Case No: 1601518/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr. Lee Cotgreave

Respondent: Food Standards Agency

Heard at: Wrexham Magistrates' Court **On:** 16 – 18 August 2023

Before: Employment Judge S Evans
Fiona Crane
Anthony Greenland

Representation
Claimant: In person supported by son, Adam Cotgreave
Respondent: Mr. Alex Jones, Counsel

REASONS

JUDGMENT having been sent to the parties and written reasons having been requested by the Respondent, on 24 August 2023, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

Introduction

1. The Claimant's date of birth is 30 June 1970 . He was employed by the Respondent as a Meat Hygiene Inspector from 15th December 1997. He resigned from his employment on 14th July 2023.

2. The Claimant referred his matter to ACAS Early Conciliation on 14th October 2022 and ACAS certificate R243298/22/84 was issued on 25th November 2022. The Claimant's ET1 was issued on 27th November 2022, bringing claims of disability discrimination.

3. The Respondent filed an ET3 dated 24th February 2023, contesting the claims made by the Claimant.

4. A case management hearing was held on 24th March 2023 during which a provisional list of issues was discussed.

Procedure, documents and evidence heard

5. The final merits hearing was listed to be heard in person at Wrexham on 16 – 18 August 2023. Although there was a late application by the Respondent to postpone, made on 14 August 2023, on the first day of the hearing , the Claimant confirmed that his claim related only to events up to and including the dismissal of his appeal on 17th October 2022. As a consequence of this confirmation, the evidence of Mr Handley was withdrawn by the Claimant and the evidence of Mr. Spears was withdrawn by the Respondent. It was agreed by the parties that the listed hearing offered sufficient time and the Tribunal confirmed, after deliberation, that it would deal with both liability and remedy. This information was shared with the parties at the outset of the hearing.

6. A bundle of 445 pages was before the Tribunal, The parties were directed to refer specifically to any pages to which the Tribunal should have regard in reaching its decision. The Tribunal also had the benefit of a chronology, a list of issues and a list of key documents. The Tribunal also had witness statements from the Claimant and Mrs Cotgreave for the Claimant and from Mr. Huw Turner and Mr Geraint Jones for the Respondent.

7. Oral evidence was taken from all the witnesses and oral submissions were made by the Claimant and counsel for the Respondent at the conclusion of the hearing. Both parties also provided written submissions and the Respondent's included reference to relevant law.

8. There was little conflict of evidence between the parties but where such conflict arose, the Tribunal found the facts below proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and the submissions made on behalf of the respective parties.

9. References to page numbers below are to the page numbers in the bundle.

The Issues

10. The list of issues began with the issue of disability. Mr Jones, Counsel for the Respondent confirmed at the outset of the hearing that the issue of disability was conceded. Both parties confirmed that the remaining issues set out in the Record of Preliminary Hearing of 24 March 2023 (pages 50 - 62) was a complete and accurate list of the matters to be determined by the Tribunal.

11. The issues to be determined were therefore as follows (the numbering below is replicated from the list of issues in the bundle):

    2. Discrimination arising from Disability (section 15 of the Equality Act 2010)

    2.1 Did the Respondent treat the Claimant unfavourably by issuing a written warning under its absence management procedure?

2.2 Did the absence from work to the trigger points, arise in consequence of the Claimant's disability?

2.3 Was the unfavourable treatment because of any of those things?

During the closing submissions, it was conceded by the Respondent that the Claimant's absence from work arose in consequence of the Claimant's disability and that the written warning was given due to the Claimant's disability related absence.

2.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent's position is that the aim of the written warning was to ensure that the Claimant's attendance was fairly managed and assist him in returning to work. This could not have been achieved in another way.

2.5 The Tribunal will decide in particular:

2.5.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.5.2 could something less discriminatory have been done instead;

2.5.3 how should the needs of the Claimant and the Respondent be balanced?

2.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

3. Failure to make reasonable adjustments (sections 20 and 21 of the Equality Act 2010)

3.1. A "PCP" is a provision, criterion or practice. The respondent had its absence/attendance management policy and procedure, which were a PCPs.

3.2. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant was required to return to work prior to the timing suggested in an OH report, or face the potential for further sanction.

