EMPLOYMENT TRIBUNALS

Claimant: **C Bruton**

Respondent: **Sodexo Limited**

HEARD AT: Manchester **ON:** 30 June, 1 July and 5-9 December 2022

BEFORE: Employment Judge Batten
BJ McCaughey
D Wilson

REPRESENTATION:
Claimant: In person
Respondent: R Kight, Counsel

JUDGMENT having been sent to the parties on 12 December 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form dated 11 January 2021, the claimant presented complaints of unfair dismissal and disability discrimination. ACAS early conciliation had been commenced on 28 November 2020 and a certificate was issued 28 December 2020. On 4 March 2021 the respondent entered its response to the claim.

2. On 26 August 2021, there was a case management preliminary hearing before Employment Judge T Brown which produced an agreed list of issues. That list of issues was subsequently amended on the first day of the hearing following the claimant's application to amend his claim to include further complaints.

Evidence

3. The Tribunal was provided with 2 lever arch files of documents together with a file of the claimant's additional disclosure. Further documents were added to the hearing files when the hearing resumed in December 2022, the last of these additional documents being tendered in the course of submissions. References to page numbers in these Reasons are references to the page numbers in the bundle.

4. The claimant gave evidence himself and called Jacqueline Phiri, his partner and also Daniel Burke, a former colleague, to give evidence in support. The respondent called 3 witnesses, being: Shaun Anders – Site Director, who was the dismissing officer; Mark Oldfield – Divisional Director, who dealt with the appeal; and Sarah Mitchell - the respondent's HR Business Partner. All the witnesses gave evidence from written witness statements and were subject to cross-examination.

5. Each party tendered a chronology. The Tribunal used the claimant's chronology because it was longer and included more detail. In addition, the Tribunal was provided with a cast list. Upon the conclusion of the oral evidence, the claimant tendered written submissions and the Tribunal heard oral submissions from both parties.

Issues to be determined

6. A list of issues had been agreed at the case management preliminary hearing on 26 August 2021. At the commencement of the final hearing, the Tribunal discussed the list of issues with the parties. After amendment, it was agreed that the complaints and issues to be determined by the Tribunal were as follows:

Disability

1. It is conceded that the claimant was a disabled person at the material time.

The claimant is disabled by a physical impairment: - the limited use of his hands, resulting from scleroderma systemic sclerosis, or secondary Raynaud's syndrome

2. Did the respondent have the requisite knowledge of disability at the material time?

Unfair dismissal

3. What was the reason for dismissal?

The respondent says conduct was the reason.

4. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

4.1. In particular:

4.1.1. were there reasonable grounds for that belief?

4.1.2. at the time the belief was formed had the respondent carried out a reasonable investigation?
4.1.3. did the respondent otherwise act in a procedurally fair manner?
4.1.4. was dismissal within the range of reasonable responses?

4.2. ***The claimant complains that his dismissal was unfair because the respondent:***

4.2.1. ***did not carry out a reasonable investigation;***
4.2.2. ***caused the investigation to be carried out by a person who was responsible for managing the emergency lighting and therefore had a conflict of interest, because the investigation concerned that person's own failings;***
4.2.3. ***shared confidential disciplinary details about him with Sodexo's management office;***
4.2.4. ***failed to take into account the claimant's mitigation;***
4.2.5. ***pre-determined the outcome.***

5. Did the claimant cause or contribute to his dismissal?

6. Would the claimant have been dismissed in any event, so that any compensation should be reduced?

<u>Disability discrimination</u>

7. At the disciplinary meeting on 21 August 2020, did Shaun Anders and/or Sarah Mitchell encourage the claimant to resign because of his health?

8. If so, was this:

8.1. harassment related to disability:

8.1.1. Has the respondent engaged in unwanted conduct related to the claimant's disability?
8.1.2. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
8.1.3. Did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
8.1.4. In deciding whether conduct has the effect referred to, the Tribunal must take account of the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

or

8.2. unfavourable treatment because of something arising in consequence of the claimant's disability, namely his abilities to do his job in light of his state of health:

8.2.1. Did the respondent treat the claimant unfavourably as follows:

By encouraging the claimant to resign

By dismissing the claimant

8.2.2. Did the following things arise in consequence of the claimant's disability:

the claimant's ability to do his job was reduced or impaired

8.2.3. Was the unfavourable treatment because of that thing?

Time point issues

9. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 29 August 2020 may not have been brought in time.

10. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

10.1. Was the claim made to the Tribunal within 3 months (plus early conciliation extension) of the act to which the complaint relates?
10.2. If not, was there conduct extending over a period?
10.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
10.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

10.4.1. Why were the complaints not made to the Tribunal in time?
10.4.2. In any event, is it just and equitable in all the circumstances to extend time?

Findings of Fact

7. The Tribunal made its findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

8. The findings of fact relevant to the issues to be determined are as follows.

9. The claimant was employed by the respondent from 1 October 2016, as Electrical Operations Manager and, from 17 March 2020, as a Projects Manager.

10. The respondent holds a contract with a large NHS Trust in Manchester to maintain electrical installations services and assets amongst other things. As the Electrical Operations Manager, the claimant had overall responsibility for electrical assets covering 4 hospitals in central Manchester and this responsibility included ensuring adequate maintenance of the emergency lighting and central battery units. The job description, for the Electrical Operations Manager, is in the bundle at

pages 96 to 99 and it shows the claimant, in that post, to be the authorised person for the high voltage and low voltage systems, the latter of which includes hospital theatre lighting and back up systems.

11. Disability has been conceded. The claimant has several physical impairments which are debilitating conditions including Raynaud's Syndrome, Scleroderma and systemic Sclerosis. These conditions manifest themselves in a number of ways including limited use of the claimant's hands. Whilst the respondent has conceded that the claimant was disabled at the relevant time, the issue remains as to what the respondent knew and when in respect of the claimant's disability.

12. On 17 March 2020, the claimant commenced the role of Project Manager and Andrew Walsh was appointed as Electrical Operations Manager to replace the claimant in that role.

13. In or around March 2020, the claimant became unwell. The Tribunal has seen emails about this, for example, on 22 April 2020, when the claimant emailed his line manager, Mr McCreedy, to notify him of his condition and in particular the state of his hands. The email included pictures which are in the bundle at page 654.

14. On 17 March 2020, by coincidence on the same day as the claimant commenced the role of Project Manager, a subcontractor of the respondent reported a loss of power to the lighting on two fire exit stairways in the surgical areas of one of the Trust's hospitals. The report is in the bundle at pages 381 to 382.

15. By 19 May 2020, the report was still live and so the lighting issues were escalated by the Trust giving formal notice to the respondent of a failure under the contract between them - see bundle pages 401, 414 and 416. The matters were described as and considered to be life critical in that a loss of lighting in surgical areas is likely to endanger patient safety.

16. Around 21 May 2020, the claimant was formally diagnosed with Systemic Sclerosis and Schleroderma, with Raynaud's Syndrome. A report of his diagnosis appears in the bundle at page 672.

17. Because the Trust had served formal notice of a contract failure on the respondent, it was compelled to carry out an investigation. This took place over June and July 2020. Initial enquiries were conducted by Mr Walsh as he was by then the Electrical Operations Manager. Mr Walsh was tasked to see what had caused the lighting issues and also to report on the state of the assets concerned. His report is in the bundle at page 421 to 463. Importantly, Mr Walsh was not tasked to ascertain whose fault it might be.

18. Amongst other things, the investigation identified that, in February 2019 and again in March 2020, subcontractors had formally made the respondent aware that certain central batteries had failed tests and were

broken. The subcontractors' reports are in the bundle at page 406 and 407. The central batteries are assets which are part of an annual schedule of asset maintenance. The asset maintenance schedule is designed in such a way as to alert the respondent's Electrical Operations Manager, 4 months in advance, of the need to carry out routine maintenance of specific assets in the annual maintenance schedule, on a month-by-month basis. The process was that a planned preventative maintenance form was issued, one month in advance of the required action, so that tests could be carried out, the outcome of those tests could be recorded and then any follow up action that was required could be undertaken and also be recorded. The evidence before the Tribunal was that those systems and processes had simply not been followed, leading to the reported concern from the subcontractors.

19. In evidence, the claimant accepted he had not checked that his team had carried out the necessary work and/or that the team had undertaken the recording of its work and outcomes together with any follow up work, in 2019 and 2020.

20. Mr Walsh handed over his report to his line manager, Mr McCreedy who decided to formally investigate. The Tribunal considered that he was obliged so to do given the contents of Mr Walsh's report.

