EMPLOYMENT TRIBUNALS

Claimant: Mr N Duke

Respondent: B & M Ltd

HELD AT: Liverpool (by CVP) **ON:** 19-22 December 2022
3-6 April 2023

BEFORE: Employment Judge Ainscough
Mr Q Colborn
Mr D Lancaster

REPRESENTATION:

Claimant: Mr L Bronze (Counsel)
Respondent: Mr S Brochwicz-Lewinski (Counsel)

JUDGMENT having been sent to the parties on 12 April 2023 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

Introduction

1. The claimant brought claims for indirect disability discrimination, failure to make reasonable adjustments, unfair dismissal, wrongful dismissal and victimisation.

2. The claimant has a physical impairment which restricts his lung capacity. The respondent accepted that the claimant was a disabled person for the purposes of the Equality Act 2010.

3. There was a preliminary hearing before Employment Judge Grundy at which she determined it would be just and equitable to extend time to allow the claimant's claims to proceed. Employment Judge Grundy did not determine whether any provision, criterion or practice was applied by the respondent – that issue was left to be determined at the final hearing. A claim of discrimination arising from disability was dismissed prior to the start of the final hearing.

4. Employment Judge Grundy made a deposit order in regard to the indirect discrimination and failure to make reasonable adjustments claims. The claimant paid the deposit and the claims have proceeded.

Issues

5. The issues in the case were as follows:

Jurisdiction

1. Does the Tribunal have jurisdiction to hear all of the claimant's complaints? In particular are any of the claims out of time? The respondent submits that the entirety of the complaints in claim form 2407320 / 21 (Claim 1) are out of time.

2. In respect of the discrimination complaints in Claim 1, were they part of conduct extending over a period and therefore within time and/or would it be just and equitable to extend time?

Claim 1

Indirect disability discrimination contrary to s.19 Equality Act 2010

3. Did the respondent apply a provision, criterion or practice (PCP)? The claimant asserts that the PCP is the requirement that all employees continue to attend work during a pandemic (save for annual leave or sick leave). The respondent asserts that it did not apply this PCP.

4. Did the respondent apply the PCP to both disabled and non-disabled employees?

5. Did the PCP put disabled employees at a particular disadvantage compared to non-disabled employees?

6. Did the PCP put the claimant at that particular disadvantage?

7. If so, can the respondent justify the PCP by showing it to be a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments contrary to s.20 Equality Act 2010

8. Did the respondent apply a PCP? The claimant relies on two PCPs:-

   a. The first is the PCP set out in point 3 above (RA Claim 1);

   b. The second is the requirement that the claimant work at his 'base store' in Blackburn (RA Claim 2). The respondent denies applying either of these PCPs.

9. Did the PCPs put the claimant at a substantial disadvantage compared to non-disabled employees?

10. Has there been a failure on the part of the respondent to make an adjustment which a) would have been reasonable to make and b) would have eliminated or reduced the disadvantage to the claimant? The claimant says that the respondent should have made the following adjustments:-

    a. In relation to RA Claim 1, the claimant submits that a RA would have been to allow him to remain on furlough;

    b. In relation to RA Claim 2, the claimant submits that a RA would have been to allow him to remain at the Chorley store.

    The respondent maintains that it would not have been reasonable to make either of these adjustments.

Claim 2

Unfair dismissal

11. What was the reason for the claimant's dismissal? Was it capable of constituting a fair reason under ERA 1996?

12. Was the claimant's dismissal unfair? The claimant asserts his dismissal was unfair for the following reasons:

    a. The stated reason was not the real reason, and the real reason was an unlawful reason (please see victimisation claim below).

    b. The claimant had not been given training on the in-store covid measures and risks.

    c. The respondent imposed a penalty which was outside the band of reasonable responses.

    d. While there may have been lapses in concentration in terms of social distancing in the store, it could not reasonably be concluded that the claimant wilfully or deliberately failed to ensure the store was covid secure or that he had deliberately failed to follow his own risk assessment.

    e. It was unreasonable to allege that the claimant had mislead Public Health England in regards to whom he had been in 'close contact' with when the concern was more of an issue about semantics.

    f. The claimant's disabilities and the affects they have on him were not taken into consideration by the respondent when the decision was made to dismiss.

13. Insofar as the claimant's dismissal may be adjudged unfair what prospects were there that he would have been dismissed in any event, and what, if any, corresponding reduction ought be made to any compensation awarded? ("Polkey" Issue).

14. Did the claimant contribute to his own dismissal such that there ought be a reduction in any basic or compensatory award made to him?

15. Ought any compensation awarded to the claimant be reduced on just and equitable grounds?

Wrongful dismissal

16. Did the claimant act in repudiatory breach of contract such that his summary dismissal was justified in the circumstances?

17. If not, to what notice was the claimant contractually entitled?

Victimisation contrary to s.27 Equality Act 2010

18. Was the claimant dismissed in consequence of bringing Employment Tribunal proceedings against the Respondent under claim number 2401408/2019 (heard on 14-18 September 2020) and claim number 2407320/2021 (which was not yet heard at the time of dismissal)?

The Relevant Facts

Claimant's disability

6. The claimant has Sarcoidosis, Inducible Laryngeal Obstruction and lumbar disc degeneration. As a result, during the pandemic the claimant was deemed Clinically Extremely Vulnerable.

