EMPLOYMENT TRIBUNALS

Claimant: Mr C Richardson

Respondent: Potts Print (UK) Limited

HELD AT: Newcastle **ON:** 31 July, 1 and 2 August, and 2 and 3 October 2023

BEFORE: Employment Judge Aspden
Mrs P Wright

REPRESENTATION:

Claimant: In person
Respondent: Mr I Steel

JUDGMENT having been sent to the parties on 10 October 2023 and written reasons having been requested by the claimant on 4 October 2023 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The claims

1. The claimant was employed by the respondent between September 2021 and June 2022. By a claim form received at the Tribunal on 3 October 2022 the claimant complained that the respondent subjected him to disability discrimination by dismissing him. Both parties consented to the claim being heard by a Judge and one other member.

2. The claimant also ticked the box on the claim form suggesting he was making a complaint of unfair dismissal. However, he later withdrew that claim as he did not have the required two years' service to qualify for the right not to be unfairly dismissed.

3. The claimant contends that he is disabled by virtue of a back condition and that the respondent dismissed him for one or more of the following reasons:
   3.1. because of the disability itself;
   3.2. because he had been absent from work in consequence of his disability; and/or
   3.3. because his disability affected his ability to do his job.

4. In so far as the claimant claims that he was dismissed because of the disability itself, this is a complaint of direct discrimination. In so far as the claimant says he was dismissed due to disability related absence or because his disability affected his ability to do the job, these are complaints of discrimination falling within section 15 of the Equality Act 2010 (sometimes called discrimination arising from disability).

5. The respondent does not accept the claimant had a disability or that the respondent dismissed the claimant for any of the reasons contended for by the claimant. In its grounds of resistance the respondent alleges that it dismissed the claimant for unsatisfactory performance. At paragraph 22 of the grounds of resistance the respondent says 'the respondent decided they would terminate the claimant's employment when he returned [to work] on 11th April because of his low skill level, the mistakes he was making and his odd behaviour.' At paragraph 28 of the grounds of resistance the respondent says 'Given the issues with the spoiled jobs, damaged machine, being less skilled than his colleagues and returning to work making statements that he did not feel up to doing much work and fancied a 'sitting down sort of day' Michael Johnson decided that the claimant's contract was to be terminated.'

Issues for determination

6. The issues the Tribunal may need to decide to determine the claims were identified at a preliminary hearing held on 9 January 2023 as follows:

   Disability

7. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

   7.1. Did he have a physical impairment by virtue of a back condition?
   7.2. Did it have a substantial adverse effect on his ability to carry out day-to-day activities?
   7.3. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
   7.4. Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
   7.5. Were the effects of the impairment long-term? The Tribunal will decide:

7.5.1. did they last at least 12 months, or were they likely to last at least 12 months?
7.5.2. if not, were they likely to recur?

Direct disability discrimination (Equality Act 2010 section 13)

8. By dismissing the claimant did the respondent treat the claimant less favourably, because of his disability, than it treated or would have treated others?

8.1. 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.
8.2. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.
8.3. The claimant has not named anyone in particular who he says was treated better than he was.

Discrimination arising from disability (Equality Act 2010 section 15)

9. Did the respondent dismiss the claimant because he had been absent from work?

10. If so, did that absence arise because of the claimant's disability?

11. Did the respondent dismiss the claimant because his ability to do his job was impaired?

12. If so, was that impaired ability to do the job something that arose in consequence of the claimant's disability?

13. When it dismissed the claimant, did the respondent know or could it reasonably have been expected to know that the claimant had the disability?

14. If the respondent asserts in its grounds of resistance that the dismissal was a proportionate means of achieving a legitimate aim:
14.1. Was the respondent's aim legitimate?
14.2. Was the treatment a proportionate way to achieve that aim?

15. At the preliminary hearing the respondent was given permission to file amended grounds of resistance. It chose not to do so. That being the case, there was no assertion by the respondent that the claimant's dismissal was a proportionate means of achieving a legitimate aim. That position did not change at this hearing. Therefore, the last of the issues identified above did not arise for consideration.

Relevant legal framework

16. It is unlawful for an employer to discriminate against an employee by dismissing him: section 39(2) of the Equality Act 2010.

Disability

17. Section 6 of the Equality Act 2010 says:

> 'A person (P) has a disability if -(a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'

18. Substantial means 'more than minor or trivial': Equality Act s212(1).

19. The effect of an impairment is long-term if it has lasted for at least 12 months or is likely to last for at least 12 months or for the rest of the life of the person affected.

20. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur: Equality Act Schedule 1, paragraph 2. This means that conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term.

21. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if -(a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect: Schedule 1, paragraph 5.

22. 'Likely' in this sense means 'could well happen': SCA Packaging v Boyle [2009] ICR 1056. This has to be assessed in the light of the information available at the relevant time, not with the benefit of hindsight: Richmond Adult Community College v McDougall [2008] EWCA Civ 4, [2008] ICR. 431.

23. The Secretary of State has issued statutory guidance on matters to be taken into account in decisions under section 6(1). The current version dates from 2011. It says, amongst other things:

    23.1. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness.

    23.2. 'The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. …This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1….Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement. It is necessary to consider whether, as a consequence of the

treatment, the impairment would cease to have a substantial adverse effect. ….'

23.3. 'In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).'

23.4. 'Some impairments with recurring or fluctuating effects may be less obvious in their impact on the individual concerned than is the case with other impairments where the effects are more constant. … It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether. '

23.5. 'Likelihood of recurrence should be considered taking all the circumstances of the case into account. This should include what the person could reasonably be expected to do to prevent the recurrence. ..'

24. In Goodwin v Patent Office [1999] IRLR 4, the EAT gave the following guidance as to the correct way to approach the definition of 'disability'-

24.1. (1) The tribunal must look carefully at what the parties say in the ET1 and ET3, with standard directions or a directions hearing being often advisable; advance notice should be given of expert opinion. The tribunal may wish to adopt a particularly inquisitorial approach, especially as some disabled applicants may be unable or unwilling to accept that they suffer from any disability (though note that even here the tribunal should not go beyond the terms of the claim as formulated by the claimant: Rugamer v Sony Music Entertainment UK Ltd [2001] IRLR 644, EAT).

24.2. (2) A purposive approach to construction should be adopted, drawing where appropriate on the guidance on the definition of disability.

24.3. (3) The tribunal should follow the scheme of [what is now s 6], looking at (i) impairment, (ii) adverse effect, (iii) substantiality and (iv) long-term effect, but without losing sight of the whole picture.