21. On 1 July 2020, the claimant attended an investigation meeting conducted by Mr McCreedy, who interviewed all members of the claimant's team, including the claimant. The investigation report, compiled by Mr McCreedy, has a list of those interviewed with the dates of each interview. His report was produced on 28 July 2020 and appears in the bundle at page 346 to 379.

22. At page 350 of the bundle, the investigation report shows the outcome of Mr McCreedy's investigation which concluded that:

"… there is a clear lack of structure within the electrical operations team. There are no clear areas of accountability or responsibility and these failures have led to poor practice and a drop in the Standards & Quality of the work required of this team. This is supported by the following points:

- *Nobody has reviewed or checked the reports*
- *Nobody has taken ownership of the DH folder*
- *All parties failed to escalate issues adequately and formally*
- *There appears to be a culture that someone else will pick up the tasks and there have been no repercussions or consequence management for the last few years"*

23. The report goes on to say:

"There are significant people issues amongst this team, misguided management of a process and lack of measuring how we comply with statutory compliance and in general a lack of people owning their role and being responsible. This poor practice has been ongoing for a number of years"

24. The report recommended that the claimant and 2 Team One Managers, Mr Cully and Mr Moroney, be taken to a disciplinary. The Tribunal was told that all 3 were in fact disciplined although the Tribunal was only concerned with the claimant's outcome.

25. On 28 July 2020, the claimant emailed the respondent about his physical health issues and said that he was struggling to carry out his role and had been so since March 2020, due to his Scleroderma.

26. On 10 August 2020, the claimant was invited to a disciplinary hearing which took place on 21 August 2020. He was accompanied by his trade union representative. The disciplinary hearing was conducted by Mr Anders, the respondent's Site Director who was the line manager of Mr McCreedy. Ms Mitchell, the respondent's HR Business Partner, also attended the meeting.

27. Mr Anders conducted a review of the investigation by Mr McCreedy in order to understand what the claimant and his team had done, or had not done. Mr Anders also read through a file of paperwork supplied to him by the claimant prior to the disciplinary hearing and he checked with the claimant, at the hearing, that he had everything that the claimant wanted him to consider. He then went through everything with the claimant. The claimant has taken no issue with the respondent's disciplinary procedures and in evidence he did not dispute that he was given a full opportunity to set out his case at the disciplinary hearing. The Tribunal considered that Mr Anders had been thorough and diligent in his approach.

28. Mr Anders found no evidence of the claimant effectively managing Mr Walsh as was expected, nor any evidence that lines of responsibilities had been established and/or were being followed.

29. At the disciplinary hearing, Mr Anders and also Ms Mitchell noticed that the claimant was not himself and that he appeared stressed by the disciplinary process. The disciplinary hearing was adjourned for Mr Anders to consider matters. During the adjournment, Mr Anders invited the claimant, and the claimant agreed to a private "welfare meeting" with him and Ms Mitchell. The claimant's trade union representative, who had been in attendance at the disciplinary hearing, suggested he was not needed and the claimant agreed. The trade union representative therefore departed and was not present at the welfare meeting. During the welfare meeting, the claimant disclosed his health position to Mr Anders and Ms Mitchell. This was the first time that Mr Anders and Ms Mitchell personally knew of the claimant's health situation, although the claimant had previously told the respondent via emails to his manager, Mr

McCreedy. There was, however, no evidence that Mr McCreedy had shared the claimant's emails nor made senior managers aware and it was apparent that he had not passed on the claimant's information to HR as might be expected.

30. In the course of the welfare meeting, that Ms Mitchell asked the claimant "*is it worth it?*". The Tribunal accepted Ms Mitchell's evidence, that she asked this only once. It was a question posed because Ms Mitchell could see that the claimant was stressed and because she was concerned about the effect of the disciplinary process on the claimant, given his health. Mr Anders also talked about stress during the welfare meeting, mentioning the effect of stress on his son in a stressful position at work, who eventually moved jobs and he said that his son had been better since then. The claimant took what was said as an indication that he himself might resign. The Tribunal found that it was reasonable for the claimant to conclude this, from the comments made which were in the context of a welfare meeting. The Tribunal noted that the claimant did not at the time raise an issue about the conduct of the welfare meeting or any comments made to him by the respondent's personnel in that meeting. Neither did he raise such at the resumed disciplinary hearing. However, the claimant did mention the matter later, in his letter of appeal

