EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104190/2022

Held at Dundee on 18, 19 and 20 July 2023

Employment Judge W A Meiklejohn
Tribunal Member Mrs E Hossack
Tribunal Member Mr S Larkin

Mr P Andrews	**Claimant** **Represented by:** **Mr R Russell,** **Solicitor**
H & H Properties (UK) Ltd	**Respondent** **Represented by** **Mr K Glass,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is as follows –

(a) The claimant's claim of unfair dismissal succeeds and the respondent is ordered to pay to the claimant a monetary award of **FOUR THOUSAND FIVE HUNDRED AND ONE POUNDS AND TWENTY EIGHT PENCE (£4501.28)**; the prescribed element is **ONE THOUSAND THREE HUNDRED AND THIRTY FIVE POUNDS AND TWENTY SIX PENCE (£1335.26)** and relates to the period from 19 May 2022 to 15 September 2022; the monetary award exceeds the prescribed element by **THREE THOUSAND ONE HUNDRED AND SIXTY SIX POUNDS AND TWO**

PENCE (£3166.02). The monetary award includes an award in terms of section 38 of the Employment Act 2002.

(b) The claimant's claim of wrongful dismissal succeeds and the respondent is ordered to pay to the claimant the sum of **ONE THOUSAND AND THIRTY THREE POUNDS AND SEVENTY FOUR PENCE (£1033.74)**.

(c) The claimant's claim of discrimination arising from disability succeeds and the respondent is ordered to pay to the claimant the sum of **ONE THOUSAND FIVE HUNDRED POUNDS (£1500.00)** plus interest of **ONE HUNDRED AND THIRTY SIX POUNDS AND FORTY FOUR PENCE (£136.44)**.

REASONS

1. This case came before us for a final hearing to determine both liability and remedy. Mr Russell appeared for the claimant and Mr Glass for the respondent.

Preliminary matters

2. Within its grounds of resistance the respondent *"Admitted that the dismissal was procedurally unfair in as much that no final Disciplinary Meeting was called".* The claimant's position was that his dismissal was both procedurally and substantively unfair.

3. Within its grounds of resistance the respondent did not admit that the claimant suffered from the asserted disability of anxiety and depression. At a preliminary hearing held on 28 September 2022 (before Employment Judge Macleod) Mr Russell undertook to provide a Disability Impact Statement, and duly did so (206-207).

4. A further preliminary hearing took place on 9 December 2022 (before Employment Judge Kemp). In advance of this, Mr Glass intimated that the respondent accepted that the claimant was disabled at the relevant time, but maintained that the respondent did not know and could not reasonably have been expected to know that the claimant was disabled. The principal

outcome of the preliminary hearing on 9 December 2022 was a series of case management orders.

5. Unfortunately these case management orders appear inadvertently to relate to a different case. The orders refer to a preliminary hearing to be held on 22 February 2023 to address whether the claims made were within the jurisdiction of the Tribunal. They should have related to the arrangements for a final hearing in the present case.

6. This issue was identified and a final hearing was duly listed for dates in April 2023. This had to be postponed at short notice because Mr Glass was cited to appear as a witness elsewhere. The present hearing dates were then fixed. While the misadventure with the case management orders caused no immediate difficulty, it did arise in the course of our hearing, as described below.

List of issues

7. Within the joint bundle of documents we had a list of issues (210-211). Although described as a draft list, we understood it to be broadly agreed. The list identified four heads of claim, as follows –

   (i) Unfair dismissal.

   (ii) Wrongful dismissal.

   (iii) Discrimination arising from a disability contrary to section 15 of the Equality Act 2010 ("EqA").

   (iv) Breach of section 1 of the Employment Rights Act 1996 ("ERA").

Documents

8. We were provided with a joint bundle of documents, extending initially to 211 pages. We refer to this above and below by page number.

9. In the course of Mr Glass's cross examination of the claimant on the first day of the hearing, an issue arose concerning an additional document which Mr Glass wished to submit. This was a report prepared following a covert investigation instructed on behalf of the respondent in August 2022.

Mr Russell objected. The claimant withdrew and we heard submissions on this.

10. Mr Glass argued that the report was necessary to test the claimant's credibility, and this would not have been possible if the claimant had advance notice of it. It related to work done by the claimant after his dismissal, the earnings from which were not disclosed in his original schedule of loss.

11. Mr Russell submitted that there had been an order of the Tribunal relating to the exchange of documents, and this could not simply be ignored. Fair notice of the report should have been given. Mr Russell accepted responsibility for the absence of details of earnings in the claimant's original schedule of loss, explaining that he had been under pressure from Mr Glass to provide this. Mr Russell argued that allowing the report would not be consistent with the overriding objective in Rule 2 of the Employment Tribunal Rules of Procedure 2013 to deal with cases fairly and justly.

12. We adjourned and deliberated about this. When the hearing resumed, we said that using the report to *"ambush"* the claimant did not in our view sit comfortably with the overriding objective. However, the assertion by Mr Russell that Mr Glass had failed to comply with an order of the Tribunal was undermined by the unfortunate error in the case management orders issued following the preliminary hearing on 9 December 2022, as described in paragraph 5 above. We decided to allow the report to be added to the joint bundle (212-237) on the basis that it related to the credibility of the claimant's evidence.

13. We directed as follows –

(a) Mr Glass should provide copies of the report to Mr Russell and the Tribunal.

(b) Cross-examination of the claimant (and further examination in chief if considered necessary) relating to the report would be deferred until Mr Russell had an opportunity to review the report and obtain instructions.

(c) Mr Russell might wish to amend the claimant's schedule of loss to reflect any earnings not previously disclosed.

14. When the claimant's evidence otherwise concluded, it was sufficiently late in the day that it was not appropriate to commence the respondent's case. It was agreed that the claimant would be examined and cross-examined regarding the report at the start of the second day of the hearing. Matters proceeded on this basis.

Evidence

15. The parties were in agreement that the claimant should lead. We heard oral evidence from the claimant. For the respondent we heard oral evidence from Mr C McIntosh, Site Manager, and Mr H Al-Saffar, Managing Director. We had a joint bundle of documents as mentioned above.

Findings in fact

16. The respondent is a property development company operating in and around Dundee. At the time of the events described below, it was engaged in the development of Armistead House in Broughty Ferry ("Armistead") and a site in Macalpine Place, Dundee ("Macalpine"). Mr McIntosh was the Site Manager with day-to-day oversight of these developments and, as such, was the claimant's line manager. Mr Al-Saffar divided his time between the respondent's head office and construction sites. He would typically be on a site where the claimant was working twice a week.

17. The claimant was a Groundworker/Labourer. He was experienced in this type of work. He commenced employment with the respondent on 12 November 2018. His work involved aspects of construction such as drainage, driveways and patios. He would normally work as part of a team of two/three operatives, depending on the nature of the activity.

