THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS C BRAYSON**
MR R MILLER

BETWEEN:

Mr O Ajanaku

Claimant

AND

Monsas Ltd

Respondent

ON: **5, 6, 7 and 8 September 2023**
Appearances:
For the Claimant: **In person**
For the Respondent: **Ms A Smith, counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claims for discrimination arising from disability and for notice pay succeed.
2. The claims for direct and indirect disability discrimination, victimisation, failure to make reasonable adjustments, disability related harassment and holiday pay fail and are dismissed.

REASONS

1. It was intended that this decision be delivered orally on day 4 of the hearing, 8 September 2023. The claimant had technical difficulties and could not join the hearing. He asked by email for a Reserved Decision to be sent to him.

2. The respondent made an application for the decision to be delivered orally in the absence of the claimant. We did not grant this application and treated the claimant's request as a request for written reasons.

3. By a claim form presented on 8 June 2022 the claimant Mr Ope Ajanaku brought claims of unfair dismissal, disability discrimination, notice pay and holiday pay.

4. The claim for unfair dismissal was dismissed upon withdrawal on 4 January 2023.

5. The claimant worked for the respondent as a Compliance and Onboarding Analyst for a period of just over 9 months.

This remote hearing

6. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

7. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

8. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties.

9. The participants were told that was an offence to record the proceedings.

10. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The issues

11. The issues were identified as far as was possible at the time, at a case management hearing on 4 January 2023, by Employment Judge Brown.

12. The claim is for disability discrimination, holiday pay and notice pay. The unfair dismissal claim was dismissed upon withdrawal. The claim for disability discrimination amounts to direct discrimination, indirect discrimination, failure to make reasonable adjustments, discrimination arising from disability, victimisation and disability related harassment.

13. The parties were ordered to agree a final list of legal and factual issues by 18 January 2023. The list of issues had been expanded since the case management hearing and the respondent raised the question as to whether the claimant required leave to amend.

<u>Disability status</u>

14. On 22 March 2022 the respondent conceded disability in relation to the

condition of severe asthma.

15. At a Preliminary Hearing on 9 May 2023 Tribunal Judge McGrade decided that the claimant was a disabled person during the relevant period, with the condition of anaphylaxis.

The claimant's application to expand the list of issues

16. The list of issues had been expanded upon considerably since the preliminary hearing before Employment Judge Brown. We worked on this list of issues with the parties before commencing the hearing and took time to explain the different legal tests to the claimant.

17. The claimant was represented by solicitors when he attended the case management hearing before Judge Brown on 3 January 2023 at which the issues were largely identified.

18. After a discussion on day 1 until 11:30am, we were asked to consider the claimant's application to add the following as acts of direct discrimination:

    e. Failing to be provided with the company's absence reporting policy prior to, during, or immediately after having requested it following the phone call on 6 May 2022.
    k. Failure to pay holiday pay.
    l. Failure to pay notice pay.

19. The respondent said that issue (e) was not included in the original claim form and although the claimant was a litigant in person, it was not a complex point. The respondent said that the claimant failed to include a key factual element, failure to be provided with the absence policy and there was no reason why he could not have included that on the claim form. It was said that there was prejudice to the respondent in having to deal with a new allegation that was not pleaded and in terms of the overriding objective it would be disproportionate to allow this to be included. The claimant said that he did not know it had to go in the ET1 and it came to light during the process.

20. In box 8.2 of the ET1 the claimant said: "*I was asked again on Monday for a medical certificate, to which I responded asking for the Monsas policy which states I am required to show one*". Although the claimant appears to have mixed up the dates of 6 or 9 May 2022 as to when he asked for this, there was no doubt in our minds that part of his pleaded case is the failure to give him a copy of the policy when he requested it.

21. The respondent had been aware of this element of the case from the outset and we took the view that there was no disadvantage to them in being asked to deal with it. Ms Rigg's evidence at paragraph 10 of her witness statement covered the point that she believed that all staff had been provided with a copy. We saw no appreciable disadvantage to the respondent in dealing with this as an allegation of direct discrimination.

22. The claimant also sought to rely on the failure to pay holiday and notice pay as acts of direct discrimination. They both existed as claims in their own right so factually the respondent knew that it had to deal with those issues and they had to explain the reasons for non-payment in any event. We took the view that the balance of prejudice lay in favour of the claimant, the respondent already being in a position where it had to explain any non-payment, and we allowed this amendment.

23. The claimant also wished to rely on a named comparator for his direct discrimination claim, namely Ms Valentine Attew who worked as an Analyst – Operations and Compliance. As his former line manager Ms Rigg had dealt with this in her witness statement at paragraph 14, we agreed that the claimant could rely on Valentine Attew as his named comparator. There was no prejudice to the respondent as they had already dealt with the point.

Direct disability discrimination – section 13 EqA

24. In doing the acts relied upon, did the respondent treat the claimant less favourably than it did treat or would treat a non-disabled comparator in the same or not materially different circumstances? Has the claimant shown facts from which the Tribunal could conclude that the respondent had discriminated against the claimant because of disability? The claimant named his comparator as Ms Attew, whom the claimant said was sick and not asked to follow the same procedure as himself or asked to provide evidence of sickness.

25. The acts of less favourable treatment relied upon were:

    a. Being required to produce medical certification for absence when other colleagues were not so required.

    b. Being required to attend a meeting, at short notice, with 3 directors, to explain his absence.

    c. Failing to be provided with the company's absence reporting policy prior to, during, or immediately after having requested it following the phone call on 6 May 2022.

    d. Failure to pay holiday pay.

    e. Failure to pay notice pay.

    f. Being dismissed.

26. If so, has the respondent shown that disability was no part of the reason it acted as it did?

Discrimination arising from disability – section 15 EqA

27. The "*something arising from disability*" relied on is the claimant's absence caused by the disability. Although in the list of issues the "*something arising from disability*" had increased to 10 matters the claimant confirmed at the start of the hearing that he only relied on his absence – which had been identified at the case management hearing at which he had been represented.

28. The acts of unfavourable treatment relied upon were:

    a. Being required to produce medical certification for absence when other colleagues were not so required.
    b. Being required to attend a meeting, at short notice, with 3 Directors, to explain his absence.
    c. Being dismissed.

29. Has the respondent shown that the treatment of the claimant was a proportionate means of achieving a legitimate aim? The respondent relies on the following legitimate aims:

    a. Maintaining satisfactory levels of attendance.
    b. Ensuring that staff were absent for legitimate reasons and that the employer has the correct information to safeguard staff and/or make adjustments.
    c. Maintaining a level of stability and transparency in the workforce so that when staff are off sick, the management are aware of it and of the issues causing the illness.
    d. Ensuring the efficient operation of the business, particularly given the pressures it was operating under during the relevant period.
    e. The efficient resolution of workplace issues.

30. Alternatively, has the respondent shown that it did not know, and could not reasonably have expected to know, that the claimant had a disability?

<u>The PCP for failure to make reasonable adjustments and indirect disability discrimination – sections 19 and 20 EqA</u>

31. Did the respondent apply the following PCP – being required to produce medical certification at short notice in respect an absence of more than 3 days? Although the list of issues had increased the number of PCP's relied upon from one to six, the claimant confirmed at the outset that he only relied on the one PCP identified in this paragraph.