31. On 2 December 2020, the disciplinary hearing reconvened. The meeting notes are in the bundle at page 498 onwards. It was conducted by Mr Andrews, who told the Tribunal that he concluded that the claimant did not accept any responsibility for the situation which the respondent found itself in regarding the lighting failures, which led to the Trust's serving formal notice of a contract failure upon the respondent. In the meeting minutes, at page 498 of the bundle, it is recorded that Mr Anders stated that:

"*the management of the systems in place are ineffective, the management of the people is ineffective and the management of the sub-contractors is ineffective*".

32. Mr Anders said there would be further investigations. The claimant agreed that the level of "professional neglect" could not be ignored and went on to say that he was sure there was more that the respondent was not aware of and that there were some things that he was not aware of either. At the end of the meeting, the claimant was told that he was dismissed.

33. On 4 September 2020, the claimant was sent a letter confirming his dismissal. The letter appears in the bundle at page 500 onwards. It includes a statement at page 501,

"… as the Electrical Operations Manager and Lead Approved Person (AP) for the site, you were accountable for ensuring that adequate standards were met in line with the statutory and contractual requirements. During either [disciplinary] meeting you failed to provide

sufficient mitigation as to why the appropriate maintenance had not been completed and to summarise my findings:

- *the systems that were in place were ineffective, and poorly managed, and you failed to demonstrate any evidence of taking appropriate and corrective actions.*

- *the management of the people and the team was ineffective, and poorly managed, and you failed to demonstrate any evidence of taking appropriate and corrective actions.*

- *and the management of the sub-contractors was ineffective, and poorly managed, and you failed to demonstrate any evidence of taking appropriate and corrective actions*

which, in turn has led to reputational damage for [the respondent], unnecessary expenditure in terms of further investigation and unavailability penalties and above all else this has led to the life safety systems within the hospital being compromised and this has resulted in hospital patients, visitors, and staff being placed at unreasonable prolonged risk".

34. On 11 September 2020, the claimant appealed his dismissal and submitted a detailed statement of his case, in a further letter dated 24 September 2020.

35. Mr Oldfield was tasked to deal with the appeal. On an initial consideration, he decided that a medical report on the claimant was required. A medical report was obtained from the claimant's GP, and it appears in the bundle at 540. Mr Oldfield considered that a medical report was necessary in order to understand the claimant's health situation and also to protect the respondent's position; there had been no medical referral or report on the claimant before this point in time and the Tribunal considered that it was a reasonable step for Mr Oldfield to take.

36. On 25 November 2020, the appeal hearing took place, conducted by Mr Oldfield. Prior to the appeal hearing, he reviewed the investigation, the disciplinary process and outcome, to understand for himself what it was said that the claimant had done, or not done. He also read through a pink file of paperwork supplied to him by the claimant and he had checked what records were on the system to evidence the claimant's management. In this regard, Mr Oldfield was troubled because he found only one version of the weekly huddle agenda, dated 10 January 2020, which appears in the bundle at page 312. This is not an up-to-date document. It contains a number of anomalies, for example, it is dated for a meeting to take place on 10 January 2020, however, the date of the next meeting is recorded as 4 October 2019. In addition, some of the documents referred to appear to be historical: for example, there is a plan of work to be done in February 2019. Mr Oldfield was surprised and concerned by what he found and he doubted that the claimant had been

having weekly meetings as he said; alternatively, he considered that the necessary records were simply not being kept as they should have been. Mr Oldfield concluded that this was symptomatic of further potential failings.

37. The claimant did not challenge the appeal process or Mr Oldfield's handling of it. Ultimately, Mr Oldfield dismissed the claimant's appeal and sent the claimant a letter turning down his appeal on 27 November 2020.

The applicable law

Unfair Dismissal

38. Section 98 of the Employment Rights Act 1996 ("ERA") sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for the dismissal or the principle reason and that must be a potentially fair reason for dismissal in law. In this case, the respondent contends that the reason for dismissal was the claimant's conduct. Conduct is a potentially fair reason for dismissal under Section 98(2)(b) ERA.