18. The respondent did not provide the claimant with a written statement of particulars of employment.

Claimant's disability

19. The claimant suffers from depression and anxiety. A report from his GP dated 27 October 2022 (56) confirmed that the claimant's depression was first noted in his records in 2002. This report stated that the claimant's anxiety was first mentioned in his GP records in August 2021. However, the records themselves indicated that anxiety had been discussed at a GP consultation on 8 June 2021 (65).

20. Within his Disability Impact Statement (206-207) the claimant described the effects of his disability in these terms –

"I find it hard to talk about my conditions with people. I get very nervous in social situations and start to feel physically unwell. I struggle to communicate with people."

"I am fearful of leaving the house. I find it very hard to concentrate and become confused easily. Some days I cannot face going out the door in case I see someone who might know how I am feeling"

"My anxiety and depression have impacted on my ability to go to work as I could not leave the house because my depression and anxiety were so bad."

Attendance record

21. Mr McIntosh's evidence was that for the first two years of the claimant's employment with the respondent, there were no issues with his attendance. The claimant then started to have *"quite a lot of days off".* He gave excuses such as his bus being delayed or problems with his bicycle, attending the dentist or hospital, or not feeling well. When he was absent the claimant was expected to telephone Mr McIntosh or the respondent's head office. The claimant did this only *"occasionally".* The respondent did not have a policy or procedure relating to absence but the claimant knew what he was expected to do.

22. The claimant's absences and lateness caused operational difficulties because (a) Mr McIntosh would not know if the claimant was going to turn up for work and (b) when he failed to do so, it would disrupt the work of the groundworks team. Mr McIntosh told us, and we accepted, that he had

spoken to the claimant *"numerous times"* about his absences. This was done on an informal basis when the claimant returned to work after being absent.

23. Mr Al-Saffar's evidence was that Mr McIntosh spoke to him on site about the claimant's attendance. He had been complaining about this *"for the past two years".* Mr Al-Saffar had himself spoken to the claimant about his attendance. The claimant gave excuses such as his bus being late, problems with his bicycle and his son/daughter not being well. Mr Al-Saffar said he had spoken to the claimant on site about his absences some 10/12 times.

24. The respondent produced a record of the claimant's absences (and wages) covering the period from week ending 9 April 2021 to week ending 27 May 2022 (53). Days of absence were indicated by "0" and days of lateness were indicated by the number of hours worked being less than 8 (7 on a Friday). The claimant did not dispute the accuracy of this. The record showed that, of the 57 working weeks within the period covered, there were only 17 where the claimant had not been absent or late on at least one occasion.

25. We regarded the evidence of Mr McIntosh as more reliable than that of Mr Al-Saffar in relation to when the claimant's absences became problematic. This was because (a) it was Mr McIntosh who had to deal with the immediate operational consequences of the claimant's lateness or absence and (b) Mr Al-Saffar's recollection of the claimant's excuses for absence was inaccurate (in respect that the claimant did not have a son or daughter).

Pay rises

26. Despite the issues with the claimant's absences and lateness, he was given two pay rises over the same period of time. The decision to give these was taken by Mr Al-Saffar. When asked about this, Mr Al-Saffar said that the respondent was "*trying to encourage the claimant to be obedient and to work".* Mr Al-Saffar said that at the time of the pay rises he had told the claimant that he needed to improve his attendance.

Meeting in March 2022

27. A meeting took place in the site office at Armistead at some point during March 2022. None of the witnesses could recall the exact date (although Mr McIntosh thought it was around the third week in March 2022). Those in attendance were Mr Al-Saffar, his son (and co-director) Mr E Al-Saffar, Mr McIntosh and the claimant. Prior to this meeting Mr McIntosh had spoken to Mr Al-Saffar about the claimant's absences, and the purpose of the meeting was to discuss these with a view to giving the claimant a verbal warning.

28. Mr McIntosh chaired this meeting. He asked the claimant about his absences, and whether he was taking any medication. The claimant answered in the negative. According to Mr McIntosh, whose evidence was supported by that of Mr Al-Saffar, the claimant offered no explanation, indicated there was nothing wrong with him and apologised for his absences. He did not mention his mental health.

29. The claimant gave a different account of this meeting. He said that he had referred to his anxiety and depression. He also said that he had told Mr McIntosh about his anxiety and depression on a number of occasions prior to this (which Mr McIntosh denied).

30. We preferred the evidence of Mr McIntosh and Mr Al-Saffar to that of the claimant on the question of whether the claimant mentioned his anxiety and depression during the March 2022 meeting. We also preferred the evidence of Mr McIntosh to that of the claimant on the question of whether the claimant had previously referred to his mental health. We found that he had not done so.

31. We came to that view because the evidence of Mr McIntosh and Mr Al-Saffar about the meeting in March 2022 was consistent and credible. The respondent had three disabled employees for whom they had, according to Mr McIntosh, "*plans in place".* That suggested that if the claimant had disclosed a health issue, this would have registered with the respondent because it might indicate a safety issue. We accepted the evidence of Mr McIntosh that, if the claimant had disclosed his mental health issues, the respondent would have discussed it and put an action plan in place. We

also noted what the claimant said in his Disability Impact Statement about finding it hard to talk about his mental health.

32. No record was kept by the respondent of the meeting, nor its outcome, but the claimant accepted in cross-examination that he had received a verbal warning and that this *"could have been"* at this meeting. We were satisfied that the outcome of the March 2022 meeting was that the claimant was given a verbal warning about his attendance.

33. We accepted the evidence of Mr McIntosh that, because he felt the claimant might not want to speak in front of the directors, he took the claimant aside a week after this meeting and asked him if there was anything he wanted to divulge. Again the claimant answered in the negative. We regarded this as indicating that Mr McIntosh suspected that there might be some underlying reason for the claimant's unsatisfactory attendance which he was not disclosing.

Meeting on 11 May 2022

34. Following the meeting in March 2022, the claimant's attendance record did not improve. The record of his absences (53) confirmed that he had absences in the weeks ending 18 March 2022, 25 March 2022 and 1 April 2022. He was then absent during the week ending 8 April 2022, late twice in the week ending 6 May 2022 and absent on 9 and 10 May 2022.

35. On 11 May 2022 the claimant was advised by Mr McIntosh that there was to be a meeting at Macalpine on that date. He was told by Mr McIntosh that it was to be a disciplinary meeting and that he could *"bring someone in"*. The timing of the meeting was determined by Mr Al-Saffar's arrival at Macalpine. We understood that Mr E Al-Saffar was also in attendance.

36. As before, Mr McIntosh chaired the meeting. He asked the claimant if there was any medical reason for his absences. The claimant was apologetic but gave no reason. He said it would not happen again. Mr McIntosh told the claimant that he would be getting a written warning.

37. In finding that the claimant gave no reason for his absences, we preferred the evidence of Mr McIntosh and Mr Al-Saffar to that of the claimant, who said that he had referred to his anxiety and depression. We did so because

the evidence of Mr McIntosh and Mr Al-Saffar was consistent and credible, and was supported by terms of the letter to which we refer in the next paragraph.

