EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Cameron	**v**	**Superdrug Stores Ltd**

Heard at: Watford

On: 28-30 September 2022 (by CVP video)

Before: Employment Judge R Lewis
Ms C Anderson
Ms F Tankard

Appearances

For the Claimant: In person
For the Respondent: Ms E Wheeler (Counsel)

JUDGMENT

1. The claimant was not unfairly dismissed by the respondent and his claim of unfair dismissal is dismissed.

2. The claimant's claim of disability discrimination fails and is dismissed.

3. By consent the claimant's claim of breach of contract (unpaid expenses) is upheld and the respondent is ordered to pay to the claimant damages of £375.00.

REASONS

1. The claimant asked for these reasons after judgment had been given.

2. At the start of this hearing the Judge informed the parties that when he had been a solicitor in private practice (ie before 2006) he had represented the respondent on a number of occasions in tribunal claims, the most recent occasion being in about the year 2000. The Judge said that while he did not think that he needed to stand down from hearing the present case, it seemed to him right in principle that the parties should be given this information, and the opportunity to comment on it. There was no objection from either side to the composition of the tribunal.

Procedural history

3. This was the hearing of a claim presented on 20 May 2020. It had been the subject of a case management hearing by telephone before Employment Judge Kurrein on 27 May 2021. The claimant took part in person then, and the respondent was represented by a solicitor. Judge Kurrein's order, reasons and judgment were sent on 29 June 2021 (40-48). Following that hearing, it was conceded by the respondent that the claimant at the material time met the s.6 definition of person with disability as a result of depression.

4. Judge Kurrein was not able to allocate the present hearing dates. His order specified that the only claims to be considered by the Tribunal would be of disability discrimination, unfair dismissal and unauthorised deductions. He gave a very brief summary of the principles applicable to the first two claims.

5. Judge Kurrein wrote that the claimant said that on the day of that hearing he had been given additional information about his pay history. The judge directed the claimant, in light of that information, to clarify his claim for unlawful deductions by a schedule of loss. The claimant did so in a handwritten document (50), which he later re-wrote in a second handwritten version.

6. The unauthorised deductions claim was not the subject of witness statement evidence by either side. It appeared to be a claim to the value of several thousand pounds. It referenced a section of the bundle which was difficult to follow. Despite the lapse of some 16 months since the preliminary hearing, and the involvement throughout of experienced professional representatives for the respondent, the claim was not prepared for a fair trial.

7. Given time constraints, and the volume of papers before us, it seemed to us that the least undesirable option at the start of this hearing was to propose that the claim for unlawful deductions would be heard separately, by the present judge sitting alone. The parties did not disagree with this proposal. After this judgment was given, a separate Case Management Order was made for that to take place. Of the tribunal's initiative the Order provides for the tribunal to consider making a preparation time order in favour of the claimant.

8. The judge was alive to the desirability at this hearing of avoiding, if possible, making any finding of fact which would be binding on the parties in the unlawful deductions hearing. The parties agreed at this hearing that the claimant was absent from work between mid-July 2019 and 24 October 2019. For the purposes of this case we made no finding as to whether any of that absence was authorised or unauthorised, and / or agreed to be paid or unpaid. Both of those points remain in dispute at the adjourned hearing.

9. The Tribunal had a bundle of 194 pages. It appeared during the first day that the claimant was working from a not quite identical bundle to that available to the respondent and tribunal. That problem was overcome. The

claimant sent the Tribunal a screenshot of an additional page, 105A, containing sick notes of December 2019.

10. The parties had exchanged witness statements. The claimant was the only witness on his own behalf. The respondent's witnesses were Mr P Vass, area manager, who had dismissed the claimant; Ms H Pearce, HR business partner, who had supported Ms Fleming and Mr Vass; and Mr F McMullan, regional general manager, who had heard and rejected the claimant's appeal against dismissal.

11. There were other concerns at the start of the hearing about preparation on the part of the respondent, which appeared to fall short of what might be expected of an organisation of the size and administrative resources of the respondent and its solicitors. Ms Wheeler is not included in that observation. In particular, as the case proceeded, the Tribunal noted gaps and omissions in the respondent's records of the claimant's employment.