32. Did that PCP put people sharing the claimant's disability, and/or the claimant at the following particular or substantial disadvantage – as a disabled person the claimant was more likely to have absences from work of more than 3 days due to the severity of his condition and therefore was more likely to be put at risk of dismissal if he did not comply with the PCP.

<u>Failure to make reasonable adjustments – sections 20 and 21 EqA</u>

33. The claimant relies on the same PCP and the same substantial disadvantage for his reasonable adjustments claim.

34. Were the following reasonable adjustments for the respondent to have to take to avoid the disadvantage?

    a. Disability related absence should not be taken into account when requiring people to produce medical certification.

    b. A longer period, of about 2 weeks, should have been allowed for the claimant to produce medical certification.

Indirect disability discrimination – section 19 EqA

35. The respondent relies upon the same PCP and particular disadvantage as identified for the reasonable adjustments claim.

36. Did the PCP put persons with the claimant's disabilities at a particular disadvantage when compared to people who do not have those disabilities? Was the claimant also put to that particular disadvantage.

37. Has the respondent shown that the treatment of the claimant was a proportionate means of achieving a legitimate aim? The respondent relies on the same legitimate aims as for the claim for discrimination arising from disability.

Disability related harassment – section 26 EqA

38. Did the respondent engage in the following conduct:

    a. Requiring the claimant to produce medical certification at short notice; and

    b. Requiring the claimant to attend the meeting with 3 directors.

39. If so was that conduct unwanted?

40. If so, did it relate to disability?

41. Did the conduct have the purpose or taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect, the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

Victimisation – section 27 Equality Act

42. Did the claimant do the following protected act – raising with the directors in the meeting on Friday 6 May 2022 that there had been a hostile

environment in the meeting and he was being treated unfairly in relation to his disability? Whilst this had changed substantially in the amended List of Issues, the claimant confirmed at the outset that the above was the protected act he relied upon.

43. Did the respondent subject him to the following detriment because he had done the protected act: dismissing him? The claimant confirmed at the outset of the hearing that despite the increase in detriments in the amended list of issues, he relied upon his dismissal.

Notice Pay

44. Was the respondent entitled, by reason of the claimant's conduct, to terminate the contract without notice? The issue for the tribunal was whether the claimant committed an act of gross misconduct.

Holiday pay

45. Is the claimant entitled to any holiday pay on termination of employment? The claimant contended that he was not paid any holiday pay on termination.

Witnesses and documents

46. There was an electronic bundle of documents prepared by the respondent running to 249 pages.

47. There was a cast list, chronology and list of issues from the respondent.

48. The parties confirmed at the outset that all the witnesses were giving evidence from inside the UK.

49. For the respondent the tribunal heard from 2 witnesses: (i) Mr Andrew Herriott, former Managing Director and (ii) Ms Sally Rigg, former Chief Compliance Officer/Money Laundering Reporting Officer (MLRO).

50. There was a witness statement for the respondent from Mr Adrian Bird, a former Operations Manager. He had left the respondent's employment and was not available to be called to give evidence. We read his statement and the respondent was aware that we could attach less weight to a statement where the witness did not attend for this evidence to be tested.

51. On the claimant's side the tribunal heard from the claimant.

52. A two-page document was introduced by the respondent at the start of the hearing, being an email chain dated 7/8 March 2022. The claimant did not object to the introduction of this document.

53. At 11:15am on day 2, the respondent disclosed two further documents in

relation to the holiday pay claim. The claimant did not object to the introduction of the document.

54. We had written submissions from both parties to which they spoke. They are not replicated here. All submissions and any authorities referred to were fully considered, whether or not expressly referred to below.

Findings of fact

55. The respondent is a financial services company which provides a secure international payment services for business clients. The claimant worked for the respondent as a Compliance and Onboarding Analyst from 3 August 2021 to 10 May 2022, a period of just over nine months. The claimant worked predominantly from home.

56. The claimant's line manager was Sally Rigg, Head of Compliance and Money Laundering Reporting.

57. The respondent company was small. During the claimant's employment the respondent employed about 12-14 people. The company was formed in about 2017.

The contract of employment

58. The claimant's contract of employment dated 26 July 2021 contained the following terms:

> *DUTIES*
> *5.1. During the appointment the Employee shall:*
>
> *5.1.1. unless prevented by incapacity, devote the whole of their time, attention and abilities to the business of the Company. The Employee is not permitted to accept any other work for private gain, nor is they permitted to have any interest in any business or undertaking, or engage or be concerned in or undertake any other activities, which might interfere with the performance of their duties or cause a conflict of interest without the prior consent in writing of the Company. This provision will not prohibit the holding of not more than five percent of the shares or securities of a company which is listed or traded on a recognised stock exchange nor the holding of shares or securities of a private company unless such private company's business competes directly or indirectly with the business of the Company in which they are involved provided that all such interests are disclosed to the Company.*
> *5.1.2. faithfully and diligently exercise such powers and perform such duties to the best of their power, skill and ability as they may be assigned by the Company together with such person or persons the Company may appoint;*
> *5.1.3. comply with all reasonable and lawful directions given by the Company;*
> *…….*

5.1.6. at all times act in the best interests of the Company and do all in their power to promote, develop and protect the business of the Company and at all times and in all respects conform to and comply with the proper and reasonable directions and regulations of the Board.

TERMINATION WITHOUT NOTICE

17.1. The employment of the Employee may be terminated by the Company immediately without notice or payment in lieu of notice if the Employee:

17.1.1. commits any serious or gross misconduct or
17.1.2. commits any conduct which affects or is likely to affect prejudicially the interests of the Company; or
17.1.3. fails or neglects to efficiently and diligently discharge their duties and/or commits any serious or repeated breach or non-observance of any of the provisions contained in this Agreement.

59. The claimant started off well at the respondent. He had a probationary period of 3 months and had a probationary review on 29 September 2021 with the then CEO Mr Andrew Herriot. The claimant passed his probation and was paid a bonus of £1,500 at the end of the year. We saw the claimant's payslip for December 2021 (page 150) showing the bonus.

60. The contract of employment, at clause 4.3, gave a right to extend a probationary period for up to a further 3 months. This was not considered necessary by the respondent.

61. The claimant's notice period on completion of his probationary period was three months (Schedule to contract, page 119).

Management of the claimant

62. Ms Rigg began managing the claimant when she became employed by the respondent in late August 2021. Her evidence was that there was "*a general perception"* in the business that the claimant was working for another company as well as for the respondent and that he was doing this whilst he was meant to be working for the respondent. Ms Rigg said that he "*never answered his phone or emails*" and that his output was low. Ms Rigg said that because there was "*so much going on in the business"* no-one formally raised this with the claimant.

63. There was an FCA investigation which created a great deal of work and there were a large number of compliance issues which Ms Rigg had to deal with. Ms Rigg said that as a result the claimant "*got away with much more in the way of poor performance than he would if these issues had not been present".* We find that the claimant was not closely managed and if there were any issues with his work, these were not raised with him in any formal manner so that he could address them.

Relevant findings from the Judgment on Preliminary Hearing

64. The following findings of fact were made by Tribunal Judge McGrade at the preliminary hearing on 9 May 2023 and are adopted by this tribunal as relevant to the issues.