38. Following this meeting Mr Al-Saffar issued a letter to the claimant dated 11 May 2022 (54) in these terms –

*"**Final Written Warning – Unauthorised Absence from Site***

Following our meeting today, this communication is a final written warning due to your unacceptable absences from the company's McAlpine Road Development site.

Your failure to turn up on site has been a long standing feature of your employment to date for over 12 months now. There have been various disciplinary meetings with you, carried out at various times by myself, your line manager Craig McIntosh, company director Eamon Al-Saffar, at none of which you have given any acceptable reason for these absences. You were asked by Craig McIntosh at the last meeting whether there was any medical reason for these absences, which you replied in the negative.

It was in fact disturbing to hear that you indicated you were not concerned if your employment was terminated as 'I have plenty of homers' was your response.

There have been any number of verbal warnings given to little effect, this is now your final warning, any further unauthorised absence, without reasonable excuse, will result in your employment being terminated forthwith."

39. In relation to the terms of this letter, we noted as follows –

(a) The reference to *"various disciplinary meetings"* was inaccurate. There had been only one such meeting, in March 2022. The claimant's unsatisfactory attendance record had been discussed at meetings between Mr McIntosh and the claimant when he returned to work following each absence, but these discussions were informal. The claimant had also been spoken to by Mr Al-Saffar about his unsatisfactory attendance record, but again these discussions were

informal. We had no evidence of Mr Eamon Al-Saffar speaking to the claimant about his attendance record.

(b) The claimant told us that he did not recall making the comment about homers, but we were satisfied that he did so. It was improbable that this would have been stated in the letter had it not been said at the meeting earlier on the same date. It was known to the respondent that the claimant did homers.

(c) The reference to *"any number of verbal warnings"* was also inaccurate in the sense that the discussions were informal and no warnings had been issued. That said, the claimant could have been in no doubt from those discussions with Mr McIntosh and Mr Al-Saffar that his attendance record was unsatisfactory.

(d) The claimant was not told what level of improvement in his attendance record was required, nor how long the warning would remain live, nor was he offered a right of appeal.

(e) Mr McIntosh's evidence was that absence due to mental health would be a *"reasonable excuse".*

Further absence

40. On Monday 16 May 2022 the claimant came into work late. Mr Al-Saffar was on site at the time. Mr McIntosh and Mr Al-Saffar spoke to the claimant. They reminded him that he was already on a written warning and stressed the need for him to turn up on time. Mr Al-Saffar described them as being *"lenient"* towards the claimant, meaning that they could have dismissed him, given the final written warning.

41. The claimant was then absent from work on Tuesday 17 and Wednesday 18 May 2022. He referred to *"feeling so low"* and said that he "*struggled to get out of bed".* He accepted that he should have contacted the respondent but had not done so because of his mood. He told us that he lived alone and there was therefore no-one else who could have contacted the respondent.

Claimant is dismissed

42. The claimant consulted his GP on 18 May 2022. The entry in his GP records (62) was as follows -

"*Diagnosis* *Discussed with patient. Not been feeling himself. Low mood and not sleeping well due to night terrors. Not aware of these himself but two people close to him have told him. Other things too prefers F2F*

Administration *eMED3 (2010) new statement issued, not fit for work. Fit Note (Diagnosis: Low mood; Duration 18-May-2022 – 31-May-2022)"*

Accordingly, the claimant was medically certified as unfit for work from 18 May 2022.

43. Notwithstanding this, the claimant went to work at Macalpine on 19 May 2022. He entered the site office around 10.00. He said to Mr McIntosh "*I take it that's me finished then".* Mr McIntosh replied *"Yes".* The claimant did not produce his Fit Note nor did he say that he had been to his GP. During their conversation the claimant referred to having "*plenty of homers".*

44. When asked by the Tribunal why he had attended at work when medically certified as unfit to do so, the claimant initially said that he went in because he had not been dismissed, then indicated that he was unable to explain why he had done so. Under re-examination, the claimant said that he was not feeling well on 19 May 2022 but did not want to lose his job. He then accepted that he had used words to the effect of those described by Mr McIntosh.

45. Mr Al-Saffar told us that the decision to dismiss the claimant on 19 May 2022 was taken by Mr McIntosh "*with my authority".* He clarified that, after the final written warning, he had told Mr McIntosh that he would approve if Mr McIntosh decided to dismiss the claimant. We were satisfied that the decision to dismiss the claimant on 19 May 2022 was taken by Mr McIntosh.

46. The claimant was not invited to a final disciplinary hearing. He was not told in advance of their meeting on 19 May 2022 that Mr McIntosh was

contemplating his dismissal. His dismissal took immediate effect. No right of appeal was offered to the claimant.

47. On Mr McIntosh's instructions a letter dated 19 May 2022 (55) was sent by the respondent to the claimant, in these terms –

*"**Gross Misconduct – Re Absences & Lateness***

Over the last few months you have been issued with numerous warnings regarding your time-keeping and absences and also the fact that you have made no contact to either Craig McIntosh or to the office explaining your absences – this is deemed to be 'Gross Misconduct'.

You were spoken to twice by both the Managing Director Hassan Al-Saffar and the Site Manager Craig McIntosh recently to which it was stated that if it continued to happen, then we would have no alternative but to take further disciplinary action.

As you have been absent from work since Tuesday 17th May 2022, again with no contact being made by yourself regarding this, and the warning issued previously, then we can only assume that you no longer wish to work for the company and you can therefore consider your employment terminated with immediate effect."

48. The claimant's dismissal took effect on 19 May 2022. He was not paid in lieu of notice. In the week ending 27 May 2022 the respondent paid the claimant accrued holiday pay of £838.50 gross (£574.04 net).

Impact on claimant

49. The claimant described his mental health as *"erratic"* and *"up and down"* after his dismissal. He said that he felt *"not capable"* and that the dismissal *"pushed me down further".*

50. The claimant's medical records disclosed that he had consulted his GP surgery again on 23 May 2022. The GP's note of that consultation (62) made no reference to the claimant having lost his job. The note of a further telephone consultation on 27 June 2022 (62) also made no reference to that, and recorded that the claimant was *"Not much better. Poor sleep, anxiety, poor appetite, no thoughts DSH".*

51. The GP's note of a telephone consultation with the claimant on 5 September 2022 (60) referred to *"no specific current stressor but long history of previous trauma".* The note of a subsequent surgery consultation on 8 September 2022 (60) referred to *"financial stressors and not sure what to do with himself through the day"* and "*difficult to get to root of issues today".*

52. We did not believe that any of these extracts from the claimant's medical records demonstrated that his mental health had been materially impacted by his dismissal. The report from the claimant's GP (56) did not address the question of whether the claimant's mental health had been affected by his dismissal.

53. The claimant had remained certified as unfit for work since his dismissal. He described himself as *"unfit for work, with limited capability".* He had not been actively seeking employment but had continued to do homers. He understood that he could work up to 16 hours per week without affecting his entitlement to Universal Credit.