39. If the employer shows a potentially fair reason in law, the Tribunal must consider the test under Section 98(4) ERA, namely whether, in all the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

40. In considering the reasonableness of the dismissal, the Tribunal must have regard to the test laid out in the case of British Home Stores -v- Burchell [1978] IRLR 379 and consider whether the respondent has established a reasonable suspicion amounting to a genuine belief in the claimant's guilt and reasonable grounds to sustain that belief and the Tribunal must also consider whether the respondent carried out as much investigation as was reasonable in the circumstances.

41. The issue of the reasonableness of the dismissal must be looked at in terms of the set of facts known to the employer at the time of the claimant's dismissal, although the dismissal itself can include the appeal; so, matters which come to light during the appeal process can also be taken into account: West Midlands Co-operative Society Ltd -v- Tipton [1986] IRLR 112.

42. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439. The range of reasonable responses' test applies both to

the decision to dismiss and to the procedure by which that decision is reached: Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23.

43. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal for conduct. Although compliance with the ACAS Code is not a statutory requirement, a failure to follow the Code should be taken into account by a Tribunal when determining the reasonableness of a dismissal.

Disability Discrimination

44. The complaint of disability discrimination is brought under the Equality Act 2010 ("EqA"). Disability is a relevant protected characteristic as set out in Section 6 and Schedule 1 of the Equality Act.

45. Section 39(2) EqA prohibits discrimination by dismissing an employee or subjecting them to any other detriment. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.

46. EqA provides for a shifting burden of proof. Section 136 EqA 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 subsection (2) does not apply if A shows that A did not contravene the provision.*

47. Consequently, it is for a claimant to establish facts from which the Tribunal could reasonably conclude that there had been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to show there has been no contravention by, for example, identifying a different reason for the treatment.

48. In Hewage v Grampian Health Board [2012] IRLR 870, the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 and was supplemented in Madarassy v Nomura International plc [2007] ICR 867. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action is taken the burden of proof provision is unlikely to be material.

Harassment

49. Section 26 EqA provides that:

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to the relevant protected characteristic, and

(b) the conduct has the purpose or effect of -

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

(4) In deciding whether conduct has the effect referred to in subsection (1) (b), each of the following must be taken into account-

(a) the perception of B

(b) the other circumstances of the case

(c) whether it is reasonable for the conduct to have that effect.

50. The concept of harassment under the previous equality legislation was the subject of judicial interpretation and guidance by Mr. Justice Underhill in Richmond Pharmacology and Dhaliwal [2009] IRLR 336. The Tribunal has applied that guidance, namely:

"*There are three elements of liability (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's [protected characteristic].*"

Discrimination arising from disability

51. The prohibition of discrimination arising from disability is found in section 15 EqA. Section 15(1) 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.

52. The proper approach to causation under section 15 was explained by the Employment Appeal Tribunal in paragraph 31 of Pnaiser v NHS England and Coventry City Council EAT /0137/15 as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. 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 A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 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. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant …...

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links …[and] may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) ….. However, 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) …..

(h) Moreover, the statutory language of section 15(2) makes clear …. that 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. Had this been required the statute would have said so.

53. In City of York Council v Grosset [2018] WLR(D) 296 the Court of Appeal confirmed the point made in paragraph (h) in the above extract from Pnaiser: there is no requirement in section 15(1)(a) that the alleged discriminator be aware that the "something" arises in consequence of the disability. That is an objective test.

Time limits

54. The time limit for presenting complaints of unlawful discrimination is found in section 123 EqA, which provides that such complaints may not be brought after the end of: -

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable.

55. Conduct extending over a period of time is to be treated as done at the end of that period and a failure to do something is to be treated as occurring when the person in question decided on it, or does an act inconsistent with doing it, or on the expiry of the period in which that person might reasonably have been expected to do it. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question.

56. In British Coal Corporation –v- Keeble [1997] IRLR 336, the EAT confirmed that in considering the just and equitable extension, a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in Keeble,

"… It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –

(a) the length of and reasons for the delay;
(b) the extent to which the cogency of the evidence is likely to be affected by the delay;
(c) the extent to which the party sued had cooperated with any request for information;
(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

57. In Robertson –v- Bexley Community Centre (T/A Leisure Link) [2003] IRLR 434 the Court of Appeal considered the application of the "just and equitable" extension and the extent of the discretion and concluded that the Employment Tribunal has a "wide ambit". Subsequently in Chief Constable of Lincolnshire –v- Caston [2010] IRLR 327 the Court of

Appeal, in confirming the Robertson approach, held that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

Conclusions (including where appropriate any additional findings of fact)

58. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way, by reference to the agreed list of issues above.

