Case No: 2300892 / 2021

EMPLOYMENT TRIBUNALS

Claimant: Mr M Zubrzycki

Respondent: Tesco Stores Limited

Heard at: London South, by CVP
On: 26, 27, 28 and 29 September 2023 and in chambers on 11 December 2023

Before: Employment Judge Rice-Birchall
Mrs J Forecast
Mr K Murphy

Representation
Claimant: In person
Respondent: Mr Westwell, Counsel

JUDGMENT

The unanimous decision of the Tribunal is as follows:

The claimant was not a disabled person within the meaning of the Equality Act 2010 at the relevant time and his claim of disability discrimination fails and is dismissed.

The claimant was fairly dismissed by the respondent. His claim of unfair dismissal fails and is dismissed.

The claimant was not discriminated against because of his race. His claim of race discrimination fails and is dismissed.

The claimant was paid notice pay and is not entitled to any additional notice. His claim for breach of contract/ wrongful dismissal fails and is dismissed.

REASONS

Background

1. The claimant was unrepresented, though his son accompanied him at the outset of the hearing on the first day. A different interpreter attended each day of the hearing.

2. A potential bias issue was identified at the outset and Mr Murphy declared that he had been an USDAW representative for an area which included some Tesco retail stores. Mr Murphy did not feel the need to recuse himself (**Porter v MacGill** considered) but the Tribunal explained the circumstances to the parties and allowed the parties to comment. The parties were happy to continue once some further clarification had been provided.

Issues

3. The Tribunal spent some considerable time at the outset of the hearing identifying the issues as regards disability discrimination, the remainder of the issues having been agreed at a preliminary hearing on 14 July 2022 before Employment Judge TR Smith. The respondent's position was that anything other than an allegation about Scott King not taking into account the claimant's hernia in 2017 would require an amendment application. After some discussion, the claimant accepted this allegation as being his claim of disability discrimination. It is worthy of note that the claimant had a number of opportunities to clarify his claim at the request of both the respondent and the Tribunal earlier in the proceedings but had not done so in such a way as to properly particularise his claims and identify the legal basis for them.

4. The issues were identified as follows:

1. Unfair dismissal

1.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct . The tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

1.2 If the reason was misconduct, 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:

1.2.1 there were reasonable grounds for that belief;
1.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

1.2.3 the respondent otherwise acted in a procedurally fair manner;

1.2.4 dismissal was within the range of reasonable responses.

2. Direct race discrimination (Equality Act 2010 section 13)

2.1 Did the respondent do the following things:

2.1.1 Fail to investigate adequately or at all four grievances lodged by the claimant, the first being approximately September 2019 directed against Mr David Webb, the second in about May/June 2020 directed against Mr Steven King, the third and fourth been lodged at 6 am on 1 November 2020 directed against Mr Carl Foreman and Mr Craig Looking?

2.1.2 Did the dismissing officer, despite being appraised there were ongoing grievances, fail to take those into account in determining to dismiss the claimant?

2.1.3 Dismiss the claimant?

2.2 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 he was treated worse than someone else would have been treated. The claimant has not named anyone in particular who he says was treated better than he was.

2.3 If so, was it because of his race?

3. Wrongful dismissal / Notice pay

3.1 What was the claimant's notice period?

3.2 Was the claimant paid for that notice period?

4. Direct disability discrimination (Equality Act 2010 section 13)

4.1 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:

4.1.1 Did the claimant have a physical or mental impairment: left inguinal hernia and/or umbilical hernia?

4.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

4.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

4.1.4 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?

4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.1.5.2 if not, were they likely to recur?

4.2 Did the respondent (Scott King) fail to take into account the claimant's hernia in 2017?

4.3 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 he was treated worse than someone else would have been

treated. The claimant has not named anyone in particular who he says was treated better than he was.

4.4 If so, was it because of his disability?

5. Remedy unfair dismissal and discrimination

5.1 Does the claimant wish to be reinstated to their previous employment?

5.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

5.3 Should the tribunal order reinstatement? The tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

5.4 Should the tribunal order re-engagement? The tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

5.5 What should the terms of the re-engagement order be?

5.6 The tribunal will decide:

5.6.1 What financial losses has the dismissal/ discrimination caused the claimant?

5.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

5.6.3 If not, for what period of loss should the claimant be compensated?

5.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

5.6.5 If so, should the claimant's compensation be reduced? By how much?

5.6.6 Did the respondent or the claimant unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.6.7 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

5.6.8 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

5.6.9 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

5.7 What basic award is payable to the Claimant, if any?

5.8 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

5.9 Additional remedies, discrimination only

5.9.1 Should the tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.9.2 Can the claimant establish his feelings were injured and if so what award should be made?