12. The parties agreed with the Tribunal's suggestion that the first stage of this hearing would deal with liability only. In the event a remedy hearing was not required. After consideration, the Tribunal decided to hear the respondent's evidence first. The witnesses were in order Mr Vass, Ms Pearce and Mr McMullan. The claimant then gave evidence. Ms Wheeler's closing submission was given at the end of the second day, which helpfully enabled the claimant to reflect and prepare his reply overnight. The Tribunal gave judgment with an outline of reasons in the course of the third day. There were then separate case management arrangements for the unlawful deductions hearing.

13. The hearing proceeded on the basis that the claimant was, and remains, a person disabled by virtue of depression. We explained to the claimant that usual practice would include a break in the middle of each session, but that if at any time the claimant needed another short break, or any other form of adjustment, he should say so. There were two or three moments when the claimant asked for short breaks to compose himself, which of course was accommodated.

General approach

14. We preface our findings with some observations about our general approach. In this case, as in many others, evidence and comment touched on a wide range of issues. Where we make no finding on a point about which we heard, or where we make a finding, but not one which goes to the depth to which the parties went, that is not oversight or omission, but a reflection of the extent to which the point truly assisted us.

15. While that comment arises in many cases, it was particularly important in this case, where the claimant represented himself and brought to the case a sense of hurt, and an emotional engagement, for which he is not criticised, but which plainly impeded the objective analysis which the case required.

16. When we consider evidence, we attempt to do so with a standard of realism. Workplace realism has a number of facets. We approach evidence on the footing that everyone who goes to work makes mistakes when they get there. Not everything that is said at work, or put in a text or email, is well said or well written. Where meetings are noted, notes are not a transcript of every word, but should be an accurate summary, accurate so far as they go on the important points. Not every interaction between colleagues or between line manager and direct report is the subject of a note or record. We should also bear in mind the problem of shifting time perspectives. We do not expect anyone to go to work with the ability to predict the future. Likewise, the Tribunal is accustomed to working with the double perspective that a witness gives evidence today about events which may be several years in the past. A witness may be guided to clarify whether their evidence expresses the understanding which they had at the time, and / or the understanding which they have at time of giving evidence (or both).

17. The Tribunal does not expect litigants in person to conduct their cases to the standard of a solicitor or barrister, or to have a professional's understanding of law or procedure. It is our duty in every case to support a litigant in person in those respects, so far as is consistent with judicial impartiality and with fairness to the respondent. That said, the claimant showed many signs of his inexperience of the law and procedure of the Tribunal and of the framework within which the Tribunal works.

18. In cross-examination, in particular, the claimant asked about the points which he understood were important; but he asked his questions repeatedly, and it was necessary a number of times to intervene, either to reformulate the question, or to direct that the question had been asked and answered and need not be asked again. While the claimant was entirely courteous to the Tribunal, and accepted its directions, he plainly struggled to understand our discipline and structure, and to understand that not everything said by Ms Wheeler, or by a witness, needed an immediate reply.

19. The Tribunal encounters many cases which a claimant approaches with what might be called binarism, ie the sense that one side is totally in the right and the other totally in the wrong. In fairness, this was not such a case: the respondent readily acknowledged many positives in the claimant's contributions to the business, and the claimant acknowledged the work of Ms Fleming. However, the claimant did not, in our judgment, understand that the approach of a Tribunal to many areas of dispute is a balanced one, because there are arguments for and against each side. We do not think that he had good insight, for example, into the balancing exercise on justification, which we deal with below.

Findings of fact

20. We turn to findings of fact. The claimant, who was born in 1984, was employed by the respondent from April 2005 until his dismissal in January 2020, in other words from age 20 for just under 15 years. At the time of his dismissal, he was store manager of the Newbury store. This case was heard on the agreed basis that the claimant was a loyal and dedicated

employee; that he was an effective performer in the role of store manager; and that he enjoyed good working relationships with his direct reports and with his line manager. He spoke with warmth approaching affection, and with professional respect, of the leadership and management shown by his area manager, Ms Fleming (whom we understand no longer to be employed by the respondent). The claimant has suffered from depression for a number of years, and as stated above was agreed to be a person within the s.6 definition of the Equality Act.