Unfair dismissal

59. The Tribunal had no hesitation in finding that the respondent had shown that the reason for dismissal was the claimant's conduct. The claimant himself described the lighting situation as "a level of professional neglect". Conduct is a fair reason in law for dismissal. The claimant has not brought evidence at this hearing to suggest there might be any other reason for dismissal and, importantly, he has not shown that his dismissal was because of his disability even though he had contended that was the case.

60. The Tribunal next considered whether the respondent act reasonably in treating conduct as a sufficient reason to dismiss the claimant. The Tribunal noted that Mr McCreedy's investigation, report and conclusions were not challenged by the claimant. It was clear to the Tribunal from the evidence before it that there were systemic failings in electrical operations over a long period of time. The claimant headed the team responsible for electrical operations at the material time and so the claimant was ultimately responsible for such failings.

61. The Tribunal considered that the investigation was reasonable and thorough. The claimant's only challenge to the investigation was that he believed Mr Walsh had a potential conflict of interest. The Tribunal rejected that suggestion as being entirely unfounded; there was no evidence of an animus towards the claimant. Mr Walsh had been tasked to fact-find because he was the Electrical Operations Manager at the time when the deficiencies came to light, the claimant having moved to another role. Mr Walsh's task was to fact find and set out the position as he found it. The Tribunal found Mr Walsh's report to be constructive rather than critical. The report set out the position and proposed an action plan to identify issues and remedy them. Mr Walsh does not 'point the finger' nor does he seek to blame anybody albeit that, when interviewed by Mr Anders later, when he is put on the spot, Mr Walsh does admit that he identified failings by the claimant.

62. Mr McCreedy's investigation was thorough. He interviewed everybody in the team and he reasonably concluded that the matters arising should be brought to a disciplinary. He did not suggest anyone should be sacked and there was no evidence that he had singled out the claimant as the one to be dismissed, despite that that was the claimant's case. Indeed,

the Tribunal heard evidence that at least 2 others in the team had also been through disciplinary proceedings as a result of the lighting situation.

63. In terms of procedural matters, the Tribunal noted that the claimant did not challenge the disciplinary process carried out by the respondent. The only issue raised by the claimant in respect of procedure was the conduct of the welfare meeting. The Tribunal considered this to be a matter separate to the disciplinary process and which formed no part of it – see also paragraphs 66, 72 and 74 below.

64. The Tribunal has addressed the question of whether dismissal fell within the range of reasonable responses available to this employer in the circumstances of the case and determined that the claimant's dismissal fell squarely within the range of reasonable responses. The claimant was the lead and manager of the electrical operations team at the relevant time. The claimant accepted that serious and sustained failings in his and the team's work and record keeping, for in excess of a year, had come to light and that the potential consequences of the team's failings included the potential for injury or loss of life.

65. The claimant argued that the respondent took no account of his mitigation and that the respondent had predetermined the decision to dismiss him. However, the Tribunal found no evidence to support such contentions; in fact, the Tribunal found quite the opposite - both managers, the dismissing officer and the appeal manager, considered the claimant's mitigation files very carefully before proceeding or making any decision. The Tribunal accepted the clear evidence of Mr Oldfield in particular, who was able to describe the claimant's mitigation file as being pink and about six inches thick and he told the Tribunal that it took him several days to read. The investigation report does not, in any way, suggest that a decision has already been made nor that the report had somehow been compiled with a view to the claimant's dismissal.

66. On the issue of the welfare meeting, the claimant's case was that he did not raise the comments made to him in the welfare meeting until his appeal because he thought there was a chance he would not be dismissed and therefore he "did not want to make waves". From this statement, the Tribunal concluded that the claimant himself did not, at the time, believe his dismissal to have been predetermined. Rather, the Tribunal considered that he had adopted that view in hindsight, and that such a view was not a reasonable view in light of the evidence.