Claimant's employment

7. The claimant was employed as a Store Manager. The claimant's initial posting was to a large store (known as a Band 4 store). At the claimant's request he transferred to a smaller store and received a reduction in salary. The claimant did not suggest that his salary should have been protected. The claimant's terms and conditions provided that if off sick, the claimant would be entitled to statutory sick pay.

8. The respondent maintained a job description for a Store Manager which contained numerous tasks within the role. The claimant gave evidence that he was able to complete those tasks with reasonable adjustments.

9. The respondent also operated a disciplinary procedure and a grievance procedure. The disciplinary procedure contained a number of rules. In regard to health and safety, the claimant was obliged not to endanger himself or others and if he did so it could lead to dismissal. Gross misconduct was defined in several ways. If there was a serious or a wilful breach or disregard for the rules this would amount to gross misconduct. Any flagrant disregard of the safety procedures could also amount to gross misconduct. If an employee was dismissed for gross misconduct the procedure provided for an appeal process.

10. The respondent operated an appraisal system. Prior to the pandemic, the claimant had achieved the second highest category in the performance of his role as

a Store Manager. The Tribunal has therefore concluded that prior to the pandemic, the claimant was performing at a more than satisfactory level, with no warnings, and he was able to complete the tasks that were attributable to his role as a Store Manager.

Outbreak of COVID

11. Prior to the pandemic, the claimant was the manager of the Blackburn store. At the start of the pandemic, the respondent closed all stores for a period of three weeks. The Government then determined that the respondent's stores were essential, and the stores were allowed to reopen. By this stage, the claimant had received notification from Public Health England that he was deemed clinically extremely vulnerable as a result of his disability. The claimant therefore shielded at home between March 2020 and 3 August 2020 and was paid furlough by the respondent.

12. The respondent produced documentation to make sure that each store was COVID compliant. There were checklists and signage displayed around the store to remind managers and staff what they needed to do to keep safe. The most recent version was September 2020.

13. On 21 July 2020 the claimant's GP produced a fit note for three months in which the GP stated that the claimant should either stay at home on furlough or to work at a low tier store were there were low rates of COVID in the area.

Claimant's return to work from furlough in supernumerary role

14. On 24 July 2020 the claimant, his manager Colin Rockliffe and Jess Perkin from the respondent's human resources department, met on a video call during which they discussed the claimant's return to work. The claimant had been informed by the Government that the shielding advice was ending on 1 August 2020.

15. During the call the claimant was told that the respondent expected the claimant to return to work because he was no longer required to shield. The claimant was told that the respondent would be following Government guidelines.

16. There then followed a discussion about reasonable adjustments that the claimant might need to return to work. It was agreed that the claimant would need to an assessment in his role. It was also agreed that the claimant would work, super numerary, in the Preston store, which at that time, was in a low tier area.

17. The claimant and Colin Rockliffe spoke on 3 August 2020. From the note of the conversation, the Tribunal notes that the claimant did not tell Colin Rockliffe that he had any inability to concentrate in the workplace that would affect his return to work. The claimant asked about an individual risk assessment and there was an agreement that the claimant would remain in Preston until the rates in Blackburn had dropped, and that the COVID controls and processes were in place to make sure that the store was safe.

18. The return from shielding risk assessment was completed on 6 August 2020. It was signed on 7 August 2020 by the claimant and Colin Rockliffe. It confirmed that the claimant was in a safe working environment.

19. However, by 8 August 2020 the claimant spoke to Colin Rockliffe and reported back problems that had started on 5 August 2020 as a result of the manual work the claimant was performing. The claimant was advised to mix up his activities to avoid strain on his back.

20. During the same call the claimant asked to move to the Chorley store by way of a reasonable adjustment. The claimant was concerned about the increase in infection rates in Preston. The Tribunal heard evidence that the Store Manager from Chorley was on secondment at another location and that it suited everybody for the claimant to move to Chorley. In September 2020 the claimant reluctantly consented to a referral to Occupational Health.

21. The claimant was initially resistant to the referral to Occupational Health due to previous difficulties he had experienced. The Tribunal determines that the claimant's email of 28 September 2020 set out the difficulties he experienced in the workplace.

Respondent's desire to return claimant to Store Manager role

22. On 29 September 2020 the claimant met with Colin Rockcliffe. The claimant was told that the respondent wanted the claimant to return as the Store Manager in Blackburn or in the alternative in Southport where there was a Store Manager vacancy, by 5 October 2020. The claimant told the respondent that he felt like he was being victimised and he should not be at work.

23. On 30 September 2020 the claimant rejected the Blackburn and Southport offers and asked that the respondent to conduct a specific COVID risk assessment. The respondent was resistant to the claimant remaining in Chorley as by this time, he was super numerary.

24. In October the respondent sought advice from both the claimant's GP and Occupational Health.

25. On 4 November 2020 the claimant received a letter from Public Health England advising that, because the claimant was deemed clinically extremely vulnerable, he should work from home if he could, or he should not attend work. The letter confirmed that it was advice only and not a legal requirement.

26. The letter also suggested that the claimant might be eligible for furlough. However, this was not the Tribunal's understanding of the furlough scheme. The Coronavirus Job Retention Scheme was created to save jobs which might otherwise have been lost through redundancy because businesses were not operating during the pandemic.

27. Under the heading "Work" the letter made reference to the use of Statutory Sick Pay, Employment Support Allowance or Universal Credit for those not attending work.

28. The claimant gave evidence that his understanding from the meeting he had in July with Jess Perkin and Colin Rockliffe was that the respondent would be following Government guidelines. The claimant's interpretation of this statement was that he would be entitled to shield at home whilst in receipt of furlough following receipt of the letter on 4 November 2020.