Direct discrimination

25. Section 13 of the Equality Act 2010 provides that it is direct discrimination to treat an employee less favourably because of disability than it treats or would treat others.

26. In determining whether there is direct discrimination it is necessary to compare like with like. This is provided for by section 23 of the Act, which says that in a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

27. To establish a claim of direct discrimination, the less favourable treatment must have been because of the disability itself, not something occurring in consequence of it: Ahmed v The Cardinal Hume Academies UKEAT/0196/18 (29 March 2019, unreported).

Discrimination arising from disability

28. An employer discriminates against a disabled employee if it treats that person unfavourably because of something arising in consequence of his or her disability and the employer cannot show either (a) that it did not know, and could not reasonably have been expected to know, that the employee had the disability; or (b) that the treatment was a proportionate means of achieving a legitimate aim: Equality Act 2010 s15.

29. Just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too there may be more than one reason in a s.15 case. 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.

30. The tribunal must determine whether the reason/cause (or, if more than one, a reason or cause) of the impugned treatment is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

31. In the case of A Ltd v Z [2019] IRLR 952, Judge Eady QC (as she then was) in the Employment Appeal Tribunal summarised the principles that apply when determining whether the employer had requisite knowledge as follows:

> *'(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492 CA at para 39.*
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> *(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see Donelien v Liberata UK Ltd (2014) UKEAT/0297/14, [2014] All ER (D) 253 (Dec) at para 5, per Langstaff P, and also see Pnaiser v NHS England (2016) UKEAT/0137/15/LA, [2016] IRLR 170 EAT at para 69 per Simler J.*
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> *(3) The question of reasonableness is one of fact and evaluation, see [2018] EWCA Civ 129, [2018] IRLR 535 CA at para [27]; nonetheless, such*

assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council (2016) UKEAT/0100/16, [2017] ICR 610, per His Honour Judge Richardson, citing J v DLA Piper UK LLP (2010) UKEAT/0263/09, [2010] IRLR 936, [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, 'it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]', per Langstaff P in Donelien EAT at para 31.

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

> *'5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.*
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> *5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.'*

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v T C Group (1998) EAT/137/97, [1998] IRLR 628; Alam v Secretary of State for the Department for Work and Pensions (2009) UKEAT/0242/09, [2010] IRLR 283, [2010] ICR 665).

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

32. The references to the 'Code' is a reference to the Code of Practice on Employment 2011 issued by the Equality and Human Rights Commission under section 14 of the Equality Act 2006. The Code must be taken into account by this tribunal if it appears to be relevant.

Burden of proof

33. The burden of proof in relation to allegations of discrimination is dealt with in section 136 of the 2010 Act, which sets out a two-stage process.

34. Firstly, the Tribunal must consider whether there are facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the claimant. If the Tribunal could not reach such a conclusion on the facts as found, the claim must fail.

35. Where the Tribunal could conclude that the respondent has committed an unlawful act of discrimination against the claimant, it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed, that act.

36. The Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258 made the following points in relation to the application of the burden of proof:
    36.1. 'It is important to bear in mind in deciding whether the claimant has proved facts from which the Tribunal could conclude that there has been discrimination that it is unusual to find direct evidence of … discrimination: few employers would be prepared to admit such discrimination, even to themselves and in some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in.'
    36.2. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
    36.3. It is important to note the word 'could' in the legislation. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
    36.4. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

37. Where the claimant has proved facts from which the Tribunal could conclude that the respondent has treated the claimant less favourably because of disability, it is then for the respondent to prove that it did not commit that act or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

Evidence and findings of primary fact

38. We heard evidence from Mr Richardson himself and from three witnesses for the respondent: Mr Livingston (the claimant's line manager and a Deputy Director of the respondent), Ms Armstrong (the respondent's HR Director) and Mr Johnson (the respondent's Operations Director).

39. Elements of this case were dependent on evidence based on people's recollection of events that happened many months ago. In assessing that evidence we bear in mind the guidance given in the case of Gestmin SGPS v Credits Suiss (UK) Limited [2013] EWHC 360. In that case, Mr Justice Leggatt (as he was then) observed that it is well established, through a century of psychological research, that human memories are fallible. They are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. Mr Justice Leggatt described how memories are fluid and changeable: they

are constantly re-written. Memories can change over the passage of time. Furthermore, external information can intrude into a witnesses' memory as can their own thoughts and beliefs. People's perceptions of events differ. That means people can sometimes recall things as memories which did not actually happen at all. In addition, the process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to parties. It was said in Gestmin: 'above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth'. In light of those matters, inferences drawn from the documentary evidence and known or probable facts tend to be a more reliable guide to what happened than witnesses' recollections.

40. Mr Richardson applied for a job with the respondent company as a print finishing operative and he had an interview in August 2021. Mr Livingston and Mr Johnson interviewed the claimant. As a result of what the claimant said at the interview, Mr Livingston and Mr Johnson believed the claimant had considerable experience in the type of work they were looking to recruit someone to do. Consequently, they offered him the job.

41. The claimant started work on 1 September 2021. He joined a team of three other operatives. The least experienced of the operatives was Mr White who had three and a half years' experience.

42. The claimant's shift pattern involved him working three out of seven days a week; one week he would work Monday to Wednesday, the next week Thursday to Saturday.

43. At the start of his employment the claimant had an induction carried out by Ms Armstrong and was given a copy of the staff handbook. When the claimant started work or possibly even just before he started work he completed a health questionnaire in which he confirmed that as far as he knew he was in good health and that he had never suffered from any back problems.

44. On his first day of work the claimant asked Mr Johnson if he could 'get a flyer' from work. Mr Johnson interpreted that as the claimant wanting to leave early. That left Mr Johnson with a poor impression of the claimant.

45. We accepted the evidence of Mr Livingston and Mr Johnson that the claimant's colleagues, including Mr Livingston himself, did not warm to the claimant. They found him opinionated, somewhat eccentric and not easy to have a conversation with or to communicate with.

46. Mr Livingston's evidence was that in December 2021 he did an assessment of the claimant's skills and performance using a standard form. That was around three months into the claimant's employment and Ms Armstrong said that carrying out a skills assessment at this time was a standard approach to take for a new employee. We accept that it is more likely than not that Mr Livingston did carry out that assessment.

47. However, we have not seen the assessment form as completed by Mr Livingston. Mr Livingston's evidence was that he overwrote the form in May 2022 when he carried out a further assessment; he says the scores he gave in December were the same as scores he gave the following May. The scores in May purported to

show that Mr Livingston's view at that time was that further training or supervision was needed. We note, however, that the claimant was not told he was underperforming in December. Nor were any steps taken to provide the claimant with further training. Those facts appear somewhat inconsistent with Mr Livingston's evidence that he had formed the view by December that the claimant was underperforming.