> *16. The claimant was best man at his older brother's wedding in London on 23 April 2022. Among the food served at the wedding was suya, which is a Nigerian food seasoned with peanut spice. The claimant consumed this at around 10pm. Shortly thereafter he went into anaphylactic shock. He did not have immediate access to his EpiPen, as he had left it in his car and did not know who had his car keys.*
>
> *17. He reported this condition to his mother, who dialled 999. While the claimant was awaiting the arrival of the ambulance, he sat down and was hunched over, trying to get air into his lungs. He was completely immobile.*
>
> *18. The ambulance arrived around 20 minutes later. The ambulance staff administered a first dose of epinephrine. He was also given oxygen. During the journey to hospital, the ambulance staff switched from oxygen to a nebuliser.*
>
> *19. Following his arrival at hospital, he was treated in the resuscitation ward and given a second dose of epinephrine, along with cortisone. He was discharged the following day and given a five-day course of chlorphenamine, nizatidine, and prednisolone under 14 day course of paracetamol. He was also told to rest.*

The claimant's condition of asthma

65. In terms of the claimant's condition of asthma, his evidence was that that he could not remember telling anyone at the respondent that he had this condition and he was not sure that he did. On this evidence we find that he did not tell the respondent that he had this condition and where knowledge of disability is in issue, we find that the respondent did not have knowledge of the condition of asthma.

Absence from work commencing 25 April 2022

66. On Monday 25 April 2022, following the medical incident referred to above, the claimant did not attend work.

67. At 13:58 hours on 25 April 2022 the claimant sent a message to his colleague Meghan Millward, an Associate in Compliance, Risk and Legal saying "*Hi Meghan, sorry this is late!! I was at my brothers wedding over the weekend and got rushed to hospital as I ate some peanuts which I'm allergic too, I've been in the resuscitation ward since but have none of my work stuff obviously!*" (page 124).

68. The claimant's evidence was that Ms Millward told him that she would "*let everyone know"* and his understanding was that she did.

69. At page 124 we saw that Ms Millward sent the claimant's message on a Teams message to seven members of staff saying: "*Just received this from Ope*" and forwarded the message. Ms Grothier replied at 14:08 hours: "*Blimey! Please can you send to Paul/Sally if not already Hopefully he is ok".*

70. Ms Rigg accepted she was told by Ms Millward that the claimant was off sick (her statement paragraph 16 and in oral evidence). In her witness statement Ms Rigg said she could not recall whether she was told that the claimant was in a resuscitation ward or that he had a peanut allergy. In evidence she accepted that she knew that the claimant had been in hospital and had a peanut allergy and she was aware of this at some point between the claimant going off sick and returning to work.

71. The claimant confirmed in evidence that he returned to work on Tuesday 3 May 2022 after the bank holiday. When he was asked by Ms Rigg in an email exchange which is set out below, of the dates he was absent, he replied "*25/09 – 29/09".* He confirmed evidence that he meant the month of April and not September. The claimant's position was that he was unfit for work for 5 days and therefore he could self-certify his absence. The respondent took the position that the claimant did not return to work until Tuesday 3 May 2022, he was off for 8 days and he needed to certify his absence in any event.

72. The general position as to the need for certification is based on calendar days not working days. The claimant's position was that he was unfit for work for five days. We find that this was the case, firstly because the claimant is the best person to know when he recovered and secondly we draw support from the decision made by Tribunal Judge McGrade, who found that the claimant was given a 5-day course of three types of medication. The claimant had used information published by ACAS as to the need for medical certification and the period for which he could self-certify.

<u>The Employee Handbook and sickness absences</u>

73. The respondent's Employee Handbook says "*If you were absent for more than 7 calendar days (including weekends and bank holidays), you must in addition to completing the Absence Request Form, obtain a medical certificate….*" (page 84). In addition the section on Sickness Absence says: "*The Company may, at its discretion, request a medical certificate from your Doctor for periods of sickness of less than 7 days."*

74. In terms of reporting sickness absence the policy says "*Employees must call the main office number [number quoted] by 9:30am to report their sickness. The Office Manager will record the absence and transfer/inform*

line managers as appropriate". It goes on to say that it is the line manager's responsibility to monitor their team's sickness, to be aware of potential issues and manage workload while the employee is absent. The policy says that the Office Manager is responsible for maintaining accurate records and ensuring all relevant paperwork is completed in a timely fashion.

75. As the respondent did not have an Office Manager, Ms Rigg said and we find, that if someone was absent, whoever took the call would notify the other members of the team (statement paragraph 10).

76. In terms of returning to work after sickness absence, the policy states that the employee must fill in an absence form. Ms Rigg was not aware of a specific form. She said: "*No one had ever been off for more than a couple of days, however, and so we'd never needed to follow the formal policy*." (statement paragraph 11).

77. Whilst Ms Rigg is now aware of the position on self-certification, her evidence was that at the time she was dealing with the claimant's absence, she thought that there was a requirement for a medical certificate after three days of absence.

The request for a medical certificate

78. It is not in dispute that at 09:45 hours on Tuesday 3 May 2023, immediately after the bank holiday, Ms Rigg sent an email to the claimant (page 125) saying:

> *"Hi Ope*
> *Following your absence last week, I hope you are feeling better. As you were off work for more than three days you need to provide me with a medical certificate with respect to your absence. Please provide this by the end of this week latest"*

Email exchanges on 5 and 9 May 2022

79. The exchange of emails between the claimant and Ms Rigg continued as follows:

> *5 May 2022 3:55pm "Hi Sally, Thanks for your email, I am feeling better. I wasn't aware I needed to provide a medical certificate with respect to my absence as I was off work for less than 7 days – please let me know if I am mistaken.*
>
> *5 May 2022 3:56pm "Hi Ope, Please can you confirm the dates you were absent and provide a full list of work completed before and after the absence a week either way".*
>
> *5 May 2022 3:59pm "Please also provide confirmation of who you notified of your absence and who you notified when you returned to*

work following that absence".

5 May 2022 10:41pm "25/09 – 29/09. I was working on invoicing tasks the week prior to my absence. Meghan was notified, and I spoke to her on Friday (29th) concerning my return. Paul was also on the ops call in the morning I returned to work".

5 May 2022 10:46pm "Dates please Ope as per my email and evidence this really shouldn't be hard to prove so I expect this by 12 pm tomorrow".

5 May 2022 10:49pm "The dates are in my previous email. You're asking evidence of?"

5 May 2022 10:53pm "Evidence that you actually did any work between those dates and we do want a medical cert"

5 May 2022 10:53pm [from C to Ms Rigg] "Can you call me tomorrow?"

5 May 2022 10:55pm [from Ms Rigg to C] "Please respond in writing".

5 May 2022 10:55pm "I have, but clearly something is being lost in translation".

5 May 2022 10:57pm "You haven't answered my questions Ope. You are now on notice we are taking disciplinary action if you cannot produce the evidence requested by 12pm tomorrow. I you haven't we will have a formal interview at 3pm"

5 May 2022 "I note you have accepted the interview request that does not discharge you from the need to provide evidence by 12pm tomorrow"

Monday 9 May 2022 8:48pm "Hi Ope Where is your medical certificate please?"