21. We heard of no material events before December 2018. The claimant mentioned briefly that he had had a recurrence of depression in 2018, and he expressed his gratitude for the support shown then by Ms Fleming, and for the quality of her management of his absence. Events before us began in effect in January 2019 and led to the claimant's dismissal on 16 January 2020. Until late December 2019, the claimant reported to Ms Fleming, and throughout the time in question his HR contact, and that of Ms Fleming, was Ms Pearce.

22. The claimant accepted in cross-examination that taking the 2019 calendar year as a whole, his attendance at work had been 8%. It was not necessary at this hearing to go into every absence in detail, and, as stated above, the judge was cautious to do so in light of the separate pending hearing about unlawful deductions.

23. That said, we express our surprise and concern at the poor quality of the paper records available to us of the claimant's attendance. There was a difficult to read spreadsheet (163) apparently prepared by Ms Fleming, with handwritten notes. There did not appear to be a contemporaneous communication record or a contemporaneous attendance spreadsheet or anything of that kind.

January 2019

24. We begin with a summary and overview of the claimant's attendance at work from January 2019 onwards. The claimant was absent from work from 12 January to 20 May 2019 inclusive, the absences all certificated as due to depression. The bundle indicates that although the first certificate was dated 14 January (66), absence from work commenced on 2 January (81).

25. The claimant attended a return-to-work interview on 20 May (81) which led to a phased and modified return to work attempt. That took place in late May and early June, but we cannot be sure of the exact dates. The claimant returned as an additional manager to the Chineham store. A further absence arose due to a severe tooth infection.

26. It appears that the claimant began another period of absence on about 10 or 12 June (84). On 25 June he had a meeting with Ms Fleming (83-88), which followed the period of absence, and after which a further continuation about the return to work was attempted in the first half of July. The note of the meeting should be read in full. The claimant agreed that he had had poor

attendance and punctuality during the return to work, and commented that he had come to the meeting expecting to be dismissed. It was agreed that there would be a request for a GP's report.

27. The parties agreed that between 18 July and 23 October the claimant was absent from work. We note tat Ms Fleming's letter of 1st August (89) refers to 'unauthorised' absence but make no further finding. Dr Whitfield's report, which is discussed below, was dated 16 October (90).

24 October 2019

28. A return-to-work meeting, also called a light duties meeting, took place on 24 October (92-97) when it was agreed that the claimant would commence a second phased return at Chineham on 4 November. A timetable was set for four weeks (96). It appears that during November the claimant had at least seven days on which he was late (102) and that there were days of absence. By letter of 20 November Ms Fleming issued an informal verbal warning for persistent lateness (98). At a meeting on 26 November, he expressed his appreciation to Ms Fleming for her support (100); Ms Fleming recorded that he had worked ten shifts, of which he was late on seven (102).

29. The claimant had had some days of absence in November due to a medical emergency unrelated to depression. Between 2 and 15 November he was signed off with renal colic (ie kidney stones); and from 15 November and again on 13 January he was signed off for depression (106), in a certificate backdated to 30 November, which therefore covered about ten weeks (to 3rd February).

30. The claimant was told on 2 December (103) that he was to attend a disciplinary meeting for persistent lateness. Ms Fleming went off sick in December, but, it seems, remained in contact with the claimant. Mr Vass, an area manager in another area, was appointed to deal with the disciplinary meeting. It was fixed to take place on 16 December. The invitation letter advised the claimant of the right of accompaniment, and that the meeting could lead to his dismissal.

31. Mr Vass's evidence was that the claimant informed Ms Fleming, who told Mr Vass, that he would not attend the disciplinary meeting, and that it could proceed without him. (Ms Fleming later confirmed the thrust of this point, 166). Mr Vass gave evidence that he considered the paperwork, all of it the work of Ms Fleming, and decided to issue a first written warning. As Mr Cameron correctly pointed out, there was no written record whatsoever of the meeting of 16 December, or any copy of any communications with Ms Fleming which preceded it.