Homers

54. Prior to his dismissal the claimant did work for a Mr D Bruce, who he described as a family member. The nature of this was general property maintenance. The respondent was aware that the claimant did homers, and took no issue with this. Indeed, on one occasion Mr McIntosh had dropped the claimant off on a Friday evening to do homer work.

55. The claimant continued to do this type of work after his dismissal. He also disclosed in his updated schedule of loss (49-51) that he did some work between June and August 2022 for the owners of a bar in Ward Road, Dundee. He said that this did not exceed 16 hours per week and was paid £25-30 per shift. The claimant asserted in his schedule of loss that, after paying for his own fuel, he made very little, if anything, from this work.

56. The report referred to in paragraphs 9-12 above (212-237) indicated that the claimant had carried out work at an address in Harper Avenue, Dundee on 23 August 2022. The claimant said that he had been assisting a landscaping contractor, SCL Landscapes, at a property belonging to Mr Bruce. The conclusion section of the report (237) stated that the

claimant was "*in all probability"* employed by SCL Landscapes. We regarded that as no more than speculation. We noted that Mr Al-Saffar said in evidence that he had been *"too busy"* to read the investigation report.

Comments on evidence

57. It is not the function of the Employment Tribunal to record every piece of evidence presented to it, and we have not attempted to do so. We have sought to focus on those aspects of the evidence which we considered to have the closest bearing on the issues we had to decide.

58. The claimant made reasonable endeavours to give his evidence to the best of his recollection. However, there were lapses in that recollection. He sought to play down the frequency with which he was spoken to about his absences and lateness. His assertions that he had told Mr McIntosh and the respondent's directors about his anxiety and depression lacked any detail as to what was allegedly said.

59. Mr McIntosh was a reliable witness. He clearly had a good working relationship with the claimant and was complimentary about the claimant's standard of work. His evidence about speaking to the claimant on numerous occasions about his absences was credible. His account of the meetings in March 2022, 11 May 2022 and 19 May 2022 was straightforward and, in the case of the May 2022 meetings, supported by the letters issued following those meetings.

60. Mr Al-Saffar was a credible witness but prone to exaggeration. He overstated the period of time over which the claimant's attendance record had deteriorated. His references in the letter of 11 May 2022 to "*various disciplinary meetings"* carried out by himself, Mr McIntosh and Mr E Al-Saffar and to *"any number of verbal warnings"* given to the claimant were an embellishment of what actually happened. Prior to 11 May 2022 there was only one disciplinary meeting (in March 2022). Other meetings with the claimant about his absences were informal.

Submissions - claimant

61. Mr Russell referred to the respondent's size and administrative resources. It was a multi-million pound business, accustomed to instructing solicitors. It should be held to a high standard (in employment law matters).

62. Mr Russell noted the concession of procedural unfairness of the claimant's dismissal in the respondent's ET3 in that no final disciplinary hearing was held. He argued that the shortcomings in how the respondent had dealt with matters went well beyond this, in that –

- No contract of employment had been provided to the claimant.
- The respondent had no written policies and procedures, so that there was no indication of what level of absence might be acceptable.
- The claimant's final written warning was manifestly unfair as *"zero process"* had been followed.
- There was no investigation prior to the claimant's dismissal.
- There was no invitation to a final disciplinary hearing giving the claimant notice of the allegation against him and advising him of the potential consequences.
- The claimant had not been offered the right to be accompanied, or to state his case.
- No right of appeal was offered.

Mr Russell argued that the scope to deal with matters properly was reduced when the appropriate procedures were circumvented.

63. Mr Russell reminded us that the issue here related to the claimant's health. The respondent had accepted that he was disabled at the relevant time. However, there had been no referral to Occupational Health or the claimant's GP and no attempt to investigate his health issues. The respondent had completely failed the claimant.

64. Mr Russell criticised the respondent for dealing with the claimant's absences informally for over one year, then moving in the space of 8 days from a final written warning to dismissal. There had been some 30 days of

absence in the year preceding the warning, yet only 2 further days of absence resulted in the claimant's dismissal. If matters had been dealt with properly and there had been an investigation followed by a disciplinary hearing, it was more likely than not that the claimant would not have been dismissed.

65. Mr Russell argued that the respondent had failed to allow the correct opportunity for the relevant information to come out. If the respondent had dealt with the matter properly, it would have emerged that at the same time as the respondent perceived a problem with his attendance, the claimant had been consulting his GP about his mental health. Mr Russell highlighted that Mr McIntosh had said that a disability related absence would have been a *"reasonable excuse".* If a fair procedure had been followed, the claimant would not have been dismissed. That view was supported by the fact that the respondent had put plans in place for other disabled employees. It was an answer to any argument the respondent might advance under reference to ***Polkey v AE Dayton Services Ltd [1987] UKHL 8***.

66. Mr Russell asked us to find that the claimant was a credible witness. Any criticism of his inability to recall dates was unfair, given that the respondent's witnesses had similar difficulty. All the witnesses were victims of a situation where there were no records kept.

67. Mr Russell submitted that the claimant's complaint of discrimination arising from disability was clearly made out, but for the issue of whether the respondent knew or ought to have known of his disability. His GP records confirmed his mental health issues. He told Mr McIntosh that he had been to his GP. We should prefer the claimant's evidence about disclosure of his anxiety and depression. In his Disability Impact Statement, the claimant was referring to difficulty in speaking to strangers; that did not apply to the respondent's management.

68. Under reference to ***Pnaiser v NHS England and another UKEAT/0137/15*** and ***Sheikholeslami v University of Edinburgh UKEATS/0014/17***, Mr Russell submitted that the claimant had clearly been dismissed for a reason related to his disability, namely his absences.

69. On the question of whether the respondent had actual or constructive knowledge of the claimant's disability, Mr Russell referred to ***Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10*** and ***McCubbin v Perth and Kinross Council UKEATS/0025/13***. His primary position was that the respondent did know that the claimant was disabled. The claimant had disclosed his anxiety and depression. He had told Mr McIntosh that he had consulted his GP. The respondent's record (53) detailed the claimant's absences and indicated that there had been many informal meetings with him.

70. Mr Russell's secondary position was that the respondent ought to have known that the claimant was disabled. It was wrong that the respondent should run an argument based on lack of knowledge when they had failed to follow a fair procedure. If they had done what they should have done, they would have found out the reason for the claimant's absences.

71. Turning to remedy, Mr Russell invited us to disregard the covert investigation report. There was no evidence from the respondent's witnesses about it. The respondent knew that the claimant did homers and all the report did was disclose work done by the claimant for Mr Bruce (as mentioned in the claimant's updated schedule of loss).

72. In relation to injury to feelings, Mr Russell invited us to make an award in the middle/upper range of the lower band in ***Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871***.

73. On mitigation of loss, Mr Russell reminded us that the onus of showing that the claimant had failed to mitigate was on the respondent. Only one question about this had been put to the claimant during cross-examination. There had been no meaningful challenge on failure to mitigate.

