EMPLOYMENT TRIBUNALS

Claimant: Mr H Sheikh

Respondents: Bestway Wholesale Limited (1)
Mr K Ullah (2)
Mr N Anwar (3)
Ms S Mahmood (4)

Heard at: Manchester **On:** 5-7 September 2022 & (in chambers) 6 January 2023

Before: Employment Judge Phil Allen
Ms C Linney
Mr W Partington

REPRESENTATION:

Claimant: In person (with assistance from Mr Sheikh and Mrs Sheikh)
Respondents: Mr J Jenkins, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondents did not treat the claimant less favourably because of his disability. His claims for direct disability discrimination against all the respondents do not succeed and are dismissed.

2. The respondents did not treat the claimant unfavourably because of something arising in consequence of his disability. His claims for discrimination arising from disability against all the respondents do not succeed and are dismissed.

3. The first respondent did not make unauthorised deductions from the claimant's wages. The claimant's claim for unauthorised deductions from wages does not succeed and is dismissed.

REASONS

Introduction

1. The claimant was employed by the first respondent as a warehouse assistant from 24 October 2018 until 14 July 2020, when he was dismissed. The claimant claimed disability discrimination (direct discrimination and discrimination arising from disability) against all four respondents and unauthorised deduction from wages against the first respondent (Bestway Wholesale Limited).

Claims and Issues

2. A preliminary hearing (case management) was previously conducted in this case on 20 May 2021. Following that preliminary hearing the respondent prepared a proposed List of Issues as they had been ordered to do. The claimant subsequently commented on the list, as he had been ordered. At the start of this hearing, the issues which were to be determined were confirmed with the parties, based primarily upon the issues from the list which remained outstanding, together with the issues as they were identified against the second, third and fourth respondents from the claimant's document. In this Judgment the Tribunal has determined the liability issues only, as it was confirmed at the start of the hearing that the liability issues would be determined first. The remedy issues were left to be determined later, only if the claimant succeeded in any of his claims.

3. The disability relied upon by the claimant is eczema. Following a preliminary hearing on 9 September 2021, Employment Judge Holmes found that the claimant had a disability at the relevant time (relying upon eczema) (104). The Tribunal read that Judgment at the start of the hearing.

4. The issues identified were as follows:

    a. Are the alleged acts of discrimination in time?

        i. The final written warning was issued in February 2020, nine months before the ET1 was submitted; the respondents therefore contend that the alleged act is out of time.

        ii. The claimant was moved to the freezer section circa 2019, over a year before the submission of the ET1 and the respondents therefore contend that the alleged act is out of time.

    b. Were the respondents aware that the claimant had a disability?

    c. Can the claimant show that the following facts occurred:

        i. The claimant was given a final written warning on 5 February 2020;

        ii. The claimant was moved to the freezer section because of his eczema;

        iii. The claimant was dismissed.

d. Who is/are the claimant's comparators?

e. If the claimant is able to prove the facts referred to at (c) above, did any or all of the incidents amount to less favourable treatment because of the protected characteristic of being disabled?

f. Can the respondents show that any difference in treatment was not related to disability?

g. Does the alleged treatment of the claimant by the respondents, namely that the claimant was given a warning because of his hygiene, amount to unfavourable treatment because of something arising in consequence of his disability?

h. If the answer to (g) is yes, can the respondents show that the treatment was a proportionate means of achieving a legitimate aim? *Whilst this was recorded in the list of issues, it was confirmed in submissions that the respondents were not seeking to rely upon such a contention and therefore it was not an issue which ultimately needed to be determined*.

i. The claim against the second respondent (Mr Ullah) is for allegedly not being independent in the appeal hearing or allowing an independent/unbiased party to hear the appeal fairly. The claimant alleged that Mr Ullah had known Mr Anwar for many years.

j. The claims against the third respondent (Mr Anwar) are that he allegedly: chose that the claimant should be chosen to be put in the chiller from all possible staff; and also pushed this onto management below himself – line managers/supervisors (the fourth respondent, Mr Mahmood).

k. The claim against the fourth respondent (Mr Mahmood) was for allegedly instructing the claimant to leave the short date coffee on the shelf and then later passing the blame to the claimant, to avoid being scrutinised for giving incorrect orders. The claimant alleges that Mr Mahmood should have had the disciplinary sanction for not following procedure and ordering his staff incorrectly.

l. What arrears of pay are due and owing?

m. Is the first respondent liable for those arrears?

n. If so, what is the value being claimed?

5. During the hearing it became apparent that there had been some confusion over two separate events. The claimant was moved/required to work in the freezer in June 2019. The claimant was moved/required to work in the chiller between December 2019 and February 2020. The claim form referred to the claimant being moved to the freezer section (8), but the claimant at the hearing confirmed that his complaint was in fact about being moved to the chiller. It was confirmed during the final hearing that allegations (c)(ii) and (j) related to the move to the chiller (not the freezer).

6. At the start of the hearing, what the claimant was claiming in his unauthorised deduction from wages claim was clarified. The claim arose from the period of twelve weeks during which the claimant did not work for the first respondent due to isolation/shielding in early 2020 when the claimant was paid statutory sick pay and he contends he should have been paid full salary. The amount claimed was £3,743.76.

Procedure

7. The claimant represented himself at the hearing with the assistance of Mrs Sheikh, his mother, and Mr Sheikh, his uncle. On occasion each of the claimant, his uncle, and his mother, spoke on his behalf during the hearing (and the respondent did not object to that approach), albeit it was made clear that the claimant's evidence was his own, and only one person was able to ask questions of any single witness called by the respondents. The claimant made his own submissions personally. Mr Jenkins, counsel, represented all of the respondents.

8. The hearing was conducted in-person with both parties and all witnesses in attendance at Manchester Employment Tribunal.

9. Standard orders had been made which required the parties to send each other all the documents which they had relevant to the issues in the case, many months before the hearing. The respondents were ordered to prepare a bundle of documents. A bundle of documents had been prepared in advance of the hearing by the respondents which had 207 numbered pages and some additional unnumbered pages.

10. On the Friday night immediately preceding the hearing, the claimant sent a number of emails to the Tribunal (and the respondents) with a large number of documents attached. When asked about the documents, the claimant did not know whether what had been sent was already in the bundle (prepared by the respondents). He may not have previously provided them to the respondents in accordance with the orders made regarding disclosure. A number of the documents related to a dispute between the third respondent (Mr Anwar) and the claimant's father and brother, about building an extension. The respondents' representative did not object to the Tribunal seeing the claimant's additional documents, but he highlighted the practical difficulties in the Tribunal doing so, where physical copies of the documents were not available (and the Tribunal was using physical bundles in the hearing).

11. In order to assist the claimant in circumstances where he did not have physical copies of the document to provide to the Tribunal, during the time taken for reading on the first morning the claimant was invited to identify a limited number of pages to the Tribunal, of which sufficient copies would be provided by the Tribunal's clerk to be added to the bundle. An indication was given to the claimant that the additional pages should be no more than twenty pages, due to the time required for such copying to be undertaken by the Tribunal staff and the time required for reading. The claimant did not object to that proposed approach and he agreed it was fair. The claimant was not stopped from providing copies of his own documents, but did not do so, as he accepted the proposal that the Tribunal clerk would copy the limited number of documents offered/proposed. During the time taken for reading,

the claimant provided an additional thirty-one pages to the Tribunal, which were copied by the Tribunal staff, added to the end of the bundle, and read by the Tribunal. He also provided seventeen photographs; the originals of which were handed to the Tribunal and photocopies included in the copies of the bundle.