32. Mr Vass informed HR of the outcome of the 16 December disciplinary. We understand that usual procedure would have been that HR then prepared the outcome letter, which was to be sent to the claimant by Mr Vass. The claimant said that he had never received any such letter, and the respondent was unable to produce or disclose a copy of it. At his capability

meeting on 16 January the claimant mentioned that he had not heard the outcome of the 16 December meeting (1067). We infer that due to oversight no outcome letter was sent, we note that this was a retail environment shortly before Christmas.

33. The claimant criticised Mr Vass for failing proactively to contact him before making his decision. We do not agree that Mr Vass was under an obligation to proactively make contact with the claimant, in circumstances where the claimant had told Ms Fleming that the meeting should proceed without him. That apart, we agree in principle with the claimant that the evidence trail about the warning is unsatisfactory. We find that no written warning was sent, and that while the issue of reliability was live at the claimant's dismissal meeting, the warning was not relied upon as a trigger of any event which followed.

Dismissal meeting

34. On 13 January Ms Pearce wrote to the claimant to invite him to attend a meeting in Ms Fleming's absence. The letter (181-2) should be read in full. It makes clear that it is a review of the handover given to Mr Vass by Ms Fleming, and consideration of the claimant's previous year's attendance. It stated that termination of employment is an option, and advised the claimant of his right of accompaniment.

35. The claimant attended a capability meeting on 16 January 2020 (107-111). The claimant attended alone; Ms Pearce was also present. Some time was taken at this hearing on whether this was truly a disciplinary meeting or some other form of meeting. It was not in dispute that the word 'disciplinary' did iot appear in the invitation letter. That seemed to us a matter of form. The respondent did not call the meeting a disciplinary meeting. It was a capability review, which could give rise to dismissal. We do not criticise the respondent for that form of words, which is not unusual in the circumstances.

36. The arrangements which preceded the meeting gave rise to further dispute. The invitation to the meeting contained the information essential to fairness. The claimant was advised of the details of the meeting, the allegations to be dealt with, and the questions to be answered. He was advised of his right of accompaniment. He was also advised that the meeting could lead to termination of his employment.

37. He subsequently pursued this last point by speaking to Ms Pearce, who said that the letter was in standard wording, but that any decision would be made at the meeting. At the meeting he confirmed that he understood that dismissal was on the cards (107). If the claimant wanted us to find that he was misled by an assurance that dismissal was not on the agenda, we reject that. He was properly told that the letter advised him of the possibilities, including termination, but that the actual outcome would be a matter for the meeting.

38. The claimant contended that the meeting, at which his employment was at risk, should have been conducted by Ms Fleming, not Mr Vass. There were a number of strands to this point. He contended first that Ms Fleming had line managed his attendance for over a year and was therefore the appropriate person. However, the evidence of Mr Vass and of Mr McMullan suggested that the company's practice was that if employment were at risk, the relevant meeting would be managed by a manager from another area, who would approach the matter independently. Linked to that point was the claimant's second contention, which was that Mr Vass did not have sufficient information to manage the claimant, especially bearing in mind that as Ms Fleming had taken sick leave, Mr Vass was (according to the claimant) not sufficiently well briefed.

39. We accept that when Ms Fleming went absent, the claimant lost a primary point of contact in which he placed great trust. We accept that while that was true of Ms Fleming's other direct reports, the claimant may have been particularly vulnerable to the need for a continuous and trusted point of contact. We accept, however, that the claimant's stability of contact was provided through Ms Pearce, who continued to be the contact through HR; and we also accept that in his fifteenth year with the company, the claimant must have had friends and contacts to whom he could turn in the event of any workplace issue or event for which needed support. When, in submission, the claimant submitted that he had been "abandoned" by the respondent when Ms Fleming went off sick, we simply cannot agree that that is a fair word to use.