9 May 2022 10:57pm "You said you were going to send me the document where It states I need to provide a medical cert for being off longer than 3 days?"

9 May 2022 10:59pm "Ope I made it very clear you had to provide what was asked for and you had an extension from Friday. No excuses. Thanks Sally".

80. Ms Rigg expressed the view in her witness statement that if the claimant's absence was genuine, it ought not have been difficult to provide a medical certificate and he would not have questioned the request. She considered him to be insubordinate in his messages to her.

81. We have considered whether the claimant properly reported his sickness

absence and we find that he did. There was no requirement in the Handbook to notify the line manager. The requirement was to notify the Office Manager and there was no such person. Ms Rigg's evidence was that Ms Millward was responsible for managing the claimant's day to day activities and she reported back to Ms Rigg who was not there all the time. To the extent that the claimant needed to report to a manager, he told Ms Millward who was managing him day to day and in any event he correctly anticipated that Ms Millward would inform Ms Rigg. We find he properly reported his absence in these circumstances.

82. Although the Handbook said that the report should be made by 09:30am and the claimant did not report until nearly 2pm, Ms Rigg herself accepted that there could be circumstances in which it may not be possible to report on time. She gave an example of having to take her dog to the vet and this meaning she may not be able to report her absence on time. The claimant had been very unwell and had been hospitalised over the weekend and was taking a lot of medication. We find that this explains why he was not as prompt as the respondent may have wished in reporting his absence on Monday 25 April 2022.

83. We find that the claimant did correctly report his sickness absence to the respondent.

Was the claimant aware of the provisions of the Handbook?

84. We have considered whether the clamant was aware of the provisions of the Employee Handbook. The claimant said he was not aware of it. Both the respondent's witnesses said it was on their intranet, Mr Herriot explaining that it was under a section called Sharepoint.

85. Neither of the respondent's witnesses explained how the Handbook had been brought to the claimant's attention. The claimant was not told about it during his induction. Ms Rigg said she was not saying that the claimant knew where it was. She thought it possible that it was referred to in his contract of employment and she expressed surprise that it had taken him many months to ask for it.

86. We find that the Handbook was not brought to the claimant's attention and that it was not a well-known document at the respondent. Had Ms Rigg been familiar with it, we find on a balance of probabilities that she would have quickly informed the claimant that he was right about the normal rule being 7 days self-certification but that the company also had a discretion to request a certificate for periods of sickness of less than that. We also find that had the Handbook been well-known and easily accessible, she would have told the claimant exactly where to find it on the intranet.

87. We are supported in this finding by Ms Rigg's evidence at paragraph 12 of her statement where she said: "*Whilst I am aware of this policy now, I had believed at the time that the Company policy and the law was that we should obtain a medical certificate if someone was off for more than 3*

days". We find on this evidence that not only was the claimant not aware of the policy, neither was Ms Rigg aware of the terms of the sickness policy at the time she was asking for a certificate.

88. The claimant complained that the respondent's failure to provide him with the company's absence reporting policy was an act of direct disability discrimination. We find that the reason the respondent did not provide him with a copy, was not because of his disability. It because they thought they were making a reasonable management request which he ought not to have queried.

Meeting on 6 May 2022

89. On Friday 6 May 2022 a meeting took place by Teams between the claimant, Ms Rigg, Mr Herriot the then CEO and Mr Paul Turner, Interim Operations Director. Ms Rigg described this as a meeting to discuss the claimant's poor performance and to give him a further opportunity to produce a medical certificate. She said the meeting started as a performance review meeting and "*ended up being a disciplinary hearing in view of the Claimant's deliberate refusal to provide a sick note and his behaviour during the meeting".*

90. The claimant complained that he was required to attend this meeting with three Directors and at short notice. The point was taken by the respondent that they were not all Directors. Mr Herriot explained that the respondent was a 1 Director company. We find that whilst there may have been a technical point as to Ms Rigg and Mr Turner not being Directors registered at Companies House, they were senior managers with the company. Sometimes a manager can be called 'Director' in their job title, even when they are not Directors in terms of company law. We find that it was reasonable for the claimant to consider that the senior people with whom he was asked to meet on 6 May, were "directors". In the cast list produced by the respondent, Mr Turner was described as the 'Interim Operations Director'.

91. We find that it was reasonable for the claimant to form the view that he was being asked to meet with three directors. It was a small company, with about 12 members of staff and these were three of the most senior, if not the most senior people in the organisation.

92. We find that when the claimant did not produce a medical certificate during that meeting on 6 May, the respondent turned it into a disciplinary hearing. The claimant had been told in Ms Rigg's email of 5 May at 10:57 (page 137) that he was now on notice that they were taking disciplinary action if he did not produce it by 12pm on 6 May and it would be a formal interview at 3pm. The claimant was not on notice that dismissal was a possible outcome of that meeting.

93. Ms Rigg accepts that in the meeting the claimant questioned whether the respondent was entitled under the terms of the policy to ask him for a

medical certificate. Ms Rigg saw this as "*beside the point"* (statement paragraph 25) because they were asking for it now and if he failed to provide it, disciplinary action would be taken.

94. We find that it would have been straightforward and helpful to have simply pointed the claimant to the provisions of the Handbook and the discretion built in to request a certificate. He was under the impression, consistent with advice given by ACAS, that if someone is off sick for 7 calendar days or less, they did not need to provide a fit note or medical evidence. As we have found above, Ms Rigg was not aware of the terms of the policy when she was dealing with this matter.

Disability related harassment

95. The claimant's case was that being required to attend this meeting with three directors was an act of disability related harassment. He also said it was an act of disability related harassment to be asked to produce this medical certification at short notice.

96. We find that the requirement for the claimant to attend the meeting on 6 May 2022 was to discuss their concerns about his performance and to obtain evidence as to the reason for his sickness absence in the week of 25 April. We find on objective assessment it did not amount to unwanted conduct to invite the claimant to this meeting which was for managerial reasons, but we also find that on a subjective basis the claimant regarded it as unwanted conduct. We find that the requirement to produce the certificate was disability related. We find that the requirement to attend the meeting was also disability related in that part of the purpose of the meeting was to investigate his sickness absence.

97. The invitation to the meeting and the request for the medical certificate was not with the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It was for the managerial reasons that they gave.

98. The claimant says that the requirement to attend the meeting with three directors and the requirement to produce the medical certificate had that effect. We find that it was not reasonable for it to have that effect for the following reasons: (i) the respondent had concerns about the claimant's performance and his recent absence and they were entitled to invite him to a meeting to discuss those concerns. Both Ms Rigg and Mr Turner had managerial responsibility for him so they had first-hand knowledge of his work. Mr Herriot was there because they said he knew about employment law. In those circumstances we find that it was not reasonable for the requirement to attend the meeting to have the proscribed effect. (ii) The claimant had been off sick and hospitalised and they wished to have some confirmation of the reason for his absence and consider what they may need to do in the light of that. It was not reasonable for the request to produce the certificate to have had that effect.

Did the claimant do a protected act in the 6 May 2022 meeting?