Medical Advice

29. On 5 November 2020 the Occupational Health report made reference to reading previous Occupational Health correspondence in order to complete the report. It is not clear to the Tribunal whether the author of that report had actually read the previous Occupational Health correspondence. The Tribunal could not see that there was any reference to the Occupational Health correspondence within the report.

30. It was the conclusion of Occupational Health that the claimant was fit to work with reasonable adjustments, which included working in a store in a low tier area within a 40 minute drive (in light of the claimant's back condition). Occupational Health also advised that the claimant should adhere to social distancing. In the absence of any reference to the previous Occupational Health correspondence, the Tribunal determines that the Occupational Health opinion was not formed with reference to the previous correspondence.

31. On 21 October 2020 the claimant submitted a fit note for a period of three months up until 13 January 2021. In the fit note the GP repeated the advice that the claimant should be at home on furlough or that he should be working at a store in a low tier area.

32. On 10 November 2020 the respondent sought the claimant's consent to ask further questions of Occupational Health. On 11 November 2020, the claimant responded by submitting the first version of his first grievance. In that document the claimant set out his concerns about the Occupational Health referral, he made reference to feeling harassed and a hidden agenda and repeated his request to shield on furlough.

Claimant's first grievance

33. By 14 November 2020 the claimant had submitted a more detailed version of his grievance. In that version, the claimant specifically requested to be absent from work on furlough as a reasonable adjustment. It is clear from the content of this document that the claimant had knowledge that the respondent was no longer subscribing to the furlough scheme. The Tribunal heard evidence that the respondent had decided to repay all furlough monies and opt out of the scheme because the respondent was making a profit during the pandemic.

34. On 18 November 2020 the claimant met with Victoria Jackson to discuss his grievance. By 7 December 2020 the claimant had been informed that his grievance was unsubstantiated and that he could not remain at the Chorley store. The claimant was offered the role of a Store Manager in a store in a tier one or tier two area, his previous role at Blackburn as a Store Manager on either full-time or on reduced hours, or one of the vacancies identified as part of that outcome to the

grievance. The claimant was also informed that he had the option to be absent from work on either annual leave or Statutory Sick Pay.

35. On 13 December 2020 the claimant appealed the outcome of the grievance. The claimant asked that he remain at work in Chorley or that he was provided with a role at a store in a low tier area within a 40 minute drive.

36. On 15 December 2020 the GP said he was not qualified to comment on what was good for the claimant at work. The GP reiterated that the claimant should be working from home if possible.

Removal of claimant from special leave

37. Victoria Jackson told the claimant that he should not return to the Chorley store and was granted special leave. Victoria Jackson told the claimant that there was no store within a tier one area within a 40 minute drive of his home. The claimant declined to go to Blackburn, whether full-time or part-time, because of the infection rates. There then followed a discussion about the claimant performing the Deputy Store Manager role in Hyndburn because it was nearer to the claimant's home and was within an area with a lower rate of infection. This conversation was recorded in the subsequent letter from Victoria Jackson and the Tribunal accepts that this role was put to the claimant.

38. The claimant gave evidence that his main concern about the Hyndburn role was that the infection rate was high in that area. Victoria Jackson's letter recorded that the claimant rejected the Hyndburn role because of the proposed reduction to his salary.

39. The Tribunal determines that the proposed reduction in salary was a factor for the claimant. It was an issue for the claimant in the same way that the claimant did not want to be absent from work on Statutory Sick Pay. Whilst the Tribunal has not seen any evidence about the infection rates in Hyndburn at that time, it accepts that this was also a concern for the claimant.

Return to Blackburn

40. On 16 December 2020 the claimant agreed to return to Blackburn in his role as Store Manager. The claimant informed the respondent that he was able to manage his health better at Blackburn and that as a Store Manager, he would have less contact with customers than he would as a Deputy Store Manager.

41. Colin Rockliffe carried out a risk assessment on 6 January 2021. The risk assessment included confirmation that the claimant was able to socially distance and use his own implements (such as pens, cups, etc). The claimant did not raise any issues with the risk assessment and subsequently signed it.

42. On 5 January 2021 the claimant received another shielding letter from Public Health England which advised him to shield from 5 January to 21 February 2021. This was continuation of the advice that had been provided in November 2020.

43. On 12 January 2021 the claimant attended the grievance appeal meeting. The claimant did not raise any difficulties about social distancing.

44. On 22 January 2021 the claimant was informed that his grievance appeal was unsuccessful. The claimant submitted the second grievance on 23 January 2021. The claimant asked for medical suspension from work.

45. On 29 January 2021 Colin Rockliffe conducted a welfare meeting with the claimant. The claimant did not raise any difficulties with the ability to socially distance during this meeting.

46. On 31 January 2021 the claimant sent a detailed email in which he complained that the respondent had failed to carry out a suitable risk assessment for him and that he did not consider his workplace to be safe.

47. Victoria Jackson heard the claimant's second grievance on 4 February 2021. On 9 February 2021 the claimant received his first vaccination. The claimant was concerned about how effective the vaccination would be.

48. On 29 January 2021 Colin Rockcliffe held a welfare meeting with the claimant. Colin Rockcliffe set out his understanding of the discussions in that meeting in a letter dated 10 February 2021.