5.9.3 Did the claimant suffer a personal injury and if so what award should be made?

5.9.4 Should interest be awarded and if so for what period?

Evidence

6 The Tribunal had the benefit of a bundle of documents running to over 400 pages and witness statements from Mr Naylor, Warehouse Shift Manager and dismissing officer, Mr Thatcher, Centre Manager and first stage appeal manager and Mr Freeman, Head of Automated Fulfilment Operations, and second stage appeal manager. There was a very short witness statement from the claimant running to just over one page of A4. He was cross-examined by the respondent for more than a full day.

7 During the morning, and before taking time to read, the Tribunal explained to the claimant that, in the afternoon, he would be required to cross examine the respondent's witnesses. When the time came for Mr Naylor to give evidence it became apparent that the claimant had done no preparation whatsoever and was unable to locate the respondent's witness statements.

8 The Tribunal gave the claimant some time to prepare his cross examination and explained the purpose of cross examination including the importance of challenging any evidence in the respondents' statements that the claimant did not agree with, and that, if he did not, it was possible that the Tribunal would view the respondent's statements as agreed facts.

9 The claimant gave long and protracted answers to the questions put to him in cross examination. He was asked by the Tribunal to give short responses to the questions being posed. The Tribunal requested the respondent to not put any question more than twice to the claimant, who frequently did not answer the question put to him.

10 The Tribunal found the claimant's evidence to be inconsistent, confusing and inaccurate. By way of example, the claimant was asked about extended leave and he said that his requests had always been granted even though his request had not been granted in 2019. Further, the claimant suggested he had told his employer about his umbilical hernia in 2017 (when he mentioned the left inguinal hernia), but it was not diagnosed until 2020. The claimant also stated that he was first diagnosed with a left inguinal hernia on 12 November 2014 but later said it was in December 2016.

11 It is noted that the claimant would not accept that any of the minutes of the meetings were an accurate representation of what had been said. He did not at any stage offer an alternative version of what was said and the Tribunal accepts all the notes as a fair and accurate reflection (rather than a verbatim account) of what was said in the various meetings with the claimant. The claimant was represented at most of the meetings and signed the minutes of the meetings as a true and accurate representation of what had been said.

Facts

12 The claimant was employed by the respondent in a distribution centre as a warehouse operative from 1 June 2010 until 1 October 2020 when he was dismissed for misconduct. He had transferred to the respondent in 2017, following a TUPE transfer, having previously been employed by Wincanton since May 2010. Prior to becoming an employee he had worked as an agency worker from 2007 until May 2010.

The claimant's hernias

13 The claimant was first diagnosed with a left inguinal hernia on 12 November 2014.

14 At an appointment on 2 December 2016, it was noted that the claimant's GP, at the claimant's request, wrote a letter to the respondent to ask if the claimant could avoid heavy lifting due to his left inguinal hernia. The Tribunal could not ascertain whether that letter had been given to the respondent. The medical report suggested that the claimant's hernia tended to hurt when lifting heavy loads at work, as it bulged.

15 The claimant states in his witness statement that he first informed his employer of this condition (the left inguinal hernia) in 2017 and suggested that he also told his employer at that time that he had an umbilical hernia. However the claimant suggested later in his statement that, because he had no adjustments, he was diagnosed with an abdominal (or umbilical) hernia in 2020, and in a letter to the Tribunal dated 4 Feb 2022, the claimant refers to the abdominal umbilical hernia being diagnosed on 28 May 2020.The claimant cannot therefore have told the respondent about the umbilical hernia in 2017, as it had not been diagnosed in 2017.

16 In December 2017, the claimant was issued with an Adjustment Passport. Only the first page was available to the Tribunal and that extract does not show the adjustments made. The Passport was for the claimant to keep and pass to anyone who he thought needed to know about his condition and for them to understand the agreed adjustments, for example as regards performance targets or duties.

17 The claimant confirmed that he did not suffer from his hernia whilst at home and that it only affected him at work when it bulged, probably as a result of heavier loads, though it would calm down following a short period of rest (approximately two hours) and without any additional treatment other than rest. The claimant was able to work but the hernia would become painful from time to time.

