business had already linked three periods of absence as an adjustment. Mr Kelly confirmed that it was his view that the stages of the HAMP had been applied correctly and that the Final Counselling stage would remain in place.

41. On 4 February 2019 the claimant sent a letter to the respondent outlining a request for reasonable adjustments. The claimant requested that he work a three-day week, in a slower paced role and that he be allowed 'disability leave' should he become ill again. On the same date the claimant sent a separate letter raising a formal grievance against the decision that he remain on the Final Counselling stage of the HAMP. The respondent responded to both of these letters on 19 February 2019. In respect of the request for reasonable adjustments it was determined that these would be discussed as part of the OH reviews appointments and absence review. In respect of the latter grievance, it was confirmed to the claimant that it was HAMP policy that grievances would not be heard in relation to this process but that the respondent had previously made adjustments in the policy by treating three periods of absence between February and April 2018 as one period, and also making a further adjustment in November 2017 by not progressing him to a Stage One after a 29 day absence for anxiety. He noted that his absence level in the period he had worked for JLR since he was given a permanent contract was that he had been absent for 249 days out of a possible 550.

42. The claimant attended an absence review on 21 February 2019. Mr Evans, Production Manager, chaired the meeting. The claimant was accompanied by his representative, Mr McGravie. Ashleigh Peterson from the HR case management team provided HR support and took notes. Mr Evans explored various options to enable the claimant to return to work. It was agreed that the claimant could work three days per week, namely Monday, Wednesday and Friday on a trial basis. In addition, the claimant requested a slower paced role and specifically asked for the speed of the production line to be reduced. The claimant was informed that this could not happen. The Claimant would, instead, be permitted to attend the plant to look at the different roles and confirm which jobs he believed he could do.

Essentially the claimant was given the opportunity to attend the Trim and Finish department and select the job or jobs that he thought he could so. There were some 471 roles available. His Union representative sought to persuade him that the respondent was going 'above and beyond' to accommodate his needs.

43. The claimant expressed that he was unhappy with this proposal and that he wanted to work three consecutive days and that he wanted a "nice easy job". Mr Evans adjourned the meeting to enable the claimant to consider the proposals carefully and enable him to visit the plant with Mr McGravie to assess the jobs which he felt might be able to do. These proposals were confirmed in a letter to him of 4 March.

44. The claimant attended a further OH referral on 4 March 2019. The OHP's view was that the claimant was not fit for work at that time, but may be, with adjustments in the next few weeks. It was commented that he remained absent with symptoms which he perceived were primarily work related. The adjustments recommended were that the claimant return on a phased basis over two weeks, flexible working (being 3 days per week) and straight forward work on a trial basis if that could be accommodated. It noted that the claimant said he had been offered adjustments as previously recommended but that he felt that working three days in a row would suit him better. The OHP indicated she would write to the claimant's GP for a report. She did this and although the respondent was unable to locate a copy of that report, the GP appears to have noted comments in response on the letter. They refer to his treatment and medication; that he has been seen and assessed by the Psychological team and that the GP had no recommendations for the OPH to consider concerning adjustments to assist him to returning. A copy of the OH report was provided to the claimant.

45. The claimant attended a further absence review on 11 March 2019; this was to follow up the adjourned absence review on 21 February 2019. Mr Evans chaired the meeting, Mr McGravie accompanied the claimant and Ms Peterson provided HR support and took notes. The claimant was unhappy with the suggestion that the three-day working week was on a trial basis and said that he was anxious that it would be taken away as soon as he came back. Mr Evans explained that he would need to make a formal request for flexible working if this was to be a long-term arrangement but that this could take a while to process and it required identifying a job share. The present arrangement that Mr Evan's was proposing was on a temporary basis to facilitate a return to work for him. During the Tribunal hearing, Mr Evan's explained that he was suggesting this temporary arrangement because a formal flexible work application would take some time to complete and he was seeking to assist the claimant in trying to get him back into work. We accepted that Mr Evans was trying to do his best for the claimant. The claimant also raised again that he wanted the production line to be slowed down. Ms Peterson confirmed that the business had done everything possible to secure a return to work for the claimant by reducing sanctions to relieve workplace stress, letting him pick the job that would be suitable for him and to work a three day week on a temporary basis. It was confirmed to the claimant that the OHP had deemed him fit for work with adjustments and that adjustments had been made over and above those recommended by OH; he was therefore expected to return to work on Monday 18 March 2019 to work alternate days on a trial basis. The claimant left the meeting and slammed the door. He then returned and reiterated that he wanted the pace of

the production line to be reduced. After a period of discussion explaining that the production line could not be slowed down to accommodate one person out of 4000 the claimant left the meeting room again in an angry manner. On his return the claimant was given an instruction to attend the plant on 14 March 2019 with his Union representative to look at alternative jobs and return to work on shift on Monday 18 March 2019. The arrangements were confirmed to the claimant in a letter dated 12 March 2019.

46. The claimant failed to return to work on 18 March 2019. A meeting was arranged to take place on Friday 22 March 2019 with Mr Evans to understand why the claimant had not attended on for work on 18 March and to seek a way forward. The meeting commenced at 8.30am and concluded at 3.30pm. There were several adjournments.