12. On the morning of the second day the claimant sent in a further document (the contract for the building extension), to which the respondents did not object, which was added to the bundle. Another page referred to during cross-examination which the claimant believed had been included in his additional pages (but which had not been), was also added to the bundle during the second day.

13. During his evidence, on the second day of hearing, Mr Mahmood referred to photographs contained on his mobile phone. He contended they showed the damage to a pallet, about which he was being asked at the time. The photographs had not been disclosed by the respondents at the time ordered and were not available as physical pages for the Tribunal. The claimant objected to the Tribunal being shown the photographs referred to. As a result, the Tribunal did not look at the photographs. On the third day of the hearing, during the time when he was giving evidence, Mr Ullah referred to the photographs when stating that he had seen them at the time, and he urged the Tribunal to look at the photographs. He was asked about his non-compliance with the Tribunal's orders and explained that the photographs had not been disclosed due to human error. The Tribunal did not look at the photographs. The respondents' representative did not apply for them to be viewed.

14. The claimant provided witness statements from: himself (there were two statements); Mr Asif Sheikh, his uncle; Mr Imran Sheikh, his brother; and Ms Virginia McAllister-Evans, a friend and colleague at the claimant's current employment. The respondents chose to ask no questions of the three witnesses (other than the claimant) who the claimant called, so they were not required to attend the hearing and give their evidence under oath. The respondents did emphasise that the decision regarding Mr Imran Sheikh had been taken on grounds of relevance, rather than because they accepted everything he had included in his statement. The respondents' representative, very fairly, explained that the claimant's own witness statements were not full and contained no reference to his disability whatsoever, and therefore two documents prepared by the claimant were also read as forming part of his evidence (and were confirmed under oath by him as being true): his disability impact statement (67); and his response to the list of issues (72).

15. The respondents provided witness statements from the following witnesses: Mr Kefayat Ullah, an operations manager at the first respondent and the second respondent; Mr Naveed Anwar, the first respondent's general manager and the third respondent; Mr Shahid Mahmood, employed as a supervisor by the first respondent and the fourth respondent; Mr Kashif Butt, the first respondent's depot's non-trading team leader; and Mr Kamal Din, an operations manager at the first respondent.

16. On the first morning of the hearing the Tribunal read all of the witness statements, together with any pages in the bundle which were referred to in those statements. The Tribunal was also asked by each of the parties to read certain additional pages, which the Tribunal read.

17. The case management orders included an order that statements from any witnesses upon which a party wished to rely were to be sent to the other parties by 5 May 2022. The order made clear, in standard terms, that permission of the Tribunal would be required for any other witnesses to be called. At the start of the hearing, mention was made by the claimant of a statement prepared by his father. The statement had apparently been amongst some documents sent to the Tribunal by email very shortly before the hearing. When the usual position regarding evidence was explained, and as it had been identified that the evidence which he gave related to the family disagreement with Mr Anwar, the claimant (at the time) did not seek to rely upon evidence from his father. On the second day of the hearing, after the claimant's evidence had been concluded and evidence had been heard from the fourth respondent, it was identified that the claimant had sent into the Tribunal by email on the morning of the second day a copy of the witness statement prepared by his father. When the statement was identified on the second day of the hearing, the respondents did not object to the Tribunal reading it (even though it had been provided late) and the Tribunal accordingly read the witness statement prepared by the claimant's father.

18. Shortly before the hearing, the respondents made an application for Mr Anwar's evidence (the third respondent) to either be heard on the third day of the hearing, or for his evidence to be heard over CVP video technology from Turkey on the second day of the hearing. The third respondent was on a holiday in Turkey with his family, from which he was due to return on a flight leaving Turkey in the early hours of the third day of the hearing (7 September). There was no reason provided for the third respondent's holiday having been booked over two days of the hearing which had been listed for some considerable time. The claimant objected to the third respondent's evidence being heard over CVP and, in any event, it was not possible for the evidence to be heard in that way as a result of the recent Presidential guidance on evidence being heard from other countries and the absence of confirmed permission from Turkey for evidence to be heard in that way. At the start of the hearing, the Tribunal agreed that the third respondent's evidence would be heard on the morning of the third day, as doing so was in the interests of fairness and justice and accorded with the overriding objective. At the time, it appeared that doing so ensured that the third respondent's evidence would be heard, and that the claimant would have the opportunity to cross-examine him. It was highlighted that it was regrettable that the third respondent appeared to have failed to ensure that he was available and in the country on the second day of hearing, when it was possible that his evidence would have been heard that day, but the Tribunal considered that the limited delay involved in the evidence being heard on the third day was able to be accommodated.

19. On the third day of the hearing the Tribunal was informed that the third respondent would not be able to attend the hearing, as his return flight from Turkey had been delayed by twenty-three and a half hours. Evidence was provided which showed the delay to the relevant flight. The respondents did not make an application for the hearing to be extended to a further day (when the third respondent would be able to attend); but asked that the third respondent's statement be accepted and given some weight, albeit it was entirely accepted that it should not be given the same weight as it would have been given had he attended and been cross-examined. The two options available were explained to the claimant and he was given time to decide which approach he preferred: the hearing be extended so that a

further day could be listed to hear the third respondent's evidence when he was able to attend, when the claimant would be able to cross-examine him; or the case conclude on the third day without the third respondent attending. The claimant asked the Tribunal to take the second option, emphasising his health and the wish to conclude matters, as reasons for not wishing the outcome to be delayed so that a further day of hearing could be added. Accordingly, the hearing was not extended to enable the third respondent to attend, and the hearing concluded without the third respondent having confirmed his statement under oath or having been cross-examined by the claimant.

20. The Tribunal heard evidence from the claimant, who was cross examined by the respondents' representative, before being asked questions by the Tribunal. Each of the witnesses called by the respondents gave evidence under oath, were cross examined by the claimant, and were asked questions by the Tribunal (save for the third respondent who did not attend).

21. After the evidence was heard, each of the parties was given the opportunity to make submissions. Mr Jenkins made submissions verbally on behalf of the respondents; the claimant made verbal submissions on his own behalf.

22. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below. The parties were informed of the date which the Tribunal had identified as being the day upon which it would reconvene in chambers to make the decision.

23. Prior to the day in chambers, the Employment Tribunal received from the claimant's mother a pile of papers in a large envelope, which were not indexed or paginated, which it appeared to be suggested should be considered by the Tribunal. The Tribunal did not consider those documents at all and made arrangements for the documents to be returned, with one exception. It was not appropriate for documents to be provided in this way after the hearing had been concluded and it would not have been appropriate for the documents to have been considered by the Tribunal. At the hearing (as explained above), the claimant provided original photographs showing the effect which his eczema had on him. The claimant had, in error, taken those photographs away with him at the end of the hearing. The photographs were included in the documents sent to the Tribunal and were retained and considered as they were documents which had been viewed at the hearing (including by the respondents' counsel) and should have been retained by the Tribunal in any event.

