EMPLOYMENT TRIBUNALS

Claimant: Mr Hamza Ibrahim

Respondent: Stanmore Implants Worldwide Ltd

Heard at: Watford Employment Tribunal
On: 3,4 July 2023
5-6 July 2023 (deliberations and in chambers)

Before: Employment Judge Young
Members: Mr D Bean
Mr P Hough

Representation
Claimant: In person
Respondent: Mr T Perry (Counsel)

JUDGMENT having been sent to the parties on 14 August 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant was employed as a Stock Technician by the Respondent a company that manufactures medical devices, implants, components and supplies from 1 June 2016 until his dismissal for gross misconduct on 25 May 2022. The Claimant contacted ACAS on 1 June 2022, a certificate was sent on 12 July 2022. On 1 August 2022, the Claimant presented his claims for ordinary unfair dismissal, a redundancy payment and age discrimination. The Respondent denies the Claimant's claim. The Respondent says the Claimant had a poor attendance record and was absent without leave from 28 April to 16 May 2022.

The Hearing and Evidence

2. The hearing was in person over a period of 4 days. Evidence was heard on days 1 and 2. We were provided with a 480 paginated bundle, a chronology & cast list from the Respondent and a chronology from the Claimant. The Claimant and Mr H Powell, a former employee of the Respondent and colleague of the Claimant's gave evidence. The Claimant's statement included a 2 page document and the Claimant's claim form. We heard from Mr Stuart Roberts (Manager of Elstree Site), Mr Gavin Mellor (European Commercial Director) and Mr Cian Crowley (Director of Personalised Solutions) on behalf of the Respondent.

The Claims and Issues

3. The Tribunal pointed out that the Claimant had mentioned harassment in his claim form though it did not form part of the proposed list of issues as contained in Employment Judge Maxwell's 9 March 2023 order. The Respondent conceded that a claim for harassment was mentioned in the claim form, but that the claim was out of time. The Claimant was asked when the claim was he said he couldn't remember but he thought it was 2020 2021. The Tribunal asked whether he meant Winter 2020 beginning of 2021. The Claimant said he couldn't say.

4. The Claimant was bringing a claim for ordinary unfair dismissal, harassment on the grounds of age and direct discrimination on the grounds of age. The Claimant wanted to bring a victimisation claim. However, when asked to set out the protected act, the Claimant agreed that he was relying upon his email dated 30 May 2020 which set out his grounds of appeal. As the grounds of appeal did not mention the Claimant's age or the Equality Act 2010, we asked the Claimant if he had mentioned it in the appeal hearing. The Claimant conceded he had not. The Claimant had also ticked the box for other payments but had not particularised those other payments other than losses following from the dismissal including notice pay as set out in his original schedule of loss **[20-21]** and up to date schedule of loss **[432]**. The Claimant agreed he was not bringing a claim for dismissal on the grounds of age or victimisation.

5. The issues were agreed as follows:

1. Time limits

1.1 Whether the Claimant's discrimination claim was presented within the applicable statutory time limit.

2. Unfair dismissal

2.1 Was the Claimant dismissed?

2.2 What was the reason or principal reason for dismissal?

2.3 The Respondent says the reason was conduct or alternatively some other substantial reason ("SOSR") because of the Claimant failing to comply with the Respondent's sickness absence reporting procedure;

2.4 The Claimant says the reason he was dismissed was to avoid the Respondent having to make a redundancy payment to him.

2.5 The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct and for this reason dismissed him.

2.6 If the reason was misconduct or SOSR, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

2.6.1 there were reasonable grounds for that belief;

2.6.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;

2.6.3 the Respondent otherwise acted in a procedurally fair manner;

2.6.4 dismissal was within the range of reasonable responses.

3. Direct discrimination (Equality Act 2010 section 13)

3.1 The Claimant's age group is 30s and comparison is made with people in their 60s.

3.2 Did the Respondent do the following things:
3.2.1 Give the Claimant more work to do than older colleagues.

3.3 Did the Respondent's treatment amount to a detriment?

3.4 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated (a hypothetical comparator).

3.5 If so, was it because of age?

3.6 Was the treatment a proportionate means of achieving a legitimate aim?

The Respondent says that its aims were:

3.6.1 the efficient distribution of tasks amongst staff

3.7 The Tribunal will decide in particular:

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

3.7.2 could something less discriminatory have been done instead;

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

4. Redundancy

4.1 Whether the Claimant was dismissed for the reason of redundancy.

4.2 Whether the Claimant is entitled to a redundancy payment.

5. Remedy

5.1 To what remedy or remedies is the Claimant entitled.

6. Harassment related to Age (Equality Act 2010 section 26)

6.1 Did the respondent do the following things:

6.2 Follow the Claimant into the bathroom by team leader and verbally abuse him to get to work and not use the toilet

6.3 If so, was that unwanted conduct?

6.4 Did it relate to the Claimant's age?

6.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.6 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Findings of fact

7. The following findings of fact are made on a balance of probabilities. All numbers in square brackets are a reference to the bundle page numbers unless otherwise indicated.