48. At this hearing, when the respondent's witnesses were asked to identify any mistakes the claimant had made or other ways in which he had underperformed during his employment, they did not identify any specific failings except for the matter we refer to below in regard to the Keith Spicer Limited job. We were told however that Mr Johnson and Mr Livingston thought the claimant seemed to lack confidence and asked questions where they thought he should not need to ask questions and should be able to deal with things himself. Mr Livingston's evidence to us was that he had formed the view the claimant was not as experienced or skilled as he originally thought the claimant would be.

49. In December 2021 the claimant started to experience back pain and he went to see his GP. The claimant's GP referred the claimant for an MRI scan, which took place on 23 January 2022.

50. On 24 January 2022 Ms Armstrong met with the claimant for a review meeting. The meeting was not arranged because there were any concerns about the claimant's performance. It was a standard review meeting that Ms Armstrong would carry out for all new employees after a few months' employment. In accordance with their standard practice Ms Armstrong went through a questionnaire asking the claimant various questions and she filled in the questionnaire based on his answers. One of the questions was 'Would you class yourself as in good health?' The claimant answered 'yes.' The next question was 'Is there anything medical related we need to be aware of?' The claimant answered 'no.' Ms Armstrong gave the claimant a health questionnaire take away and fill in. Again, that was standard practice: it was not given to him because of anything the claimant had said. The claimant did not complete and return that document.

51. In that meeting the claimant made some suggestions about working practices. Those suggestions were in response to questions seeking to elicit views about improvements that could be made or difficulties experienced. The claimant commented on the type of wheels on waste bins. He had also said that other companies he had worked previously had conveyors to take waste away rather than expecting people to wheel bins. The claimant suggested at this hearing that the reason he complained about having to move waste bins was because it was causing him back pain. However, the claimant acknowledged in cross-examination he had never told Ms Armstrong or Mr Johnson about any back problems he was experiencing before his absence from work that began in March 2022. Looking at the evidence in the round, we find that the claimant did not mention having back pain, or any problems with his back, at this meeting with Ms Armstrong. When the claimant raised these issues about moving bins he did not suggest and was not implying he was having any physical difficulty moving the bins. He was simply expressing an opinion as to what he considered was an inefficient way of working.

52. Ms Armstrong told Mr Johnson what the claimant had said about moving bins. Mr Johnson and Mr Livingston viewed it as criticism of the current working practices. They were displeased by the perceived criticism.

53. On or before 2 March 2022 the claimant had an appointment at the hospital to discuss the result of the MRI scan he had had in January. The claimant was told the result and the claimant and clinician agreed the claimant should be referred for physiotherapy at Northumberland Joint Musculoskeletal and Pain Services (JMAPS). The result of the MRI scan showed 'Minor non-compressive disc bulge at L5/S1. Multi-level Schmorl's nodes. Nil else of note.'

54. The claimant was referred for physiotherapy and a letter was written saying that was what was happening and setting out the result of the MRI scan. At this time the claimant was taking Paracetamol for pain. He was still working.

55. On Monday 21 March 2022 the claimant went into work for his shift but he left not long into his shift. The shift started at 6am. At 8.52 am the claimant texted Mr Livingston and said 'I didn't last long. Problem with my legs possibly caused by disc compression. Bit panic. Ring later. Update.'

56. The claimant was on sick leave for the rest of the day. The claimant also took time off work on 22 and 23 March when he was due to work. We find it more likely than not that the claimant spoke to Mr Livingston to say he would be absent on those days. The claimant's next working day was due to be 31 March.

57. On or before 30 March 2022 the business received a complaint from a customer, Keith Spicer Limited. The respondent had sent the customer a product that was defective.

58. Mr Livingston said in evidence that he did not know when the complaint came in; he said it might have been 30 March or it might have been sooner. What we do know is that on 30 March Mr Livingston completed a non-conformance report. The standard practice of the respondent business if something goes wrong is to investigate what has gone wrong and produce a report. Mr Livingston stated in that report that the 'Cause' was 'operator incompetence.' In his report, Mr Livingston identified the operator at fault as being Mr White. Mr Livingston said in the report that Mr White had failed to check the quality of the product and it was sent out to the client. Mr Livingston identified the 'Corrective Action' as: 'Stock to be reproduced at a later date…Disciplinary procedure to take place with operative. Client rejected the job.'

59. Subsequently Mr White was given an oral warning under the respondent's disciplinary procedure.

60. The claimant telephoned Mr Livingston on either 30 or 31 March and said he would not be in work because he still had problems with his back. They discussed the claimant's absences on 22 and 23 March and Mr Livingston gave the claimant the option of taking those days as annual leave rather than as sick leave. We infer that was so that the claimant would be paid. We find the reason the claimant gave for his absences on those dates was his back problem.

61. During this telephone conversation Mr Livingston told the claimant about the issue with the Keith Spicer order and blamed Mr White. He did not suggest to the claimant during this conversation that the claimant had anything to do with the defective order.

62. On or before 31 March the claimant had an appointment with his GP. The GP notes record that the claimant told his GP he was very worried about his back and was having to stay off work because he 'couldn't cope.'

63. On 1 April the claimant texted Mr Livingston. We have not seen the whole of the text, just a partial copy. However we can see that the claimant was saying he should be back at work and we infer from that he gave a date that implied the claimant was not expecting his absence to last much longer.

64. On that date the claimant spoke to his doctor who gave him a fit note saying the claimant was not fit for work from 1 to 7 April. The reason given was back pain and the GP notes record that the claimant had experienced what was described as a 'flare up' of back pain and also referred to the claimant saying he was thinking about alternative careers.

65. On 6 April the claimant's GP issued another fit note. This one covered the period 6 to 12 April, again referring to back pain.

66. On 7 April the claimant had a telephone appointment with his GP. The claimant had called the surgery to ask about collecting his sick note and getting stronger painkillers and his GP prescribed the claimant Codeine on a trial basis. It appears the claimant was prescribed a week's worth of medication.

67. The claimant was asked to attend a meeting at work on 8 April to discuss his absence. Ms Armstrong was present at that meeting as were Mr Johnson and Mr Livingston. The claimant told them he was feeling much better and that he felt his back had 'clicked into place' when he had been in bed. He attributed the improvement in his condition to the fact that he was using a different mattress to the one he had been using. The claimant told his managers he was taking codeine when needed but that he was not taking any at present and was pain free. Ms Armstrong asked the claimant whether he might need any adjustments at work and they talked about the possibility of the claimant having a chair that he could sit on. We find it more likely than not what prompted the discussion of a chair is that the claimant had said something about standing for long periods causing him pain. That is certainly what he was telling those who were treating him. At this meeting Ms Armstrong also mentioned the possibility of a phased return to work but the claimant said he wanted to return and see how things were. He said then that he wanted to return to work on 11 April.