47. The claimant went through the jobs that he had looked into on the production line; he did not believe that he could cope with any of them. It was confirmed that one of the roles (installing batteries into electric vehicles on the M HEV) had an expectation of working at a pace of 60% in so far as the claimant would have 92 seconds to complete a single procedure which would take 50 seconds to complete. It was explained to the claimant that that role would relieve the line speed issue as not every car that passed through would require action. Mr Evans further clarified that he was prepared to buddy the claimant up with another associate so the reduced role at 60% would be further reduced to 30% as there would be two people doing the role. His Union representative commented that the claimant needed to try it rather than “saying no to everything [he] presented to him”. The claimant continued to be reluctant to try any of the roles that were identified as being suitable for him. Ms Peterson offered to break down the barrier of returning to work by facilitating a uniform day. This is where the employee puts on their uniform, reports for work, attends the area and tries the role; this would be for only an hour. The claimant indicated that he could not be bothered to try this and again left the meeting in temper. On his return to the meeting the claimant was asked to attend the plant with the trade union to try the jobs; the claimant agreed to do this.

48. The claimant’s view was that she should not have to return to work whilst he had a GP fit note.

49. The claimant was invited to attend an absence review meeting on 1 April 2019 to discuss how he managed with the trials of the various roles and the next steps in respect of facilitating a return to work. It was confirmed that the claimant had not attended the plant for the planned uniform day. The claimant said that he did not feel like it. The respondent confirmed to the claimant that it had presented a number of options to the claimant to facilitate a return to work. Mr Evans made all efforts to put forward ways to assist the claimant in returning work.

50. During the course of the review meetings with Mr Evans, the claimant made various comments concerning the efforts to assist him in returning to work. These included the comments on 1 April 2019 that he “didn’t return to work because he didn’t feel like it”; and ”what if I don’t want to do it” referring to his return to work; on 22 March 2019 that “no matter what job offered on the production line, it made him feel sick”; ”It’s just not for me Andy regarding the battery role; “ what can I say, I can’t do the job” and he “doesn’t know whether he would feel OK to come back to work;

and “I don’t want to work I don’t want the stress; on 22 February 2019 “I just want a nice easy job”; “ I want to camp for days”; and “I can’t do the job”;

51. The claimant was invited to a disciplinary hearing by a letter dated 16 April 2019. This was to discuss his refusal to return to work and would be held on 24 April 2019. The claimant refused to attend as he believed it would be held in bad faith.

52. The hearing was rescheduled for 29 April and the claimant was advised of this by a letter dated 25 April. The claimant again refused to attend. He was then told that the hearing would go ahead in his absence.

53. The meeting was conducted by Mr Gresty. Before the meeting commenced, Mr Gresty was made aware of conversations between the claimant’s father and Ms S McCarthy of HR on 20 April. In those calls, Mr P Nimmo expressed his concern about the claimant’s mental state and said that he would be attending his GP to obtain a further sick note. He also discussed the return to work arrangements and that his son wanted to return to work three days but consecutive days. He was clearly concerned about his son’s mental health. Later that day he called again to confirm that the claimant had been provided with a further fit note. Upon becoming aware of this, Mr Gresty made enquiries of the claimant’s manager, who advised him that the claimant’s Production Leader Mr Whitehead had heard from the claimant that morning. Mr Gresty spoke with Mr Whitehead and he said he had spoken to the claimant that morning at the start of the shift some hours before the disciplinary hearing start time. It was their weekly contact call and the claimant had seemed normal, that he had said he did not know when he would be returning to work but that Mr Whitehead said he had no reason to feel concerned for him and he did not detect any signs of distress. Mr Gresty decided to continue with the hearing.

54. He reviewed all of the evidence including the notes of the review meetings and OH information. He felt however that he needed further information about the claimant’s mental health and adjourned the hearing so that he could make further enquiries of the OHP. Ms Harkin, the HR support, contacted the OHP to enquire whether a report had been received from the claimant’s GP. The OHP confirmed that the report had been received and that she had discussed it with the respondent’s Company doctor and there was no change to the advice with OH had provided in their report of 3 March 2019.

55. He considered the medical evidence and the answers provided by the claimant to Mr Evans’ various efforts and proposals for him to return. Mr Gresty’s view was that the claimant would not return because he did not want to. He concluded that it was not a case where the claimant could not return. Although at that time, the claimant had a note from his GP which had signed him as unfit for work, Mr Gresty chose to rely upon the respondent’s OHP advice. He considered that the OH advice was that his reason for his absence was perceived work related issues; that respondent had made numerous and exhaustive attempts to put in place measures and suggest options to facilitate his return to work; that each time a resolution had been offered the claimant had put up more barriers; that following the further enquiries of OH that any further medical view would not take matters further; and that the request that the claimant work his 3 days in a block rather than spread out through the week was a personal preference rather than a medical one and that his view was that working alternate days would give him time to recuperate after

each shift and fitted with the business demands of absence cover [on a Monday and Friday]. He concluded that the claimant had failed to engage and cooperate with the respondent's efforts to support him in his return to work, and that it was reasonable to expect the claimant, in light of the OH report of 4 March for him to return to work on 18 March. He was satisfied that his continued absence was unauthorised; that he was not returning because he did not want to, rather than could not and that he had failed to comply with a reasonable request to return. He considered that was gross misconduct. He took into account possible mitigation but decided that dismissal was the appropriate sanction.