49. Colin Rockcliffe recorded that the claimant had described his difficulties in the workplace and the adjustments that he needed. There was no record that the claimant described any difficulty with social distancing.

50. On 17 February 2021 the respondent determined that the claimant's second grievance was unsubstantiated. The claimant submitted an appeal on 18 February 2021. The claimant attended the grievance appeal meeting on 10 March 2021.

51. Public Health England advised the claimant to shield from 16 February 2021 to 31 March 2021.

Claimant's positive COVID test

52. On 22 March 2021, prior to a hospital appointment, the claimant took a COVID test which was positive. The claimant reported the positive test to Colin Rockliffe. The claimant reported that he had had close contact with all staff, including two staff that may well have gone to work in other stores. Colin Rockliffe asked the claimant whether he has been within two metres of any staff for more than 15 minutes within 24 hours of the test; the claimant confirmed that he had been in such contact.

53. The claimant also reported his positive test result to Test and Trace. The transcript of the conversation between the claimant and Test and Trace records that the claimant reported that he has been in close contact with 30+ staff.

54. On 23 March 2021 the claimant was informed that his second grievance appeal had been unsuccessful. On the same day the claimant spoke with Test and Trace. The transcript records that the Test and Trace agent recalled that the

claimant had previously reported close contact with 40+ staff. The claimant did not correct this assertion.

55. On 25 March 2021 Test and Trace contacted Colin Rockliffe and repeated that the claimant had informed the service that he had been in close contact with 40+ staff. As a result, on 26 March 2021 Colin Rockliffe informed the respondent that the claimant had tested positive and had informed Test and Trace that he had been in close contact with 40+ staff.

Disciplinary procedure and dismissal

56. The claimant was subsequently invited to an investigation meeting which took place on 30 March 2021. The respondent was concerned that the claimant had failed to adhere to the guidance on social distancing which led to his infection. The respondent had obtained CCTV of an office meeting during which there was a failure by the claimant and his staff to adhere to social distancing.

57. The investigation manager, Mr Swetnman asked the claimant to explain his understanding of close contact. The claimant said he understood it to mean within six metres because of droplets that may spread through the air.

58. Following the meeting, the claimant was suspended from work. The Local Authority also visited the Blackburn store to ensure it was COVID compliant.

59. The claimant was invited to a disciplinary hearing because the respondent asserted that the claimant has failed to ensure that the store was COVID secure and had put his own safety and that of his colleagues at risk by not adhering to social disatancing. The respondent also asserted that the claimant had failed to follow his own risk assessment and misled Test and Trace.

60. The claimant attended a disciplinary hearing on 9 April 2021. During the hearing the claimant explained that his disabilities caused him to have a lack of concentration. The claimant submitted that it was his lack of concentration which meant he was unable to adhere to social distancing.

61. On 12 April 2021 the claimant was told that he had been dismissed. On 16 April 2021 the claimant received a letter from the respondent which set out the four reasons for his dismissal as:

(1) A lack of social distancing in the store;

(2) A failure by the claimant to adhere to his own individual risk assessment;

(3) Misleading of Public Health England; and

(4) As a result of all that, there being a direct link to the closure of the store.

Appeal procedure

62. The claimant submitted an appeal in which he complained that there were a number of documents missing and further that there had been a failure to interview all the witnesses.

63. The first appeal meeting took place on 26 May 2021. The chair, Audrey Lawson, adjourned that meeting so that further documentation could be obtained. On 28 May 2021 the claimant's trade union representative sent an email setting out the claimant's full concerns.

64. The second appeal hearing took place on 9 June 2021. Audrey Lawson allowed the claimant to discuss what he considered to be wrong with the disciplinary process. During that meeting the claimant told Audrey Lawson that his disability led to a lack of concentration which he attributed to his failure to follow social distancing.

65. On 10 June 2021, the claimant sent Audrey Lawson an email confirming that he had told the respondent about his lack of concentration.

66. The final appeal hearing took place on 29 June 2021. Audrey Lawson subsequently asked the claimant to set out when he had mentioned to the respondent that he was unable to socially distance because of a lack of concentration. Audrey Lawson also interviewed, Colin Rockliffe on two occasions, Mr Wilkinson, Ms Beecham and Mr Swetnam following queries that had been raised by the claimant.

67. On 1 September 2021 the claimant was asked to consent to a further Occupational Health referral so Audrey Lawson could understand the impact of a lack of concentration on the claimant's ability to social distance.

68. On 6 September 2021 the claimant declined to consent to the referral on the basis that he no longer worked for the respondent. The claimant contended that there were various reports on this issue of which the respondent was aware. The claimant did not think the referral was appropriate nor needed for Audrey Lawson to reach a conclusion.

69. On 8 October 2021 the claimant was informed that Audrey Lawson had dismissed his appeal.

The Relevant Law

70. Discrimination against an employee is prohibited by section 39(2) Equality Act 2010:

> **"An employer (A) must not discriminate against an employee of A's (B) –**
>
> **(a) as to B's terms of employment;**
>
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment."**

<u>Indirect discrimination</u>

71. Section 19 of the Equality Act 2010 sets out the following:

"**(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if —

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Reasonable adjustments

72. Section 20 of the Equality Act 2010 sets out the following duty:

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) ….

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Victimisation

73. Section 27 of the Equality Act 2010 provides that:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because —**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act —**
>
> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act;**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act."**

Code of Practice on Employment 2011

74. The Code of Practice on Employment issued by the Equality and Human Rights Commission in 2011 provides a detailed explanation of the legislation. The Tribunal must take into account any part of the Code that is relevant to the issues in this case.