8. The Respondent has 80-94 employees and has multiple sites. The Claimant worked at the Elstree site. The Claimant stated on his claim form that his employment started on 3 May 2016 and his employment ended on 25 May 2022. The Respondent puts forward slightly different dates of employment, of 1 June 2016 to 25 May 2022. The Claimant's contract of employment states his continuous date of employment as 1 June 2016 [66]. The Claimant signed that contract of employment **[71]**. We find that the Claimant's employment continuous date of employment commenced on 1 June 2016.

9. The Respondent had an internal HR resource. The Claimant had 20 days of sickness from 2017 until the end of 2018. Although, the Claimant's absences in 2018 would have triggered the Respondent's absence review policy and on 4 March 2018, the Claimant was told that he would not be paid if he did not inform his manager, the Respondent did not trigger its sickness absence procedure. However, in October 2019 the Respondent did trigger its absence review policy. The Respondent said that this was because it was becoming difficult to plan work, because of the Claimant's intermittent absences. The Claimant says the reason that the Respondent started the formal process was because Trevor Issacs, Distribution Team Leader became his manager. We find that there was clearly an issue with the Claimant following the sickness policy and the Claimant's absence before 2019 and so we prefer the Respondent's explanation.

Claimant's history of absences

10. Consequently, following an investigation and a disciplinary hearing, on 2 December 2019 the Claimant received a verbal warning to remain active for 6 months. The Claimant subsequently had another two periods of absence in December 2019. The Claimant was invited to attend an investigation meeting in relation to these absences on 13 January 2020. However, on the morning of 13 January 2020, the Claimant booked holiday for that day without authorisation. A disciplinary hearing was held on 30 January 2020 adding the unauthorised absence as an allegation. At that meeting the Claimant was asked if he had read the absence policy and whether he was aware of it and if the Claimant wanted time to read it. The Claimant responded in the affirmative. The Claimant was then asked having reviewed the policy do you understand why the company may view the Claimant's conduct as misconduct. The Claimant responded yes. On 31 January 2020, the Claimant was given a first written warning to remain active for 12 months. The Claimant was off work for a further 6 days in 2020 and was given a final written warning to remain active for 12 months on 16 December 2020.

11. In respect of absences of 29 May, 31 July 2018, 1 October, 7 November 2019 the Claimant complied with the absence review policy by calling the Respondent within 2 hours of his start time. However, we note that there were

examples in the bundle where the Claimant did not comply with the absence review policy for example the Claimant did not provide a sick note within 4 days of absence on 20 August 2019.

12. From 2019 the Claimant's manager was Mr Trevor Isaacs. The Claimant worked in a team which included Mr Powell who was in his early 20's at the time he worked for the Respondent and Mr Keith Boddy who was in the Claimant's team and was in his 60's at the time of the Claimant's dismissal. Mr Powell left the team at the end of 2019. The Claimant was aged 32 at the time of his dismissal.

Claimant's absence from 28 April- 16 May 2022

13. The Respondent's sickness absence policy stated that *"…For each and every day of absence, unless this is covered by a Med3 certificate you need to contact your Line Manager.*

■ *The following information must be given - name, reason for absence (a brief description of the illness/nature of injury) together with the expected date of return, if possible.*

■ *Where the duration of sickness absence is not more than 7 calendar days, you are required to complete, on the day you return, a self certification form which is available from your Line Manager, or HR department. The completed form should be passed to your Line Manager. The completed form should be passed to your Line Manager."* **[46]**

14. On 28 April 2022, the Claimant text messaged his line manager, Mr Trevor Issacs, Distribution Team Leader to indicate he would not be attending work that day because he had a problem with his niece and his brother was supposed to pick her up, but he had got a bit of an issue **[219].** The Claimant suggested in evidence that following that text, he sent another text on 29 April 2020 providing further details of why he was off work. However, when questioned the Claimant could not say what was in the text and when the Claimant was requested to provide a copy of the text the Claimant said he could not find it, the Claimant said he was sent a copy of the text by the Respondent as he no longer had access to the mobile phone with the text. However, the Claimant did not provide a copy of this text and we find there was no such text. The Respondent responded to the Claimant's 28 April 2022, text stating *"why do you keep letting me down"* **[220]**.

15. The Claimant did not contact the Respondent at all on 29 April which was a working day. However, on 29 April 2022, Mr Mellor, European Commercial Director of the Respondent texted the Claimant "I expect you to be in work this consistent absenteeism is totally unacceptable! Gavin" The 2 May 2022 was a bank holiday and therefore a nonworking day for the Claimant. On 3 May 2022, the Claimant texted Mr Issacs and said *"I seeking professional help today this is now effect me mental health don't pressure me to be in today and Gavin aswell I will let you know what the outcome is. can pay me or not upto you".* Mr

Issacs replied *"ok"* an hour later **[220]**. *On 4 May 2022, Mr Mellor texts the Claimant to say "Hamza. I heard you are seeking health [sic] which is good news. Are you able to get a sick note from your GP please so we can support you as best as we can. Best Wishes Gavin*". **[416].** The Respondent did not hear from the Claimant on 5,6,9,10,11 May at all. On 12 May 2022, the Claimant sent an email to Mr Issacs **[p262]**. We find that Mr Issacs did receive this email contemporaneously to when it was sent. However, Mr Issacs did not see the email and therefore no action was taken in respect of it. We find that the email did not comply with the Respondent 's sickness absence policy as the policy required the Claimant to set out the reason for why the Claimant was absent with a with a brief description of the illness and or injury. The Claimant's email dated 12 May 2022 did not provide any reason for absence or description of the illness or injury at all. The Claimant made no contact at all with the Respondent from 13-16 May 2022. The Claimant came back to work on 17 May 2022. The Claimant did not provide a sick certificate to the Respondent on his return to explain his absences for the last week and a half.