Facts

24. The Tribunal was provided with the claimant's contract of employment (121). The claimant's contract recorded that the claimant was a warehouse operative. It stated that he would be required to undertake all duties within his capability within the context of his role. The contract also provided that the claimant's duties could vary from time to time, and he may be required to work in another department or area. The respondents' evidence was that this meant the claimant could be required to work anywhere in the warehouse. The claimant accepted he moved department/work area from time to time. The contract also provided that the first respondent paid statutory sick pay only; there was no provision for enhanced

company sick pay. There was a standard provision about the need to comply with work rules.

25. The first respondent has a lengthy disciplinary policy (129). The claimant had not read it prior to the Tribunal hearing. Within the list of examples of things which would be considered misconduct (which would not normally lead to dismissal for a first offence) were: "*Failure to comply with a health & safety requirement*"; and "*Failure to perform to the required standards, including personal attitude, rudeness, abruptness, or personal hygiene*". The Tribunal would observe that this latter example appeared to be one which, as drafted, did not reflect what would normally be found in such procedures. It appeared to collate a number of different issues which would not normally be put together, particularly by including personal hygiene alongside failure to perform and rudeness. Under a heading "contractual status" (136) it was stated that the policy sat outside the contract of employment "*and does not automatically convey that it will be used in full*".

26. The claimant's employment commenced on 24 October 2018. The claimant was a very inexperienced employee when he started working for the first respondent. At the time he had no knowledge about, or experience of, disciplinary procedures. At the start of the claimant's employment, he worked on the tills. The claimant's evidence was that he worked well on the tills. There was no evidence of any issues arising.

27. In around June 2019, the claimant was moved to work on an area which included the freezer, as well as one of the aisles in the store (where coffee was located). It became clear in the hearing that the claimant did not bring a complaint about being required to work in that area. The respondents' evidence was that, as part of that role, the claimant would need to enter the freezer, which was kept at a much lower temperature than the chiller (something the claimant accepted). The respondents' evidence was that the chiller, the freezer, and the relevant aisle, were all part of the same department, and those working in one part would be required to cover the other areas on occasion, such as when someone was absent in the other parts of the department. The claimant contested this, and he emphasised that during a shift a different person was responsible for each of the freezer and the chiller.

28. The supervisor responsible for the claimant's work from approximately June 2019 was Mr Mahmood. Mr Mahmood's evidence was that he was not aware that the claimant suffered from eczema. There was no evidence that the claimant informed him about his eczema. The claimant's belief was that his eczema was obvious; Mr Mahmood's evidence was that it had not been.

29. An incident arose relating to coffee. Coffee which was passed its best before date was not removed from the shelves in the aisle for which the claimant was responsible. The claimant did not remove the coffee. The claimant's evidence was that he had raised this with Mr Mahmood and Mr Mahmood had told him to leave it there. Mr Mahmood denied that was the case.

30. There was some confusion in the evidence heard by the Tribunal about when the issue had first been identified. The claimant believed the incident occurred in November 2019. He also believed that he had been spoken to about the issue at the time, and he considered that to have been the end of the matter. Mr Mahmood, in his

statement, dated the issue as having been identified in December 2019. In his verbal evidence and in his answers to questions, Mr Mahmood appeared to have no idea at all of when the issue had been identified. In the investigation meeting notes from 17 December 2019 (152), Mr Nestor (the investigator from whom the Tribunal did not hear evidence) recorded that he had personally identified that out of date coffee products remained on the shelves "*last Friday*" (which would have been 13 December 2019). From the evidence heard it appeared possible that there had been two separate occasions when the out of date coffee was identified: one with Mr Mahmood which the claimant recalled and referred to; and a later one with Mr Nestor, which the claimant had not recalled and had not identified was the subject of the disciplinary investigation. Save for the reference in the investigation meeting note, the documents produced during the disciplinary procedure did not date the event.

31. Mr Anwar became general manager responsible for the store in which the claimant worked in November 2019. He and Mr Mahmood briefed staff generally about stock rotation and date procedures. Mr Mahmood was uncertain in his evidence about whether or not the briefing pre-dated the incident for which the claimant was subjected to disciplinary procedures, and he ultimately stated in evidence that he did not know. The claimant's evidence was that the incident occurred prior to the briefing. If the date recorded by Mr Nestor in his notes was correct, the briefing pre-dated what Mr Nestor had identified.

32. The claimant, in his evidence, which was supported by the evidence of his brother and the statement made by his father, explained his belief that Mr Anwar treated him badly because of a historic disagreement between Mr Anwar and the claimant's brother and father regarding an extension which the claimant's brother's company had built for Mr Anwar (and an alleged refusal to pay what was due by Mr Anwar). In his verbal evidence and his written response to the list of issues (74) the claimant asserted that he was told by his previous manager that Mr Anwar had requested he get rid of him, prior to Mr Mahmood becoming his manager. The claimant felt there was a campaign by Mr Anwar to get rid of him and the reason for that campaign was because of the claimant's relationship with his father and his brother and Mr Anwar's issues with them following the extension being built. The claimant's assertion was that the coffee issue was treated more seriously because Mr Anwar saw it as a way to get at the claimant. He believed Mr Anwar made the decision to move the claimant to work in the chiller, a job which the claimant believed nobody wanted to do, as a way to try to get him to leave the job, because of the historic family disagreement about the extension. The claimant's father's witness statement was particularly scathing about Mr Anwar and related a falling out between the claimant's father and Mr Anwar which went beyond the issues with the extension.

33. An investigation meeting took place with the claimant on 17 December 2019. The meeting was conducted by Mr Nestor. It was attended by the claimant and Mr Karsan, who took notes. The notes were provided to the Tribunal (151). They consisted of typed questions and hand-written answers. The claimant explained in his verbal evidence how the investigation meeting was a surprise to him on a day when he was focussed on undertaking his work. He asserted that he agreed with the questions asked, because he believed that was what those asking wanted and he wanted the meeting to be over. There was no dispute that the meeting was about out

of date coffee. In the notes the claimant was recorded as: confirming it was not acceptable to leave stock beyond its best before date on sale; and that "*It's my fault. I accept it*" in answer to whether he had anything to add. When explaining why he had left the out of date products on sale, he said that it was because when he had told Mr Mahmood, he had been told not take them off the shelves.

34. An invite to a disciplinary hearing was sent on 31 December 2019 (158). The letter referred to the interview with Mr Nestor, but was signed by an HR case advisor. The claimant was provided with the details of a disciplinary hearing to be held on 6 January 2020, was told that he had the right to be accompanied, and was warned that a formal warning was a potential outcome. The allegations were not explained with details of what had occurred or when. They were detailed by reference to the two examples from the first respondent's disciplinary procedure cited above: failure to comply with a health & safety requirements; and failure to perform to the required standards, including personal attitude, rudeness, abruptness, or personal hygiene. The respondents' witnesses in their evidence were clear that what was considered in the process was the failure to comply with health and safety requirements and the failure to perform to the required standards; both in relation to the failure to remove the stock when it should have been removed. There was no suggestion that the claimant had been rude or abrupt. There was also no issue in relation to hygiene; the reference was simply re-produced from the line of the first respondent's procedure. That had the unfortunate impact that it raised for the claimant the possibility that what was being addressed was an issue with hygiene (unsurprisingly as that is what the allegation said), which he then connected with his eczema and his concerns about how people perceived him as a result of his eczema, of which he was clearly acutely aware and concerned.