56. The claimant appealed by letter dated 8 ay 2019. Appeal hearings were held with Darren Morrison, Ian George and Ian Holohan. The claimant's appeals were unsuccessful. The claimant declined the opportunity to attend any of the appeal meetings.

57. His union representative, Steve McGravie, was permitted to attend on his behalf. In the first appeal before Mr Morrison, the hearing was adjourned so that Mr McGarvie could visit the claimant at his home and meet with him and his father to ensure he understood the points which the claimant's wanted to make. On 27 September 2019, the claimant emailed to say that in relation to the final appeal hearing, if Mr Holohan had questions, he could email, write or phone him, but he would be represented by Mr McGarvie, who would attend on his behalf. The respondent did not consider that it was feasible to conduct the hearing by email or phone, but asked that the claimant provide any additional written representations and at the appeal hearing on 30 September McGarvie was given time to speak to the claimant and additional points were raised by him which were explored by Mr Holohan.

58. Each of the appeal officers concurred with Mr Gresty's view that the claimant's decision not to attend work was because he did not want to. Each had access to the OH reports and the minutes of the review meetings which included the claimant's comments and responses when adjustments were discussed with him by Mr Evans. One of the claimant's points of appeal was that he could not have been absent without leave, when he had a fit note which covered him for his absence for the period including 18 March 2019. This was considered by the respondent's appeal officers who concluded that they were permitted to take the advice of their OH team who were of the view that he was fit for work with the adjustments proposed by Mr Evans and who had a full understanding of the various role and arrangements within the respondent's business.

59. Outcome letters were provided by each of the appeal officers confirming their reasons for upholding the original decision to dismiss which we have considered.

60. There were two areas of factual dispute between the parties which were relevant to our decision.

<u>The minutes of Meetings</u>

61. At various parts of his evidence, Mr Nimmo challenged the accuracy of the minutes of meetings. This was generally when the minutes recorded him having made comments which were detrimental to his case. His challenges were vague and

at times random and it was generally that he had not made certain comments. Having looked at these minutes, including the context of the conversations, we find that they are an accurate reflection of the discussions that took place. There was a note taker present who produced the notes. Although they were not verbatim, they recorded the key matters. During many of these meetings it was apparent that the claimant was emotional and his actions were erratic. We take the view that he would have had difficulty remembering the exact nature of what he said at the time.

Sarah Beddows

62. The claimant disputed that there was any physical contact with Ms Beddows on 22 October 2018, though he accepts that he did made comments about other people to Ms Beddows which were threatening and offensive. Ms Beddows did not feel threatened herself and reported the behaviour of the claimant as she was worried about his mental health. Ms Beddows confirmed that the claimant did make contact with her. We accept that did happen despite what the claimant says. We cannot rely upon his recollection of that meeting in view of his erratic behaviour and prefer the statements that Ms Beddows gave to the investigating officer. This issue has only limited relevance in any event as the disciplining officer who issued the claimant with a FWW did not rely upon the physical contact but only on the comments which the claimant made.

The Law

Discrimination arising from disability

63. Section 15 of the Equality Act 2010 provides that

> (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.

64. There is therefore a need for knowledge or constructive knowledge of the claimant's disability at the time that the claimant is treated unfavourably.

65. While the Equality Act 2010 stops short of imposing an explicit duty to enquire about a person's possible or suspected disability, the EHRC Employment Code states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see para 5.15).

66. Failure to enquire into a possible disability is not by itself sufficient to invest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know had it made such an enquiry A Ltd v Z EAT 0273/18.

67. In Secretary of State for Justice and anor v Dunn EAT 0234/16 the EAT (presided over by Mrs Justice Simler, President) identified the following four elements that must be made out in order for the claimant to succeed in a S.15 claim:

(1) there must be unfavourable treatment

(2) there must be something that arises in consequence of the claimant's disability

(3) the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and

(4) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

68. If the employer can establish that it was unaware and could not reasonably have been expected to know that the claimant was disabled, the claim cannot succeed.

69. The key question is whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, consciously or unconsciously, to a significant extent. Mrs Justice Simler in Secretary of State for Justice and anor v Dunn (above) noted "the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability… [I]t need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary'.

Reasonable adjustments

70. Section 39(5) Equality Act 2010 applies to an employer the duty to make reasonable adjustments. Further provisions about the duty to make reasonable adjustments appear in Section 20, Section 21 and Schedule 8.

71. The duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20).

72. Section 20(3) provides as follows:-

> "The first requirement is 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".

73. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in Environment Agency –v- Rowan [2008] ICR 218 and reinforced in The Royal Bank of Scotland –v- Ashton [2011] ICR 632.

74. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Commission Code of practice paragraph 6.10 says the phrase is not defined by the Act but "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions". The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in October 2012 in Nottingham City Transport Limited –v- Harvey UKEAT/0032/12 in which the President Mr Justice Langstaff (dealing with a case under the Disability Discrimination Act 1995 and the Disability Rights Commission's Code of Practice from 2004, both now superseded by the provisions summarised above) said in paragraph 18:

> "Although those words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, absent provision or criterion there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustment, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned."

75. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards.

76. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being "more than minor or trivial".

Victimisation

77. Section 27 Equality Act 2010 provides protection against victimisation.

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because —
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

78. It is clear from the case law that the tribunal must enquire whether the alleged victimisation arises in any of the prohibited circumstances covered by the Act, if so did the employer subject the claimant to a detriment and if so what that because the claimant had done a protected act. Knowledge of the protected act is required and without that the detriment cannot be because of a protected act.

Burden of proof

79. Section 136 of Equality Act 2010 applies to any proceedings relating to a contravention of the Equality Act 2010. Section 136(2) and (3) provide that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

80. We are reminded by the Supreme Court in Hewage v. Grampian Health Board [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

81. Unfair Dismissal

82. Section 98 Employment Rights Act 1996 reads as follows:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this sub-section if it … relates to the conduct of the employee …

(3) …

(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case".

83. Conduct dismissals can be analysed using the test which originated in British Home Stores v Burchell [1980] ICR 303, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal.

84. The "Burchell test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

85. Since Burchell was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

86. A fair investigation requires the employer to follow a reasonably fair procedure. Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

87. The appeal is to be treated as part and parcel of the dismissal process: Taylor v OCS Group Ltd [2006] IRLR 613.

88. If the three parts of the Burchell test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

89. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

Conclusions

Knowledge

90. The first issue which we must consider is whether, and if so when, the respondent had knowledge of the claimant's disability. The respondent has accepted that the claimant was disabled by reason of his anxiety and panic attacks from 1 October 2018, but disputes that it had knowledge or ought to have had knowledge that the claimant was a disabled person at any time during his employment. In this case we find that the knowledge of the OH team was the knowledge of the respondent and that the information that the OH team had about the claimant and his mental health impairments as at 31 October 2018, which was the date upon which they met with the claimant again and produced their report were sufficient for the respondent to know or ought to have known that the claimant was a disabled person.

91. The EHRC Code on Employment provided guidance and examples of situations when an employer ought to make enquiries and ought to have had knowledge. Further it states that knowledge of disability held by an employer's agent or adviser, such as OH or HR will usually be imputed to the employer. We have considered the decision of the CA Hartman v South Essex Mental Health and Community Care NHS Trust and others referred to us by Mr Santy, but note that although he refers to it as supportive of the position that OH's knowledge is not imputed, paragraph 35 of the judgment reminds us that there may be circumstances in which an OH department's duty of care to an employee require the department to seek an employee's consent to the disclosure to the employer of information that the employer needs to know, if proper steps are to be taken for the welfare of the employee. That was not advanced in that judgment, but we consider it is relevant in the present case.

92. The respondent is our view appears to take a particularly restrictive approach to the information provided by OH to HR and the managers who made decisions about the claimant. When asked by the Tribunal, the managers seemed to believe that they had no option but to rely upon what the OHP said. They appeared not to ask for more information which might assist them in understanding the claimant's actions or his needs as they believed GDPR prevented them knowing more. The information provided by the OHP in this case was focussed on whether the claimant was able to return to work and if so with what adjustments. There was little reference in the OH reports to what the claimant's medical diagnosis was (indeed in the report of 4/3/19 there is not even a mention of his medical condition) or the symptoms or other matters which might assist the managers in understanding the claimant and his needs. Our observations have only limited relevance in this particular case as for the reasons set out below, we consider that the claimant's mental health issues were

apparent in the many review meetings with Mr Evans, minutes of which were made available to those manager who took decisions relating to his employment.

93. In the claimant's case, the notes of the OH meeting on 31 October 2018 reference his suicidal thoughts, the major stress symptoms; that he was on medication, that he could not concentrate, was not currently driving, not sleeping, unable to participate in hobbies and felt tired all the time. He was very tearful, nervous and unable to answer some questions and very worried. The OHP was aware that this was a reoccurrence of pervious spells of anxiety. The cause of the anxiety was said by the claimant to be that his managers were 'trying to get him sacked' that he kept getting letters about being disciplined which was causing him stress. The OHP's knowledge together with the way that the claimant had behaved on 22 October, should have alerted the respondent to the claimant's disability.

94. The respondent therefore had knowledge from 31 October 2018.

Discrimination arising from Disability – section 15 Equality Act 2010

Subjecting the claimant to disciplinary proceedings in October 2018; and imposing a final written warning, later reduced to a written warning.