Disciplinary Process

(a) Investigation

16. On 17 May 2022 the Respondent invited the Claimant to attend a investigation meeting scheduled for 18 May 2022 to be held by Mr Colin Luke, Inspection Team Leader. However, on 18 May the Claimant emailed the associate HR manager, Priya Angra to request that the investigation meeting be pushed back a day so that the Claimant could obtain "paperwork from his GP" which he said he was going after work on 18 May 2022 to pick up if it was ready.**[194]**. The investigation meeting took place on 19 May 2022, at which the Claimant presented to the investigator Mr Colin Luke with an unsigned sick note after the Claimant was asked "why did you not maintain contact with your manager when you were off work?" The Claimant responded, "I told Trevor I would let him know when I would be back." Mr Luke then asked, "so did you text him to let him know when you would be back?". The Claimant responded, "Yes I emailed him and he emailed me back on 11 May". We find that there was no evidence that Mr Issacs emailed the Claimant following receipt of an email from the Claimant in the period 29 April- 16 May 2022.

17. When the Claimant handed his sick note to Mr Luke he said *"the doc who was to sign me off hasn't signed it off. I have one that says May 3rd"*. There was significant dispute about whether this is what the Claimant said at the investigation meeting on 19 May 2022. The investigation notes were not signed by the Claimant. We find that the Claimant did say these things at the investigation meeting because in evidence the Claimant's version was wholly inconsistent. The Claimant said at one point in his evidence that he did show Mr Luke a sick note dated 3 May 2022. However, when it was pointed out to him that the sick note that Mr Luke saw was unsigned and dated 18 May 2022, the Claimant changed his story and said he just spoke to the Doctor on 3 May 2022. We accept Mr Robert's evidence that Mr Luke told him that the Claimant

did show Mr Luke an unsigned sick note dated 18 May 2022 as reflected in the investigation notes **[200]**. In the end the Claimant provided a signed sick note dated 20 May 2022 stating that the Claimant was assessed on 20 May as having "chronic fatigue" from 28 April 2022 to 16 May 2022.**[415]**. The Claimant also stated in the investigation meeting that he felt like they [the Respondent] "were harassing him so I changed my sim card". This ensured that the Respondent could not contact him by phone. But the Claimant said he could have been contacted by the Respondent by email. We accepted that the Respondent had tried on a number of occasions to contact the Claimant, but they had not been able to make contact because the Claimant took out his sim card from his phone. We note that in an interview with Mr Issacs he said he did phone the Claimant at 11:32 on 10 May and texted at 11:34.

(b) Disciplinary

18. On 23 May 2022, the Claimant was invited to attend a disciplinary hearing for 25 May 2022 **[228]**. The invitation also had with it the absence review policy which the Claimant received **[243]**. The invitation stated that the Claimant would be facing allegations of: absence without leave from 28 April- 16 May 2022 inclusive, wilful breach of the absence management policy, refusal to follow reasonable management instructions to maintain contact and a breakdown in trust. The letter informed the Claimant that the Respondent viewed the allegations as gross misconduct. The Respondent's disciplinary policy stated that unauthorised absence, refusal to follow management instructions amount to gross misconduct. The Claimant knew that unauthorised absence amounted to gross misconduct. The letter warned the Claimant that if the allegations were substantiated it could result in the Claimant's summary dismissal. The Claimant was also told that he would be permitted to put forward any mitigating factors which could affect the disciplinary sanction imposed. **[229]**

19. The Claimant's disciplinary hearing was heard by Mr Stuart Roberts, Manager of the Elstree site. At the disciplinary hearing on 25 May 2022, when the Claimant was asked what was the reason for his absence, the Claimant stated that he was depressed **[244]**. The Claimant did not make any mention of medication or therapy in respect of his depression. In the meeting the Claimant was told that he was sent the absence review policy on 24 November 2020, the Claimant said that he may have skimmed the policy **[243]**. The Claimant was asked about the different reasons he gave as the reason for his absence i.e., chronic fatigue and mental health. The Claimant responded, "*are they not linked?*" **[244]** The Claimant also said he now could not remember when he went to the doctors to be assessed. The Claimant's response to his lack of contact was *"I was trying to recuperate, I was not in a good headspace. I told him I needed some time. As soon as I knew something I told him. I can't say anything else."* **[244]**. The Claimant accepted that his managers needed to keep in contact with him regarding his wellbeing etc. **[245]**. The Claimant was also asked if he had read the absence review policy as he had indicated in the investigation meeting that he had not. The Claimant confirmed that he still had

not read the policy. But the Claimant did admit in evidence that he knew that unauthorised absence was gross misconduct, which we accepted.