18 As a result of the claimant requesting to avoid lifting heavy loads, the claimant was given some adjustments which included 50:50 working (which refers to using two skills, usually picking and loading, which is an adjustment aimed at the employee returning to their correct role, though adjustments can be extended subject to review). There was no evidence to suggest that the respondent sought to curtail or stop the adjustments for the claimant.

Extended leave- 2018-9

19 The employee handbook applicable to the claimant specifically provided for employees to take periods of extended leave, subject to certain criteria. One such criteria was that extended leave would not normally be available to an employee more than once in a five year period. According to the handbook, applications must be made in writing and are approved by the General Manger. The claimant had previously taken advantage of this in 2018 when his leave request had been accepted. The claimant confirmed that he was aware of that policy, and, in particular, that extended leave could only be granted once in a five year period. He also confirmed that five weeks would be an extended leave period.

20 In 2019, the claimant applied for extended leave again, despite the policy saying that it could only be applied for once every five years. His application was refused. Around the time for which he had requested the extended leave, the claimant commenced a period of sick leave (on 25 July 2019). When the respondent called him, on 26 July 2019, there was an international dialling tone. Nonetheless, the claimant was given the benefit of the doubt on his return to work and no action was taken against him. However, in cross examination the claimant confirmed that he had returned to Poland with his family during his reported sickness absence. He did not return to work until November 2019.

Grievance 1

21 The claimant raised a grievance on 24 October 2019 (grievance 1). He received an outcome on 22 November 2019. His grievance was: upheld in that it was found that Mr King, Warehouse Service Team Manager, had shared the performance of colleagues openly, which had caused some laughter as the claimant was the lowest performer; and partially upheld as it was found that some managers adhered more strictly to the delay time policy than others which could result in an inconsistent application of the policy. Other allegations were not upheld. This shows a well-reasoned and proportionate response by the respondent with next steps put in place.

22 The claimant was accompanied at hearings by his trade union representative.

Final written warning

23 The claimant was issued with a final written warning on 2 June 2020 for inappropriate behaviour and language used towards a colleague after it was found that he swore at a colleague. The claimant had also walked out of the investigation meeting convened to discuss his conduct, and this conduct was also taken into account in deciding to issue the final written warning.

24 The claimant admitted that he swore at Mr Fordham and that he walked out of the investigation meeting.

25 The final written warning specifically stated that it would remain live for 12 months and that any further misconduct could lead to dismissal.

26 The claimant did not appeal the final written warning.

27 It is important to note that the claimant was accompanied at the investigation and disciplinary meetings by his trade union representative, as one of the claimant's complaints is that he was not supported at any of his meetings.

Extended leave 2020

28 The claimant requested a further period of extended leave to return to Poland during summer 2020. It was not granted but a compromise was reached whereby the claimant could have two weeks off, return to work for a week and then have a further two weeks off. It is relevant that there were COVID restrictions in place throughout 2020.

29 Shortly before his first two weeks of annual leave, the claimant spoke to Mr King to see if it would be possible to take off the middle week also, so enabling him to take a continuous five weeks' leave. The claimant says he raised that because he was concerned about COVID preventing his return. He said his intention was to drive out and back for the first two weeks and then fly back for the second two weeks.

30 On 10 July 2020, the claimant drove to Poland. He was due to be back at work on 25 July 2020. On 22 July 2020, the claimant asked his daughter to phone the sick line. She explained to Mr King that the claimant's father was ill and that, therefore, the claimant would not be returning to work on 25 July 2020 as expected.

31 On 29 July 2020, the claimant again arranged for the sick line to be contacted to explain that his father was better and he would be able to resume his two week holiday.

32 The claimant returned to work on 15 August 2020.

33 On 17 August 2020, the claimant attended a return to work interview. That return to work interview records that "Travel was more than 20 hours and cost was very high and high risk corona virus as lots of bus changes and 3 airports also my father very weak, his age 72 and he needed help with the harvest." The claimant also confirmed that his father was much better.

34 On 21 August 2020, the claimant attended an investigation meeting. The purpose of the hearing was stated to be "Conduct – breach of trust". The claimant was asked why he didn't make it back to work. The claimant explained that before he went to Poland he checked whether he could travel back by plane or bus but both were "locked". He was asked why he didn't book in advance. He explained that it was too expensive to drive back alone

and there were no flights, then his father was ill so he made the decision to stay.

35 It was put to the claimant that, at the return to work meeting he said the main issue was travel, but that, at the time, he had called the sick line to say his father's illness was the main reason for not returning to work as agreed. The claimant confirmed that the reason he went home was to help his father with the harvest.