3.3. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

3.4. What steps could have been taken to avoid the disadvantage? The Claimant suggests:

3.4.1. As he was 19 weeks into a 22 week waiting list, and he was being "fast-tracked" for attention, waiting for his appointment with the specialist to take place and for the consequent report;

3.4.2. Disapplying the triggers for further action under the policy/procedure.

3.5. Was it reasonable for the Respondent to have to take those steps and when?

3.6. Did the Respondent fail to take those steps?

4. Compensation

4.1. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

4.2. What financial losses has the discrimination caused the Claimant?

4.3. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

4.4. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.5. Did the Respondent or the Claimant unreasonably fail to comply with it?

4.6. If so is it just and equitable to increase or decrease any award payable to the Claimant?

4.7. By what proportion, up to 25%?

4.8. Should interest be awarded? How much?

Findings of Fact

12. The Claimant meets the definition of a disabled person under the Equality Act 2010 and this was conceded by the Respondent. His condition is Right C6 – C7 disc prolapse and right C7 nerve root impingement.

13. On 25 February 2022 the Claimant was involved in a minor road traffic accident. Following this, due to persistent pain in his right arm and hand and persistent headache, he visited an accident and emergency department on 26 February 2022.

14. On 28 February 2022, the Claimant attended a GP appointment and a sickness note was issued documenting paraesthesia and confirming that the Claimant was not fit for work through to 14 March 2022 (page 348). The Claimant sent this note to his employer

15. Whilst off work, the Claimant kept in touch with his line manager, Huw Turner by telephoning him on at least a weekly basis.

16. On 14 March 2022, a further sick note was issued to the Claimant for a period of four weeks (page 349) and this was sent by the Claimant to his line manager, Mr Huw Turner, by email (page 131).

17. The Respondent has a Managing Attendance Policy& Procedure (page 366 – 381) ("the Policy"). Principles of the Policy are set out in paragraph 1.1 – 1.8.

18. The Policy sets out its process and procedure for absence at paragraph 2. The short term absence review process is set out at paragraphs 2.12 and 2.13 (page 371). This process is triggered by a pattern of absence involving three separate occasions of sickness absence in any 12 month rolling period or 10 working days absence [prorated for part time staff and staff working less than five days per week] in any 12 month rolling period or any pattern of absence that is causing concern.

19. The Claimant's working pattern was four days a week. He was called to an informal absence review meeting to be held on 24 March 2022. At that point he had been absent for more than the eight working days (pro-rated) that would have triggered the informal absence review meeting.

20. Under paragraph 2.15 (page 372) the purpose of the meeting was to review the Claimant's attendance record, advise that his absence was beginning to cause concern and explore whether assistance can be offered. The policy states that the focus and outcome of the meeting are to be determined based on the circumstances of the case.

21. The meeting of 24 March 2022 was held by a telephone call over Microsoft Teams. A record of the meeting is at pages 132 – 134. The Claimant summarised his accident and injury and told Mr Turner that he had been referred to a spinal consultant.

22. After Mr Turner explained the purpose of the meeting, the note of the meeting indicates it was agreed not to set up a HML appointment (i.e. a reference to Occupational Health) as it was not a work related absence. The Claimant disputed that this was agreed at the meeting and gave evidence that he was not invited to comment on the note. The Tribunal noted that the meeting record at page 134 bears the signature of Mr Turner but there is no provision for or signature by the Claimant. The Tribunal finds that the Claimant did not agree to the decision not to refer him to Occupational Health after the meeting of 24 March 2022 : he felt he had no control and simply noted what Mr Turner said.

23. At that meeting, Mr Turner told the Claimant about the employee assistance provider and identified the union as a source of support.

24. The consequences of the Claimant's absence on workload and colleagues were discussed. Mr Turner outlined how the Managing Attendance Policy& Procedure would progress, namely that a further trigger in 12 months would mean the Claimant had to attend a formal attendance review meeting and a written warning could be issued. He was also told that continued high levels of absence could lead to final written warning and ultimately dismissal.

25. Mr Turner then told the Claimant that the next trigger if he did not return to work would be in 2 months' time. This timeline related to the long term absence policy where formal absence review meetings should be held every two months.

26. The Policy has a separate section for long-term sickness absence. Under paragraph 2.27 (page 374) the long term absence review process will be triggered by any period of continuous absence of three calendar weeks or more. The Claimant had been absent for just over three calendar weeks at the time of the meeting of 24 March 2022.

27. Under paragraph 2.28 (page 374), employees who have absences relating to musculoskeletal conditions should be referred to occupational health immediately after seven continuous days absence. All other absences should be referred immediately after 14 days continuous absence unless there are mitigating circumstances such as an imminent return to work date or where the individual is hospitalised or waiting to be hospitalised.