20. Immediately, after the disciplinary hearing, the Claimant showed his 12 May 2022 email to Mr Roberts. Mr Roberts took a couple of hours to deliberate on the decision and consider the evidence. By letter dated 25 May 2022, the Claimant was dismissed by reason of gross misconduct. Before making his decision, Mr Roberts had a conversation with Mr Luke. The reasons set out by the Respondent for the dismissal was that they accepted that the Claimant had sent Mr Issacs an email on 12 May 2022, but that this email was not compliant with the Respondent's absence review policy. The Respondent also found that the lack of communication by the Claimant was the basis of the Claimant being absent without leave and this was gross misconduct. The Respondent considered that the Claimant wilfully failed to follow the absence review policy in what Mr Roberts described in his evidence as *"in any shape or form".* The Respondent did not believe that the Claimant had attended his GP before being invited to the investigation meeting on 17 May 2022 and that he deliberately refused to maintain contact with his line manager. The Respondent considered that the Claimant was in breach of trust because he had given contradictory reasons for his absence. Mr Roberts did not consider the Claimant's mental health in his reasons for dismissal and was not asked to by the Claimant at the disciplinary stage.

(c) Appeal

21. The Claimant appealed his dismissal by email on 30 May 2022 **[247]** on the grounds of harassment and bullying. The Claimant stated that there was a significant breach by his managers, and he was being punished for speaking up. He was being made to do 90% of the work and he was not allowed to use the bathroom at one point. The Claimant did not mention his mental health as a grounds of appeal. The appeal manager was Mr Cian Crowley, Director of Personalised Solutions. The appeal hearing took place on 27 June 2022 and was a complete rehearing with the appeal manager considering all the evidence that the disciplinary manager considered and any additional evidence that appeared since the disciplinary outcome as well as the grounds of appeal.

22. In the appeal the Claimant referred to witnesses Stephanie Ware and Robbie Blakely as evidencing his claims of unfair distribution of work and being prohibited from using the bathroom. When the Claimant was asked what the significant breaches were, he said they were in respect of being required to do 90% of the work and not being allowed to use the bathroom. For the first time the Claimant mentioned that the Respondent was trying to get him out of the door so that they would not have to give him a redundancy payment and that he wanted redundancy pay as an outcome to his appeal and not reinstatement. The Claimant admitted in the appeal meeting that he didn't know that not everyone was being made redundant. The Claimant accepted that he had not mentioned the allegation of harassment before the appeal meeting. We noted that the Claimant did not mention that the basis of his complaint of harassment was his age in the appeal meeting. In evidence when the Claimant was asked

when he was being asked to do the extra work. The Claimant admitted that it was because he was flexible and reliable. The Respondent agreed with this. We find that the Claimant was a hard worker, and he was flexible and reliable.

23. Following the appeal hearing, Mr Crowley interviewed Ms Ware on 1 July 2022 and Mr Blakey on 11 July 2022. Ms Ware confirmed that the workload was not distributed evenly between the Claimant and the other team member Keith Boddy. The Claimant a good worker and Keith was lazy. Mr Issacs took advantage of the Claimant's willingness to work hard and put pressure on the Claimant. Mr Issacs was regularly looking for the Claimant and would call and text the Claimant to find out where he was. Mr Blakely says he was there on an occasion when it looked like the Claimant was going to the toilet and then Mr Issacs came through and asked him where the Claimant was, a few seconds later they both walked back together. Mr Blakey did not say when this incident took place. Mr Blakey said that the Claimant and Mr Issacs had a good relationship.

24. By letter dated 3 August 2022, the decision to dismiss the Claimant was upheld. The Respondent found that the Claimant admitted that he knew of the absence review policy and its contents, and that the Claimant did not adhere to the policy in respect of timely reporting of absence and ongoing communication and failure to attend work. The Respondent found that the incident regarding the Claimant's visit to the toilet was not one of harassment. The Respondent found that the reason why the Claimant was being chased by Mr Issacs was because the Claimant was not where he was supposed to be as he was wandering around the building. There was no reference to the Claimant's complaint that he was being giving 90% of the work. In evidence the Claimant was asked how he assessed that he was given 90% for the work. He stated that he told Mr Mellor and Mr Crowley, and no one contradicted him. We find that the Claimant was given the majority of the work to do. Mr Crowley did not consider the Claimant's mental health as mitigating circumstances as the Claimant had not argued that it was. Mr Crowley did not take it in to consideration as he was not provided with any medical evidence that allowed him to do so. Mr Crowley did consider a lesser sanction other than dismissal, but believed that the Claimant had committed gross misconduct based on the evidence before him.