40. Secondly, we accept Mr Vass' judgement that he had sufficient information upon which to manage the claimant's absence and record, and that if he found that he did not, he had access to Ms Pearce and to Ms Fleming, with whom he remained in contact despite her illness.

41. We regard the choice of disciplining manager between the one with complete independence and the one with prior knowledge as a matter for the management discretion of the respondent. We cannot say that either is fair or unfair. We find that Mr Vass was not an inappropriate person to conduct the meeting.

42. The notes of the meeting should be read in full. At that stage the claimant was at the start of a second year of incomplete attendance, and was signed off to 3 February 2020. He used two telling, damaging phrases when asked early on how he was: "Not good;" and, "On a downward spiral." We note that when asked if Ms Fleming had been supportive, he said that she 'couldn't have done more for me.' He did not dispute Mr Vass' summary of '8%' attendance. When asked about the prospects of return, he gave a cautious '100% try' but conceded, 'I keep letting people down.' He expressed concern about the demands of time keeping. After an adjournment, the meeting concluded with the claimant's dismissal, which was confirmed in writing on 21 January (112).

Appeal

43. On 26 January the claimant wrote to state that he wanted to appeal; he was asked the following day by HR to provide his grounds of appeal, and that request was repeated a week later (117-118). He did not reply. As a result, and following the respondent's procedure, his appeal was treated as closed.

44. The claimant provided grounds of appeal on 11 March (115). The lockdown started two weeks later. The appeal did not take place until 19 May. The claimant had a meeting with Mr McMullan, following which Mr McMullan contacted Mr Vass and Ms Fleming (180) and interviewed them both remotely. One telling point at that stage was that when asked what she thought the proper outcome of the dismissal meeting was, Ms Fleming told Mr McMullan, in robust language, that she thought dismissal was the right option, and the one which she would have taken.

Medical referrals

45. During 2019 there were two medical referrals. The claimant was seen by Occupational Health on 30 April. The report of Dr Mishir of 3 May was in the bundle (76). The bundle also contained the report of Dr Whitfield, the claimant's GP, of 16 October (90).

46. Both documents should be read in full. Dr Mishir wrote that the claimant:

> "remains absent from his role but remains keen and motivated for a return to work. The evidence base suggests that returning to work is beneficial for individual's mental health… Mr Cameron confirms that he has declined talking therapies at this stage… I feel Mr Cameron is fit for a return to his role at the end of his current sickness certification. However, as I feel that his ill health is not work related, and almost entirely related to his domestic situation, I do not feel that any restrictions are required."

47. Dr Mishir advised that the claimant should return to his current store, and that colleagues should not be made aware of his hours "to minimise issues to around credibility." Dr Mishir advised flexibility in start times and that he should return on a 50% of hours basis, increasing 10% per week.

48. Dr Whitfield wrote that he agreed with Mr Mishir. He confirmed the history, and wrote (emphasis added):

> "As you correctly state, he has repeatedly been advised to undergo some form of psychological therapy (talking therapies). Whilst his recovery with medication alone may be sufficient to enable him to return fully to the workplace, <u>there is no doubt that undertaking psychological therapy will cement the recovery and reduce the risk of relapse in the future.</u> There is no other relevant treatment intervention that he needs to access. I would not recommend anything different to his return as suggested by the occupational health physician, and I would reiterate the importance of doing this in such a way as to maintain his credibility amongst the other staff.
>
> Recovery from this sort of condition is measured in months rather than weeks. That said, I do believe he should be able to make a full recovery and return to his full-time contracted role. Mental health problems are very common, but there is a risk of recurrence – particularly with subsequent episodes. It is important that he stays on his

> medication for the foreseeable future, and I would reiterate my recommendation that he undergoes therapy. In my experience, having a supportive network is very important but does not replace the benefits of one-to-one psychological therapy."

49. At this hearing the claimant stressed that the respondent had failed to follow the medical advice, which was that he should return to work. The position was more nuanced than that, and we find that that is not a fair summary. The medical advice was that there was no medical obstacle to the claimant returning to work. In light of that advice, the management of the claimant's return to work was a matter for the respondent.