74. When responding to Mr Glass's submissions, Mr Russell said that he was not departing from reliance on ***Devine v Designer Flowers Wholesale Florist Sundries Ltd 1993 WL 963706***. His position was that the claimant should be compensated for his loss of earnings post-dismissal notwithstanding that he had been medically certified as unfit for work.

Submissions – respondent

75. Mr Glass focussed on what he described as the principal issue in dispute – whether the respondent had actual or constructive knowledge that the claimant was disabled at the relevant time. He invited us to accept the clear evidence of Mr McIntosh and Mr Al-Saffar that the claimant had not told them about his anxiety and depression.

76. In relation to constructive knowledge, Mr Glass referred to ***Seccombe v Reed in Partnership Ltd 2021 WL 08263477***, ***Gallop v Newport City Council [2014] IRLR 211*** and ***A Ltd v Z [2020] ICR 199***. He also referred to paragraphs 5.14 and 5.15 of the Equality and Human Rights Commission: Code of Practice on Employment (2011) (the "Code").

77. Mr Glass referred to the three elements as set out in ***Gallop*** (per Tayler HHJ at paragraph 36) –

"….(i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii)….for that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in s.1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day activities."

78. Mr Glass addressed the evidence on disability. Mr McIntosh's concerns about the claimant's absences were escalating in the period covered by the respondent's record of absence (53). Over the same period, the claimant's GP records (62-70) disclosed limited entries relating to anxiety. If, as this indicated, the claimant was not raising his anxiety regularly with his GP, the evidence of the respondent's witnesses that he did not raise it with them became more coherent.

79. Mr Glass invited us to accept the evidence of Mr McIntosh and Mr Al-Saffar denying any disclosure to them by the claimant of his anxiety and depression. The evidence about the respondent's other disabled

employees demonstrated that where disability was raised, the respondent met the challenge of that.

80. Mr Glass referred to the terms of the final written warning letter of 11 May 2022 (54). This clearly recorded that the claimant had been asked if there was any medical reason for his absences and had said that there was not. At that time, there was no Tribunal claim in prospect. Why would the respondent put that in their letter if it was untrue?

81. Mr Glass described the claimant's Fit Note, issued when he consulted his GP on 18 May 2022, as the *"golden ticket".* His failure to hand over the Fit Note on 19 May 2022 was, Mr Glass submitted, consistent with the actions of someone who had sought to keep his mental health issues to himself. There had been nothing in the claimant's job performance or his demeanour or his interactions with management to suggest a problem. Mr Glass invited us to accept Mr McIntosh's evidence that the claimant had asserted repeatedly, when spoken to about his absences, that there was no problem.

82. Referring to ***Seccombe***, Mr Glass argued that there was nothing here to suggest constructive knowledge that the claimant was disabled, or that further investigation was needed. It was significant that the claimant had given repeated assurances that there was nothing wrong (in terms of an underlying medical reason for his absences). Mr Glass urged us to find that the respondent had discharged the burden of showing that it did not know, and could not reasonably have been expected to know, that the claimant was disabled at the relevant time.

83. Turning to the unfair dismissal claim, Mr Glass accepted that there would be a finding of unfair dismissal. The ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the "ACAS Code") had not been followed. He then made submissions about the effect of ***Polkey***.

84. Mr Glass submitted that the claimant had demonstrated a blasé attitude to his employment. At the meetings in March and May 2022 he did not appear concerned about losing his employment, referring to having "*plenty of homers".*

85. Mr Glass described the claimant's behaviour on 19 May 2022 as "*inexplicable".* He had been issued with a Fit Note but did not hand it over. This showed his attitude to absence, sharing information and engaging in any sort of process. There was, Mr Glass submitted, a high chance that this attitude would have continued if a compliant meeting had taken place. It was difficult to envisage the claimant's attitude changing if there had been better engagement by the respondent. The Tribunal should in these circumstances find that dismissal would have been inevitable or at least highly likely.

86. Mr Glass moved on to contributory fault. The claimant's level of absence was clearly poor. He had failed to contact the respondent regarding his absences, and had failed to engage despite Mr McIntosh's efforts to get him to do so. Mr Al-Saffar had also encouraged the claimant, including giving him two pay rises. Mr Glass urged us to make deductions from any compensation to reflect both ***Polkey*** and contributory fault.

87. Mr Glass noted that there was no updated medical report for the claimant. No Fit Notes had been produced. The claimant acknowledged that he was doing some work. There was no evidence about any attempts by the claimant to obtain fresh employment. Indeed, the claimant accepted that he had not done so.

88. Mr Glass sought to distinguish ***Devine***. In that case there was clear medical evidence that the absence was directly attributable to the dismissal. There was no such evidence in the present case. The claimant had been suffering from depression for some 20 years, so this could not be caused by his employment with the respondent. Mr Glass relied on ***Adey-Jones v O'Dowd 2008 WL 3819610***.

89. In relation to injury to feelings, Mr Glass submitted that there was little evidence about this. He invited us to consider (a) the claimant's blasé attitude and (b) what he had said to Mr McIntosh on 19 May 2022 – *"I take it that's me finished then".*

90. Mr Glass accepted that there was a lack of policies and procedures. However, he contended, the claimant must have known by May 2022 that

his employment was at risk. That was the purpose of the meeting on 11 May 2022, reflected in the letter of the same date.

91. Addressing the criticism that the respondent had made no referral to Occupational Health or to the claimant's GP, Mr Glass reminded us that there had been no overt indications that the claimant was suffering from any disability. When at work he was doing a good job. He was telling the respondent (when asked about his absences) that there was nothing wrong. There was no underlying theme in his various reasons for absence. There was nothing to sound warning bells.

92. Turning finally to the issue of an uplift under the ACAS Code, Mr Glass acknowledged the lack of formal procedure but argued that there had not been a complete absence of engagement with the claimant. It could not be said (as stated in his ET1) that the claimant's dismissal came "*out of the blue".* The respondent had done what it thought was fair. Dismissal was not a *"giant leap"* from the final written warning given to the claimant on 11 May 2022. The claimant could have been dismissed when, despite that warning, he turned up late for work on 16 May 2022.

Applicable law

93. The circumstances in which awards of compensation for unfair dismissal can be reduced with reference to the conduct of the employee are set out (a) in relation to the basic award in section 122(2) ERA and (b) in relation to the compensatory award in section 123(6) ERA. These provide as follows –

122 Basic award: reductions

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce that amount accordingly.

123 Compensatory award

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal

considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer….

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

94. Section 15 EqA deals with discrimination arising from disability, and provides as follows –

(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.

95. Section 38 of the Employment Act 2002 (**Failure to give statement of employment particulars etc**) provides, so far as relevant, as follows –

(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.

(2) ….

(3) If in the case of proceedings to which this section applies –

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996….

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3) –

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable….

96. The jurisdictions listed in Schedule 5 include unfair dismissal, work-related discrimination and wrongful dismissal.

Discussion

97. We approached our deliberations by working through the list of issues (referred to at paragraph 7 above). Some of those issues were superseded by the respondent's acceptance that (a) the claimant's dismissal was procedurally unfair and (b) the claimant was disabled at the relevant time.