95. The claimant accepted during the proceedings that the reduction of sanction to a written warning was not something he relied upon as part of his claim. We have considered both of the remaining issues together. Following the incident on 22 October 2018, the respondent commenced a disciplinary investigation which resulted in the claimant being issued with a final written warning on 10 January 2019 which was then reduced to a written warning on appeal on by Nick Teasdale. Unfavourable treatment is to be interpreted as putting the claimant to a disadvantage. Commencing disciplinary proceeding and issuing a warning of any type against the claimant is putting him to a disadvantage. We do not accept Mr Santy's suggestion that because the sanction was reduced on appeal there was no unfavourable treatment.

96. We must then look at the next stages of the test set out by Mrs Justice Simler in Dunn (above). We consider that the reason that the disciplinary proceedings were commenced and a warning issued was because of the claimant's behaviour on 22 October as reported by Ms Beddows. This included his threatening and offensive comments in respect of Mr Whitehead, including threats that he would kill him. It was accepted that this behaviour arose as a consequence of the claimant's mental health issues, and we consider that this is right. His behaviour was out of character and concerning to those who saw him, including Ms Beddows. The claimant has therefore shown facts which shift the burden to the respondent such that they must justify their treatment of the claimant.

97. We consider that they have done so. The respondent says that using its disciplinary procedure to control behaviour in the workplace is a legitimate aim. That must be correct. The respondent in our view were balanced and reasonable in their response. It was entirely appropriate that a disciplinary investigation was commenced when Ms Beddows reported these issues. Although she herself did not feel threatened and was worried about the claimant, an employer must take seriously threats to harm other employees. When Mr Booth disciplined the claimant and

issued him with a Final Written Warning, the claimant's mental health issues were taken into account. The claimant's actions that day, even discounting whether the claimant had physical contact with Ms Beddows (as Mr Booth did) were sufficient to amount to gross misconduct such that he could reasonably have been dismissed. This was recognised by Mr Booth in reducing the sanction as is clear in his outcome letter. He adjourned the disciplinary meeting, and had further discussions with Ms Beddows, he looked into the effects of the claimant's medication and took what he described as an exceptional decision of not dismissing the claimant. The claimant was offered a right of appeal which he exercised. That ultimately resulted in a lesser sanction, again recognising the claimant's mental health and its impact upon his behaviour on 22 October 2018. It would not have been proportionate to have permitted the claimant to have no sanction at all imposed for such serious allegations.

98. This claim therefore fails.

Making a decision to discipline the claimant without seeking or obtaining a medical report on the claimant?

99. Mr Booth as part of the disciplinary investigation and hearing looked into the effects that Diazepam, which the claimant was prescribed, and whether it might have affected the claimant's actions. He printed off information about the drug from the internet. This part of the claimant's case focussed upon the need for a medical report to look at the impact of his medication as opposed to what Mr Booth had obtained. The claimant was taking diazepam because of his anxiety, but we do not consider that the claimant has shown that it was unfavourable to him not to obtain a medical report at that stage. Mr Booth took his mental health issues into account when issuing him with a final written warning, which was the reason he did not dismiss. The claimant has not brought forward any evidence that obtaining a report would have shown that diazepam caused or impacted his behaviour on 22 October or that may have resulted in Mr Booth issuing a lesser sanction. The claimant has failed to show that not obtaining a medical report amounted to unfavourable treatment and this claim fails.

Subjecting the claimant to the HAMP by the imposition of a disciplinary sanction and by dismissing him?

100. The respondent's HAMP commenced prior to the date that the claimant was disabled, but its various stages, including appeals, continued after 1 October 2018 when the sickness absences were because of the claimant's disability. Although the respondent suggests that subjecting an employee to the HAMP is not unfavourable treatment, we disagree. Although the aim is to get an employee back to work, it is a staged process which ultimately leads to an employee losing their employment if they are unable to maintain regular attendance at work. The claimant was subjected to the later stages of that policy (after 1 October 2018) because he was absent and that absence arose as a consequence of his disability. There is medical evidence that the ongoing HAMP and the threat of moving to the next stage was exacerbating his condition, which was what the OHP was referring to as work related issues.

101. The burden is therefore on the respondent to objectively justify the imposition of that procedure upon the claimant. The aims which the respondent rely upon are,

in summary, to maintain full attendance in work by use of the HAMP, to remain aware of the welfare of its absent employees and to provide a clear and fair process and where possible to facilitate a return to work. We find these are legitimate aims.

102. The respondent says that the way they sought to achieve these aims was proportionate. The policy says that it will make adjustments for those who have disabilities, but it seems that this is something which is only considered if it is raised by the employee. In the claimant's case, this may have been in part because the managers were never formally aware that the claimant was disabled, which leads us back to the OHP's communications to managers which we noted earlier. Adjustments were however made during the process but only when the claimant appealed. Those adjustments were that claimant's initial periods of absence were linked, such that the claimant did not move to the next stage of HAMP. The respondent's approach to their HAMP is that it is essential to deal with a historic absenteeism problem within the company. It is applied rigorously from what we have heard and no doubt that assists in Mr Santy's submissions that "The respondent needs to maintain attendance in order to build cars!". No doubt that it correct, but unfortunately that can result, as in the claimant's case, to the process itself causing additional anxiety and in this case adding to the claimant's perception that his managers wanted him sacked. Overall, however, the adjustments made to the HAMP on appeal and the sympathetic and understanding approach of Mr Evans during the absence review meetings were in our view, on balance, sufficient for the respondent to have shown a proportionate response when seeking to pursue their aims. This claim also fails.