67. The claimant also pursued an argument that previous similar incidents had not result in any dismissals and that he had been treated harshly on this occasion. He gave anecdotal evidence of certain failings having been tolerated by the respondent in the past. The claimant's case appeared to be that this meant he should have not been dismissed despite the circumstances revealed by the investigation. The Tribunal considered this to be a contention, in effect, that nobody should be dismissed however serious their failures might be, and it rejected the claimant's argument on

that basis. The Tribunal considered that the historical incidents which the claimant relied upon were not comparable to, nor as serious as, the potential failure of lighting in surgical areas. For example, the claimant pointed to a previous failure of the lighting in the Costa Coffee shop at one of the Trust's hospitals. The Tribunal considered that, whilst any lighting failure could be seen as serious, this example was not comparable to the matters discovered in 2020 which might have led to lighting failures in the middle of surgical operations, in a hospital theatre, with likely fatal consequences.

68. The Tribunal were concerned to hear that the claimant sought to lay the blame on a number of employees in his team, who were junior to him. At least 2 of those employees had been the claimant's choice and were recruited by the respondent at his behest. The claimant also complained that he had been given no support with problems arising from employees' work. However, the Tribunal found there was only one email in the bundle to suggest that the claimant had raised such difficulties with, or sought support from, senior management and no evidence that the claimant had asked for additional resources to deal with his workload or any issues arising from it. The Tribunal here accepted the respondent's unchallenged evidence that Mr Anders operated an open-door policy, that the respondent put compliance before profit and that costs and budgets were not under pressure. Mr Oldfield was clear; he told the Tribunal there was a "blank cheque" for work on life-critical infrastructure and that resources were available. The claimant did not dispute this. Further, the Tribunal noted that, in the course of the investigation, a number of the claimant's team said that they felt that the claimant did not support them and one interviewee produced emails to the investigation to illustrate what he meant by this, for example see page 348 of the bundle.

69. In light of all the above, the Tribunal fond that the claimant's dismissal fell within the range of reasonable responses and was fair.

Disability discrimination

70. The Tribunal first addressed the issue of what the respondent knew of the claimant's disability, and when. In light of the evidence, the Tribunal considered that the respondent did have the requisite knowledge of the claimant's disability, from the time when the claimant started to tell Mr McCreedy of his ill health and difficulties in March 2020, and certainly in light of his diagnosis in May 2020 which he shared with his manager. The respondent's case was that, in March 2020, they had received limited information from the claimant but they did not know that his condition amounted to a disability, contending that the claimant's view was that it didn't impact him as a disability, so how could the respondent know otherwise? The respondent pointed to the fact that, at the disciplinary hearing and at the welfare meeting, the claimant had not made it known that his Scleroderma was a progressive condition and also that he had only himself received a diagnosis in May 2020.

71. The respondent also relied upon the GP's report, in the bundle at pages 540-542, in which the claimant's GP stated that they didn't consider the effect of the claimant's conditions was sufficient to be a disability under EqA and that, because the GP did say that it was a progressive condition, this led to the respondent's concession of disability. The Tribunal consider it was not reasonable for the respondent to say they did not know of such until the welfare meeting on 21 August 2020 at the earliest. The Tribunal considered that the information shared by the claimant with his manager, coupled with his increasing need to work from home, should have put the respondent on notice of a potential for the claimant's health conditions to be a disability. At the very least, the respondent should have made further enquires. As Mr Oldfield said, he decided to obtain a medical report "to protect [the respondent's] position". That was not an unreasonable approach to take in the circumstances. It was clear to the Tribunal that the information given by the claimant to Mr McCreedy was not shared or reported for example to HR, when it should have been, but that situation does not provide the respondent with an absolute defence on the issue of knowledge of disability. Mr McCreedy was alerted to issues with the claimant's health and, by construction, the respondent knew of it.

Harassment

72. The harassment complaint relates solely to the conversation at the welfare meeting on 21 August 2020. The Tribunal found Ms Mitchell's comment, "*is it worth it?*", to be a one-off comment, made by Ms Mitchell only and that it was born out of concern for the claimant. In those circumstances, the Tribunal did not consider the claim of unlawful harassment to be made out. There was no evidence that the claimant perceived the comment to be harassment at the time, nor that he took offence at the time. This complaint was raised much later, in support of the claimant's belief that his dismissal was predetermined, a view that the claimant erroneously formed over the course of the disciplinary proceedings and the appeal. The Tribunal considered that the claimant had not expected to be dismissed but had gradually realised the writing was on the wall and that he was not going to be given the leeway which he had been given in respect of previous failures. This realisation led to a theory, unsupported by the evidence, that his dismissal was predetermined and that Ms Mitchell's comment was somehow a means to that end. In all the circumstances, the Tribunal found that it was not reasonable for the claimant to perceive that the conduct of Ms Mitchell at the welfare meeting had the effect of harassment nor that it was designed to encourage him to resign.