25. Subsequent to the appeal, the Claimant produced a letter from his GP dated 19 December 2022 that stated that the Claimant was suffering from anxiety and chronic fatigue and the Claimant was on medication. The GP explained in the letter that the reason for the Claimant's symptoms mostly likely stem from the Claimant's dismissal and not prior to the Claimant's dismissal. **[380]**

Redundancy

26. Mr Roberts was not aware there was an impending redundancy situation at the point of dismissal on 25 May 2022. However, by the time of the appeal hearing, the consultation process for redundancy had begun and Mr Crowley was aware of this. Mr Mellor was involved in the negotiations of the sale of product lines that led to the closing of the Claimant's workplace. We accept Mr Mellor's evidence that these negotiations were not finalised, and the sale did not

conclude until 1 June 2022. Although Mr Mellor accepted that once the sale was concluded it was inevitable that the Elstree site where the Claimant worked would close, Mr Mellor was not involved in the disciplinary process. We find that there was no redundancy situation until the sale was finalised on 1 June 2022. Following the Claimant's dismissal, the Claimant's position was filled and that employee was made redundant in June 2023. Keith Boddy was also made redundant at the end of June 2023. The Claimant accepted in evidence that his role was not redundant in June 2022.

Discrimination

27. Mr Powell's evidence confirmed that there were occasions in 2019 where the Claimant was chased out of the toilet. Mr Blakely also witnesses an incident where the Claimant was chased out of the toilet by Mr Issacs. But when the Claimant left the toilet with Mr Issacs, Mr Blakely said he was joking with Mr Issacs. The Claimant said he did this because he was embarrassed. Mr Powell acknowledged that the incident that he saw may have not been the same as the one Mr Blakely saw. So, there could have been 2 incidents. Mr Powell said he had seen an incident in 2019 because he was not in the workplace after that, as he resigned in 2020. The Claimant was asked why he did not bring a claim in respect of his matter until 2022, the Claimant said that he was afraid that he would be sacked. We find that an incident where the Claimant was chased from the toilet by Mr Issacs as described by Mr Powell did happen in 2019. We find that the incident witnessed by Mr Powell in 2019 may have been the same incident witnessed by Mr Blakely. However, we find there no additional incident in 2020-2021 which the Claimant referred to. If the incident viewed by Mr Powell was separate to the incident viewed by Mr Blakely, we think that on a balance of probabilities that Mr Blakely's witnessing of such an incident took place in 2019 as well. We say this because the Claimant said, things changed when Mr Issacs became his manager in 2019. We think it is therefore more probable that the incident happened in 2019 because the Claimant had significant difficulty in remembering when it happened which is more likely if it happened sometime before he raised it. We do not accept that the Claimant genuinely believed that he would be sacked for raising a complaint about this matter as the Claimant said he raised a complaint during his employment about having to do what he considered to be 90% of the work.

28. The Claimant was throughout his employment and until the last day he worked just before his dismissal required him to do more work than Mr Boddy. Since Mr Powell left the team, the Claimant did the majority of the work in his team. We did not find the Claimant did "90 %" of the work as the Claimant did not make any kind of measured assessment of the amount of work he or Mr Boddy did. The Claimant had with Mr Powell complained to "Neil" who was one above Mr Issacs at the relevant time about the uneven distribution of work. We find that although this complaint was made and there no evidence that anything was done about the complaint, there was no mention of the uneven distribution of work being based upon the Claimant's age. We accept Mr Mellor's evidence that the Claimant did discuss the workload with him but that the Claimant said

that he wanted to keep busy, and the Claimant didn't say it was causing additional stress.

Law

Unfair Dismissal

29. The test for unfair dismissal is set out in section 98 Employment Rights Act 1996 ("ERA 1996"). Under section 98(1) ERA 1996, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

30. The reason for dismissal is 'a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee'. (Abernethy v Mott Hay and Anderson [1974] ICR 323, CA.)

31. Under s98(4) ERA 1996 *"… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.*"

32. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4) ERA 1996. However, Tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; EAT on considering the issue of reasonableness. There are three stages: (1) did the Respondent genuinely believe the Claimant was guilty of the alleged misconduct? (2) did they hold that belief on reasonable grounds? (3) did they carry out a proper and adequate investigation?

33. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the Respondent, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the Respondent (Boys and Girls Welfare Society v McDonald [1996] IRLR 129).

34. Finally, Tribunals must decide whether it was reasonable for the Respondent to dismiss the Claimant for that reason.

35. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for a Tribunal to substitute its own decision.

36. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)

37. Tribunals should also heed the words of Browne Wilkinson J the case of Iceland Frozen Foods v. Jones [1982] IRLR 439 EAT at 442: that *"(1) the starting point should always be the words of [section 98(4)] themselves; (2) in applying the section the [Employment] Tribunal must consider the reasonableness of the employers conduct, not simply whether they (the members of the [Employment] Tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer".*

38. Included in applying the reasonable responses test, the Tribunal must also take into account the ACAS Code on Disciplinary and Grievance Procedures ("the Code"). By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A 1992"), the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

39. Failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings. However, the Code is also relevant to compensation. Under section 207A TULR(C)A 1992, if the claim concerns a matter to which the Code applies and there is unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.

40. Under s122(2) ERA 1996, the Tribunal shall reduce the basic award where it considers that any conduct of the Claimant before dismissal was such that it would be just and equitable to do so. Under s123(6) ERA 1996, where the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the Claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

41. Where the dismissal is unfair on procedural grounds, the Tribunal must also consider whether, by virtue of Polkey v AE Dayton Services [1987] IRLR 503, HL, there should be any reduction in compensation to reflect the chance that

the Claimant would still have been dismissed had fair procedures been followed.