35. Mr Din heard the disciplinary hearing. Minutes of the disciplinary hearing were taken by Mr Karsan (159). It was not in dispute that the claimant: admitted that he had left the stock on the shelves; and that he knew the procedure. However, as with the previous meeting, the claimant asserted that Mr Mahmood had told him that he could not write the stock off, so the claimant had left it on the shelf. After the hearing Mr Din spoke to Mr Mahmood who denied that he had told the claimant to leave the stock on the shelves. Mr Din decided to impose a final written warning. In his witness statement, Mr Din explained the severity of the sanction as being due to the seriousness for the first respondent and its customers of the stock rotation/health and safety issue it presented.

36. The decision reached by Mr Din was clearly set out in two emails which he sent to the relevant HR case advisor on 6 and 8 January 2020. In the first, he told him to issue the claimant with a final written warning (162). In the second (161) he stated that the claimant: "*had been told many times before as well that how important dates issue are and how to sort them out, which he has accepted as well. So he was clearly aware of it but he was not following the correct procedure*"; and "*was aware that OOD stock was on shelf but he did not bother to take it off the shelf, and it is a potential health hazard as well. And this ignorance can not be tolerated to be repeated again"*. The emails recording Mr Din's decision contained no reference to hygiene, or being rude or abrupt.

37. The letter informing the claimant of the final written warning was issued dated 5 February 2020 (163). It was sent out in Mr Din's name; however, Mr Din's evidence

was that he had not prepared it as it had been prepared for him. That letter reflected the invite letter by reproducing the allegations as the lines from the procedure and confirming that those allegations were found to have been the breaches of the company policies. It also said: "*To clarify, your failure to perform the correct date checks and stock rotation is unacceptable and could have had severe consequences to the Company had customer purchased any out of date stock or had any audits been conducted*". A final written warning was imposed which would remain on the claimant's record for twelve months. The claimant's right of appeal was outlined in the letter.

38. Mr Din's evidence was that he was not aware that the claimant suffered from eczema, had not physically seen that the claimant was affected by eczema, and was not told at any time by the claimant that he suffered from eczema. Eczema was not mentioned at the disciplinary hearing. Mr Din's evidence was that it was never an issue which he was aware of, or which was discussed at the time.

39. At some point in late 2019 or early 2020 the claimant was asked to undertake work in the chiller. The claimant contended that he had been moved into the chiller and it was a job which nobody wanted to do. His contention was that it was Mr Anwar's decision that he work there and the reason why he did that was to try to make the claimant leave. The respondents' evidence was that the claimant was asked to cover for another employee when that employee (who normally worked in the chiller) had an extended period of absence to travel to and attend his daughter's wedding (something the claimant accepted as being correct). The respondents' contended that the claimant was asked because he worked within the same department. When the other employee returned, as the claimant had been working without issue in the chiller, there was no need to move him away from working in the chiller. In any event it was not in dispute that when the claimant raised that he did not wish to work in the chiller due to his health (the respondents believed the issue was asthma related), the claimant was moved to the drinks' aisle. That move was in February 2020.

40. In the documents which the claimant provided the Tribunal, were two transcripts of recordings which he had taken of conversations at work with Mr Anwar on 3 and 11 February 2020. In the first conversation on 3 February, the claimant explained that he had been expected to cover the named employee who had previously worked in the chiller for only three weeks, but it was now the fifth week. He explained that his father had told him to be patient for the three weeks. He referenced his asthma, coughing and his inhaler, and asked to be put back on his section due to his health. Mr Anwar said he would speak to two others and come back to the claimant. No reference was made to eczema in the conversation. In the conversation of 11 February, the claimant explained that he had not been on the relevant aisle for a week so it wouldn't be perfect in the timeframe. Accordingly, it would appear that the claimant had been moved from the chiller to the drinks' aisle shortly after the first conversation with Mr Anwar, which was broadly consistent with the evidence which the claimant gave whilst being questioned in the hearing (albeit the claimant could not recall the precise date upon which he had been moved out of the chiller to the drinks aisle).

41. In February 2020 the claimant appealed against the final written warning (165). As part of the appeal the claimant refuted the allegations made against him.

For the first time, the claimant also raised in writing with the first respondent the issue of his eczema. He did so in response to the reference to hygiene in the decision letter. He contended that Mr Din had shown a total lack of empathy by "*confusing my severe eczema and skin infection for poor personal hygiene*". He also contended that because he had mentioned the impact that working in the cold had upon his health, that appeared to be why Mr Din had issued a final written warning. He also referred to the times he was required to work having an impact on his asthma and eczema because it reduced his ability to attend a sauna. He alleged he had been victimised.

42. In a letter of 21 February 2020, the claimant was invited to an appeal hearing to be heard by Mr Ullah on 26 February 2020 (168). That hearing did not proceed after the claimant attended with someone who was not authorised to accompany him. The hearing was initially re-arranged for 18 March 2020, but was delayed by the claimant's ill health absence and subsequent period of shielding.

43. The claimant was absent from work on ill health grounds from 3 March 2020. This was recorded in the fit notes provided as being due to stress (171), and, on 26 March 2020, stress related issues and asthma (172). The second fit note recorded that the claimant was not fit to work until 8 May 2020. As a result of the Covid-19 pandemic the claimant was required to isolate due to his asthma. The claimant's GP wrote a letter dated 2 April 2020 (180) which said that the claimant would be in the Covid-19 high risk group due to having asthma and stated that the GP had advised the claimant to self-isolate for twelve weeks. The claimant remained away from work for twelve weeks as a result, returning in June 2020.

44. During the period of ill health absence, the claimant accepted he was paid statutory sick pay. He was not paid full pay. The claimant asserted in his evidence that he should have been paid full pay because his asthma had worsened in 2020 after working in the chiller, and therefore he would not have been required to isolate if he had not been required to work in the chiller. There was no medical evidence shown to the Tribunal which demonstrated that the claimant's asthma had worsened due to working in the chiller, or that the requirement to isolate was caused by the actions of the first respondent.

45. The Tribunal heard evidence about some issues which arose in the period between the claimant's return to work in June 2020 and his dismissal. Mr Mahmood made statements about: an occasion when he said the claimant was rude to him on 30 June 2020, which the claimant denied (181); and an occasion on 7 July when the claimant was asserted to have negligently driven his fork-lift truck and crashed into a pallet resulting in some damage, after which the claimant was alleged to have been rude (something which the claimant denied and asserted made no sense) (186). In evidence, the claimant referenced a different occasion when a pallet had been damaged after he endeavoured to lift it from a place where it had previously been incorrectly stacked, an incident which Mr Mahmood could not recall. Mr Mahmood accepted that the accident which he did recall had not been deliberate. The claimant left work on 1 July 2020 earlier than the first respondent believed he should have done. The claimant's evidence about this was a little confused. He accepted there was an issue. He explained it by referring to changes in shift patterns and times which meant he was not clear about the relevant shift. A meeting took place about this on 2 July which was noted (182).