68. During that meeting the claimant said he was going to have physiotherapy. We note from the claimant's medical records that his appointment was due to take place in a few days' time. He showed Ms Armstrong something to show he had been referred to physiotherapy. Both the claimant and Ms Armstrong were asked if it was the letter at page 123 of the file of documents prepared for this hearing. However, neither could remember. During the meeting when discussing his back the claimant used the word 'spastic' to describe himself. He used that word in an attempt to explain that the effects of his back pain were not trivial and caused him a lot of problems. There was no mention of the Keith Spicer job at this meeting.

69. Although the claimant had said he wanted to return to work on 11 April, he did not do so.

70. We note that in an online personnel record kept by Ms Armstrong in relation to the claimant an entry dated 8 April 2022 includes the following comment '…Failed to RTW on 11.04.22 as agreed. Termination had been discussed as a result of poor performance – issue with Spicers job as a result of tampering with machine and skills set not as expected. To be actioned on RTW.' Although the entry was dated 8 April, it is clear from the reference to the claimant not returning on 11 April that some of what was written there was added after 8 April.

71. The claimant had his first physiotherapy appointment on 12 April. On 13 April his doctor issued another fit note referring to back pain and certifying the claimant was not fit for work from 13 to 19 April ie for a week.

72. On 19 April the claimant spoke with Ms Armstrong and told her he was still having problems with his legs. The claimant had associated problems he was having with his legs with his back problem. He also told Ms Armstrong that his brother was seriously ill in hospital.

73. On 20 April the claimant was given another fit note referring to back pain which said the claimant was not fit for work between 20 and 26 April.

74. On 25 April the claimant spoke with Ms Armstrong again and said he was still unfit to attend work and was seeing his doctor on the 26th.

75. On 26 April the claimant saw his doctor. By this time the claimant had been discharged from physiotherapy. The physiotherapist had shown the claimant exercises for him to do to. These were strengthening and stretching exercises and exercises to help with joint movement.

76. We make the following observations about the discharge notes from the physiotherapist:

    76.1. The discharge notes recorded that the claimant had said that over the past few years he had had 'flare ups on and off'. This is at odds with what the claimant had told the respondent when he was recruited when he confirmed that he did not have any history of back pain.

    76.2. The notes referred to what was described as 'a long history of low back pain' and an exacerbation in March. They referred to the claimant having said he worked in a physical job involving standing on concrete for prolonged periods. They recorded the claimant having said that at the time of onset the pain had been so bad that the claimant had been unable to walk for three days. The claimant had, at that time, graded his pain as 10 out of 10 and had said it was 'flaring with movement' and that he was getting leg pain with pins and needles and numbness. The physiotherapist appears to have taken the time of onset as March 2022, rather than December 2021 when the claimant first saw his GP about his back.

    76.3. The discharge notes record that the claimant had described a pattern of worse pain in the morning and pain and disturbed sleep at night but it had stopped after he changed the mattress he used which we find had occurred back in April. The notes said that since the physiotherapy appointment the pain had 'improved 80 to 90 per cent' and the claimant 'felt ready to return to work.'

    76.4. The discharge notes referred to a discussion having taken place about disc bulge and 'natural age related changes.'

    76.5. The notes said 'discussed and practised back mobility and strengthening exercises to manage future flare ups.'

    76.6. It was agreed between the claimant and the clinician there would be a period of self-management.

    76.7. The physiotherapist sent the claimant information about things he could do to help himself, advised the claimant 'it usually takes a number of weeks to

start to see a change in your symptoms' and said further support could be arranged if the claimant was not improving.

76.8. The discharge notes said 'we believe your condition will improve.'

77. On 28 April the claimant's GP issued another fit note referring to back pain. It ran from 27 April to 8 May. At that appointment the claimant said he felt well and ready to return to work on 9 May.

78. On 5 May Ms Armstrong wrote to the claimant saying he had failed to follow procedures for reporting absence. She asked the claimant to contact her immediately to have a discussion about his absence. We infer at that point she was unaware of the latest fit note.

79. On 9 May the claimant contacted Ms Armstrong. He told her he was going to ask his doctor for a further fit note and that the new fit note would be for 'stress.' The claimant told Ms Armstrong the reason he needed time off was to support his parents and sister in law as his brother was still very ill. The claimant gave Ms Armstrong the impression that the real problem preventing the claimant from returning to work at that stage was related to his family circumstances rather than a back problem.

80. On 11 May Mr Livingston completed a performance review document for the claimant and also did the same for other operatives. The claimant was scored the lowest apart from one other person. The claimant acknowledges that the person who scored lower than him rarely used the machine. The evidence of Ms Armstrong was that it is the company policy for these performance reviews to be completed every year. The respondent's witnesses gave evidence that Mr Johnson had already decided to dismiss the claimant at this point.

81. On 11 May the claimant's GP issued him with another fit note. It referred to back pain and family stress. It ran from 9 to 22 May ie for two weeks. There was then another fit note on 20 May referring to back pain and family stress which ran to 19 June ie more than four weeks. The claimant told Ms Armstrong he would like to return to work on 6 June but, in the event, did not do so. Ms Armstrong recorded this in the online record she kept of her conversations with the claimant.

82. On 7 June the claimant saw his GP. The GP notes record that the claimant said he was still troubled by sciatica. The claimant and his GP discussed the possibility of surgery but the claimant's GP advised the claimant that the risks outweighed the benefits.

83. On 16 June Ms Armstrong made a note in her records following a conversation she had with the claimant in which the claimant said he wanted to return to work. Ms Armstrong wrote 'he's indicated prior to this that he would return to work but this never happened.' We find that Ms Armstrong was frustrated at the claimant failing to return to work when he said he would. We also find that she was sceptical as to whether the claimant was really unfit for work. Mr Johnson also doubted whether the claimant really was unfit for work. That was evident from a sarcastic comment he made about the claimant making a 'miraculous recovery'.

84. The claimant did in fact return to work on 23 June. He was asked to come into work at 9am rather than his usual start time. When he attended he was seen by Mr Johnson and Ms Armstrong. They told the claimant his employment was being terminated.