36 By letter dated 21 August 2020, the claimant was invited to a disciplinary hearing. He was informed of his right to be represented.

Grievance 2

37 On 24 August 2020, the claimant raised a second grievance (grievance 2) against Mr King, on the basis that Mr King had betrayed his trust, by not providing support to him and his family and making false accusations about him failing to return from Poland. The first allegation raised related to the allegation about sharing the claimant's information as dealt with in the first grievance. As a result, that allegation was not dealt with again.

38 The claimant was invited to a grievance hearing on 28 August 2020 with Anna Mayor. Mr King was interviewed as part of the grievance process.

39 There was a grievance outcome meeting on 28 September 2020. The detailed investigation report confirmed that none of the allegations were upheld and this was communicated to the claimant at an outcome meeting, at which the claimant declined the opportunity to be accompanied. The claimant was given the right of appeal, but did not do so.

40 It was noted in the grievance outcome, when considering the support that the claimant had been given by Mr King, that Mr King had kept the claimant on the 50:50 pattern which had started before the TUPE transfer and that there was a move to an early shift to seek to ensure that the claimant was picking lighter products. There was also a flexible approach to working hours and a phased return to work. However , the claimant's absence records demonstrated that the claimant had largely been dealing with another manager about this.

Grievances 3 and 4

41 On 28 August 2020, the claimant raised a third grievance. The grievance named Karl Fordham, distribution, who the claimant alleged inflicted "psychological mental abuse", and asked for his final written warning to be withdrawn and for disciplinary consequences for Mr Fordham. The content of the grievance was essentially an appeal against his final written warning.

42 On 28 September 2020, the claimant raised a fourth grievance, this time against Craig Lucking, General Manager.

43 It was confirmed to the claimant on 2 October 2020 that the third and fourth grievances were not being progressed on the basis that the claimant was unable to raise a grievance against a previous disciplinary decision and, as

his fourth grievance related to the respondent's time management system which applied to everyone, and not to the claimant personally, he was unable to complain about that. Further, that issue had been previously considered and resolved in October 2019.

Disciplinary hearing

44 On 29 September 2020, the claimant was invited to a disciplinary hearing to be held on 1 October 2020. The invitation letter warned the claimant that the hearing may result in disciplinary action against him, up to and including dismissal.

45 The claimant was accompanied at the hearing by his trade union representative. The disciplining manager was Mr Naylor. In fact, this hearing had been re-scheduled from 28 August 2020 in order for the claimant's second grievance to be concluded.

46 The claimant confirmed in the disciplinary hearing that he had intended to fly back for the week in between his two separate two-week periods of leave, but hadn't booked a flight. He said there were no options to travel and it was high risk to travel because of COVID. He said he didn't book flights before he left because flights suddenly closed, and he didn't pre-book them because they suddenly got cancelled. He then said he didn't pre-book a flight because he knew he could get a bus. Then he said there were flights but they were too expensive as they had gone up to £500. He said he couldn't drive back because of quarantine rules, but then confirmed that he did drive back at the end of his holiday and had not had to change his driving route from the one he normally took.

47 Following an adjournment, the claimant was dismissed. Mr Naylor confirmed that he considered previous holiday that the claimant had booked and believed that the claimant was not intending to return to work on this occasion between the two holiday periods. Mr Naylor considered this to be a breach of trust, which was an act of misconduct, and taking into account the claimant's disciplinary record, which had a final written warning which was still live, he was dismissed with notice. He was paid ten weeks' notice and had ten weeks' continuous service with the respondent.

48 Mr Naylor was not aware of grievances 3 and 4 when he dismissed the claimant.

49 The claimant was given a right of appeal and appealed by a letter dated 8 October 2020. Two stages of appeal. C appealed on. He said that the final written warning should be questioned and that he was appealing because there was an ongoing grievance against Mr King, and that, although it had been rejected, he had the right to appeal. He relied on his poor relationship with Mr King as evidenced by "attacks" about the claimant not being efficient enough. He went to say that he was being dismissed because of new rules in the workplace and added that his health condition had not been sufficiently considered.