103. In respect of the dismissal of the claimant, the respondent accepts this is unfavourable treatment. The respondent's position is that the dismissal was because of the claimant's conduct being his refusal to engage with them concerning arrangements for his return to work and his not attending work on 18 March 2019 when they say he was fit to do so. They say this was a situation where the claimant would not return to work. The claimant must show that his failure to engage or return to work when instructed by the respondent to do so, arose as a consequence of his disability. Although we consider that the claimant had perceptions of what he thought would happen if he returned to work, we do not consider that the Claimant has shown that this was a consequence of his disability. There is no medical evidence put forward by the claimant at the time or since to that effect. The notes of the review meetings in February, March and April 2019 show a complete reluctance by the claimant to accept that any of the roles might be possible for him to do or to try any of those which had been identified by Mr Evans or indeed his Union representative. Further the notes demonstrate the efforts which Mr Evans made to try to accommodate the claimant and his concerns. On each occasion that Mr Evans agreed to an adjustment, the claimant put up a further obstacle. It is apparent to us that the claimant would not try anything that was suggested and did not intend returning to work.

104. In any event, if the claimant was able to show that, we consider the respondent has shown a legitimate aim and that it was achieved by proportionate means. The respondent relies upon an aim of being permitted to discipline employees who do not obey management instructions. This is legitimate. We consider that it is able to show that it achieved this aim by proportionate means. The approach of Mr Evans in his review meetings with the claimant on 21 February, 11

March, 21 March and 1 April demonstrate a supportive and clear effort by Mr Evans to assist the claimant in returning to work. This was the information which was relied upon by Mr Gresty in coming to the conclusion that the claimant would not, as opposed to could not, return to work. We consider that the respondent was entitled to rely upon its own OHP rather than the claimant's GP as to whether the claimant was able to return to work, as Mr Gresty made further enquires before his decision to dismiss and although we have not seen the final letter from the GP to the OHP, we have seen the notes which the GP made upon the request for information, which does not add anything of consequence. The OHP had also spoken to the Company doctor.

105. The claimant's various comments and approach in his meetings with Mr Evans demonstrated an unwillingness to engage. We consider that it did not and would not have mattered what the respondent suggested, because of his perceptions, the claimant would not have returned to work. On each occasion that the claimant said he wanted a particular adjustment and the respondent agreed, the claimant wanted something else. He was unwilling to return to work unless it was completely on his own terms and those terms were not reasonable.

106. The union representative who had supported the claimant throughout also tried to persuade the claimant to try the roles he was being offered, but the claimant's responses demonstrated a complete unwillingness to engage. The claimant would not attend the disciplinary hearing or the various appeal hearings, so it was not possible for the dismissing managers to see the claimant for themselves. That was the claimant's choice. He did not produce any medical evidence to show that he could not attend, though his union representative was able to put forward his position in his absence. That position was however a refusal to try the options that were put to him, and as a result he was dismissed. The decision makers had access to the minutes of the absence review meetings with the claimant and as such were able to form a view as to how his mental health impacted upon the situation. It was proportionate for the respondent's decision makers, faced with the evidence they had and which we have heard, viewed objectively, to have dismissed the claimant and for that decision to have been upheld on appeal.

107. This claim fails.

<u>Reasonable Adjustments – sections 20 and 21 Equality Act 2010</u>

108. In respect of each of the PCPs which the claimant relies upon we must consider whether the respondent had that PCP, whether that PCP put the claimant at a substantial disadvantage compared with people who were not disabled; whether there were any steps which the respondent should have put in place for the claimant to avoid that disadvantage; would it have been reasonable for the respondent to have taken those steps and would those adjustments have removed the substantial disadvantage faced by the claimant? Taking each PCP in turn:

Requiring its employees to work full time or to work part-time on non-consecutive days?

109. The respondent did not require employees to work full time, but it did have a PCP which it applied to the claimant when working part time that he work on non-consecutive days in his case being Monday, Wednesday and Friday.

110. The claimant was unable to show that working on non-consecutive days would have put him at a substantial disadvantage. His reasons for using this as a reason he could not return to work, varied over time. In the Tribunal he referred to his insomnia being the reason (which was an explanation that we could not understand as he appeared to be suggesting that would have been awake for the full 24 hours of each of the 3 days that he would have been in work and then sleep for 4 days to recover); in the OHP report at the time, he refers to needing it so he could 'calm down' and in his absence review meetings he refers to having down time so he could 'go camping'. Again, the claimant produced no medical evidence to show that working three consecutive days would have assisted him. The only reference is in a GP record saying that was what the claimant wanted, as opposed to medical advice that it would assist him in his return to work. The claimant has not therefore been able to show that there was a substantial disadvantage and this claim fails. In any event we consider that had there been a substantial disadvantage, the respondent had made adjustments in allowing a 3 day week and that they had justifiable and proportionate reasons for believing that three separate days would assist the claimant in returning to work and maintaining attendance, as having a day between each day in work to recover would be beneficial to him. .