Unfair dismissal

98. We were satisfied that the claimant had been dismissed for a reason relating to his conduct. This was clear from the terms of the dismissal letter (55) which referred to "*gross misconduct*". Conduct is a potentially fair reason for dismissal in terms of section 98(2)(b) ERA.

99. While the dismissal was conceded to have been procedurally unfair, we understood the claimant's position to be that it was also substantively unfair. We therefore looked at the three questions identified in ***British Home Stores Ltd v Burchell 1978 IRLR 379*** (which were included in the list of issues).

Did the respondent have a genuine belief in the claimant's misconduct?

100. We found that the respondent did have such a belief. As at 19 May 2022 (a) the claimant had an unsatisfactory record of absence and lateness, (b) the respondent had given him a verbal warning and a final written

warning about this and (c) after the final written warning, the claimant had further instances of absence and lateness.

Were there genuine grounds to hold that belief?

101. We found that there were such grounds. The claimant's record of absences and lateness was set out in the record of absences prepared by the respondent (53). The accuracy of this was not disputed by the claimant. There were, as stated above, further instances of absence and lateness after a final written warning had been given.

Did the respondent carry out a reasonable investigation?

102. It had been all too easy for Mr McIntosh to answer in the affirmative when the claimant said on 19 May 2022 *"I take it that's me finished then",* but that did not negate the need for an investigation before he was dismissed. That the claimant might have an acceptable reason for future absences was recognised in the final written warning letter (54) where the phrase "*without reasonable excuse"* was used. The existence or otherwise of an acceptable reason could only be ascertained if the matter was properly investigated. We found that no such investigation took place.

Was the decision to dismiss the claimant within the band of reasonable responses?

103. We believed that no reasonable employer would have dismissed the claimant on 19 May 2022 without making some enquiries to ascertain why he had been absent from work on 17 and 18 May 2022, and why he had arrived at work late on 19 May 2022. That was sufficient to take the claimant's dismissal outwith the band of reasonable responses open to the respondent. The dismissal was substantively unfair.

Was the dismissal of the claimant procedurally fair?

104. We did not have to answer this question as the point was conceded by the respondent. However, we considered that it was appropriate to look at the nature of the procedural unfairness and the consequences of that.

105. The respondent should have followed the ACAS Code. They should have –

- Established the facts relating to the claimant's absence/lateness.
- Informed the claimant of the problem, in writing.
- Held a meeting with the claimant to discuss the problem.
- Allowed the claimant to be accompanied at the meeting.
- Decided on appropriate action.
- Provided the claimant with an opportunity to appeal.

106. The respondent took none of these steps. We deal below with the question of whether the failure to comply with the ACAS Code was reasonable. We considered that if the respondent had followed the ACAS Code and held a meeting with the claimant before deciding to dismiss him it was, on the balance of probability, likely that the respondent would have become aware that –

(a) The claimant had consulted his GP on 18 May 2022 and had been issued with a Fit Note.

(b) The reason for his latest absence and his previous absences was related to his mental health.

(c) The claimant's mental health issue was anxiety and depression.

Wrongful dismissal

107. The issue here was whether, in dismissing the claimant, the respondent had acted in breach of his contract of employment. The claimant was dismissed without notice on 19 May 2022. The respondent would be entitled to dismiss him without notice only if the claimant had himself acted in breach of the contact, and his breach was sufficiently serious to justify his summary dismissal.

Was the claimant's dismissal for gross misconduct legitimate?

108. We reminded ourselves that the legal test here was different from unfair dismissal. In the case of unfair dismissal we had to determine the fairness or otherwise of what the respondent had done, and should not substitute our own view. In the case of wrongful dismissal, we had to come to our own

view as to whether the conduct of the claimant merited dismissal without notice.

109. The nature of that conduct was the claimant's absence from work on 17 and 18 May 2022 and his late arrival on 19 May 2022. Given that the claimant had consulted his GP on 18 May 2022 about his "*low mood"* and had been certified by his GP as unfit for work for two weeks for that reason, we did not believe that the conduct for which the claimant was dismissed could properly be classed as gross misconduct. His absence on 17 and 18 May 2022 related to his mental health, and was a matter of capability, not conduct. He was not medically fit to work on those dates.

110. It followed that (a) the claimant's absence on 17 and 18 May 2022 was not a breach of contract and (b) the respondent was not entitled to dismiss him without notice on 19 May 2022. That meant that the claimant's dismissal was wrongful, and the respondent was liable to the claimant for the loss and damage he suffered as a result of that dismissal.

111. We considered that the claimant's late arrival at Macalpine on 19 May 2022 was less significant, in terms of why he was dismissed, than his absence on the two preceding days. We did not get a satisfactory answer from the claimant as to why he had gone to Macalpine on 19 May 2022. He said that he had done so *"because I had not been dismissed".* Given that he had been certified as not fit for work the previous day, the only logical reason would have been to hand over his Fit Note, but he did not do that.

If not, was the claimant entitled to notice pay when he was dismissed?

112. We deal with this below.

Discrimination arising from disability

113. That the claimant was disabled at the relevant time (being the time of his treatment by the respondent said to be discriminatory) was accepted by the respondent. The key area of dispute here was knowledge of that disability.

If the claimant is a disabled person, did the respondent know that he was disabled at all material times?

114. We found that the respondent did not know that the claimant was disabled at any time during the course of his employment. Our reasons for so finding are those set out in paragraphs 31 and 37 above.

If not, could the respondent be reasonably expected to have known of the claimant's disability at all material times?

115. We reminded ourselves of what Tayler HHJ said in ***Seccombe*** (at paragraph 41) –

*"The correct approach to adopt to actual or constructive knowledge was analysed by HHJ Eady in **A Ltd v Z [2020] ICR 199**:*

23. In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:

*(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment: see **York City Council v Grosset [2018] ICR 1492, para 39.***

*(2) The respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect: see **Donelien v Liberata UK Ltd (unreported) 16 December 2014, para 5,** per Langstaff J (President), and also see **Pnaiser v NHS England [2016] IRLR 170, para 60,** per Simler J.*

*(3) The question of reasonableness is one of fact and evaluation: see **Donelien v Liberata UK Ltd [2018] IRLR 535, para 27**; none the less, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.*

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability-related symptoms can be of importance: (i) because, in asking whether the

*employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition for Equality Act purposes (see **Herry v Dudley Metropolitan Borough Council [2017] ICR 610,** per Judge David Richardson, citing **J v DLA Piper UK LLP [2010] ICR 1052**), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it has not [already] done so, per Langstaff J in **Donelien 16 December 2014, para 31**.*

(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the code, which (relevantly) provides as follows:

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person".

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

*(6) It is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so: **Ridout v TC Group [1998] IRLR 628, Secretary of State for Work and Pensions v Alam [2020] ICR 665**.*

(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the employee, as recognised by the code."