Discrimination arising from disability

73. The claimant relies on the "something arising" from his disability as the fact that his ability to do his job was reduced or impaired by his Schleroderma. The Tribunal accepted this as "something arising" in consequence of the claimant's disability. However, the Tribunal found no

evidence of a causal connection between any lack of performance by the claimant and the unfavourable treatment contended for, namely the comment at the welfare meeting and/or the claimant's dismissal.

74. The Tribunal accepted Ms Mitchell's evidence that her comment at the welfare meeting was made out of compassion for the claimant and that she was not 'encouraging' the claimant to resign, albeit that she accepted in evidence that resignation may have been one option implicit in what she said. The Tribunal also accepted the respondent's witness' evidence that they could see that the claimant was highly stressed and, at times, emotional during the disciplinary process. Mr Anders' evidence was that he had not seen any manager behave in quite such a distressed way in similar circumstances. The welfare meeting was called by Mr Anders because he was so concerned about the claimant's demeanour. There was no intention by the respondent's personnel to put pressure on the claimant to resign before he was sacked and, at that point in time, the Tribunal considered that the decision to dismiss had not yet been made. Mr Anders told the Tribunal that he was concerned that a senior manager was "in a state" and, in those circumstances, the respondent was reasonably offering the claimant some time and space, asking him to think about things and to think about himself and his well-being because he was so distressed, as indeed he was at times during the Tribunal hearing. In light of the above, the Tribunal did not consider that Ms Mitchell's comment amounted to unfavourable treatment or that it was because of the 'something' arising from the claimant's disability; rather it was made because of the stress which the respondent saw the claimant suffering because of the disciplinary proceedings, which are stressful.

75. In respect of the claimant's dismissal, the Tribunal took account of Mr Ander's reasons for dismissal. The Tribunal found no evidence that the decision to dismiss the claimant was in any way linked to or because of the claimant's disability or because of anything arising in consequence of it. The claimant was fairly dismissed for conduct. In particular, the Tribunal noted from the evidence that the claimant had displayed an inability to recognise his role as the manager in charge of the team and an inability to accept responsibility for the lighting failures which arose from the team's poor performance. Given that the claimant's case was that there had been a number of previous failures for which disciplinary action appeared not to have resulted, the Tribunal also considered that this indicated that the claimant appeared unable to learn from previous mistakes and put systems in place to prevent the recurrence of what became serious failings. Regrettably, at this Tribunal hearing, the claimant seemed not to recognise or appreciate the gravity of the potential consequences of surgical area lighting failure. For example, in the claimant's written submissions, he made the point that nobody was hurt. The Tribunal nevertheless considered the fact of the considerable risk created, which should have been taken seriously, managed and addressed promptly, but was not. The Tribunal also heard evidence that there had been a number of failings in the respondent's management processes over time, before the claimant's health issues arose and

therefore at a time when the claimant was able to address them in any event. There was no suggestion that, when previous mistakes were made, the claimant's health had been a factor contributing to those mistakes. By the time of the disciplinary hearing, it is accepted that the claimant did have significant health problems but his health issues and his disability played no part in the decision by Mr Anders to dismiss the claimant for systemic failures for which the claimant was ultimately responsible.

76. The Tribunal has also been told that other people were also disciplined for the same matters as the claimant. The Tribunal has not been told of the outcome(s) of those cases but it was clear that the claimant was not the only person to have been disciplined for this episode, despite him suggesting otherwise.

Time limits

77. The Tribunal has found the claimant's dismissal was not discriminatory and that the comment, on 21 August 2020, was not harassment nor because of something arising from disability. There was therefore no continuing course of conduct and so the complaint about the comment on 21 August 2020 is out of time. In any event, whilst the Tribunal has a discretion to extend time, it considered that it would not have exercised its discretion in this case, noting that the claimant had been advised throughout the disciplinary process by his trade union.

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Employment Judge Batten
30 January 2023

REASONS SENT TO THE PARTIES ON:

3 February 2023

FOR THE TRIBUNAL OFFICE