50. At each meeting with management, and again at this hearing, the claimant agreed that he had declined talking therapies. His reason was that he had undertaken the therapy some years previously (he thought in about 2012), had found it ineffective, and that he felt that he had supportive friends and relatives.

51. The line of argument which the claimant advanced, which was that the respondent had failed to follow medical advice, seemed to us misplaced on two grounds. The first was that it had not. The second was that it was the claimant who had disregarded medical advice. Dr Whitfield's language (underlined above) could not, we find, have been more clear.

Legal framework

52. This was primarily a claim of unfair dismissal. The task of the Tribunal is first to decide as a matter of fact what was the reason for dismissal. That is not the label attached to it but the factual circumstance which led to dismissal. The Tribunal must then decide whether that fact falls within one of the potentially fair reasons for dismissal set out in s.98 of the Employment Rights Act 1996. It must then decide, whether a fair process applicable to that reason for dismissal has been followed.

53. In its approach to unfair dismissal, the Tribunal must take care not to substitute its own view for that of the employer. That means that the question for us is not, would we as Tribunal members have dismissed the claimant, but we must assess the fairness of the decision made by the actual decision maker. We must also respect that at each stage where a respondent has to make a decision, there may be more than one right answer or right option. In other words, there is a range of reasonable responses. That applies both to the investigation stage and to the decision to dismiss.

54. If in this case we had found the dismissal on 16 January 2020 to be unfair, we would have then had to consider the impact of any Polkey reduction, ie in light of our findings of unfairness, might a fair or better procedure have saved the claimant's employment, and if so by what percentage and/or for how long a period.

55. The claim was also brought under Equality Act s.15. The relevant part reads as follows:

> "A person discriminates against a disabled person if he treats the disabled person unfavourably because of something arising in consequence of their disability and cannot show that the treatment is a proportionate means of achieving a legitimate aim."

56. Our task in this case was to focus on the last eight words. It was agreed that the claimant had been treated unfavourably (ie dismissed) because of something (ie absence and poor attendance) arising in consequence of his disability.

Discussion and conclusions

57. In the claim of unfair dismissal, we find that the factual reason for dismissal was that the claimant was, and was believed to be, unable to sustain the reliable level of attendance required of a store manager. The word attendance embraces both presence and punctuality.

58. We stress that that formulation, which is ours, has a number of separate elements. The respondent looked to the claimant to sustain his return, because an intermittent pattern of working was not manageable or acceptable. He was required to sustain his return at a reliable level commensurate with the responsibilities of store manager: one straightforward example was that on days when a store manager (as keyholder) opens the store, he must be there in time to admit staff and the first customers.

59. We find that that was the real and operative reason for dismissal, which is capable of being categorised as one of two of the potentially fair reasons for dismissal set out in s.98 Employment Rights Act 1996, ie either capability or some other substantial reason. We find that the reason was evidence based, ie Mr Vass's conviction was that the claimant had not displayed the required standard, and could not be relied upon to do so within the foreseeable future. His conviction was based on evidence of the claimant's history of attendance for the whole of 2019, the two medical reports, his Med 3 for the start of 2020, and what the claimant said at the dismissal meeting.

60. We find that in the course of 2019 the respondent's need had been made clear to the claimant (although he was already well aware of it) and the claimant had been given objectives to meet and the opportunity to meet them. We find that the arrangements for the meeting of 16 January were fair. We do not agree that the claimant had been led to believe that dismissal was not an option for the meeting. Much of this case turned on whether the claimant should have been given one more chance. While we understand the claimant's strength of feeling about that point, the question for us is not whether he should have been given that chance. The question for us is whether the failure to offer one more chance placed the decision to dismiss outside the range of reasonable responses. We find that in light of the situation at the time of dismissal, ie one year of absence, with no certainty about a timescale for return, dismissal was within the range of reasonable responses.