116. We found that the respondent had created a significant barrier to making out the section 15(2) defence – that they could not reasonably be expected to have known of the claimant's disability – by their failure to comply with

the ACAS Code when dismissing the claimant. In particular, they should have held a meeting with the claimant before deciding to dismiss him. We have set out at paragraph 106 above what we considered the respondent would, on the balance of probability, have known had they held such a meeting.

117. Applying that to the respondent's section 15(2) defence, we found as follows –

(a) The respondent would have become aware that the claimant suffered from anxiety and depression.

(b) They would have become aware that this was the underlying reason for his absences, and would have in all likelihood have gained an understanding of how his anxiety and depression affected the claimant and how long it had done so.

(c) They would have become aware that the reasons for absence previously given by the claimant were not the real and underlying reason.

(d) They would have discovered that he consulted his GP on 18 May 2022 and was issued with a Fit Note for a reason related to his anxiety and depression.

118. Reminding ourselves that the burden of proof in section 15(2) EqA was on the respondent, and adopting the language of paragraph 5.15 of the Code, we found that the respondent had not done all that it could reasonably be expected to do to find out if the claimant had a disability. Holding a meeting with the claimant before deciding to dismiss him was a step which it was reasonable to expect the respondent to take. The failure to take that step meant that the respondent did not succeed in its section 15(2) defence.

Did the respondent treat the claimant unfavourably? The claimant alleges that his dismissal was unfavourable treatment.

119. We agreed with the claimant. It seemed to us sufficiently obvious that dismissal amounted to unfavourable treatment that no further explanation of that finding was required.

If so, did the respondent treat the claimant unfavourably because of something arising in consequence of his disability?

120. The reason for the claimant's dismissal on 19 May 2022 was his absence on 17 and 18 May 2022. The reason for his absence was his low mood. We understood his low mood to be linked to his diagnosis of anxiety and depression. We were accordingly satisfied that the claimant's absence was something arising in consequence of his disability.

If so, can the respondent show that that treatment was a proportionate means of achieving a legitimate aim?

121. We regarded it as self-evident that achieving an acceptable level of employee attendance was a legitimate aim of the respondent. We also regarded it as self-evident that dismissing an employee who, despite warnings, failed to maintain an acceptable level of attendance was potentially a proportionate means of achieving that aim. However, we believed that for such a dismissal to be proportionate, the employer would need to have followed a fair procedure.

122. In the present case, no such procedure had been followed. The consequence was that the respondent had not shown that the claimant's dismissal on 19 May 2022 was a proportionate means of achieving the legitimate aim of achieving a satisfactory level of attendance. The claim of discrimination arising from disability succeeded.

Remedy

Unfair dismissal

123. We calculated the claimant's gross and net pay by reference to the information within the respondent's record of the claimant's absences (53). The claimant's pay varied from week to week according to the number of hours he worked, so that sections 222 and 223 ERA were engaged. This required a calculation based on the claimant's last 12 weeks of employment. By reference to section 222(4)(b) ERA, the calculation began with the last complete week the claimant had worked, being week ending 13 May 2022. The resulting figures for gross and net weekly pay were £332.07 and £287.15 respectively.

124. The claimant was entitled to a basic award. We calculated this by multiplying the claimant's gross weekly pay of £332.07 by 4.5, based on the claimant's length of service (3 years) and age at date of dismissal (47, indicating a multiplier of 1.5). This produced a figure of £1494.32.

125. We then considered whether there should be a compensatory award. We reminded ourselves of the terms of section 123(1) ERA. We recalled the evidence of Mr McIntosh to the effect that absence due to mental health would have been a reasonable excuse. We proceeded on the basis of what we decided would, on the balance of probability, have occurred if the respondent had followed a fair procedure.

126. If that had happened, the respondent would have become aware of the claimant's mental health issues and the fact that he had been issued with a Fit Note for two weeks. The claimant would not have been dismissed on 19 May 2022. The respondent would have conducted an investigation, and might have sought advice. That might well have taken another two weeks or thereby.

127. The claimant had continued to be medically certified as unfit for work. We did not believe the respondent would have kept his job open for an extended period. It seemed to us more likely than not that the respondent would have dismissed the claimant on the basis of lack of capability, and would have done so after a period of no more than three months following the conclusion of their investigation.

128. We noted that the respondent had used contractors to cover the work the claimant did, following his dismissal. It seemed to us unlikely that they would have continued to incur that cost while retaining the claimant as an employee for an extended period. We also thought it likely that the respondent would have taken some steps to ascertain how long the claimant would be incapacitated and what the prospects were of his maintaining a satisfactory attendance record, and that those prospects would have been low. Looking at matters in the round, we believed it was reasonable to estimate that this process would have taken around three months.

129. On this basis, we decided to calculate the compensatory award over a period of 17 weeks from 19 May 2022. We discounted the first 3 weeks as the claimant was entitled to pay in lieu of notice. For the remaining 14 weeks, we calculated that the claimant would have received Statutory Sick Pay at the then applicable rate of £99.35 per week, making a total of £1390.90.

130. We noted that the amount sought by the claimant for the loss of his statutory employment protection rights was £500. We saw no reason to depart from this figure.

131. We noted that the claimant had participated in a pension scheme while employed by the respondent. The employer contribution rate was stated in the claimant's schedule of loss to be 3%. The claimant was entitled to be compensated for the loss of employer contributions for the period over which the compensatory award was calculated. The calculation was £332.07 (weekly gross pay) times 3% (employer contribution rate) times 17 (the number of weeks over which the compensatory award was assessed). This produced a pension loss figure of £169.36.

132. We took no account of the claimant's earnings following his dismissal because (a) we accepted his evidence that he was already doing work for Mr Bruce while employed by the respondent and (b) we did not have enough information to assess how much the claimant had earned doing work for the owners of the bar in Ward Road, Dundee. Accordingly, the amount of the compensatory award, subject to the deductions referred to below, was £2060.26.

133. We next considered whether there had been conduct on the part of the claimant by reference to which it would be just and equitable to reduce the basic award and the compensatory award. We found that the claimant's failure to contact the respondent when he was absent on 17 and 18 May 2022 was such conduct.

134. We reminded ourselves that the statutory language differs as between section 122(1) ERA (basic award) and section 123(6) ERA (compensatory award). Notwithstanding that, we decided that it was just and equitable to

apply the same percentage reduction to both the basic award and the compensatory award. We assessed that reduction at 20%.

135. We came to the view that 20% was the appropriate level of reduction because it was the fact of the claimant's absence which led to his dismissal rather than his failure to contact the respondent. However, if the claimant had contacted the respondent there would have been an opportunity for the respondent to ascertain the reason for the absence and to make arrangements to cover the claimant's work while he remained absent. It was therefore a contributing factor.

136. We considered whether there should be a reduction in the compensatory award by reference to ***Polkey***, and decided that there should not. This is because the basis upon which we have calculated the compensatory award already takes account of the likelihood of a fair dismissal at some point, had the actual dismissal not occurred when it did. It would not therefore be just and equitable to apply a ***Polkey*** reduction in this case.