46. On 7 July 2020 Mr Ullah heard the claimant's appeal against the final written warning. The meeting was attended by: the claimant; Mr Butt as a note-taker; and Mr Ayub as a witness. Notes were provided to the Tribunal (187). The claimant explained that he had followed his supervisor's instruction when he left the coffee on the shelf. Following the appeal hearing a statement was taken from Mr Mahmood by Mr Ullah (189) in which Mr Mahmood's account was that he had told the claimant not to write off the short date stock with a best before date, but rather that the stock needed to be taken to the reduction area and put on a reduced price for clearance. He stated that he did not tell the claimant to leave it in the normal selling area.

47. Mr Ullah decided that the appeal would not be upheld. A decision letter was prepared dated 14 July 2020 (190). That decision letter repeated the wording from the procedure as the allegations. The decision was that the appeal was not upheld, and the sanction of a final written warning remained. The letter emphasised that the decision made was about the misconduct found to have been committed and stated it was "*in no way a reflection on your personal attitude, demeanour or personal hygiene*".

48. On 14 July 2020 the claimant was waiting to receive the outcome to his appeal. The claimant's evidence in his witness statement was that he went into work at 10 am on 14 July and was called into the office at 3 pm. He explained that he was sacked on the spot and frogmarched out. He retrieved his belongings and left. In verbal evidence he explained that he knew there was to be a meeting on that day, and he asked about the meeting on a number of occasions because he wanted to get it over with. Mr Ullah's evidence was that the claimant was provided with the outcome of his appeal against the final written warning before he was dismissed, as he had been advised by those responsible for HR at the first respondent that the appeal process needed to be completed first. The claimant was called to a meeting with Mr Ullah, which was also attended by Mr Butt. The claimant was informed by Mr Ullah that he was being dismissed for misconduct. The decision was a complete surprise to the claimant. The claimant was paid in lieu of notice and his employment was terminated effective 14 July 2020.

49. The claimant was recorded to have undertaken various training courses on 14 July 2020, the day he was dismissed (142). The claimant denied that he undertook those courses, or indeed any of the courses he was recorded as having undertaken between 22 June 2020 and 14 July 2020. Mr Butt's evidence was that the claimant did undertake the training recorded. Mr Butt's evidence was that he decided who undertook the training and when, and that he had no knowledge that the claimant was to be dismissed. It was not necessary for the Tribunal to determine the dispute about whether or not the training was undertaken; nothing material turned upon whether the claimant had been trained or not.

50. The decision to dismiss was recorded in a letter from Mr Ullah dated 20 July 2020 (195). That recorded that the meeting had been held to discuss ongoing performance and misconduct. The letter expressly referred to the fact that the claimant had less than two years' service. The decision was explained as being as a result of numerous concerns with the claimant's overall attitude and conduct. It said: "*There have been complaints with regards to your attitude towards work, including unreasonable arguments and a negative behaviour towards your direct Line Manager, causing frustration and negativity with other team members. There have*

also been concerns with your overall performance and failure to comply with Health and Safety requirements". There was absolutely no evidence whatsoever presented to the Tribunal about any occasions when the claimant had caused frustration or negativity with team members.

51. Mr Ullah's evidence was that he made the decision to dismiss the claimant. In his witness statement Mr Ullah described calling the claimant to an abbreviated disciplinary hearing on 14 July 2020. He stated that given the claimant's length of service he made the decision to dismiss on the day. Mr Ullah's evidence was that he was entitled to do this under the respondent's disciplinary procedure. The Tribunal was not shown any abbreviated procedure.

52. Mr Ullah's evidence was that the factors in his decision were: the claimant's negative behaviour; the occasion of alleged rudeness which Mr Mahmood had recorded; the claimant leaving work without authority; the fork-lift truck incident recorded by Mr Mahmood; the claimant being alleged not to have met work standards; and the existing final written warning. When answering questions, he emphasised the fork-lift truck incident and the final written warning.

53. Mr Ullah was aware of the claimant's eczema at the time he made the decision to dismiss, because the claimant had raised his eczema as part of his grounds of appeal against the final written warning. Mr Ullah's evidence was that the fact that the claimant had eczema was completely irrelevant to, and did not enter into, his decision making. He felt that the claimant's eczema was wholly unconnected to any of the issues with the claimant's attitude and performance.

54. Mr Mahmood's evidence was that he did not make the decision to dismiss, was not spoken to about the claimant being dismissed, and did not know the claimant was to be dismissed before it happened. In a paragraph of Mr Mahmood's witness statement, he referred to the use of the abbreviated disciplinary procedure. When he was asked about it, Mr Mahmood had no idea what that meant. The Tribunal concluded that the relevant part of his statement clearly did not record Mr Mahmood's own evidence. In the same part of his witness statement, Mr Mahmood also recorded that the claimant was unmanageable. When asked about this, Mr Mahmood described the aisles for which the claimant was responsible being incorrectly stocked. This neither reflected what the statement said nor was it recorded in any other documents.

55. The claimant was not offered the right to appeal against his dismissal. Mr Ullah's evidence was that he did not offer it because he had adopted the abbreviated short service dismissal procedure. When he was asked about this and asked to identify where in the first respondent's policy such a procedure was referred to and explained, Mr Ullah referred only to the provision in the claimant's employment contract which explained the period of notice which would be given to an employee who had been employed between one and two years. The Tribunal found that the respondent's disciplinary policy did not contain any abbreviated short service procedure (once the probationary period was completed).

56. At some time shortly after his dismissal, the claimant took advice from an USDAW official. His evidence was that he became a member of USDAW, although it was not clear precisely when. Around the same time, advice was also provided by

someone who was a friend or acquaintance of the claimant's mother, albeit that person was not professionally qualified. The claimant emphasised the importance of the support he had received from his family, including in particular his mother and uncle. They supported him in bringing his Tribunal claim and wrote the relevant forms and documents for him.

57. The claimant provided the Tribunal with photographs which he had taken of his eczema. The claimant's evidence was that those photographs were taken whilst he was employed by the first respondent (although he did not record exactly when). The photographs clearly show the claimant's skin being visibly affected by the eczema. The majority of the photographs were of the parts of the claimant's body which might not have been visible to others if the claimant was working in clothing which covered his arms and legs. Two of the photographs showed clearly visible eczema on the claimant's neck, which would have been visible even if the claimant was wearing work-clothes. None of the photographs showed the claimant's face. The claimant's evidence was that he undertakes a significant routine each day to endeavour to manage his eczema and that he will often shed skin during the day. The claimant's uncontested evidence was that the severity of his eczema was exacerbated by extremes of temperature, by dry air, and by stress. The claimant himself described his eczema as being worse in December, for example, when the weather was cold.