61. When we come to the discrimination claim, we accept the undisputed stages of a s.15 claim. We find that the claimant was treated unfavourably (ie dismissed) because of unreliable attendance, which was something which arose from his disability. When we consider justification, we accept that the respondent has made good its case for justification, based on three factors. Mr Vass and Mr McMullan analysed justification through the four broad factors of cost, impact, and time. These seemed to us to be points which went to proportionality. Ms Wheeler in closing gave an overview, which she summarised as the business need for a productive workforce. We turn to each point separately, although all could be said to express the same point: that of striking the balance between business requirements and individual interests.

    61.1 We accept Ms Wheeler's submission that the respondent has the aim of employing a productive, efficient workforce, and that that is a legitimate aim. We accept that the dismissal of an employee who has ceased to be productive may further that aim. That leaves the question of whether the dismissal of this individual in the circumstances of this case was proportionate. Our consideration of that last point leads us to the other three questions.

    61.2 We accept that managing long term absence placed a burden on the respondent's resources. The claimant challenged cost by speculative figures of what the cost of employing or dismissing him was. That seemed to us naïve, to a surprising degree in someone of the claimant's managerial experience. The cost of a vacant post includes the financial cost of covering the vacancy, and sometimes the simple point that a post has a substantive postholder and temporary postholder; and some unquantifiable cost, eg if an individual is covering two stores, the cost of what cannot be done to a proper extent at either of them. We accept that a prolonged vacancy, 13 months in this case, creates a financial burden. We do not agree that that is simply set on a balancing scale against the apparent short-term cost of a dismissal.

    61.3 We accept that the claimant understood that he had good relationships with colleagues, and that they wanted to see him return to post. We accept the respondent's evidence about the impact of the claimant's absence on the claimant's colleagues at the Newbury store. In particular, when interviewed for the appeal, Ms Fleming said (170) that the impact of the claimant's attendance pattern was,

    > "Disastrous. We have let go many team members as they have picked up similar attendance habits as James. The team needed to be led and supported and they weren't getting that."

    We accept that that was also the view of Mr Vass and Mr McMullan. We also accept that prolonged uncertainty, and short-term management have a negative impact on a group of workers, in terms of stability, career support, possible career advancement, and the morale of the working environment.

61.4 That is not difficult to separate from the final element, which was that the company looks to a store manager for long term planning of his or her store environment. We accept that a short-term cover manager cannot provide the required level of commitment to the same degree.

62. Our task is to weigh up those factors against the individual's needs, and the impact of dismissal for something arising from disability. That is a balancing exercise, in which the tribunal must be cautious in its consideration of proportionality, balancing the impact of dismissal after long service and unemployment with the reasons advanced by a large corporate respondent for taking that step. We may ask in particular if it has been shown that the respondent has tried to minimise, so far as it can, the impact on the individual of what would otherwise be a discriminatory step.

63. The particular factor which we find tips the balance firmly in favour of the respondent is uncertainty about length and extent of recovery. The claimant's absence had been a prolonged period of uncertainty arising out of absences. The claimant on 16 January 2020 could give no assurance about his return and indeed spoke about a, "downward spiral". We have referred separately to the talking therapy issue. That seemed to us important in context because not only was it an instance of the claimant declining medical advice, it was also a striking instance of lack of insight: the claimant did not understand that, even with misgivings, it might have been expedient to trial talking therapies in the context where his job was at stake.

64. Drawing the above points together, we find that the respondent has made good the defence of justification, and that the respondent's dismissal was a proportionate means of achieving the legitimate aim set out above.

65. We now turn, not necessarily in order of priority or exhaustively, to the major points raised by the claimant on both unfairness and, in essence, on justification. We have found it more useful to conclude this judgment by setting these out individually rather than interspersing them through the fact find.

Health points

66. The claimant challenged the failure of the respondent to update occupational health advice. He was dismissed in January 2020 when the most recent occupational health advice was from early the previous May. The respondent's witnesses answered this astutely. The occupational health advice was that the claimant was fit to return to work; the respondent did not need advice to ask if he had improved. There was no point in obtaining a second report which said the same thing; but if a second report said the claimant's health had deteriorated, that would certainly not help the claimant.

67. Although the Tribunal was initially attracted to the claimant's argument, that was because our instinct was in favour of the usual case, where the question for occupational health was whether the individual has improved since the previous report. However, we accept the respondent's analysis:

the existing OH advice did not impede the claimant's return, and there was no need to update it.