137. We next considered whether there had been an unreasonable failure by the respondent to follow the ACAS Code and, if so, whether there should be an uplift in the compensatory award in terms of section 124A ERA. In this case, it was accepted by the respondent that they had taken none of the steps provided for in the ACAS Code. No excuse for non-compliance was offered.

138. We found, in the absence of any excuse, that the failure to comply with the ACAS Code was unreasonable. This meant that, in terms of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, we could, if we considered it just and equitable to do so, increase the compensatory award (and any award of damages for breach of contract) by up to 25%.

139. While there had been a complete failure by the respondent to follow the ACAS Code when dismissing the claimant, we believed that some credit should be given for the fact that the respondent had acted reasonably in giving the claimant a verbal warning in March 2022 and a final written warning on 11 May 2022, albeit without taking steps which would have

complied with the ACAS Code. In all the circumstances, we decided that the appropriate level of uplift was 20%.

140. The claimant was not provided with a statement of initial employment particulars by the respondent. As his unfair dismissal claim succeeded, section 38(3) of the Employment Act 2002 was engaged. This meant that we had to award the claimant the lower amount of two weeks' pay and could, if we considered it just and equitable to do so, award the higher amount of four weeks' pay.

141. As there had been no compliance with the statutory obligation to provide an initial statement of employment particulars, and no excuse or explanation provided, we considered that it was just and equitable to award the higher amount. This was £332.07 (weekly gross pay) multiplied by 4, which totals £1328.28. We were satisfied that there were no exceptional circumstances which made this unjust or inequitable.

142. The basic award of £1494.32 required to be reduced by 20% by reason of the claimant's conduct. The net amount of the basic award was £1195.46.

143. The prescribed element of the compensatory award was £1390.90. This required to be increased by 20% by reason of the respondent's failure to follow the ACAS Code. This produced an amount of £1669.08. This figure then required to be reduced by 20% by reason of the claimant's conduct. This resulted in a prescribed element of £1335.26.

144. The non-prescribed element of the compensatory award was £669.36. This required to be increased by 20% by reason of the respondent's failure to follow the ACAS Code. This produced a figure of £803.23. This figure then required to be reduced by 20% by reason of the claimant's conduct. This resulted in a non-prescribed element of £642.58. To this we required to add the award under section 38 of the Employment Act 2002, giving a total of £1970.86.

145. The total amount of the award in respect of unfair dismissal was therefore £1195.46 (basic award) plus £1335.26 (prescribed element of compensatory award) plus £1970.86 (non-prescribed element of

compensatory award) giving a total of £4501.28. The excess of the total award over the prescribed element was £3166.02.

146. For the sake of completeness, we should add that we did not accept Mr Russell's argument, based on ***Devine***, that the claimant should be compensated for his loss of earnings post-dismissal notwithstanding that he had been medically certified as unfit for work. We agreed with Mr Glass that there was no evidence here that the claimant's absence was directly attributable to his dismissal. We noted that the claimant had already been medically certified as unfit for work, by reason of low mood, prior to his dismissal.

Wrongful dismissal

147. Having found that the respondent's dismissal of the claimant on 19 May 2022 was a breach of contract, we required to assess what loss or damage the claimant had suffered in consequence of that breach. If the respondent had given the claimant the notice to which he was entitled (three weeks by reference to his length of service) he would have received three weeks' net pay. That amounted to £861.45. We decided that the claimant should be paid this amount to reflect his loss by not having received the notice of termination of employment to which he was entitled.

148. Having decided that the appropriate level of uplift for unreasonable failure by the respondent to comply with the ACAS Code was 20%, it was appropriate to apply the same level of uplift to this award. That produced a figure of £1033.74.

Discrimination arising from disability

149. We reminded ourselves of the relevant provisions of EqA dealing with remedies and compensation –

119 Remedies

(1) This section applies if the county court or the sheriff finds that there has been a contravention of a provision referred to in section 114(1).

(2) ….

(3) The sheriff has power to make any order which could be made by the Court of Session –

(a) in proceedings for reparation ….

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis) ….

120 Jurisdiction

(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to –

(a) a contravention of Part 5 (work); ….

124 Remedies: general

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may –

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

(3) ….

(4) ….

(5) ….

(6) The amount of compensation which may be awarded under subsection 2(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119 ….

150. The claimant was seeking an award in respect of injury to feelings in the middle/upper range of the lower band in ***Vento***. We took account of the Presidential Guidance: Vento Bands (2017) and the Fifth Addendum to that Guidance (which applies to claims presented on or after 6 April 2022). The range of the lower band at the relevant time was £990 to £9900.

151. We reminded ourselves of what the Court of Appeal said in ***Vento*** (at paragraphs 50-51) –

"50. It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively by evidence, reason and precedent. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise….

51. Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury."

152. The Court of Appeal went on (at paragraph 53) to quote with approval what the EAT said in ***HM Prison Service v Johnson [1997] ICR 275*** (per Smith J at 283B) -

"(i) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings on indignation at the tortfeasor's conduct should not be allowed to inflate the award. (ii) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham MR, be seen as the way to "untaxed riches". (iii) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think that this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards. (iv) In exercising that discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings. (v) Finally,

tribunals should bear in mind Sir Thomas Bingham's reference for the need for public respect for the level of awards made."

153. We reflected on the evidence available to us –

- The claimant's depression was long-standing, having first been noted in his GP records in 2002. His anxiety was first noted in June 2021.
- The claimant's evidence was that his dismissal had *"pushed me down further"* (see paragraph 49 above) but (a) he had consulted his GP and been diagnosed with *"low mood"* prior to his dismissal, (b) the record of his next GP consultation on 23 May 2022 (62) made no reference to the claimant having lost his job and (c) he made no reference to the effect on him of his dismissal in his Disability Impact Statement.
- The letter from the claimant's GP dated 27 October 2022 (56) confirmed the diagnosis and described the treatment the claimant was receiving, but did not address the issue of whether the claimant's mental health had been adversely affected by his dismissal. It may be, of course, that the GP was not asked to comment on this.

154. The claimant had suffered discrimination and was entitled to be compensated for the injury to his feelings. However, the evidence before us as to the extent of that injury was thin. In these circumstances, we believed that an award near the bottom of the lower Vento band was appropriate.

155. We decided that an award of £1500 for injury to feelings would be made. This reflected our view that the discriminatory treatment had no more than a minor impact on the claimant. If the impact had been more than minor, we would have expected this to have featured in the claimant's GP records and to have been mentioned in his Disability Impact Statement.

156. The claimant was, in terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, entitled to interest on this award (at the judicial rate of 8%) from the date of the act of

discrimination (ie his dismissal on 19 May 2022) until the day of calculation, being the date upon which we anticipated our Judgment would be sent to the parties.

157. The attention of parties is drawn to the attached schedule in terms of the Employment Protection (Recoupment of Benefits) Regulations 1996.

Employment Judge : WA Meiklejohn
Date of Judgment : 08 August 2023
Date sent to parties : 15 August 2023