75. In particular the Tribunal has considered:

(a) paragraphs 4.30 - 4.32 to decide whether the respondent's actions were proportionate to achieving a legitimate aim;

(b) paragraphs 6.23 – 6.29 to decide whether the adjustments suggested are reasonable; and

Burden of Proof

76. The burden of proof provision appears in section 136 and provides as follows:

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

77. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867** where Mummery LJ held that "could conclude", in the context of the burden of proof provisions, meant that a reasonable Tribunal could properly conclude from all the evidence before it, including the evidence adduced by the complainant in support of

the allegations, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment.

78. Importantly, at paragraph 56, Mummery LJ held that the bare facts of a difference in status and a difference in treatment are not without more sufficient to amount to a prima facie case of unlawful discrimination. However, whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

Time Limits

79. Finally, the time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 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 …**
>
> **(2) …**
>
> **(3) For the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it".**

80. In considering whether conduct extended over a period we had regard to the decision of the Court of Appeal in **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96**.

Unfair Dismissal

81. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

82. The primary provision is section 98 which, so far as relevant, provides as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal; and**

> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this sub-section if it … relates to the capability…. of the employee for performing work of the kind which he was employed by the employer to do,**
>
> **(3) (a) capability in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

83. If the employer fails to show a potentially fair reason for dismissal, dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

84. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in **British Home Stores v Burchell [1980] ICR 303**, but which was subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? If the answer to each of those questions is "yes", the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band falls short of encompassing termination of employment.

85. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

86. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

Submissions

Claimant's submissions

87. The claimant submitted that the respondent had not justified the requirement that employees attend work during a pandemic. The claimant contended that the respondent made a policy decision that was to the claimant's detriment when it opted out of the furlough scheme.

88. The claimant maintained that the respondent's reasonable adjustments did not go far enough, and it was wrong of the respondent to seek to treat all employees equally when those with particular disabilities needed further adjustments.

89. The claimant submitted that the respondent failed to properly consider the medical evidence. The claimant maintained that had the respondent done this it would have connected his lack of concentration with an inability to socially distance. The claimant also submitted that the respondent placed too much reliance on what the claimant didn't say to the test and trace service.

90. The claimant maintained that he was only subject to a disciplinary investigation because he had raised issues about reasonable adjustments.

Respondent's submissions

91. The respondent submitted that the claimant had not satisfied the burden of proof about the application of a provision, criterion or practice. The respondent also questioned whether the adjustments suggested by the claimant were in fact reasonable and necessary to avoid the substantial disadvantage.

92. The respondent maintained that it was not legally obliged to sign up to the furlough scheme and this couldn't possibly be a reasonable adjustment.

93. The respondent submitted that the decision to dismiss the claimant was reasonable. The respondent contended that it was entitled to reject the claimant's proposition that there was inadequate training. The respondent was concerned that the claimant had changed the narrative of his claim throughout the proceedings.

Discussion and Conclusions

Indirect discrimination claim

94. The Tribunal has considered this claim over two time periods – July 2020 to December 2020 and December 2020 until the claimant's dismissal in April 2021.

(i) July 2020 – December 2020

PCP

95. The claimant asserted that the respondent applied a PCP of a requirement that all employees continue to attend work during a pandemic (save for annual leave or sick leave).

96. The Tribunal notes from the record of the video conference that took place between the claimant, Mr Rockliffe and Ms Perkin on 24 July 2020, that there was a

request on at least two separate occasions from Ms Perkin for the claimant to attend work.

97. There was a discussion about Public Health England ending the shielding advice on 1 August 2020. The claimant was informed that there would be a requirement for him to attend work, and the purpose of that meeting was to discuss the reasonable adjustments in order for him to do so.

98. The claimant was not required to shield from 1 August 2020 until 4 November 2020. The claimant had a fit note from 21 July 2020 to 21 October 2020 in which he was advised to either stay at home or work in a low tier store. Ms Perkin and Mr Rockliffe did discuss the possibility of the claimant working at low tier stores in accordance with that GP advice.

99. There was no specific mention in that meeting of the claimant either being off on annual leave or in receipt of statutory sick pay. By 3 August 2020 the claimant was working in the Preston store on full pay as a supernumerary Store Manager. By 8 August 2020 the claimant was working in Chorley on full pay as a supernumerary Store Manager where he remained until 15 December 2020.

100. As a result, the Tribunal determines that the respondent did apply the provision, criterion or practice of requiring employees to continue to attend work during the pandemic.

Group disadvantage

101. The PCP would have disadvantaged disabled managers who had a lung condition in the same way that the claimant did. That group would have had an anxiety that they were at high risk of a severe illness based on the GP and Public Health England advice.

Claimant disadvantage

102. However, having made those findings we are of the conclusion that the claimant was not put at that particular disadvantage because he was able to work, in accordance with the GP advice, at a low tier store. We have therefore not gone on to consider justification for this period.

(ii) December 2020 – April 2021

PCP

103. The claimant had a fit note from his GP from 21 October 2020 to 13 January 2021 in which the same advice was given – work from home or a low tier store. On 5 November 2020 the Occupational Health department provided advice and on 15 December 2020 the GP advised the claimant to work from home.

104. From the letter prepared by Victoria Jackson following the meeting with the claimant in December 2020, the Tribunal determines that the respondent had a requirement for employees to attend work during the pandemic during this period of time. At this stage there was reference to annual leave and sick leave.