99. The claimant's case was that in this Teams meeting he said that there had been a hostile environment in the meeting and that he was being treated unfairly in relation to his disability. He dealt with that meeting in paragraph 21 of his witness statement. The account he gave of what he said was: *"I explained on the call again, that I wanted to self-certify as I was still within that time period where I was able to according to Acas"* and "*I offered to yield in the event that Sally sends me a copy of the Monsas policy*". There was nothing in his witness statement to the effect that he said he was being treated unfairly in relation to his disability.

100. The claimant was asked in cross-examination as to there being a hostile environment in the meeting and that he was being treated unfairly in relation to his disability, was something he felt rather than something that he raised? He replied: "*Yes, that's fair".* We find that the claimant did not do a protected act in that meeting. It was something he felt, not something he said.

A further opportunity to produce the medical certificate

101. The claimant was given a further opportunity, until Monday 9 May, to provide a medical certificate in respect of his absence.

102. At no point did the claimant produce a medical certificate. In evidence he said that he would have been happy to do so if he had known that it was a fair and lawful request. He said that because he was not given confirmation of this, he did not produce it. He continued to ask for the details of the policy.

The decision to dismiss

103. No further meeting or discussion took place with the claimant before the decision to dismiss was made. The decision maker was Mr Herriot. He confirmed that it was ultimately his decision and we find that it was his decision following discussions with Ms Rigg and Mr Turner. He asked Ms Rigg to dismiss the claimant.

104. Mr Herriot said that he could not recall when the decision was made, as to whether it was before or after the meeting on 6 May. In paragraph 14 of his statement he said that when the claimant was absent from work and then refused to provide evidence for the absence, it would not have been a problem if the claimant had not built up a pattern of behaviour beforehand of being "*unreliable and shirking work*". He said that he failure to produce the medical certificate was the "*straw that broke the camel's back".*

105. The dismissal letter was sent to the claimant on 10 May 2023 by Ms Rigg. The reason for dismissal was given as follows:

> *"Since Tuesday 26 April 2022, we have not heard regularly from you and it appears as though you have not logged into the Company's computer system during the working hours defined in your contract. We have contacted you several times to enquire about your situation and you have failed to respond.*
> *It is not acceptable for you to fail to attend work in this way, to fail to communicate your whereabouts and your situation with us and to fail to respond to our messages."*

106. The letter went on to quote the provisions of the claimant's contract of employment as to a 'Duties' and 'Termination Without Notice' (set out above) and concluded in terms of the reason for dismissal:

> *"In failing to attend work since 26 April 2022 without notifying us and in failing to respond to our enquiries, we consider that you have failed to comply with [quoted clauses of contract], we are entitled to terminate the Contract without notice. We are therefore informing you of our intention to do so."*

107. No right of appeal was given despite a right of appeal being afforded in the Employee Handbook (page 67).

The claimant's comparator Valentine Attew

108. The claimant's comparator for his direct discrimination claim was Ms Valentine Attew, an Analyst in Operations and Compliance. In the bundle we saw an undated message from Ms Millward saying: "*V messaged me just now to say she has food poisoning so she's just trying to sleep it off and will log on later if she feels better".* Mr Bird replied "*OK ta*". The claimant raised this in comparison because he says Ms Attew was not required to submit a medical certificate.

109. Ms Rigg said that the reason they asked the claimant to submit a medical certificate was because he frequently failed to log in or answer emails in the months before he went off sick and was then absent for over a week without notifying managers. She said in her witness statement that they thought he had decided to leave the respondent and work full time in his "*other job*".

110. We find on the respondent's evidence that Ms Attew was only absent for one day. The claimant accepted in submissions that his absence was longer than hers, but he thought he was subjected to harsher treatment.

111. We find that Ms Attew was only off sick for 1 day and there was no evidence that she was hospitalised. We find that she was not hospitalised. We find that there were material differences between the claimant's and Ms Attew's cases such that she was not a suitable comparator. We find that the claimant was not treated less favourably than his comparator Ms Attew because of the difference in their circumstances. The respondent's evidence was that prior to the claimant's absence, they had never had

anyone off sick for more than a couple of days.

112. We have set out above the reasons why the claimant was required to attend the meeting on 6 May 2022 with three directors to explain his absence. A discussion of his absence was not the only reason for that meeting, it was also to discuss their concerns about his performance. We have made findings as to why three people were there, 2 had managerial responsibilities for him and were in a position to discuss his work, from their first hand knowledge and they considered that Mr Herriot had knowledge of employment law. The meeting was at short notice but we find that the short notice was not because of the claimant's disability but because of the concerns they wished to resolve. The claimant did not ask for a postponement of that meeting.

113. We have made findings below on the holiday pay issue. We have found below that the holiday pay claim has been satisfied by the payment made to him on termination of employment. We find no less favourable treatment.

114. We have made findings below on the notice pay issue. There was no evidence of any failure to pay notice pay to Ms Attew so we find that the claimant did not meet the first stage of the burden of proof in relation to notice pay.

115. We have made findings below on the reason for dismissal. The claimant's comparator Ms Attew was not dismissed so the claimant did not pass the first stage of the burden of proof. We find below that the reason for dismissal was the claimant's absence and the related request for medical certification with which the claimant did not comply. The reason for dismissal was not because the claimant had anaphylaxis or asthma.

<u>Discrimination arising from disability</u>

116. The claimant relied on his absence as arising from his disability which he says was causative of three acts of unfavourable treatment. These were:

    a. Being required to produce medical certification for absence when other colleagues were not so required.
    b. Being required to attend a meeting, at short notice, with 3 Directors, to explain his absence.
    c. Being dismissed.

117. The respondent accepted (submissions paragraph 81) that the claimant's absence arose in consequence of his disability.

118. It was not in dispute that the claimant was asked to produce medical certification for his absence when he says others were not required to do so. Although the claimant made the comparison, in terms of other colleagues not being so required – this was a company where no-one had ever been off sick for more than a couple of days. A comparison was not

necessary under this head of claim.

119. The respondent argued that requiring a medical certificate was not unfavourable treatment. We find that it was unfavourable treatment because it was requested without informing the claimant that they had the right to ask for it. It is widely known and accepted practice in the UK that self-certification is for seven days, the claimant knew this, he had checked it via ACAS and the respondent did not explain the company policy to him.

120. Although we find that the request for the medical certificate was because of the claimant's absence, we have considered whether the request was a proportionate means of achieving a legitimate aim. We find that it was a proportionate means of achieving the legitimate aims of (a) maintaining satisfactory levels of attendance, (b) ensuring that staff were absent for legitimate reasons and that they had the correct information to safeguard staff and/or make adjustments and (c) dealing with staff absences in an appropriate manner.

121. The respondent had some doubts about the genuineness of the claimant's sickness absence and they wished to investigate this, they wished to maintain a satisfactory level of attendance on his part which we find to be a legitimate aim and they needed medical information in order to manage the situation appropriately. It was not disproportionate to seek a medical certificate for this purpose.

122. It is not in dispute that the claimant was required to attend a meeting, at short notice to explain his absence. This was unfavourable treatment because it was a short notice disciplinary hearing and it did not comply with the respondent's own disciplinary rules. It arose from his absence.

123. We have considered whether the request to attend this meeting was a proportionate means of achieving a legitimate aim. We find that it was a proportionate means of achieving the legitimate aims of (a) maintaining satisfactory levels of attendance, (b) ensuring that staff were absent for legitimate reasons and that they had the correct information to safeguard staff and/or make adjustments and (c) dealing with staff absences in an appropriate manner (this is a shortened version of the respondent's legitimate aim (c).