85. Ms Armstrong then sent the claimant a letter dated that same day. She said the decision to dismiss him had been reached as a result of his unsatisfactory performance. The letter did not tell the claimant anything about the ways in which his performance was considered unsatisfactory. After he received that letter the claimant telephoned the respondent and angrily took issue with the allegation that his performance had been unsatisfactory.

86. There was a dispute between the parties as to what reason the claimant was given for his dismissal in the meeting on 23 June. The claimant's evidence was that the only reason the respondent gave was that things were 'not working out.' The respondent's witnesses said they told the claimant they were dismissing him for unsatisfactory performance. Although we note that Ms Armstrong referred to unsatisfactory performance in the letter she sent to the claimant, we find the claimant's account of what was actually said at the meeting to be more compelling. It is consistent with the fact that, when he appealed, he said that he was told in this meeting things were not working out. It is also consistent with the evidence of the way in which the claimant reacted after receiving the letter of termination: if the claimant had been told he was underperforming during the meeting it is likely he would have reacted adversely in the meeting or at least asked for further information during the meeting, yet he did not do so.

87. Although the letter of termination did not mention any right of appeal, the claimant did subsequently appeal. He queried the alleged inadequate performance in his appeal. He said he had done nothing wrong to justify dismissal and he referred to the fact that he had been told at the meeting that the reason his employment was being terminated was that it was not working out.

88. The appeal was dealt with by Mr Steel who works for the federation of which the respondent company is a member. Mr Steel spoke to the claimant by telephone on 8 July to discuss his appeal. Before then Mr Steel had spoken with Ms Armstrong. During the appeal meeting Mr Steel noted that the claimant had said in his appeal he had done nothing wrong to justify dismissal and he was told the reason that it was not working out. Mr Steel said 'I can't really comment on that. What I do know is that the company felt it was not working out.' The claimant referred to the fact that he had not had previous warnings. Mr Steel said 'I understand that one example of problems is that you asked for an assistant when the .. job didn't require an assistant.' It is clear from that exchange that Ms Armstrong had given Mr Steel some information about why the claimant had been told he was underperforming. Mr Steel made no reference to the Keith Spicer order.

89. On 15 July Mr Steel wrote to the claimant with the outcome of the appeal. He upheld the decision to terminate the claimant's employment. In his letter Mr Steel, again, made no reference at all to the Keith Spicer order. He referred again to the comment the claimant had allegedly made about having an assistant. Mr Steel also said 'since the appeal I have discussed the company's view that your performance was below what was expected and they have shown me your ability score.' This was a reference to the performance document completed by Mr Livingston and dated May 2022. We find that, between the 8 and 15 July Mr Steel had asked Ms Armstrong about the reasons for dismissal.

90. In this hearing the evidence of the respondent's witnesses was that they believed the claimant had been responsible for the Keith Spicer order going wrong in March. Their evidence was that they believed the claimant had damaged equipment when readying the order. The evidence given by Mr Johnson and Ms Armstrong was that

this incident was the 'last straw' in a series of concerns and was the main reason for his dismissal. They said in their witness evidence that Mr Johnson had taken the decision to dismiss the claimant for that reason whilst the claimant was on sick leave but, having discussed the matter with Ms Armstrong, decided not to dismiss the claimant until he returned to work.

91. When Ms Armstrong was asked questions at this hearing about whether she told Mr Steel about the Spicer order being a reason for termination, her replies were evasive. We infer from that evasive evidence and from the absence of any reference to the Spicer order in Mr Steel's letter that Ms Armstrong did not mention to Mr Steel that one of the reasons for the claimant's termination was that it was believed the claimant had damaged equipment when readying the Spicer order and had been responsible for that order going wrong.

92. Looking at the evidence in the round, we find that that, at the time the claimant's employment was terminated, neither Mr Johnson, Ms Armstrong nor Mr Livingston believed the claimant was at fault for any mistakes that had been made in relation to the Keith Spicer order. Mistakes made in relation to that order did not form part of their reasoning for terminating the claimant's employment. We say that for the following reasons:

    92.1. If it really was the case that the respondent's managers believed the claimant had caused the Keith Spicer order to go wrong and that this was the trigger for the claimant's dismissal, as the respondent's witnesses now claim, Ms Armstrong would have told Mr Steel that was the case when he was dealing with the appeal. She did not do so.

    92.2. There is no mention of the claimant in Mr Livingston's non-conformance report of 30 March. Nor is there any mention in that report of pins being damaged. Mr Livingston suggested, when asked about that, that the investigation had not been completed at that stage. We do not accept that evidence. It is clear from that report that a decision had already been reached that Mr White was at fault and that he should be disciplined. Had the investigation been ongoing it is difficult to see why Mr Livingston completed his non-conformance report at that stage or why a further non-conformance report was not completed subsequently identifying the claimant's actions as a further cause.

    92.3. The evidence of the respondent's witnesses was inconsistent and changed as the case progressed. For example, in the witness statements the witnesses said the Keith Spicer job began on 23 March. After the claimant was cross-examined and Mr Livingston's attention was drawn to the text message of 21 March, which was clear evidence that the claimant was not working on 23 March, Mr Livingston changed his evidence, saying the job began on the day the claimant had left his shift early. Mr Johnson then changed his evidence, in line with Mr Livingston's revised position. Another example was that Mr Johnson said, when questioned, that the client had put pressure on him to take disciplinary action. He made no mention of that in his witness statement, however.

    92.4. There were also discrepancies between the evidence of Mr Johnson and Ms Armstrong and the position of the respondent as set out in the grounds of resistance. The grounds of resistance suggested, at paragraph 19, only that the claimant would 'probably' have been dismissed for the Keith Spicer incident

if he had been at work. At paragraphs 22 and 27 to 28 it is suggested that the decision to dismiss the claimant was made for a number of reasons, including the fact that, upon his return to work, he is alleged to have said he 'fancied a sitting down sort of day'.

93. We find that Mr Johnson decided at some time during the claimant's absence from work to dismiss him. That decision was not made before the claimant failed to return to work on 11 April. Had it been, it is likely there would have been a reference to it earlier in Ms Armstrong's notes.

94. One of the issues we have to decide in this case is whether the claimant had a disability. That entails making findings of fact as to whether the claimant had a physical impairment and the effects of that impairment on the claimant's ability to carry out day to day activities at the relevant times.

95. The claimant was directed to prepare an impact statement ahead of this hearing. At this hearing he confirmed the contents were accurate.

96. We make the following findings:

96.1. The claimant started having back pain in late 2021. It was bad enough for him to seek advice from his GP in December 2021. Notwithstanding what the claimant told his physiotherapist, we do not find that the claimant had a history of back pain before then given that, on recruitment, the claimant told the respondent that he had not had a history of back problems.