Group disadvantage

105. The Tribunal also determines that this PCP would put disabled managers with a lung condition at a disadvantage when compared to non-disabled managers because they would have had anxiety about being at work and the high risk of a severe illness.

Claimant disadvantage

106. From 16 December 2020 the claimant returned to Blackburn, and he too would have been put at this particular disadvantage. The claimant took the view that he could better control his condition at Blackburn, but he was still concerned about being at work in a mid-high tier area.

Respondent's Justification

107. The respondent had a legitimate aim of staffing concerns during the pandemic. This was an essential store. It was a store that the respondent admits was doing well out of the pandemic, it was making money, and the Tribunal took note of the fact that there was a recruitment need within the retail sector. There was a real staffing need in retail because of the pressure that was being put on this sector during the pandemic.

108. The Tribunal asked itself whether that staffing need and the need to incentivise people to come back to work (which the respondent says was also part of its legitimate aim) was proportionate. The Tribunal determines that it was proportionate for the respondent to maintain its position to pay statutory sick pay to those who chose to shield. The respondent wanted to incentivise people back to work.

109. The Tribunal was aware from the evidence provided by Victoria Jackson that the respondent had thought about keeping shielding employees on full pay but did not think that this was a reasonable adjustment because it would have a detrimental impact on the business.

110. We note that the respondent has tens of thousands of employees and that the terms and conditions are at the lower end of what is offered by an employer in the retail sector. It is likely that the workforce would have had diverse disability needs. There would have been a greater burden on the respondent had it offered full pay or furlough to those who were clinically extremely vulnerable.

111. Whilst there would have been a financial cost to the respondent, there would also have been a staffing issue because it is likely it would have lost a high number of staff and would not necessarily have been able to backfill those roles with any ease or without any difficulty during the pandemic. For those reasons the indirect discrimination claim fails.

Reasonable Adjustments Claim

(i) August 2020 – December 2020

PCP 1

112. The first provision, criterion or practice that all employees were required to work during the pandemic applied during this time period.

Substantial disadvantage

113. As a result, the claimant suffered a substantial disadvantage because he was anxious about working in Blackburn and being exposed to Covid due to the high rates in Blackburn.

Reasonable adjustment

114. The respondent allowed the claimant to move to Chorley in a supernumerary role. The Tribunal determines that this was a reasonable adjustment up until and including 15 December 2020.

(ii) December 2020 – April 2021

PCP 1

115. The first PCP also applied during this period.

Substantial disadvantage.

116. The claimant suffered the same substantial disadvantage in that he had anxiety because he was at higher risk of severe illness compared to non-disabled people.

Reasonable adjustment

117. The claimant contended that a reasonable adjustment would be allowing him to stay at home on furlough. However, by this stage the respondent was no longer subscribing to the furlough scheme and the Tribunal does not conclude that it was reasonable to ask the respondent to re-join the furlough scheme in order to facilitate the claimant or any others who were clinical extremely vulnerable to stay off work. The respondent had taken a decision to pay back the furlough, it was doing well out of the pandemic, and it would have had quite severe reputational damages if the respondent had re-joined the furlough scheme.

118. The contract of employment provided that the respondent would pay statutory sick pay, if an employee was off sick. The respondent extended the payment of statutory sick pay to those who wanted to shield during the pandemic. The Tribunal determines that this was a reasonable adjustment. Those who wanted to shield were not sick, but the respondent allowed them to stay off work without consequence during the pandemic.

PCP 2

119. The second PCP of requiring the claimant to return to his base store, Blackburn, could only apply from December 2020 when the claimant met with Victoria Jackson on 15 December 2020.

120. This requirement was a provision, criterion or practice. There was a requirement to return to base store. In the claimant's case this was Blackburn. However, the requirement to work at the base store would have applied to all staff.

121. The claimant was paid in accordance with working at the Blackburn store and there was a vacant manager role that the respondent needed to fill.

Substantial disadvantage

122. The Tribunal determines that the claimant would have been at the same substantial disadvantage because he would have had anxiety that he was at high risk of severe illness going back to Blackburn which had high rates of Covid.

Reasonable adjustments

123. The letter produced by Victoria Jackson on 16 December 2020 reveals that the claimant was offered various options for a return to work. This included a return to Blackburn on reduced hours which would have resulted in a reduction in pay.

124. The claimant was also offered the opportunity to work in stores in a tier one area. However, this was not a realistic option for the claimant because he was not able to relocate. The option to work in stores in the tier two and tier three areas or at Head office were also unrealistic as the claimant would have to drive for more than 40 minutes.

125. The claimant was offered the chance to work in the Hyndburn store as the Deputy Store Manager which would lead to a reduction in pay. This store was within driving distance, but there was a dispute over the height of the Covid rates in this area.

126. The claimant also had the option to work in a temporary administrative role in Chorley, but this was only for 15 hours and would have resulted in a reduction in pay for the claimant.

127. The claimant said he wanted to stay in Chorley, albeit he was supernumerary by this stage. This would have led to an additional financial burden for the respondent. The Tribunal heard evidence that it was not possible to move the Chorley manager during the pandemic.

128. The Tribunal also heard evidence that Chorley was a Band 3 store. The claimant had chosen to work in a Band 1 store (which was Blackburn), because of his disability. The Tribunal determines that a move to a Band 3 store would have had a detrimental impact on the claimant for different reasons, because of his disability. The respondent also provided evidence that Chorley was a harder store to manage in the pandemic. It had two exits and two entrances and there was an increased footfall in a bigger store.