124. Whilst we find that it would have been a proportionate means of achieving the respondent's legitimate aims if they had just asked the claimant to attend an investigatory meeting, we find that it was not proportionate to turn that meeting into a disciplinary hearing with none of the employee safeguards set out in their Employee Handbook (pages 65 and 66). There was no letter setting out the allegations he faced or the possible consequences of the meeting, he was not given time to prepare for the meeting and he was not afforded his right to be accompanied. The claimant had no idea that a possible outcome of that meeting might be his dismissal. It was not enough for Ms Rigg to simply say in her email of 5 May he was now on notice that they were taking disciplinary action.

125. The respondent relied on the Handbook in terms of their requirements of the claimant on medical certification, yet failed to follow the procedural safeguards in the Handbook around this meeting. This was unfavourable treatment because of the claimant's absence.

126. It is not in dispute that the claimant was dismissed and that this was unfavourable treatment.

127. We have considered what was the reason for dismissal and whether it was because of the claimant's absence, being something arising from his disability. The respondent submitted that the claimant was dismissed for "*failing to comply with a reasonable management instruction, after a period of poor work performance and not being contactable".*

128. The following reasons were given in the dismissal letter:

> *"It is not acceptable for you to fail to attend work in this way, to fail to communicate your whereabouts and your situation with us and to fail to respond to our messages."*
>
> *"In failing to attend work since 26 April 2022 without notifying us and in failing to respond to our enquiries, we consider that you have failed to comply with….[terms of contract]…"*
>
> *(our underlining)*

129. Ms Rigg was the witness who set out the reasons for dismissal at paragraph 34 of her statement as "*the Claimant's repeated failure to provide a medical certificate to prove the reason for his absence and for his failure to attend work from Tuesday 26 April without proper explanation*" (again our underlining).

130. We find that it was the claimant's absence and their related request for medical certification that formed the reason for dismissal. It was not performance related because the dismissal letter and Ms Rigg's statement did not say that it was. We find that had the claimant not been absent from Monday 25 to Friday 29 April 2022, the respondent would not have dismissed him on 10 May for performance reasons, particularly when this had never been addressed with him. It also had nothing to do with the claimant not being contactable. We have also found that he did not fail to notify them of his sickness absence.

131. As to knowledge of disability Ms Rigg said in evidence that she was aware of the claimant's nut allergy "*around 28th or 29th April".* Mr Herriot was the dismissing officer. In his witness statement he denied knowledge of the claimant's disability (paragraph 15). In oral evidence he was vague on the point and said he could not remember when he became aware of the claimant's allergy and said it "*could have been June 2022*" when the claim was made.

132. Mr Herriot took ultimate responsibility for the decision to dismiss, but we find that it was based on discussions between Ms Rigg, Mr Turner and himself (see Ms Rigg's statement paragraph 34). We find that all relevant matters were discussed and aired between them, including what they knew about the medical condition. We find on a balance of probabilities Mr Herriot had knowledge of the claimant's disability when he made the decision to dismiss.

133. We have taken into account the fact that the respondent relied on other reasons in addition to the absence. We find that the claimant's absence had a significant influence on decision to dismiss.

134. Was the dismissal a proportionate means of achieving the respondent's stated legitimate aims? We find that it was not, particularly in the light of the respondent's Handbook. There were lesser and more proportionate sanctions available to them to achieve those means. Instead, they moved to summary dismissal without an investigation, held a hearing at which the claimant did not know the charges or possible consequences in advance and he was not given time to prepare or be accompanied if he had wished.

135. We have made findings below on the notice pay claim that this was not an act of gross misconduct and we consider that a warning might have been justified, but dismissal was not a proportionate means of achieving their aims.

<u>The reasonable adjustments claim</u>

136. There was one PCP relied upon that of being required to produce medical certification at short notice in respect an absence of more than 3 days. The respondent accepted that asking the claimant for a medical certificate could amount to a PCP and that it was applied to the claimant. We find that it did amount to a PCP.

137. Did it put the claimant at a substantial disadvantage of being more likely to be put at risk of dismissal if he did not comply with the PCP? We find that being asked to produce a medical certificate for less than 7 days sickness is something that the respondent could apply to any employee, disabled or not, under the terms of the discretion under their policy. It is disadvantageous to any such employee because of the difficulty they are likely to encounter in asking a GP to certify an absence of less than 7 days. We find that the claimant was not put at a substantial disadvantage compared to persons who are not disabled.

138. The duty to make reasonable adjustments did not arise because the claimant did not prove substantial disadvantage in comparison to non-disabled persons.

<u>The indirect discrimination claim</u>

139. The same PCP was relied upon as for the reasonable adjustments claim; that of being required to produce medical certification at short notice in respect an absence of more than 3 days. Again, the respondent accepted that asking the claimant for a medical certificate could amount to a PCP and that it was applied to the claimant. We find that it did amount to a PCP.

140. The respondent also accepted that the PCP would have applied to non-disabled persons.

141. The claimant gave no evidence as to whether the PCP put persons with his disabilities at a particular disadvantage when compared to people who do not have those disabilities. He did not cover this in his witness statement or in any oral evidence. His case was that as a disabled person he was more likely to have absences from work of more than 3 days due to the severity of his condition and therefore was more likely to be put at risk of dismissal if he did not comply with the PCP.

142. We had no evidence to show that people with asthma were more likely to have absences from work of more than three days. The claimant did not have a single day off during his employment for asthma.

143. We had no evidence to show that people with anaphylaxis are more likely to have absences from work of more than three days. Whilst we have found that the claimant had more than 3 days off with this condition in April 2022, we had nothing to help us with the position as to the likelihood of others with anaphylaxis being more likely to have absences from work of more than three days.

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144. The claimant did not produce evidence to assist the tribunal with the question of group disadvantage for those with anaphylaxis or those with asthma. There was no medical evidence or statistics to show us how persons with those conditions were affected or the likelihood of the amount of time off work they might need.

145. We find that the claimant did not show facts from which we could decide in the absence of any other explanation that people with the claimant's disabilities were put at the particular disadvantage of being put at risk of dismissal by being required to produce a medical certificate. The burden of proof did not pass to the respondent.

<u>Notice pay – did the claimant commit an act of gross misconduct?</u>

146. We have considered whether the claimant committed an act of gross misconduct.

147. The reason for dismissal given in the dismissal letter was the failure to attend work and communicate his whereabouts and the failure to respond to the respondent's messages. We have found above that the claimant did not fail to communicate his whereabouts. He reported sick on 25 April 2022 and this information came to Ms Rigg's attention on the same day.

The few hours delay in reporting on Monday 25 April 2022 was because he was unwell and on a lot of medication.

148. We have considered whether the claimant committed a repudiatory breach of his contract of employment such that the respondent could terminate the contract without notice. The question for us was: did he commit an act of gross misconduct?

149. In submissions (paragraph 119) the respondent relied upon the following: they said the claimant was (i) under performing, (ii) he was not contactable, (iii) he was not doing pieces of work, (iv) he was taking far longer than other people to do his work, (v) he did not follow the sickness absence policy and (vi) he refused a reasonable management instruction.