50 The claimant's appeal was heard by Mr Thatcher. Mr Thatcher sent the claimant a grievance outcome letter on 8 December 2020. That letter

confirmed that the appeal was unsuccessful and that the decision to dismiss the claimant was upheld. Mr Thatcher explained firstly that dismissal was in accordance with the procedure where the claimant was already on a live final written warning and, secondly, that from the evidence, he believed the claimant had no intention of returning to the UK to work for the week that was not booked as annual leave. He explained that the reasons given by the claimant as to the reason why he had not returned had changed several times throughout the investigation, disciplinary and appeal meetings as the claimant had originally said he was driving out and back for the week at work before flying back out to Poland (according to the statement from Mr King); then stated that his father was unwell so he needed to stay and look after him and then said that the flights to return were too expensive and that the bus was not an option because of COVID. Mr Thatcher believed, because of this variation in reasons given, the claimant had no intention of returning to work. Mr Thatcher took into account the fact that the claimant's 2019 request for extended leave had been turned down and the claimant had gone off sick.

51 Mr Thatcher concluded that there had been a breach of trust and confirmed the claimant's dismissal.

52 On 21 December 2020, the claimant lodged a second appeal against his dismissal. The second appeal was heard by Mr Freeman, Centre manager.

53 Following an appeal hearing on 13 February 2021, the claimant's dismissal was upheld. The claimant was again accompanied at his appeal hearing. The decision was confirmed by a letter dated 13 February 2021, which stated: "My reasonable belief is that you knowingly took extended leave after asking for this time off and had been told that it was not possible. Whilst this could be coincidence, I reasonably believe that there is significant evidence to suggest different."

Law

Unfair Dismissal

54 An employee has the right under section 94 of the Employment Rights Act 1996 (ERA) not to be unfairly dismissed (subject to certain qualifications and conditions set out in ERA).

Reason for dismissal

55 When a complaint of unfair dismissal is made, it is for the employer to prove that it dismissed the claimant for a potentially fair reason, namely a reason falling within Section 98(2) ERA or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held.

56 A reason relating to the employee's conduct is a potentially fair reason falling within section 98(2).

57 Where an employer alleges that its reason for dismissing the claimant was related to their conduct, the employer must prove: that at the time of the

dismissal it genuinely believed the claimant had committed the conduct in question; and that this was the reason for dismissing the claimant.

58 The test is not whether the Tribunal believes the claimant committed the conduct in question but whether the employer believed the claimant had done so.

Fairness

59 If the respondent proves that it dismissed the claimant for a potentially fair reason, the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) ERA.

60 Section 98(4) ERA provides that "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.

61 The Employment Appeal Tribunal (EAT) set out guidelines as to how this test should be applied to cases of alleged misconduct in the case of **British Home Stores Limited –v- Burchell** 1980 ICR 303. The EAT stated that what the Tribunal should decide is whether the employer who discharged the employee on the grounds of the misconduct in question "entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time.

62 First of all, there must be established by the employer the fact of that belief, that the employer did believe it. Secondly that the employer had in its mind reasonable grounds upon which to sustain that belief and thirdly that the employer at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, has carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

63 The concept of a reasonable investigation can encompass a number of aspects including: making proper enquiries to determine the facts, informing the employee of the basis of the problem, giving the employee an opportunity to make representations on allegations made against them and put their case in response and allowing a right of appeal.

64 In 2009, ACAS issued its current code of practice on disciplinary and grievance procedures. The Tribunal must take into account relevant provisions of the code when assessing the reasonableness of a dismissal on the grounds of conduct (section 207(3) TULRCA).

65 Under the Code, employers should give employees an opportunity to put their case before any decisions are made. The Code identifies the need for a disciplinary meeting. It also provides that, when notifying an employee of a disciplinary meeting, the notification should contain sufficient information

about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. Furthermore, at the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered.

66 The Code also states that an employee who is not satisfied by the outcome of disciplinary proceedings should appeal and should be allowed to do so by the employer. It goes on to state that appeals should be heard without unreasonable delay and should be dealt with impartially (wherever possible by a manager who has not previously been involved in the case).

67 Paragraph 46 of the Code, which deals with overlapping grievance and disciplinary cases, reads: Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently."

68 Even if procedural safeguards are not strictly observed, the dismissal may be fair. This will be the case where the specific procedural defect is not intrinsically unfair and the procedures overall are fair (**Fuller –v- Lloyds Bank** 1991 IRLR 336 EAT). Furthermore, defects in the initial disciplinary hearing may be remedied on appeal if, in all the circumstances, later stages of a procedure are sufficient to cure any earlier unfairness.