28. Under the long-term absence review process, an informal absence review meeting should be arranged within one week of the employee reaching the long term absence trigger point (page 375). The Tribunal noted that the purposes of the informal review meetings are different for short term and long term absences. Under paragraph 2.30 (page 376) the purpose of a long term absence review process was to discuss:

    - the employee's health and the referral to the Occupational Health Service
    - explore when the employee might be fit to return to work
    - explore what steps the line manager and or the employee can take to aid recovery
    - discuss the options workplace, for example to workload, reduced hours etc

29. the Claimant was not offered a long term informal review meeting.

30. On 28 March 2022, the Claimant began physiotherapy treatment and on 31 March 2022 he received a letter confirming his referral to a spinal surgeon. A further sick note was submitted on 12 April to cover the period to 11 May and again from 11 May to 11 June 2022.

31. On 9 June 2022, the Claimant attended a formal absence review meeting with his union representative, Graham Cross (page 137 – 141). He updated Mr Turner as to the physiotherapy that he was receiving and told him that he had been referred to a spinal consultant. Mr Turner explained that the meeting was because a further sickness trigger had been reached and outlined both short term and long term sickness absence policies. He confirmed that a formal absence review meeting should be held every two months if the employee continued to be absent from work and that the first meeting should take place two months after the informal absence review meeting.

32. In the meeting on 9 June, Mr Turner enquired as to the Claimant's return to work and discussed a possible phased return of one week, working up to the Claimant's full daily hours by end of the week.

33. The Claimant told Mr Turner that he anticipated he was still a few weeks away from a return to work. Mr Turner suggested a referral to Occupational Health as the Claimant had now been off work for over 3 months and that the Occupational Health team could help establish and support return to work proposals. The Claimant agreed to this referral and was also advised again about the employee assistance provider.

34. Towards the end of the meeting, Mr Turner explained the difficulties created by the Claimant's absence and the pressure on the remainder of the team to work short staffed due to inability to cover and resource situations. He told the Claimant that he needed to improve his attendance record and that continued and further sickness could lead to sanctions and ultimately dismissal. Mr Turner also told the Claimant that if he was still absent by the 28th of August, he would hit the trigger for reduced sick pay. The Claimant and Mr Turner agreed that they would continue to keep in touch on a Thursday.

35. At the end of the meeting on 9 June, Mr. Turner recorded that he had decided not to issue a written warning. This was an option that he could have chosen under the Policy but in evidence he said he considered there was a possibility that the Claimant would return to work in a few weeks and he wanted to support and not put pressure on him. This reasoning was not in the record of the meeting (page 140) which records:
"*Decided to use my discretion on this occasion and not issue a written warning."*

36. After the meeting on 9 June, as he had been offered a one week phased return, the Claimant decided to increase his activity and attempted some lifting and further physical activity to prepare for his return. He realised his recovery was not as progressed as he had thought and returned to his GP who issued a further sick note on 13 June 2022 for a period of 10 weeks (page 352).

37. An Occupational Health assessment was held on 21 June 2022 (page 357 – 359). The report concluded that the Claimant was not fit to return at this time and recommended a phased four week return to work in due course with adjustments and further assessments and not before the Claimant had seen his specialist. The report confirmed that the Claimant had had a scan and was awaiting a review with his consultant.

38. On 29 July the Claimant received a letter inviting him to a formal absence review meeting on 10 August 2022(page143). It stated that the aim was to discuss the Claimant's progress and what the Respondent could do to help him to return to work as soon as he was able. At the end of the letter it advised that, following the meeting, a decision would be made as to whether or not a formal warning should be given and the Claimant was reminded that his employment with the Food Standards Agency could be affected if his sickness absence could no longer be supported.

39. A formal absence review meeting was held by Microsoft Teams on 10 August 2022. It was attended by Mr Turner, the Claimant and the Claimant's union representative, Mr Cross. The record of the meeting is at pages 144 -149. The Claimant gave an update on his progress with physiotherapy, confirming that he had exhausted his NHS physiotherapy allocation and was paying privately for physiotherapy sessions. He told Mr Turner that he had chased the hospital and was 19 weeks into a 22 week waiting list to see the consultant. Mr Turner understood that meant the Claimant would receive his letter of appointment (rather than the appointment itself) in three weeks.