96.2. The claimant's GP referred the claimant for an MRI scan. This suggests the claimant's GP thought what the claimant was complaining about was significant enough to refer him for further investigation. The MRI scan showed the claimant had a 'minor non-compressive disc bulge'. The physiotherapist referred to age related changes. We infer that the physiotherapist believed the claimant may have experienced changes in his spine that were related to ageing.

96.3. The claimant was still able to work until 21 March. He did not mention his back paid to Ms Armstrong in January 2022 when specifically asked about his health. At the time he was taking paracetamol. We infer that the pain, reduced as it was by the effects of paracetamol, was not so bad at that time that the claimant considered it needed to be mentioned to managers, even when he was specifically asked about his health.

96.4. On 21 March the claimant experienced an acute exacerbation of the back pain he had been experiencing. For three days the claimant struggled to walk due to the severity of the pain. The pain 'flared' when he moved and he was getting leg pain with pins and needles and numbness. That continued over the next few days. The claimant took painkillers which improved matters. The pain would have been worse without the painkillers.

96.5. Over the next couple of weeks, the claimant experienced pain which was worse in the morning and experienced pain and disturbed sleep at night. That stopped after he changed the mattress he used in early April 2022. On 8 April the improvement was such that he told his employers that he was hoping to return to work on 11 April. But the claimant still had a problem with his back even then, which is why he did not return to work.

96.6. The claimant then had physiotherapy in April and did exercises that improved his back problem significantly. By the end of April 2022 the pain had eased greatly (the claimant told the physiotherapist it had 'improved 80 to 90 per cent'). By then the claimant felt he may be ready to return to work. We infer, however, that the claimant still had some lingering pain given that the physiotherapist told the claimant that it usually takes a number of weeks to start to see a change in symptoms and the claimant's GP issued another fit note on 28 April.

96.7. We infer that the claimant, his GP and his physiotherapist all expected the claimant's condition to improve over the following days and weeks. The physiotherapist said 'we expect your condition to improve'; the fit note was due to expire on 8 May; and the claimant told his GP he felt well and ready to return to work on 9 May.

96.8. The claimant did not return to work on 9 May. His GP continued to sign him off sick until June. However, although these fit notes continued to refer to back pain, they also gave as a reason for absence 'family stress'. When the claimant spoke to Ms Armstrong on 9 May he gave the impression that the real problem preventing the claimant from returning to work at that stage was stress related to his family circumstances rather than a back problem. Looking at the evidence in the round (including the fact that the claimant told his GP on 7 June that he was still troubled by sciatica and they discussed treatment options on that date) we find that the claimant was still troubled, to some extent, by back pain throughout May and into June 2022. However, the claimant's condition was not worsening and the claimant was expected to recover from the 'flare up' he had experienced. The fit notes issued by the claimant's GP were of short duration until the last one, when the claimant was dealing with a stressful family situation.

96.9. We infer from the MRI scan, the discussion of surgery and the physiotherapist's reference to age related changes, that the claimant had an underlying impairment in part of his spine. We find it more likely than not that that was the cause of the pain and reduced mobility the claimant was experiencing. That underlying impairment still existed when the claimant was dismissed on 23 June. However, it does not automatically follow from the existence of the underlying impairment that the condition was likely to (ie could well) remain symptomatic, with the back pain and reduced mobility persisting indefinitely. We return to this later in our conclusions.

96.10. In his impact statement the claimant said he said he could not walk or stand up. But we find that he clearly could, certainly up to 21 March 2022, because he was continuing to work. In a text to Mr Livingston the claimant said on 21 March his legs were weak. He did not say then he could not walk. We find in the claimant's statement that he could not walk or stand up to be something of an exaggeration. But we do think the claimant had some difficulty standing for long periods because it put pressure on his back causing pain and that is why he did not go in to work.

96.11. The claimant referred in his impact statement to difficulty shaving and washing. Those are the things one usually does standing up although they do not take a long time. The claimant referred to being in bed for days at a time in his impact statement, but he did not say when. Given what he told his physiotherapist we find that the claimant was largely confined to his bed for a

period of three days immediately after the acute exacerbation on 21 March 2022.

96.12. The claimant referred to getting in and out of his car being a big problem. We accept that after the 'flare up' on 21 March, the claimant's mobility was restricted due to the pain he was in and that would have affected him getting in and out of the car: he could do it but with some difficulty. He said he was not comfortable when he was driving and we accept that and that evidence, which was not challenged. In his impact statement, the claimant also referred to only feeling comfortable sitting down. He said he was comfortable sitting down on a soft chair; that's when he could get comfortable but getting out of a chair was difficult. We accept that. The claimant also said lifting heavy things was difficult. We accept that he either could not lift heavy items or avoided doing that because it put pressure on his back.

96.13. Looking at the evidence in the round we accept that walking caused the claimant some discomfort and consequently he had difficulty walking and was likely to have avoided doing that to a degree.

96.14. We find that, at times between December 2021 and when he was dismissed in June 2022, the effect of the claimant's impairment on his ability to carry out day to day activities was more than minor or trivial and, without pain killers, those effects would have been even more significant and frequent during that period. In particular, the impairment had a more than minor or trivial effect on the claimant's ability to stand and walk and to lift heavy things. We find that was probably the case to some degree from December 2021; that was why the claimant sought advice from his GP. The pain was particularly acute from 21 March and the days that followed that. We find the claimant's back problem was still having some effect in June 2022, as evidenced by the fact that the claimant had a discussion with his GP about the pros and cons of surgery. By then, however, the adverse effects of the claimant's condition on his ability to carry out day to day activities were vastly reduced.

Conclusions

Did the claimant have a disability at the relevant time?

97. We have found as a fact that the claimant had an impairment to his physical health by virtue of back pain. That impairment existed from December 2021 and was still in existence at the date of dismissal.

98. We have also found that the impairment had an adverse effect on the claimant's ability to carry out day to day activities that was more than minor or trivial.

99. The remaining question is whether the adverse effects on the claimant's ability to carry out normal day to day activities were long term or are to be treated as being long term.

100. For the purposes of the section 15 claim we must consider whether the claimant was a disabled person:

100.1. as at 23 June 2022; and

100.2. during any absence from work from 21 March 2022 that arose in consequence of his back condition.

101. By 23 June 2022, the substantial adverse effects had not lasted 12 months. The question we must ask, therefore, is whether, as at 23 June, it was the case that those effects 'could well' last 12 months or more.