150. The respondent also relied on alleged aggressive conduct on the part of the claimant during the meeting on 6 May 2022. When asked in what way his conduct was aggressive Ms Rigg said: "*Your body posture, you sat back with your arms folded and point blank said [of the medical certificate] I am not going to give it to you*". The meeting was remote, by Teams and not in person, so we find that no-one was under any threat in that meeting. Sitting back with folded arms could be regarded as uncooperative and possibly defiant but we find it was not aggressive.

151. We find that points (i), (iii) and (iv) above are all potential performance issues. They are not misconduct issues. The respondent's witnesses admitted that the claimant had not been closely managed because they were all busy with the FCA investigation. We find that any issues that they had with any under-performance did not amount to acts of gross misconduct, either individually or collectively. We make no finding as to whether the claimant was underperforming. We find that this was the respondent's perception, but they had not taken any steps to manage or address it.

152. On issue (v) we have found against the respondent as we have found that the claimant did follow the sickness absence policy in terms of his initial sickness reporting.

153. This leaves the allegations that the claimant was not contactable and that he did not comply with a reasonable management instruction. We are unable to find that the claimant was not contactable. He was contactable. For example they contacted him to attend a meeting on 6 May and he attended. He did not fail to contact them about his sickness absence. He may have been less contactable than they would have liked and this may have been a matter they needed to address in conjunction with performance, but it comes nowhere near the threshold of gross misconduct.

154. We have considered whether his failure to provide a medical certificate was an act of gross misconduct. We find that it was not. He had been asked to provide this in circumstances where we have found that he was

unaware of the sickness absence policy. He was under a reasonably held impression that he could self-certify for an absence lasting less than 7 calendar days and we have found that his sickness until Friday 29 April 2022, under 7 days.

155. If the Employee Handbook was as accessible as they said, it would have been the easiest step imaginable for Ms Rigg to say, "*It's on Sharepoint, you can look it up".*

156. As it was, the respondent had a right under the policy to request a certificate for periods of less than 7 days. It would have been a more reasonable management instruction if they had taken him to the terms of the policy. The claimant was not aware of it and it was not well-known in the business.

157. Even if his refusal could be considered a failure to comply with a reasonable management instruction, it did not amount to gross misconduct. Had the claimant been aware of the policy, we find that it would have been an act of misconduct, but not gross misconduct, to fail to produce the certificate without a good reason. In evidence he said: "*I was happy to provide a medical certificate as long as I knew it was a fair and lawful request and because I wasn't given confirmation of that, I didn't produce it".* He did not say in his statement or in oral evidence that he failed to produce it because he had difficulty in obtaining it from the hospital or his GP. He said this in submissions but not in evidence.

158. We find that had he known it was a request consistent with the policy it would have amounted to misconduct, but not gross misconduct, to fail to produce it within a few days of the request. It would not at that stage have amounted to gross misconduct without more. The claimant should have been made fully aware of the policy and told that the failure to comply, without good reason, would be regarded as gross misconduct.

159. In the circumstances, where the respondent had not brought the policy to the claimant's attention, we find that he did not commit gross misconduct.

<u>The decision to wind up the respondent</u>

160. In mid-May 2022 a decision was made to wind up the respondent business.

161. We saw an email from Mr Herriot to all staff dated 7 March 2022 in which he said: "*Given the recent upheaval and business changes I think a get together for a quick over view of where we are going, and what we are going to be doing would be in order".* Staff were invited to a meeting on 10 March at which Mr Herriot was to give a brief outline of the plan going forward. The claimant was not available to attend that meeting. He said that following a chat with Mr Turner on 6 March, he already had a some insight into what was going on.

162. All the employees save for those involved in winding up the company, were dismissed at the end of May by reason of redundancy. The claimant accepted in evidence that if he had not been dismissed on 10 May 2022, he would probably have been dismissed at the end of May along with everyone else. We find that he would have been dismissed at the end of May along with everyone else.

Holiday pay

163. The claimant's holiday entitlement was 23 days in the holiday year, in addition to English bank holidays. This was set out in the Schedule to his contract of employment (page 119).

164. The holiday year is stated in the Handbook (page 83) as "*MON's holiday year runs from the day to join for 12 months*". The claimant's contract of employment at clause 12.1 gave the holiday year as the calendar year. Mr Herriot in evidence said he accepted that the leave year was the calendar year if this was what was said in the claimant's contract. We find that the leave year was the calendar year as per the claimant's contract.

165. The claimant agreed that he did not work on any of the bank holidays during his employment.

166. The claimant accepted that he took the following dates in December 2021 as annual leave: 16th, 17th, 20th, 21st, 22nd, 23rd, 24th and 29th. He also accepted that he took half a day on 22 February 2022 and that he had 4 May 2022 as holiday for his graduation ceremony.

167. When the claimant's employment terminated on 10 May 2022, he had accrued annual leave for 5.5 months of the leave year. In round terms, accrual of the 23 days (other than bank holidays which he took) was at the rate of 2 days per month. This means he had accrued 11 days and taken 1.5 days. We find that he had 9.5 days accrued annual leave on termination of employment.

168. The claimant sought to claim 22.5 days leave for 2022. This failed to take account of the fact that his employment terminated on 10 May 2022 and he did not continue to accrue leave after that date. He also had not taken into account the day's leave on 4 May 2022.

169. We saw the claimant's final payslip dated 21 May 2022 (page 151) which showed that he was paid his full basic pay for the month of May, in the gross sum of £2,166.67. It made no reference to accrued holiday pay.

170. The claimant was overpaid his basic salary for the month of May 2022 because his employment terminated with immediate effect on 10 May 2022. He was paid for 14 working days after the end of his contract. To the extent that there was any failure to pay holiday pay, credit must be given for this overpayment. We find that the holiday pay claim is therefore satisfied and the claimant is still in credit by 4.5 days.

The relevant law

Direct discrimination

171. Direct discrimination is defined in section 13(1) of the Equality Act 2010 which provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

172. It is a two-stage process taking account of the burden of proof provisions. Firstly the claimant has to show facts from which an inference of discrimination can be drawn. If he/she does show such facts, the tribunal must then consider the explanation from the respondent. A comparator, actual or hypothetical is needed.

173. Section 23 Equality Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case

Indirect disability discrimination – section 19 Equality Act

174. Section 19 Equality Act provides that a person discriminates if it applies a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic, in this case disability.

175. A PCP is discriminatory if the employer applies or would apply it to persons who do not share the claimant's disability and it puts persons with the claimant's disability at a particular disadvantage when compared to people who do not have that disability. It must also put the claimant at that particular disadvantage.

176. There is a defence if the respondent can show that the application of the PCP is a proportionate means of achieving a legitimate aim.

Discrimination arising from disability

177. Discrimination arising from disability is found in section 15 Equality Act 2010:

> *(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,*
>
> *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.*

178. The approach to be taken in section 15 claims is set out in ***Pnaiser v***

NHS England 2016 IRLR 170 (EAT) by Simler P at paragraph 31. This case also addresses the burden of proof in section 15 cases. Under section 136, once a claimant has proved facts from which a tribunal could conclude that an unlawful act of discrimination has taken place, the burden shifts to the respondent to provide a non-discriminatory explanation. In order to prove a prima facie case of discrimination and shift the burden to the employer, the claimant needs to show:

a. that he or she has been subjected to unfavourable treatment;

b. that he or she is disabled and that the employer had actual or constructive knowledge of this;

c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment;

d. some evidence from which it can be inferred that the 'something' was the reason for the treatment.