40. At the meeting, the Occupational Health assessment was discussed along with possible adjustments to be made on the Claimant's return to work. Mr Turner proposed a further referral to Occupational Health and told the Claimant of the difficulties caused by his absence. He said the Claimant needed to improve his attendance and that continued absence could lead to sanctions and ultimately dismissal. Mr Turner referenced the fact that the Claimant had now been signed off work for a further 10 weeks and said that there was no return to work date, no guarantee of when the specialist appointment would be or whether he would return to work. Mr Turner told the Claimant that he was going to issue a written warning.

41. The Claimant's representative, Mr Cross, asked if the warning could be held off until the Claimant had seen his consultant. Mr Turner replied that he said would speak with the HR team.

42. Mr Turner confirmed his decision to issue a warning on 12 August 2022 in a letter (page 152 – 153). In it, Mr Turner summarised the meeting of 10 August and confirmed he would be referring the Claimant to Occupational Health. He provided details of the employee assistance scheme. The letter then went on (page 152):

"*I have given full consideration to the points you raised in explanation of your absence record. I have however decided to give you a Written Warning. This warning will be placed on your personal file. It is effective from the above date and is valid for a period of 12 months. I will continue to regularly monitor your absence and you may be subject to further formal action if I consider that you are unlikely to return to work within a reasonable period of time."*

43. No reason was provided for the Written Warning in the letter of 12 August.

44. In evidence Mr Turner said the purpose of the warning was to indicate where they are along the absence process, to highlight that the Claimant's absence was beginning to cause concern and to act as a prompt. Mr Turner said that he said he was following the policy to support the Food Standards Agency and highlighting that the Agency might not continue to support the Claimant at a final review meeting which might consider for example ill health retirement as an alternative to termination of employment. He also said that the warning step was necessary to get to final case hearing where support could be offered, for example nor reducing pay, because matters would be dealt with by more senior members of staff. His explanation of purpose was somewhat confused but he was clear that his view was that there were no other options available, other than issuing a warning to the Claimant. He said this was because the Claimant had no return to work date, no guarantee of when the specialist appointment would be or whether he would return to work. He stated that he had exercised his discretion not to issue a warning in the first formal absence meeting.

45. The letter advised the claimant of a right of appeal. The Claimant exercised his right by email of 18 August 2022 (page 155) giving the reasons for appeal as :

"*Unfavourable treatment as a consequence of my disability with reference to the Equality Act 2010 – discrimination arising from disability.*

The outcome I am seeking is the written warning to be revoked."

46. Further sick notes were issued on 20 August to 30 September, 30th September to 10 October and 10 October – 17th October 2022 (pages 353 - 355. The Claimant was then certified on 12 October as being fit for a phased return from 17th October – 9 November 2022 (page 356).

47. An Occupational Health report on 29 September 2022 (page 360 – 362) stated that "*due to the complexity of this case*" (page 360) escalation was needed to an Occupational Health physician consultation. It flagged (page 361):

"***Advice on the Disability Provisions of Equality Act (2010):***

The medical condition would appear to cause substantial impairment of day-to-day activities and is likely to persist beyond 12 months, which in my opinion is likely to mean that the provisions of the Act will apply.

However, as you will appreciate, I cannot give any more definitive view than that as ultimately this is a legal and not a medical decision."

48. The Claimant's appeal was scheduled for 30 September but had to be adjourned as the Claimant's representative was unavailable. The meeting was rescheduled for 10 October 2022.

49. A record of the appeal hearing is at pages 181 – 187. After the hearing, the appeal officer Mr Geraint Jones reviewed the decision of Mr Turner and upheld it. He found that Mr Turner had no other option, that it was not appropriate for Mr Turner to use his discretion and that the Claimant was not placed at a disadvantage. Mr Jones concluded that if the absence end date had been other than open, the warning would not have been issued. It was also his view that there was no indication that the Claimant was absent through a condition that questioned his ability to discharge his job which would have opened up other avenues such as ill health retirement or job role move. Mr Jones concluded that Mr Turner acted reasonably.

50. In evidence, Mr Jones accepted that the Claimant's condition and reason for absence were genuine.

51. The outcome of the appeal was communicated to the Claimant by letter (sent by email) on 17 October 2022 (page 179 – 180).

52. There is no reference to the provisions of the Equality Act 2010 being considered by Mr Jones in the notes of the appeal meeting.