PCP: Requiring employees from the Trim and Final area to remain in the Trim and Final area and forbidding them from moving to an alternative area within the Halewood plant?

111. This PCP exactly as drafted is not a PCP which the respondent applied, but viewed liberally as the claimant is not represented, we consider that the respondent applied a PCP that at the stage the claimant had reached in the HAMP, employees could only look for alternative jobs in the Trim and Final area. The claimant says that his substantial disadvantage was that he was required to stay in the Trim and Final area and wasn't permitted to transfer. It seems to us, again viewed liberally, that the PCP would put the claimant at a disadvantage compared with non-disabled employees in that there would have been fewer roles that the claimant could do with the restrictions placed upon him if he was restricted to the Trim and Final area.

112. The respondent had not however prevented the claimant from looking outside Trim and Final area. He had not reached that stage and he had been given the full range of over 400 roles in Trim and Final to consider. The stage it had reached in March 2019 was to find the claimant a single task role with little variation as recommended by the OHP. It had identified some nine potential roles within Trim and Final and had offered these to the claimant to try out. There was at least one of these, being the battery replacement role, which even in the Union representative's view, was a role which the claimant could do and which complied with the OHP's recommendation. The claimant would not try it, nor try any of the other roles. We do not consider that the claimant was at a substantial disadvantage in that it was no more than a minor or trivial disadvantage that he was put to. The claimant had roles

within Trim and Final which he could do and he had not reached the stage in the process that there was any need to look outside that area.

113. The claimant also suggests that if he been permitted to transfer to another area away from Trim and Final, there would be roles which were in a slowed paced environment and which he would have been able to do. He says that the respondent should have made adjustments for the negative effects of his medication on his ability to work at a fast pace by allowing him to transfer. The evidence was that no one, including the claimant, could think of any other single task roles which the claimant could do outside the Trim and Final area. All production lines throughout the plant operated at the same speeds and it was inconceivable (as accepted by the claimant) that the lines could be slowed down to accommodate him. Further we do not consider that the claimant would have accepted a role whereever it had been. As such making an adjustment such that the claimant could look outside the Trim and Final for a role would not have alleviated any disadvantage.

PCP: Subjecting the claimant to the HAMP?

PCP: Subjecting the claimant to the disciplinary procedure?

114. Both of these PCP's are accepted by the respondent as PCPs which they applied. The claimant says that he was put to a substantial disadvantage because he could be dismissed if he was absent in the future. We agree that as a disabled person, he would be put to a substantial disadvantage as he would be more likely to be absent than someone who was not disabled. The claimant says that the respondent should have made adjustments to its HAMP so that if the claimant had to take time off in the future he would not have been disadvantaged by his absence by subjection to HAMP and the disciplinary procedure.

115. The respondent says in their HAMP that they will make adjustments for employees who are disabled. This is the type of adjustment that may have assisted the claimant. At the time that the respondent was discussing with the claimant his return to work and the role he might be able to undertake, he had a Final Counselling under the HAMP and had triggered the next stage by a further period of absence. As such under the procedure had he returned to work, he would have been facing an Employee Review which could have resulted in his dismissal by reason of capability.

116. It is clear that this is something which is on his mind as in the review meetings he asks what will happen if he returns and is absent again. It would have been a reasonable adjustment in our view for the respondent to have advised the claimant that in respect of a trial return to work in a new role, any absence would not have triggered the HAMP again. We must however also consider whether such adjustment would have alleviated the substantial disadvantage to the claimant. We find that it would not. The claimant for the reasons stated previously would not in our view have returned to work whatever adjustments or suggestions were put in place. At that time his mindset was that he was not returning to work. Although his perceptions were misplaced, they were actual in his mind and in our view, no amount of reassurance would have made him return. This claim fails.

117. The claimant says that the respondent should have checked to see if he was covered by section 6 of the Equality Act 2010 when he sought reasonable adjustments.

118. We consider that the respondent not asking this question of the OHP put the claimant to a substantial disadvantage compared with a non-disabled person as had they done so, the claimant's particular needs and rights may have been recognised. Although this is a question for the Tribunal as opposed to a medical practitioner, we consider that it would have been a reasonable adjustment for the respondent to have asked for the OHP view on that question. We do not however consider that would have alleviated the substantial disadvantage as the respondent treated the claimant as if he was disabled in any event. The claimant would not therefore have returned to work when asked or engaged more with the respondent and as such he would still have been dismissed. The respondent considered fully the adjustments the claimant asked for as if he were a disabled person.

119. The claimant suggests that the respondent should have altered its disciplinary process by allowing him to participate by email or phone.