179. If the prima facie case is established and the burden shifts, the employer can defeat the claim by proving either:

a. that the reason or reasons for the unfavourable treatment was not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability; or

b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

180. The something that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant or more than trivial influence on the unfavourable treatment and so amount to an effective reason for or cause of it (Judgment paragraph 31b).

181. A disabled person is not subjected to unfavourable treatment within the meaning of section 15 simply because he thinks he should have been treated better - see ***Trustees of Swansea University Pension & Assurance Scheme v Williams 2017 IRLR 882 CA*** – (paragraph 43).

182. In terms of the objective justification defence, there has to be a balancing of the needs of the employer against the discriminatory effect of the treatment - ***Department for Work and Pensions v Boyers 2022 IRLR 741.*** In that case the EAT said (at paragraph 41):

"the ET must undertake the balancing exercise required by s 15(1)(b) EqA by focusing on the outcome – the dismissal itself – but it remains open to the ET to weigh in the balance the procedure by which that outcome was achieved. It will be more difficult for a respondent to show that it acted proportionately when dismissing a disabled employee if, as happened in this case, it has led no evidence on how

its decision-makers thought their actions would serve the legitimate aims relied upon. It will also be more difficult for a respondent to show that it acted proportionately when dismissing a disabled employee if it has led no evidence on how, as part of the process culminating in dismissal, its decision-makers considered other, less discriminatory, alternatives to dismissal".

The duty to make reasonable adjustments

183. The duty to make reasonable adjustments is found under section 20 EqA. They duty comprises three requirements. Subsection (3) is as follows:

> *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.*

184. The EAT in ***Royal Bank of Scotland v Ashton 2011 ICR 632*** held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment.

185. This case was considered by the Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions 2015 EWCA Civ*** on the comparison issue. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied to equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of her disability.

186. Under section 21 of the Equality Act a failure to comply with section 20 is a failure to make reasonable adjustments. Section 21(2) provides that "*A discriminates against a disabled person if A fails to comply with that duty in relation to that disabled person".*

187. In deciding whether an employer has failed to make reasonable adjustments, as set out by the EAT in ***Environment Agency v Rowan 2007 IRLR 20,*** the tribunal must identify:

> *(a) the provision, criterion or practice applied by or on behalf of an employer, or;*
>
> *(b) the physical feature of premises occupied by the employer;*
>
> *(c) the identity of non-disabled comparators (where appropriate); and*
>
> *(d) the nature and extent of the substantial disadvantage suffered by the claimant.*

188. On the burden of proof, the EAT in ***Project Management Institute v Latif 2007 IRLR 579*** (Elias P as he then was) held that the claimant must not only establish that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. It is necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.

189. In relation to knowledge of disability, knowledge of the disadvantage and reasonable adjustments Schedule 8 paragraph 20(1)(b) of the Equality Act provides:

> *(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know -*
> *…..that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

190. In ***Newham Sixth Form College v Saunders 2014 EWCA Civ 734*** *the Court of Appeal (*Laws LJ) said in relation to knowledge of the substantial disadvantage: *''[the] nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP*" (judgment paragraph 14).

<u>Disability related harassment</u>

191. Section 26 of the Equality Act 2010 defines harassment under the Act as follows:

> *(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

(a) the perception of B;

(b) the other circumstances of the case;

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

192. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic? The EAT also said (Underhill P) that a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

193. In ***Grant v HM Land Registry 2011 IRLR 748*** the CA (Elias LJ) said:

Furthermore, even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. (para 47)

Victimisation

194. Section 27 Equality Act provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act or because they believe that the person may do a protected act.

195. 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.

196. It is for the claimant to prove that he or she did the protected acts relied upon before the burden can pass to the respondent - see ***Ayodele v Citylink Ltd 2018 ICR 748 (CA)***: "*Before a tribunal can start making an assessment, the claimant has got to start the case, otherwise there is nothing for the respondent to address and nothing for the tribunal to assess.*"

The burden of proof

197. Section 136 of the Equality Act deals with the burden of proof and provides that 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.

198. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

199. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

200. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "*could conclude*" means that "*a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination*".

201. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

202. More recently in ***Efobi v Royal Mail Group Ltd 2021 IRLR 811*** the Supreme Court confirmed the approach in ***Igen v Wong*** and ***Madarassy***.

203. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

Conclusions

Direct disability discrimination

204. The claimant did not show facts from which we could conclude in the absence of any other explanation that the respondent treated him less favourably than his comparator Ms Attew because of his anaphylaxis or asthma. Our finding is that at no time did he disclose his asthma to the respondent so they did not know about it.

205. We found that the reason the claimant was asked for a medical certificate was due to the length of his absence and there was no comparator within the company. The burden of proof did not pass to the respondent.

206. We found that there were managerial reasons for the calling of the meeting on 6 May 2022 and it was not because of disability.

207. In relation to the failure to provide the sickness policy, our finding was that this was not because of disability but because the respondent thought they were making a reasonable management request which the claimant ought not to have queried

208. In terms of the holiday pay claim, we have found this claim to be satisfied so this allegation failed on its facts.

209. In terms of the reason for dismissal, our finding is that he was not dismissed because he was disabled.

210. The claim for direct disability discrimination fails and is dismissed.

Indirect disability discrimination

211. The claimant did not produce any evidence to prove group disadvantage so the burden of proof did not pass to the respondent.

212. The claim for indirect disability discrimination fails and is dismissed.

Discrimination arising from disability

213. We have found that the claimant's absence which arose from his disability of anaphylaxis was a significant part of the reason for his dismissal such that the claim for discrimination arising from disability succeeds.

Reasonable adjustments

214. We have found that the PCP relied upon did not put the claimant at a substantial disadvantage in comparison with non-disabled persons so that the claim for failure to make reasonable adjustments fails and is dismissed.

Victimisation

215. We have found above that the claimant did not do the protected act that he relied upon in the meeting of 6 May 2022. The claim for victimisation therefore fails as there was no protected act. The burden of proof did not pass to the respondent.

216. The victimisation claim fails and is dismissed.

Disability related harassment

217. We have found that the factual events took place as relied upon by the claimant but that it was not disability related harassment because it was not reasonable in all the circumstances for the conduct to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

218. The claim for disability related harassment fails and is dismissed.

Notice pay

219. We have found above that the claimant did not commit gross misconduct by failing to produce a medical certificate within 10 days of his recovery, when he was unaware of the terms of the respondent's sickness policy. He did not commit a repudiatory breach of contract and the respondent was not entitled to dismiss him without notice.

220. The breach of contract claim for notice pay succeeds. The claimant is entitled to his contractual three months' notice.

Holiday pay

221. We have found that the claim for holiday pay has been satisfied so that the claim for holiday pay is dismissed.

_____

Employment Judge Elliott
Date: 11 September 2023

Judgment sent to the parties and entered in the Register on:06/10/2023

_____ for the Tribunal