53. The outcome letter (page 179) states:
" *The grounds of your appeal was 'unfavourable treatment as a consequence of my disability, with reference to the Equality Act 2010 - discrimination arising from a disability.'*

54. After that, there is no reference to the ground of appeal. The letter states:
"*I can see your then line manager, Huw Turner, really considered your absence, exercised discretion at the first formal absence review in June this year and appropriately sought Civil Service HR Case Worker advice and support…*
I can see that Huw, working with his Civil Service HR caseworker, really considered the FSAs Policy and so implemented; In doing so he's really considered you and your absence and this therefore demonstrates his reasonableness, this includes his actions from the Health Management Limited Occupational Health report of June this year. Specifically considering this Occupational Health advice there would be, and are, advice your line manager pursued whilst you remain unwell and absent from work but also those that he needs to *work with you upon your return to work...*

…my role in this appeal was to hear your and Huw's presentations and review the decision reached and the basis for that decision, it is not a re-investigation."

55. The Tribunal finds that the specific ground of appeal, of unfavourable treatment as a consequence of the Claimant's disability with reference to the Equality Act 2010 – discrimination arising from disability, was not considered by Mr Jones in determining the outcome of the appeal.

56. As to the impact of the warning on the Claimant, his evidence was that the warning was a cause of great stress and anxiety. The Tribunal was mindful of the need to focus on the specific impact of the warning rather than the overall attendance management process or any effect of returning to work. Whilst this was difficult to isolate, the Tribunal is satisfied that it did so. The Tribunal took notice of the evidence of the Claimant and his wife that the warning did increase his anxiety and caused concern and pressure to the Claimant during the period before he was able to return to work. It was also accepted by Mr. Turner in evidence that the issue of a warning was likely to cause stress and anxiety.

The Law

57. Section 39(2) of the Equality Act 2010 ('EqA 2010') states:

    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.

58. Section 15 of the EqA 2010 defines discrimination arising from a disability 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.

59. Section 20 of the EqA 2010 sets out the duties to make reasonable adjustments in respect of disabled persons. So far as relevant, section 20 states:

(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 … 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. …

60. Schedule 8 to the EqA 2010 provides more details as to the duty to make reasonable adjustments. In addition, section 212 EqA 2010 defines “substantial” as “more than minor or trivial.”

61. If a person fails to comply with the duty to make reasonable adjustments, that person discriminates against the disabled person (per section 21 EqA 2010).

62. Section 136 EqA 2010 sets out the burden of proof and provides:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

63. Section 136 establishes a “shifting burden of proof”. If the Claimant is able to establish facts, from which the Tribunal could decide, in the absence of any other explanation that there has been discrimination, the Tribunal is to find that discrimination has occurred, unless the Respondent is able to prove that it did not.

64. In *Igen Limited and others v Wong and conjoined cases* [2005] ICR 931, the Court of Appeal gave guidance on how the shifting burden of proof should be applied.

65. It is for the Claimant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant that is unlawful. These are referred to below as "such facts".

66. If the Claimant does not prove such facts their discrimination claim will fail.

67. Where the Claimant has proved such facts, the burden of proof moves to the Respondent to prove that they did not commit that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of [disability], since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

68. The remedies available to the Tribunal are to be found in section 124 of the EqA 2010. The Tribunal may make a declaration as to the rights of the Claimant and the Respondent in relation to the matters to which the proceedings relate; may order the Respondent to pay compensation to the Claimant (on a tortious measure, including injury to feelings); and make an appropriate recommendation.

69. An award for injury to feelings is compensatory. It should be just to both parties: fully compensating the Claimant without punishing the Respondent. Awards for injury to feelings or for financial loss must compensate only for those unlawful acts for which the Respondent has been found liable. The Claimant bears the burden of proving injury to feelings and/or losses flowing from discrimination.

70. An award should not be so low as to diminish respect for the legislation; on the other hand, it should not be excessive. An award should bear some broad similarity to the level of awards in personal injury cases. In deciding upon a sum, the Tribunal should have regard to the value in everyday life of that money, being careful not to lose perspective.

71. In *Vento v Chief Constable of West Yorkshire Police (No.2)* [2003] IRLR 102, the Court of Appeal identified three bands for awards: the top being for the most serious conduct, such as a lengthy campaign of harassment; the middle band for those acts which are serious, but not within the top band; and the bottom band for those acts which are less serious, one-off or isolated. Presidential Guidance for a claim presented in November 2022 gives a lower band of £990 to £9,900; a middle band of £9,900 to £29,600; and an upper band of £29,600 to £49,300 with the most exceptional cases capable of exceeding £49,300.