58. The claimant placed particular emphasis on two reports prepared by his GP, Dr Saeed, dated 19 October 2021 and 28 July 2022. The 2021 report described that when Dr Saeed saw the claimant in clinic in 2020, the claimant was in severe pain due to weepy eczema and loss of function. His later report in 2022 stated that when Dr Saeed saw the claimant in February 2020, his eczema was clearly visible on his face, neck and ears. The medical reports did not record the precise dates upon which such observations were made. As explained below, the Tribunal considered those reports to be important in providing evidence about the clear visibility of the claimant's eczema.

59. During his answers to questions, the claimant asserted that a number of employees at the respondent, including a number of those who were called to give evidence, made comments to him about his skin while at work. He referenced a word in Urdu which he said had been used, which he translated to mean dirty or unclean. That allegation was not contained in the claim form. It was not recorded in the claimant's witness statements, nor was it recorded in the response to the list of issues document, nor the disability impact statement. When asked why not, the claimant explained that he thought the documents and statements were not particularly important and he thought his evidence at the hearing would be what mattered. The Tribunal did not accept this evidence as being true. Had the claimant been subjected to comments about his skin in the way he asserted in verbal evidence at the hearing, the Tribunal had no doubt that this would have been recorded in the relevant statements and documents (at least for the claimant's Tribunal claim) and would have been at the heart of the matters about which he complained. The absence of any reference to such comments being made, even in the claimant's own witness statements for the Tribunal hearing, led the Tribunal to find that this evidence given verbally was not correct.

The Law

60. The claimant brought a direct discrimination claim, which relies on section 13 of the Equality Act 2010 which provides that:

> *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

61. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include any other detriment and dismissal. The characteristics protected by these provisions include disability.

62. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and a comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

63. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> *"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.*
>
> *(3) But sub-section (2) does not apply if A shows that A did not contravene the provision."*

64. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondents, that the respondents committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that he has been treated less favourably than he might have been and has a disability. In general terms "*something more*" than that would be required before the respondents are required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

65. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondents. The Tribunal must uphold the claim unless the respondents prove that it/he did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

66. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the ground that the claimant had the protected characteristic. However, a Tribunal is not always required to do so, as

sometimes these two issues are intertwined, particularly where the identity of the relevant comparator is a matter of dispute. Sometimes the Tribunal may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason?

67. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

68. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare and that Tribunals frequently have to infer discrimination from all the material facts. Few employers would be prepared to admit such discrimination even to themselves.

69. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.

70. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee without a disability would have been treated reasonably. That was something which the Tribunal considered to be particularly important in this case.

71. The claim was also brought as one for discrimination arising from disability under section 15 of the Equality Act 2010, which provides:

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

72. For unfavourable treatment there is no need for a comparison, as there would be for direct discrimination. However, the treatment must be unfavourable, that is there must be something intrinsically disadvantageous to it.

73. **Pnaiser v NHS England [2016] IRLR 170** outlined the correct approach to be taken, which can be summarised as follows:

a. A tribunal must first identify whether there was unfavourable treatment. It must ask whether the respondents treated the claimant unfavourably in the respects relied on by the claimant. Unlike for the direct discrimination claim, no question of comparison arises;

b. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of the alleged discriminator. An examination of the conscious or unconscious thought processes is likely to be required, just as it is in a direct discrimination case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it;

c. Motives are irrelevant;

d. The tribunal must determine whether a reason or cause, is 'something arising in consequence of B's disability';

e. The more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact;

f. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator;

g. The knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.

74. Section 15(1)(b) provides that unfavourable treatment can be justified where it is a proportionate means of achieving a legitimate aim; however in this case such an argument was not ultimately pursued by the respondents.

75. For the claims for discrimination, Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

76. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are

usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble [1997] IRLR 336**. Subsequent case law has said that those are factors which illuminate the task of reaching a decision, but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. This has recently been reinforced by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**. **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** confirms that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases. The onus to establish that the time limit should be extended lies with the claimant.

77. The claimant also brought a claim for unauthorised deductions from wages under section 23 of the Employment Rights Act 1996, relying upon the right under section 13 of the Employment Rights Act 1996 which provides that:

> "*An employer shall not make a deduction from the wages of a worker employed by him unless:*
>
> *(a) The action is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or*
>
> (b) *The worker has previously signified in writing his agreement or consent to the making of the deduction*."

78. Under section 27 "wages" includes any sums payable to the worker in connection with his employment, expressly including statutory sick pay.

79. In practice in a deduction from wages claim, the Tribunal needs to determine: whether the claimant was due either contractually or upon any other basis, any amounts which were not paid to him; whether the claimant was paid the same (or more than) he was entitled to in each payment of wages; and, if not, whether any deduction made from the payment of any wages, was otherwise authorised in one of the ways provided for within the Act and/or was reimbursement of an overpayment of wages.

80. In his submissions the respondents' representative emphasised the difference between: a claim that an employer had caused a personal injury; and a claim for unauthorised deduction from wages. It was not sufficient for the claimant to prove that the respondents (or the first respondent) in some way caused or contributed to something which resulted in the claimant's absence, as that would potentially be a personal injury claim which the Tribunal does not have jurisdiction to determine (at least where the personal injury alleged does not result from unlawful discrimination). The claimant must prove that a deduction has been made from wages to which he was otherwise entitled, in order to succeed in his claims.

81. In their submissions neither party referred to any specific statutory provision or legal authority. The submissions emphasised the facts rather than the law. The respondents' representative emphasised that the burden of proof for proving the

initial prima facie case of discrimination because of disability, was the claimant's (and submitted that it had not been met).

Conclusions – applying the Law to the Facts

82. It is appropriate to start this part of the Judgment by emphasising the things which the Tribunal was not required to decide as part of determining the claims pursued by the claimant. The Tribunal did not need to decide: if the claimant committed any of the alleged misconduct; how serious it was; or what the penalty should have been. The Tribunal did not have to decide whether it would have dismissed the claimant. The Tribunal did not need to determine whether the dismissal was fair. The claimant did not have two-years service with the first respondent and, as a result, could not pursue his unfair dismissal claim.

83. The Tribunal did not address the time limit points first, even though they had been recorded first in the list of issues, as determination of those issues was considered to be better left until the other discrimination issues had been considered.

Knowledge of disability

84. The first question from the list of issues which needed to be determined was: were the respondents aware that the claimant had a disability?

85. At the time that he dismissed the claimant, Mr Ullah knew that the claimant had the disability, as the claimant had explained his eczema in his grounds of appeal against the final written warning, and his eczema was discussed at the appeal hearing.

86. The position on knowledge was in dispute for the other alleged discriminators and decision-makers. Mr Mahmood, Mr Din and Mr Anwar all denied that they were aware that the claimant suffered from eczema and all stated (in identical terms) that it could not be physically seen that the claimant was affected by eczema. The Tribunal took particular note of the reports of Dr Saeed (particularly what was said in the report dated 28 July 2022), albeit also noting that the reports did not provide the precise date upon which his observations were based. The Tribunal also took note of the photographs provided by the claimant of his eczema on his neck. The Tribunal accepted that none of Mr Mahmood, Mr Din or Mr Anwar were informed that the claimant had a medical diagnosis of eczema. Nonetheless the Tribunal found that, contrary to what each of them said in evidence, they each would have known that the claimant had a skin condition from what they would have observed, but did not really care. On that basis the Tribunal found that all of Mr Ullah. Mr Mahmood, Mr Din and Mr Anwar had knowledge of the claimant's disability. They were aware of his condition. It was not necessary for them to be aware of the precise medical diagnosis for them to know that the claimant had a disability which impacted upon his skin.