129. The Tribunal determines the move to Chorley at that stage was not a reasonable step to take to avoid the substantial disadvantage to the claimant. It was reasonable for the respondent to allow the claimant to shield at home in receipt of

statutory sick pay. This was a reasonable adjustment to negate the substantial disadvantage of the claimant's anxiety about being at work.

130. The Tribunal notes that the claimant sent an email on 16 December 2020 in which he stated that he actually felt better going back to Blackburn than Chorley or Preston because he was able to manage his health better. The claimant also took this view because he would be in a Store Manager role where he would have less contact with customers.

131. The Tribunal concluded that the respondent made the appropriate reasonable adjustments and for that reason the reasonable adjustments claim fails.

Unfair Dismissal Claim

Test and Trace conversation

132. The Tribunal notes from the email trail between the claimant and Mr Rockliffe that the claimant said he was in close contact with staff during briefings and he was not able to remember who they were. During the same email exchange, it was Mr Rockliffe that defined close contacts as being within two metres for more than 15 minutes. During the claimant's conversation with Test and Trace on 23 March 2021 it was actually the agent who said the claimant had been in contact with 40+ colleagues but the claimant did not correct him. On 25 March 2021 a Test and Trace agent made the same statement to Mr Rockliffe.

Respondent's investigation

133. During the investigation meeting on 30 March 2021, Mr Swetnam did not have the Test and Trace transcripts. The claimant was asked to attend the investigation meeting on his return to work.

134. During the disciplinary hearing the claimant was asked about a failure to comply with social distancing in the store. The claimant was asked about individual risk assessments and his conversations with Public Health England.

135. The notes of the investigation meeting reveal that all of these issues were put to the claimant during the investigation meeting. The claimant confirms his understanding that social distancing meant two metres apart. The Tribunal determines that social distancing at that point in the pandemic was to keep two metres apart. Close contact was used by Test and Trace in positive cases to determine those with who the infected person had been within two metres for more than 15 minutes.

136. The claimant was asked about what he said to Test and Trace. The claimant asserts that he said roughly 30, and that if Test and Trace had said anything other than that they were incorrect.

137. The respondent did at that stage have a statement from Mr Rockliffe but it was not given to the claimant. The Tribunal finds that there is nothing untoward about that. This was an investigatory meeting to discuss the matter with the

claimant. The claimant was shown the individual risk assessment and the CCTV footage.

138. During the investigation meeting the claimant said that he suffered from a lack of concentration and that was why he had difficulty in remembering to follow the social distancing guidelines. The respondent was therefore aware at the outset of the investigation that that was the claimant's position on social distancing.

139. The investigating officer did adjourn the meeting for approximately 30 minutes before the claimant was suspended. The Tribunal determines that there that there was a pause for thought by the respondent before any decision was taken about suspension of the claimant.

140. The Tribunal also notes that following the investigation meeting, Mr Snook was asked to investigate the health and safety procedures at the Blackburn store. Mr Snook held an incident meeting on 31 March 2021 and interviewed two staff members.

141. For those reasons, and with regard to the ACAS Code on Disciplinary and Grievance Procedures, the Tribunal determines that there was a reasonable investigation by the respondent.

Disciplinary

142. The respondent was only able to obtain the Test and Trace transcripts after the claimant, as the data subject, had made a subject access request. The claimant did not submit the subject access request until 20 April 2021, and therefore, the transcripts were not available to the respondent during the investigation or the disciplinary hearing.

143. On 6 March 2021 the respondent sent the claimant an invite to the disciplinary hearing and included a copy of the Occupational Health report from November 2020, the claimant's disability impact statement and the GP report from December 2020.

144. The claimant attended the disciplinary hearing on 9 April 2021 during which he expressed his upset that Mr Rockliffe had not been interviewed after the investigation meeting. However, the Tribunal determines that Mr Rockliffe was not a witness as to whether the claimant was adhering to social distancing. The only matters Mr Rockcliffe could give evidence about was his contact with the claimant on the day that the claimant reported the positive test and Mr Rockcliffe's own contact with the Test and Trace. During the disciplinary hearing the claimant confirmed that he understood that social distancing was two metres. The claimant explained that he had not been able to adhere to it because of his lack of concentration.

145. The Tribunal determines that when the claimant was seeking adjustments of being at home on furlough or medical suspension, he did not tell the respondent that he had difficulty with concentration and would therefore have difficulty adhering to social distancing. Instead, the claimant set out lots of details about his condition and the importance of staying at home. The Tribunal understands the claimant's concerns given the advice he had received from Public Health England and from his

GP. However, none of those difficulties were with a lack of concentration or the ability to adhere to social distancing.

146. The claimant gave evidence that he often used lists to remind him of the things he needed to do in his role. The Tribunal determines, from the evidence it has seen in the bundle, that the respondent had lots of posters and signs reminding everybody as they walked around the stores and behind the scenes, that they had to adhere to social distancing.

147. The claimant said his individual risk assessment was not fit for purpose in that it did not adequately deal with his condition. The Tribunal determines that the respondent did have welfare meetings to discuss reasonable adjustments and risk assessments with the claimant, particularly in July 2020, August 2020, September 2020, December 2020 and January 2021.