68. The claimant also expressed this point as a failure to accept medical advice. We have set out above our reasons for rejecting that argument.

69. The claimant also referred to what he called the respondent's failure to prepare "an action plan to manage my condition". The respondent was under no such obligation. Its primary obligation was to manage the claimant's employment, not his condition, and, where necessary, to do so in light of medical advice. While that may have required it to make reasonable adjustments, its obligations were limited to workplace-based adjustments which would or might assist the claimant to return to his working life.

70. The bundle contained records of a number of meetings in which the claimant took part. It did not contain his email or message trails with Ms Fleming or records of telephone communications with her. The claimant said that because of his disability he could not do himself justice in meetings or express himself well. There was no evidence of that. There was no evidence of any point when he raised that issue expressly, or implied it by asking for any particular form of support, or through his conduct suggested an inability to express himself. We accept that the respondent had no reason to believe that this was an issue.

Phased return

71. The claimant returned many times in this hearing to issues around the phased returns which were attempted unsuccessfully in May and November 2019.

72. We find that the management of the claimant's phased returns was a more complex issue for the respondent than the claimant may have appreciated. It involved a number of considerations, some of them not necessarily compatible. There was a need to use resource efficiently and minimise burden, so that the claimant returned in a way which enabled him to recover confidence and skills, without excessively burdening colleagues elsewhere. The respondent took the view that by returning as a supernumerary manager at Chineham, he would have had the opportunity to regrow his management skills without having the burden of being personally autonomous or responsible. That seemed to us an entirely reasonable calculation.

73. The respondent did not want the claimant to return to Newbury until he was fully fit, and we accept that the consideration of a possible negative impact on the Newbury staff and store was a reasonable and legitimate one, which outweighed the burden of travel on the claimant.

74. The claimant requested return with a "blank rota" ie a rota which would show his name, but not show the shifts which he was to work, so as to preserve his credibility with colleagues. We accept that that need had to be balanced by the respondent with offering the claimant a system of working

which balanced structure and discipline with flexibility and understanding. We find that the decision that a blank rota was not appropriate was a reasonable exercise of management discretion.

Other management points

75. We share the claimant's concerns in principle about the lateness disciplinary. We do not agree that Mr Vass should have rung him during the meeting. The information which he had from Ms Fleming was that the claimant's response was he wanted it to be dealt with without him. He was off work with depression. It is easy to envisage how Mr Vass might have been criticised if he had contacted the claimant, contrary to the claimant's express wishes.

76. The claimant considered that he had "been abandoned" ie deprived of trustworthy management support when Ms Fleming went off sick, without a replacement being nominated. For reasons set out above, we sympathise with the claimant at the loss of the trusted point of contact but do not agree that the point is well made.

77. The claimant complained of the appointment of Mr Vass to conduct the dismissal meeting; for reasons set out above we do not agree. We accept that Ms Fleming later told Mr McMullan that she would have reached the same decision (170). The claimant attempted to dismiss this by the argument that it was an expedient email sent in recognition of Ms Fleming's position, which was that the claimant had long since been dismissed and it was expedient for her to support colleagues. We have not heard from Ms Fleming but we find that comment hard to reconcile with the claimant's repeated praise of Ms Fleming and of her effectiveness and professionalism as a manager.

78. We agree with the claimant that the appeal against dismissal was slow to be heard. The first part of the reason was his own failure to follow procedure and provide grounds, despite two or three requests. We do not know how the appeal came to be heard, although we do note that it was after the involvement of ACAS (possibly through early conciliation); that the respondent extended its own procedural time for appealing; and that retail was of course severely affected by the pandemic lockdown.

79. Taking these 'management points' individually or collectively, we do not find that any shortcomings on the part of the respondent tip the balance between a fair and unfair procedure. It follows that the claimant's claims fail and are dismissed.

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Employment Judge R Lewis

Date: 1/11/2022

Sent to the parties on: 3 November 2022

Naren Gotecha
For the Tribunal Office