87. It was very clear from the evidence that the claimant himself was acutely aware of his eczema and how it would appear to others. The Tribunal entirely accepted that, as a result, he would have believed that those who worked with him would have also been aware of his eczema, and that he would have a far greater awareness of it than others would have done.

Did the specific facts occur?

88. The next issue in the list of issues, asked whether the claimant could show that the specific facts occurred?

89. The first of those facts was that the claimant was given a final written warning on 5 February 2020. The claimant was given a final written warning on 5 February 2020, that was not in dispute. The final written warning was imposed by Mr Din (163).

90. The second alleged issue in the list was that the claimant was moved to the freezer section because of his eczema. As explained above, this was ultimately identified to be an allegation which related to the claimant being required to work in the chiller for a period of approximately six weeks between December 2019/January 2020 and February 2020. There was no dispute that the claimant did work in the chiller for that period. The issue in dispute was the reason why the claimant was asked to do so.

91. The third allegation was that the claimant was dismissed. There was no dispute that the claimant was dismissed. The claimant was dismissed on 14 July 2020 by Mr Ullah, confirmed in the letter of 20 July 2020 (195).

Comparators

92. There were no actual comparators identified by the claimant, so the Tribunal considered his claims based upon a hypothetical comparator in substantially the same circumstances as the claimant.

Less favourable treatment because of eczema?

93. The next step identified in the list of issues, was that if the claimant was able to prove the facts referred, did any or all of the incidents amount to less favourable treatment because of the protected characteristic of being disabled? In considering this issue, the Tribunal was applying the first stage in the burden of proof as explained in the legal section above. As explained, 'something more' is required to show that any treatment was because of the claimant's eczema. As emphasised, simply unfair or unfavourable treatment of the claimant by the respondents would not be enough to shift the burden of proof.

94. The person who decided that the claimant should have a final written warning imposed was Mr Din. There was nothing before the Tribunal which shifted the burden of proof to the respondents and which provided the 'something more' required to show that the disability was an effective cause or significant influence on Mr Din in giving the claimant a final written warning. The Tribunal found that the claimant's eczema did not play any part in Mr Din's decision to give the claimant a final written warning. The Tribunal accepted Mr Din's evidence about why he imposed a final written warning on the claimant. The claimant admitted to leaving stock on the shelves and he knew that he was at fault and what had been done was wrong. The Tribunal, in particular, accepted Mr Din's evidence about the consequences of out of date stock being left on the shelves, why it was serious, and the reason why he determined that a final written warning should be imposed.

95. In his submissions, the respondents' representative submitted that the evidence was quite clear why the claimant was given a final written warning for keeping out of date stock on the shelves. Although the claimant did not agree with the sanction imposed and believed that Mr Mahmood should have taken some or all of the responsibility, that did not matter to the Tribunal's decision, because the only thing which mattered was if there was any evidence that the decision-made was related to eczema. The respondents accepted that a degree of confusion arose from the decision letter and the reference to hygiene within it and understood why there was confusion at the time, but the representative contended that it was difficult to understand how the confusion could have been maintained by the end of the hearing. The respondents' representative submitted that it was plain that the claimant's eczema played no part in the decision to impose a final written warning at all. The Tribunal agreed with that submission.

96. In terms of the claimant being moved to work into the chiller, the claimant accepted that the reason why somebody was moved to work in the chiller at the time was because the person who normally worked in the chiller had a period of absence to attend his daughter's wedding. The claimant's case was in practice about why it was him identified as the person to work in the chiller, rather than any other employee of the respondent.

97. There was no evidence whatsoever before the Tribunal which shifted the burden of proof to the respondents and which provided the 'something more' required to show that the claimant's disability was an effective cause or significant influence on the claimant being chosen to be the one moved into the chiller.

98. Even if the claimant's own evidence about why he was chosen to be moved to the chiller was accepted by the Tribunal, he would still not succeed in his direct disability discrimination claim. If it was accepted that Mr Anwar was the person who made the decision to move the claimant to the chiller as the claimant asserted, the claimant himself stated that the reason why Mr Anwar made that decision was because of the disagreement between Mr Anwar and members of the claimant's family. The Tribunal took into account Mr Anwar's statement but gave limited weight to it as he had not attended the hearing and been cross-examined. On the basis of the evidence of the claimant, his brother and his father, it was highly likely that Mr Anwar's treatment of the claimant may have been influenced by Mr Anwar's dispute with other members of the claimant's family. However, whilst that is based on the claimant's own evidence, it did not assist the claimant in the claim which was being determined by the Tribunal.

99. If the reason why the claimant was chosen to work in the chiller was because of Mr Anwar's dispute with members of the claimant's family as the claimant asserted, where there was no evidence whatsoever that an influence on the adverse treatment was the claimant's eczema, the Tribunal did not find that the reason was because of the claimant's eczema at all. Someone can be treated less favourably for more than one reason. However in this case the appropriate hypothetical comparator for the claimant was someone without eczema but who also had members of their family who were in dispute with Mr Anwar. The Tribunal found that such a comparator would have been treated in the same way as the claimant.

100. The decision to dismiss the claimant was made by Mr Ullah. Mr Ullah knew about the claimant's eczema because it had been something raised as part of the claimant's appeal against his final written warning, which was heard by Mr Ullah. The Tribunal did not hear anything which provided the something more to shift the burden of proof in showing that the claimant's eczema was a material influence on the decision to dismiss the claimant. The Tribunal found that the claimant was dismissed by Mr Ullah for the reasons which Mr Ullah stated in his evidence to the Tribunal. The Tribunal entirely accepted Mr Ullah's evidence that the claimant's eczema was completely irrelevant to the decision that he made, did not enter into his decision-making and was wholly unconnected to any of the issues which he identified as relating to the claimant's attitude or performance.

101. Having reached the decisions explained, the Tribunal did not need to go on to consider whether the respondents could show that any difference in treatment was not related to disability, as the claimant had not succeeded in reversing the burden of proof.

Discrimination arising from disability

102. The first question to be determined from the list of issues on the discrimination arising from disability claim was: Does the alleged treatment of the claimant by the respondents, namely that the claimant was given a warning because of his hygiene, amount to unfavourable treatment because of something arising in consequence of his disability?

103. Being given a final written warning was clearly unfavourable treatment in that there was something intrinsically disadvantageous to it. For the claim for discrimination arising from disability, no question of comparison arose.