148. The respondent also had the Occupational Health report from November 2020, fit notes and the GP report from December 2020. However, none of this information dealt with the claimant's lack of concentration or his inability to socially distance. Whilst an employer has a duty to make sure an employee is safe in the workplace, there is also a duty on an employee to raise issues that may make his working environment unsafe. If the claimant had difficulties with lack of concentration and in particular social distancing the Tribunal determines that the claimant should have raised the matter at any one of those meetings with the respondent, but he did not.

149. The Tribunal determines from the content of the dismissal letter of 16 April 2021, that when the respondent took the decision to dismiss the claimant, Mr Wilkinson has considered the medical documentation. Due to the fact that there was no mention of the claimant's lack of concentration or the claimant's difficulty adhering social distancing and the fact that the Occupational Health report in November 2020 did say the claimant should be socially distancing, Mr Wilkinson had a genuine belief that the claimant had endangered the health and safety of his colleagues and had serious and wilful disregard for health and safety rules which amounted to gross misconduct. The Tribunal determines that it was reasonable for Mr Wilkinson to discount the claimant's explanation of a lack of concentration.

150. Mr Wilkinson did not have access to the Test and Trace transcript. However, he did know that Test and Trace had called Mr Rockliffe and told him that the claimant had said 40+ colleagues. Mr Wilkinson also knew that when, the claimant was pushed to calculate how many colleagues he had interacted with, he was quite evasive in his response to Mr Rockliffe.

151. Therefore, notwithstanding the store closure allegation, which was dealt with separately in the appeal process, the Tribunal determines that it was within the range of reasonable responses to dismiss the claimant. The Store Manager is responsible for his own safety and the safety of the staff and the customers. The claimant was clinically extremely vulnerable, and he had to take particular care as to how he was interacting with colleagues and customers. The claimant had the authority to enforce social distancing, and he would have known of the impact of what he was saying to Trace and Trace.

152. The Tribunal notes that the claimant's colleagues who were also involved in the failure to adhere to social distancing received written warnings. The Tribunal accepts the respondent's explanation that this disparity is due to the difference in seniority between the claimant's role and those in his team.

Appeal

153. The claimant appealed his dismissal on 20 April 2021 on the grounds that there had been a failure by the respondent to take any account of his disability. The claimant complained about victimisation as a result of a previous Employment Tribunal and the fact that he had instigated these proceedings. The claimant complained about procedural defects and in particular was concerned about the withholding of documentation. On the same date the claimant requested the Test and Trace transcripts.

154. On 28 May 2021 the claimant's trade union representative sent a long email in support of the claimant's appeal. This email was forwarded to the appeals manager, Audrey Lawson.

155. The claimant was given the opportunity to provide details of his lack of concentration. On 2 July 2021 Audrey Lawson asked the claimant to provide documentary evidence which dealt with his lack of concentration and specifically, with his inability to adhere to social distancing. In response the claimant made reference to the medical evidence that was obtained in 2019 and his disability impact statement. This evidence predated the pandemic. Audrey Lawson wanted evidence that had been created as a result of the pandemic.

156. Audrey Lawson interviewed Mr Swetnam, Ms Beecham, Mr Snook, Mr Rockliffe and Mr Wilkinson. Following those interviews, the claimant was asked to attend for a further assessment by Occupational Health, and he declined to do so. The claimant's reasons for declining to do so differed to those he gave to the Tribunal in oral evidence.

157. The Tribunal did not understand the claimant's reasons for not allowing a further Occupational Health assessment to be obtained about the lack of concentration. The Tribunal determines that it was reasonable for the respondent to ask for this given that it was so important to the claimant's position on why he should not have been dismissed.

158. Audrey Lawson was clear that she had effectively conducted a re-hearing of the disciplinary process because of the extent of the grounds of appeal.

159. Audrey Lawson did not accept that a lack of concentration stopped the claimant from socially distancing. Audrey Lawson took the view that had it been so important it would have been mentioned in previous reports. Audrey Lawson did not have the Test and Trace transcript in which the claimant said 30+ colleagues. However, she did have the report that Mr Rockliffe has been told it was 40+ and she did have the transcript by this stage in which it was put to the claimant that he said 40+.

160. Therefore, the Tribunal has concluded that it was within the range of reasonable responses for Audrey Lawson to uphold the claimant's dismissal.

Victimisation

161. It was agreed between the parties that the protected acts were the first Employment Tribunal claim in 2020 and these proceedings. It was not disputed that both would amount to protected acts.

162. The burden of proof is whether the claimant has proven facts from which the Tribunal could conclude, in the absence of any explanation from the respondent, that the respondent has subjected the claimant to detriments because of the protected acts.

163. The Tribunal determines that the claimant has not proven facts that the reason for his dismissal was the protected acts. During live evidence, Mr Wilkinson and Ms Lawson were clear that they had no knowledge of the previous Employment Tribunal, nor any knowledge of this Tribunal prior to making the decision to dismiss and uphold the dismissal.

164. The claims for unfair dismissal and victimisation are unsuccessful.

Evidence from witnesses

165. The Tribunal has concluded that all of the respondent witnesses were credible. We find that, at times the claimant gave inconsistent evidence and was evasive. The Tribunal had knowledge of the claimant’s disability but was unable to observe that his lack of concentration was any worse in the morning or at the end of the day. The claimant was given sufficient breaks during his evidence and given extra time during cross examination to put all of the points he wanted to make.

Employment Judge Ainscough
Date: 15 August 2023

REASONS SENT TO THE PARTIES ON
25 August 2023.

FOR THE TRIBUNAL OFFICE