102. As at 23 June the back problems the claimant had been experiencing were vastly reduced. His physiotherapist had said the expectation was that problems from that 'flare up', as it was described, were expected to resolve with him managing himself by doing exercises. We find that the position on 23 June was that the adverse effects the claimant had been experiencing from that particular flare up were not expected to last much longer and certainly not as long as November that year. It is immaterial whether or not those effects did in fact continue: we must consider the claimant's situation as it appeared on 23 June 2022 and not with the benefit of hindsight gleaned from what actually transpired. Taking into account all the relevant circumstances, we conclude that, as at that date, the claimant's condition was not such that it could be said that any adverse effects on the claimant's ability to carry out day to day activities were likely to (ie could well) continue until November 2022.

103. However, the claimant's physiotherapist had referred to the possibility of future flare ups and had suggested the claimant had experienced age-related changes. We infer that the physiotherapist believed the claimant could well have further flare ups in the future. In other words, the position on 23 June 2022 was that, because the claimant had an underlying impairment affecting his spine, that could well give rise to a similar episode of back pain in the future (including in 2023 and beyond) that could well, once again, have a substantial effect on the claimant's ability to carry out normal day to day activities.

104. Because of that possibility of recurrence, we must treat the substantial adverse effects of the claimant's condition on his ability to carry out normal day to day activities as being likely to continue for more than a year: Equality Act Schedule 1, paragraph 2. That was the case when the claimant was absent from work from 21 March 2022 and when he was dismissed in June 2022.

105. It follows that, at those times, the claimant had, over that period, a physical impairment that had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. Therefore, he was a disabled person, within the meaning of that term in section 6 of the Equality Act 2010, at the date of his dismissal, 23 June 2022, and throughout his absence from work which began on 21 March 2022.

The section 15 claim

Reason for dismissal

106. The claimant says he was dismissed either because of disability related absence or because he could not do his job because of disability.

107. We accept the claimant was absent from work because of his disability starting on 21 March 2022 and that absence continued until he returned in June 2022. The early period, we find, was entirely due to the claimant's back condition. In the later period, the claimant's absence was also due to his family circumstances but, we find, was also partly due to his back problem given that the claimant's GP continued to refer to the back problem in fit notes and the claimant was still speaking to his GP about his back problem.

108. We find that certainly during the early stages of this period of absence the claimant could not do his job because of his disability. Before his absence, however, he could do his job and when he returned to work on 23 June 2022 he was able to do his job (or would have been had he not been dismissed).

109. The question for this Tribunal is whether the respondent dismissed the claimant because he was absent from work and unable to do his job during that period between 21 March and 23 June 2022 or because of any of that absence.

110. The burden of proof is on the claimant to prove facts from which we could conclude, in the absence of an explanation, that he was dismissed because of his absence.

111. We have made the following findings of fact:

111.1. The claimant was not dismissed because the respondent believed the claimant to be responsible for the Keith Spicer job going wrong as has been alleged.

111.2. The claimant's managers were sceptical about the reasons given by the claimant for his absence and frustrated about him not returning to work.

111.3. The claimant was dismissed immediately upon his return from his absence on sick leave.

112. Based on those facts, we could infer, in the absence of an explanation, that the claimant was dismissed because of his disability related absences. Therefore, the burden of disproving this shifts to the respondent.

113. The respondent's position was that the claimant was dismissed for unsatisfactory performance.

114. We found the evidence of all three of the respondent's witnesses as to the reason for dismissal to be unreliable, for reasons referred to in our findings of fact.

115. We have rejected the respondent's witnesses' claims that the main reason for dismissal was the Keith Spicer order going wrong.

116. As for whether there were other performance concerns, there is no evidence that there was any suggestion made to the claimant during his employment that there was a problem with his performance. Nor did the claimant's witnesses identify any mistakes they believe the claimant had made or areas where he was otherwise underperforming (other than in relation to the Keith Spicer order, which we have found was not a reason why the claimant was dismissed). Mr Livingston's evidence was that he scored the claimant lower than his colleagues on a performance review document in December 2021. However, we have expressed our doubts about that evidence in our findings of fact above. Even if Mr Livingston did have doubts about the claimant's abilities, the fact that he did not broach them with the claimant in December suggests they were not serious concerns. As for the document Mr Livingston says he completed in May 2022, Mr Johnson's evidence was that he did not see that document before deciding to dismiss the claimant. In any event, that document was created at a time when managers were unhappy with the claimant's ongoing absence and appears self-serving.

117. We have found that, during the claimant's employment, Mr Johnson and Mr Livingston formed the view that the claimant was opinionated, somewhat eccentric and difficult to communicate with. The claimant had got off on the wrong foot with Mr Johnson by asking for a 'flyer' on his first day of work. Subsequently Mr

Livingston and some of the claimant's other colleagues had not found the claimant easy to work with and had not warmed to him. Mr Livingston and Mr Johnson were also unhappy because they believed the claimant had been critical of their established ways of working. Whether or not those perceptions of the claimant were fair, they are likely to have contributed to the decision to dismiss the claimant.

118. However, the respondent has not proved that the claimant's absence from work and inability to work between March and June 2022 did not also materially influence the decision to dismiss the claimant.

119. The respondent has not discharged the burden of disproving that the claimant was dismissed because of his absence.

120. We find therefore that the respondent treated the claimant unfavourably by dismissing him because of his absence (and inability to work during some of that period) which is something that arose in consequence of the claimant's disability.

Knowledge of disability

121. The question of whether the respondent acted unlawfully turns on whether the respondent shows it did not know, and it was unreasonable for it to be expected to know, one or more of the following things:

121.1. that the claimant suffered an impediment to his physical health;

121.2. that the impairment had an effect on the claimant's ability to carry out normal day to day activities that was more than minor or trivial;

121.3. that an effect on the claimant's ability to carry out normal day to day activities was long-term.

122. Mr Steel submitted that the date on which knowledge of disability must be assessed is the date the decision was taken to dismiss the claimant, rather than 23 June 2022, when the claimant was actually dismissed. We disagree. The complaint the claimant has made is that the respondent discriminated against him by dismissing him. The act of dismissal occurred on 23 June 2022. That is the date on which knowledge of disability is to be assessed.

123. At the time they dismissed the claimant, the respondent's managers knew the claimant had suffered back pain and restricted movement in his back that and that this was an impediment to his physical health.

124. At the time of dismissal, however, they only knew the claimant had suffered from that impediment from 21 March 2022, the date the claimant's sickness absence began. As at the termination date, it was not reasonable for the respondent to be expected to know the claimant had suffered that impediment before 21 March 2022 given that the claimant had chosen not to divulge that he was experiencing back pain before then, despite Ms Armstrong asking him about his health in January 2022 and giving him a form to fill in.