72. The Tribunal may also award interest on any award pursuant to section 139 of the EqA 2010. Interest is to be calculated as simple interest accruing from day to day. The interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation.

73. In considering the relevant law in this case, the Tribunal also directed itself to the common law authority points made in the Respondent's written closing submissions and the provisions of Paragraphs 5 and 6 of the EHRC Statutory Code.

Conclusions

74. In relation to the claim under s.15 Equality Act 2010, the Tribunal is satisfied that the evidence before it established facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant that is unlawful. The Claimant therefore discharged his initial burden and it fell to the Respondent to prove that the treatment of the Claimant, in issuing the written warning, was in no sense whatsoever

on the grounds of disability. For the reasons set out below, the Tribunal concluded that the Respondent failed to discharge this burden and failed to establish that the discriminatory act was a proportionate means of achieving a legitimate aim.

75. Did the Respondent treat the Claimant unfavourably by issuing a written warning under its absence management procedure?

    Unfavourable treatment involves placing the Claimant at a disadvantage. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably. The Tribunal finds that the Respondent treated the Claimant unfavourably by issuing a written warning on 12 August 2022 under its absence management procedure. The warning placed the Claimant at a disadvantage because it was described as a sanction, it was to remain in place for 12 months and meant that further absence would activate further sanctions and could eventually lead to dismissal.

76. Did the absence from work to the trigger points, arise in consequence of the Claimant's disability?

    Was the unfavourable treatment because of any of those things?

    The Respondent did not concede there was unfavourable treatment but did concede that the warning arose in consequence of the Claimant's disability and that the written warning was given due to the Claimant's disability related absence.

77. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent's position, set out in the list of issues, was that the aim of the written warning was to ensure that the Claimant's attendance was fairly managed and assist him in returning to work. The Respondent says this could not have been achieved in another way.

78. Paragraph 39 of the Respondent's closing submissions lists a number of considerations of fair management but there was no reference to the other aims of the policy including support of employees to stay in work or to return to work after a period of absence.

79. The Tribunal accepts that the Respondent's written long term absence policy includes the legitimate aim of supporting employees to stay in work or to return to work after a period of absence. However, the Tribunal finds that the warning was not issued with the aim of assisting the Claimant's return to work or ensuring fair management of the Claimant's absence. Mr Turner's evidence was that he had no other option than to issue the warning. This was not the case. The Policy makes it clear at Principle 1.6 that "*Actions taken should be considered on a case by case basis in light of the circumstances of the case".* The need to determine focus and outcomes of formal review meetings based on the circumstances of the case is seen at paragraph 2.20 for formal absence review meetings in cases of short term absence and at paragraph 2.34 for long term absences.

80. Mr Turner was focussed on his belief that the Claimant might not return to work and his focus was very much on further sanctions. He was

following the procedural steps mechanically without regard to the information given by the Claimant about his progress and the Occupational Health report of June 2022 which gave a very clear time line and structure as to how the Claimant could return to work. He did not consider whether the aims of the policy could be met in a different way.

81. The warning was not an appropriate way of achieving the Respondent's aims as expressed in its written policy nor was it reasonably necessary. The Claimant's disability was acknowledged by the Respondent and it was accepted that his absence was genuine. The Claimant had explained to Mr Turner that he was endeavouring to return by chasing the specialist appointment and undergoing physiotherapy, including paying for treatment and co-operating with Occupational Health. There was nothing further he could do to hasten his return to work so the warning did not meet the aims listed in the policy statement.

82. The warning letter issued by Mr Turner sets out potential adjustments that can be made, the Claimant was referred back to Occupational Health and the Respondent was aware that the Claimant was awaiting a specialist report and had a detailed plan in place ,from the June Occupational Health report. To return to work. An outcome letter from the meeting which set these things out but omitted the warning was a less discriminatory option that would have met the aims of fair management and helping him back to work. This could have been combined with a review meeting at an appropriate time in the next 6 – 8 weeks and would have implemented the Claimant's representative's suggestion, at the meeting of 10 August 2022, of deferring the warning until the specialist report was available.