104. The Tribunal did not find that the claimant was given a warning because of his hygiene. The final written warning imposed by Mr Din was because of the out of date stock issue. It was not because of the claimant's hygiene nor was the claimant's hygiene a significant influence upon it. It was no influence on Mr Din's decision at all. The Tribunal fully understood why the claimant might have thought that hygiene was an influence on the decision based on what was said in the decision letter itself. However, the Tribunal accepted that the reference to hygiene was based upon what was said in the respondent's procedure. The Tribunal also accepted what Mr Ullah said in his decision in the appeal on 14 July 2020 (191), that the allegation was in no way a reflection of the claimant's personal hygiene. As a result, the claimant's claim for discrimination arising from disability did not succeed as the Tribunal did not find that the unfavourable treatment (being given a final written warning) was caused by the claimant's hygiene or the respondents' perception of it (to any extent at all).

The claim against Mr Ullah (the second respondent)

105. As confirmed in the list of issues, based upon the document completed by the claimant, the claim against the second respondent (Mr Ullah) was for allegedly not being independent in the appeal hearing or allowing an independent/unbiased party to hear the appeal. The claimant alleged that Mr Ullah had known Mr Anwar for many years.

106. Whether or not Mr Ullah had known Mr Anwar for many years, the reason why he made the decision to hear the claimant's appeal against the final written warning appeal was because of his role in the company. It was not because of the claimant's eczema nor was there any evidence that it was related to the claimant's eczema in any way. The allegations were of direct disability discrimination and the Tribunal only needed to decide whether or not the treatment complained of was unlawful discrimination because of disability; it did not need to decide whether the treatment was correct or fair (the same is true of the allegations against each of the individual respondents). The claimant did not demonstrate the something more required to shift the burden of proof in this case for the claimant's allegation of direct disability discrimination regarding the decisions made by Mr Ullah.

The claim against Mr Anwar (the third respondent)

107. The claims against the third respondent (Mr Anwar) were that he allegedly: chose that the claimant should be chosen to be put in the chiller from all possible staff; and also pushed this onto management below himself – line managers/supervisors (the fourth respondent, Mr Mahmood). This allegation has already been addressed when considering the issue of the claimant being placed in the chiller more generally as explained above. Based on the claimant's own evidence and the case which he advanced, the reason why Mr Anwar made any decisions regarding the claimant which were adverse for him was because of the disagreement which existed between Mr Anwar and the claimant's family, it was not because of the claimant's eczema. The claimant did not show the something more required to shift the burden of proof in this case for the claimant's allegation of direct disability discrimination regarding the decisions made by Mr Anwar.

The claim against Mr Mahmood (the fourth respondent)

108. The claim against the fourth respondent (Mr Mahmood) was that the claimant alleged that he had instructed the claimant to leave the short date coffee on the shelf and then later passed the blame to the claimant, to avoid being scrutinised for giving incorrect orders. The claimant alleged that Mr Mahmood should have had the disciplinary sanction for not following procedure and ordering his staff incorrectly.

109. The Tribunal did not find that Mr Mahmood's approach to the case pursued against the claimant for leaving out of date stock on the shelves, was anything to do with, or was at all influenced by, the claimant's eczema. The claimant did not demonstrate the something more required to shift the burden of proof in this case for the claimant's allegation of direct disability discrimination regarding the decisions made by Mr Mahmood. The Tribunal found that it was entirely possible that Mr Mahmood had given instructions to the claimant which did not accord with the respondent's procedures, albeit what exactly he instructed the claimant was not entirely clear. However, even taking the claimant's case as being correct as asserted, the reason that Mr Mahmood passed the blame to the claimant was to avoid being scrutinised for, or sanctioned for, giving incorrect orders. If he did so, it was to avoid taking the blame himself. There was no evidence that it was influenced by the claimant's eczema. Mr Mahmood would have behaved in the same way in a case pursued against another employee without eczema (but otherwise in materially the same circumstances and facing the same allegations).

Jurisdiction/time

110. The other issue in the discrimination claims, was the first one recorded in the list of issues: whether the alleged acts of discrimination were in time? The claim was entered in time for the dismissal itself. The claim was not entered in time for either the final written warning which was issued in February 2020, nine months before the Employment Tribunal claim form was submitted, or the claimant working in the chiller (which ceased in February 2020, approximately nine months before the claim was submitted). The latter two claims were only in time if they were part of a continuing act with the dismissal or if it was just and equitable to extend time. In the light of the Tribunal's findings on the merits of the allegations themselves, the Tribunal did not need to decide those issues.

Unauthorised deduction from wages

111. Turning to the claim for unauthorised deductions from wages, that arose from the period of twelve weeks during which the claimant did not undertake work for the first respondent due to isolation/shielding in early 2020, when the claimant was paid statutory sick pay and he contended he should have been paid full salary. The amount claimed was £3,743.76.

112. The claimant accepted that he was paid what he should have been. There was no evidence that the first respondent failed to pay the claimant a sum that was due. As recorded above, under the terms of the claimant's contract of employment he was entitled to statutory sick pay only during absence on ill health grounds, there was no contractual entitlement to be paid any higher amount.

113. The claim was in fact one which arose from the claimant's assertion that he would not have been off sick, or have needed to have isolated, if his asthma had not been exacerbated by working in the chiller. As recorded in the legal section above, the respondents' representative's submission emphasised the difference between: a claim that an employer had caused a personal injury; and a claim for unauthorised deduction from wages. To succeed in his unauthorised deduction from wages claim, the claimant needed to prove that a deduction had been made from wages to which he was otherwise entitled. It was not sufficient for the claimant to prove that the respondents (or the first respondent) in some way caused or contributed to something which resulted in the claimant's absence, as that would potentially be a personal injury claim which the Tribunal does not have jurisdiction to determine (at least where the personal injury alleged does not result from unlawful discrimination). The respondents' representative's submissions on this issue were entirely correct. What the claimant was advancing in this claim was a claim for personal injury, not an unauthorised deduction from wages claim. The issue also had nothing whatsoever to do with the claimant's eczema, which was the disability upon which he relied in his disability discrimination claims. The issue related to the claimant's asthma, a condition which was not evidenced for the Tribunal hearing.

The claims generally

114. The respondents' representative appropriately accepted in submissions that it was clear that the claimant had a genuine sense of grievance about the way in which he was treated. The Tribunal entirely understood why that was the case. The manner

of the claimant's dismissal fell well outside any fair process or procedure. Whilst the respondents endeavoured to contend that some form of documented abbreviated procedure had been followed, the reality for the dismissal was that no procedure whatsoever was followed. The claimant was called to a meeting and dismissed, for a number of things which had not been fully investigated, and in relation to which he had not been given the opportunity to respond. There was a notable contrast between the apparently full process followed to consider the final written warning imposed, and the absence of any process whatsoever for the more serious decision to dismiss. The claimant submitted that if he had been treated fairly, a lot of the issues could have been avoided. That is probably true. However, as was identified at the start of this section of the Judgment, this was not an unfair dismissal claim. The fact that the claimant's dismissal would undoubtedly have been found to have been unfair had he had two years' service and had he been dismissed in the same way based upon the same allegations, did not mean that the claims which the Tribunal needed to determine should succeed. Unimpressed as the Tribunal was with the way in which the claimant was treated, the claims which the Tribunal needed to determine did not succeed for the reasons given.

Employment Judge Phil Allen
6 January 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
9 January 2023

FOR THE TRIBUNAL OFFICE