125. The respondent's managers knew from 21 March 2022, or could reasonably be expected to know, that the pain was serious enough to prevent the claimant from doing his job. On 8 April the claimant told Mr Johnson, Ms Armstrong and Mr Livingston that the pain had been really bad. At that time the respondent's managers knew the claimant was going to have some physiotherapy. They also knew that, whatever the claimant had said about returning to work, over the weeks that followed the claimant's doctor was still signing him off sick with his back and latterly with back and stress.

126. Given that the claimant had had to take time off work, and in light of what the claimant told his managers about how he had been affected during the meeting on 8 April 2022, the respondent has not persuaded us that it could not reasonably have been expected to know that the back pain and restricted movement the claimant experienced from 21 March 2022 had a substantial adverse effect on the claimant's ability to carry out normal day to day activities for at least some of the period between 21 March and the date of dismissal.

127. The key issue, then, is whether the respondent's managers knew, or could reasonably be expected to know that the adverse effects of the impediment could well recur one year or more after they began (which, from the perspective of what the respondent knew or could reasonably be expected to know, was 21 March 2022).

128. In determining this issue it is relevant to consider whether, as at 23 June 2022, the respondent knew or could reasonably have been expected to know that the claimant had an underlying condition that could well result in future relapses.

129. It is generally known that back pain can strike anyone for any number of reasons and can be transient. Having back pain itself does not mean there must be an underlying spinal impairment that is causing pain. For example, back pain can be caused by muscle strain.

130. On 8 April the claimant told the managers that he thought his back had 'clicked into place' since he started using a new mattress that things were better and that he was planning to come back to work in a few days' time. Although the claimant remained off work for considerably longer, in the later weeks of his absence Ms Armstrong, believed that the main reason the claimant was off work at that time was not back pain but family circumstances. That belief was reasonable and based on what the claimant told her when she spoke with him over the 'phone.

131. As at the date of dismissal, the respondent's managers had not seen the claimant's medical records. They did not know that the claimant's physiotherapist had referred, in discharge notes, to age-related changes and the possibility of future 'flare-ups', and they did not know that the claimant's GP had discussed with the claimant the pros and cons of surgery or what the MRI scan had shown. There is no evidence that the claimant said anything at the meeting on 8 April that might alert the respondent's managers to the possibility that he had an underlying problem that could have long term effects. Nor is there any evidence that the claimant said anything along those lines to Ms Armstrong in any of the subsequent conversations they had during the claimant's absence. On the contrary, what the claimant said left Ms Armstrong with the impression that the claimant was recovering well from his back pain.

132. The claimant said to Mr Livingston in a text on 21 March that his pain was possibly caused by disc compression (although the MRI scan did not refer to disc compression: it referred to a 'minor non-compressive disc bulge'). Looking at all of the facts in the round, we are satisfied that the respondent did not know, and could not reasonably be expected to know, based on that comment in a text, that the claimant had an underlying impairment that meant he was vulnerable to relapses or 'flare ups'.

133. Looking at all of the evidence in the round, we are satisfied that, when they dismissed the claimant, the respondent's managers did not have actual knowledge that the back problems the claimant had been experiencing had been caused by

an underlying impairment affecting his spine that could well give rise to a similar episode of back pain in the future. Given that they did not know the cause of the claimant's back problems, we are satisfied the respondent did not know, as at 23 June 2022, that there was any possibility of the claimant's back problems recurring more than a year after they first began.

134. The next question we must consider is whether, even though they did not have that knowledge, the respondent could nevertheless reasonably be expected to know that the back pain and/or reduced mobility could well recur more than a year after the claimant first experienced it.

135. We bear in mind that an employer must do all it can reasonably be expected to do to find out if a worker has a disability. In some cases an employer might be expected to refer an employee to occupational health for an assessment or make enquiries of the claimant's GP, if the employee agrees. Had the respondent done that in this case, an occupational health adviser is likely to have made enquiries as to what the claimant had been told by his physiotherapist and GP and what the MRI scan revealed. The occupational health adviser or GP may well have identified the cause of the condition as being an underlying impairment affecting the spine and have alerted the respondent to the possibility of future relapses or 'flare ups'.

136. However, in our judgement, this was not a case in which it was reasonable to expect the respondent to make such further enquiries, whether by contacting the claimant's GP or commissioning an occupational health report. The claimant had, for some weeks, been telling his employer that his back was much improved, having 'clicked into place'. Ms Armstrong had asked the claimant if adjustments were required but he had not suggested they would be. From the perspective of the respondent's managers, this appeared to be an isolated and relatively short-lived period of back pain that started suddenly on 21 March 2022, had improved significantly after a couple of weeks and that, by the time of the return to work, had more or less resolved. During the claimant's absence, Ms Armstrong had had regular conversations with the claimant about how his back was progressing. In the absence of any suggestion from the claimant that there was a risk of future flare ups, asking the claimant to undergo an occupational health assessment or agree to his GP providing a report would have involved an infringement of the claimant's privacy that was not warranted in the circumstances of this case. Nor was there anything in the circumstances that ought to have led Ms Armstrong to expressly ask the claimant if he might have an underlying impairment that could give rise to problems in the future.

137. In all the circumstances, we conclude that the respondent has shown that, as at 23 June 2023, it did not know and could not reasonably have been expected to know that the adverse effects of the claimant's back condition could flare up again more than 12 months after they first began.

138. It follows that, although the respondent's managers knew the claimant had had a bad back, they did not know the claimant had a disability by virtue of his bad back and nor could they reasonably have been expected to know that was the case.

139. Therefore, section 15(1) of the Equality Act 2010 did not apply. The respondent did not discriminate against the claimant when it dismissed him.

Direct discrimination

140. We must consider whether the respondent would have dismissed somebody who did not have a disability but whose circumstances were otherwise the same as those of the claimant ie a hypothetical comparator.

141. A hypothetical comparator would be someone in their first year of employment; with significant sickness absence; whose managers had doubts about the genuineness of the illness; who was considered by managers to be opinionated, somewhat eccentric and difficult to communicate with; whose colleagues had not found easy to work with and had not warmed to; and with whom managers were already unhappy because they believed he had been critical of their established ways of working.

142. In our judgement, the respondent would have dismissed anybody in those circumstances, whether or not they had a disability.

143. We are satisfied that the reason for the claimant's dismissal was not the claimant's back problem in itself. Rather, the claimant was dismissed because of his absence from work (which was a consequence of his disability).

144. Therefore, the claim of direct disability discrimination is not well founded.

Employment Judge Aspden

Date 12 December 2023