Redundancy Payment

42. Section 135 ERA 1996 sets out the circumstances where an employee has the right to a redundancy payment. Section 135(1) ERA 1996 states "*(1) An employer shall pay a redundancy payment to any employee of his if the employee— (a) is dismissed by the employer by reason of redundancy"*

Age discrimination

43. Under section 4, Equality Act 2010 ("EA 2010") age is a protected characteristic. Section 5 provides *"In relation to the protected characteristic of age— (1)*

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.

(2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages."

Direct Discrimination

44. Section 13 EA 2010 requires that a Claimant must compare his or her treatment with that of another actual or hypothetical person who does not share the same protected characteristic when claiming direct discrimination.

45. In comparing whether the Claimant has been treated less favourably than another, section 23 EA 2010 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."* It is not necessary for all the circumstances to be the same provided that the circumstances are materially similar. In other words for the comparison to be valid, like must be compared with like.

46. Section 39(2) (d) EA 2010 states " *An employer (A) must not discriminate against an employee of A's (B)— […] (d) by subjecting B to any other detriment."*

47. In *Ministry of Defence v Jeremiah 1980 ICR 13, CA*, the Court of Appeal took a broad view of the words 'any other detriment'. Lord Justice Brandon said it meant simply 'putting under a disadvantage', while Lord Justice Brightman

stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'.

48. Section 136 EA 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The wording of section 136 EA 2010 should be regarded as the touchstone.

49. Guidance has been given to Tribunals in a number of cases in how to apply the two stage test, in Igen v Wong [2005] IRLR 258 and approved again in Madarassy v Normura International plc [2007] EWCA 33.

50. To summarise, the Claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the Respondent had discriminated against him. If the Claimant does this, then the Respondent must prove that it did not commit the act. Once the Claimant has established a prima facie case (which will require the Tribunal to hear evidence from the Claimant and the Respondent, to see what proper inferences may be drawn), the burden of proof shifts to the Respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as it did. The Respondent will have to show a non-discriminatory reason for the difference in treatment.

51. In the case of Madarassy the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination" [Mummery LJ, [paragraphs 56-58]

52. Unlike other forms of direct discrimination, direct discrimination on the grounds of age can be justified. Section 13(2) EA 2010 states "*If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."*

53. *Seldon v Clarkson Wright and Jakes (A Partnership) 2012 ICR 716, SC* confirms that justification test for direct age discrimination under the Equality Act 2010 is narrower than that for indirect age discrimination, in that indirect discrimination can only be justified by reference to legitimate objectives of a public interest nature, rather than purely individual reasons particular to the employer's situation.

Harassment

54. Section 40 EA 2010 prohibits an employer from harassing its employees. Section 26 (1) EA 2010 defines harassment as follows

"*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."

55. In considering whether there has been unlawful harassment, Underhill J in Richmond Pharmacology v Dhaliwal [2009] ICR 724 said the Tribunal should look to see if there is unwanted conduct that has the proscribed purpose or effect and whether the harassment related to a particular protected characteristic.

56. The Tribunal is required to identify the reason for the harassment with a particular focus on the context of the particular case. Although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so. (ECHR Employment Code, paragraph 7.8)

Time Limits

57. Section 123 sets out the time limits under the Equality Act 2010 ("EQA 2010"). It states as follows: *"(1) [Subject to sections 140A and 140B,] proceedings on a complaint within section 120 may not be brought after the end of— (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable… (3) For the purposes of this section— (a) conduct extending over a period is to be treated as done at the end of the period; (b) failure to do something is to be treated as occurring when the person in question decided on it. (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something— (a) when P does an act inconsistent with doing it, or (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

58. Section 123(1)(b) EA 2010 provides the Tribunal with the discretion to hear a discrimination claim if it is just and equitable to do so. The EAT decision of British Coal Corporation v Keeble and ORS 1997 IRLR 368 has been approved repeatedly as confirming that a Tribunal should consider the checklist under section 33 of The Limitation Act 1980, as adjusted for Tribunal cases. Although the Court of Appeal in Southwark London Borough Council v Afolabi [2003] ICR 800, warns Tribunal's not to adhere slavishly to the checklist.

59. The factors that a Tribunal ought to take into account under Keeble are as follows: the length of, and reasons for, the employee's delay; the extent to which the strength of the evidence of either party might be affected by the delay; the employer's conduct after the cause of action arose, including his/her response to requests by the employee for information or documents to ascertain the relevant facts; the extent to which the employee acted promptly and reasonably once s/he knew whether or not s/he had a legal case; the steps taken by the employee to get expert advice and the nature of the advice s/he received. Unlike in the unfair dismissal jurisdiction, a mistake by the employee's legal adviser should not be held against the employee and is therefore a valid excuse.

Is there a continuing act of discrimination

60. In applying s123(1)(a) EA 2010, the House of Lords in Barclays Bank Plc v Kapur and others [1991] ICR 208 HL, make a distinction between a continuing act and an act that has continuing consequences. A practice will amount to an act extending over a period, but if there is no practice then there is no continuing act even if that act has ramifications which extend over a period.