120. He says he was put at a substantial disadvantage by not being able to do so. He made that request for the final appeal meeting only. The claimant's reasons for not attending the disciplinary and appeal meetings were that he considered that they would be conducted in bad faith. He had a choice whether to attend or not. His union representative attended in his place and had extensive discussion with the claimant. The respondent went out of its way to ensure the claimant, who did not want to participate, was able to express his views. The request which was made in respect of the final appeal meeting was not repeated by his representative in the meeting and the respondent considered in our view that the attendance by union representative whom he had nominated was in place of the communication with the claimant. There is no doubt it was a disadvantage to the claimant not to attend the meetings in person and that disadvantage was more than minor or trivial. Had he been there, he could have provided the respondent's managers with more information and they would have been able to assess his mental health condition. However, emails would have made no difference as he was communicating by email in any event. We do not see how this disadvantage could have been avoided by telephone calls. If the claimant considered that the hearings would be conducted in bad faith and so he did not wish to participate, we do not consider that he would have participated by phone. As such the adjustment would not have removed the disadvantage. This claim fails.

Victimisation

121. The claimant has shown no facts from which we can conclude that the decision to dismiss him was because he had brought or said he was bringing these Tribunal proceedings. The sequence of meetings and decision making of Mr Evans and then the other managers show a clear reasoning for commencing the proceedings which resulted in the claimant's dismissal which was not in any way because of this claim. The claimant has not discharged the burden of proof and this claim fails.

Unfair Dismissal

122. We find that the respondent has shown that its reason for the dismissal was the claimant's unauthorised absence following his refusal to return to work on 18 March 2019, which they concluded was a refusal to follow a reasonable management instruction.

123. In considering a claim of unfair dismissal because of conduct, we have in our mind the BHS v Burchell principles, being, in summary, a genuine belief by the decision makers that the claimant was guilty of the allegations against him, that such belief was based upon reasonable grounds and that it was following a reasonable investigation.

124. We must then go on to consider whether the decision to dismiss falls within a band of reasonable responses open to a reasonable employer and apply the wording of section 98(4) of the Employment Rights Act 1996 set out above. We must not substitute our own views.

125. We must look at the whole disciplinary process including the decisions of each of the decision makers at disciplinary and appeal stage. We consider that each of the witnesses we have heard, Mr Gresty, Mr Morrison and Mr Holohan all held the belief that the claimant would not return to work, as opposed to could not, and was guilty of the allegations against him and that this was based upon reasonable grounds.

126. Each had reviewed the absence review meetings which recorded the claimant's approach to the adjustments which Mr Evans was seeking to make, the non-cooperation by the claimant, his unwillingness to engage and his reluctance and indeed refusal to try out some of the alternative roles. They had seen the comments made by the claimant in these meetings as set out above. The claimant complained that part of his reasons for refusing to try the roles were that adjustments were not formal and could be withdrawn at any stage. There was no evidence to support that suggestion and Mr Evans did everything he could to assist the claimant in returning, including altering the normal process to assist the claimant so that he could try alternative roles and a different working pattern more quickly. Throughout he sought to reassure the claimant on these points. During the meetings with Mr Evans the claimant's proposals about 'disability leave' were not clearly explained by him. He suggests that it would be unpaid but at the time he was not sufficiently clear for the respondent to understand what he was seeking. In any event they concluded nothing would have persuaded him to return to work.

127. They considered his responses during that process and concluded that it was a refusal as opposed to an inability to engage and not return on 18 March. They had each seen the OH reports and it was reasonable for them to have preferred the opinion of the company OHP to the GP when the OHP had made the specific enquiry of the claimant's GP at the request of Mr Gresty. The claimant's failure to attend the disciplinary and appeal meetings resulted in none of the managers being able to see the claimant and assess his reasons for his refusal to return at first hand. The claimant's indication that he would not attend as he had no faith in the process, resulted in them having to make decisions based upon the minutes of meetings and representations of the Union representative. They facilitated this, ensuring that

adjournments took place and time was given to the representative to discuss issues with the claimant. There were reasonable grounds for the managers overall to come to the decision that the claimant was guilty of gross misconduct.

128. We further conclude that this was based upon a reasonable investigation. The meetings held with Mr Evans were many and detailed, the minutes gave a full impression of the claimant's refusal to try out the roles and the efforts that had be made to assist him in returning to work. Further investigation and adjournments took place throughout the disciplinary process in order than any areas which were of concern to the managers were looked into. This included the further enquiries made of the OHP and time for the union representative to meet and discuss the issues with the claimant. We conclude that the investigation was within the band of reasonableness.

129. Finally, was the decision to dismiss itself within a band of reasonableness. Mr Evans had given the claimant a number of opportunities to engage and even when he did not attend for the trial day and then not attend on 18 March, the respondent did not immediately decide to institute disciplinary proceedings. Mr Evans held two further meetings with him to try to persuade him to return to work in one of the roles identified. It was only when the claimant continued to refuse to engage that disciplinary proceedings were instituted. Unauthorised absence and a refusal to attend for work when assessed as fit to do so (with adjustments) is a refusal of a reasonable management instruction for which dismissal without notice is a sanction which is in the band of reasonableness.

130. This claim fails.

131. All claims are dismissed.

Employment Judge Benson
Date:25 January 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
27 January 2022

FOR THE TRIBUNAL OFFICE