83. The evidence of Mr Turner referred to the impact on other employees of the Claimant's absence and the Tribunal recognises that these need to be balanced against the impact of the warning on the Claimant. The Claimant had been absent for five and a half months and was about to be reduced to half pay. The Tribunal acknowledges that the absence of an employee will have an impact on other employees but the Respondent produced very little detail relating to the extent of that impact. In the absence of such evidence, the Tribunal conclude that the Respondent was able to manage the demand and that the business needs do not outweigh the discriminatory treatment of the Claimant.

84. The unfavourable treatment identified in the issues is "issuing a written warning under its absence management procedure decision". As the evidence also centred on the appeal process it is relevant to recognise that Mr Turner's decision to issue the written warning could have been reversed on appeal. At that appeal, the aim of Mr Jones was to consider whether Mr Turner's decision was reasonable. He did not consider the ground of appeal as set out by the Claimant. He did not consider that the Claimant had been treated unfavourably. He did not consider whether a less discriminatory option could have been deployed such as those outlined at paragraph 82 above.

85. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

    The Respondent's knowledge of the Claimant's disability was conceded. The Respondent knew of the Claimant's condition on or before the relevant start date of the Claimant's absence in February 2022. The Respondent was also aware that the condition was exacerbated by collision in February 2022 as the Claimant notified the Respondent of the collision on 28 February 2022 and it was discussed in the March meeting with Mr Turner.

86. The issue of the written warning to the Claimant was unfavourable treatment arising from the Claimant's disability. It was given because he was absent from work. He was absent because of his disability and the exacerbation of his pre-existing condition, caused by the collision on February 2022. For the reasons set out above, the issue of the warning was not a means of achieving a legitimate aim and, if it was such a means, it was not a proportionate way of doing so.

87. Failure to make reasonable adjustments (sections 20 and 21 of the Equality Act 2010).

    It was agreed between the parties that the Respondent had its absence/attendance management policy and procedure, which was a provision, criterion or practice ("PCP").

88. Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant was required to return to work prior to the timing suggested in an Occupational Health report, or face the potential for further sanction?

    The Respondent's written absence/attendance management policy and procedure includes discretion as to progress of procedures to manage attendance and help people back to work. The Tribunal therefore found that the written policy does not place the Claimant at a substantial disadvantage compared to someone without the Claimant's disability. It is the *implementation* of the policy in the particular circumstances of this case that caused the disadvantage and so, based on the precise wording of the agreed issues, the Tribunal finds that the PCP did not put the Claimant at a substantial disadvantage.

89. Accordingly the remaining issues identified in relation to the claim of failure to make reasonable adjustments fall away and that claim is dismissed, as not well-founded.

90. Turning to the issue of remedy, the Tribunal was not asked to make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant and did not consider it appropriate to do so as the Claimant is no longer in the Respondent's employment.

91. The Claimant's case relates solely to the written warning. He did not seek to recover any financial losses caused to him.

92. In relation to an award for injury to feelings, the Tribunal accepted the Claimant's evidence that he suffered stress and anxiety as a result of the warning. It hung over him at least until his return to work in October

and caused him concern that needed to get back to work (and stay there) to avoid further sanctions. It was accepted by the Respondent that a warning has the potential to cause stress and anxiety. The Tribunal reminded itself of the need to focus just on the impact of the warning and subsequent appeal. Although we regarded this as one incident and falling in the lowest Vento band, taking account of the relevant legal principles, within that band we concluded that the award should fall in the top half due to the stress caused over that period of time and awarded £7000.

93. Dealing with the issue of whether the ACAS Code of Practice on Disciplinary and Grievance Procedures applied in this case, the Tribunal struggled with the submission that this was not a disciplinary process in light of the fact that a warning given. However, authority was provided by counsel and, in the absence of challenge, accepted by the Tribunal that this is not a case to which s.207A Trade Union and Labour Relations (Consolidation) Act 1992 applies. If that acceptance is wrong, the Tribunal confirms that it heard no evidence of, or submissions relating to unreasonable failure to comply. There should be no increase or decrease increase or decrease in the award payable to the Claimant.

94. As the Claimant has succeeded in a claim of discrimination, interest should be awarded on the compensation for injury to feelings from the date of discrimination, 12 August 2022, to the date of judgment, which was 18 August 2023. This is a period of 372 days at 8% per annum, making a daily rate of £1.53 and a total of £570.73.

Employment Judge S. Evans

Date 19 September 2023

SENT TO THE PARTIES ON 26 September 2023

FOR THE TRIBUNAL OFFICE Mr N Roche