Submissions

61. On behalf of the Respondent, Mr Perry submitted that the Tribunal should find the reason for dismissal was the Claimant's failure to comply with the absence review policy as to reporting absence and providing sick note and not keeping contact, there was a loss of trust in respect of failures and level of absence. There was no redundancy because dismissal was in effect before the sale at the start of June 2022 and closing of the Elstree site. The Claimant was still going to be needed until June 2023, as someone else transferred into the team to cover the work and Keith Boody was only dismissed by reason of redundancy a few weeks ago. The Respondent had reasonable grounds for dismissal and there was a reasonable investigation. The Claimant knew what he needed to do to maintain contact and on his return to work. There has been no challenge that the Respondent did not comply with the ACAS process. The Tribunal should not fall into a substitution mindset. It is not the correct test to look at what we as the Tribunal would have done.

62. In respect of the discrimination claims, the Respondent admits there was less favourable treatment. But a mere difference in treatment or unreasonable treatment is not enough to shift the burden of proof and there is nothing to do that. If there is, the Respondent's reason for treatment was because distribution of work was due to a combination of factors, that the Claimant worked quickly, hard, was reliable and flexible contrast that with Keith who had not be trained on certain tasks. The Claimant was physically fit as he went to the gym and so not surprising he was being asked to do work. The Claimant said that he liked to be busy. The Claimant was saying don't change things too much because I like to be busy. As regards the just and equitable jurisdiction, the Respondent would be prejudiced as the evidence has been affected by the delay and there is a disagreement, but the Respondent does not have Mr Issacs, the Respondent would have had him as a witness if the Claimant had brought the claim in the time.

63. The Claimant submitted his harassment claim should be allowed because the discrimination was an ongoing thing. The Claimant was being followed around and this should not happen to anyone. The Claimant felt like he was being bombarded as soon as Trevor became his manager. The Claimant said there was constant surveillance and that It got a bit too much. Before dismissing the Claimant, the Claimant was not referred to occupational health nor were other solutions looked at. The moment the Claimant brought up discrimination, demeanours changed, and the Claimant said he should have kept quiet. Trevor retired 2 days later. Trevor became the Claimant's manager and that is when the absence process started. The Claimant still believed that the text from him dated 29 April 2022 was hidden in the documents. The Claimant thought what Keith had should have been offered to him before the dismissal. The Claimant wasn't helped. As soon as he brought up discrimination it was game over. The witnesses for the Respondent were not people who the Claimant worked with closely. His witnesses were those who he had worked with closely.

Analysis and Conclusions

Unfair Dismissal

64. We accept the Respondent's reason for dismissal as misconduct. We do not think that redundancy was the reason for the dismissal because Mr Roberts was not aware of the decision to close the Claimant's workplace when he made the decision to dismiss on 25 May 2022. Even though Mr Crowley was aware at the time he made the decision to uphold the dismissal, he believed that the Claimant would not have been dismissed in any event and so the Claimant would not have received a redundancy payment even if he reinstated the Claimant.

65. We find that there was a genuine belief by the Respondent that the Claimant was guilty of gross misconduct based upon reasonable grounds. The reasonable grounds were: the Claimant knew about the absence review policy. The Claimant had received it some 2 years prior to his dismissal and had an opportunity to read it and had acknowledged he knew its contents. The Claimant was sent the most up to date absence review policy with the letter inviting him to the disciplinary hearing. The Respondent therefore believed that the Claimant knew what the rules were around absence reporting.

66. The Claimant presented a case in his claim form that he was off work due to illness and that the Claimant made contact, but the Respondent sacked him. However, the Claimant acknowledged in evidence that he knew that unauthorised absence was gross misconduct. The Claimant had received a final written warning in 2020 which included allegations of unauthorised absence. Coupled with the fact that the Claimant stated in his 3 May text "you can pay me or not it is up to you", clearly indicates that the Claimant knew there were consequences to absence without leave and his lack of communication. This was not a case where the Claimant did not have fair warning about his misconduct.

67. Furthermore, the Claimant had indeed complied with the policy on a number of occasions in the past. The Claimant did not report his absence on 5,6,9,10,11, 13 and 16 May 2022 at all. The Claimant did not comply with the policy via his email dated 12 May either. The Claimant did not have permission to be absent on those days and the reasons that the Claimant gave for his absences were varied and did not come with supporting evidence. The Claimant's GP dated 19 December 2022 was not seen by the Respondent or provided to the Respondent as part of the disciplinary process. The letter did not support the Claimant's case that he suffered mental health issues before the dismissal and therefore should have been a factor to consider in the decision to the dismiss the Claimant. The Claimant was given every opportunity to explain why he did not report his absence and he did not rely upon his depression as the reason but said he did report his absence. The Claimant did not present any mitigating circumstances. So contrary to the Claimant's submissions there was no reason for the Respondent to refer the Claimant to occupational health.

68. The Claimant did not provide any medical evidence either as part of these proceedings or as part of the disciplinary process that his medical health affected his ability to communicate with his employer during the time he was off between 28 April- 16 May 2022. We take the view that if it was the case that the Claimant's mental health had prevented him from communicating with the Respondent he would have raised it as the basis of his appeal and provided medical evidence for it. He did not. We therefore consider that it was

reasonable for the Respondent to not have taken this reason into account as we heard from Mr Roberts and Mr Crowley in their decision making process..

69. We find that it was therefore in the band of reasonable responses for the Respondent to dismiss the Claimant for gross misconduct.

70. The Respondent followed the ACAS code and the Claimant did not raised any issues with the Respondent's investigation. We find that overall the process applied to the Claimant was fair. The Respondent is a medium size employer and had HR advice throughout the process. A lesser sanction was considered, but the Claimant had committed gross misconduct in accordance with the Respondent's policy. We find that the Respondent acted reasonably in treating the Claimant's misconduct as a sufficient reason for dismissing the Claimant.

71. For those reasons, the Claimant's claim for unfair dismissal fails.

Redundancy Payment

72. The Claimant accepted that his role was not redundant as it was filled after his dismissal. In those circumstances we find that the Claimant's claim for a redundancy payment fails.

Harassment

73. The Claimant asserted that he was being harassed by being followed around the building **[8]** and because when he was off during, 28 April -16 May 2022 he was constantly being contacted by the Respondent. The Claimant did not present a case that this was because of his age. It was not an issue to be considered and the issues were agreed with the party. In those circumstances we did not have jurisdiction to consider the Claimant's claim for harassment in respect of these points. In any event we accept that the Respondent's efforts to contact the Claimant were not harassment but was reasonable in the circumstances as the Claimant acknowledged that the Respondent's managers needed to keep in contact with him for wellbeing.

74. The Claimant's only claim for harassment on the grounds of his age was in respect of being prevented from using the bathroom. We found there was no incident in 2020- 2021 but 2 possible incidents in 2019.

75. Thus, by any reasonable measure even if we considered there were 2 acts and treat them as a continuing act, the last incident in 2019 is significantly out of time by approximately 2 years as the last possible date for the incident to have taken place in 2019 would have been 31 December 2019.

76. We had to consider whether to exercise our discretion to extend time having regard to the factors set out in British Coal Corporation v Keeble and ORS 1997 IRLR 368. The Claimant's reason for delay was because he said that he was afraid that he would be sacked if he raised a discrimination claim. We did not believe the Claimant. The Claimant raised complaints with both Neil and Mr Mellor about the amount of work he was being asked to do. If the Claimant was afraid of raising complaints he would not have raise this matter with two senior managers, nor would he have raised the issue at his appeal. We were persuaded by the Respondent's submission that they were prejudiced as Mr Issacs had retired and so they were not in a position to defend the claim as Mr Issacs was not a witness. We accept that following the Claimant's dismissal he acted promptly in contacting ACAS and presenting his claim to the Employment Tribunal. However, taking all the factors together, we do not exercise our discretion to extend time. As the Claimant's harassment claim was not in time we did not need to consider if the Claimant was harassed on the grounds of his age. The Claimant's claim for harassment on the grounds of age is dismissed for want of jurisdiction.

Direct discrimination

77. We find that the Claimant's claim for direct discrimination is in time as the Claimant was being asked to do the majority of his work throughout his employment and the Claimant worked in the last week of his employment. The Claimant's last day of employment was 25 May 2022 and the Claimant contacted ACAS only 5 days after his dismissal. The Claimant relied upon the less favourable treatment as being told to do most of the work and was doing 90 % of the work because of his age 32 as compared to his named comparator Keith Boddy who was in his 60's until his last day of work. The Respondent conceded that this amounted to less favourable treatment. We consider that the Claimant doing the majority of work in a team of 2 put the Claimant at a disadvantage and so was a detriment.

78. We considered the burden of proof provision section 136 EA 2010 and the relevant case law. We first considered whether the Claimant had proved facts from which if unexplained the Tribunal could conclude that the Claimant suffered the detriment on the grounds of his age. The Claimant relied on the difference in age as the basis for his claim for discrimination. The Claimant did not mention his age at any point in the disciplinary process. The Claimant accepted himself that the reason he was asked to do more work was because he was flexible and reliable. We did consider Mr Powell's evidence that he complained with the Claimant about the uneven distribution of work, and he was in his 20's. We accepted that the Claimant was doing the majority of the work in his team. However, we did not find it was because of the Claimant's age. We find that the Claimant was asked to do more work than Mr Boddy because he was better at it. Mr Boddy was lazy, the Claimant like to keep

busy. Mr Boddy had not been trained on many tasks, the Claimant has and was able and considered a good worker. Thus, even though Mr Powell was also younger than Mr Boddy we find that it was because of Mr Boddy's inadequacies that resulted in others in the team being landed with the majority of work and when Mr Powell left the team, that left the Claimant with the majority of work. As the Claimant did not make a prima facie case of discrimination on the grounds of age we did not need to go on to make conclusions on the second limb of section 136 EA 2010, as the Claimant had not shifted the burden. It is therefore the case that the Claimant was not treated less favourably because of his age.

79. For those reasons the Claimant's claim for direct discrimination on the grounds of age fails.

_____

Employment Judge Young

_____19 October 2023_____
Date

REASONS SENT TO THE PARTIES ON

20 October 2023

FOR THE TRIBUNAL OFFICE