69 In applying section 98(4), the Tribunal must also ask itself whether dismissal was a fair sanction for the employer to apply in the circumstances. The test is an objective one. It is irrelevant whether or not the Tribunal would have taken the same course had it been in the employer's place, similarly it is irrelevant that a lesser sanction may have been reasonable. Rather section 98(4) requires the Tribunal to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (**Iceland Frozen Foods Ltd –v- Jones** 1982 IRLR 439). This "range of reasonable responses" test applies equally to the procedure by which the decision to dismiss is reached (**Sainsbury's Supermarkets Limited –v- Hitt** 2003 IRLR 23).

70 In **Davies v Sandwell MBC** [2013] IRLR 377, Mummery LJ explained that in misconduct cases involving a final written warning prior to the decision to dismiss: the test of fairness is whether "it was reasonable for the employer to treat the conduct reason, taken together with the circumstances of the final written warning, as sufficient to dismiss the claimant" (para 22); it is not the ET's function to reopen the final written warning and decide whether the warning should have been issued (para 23); and "it is relevant for the ET to consider whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning". These are "material factors in assessing the reasonableness of the decision to dismiss by reference to, inter alia, the circumstance of the final warning" (para 24).

Discrimination

Time limits

71 Section 123 EqA provides:

> "(1) Subject to section 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."

1. For separate acts to constitute "conduct extending over a period" under s. 123(3)(a), the claimant must show that the acts are linked to each other and are evidence of a "continuing discriminatory state of affairs" as opposed to "a succession of unconnected or isolated specific acts": **Hendricks v Metropolitan Police Commissioner** [2003] 1 All ER 654 at [48], [52].

2. In **Bexley Community Centre (t/a Leisure Link) v Robertson** [2003] IRLR 434, the Court of Appeal held that "the time limits are exercised strictly in employment and industrial cases" and that a decision to extend time should therefore be the "exception rather than the rule", *per* Auld LJ at para 25. The Court also stated there that there is no presumption in favour of extending time; the onus is on the claimant to convince the Tribunal that it is just and equitable to do so.

3. In **British Coal Corpn v Keeble** [1997] IRLR 336, Smith LJ stated at para 8 that the Tribunal should have regard to the prejudice that will be suffered by either party as a result of its decision on extending time; should have regard to all the circumstances of the case; and will be assisted by the factors mentioned in s.33 of the Limitation Act 1980, namely:

    a. The length of and reasons for the delay;
    b. The extent to which the cogency of the evidence is likely to be affected by the delay;
    c. The extent to which the party sued co-operated with any requests for information;
    d. The promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
    e. The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

4. However, in **Adedeji v University Hospitals Birmingham NHS Foundation** [2021] EWCA Civ 23, Underhill LJ at para 37 reiterated that tribunals should not treat the list in **Keeble** as a checklist, stating that:"The best approach for a tribunal in considering the exercise of the discretion under s 123(1)(b) is to assess all the factors in the particular case which it

considers relevant to whether it is just and equitable to extend time, including in particular … "the length of, and the reasons for, the delay"".

Disability

5. Section 6(1) EqA provides:
"(1) 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."

6. Section 212(1) EqA provides that "substantial" means "more than minor or trivial".

7. The section therefore poses four principal questions:
   a. Did C have a physical or mental impairment?
   b. Did that impairment have an adverse effect on the C's ability to carry out normal day-to-day activities?
   c. Was that effect substantial?
   d. Was that effect long-term?

8. The Office for Disability Issues' Guidance states that:"In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities" (Paragraph D3).

9. Whether C's impairment a "substantial and long-term adverse effect on [his] ability to carry out normal day-to-day activities" is to be assessed with reference to the effect of the impairment when the alleged discriminatory act took place: *All Answers Ltd v W* [2021] IRLR 612 at para 26 *per* Lewis LJ. The Tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination.

10. Para 5 to Sch. 1 EqA provides that "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".

Direct Discrimination

11. Direct Discrimination is defined by section 13 of Equality Act 2010 ("EqA) which provides: "A person (A) discriminates against another (B) if, because of a protected characteristic, AS treats B less favourably than A treats or would treat others."

12. Section 23(1) EqA 2010 provides there should be no material difference in circumstances between the claimant and any comparator or hypothetical comparator (save for the protected characteristic).

13. Relevant in deciding whether discrimination is established is the burden of proof. s.136 EqA 2010 provides:-

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
(5) This section does not apply to proceedings for an offence under this Act.
..."

14. In **Igen v Wong**, in relation to a predecessor provision to section 136 EqA, the Court of Appeal held that it is for the claimant who complains of discrimination to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of unlawful discrimination. In deciding whether the claimant has proved such facts, it is important to remember that the outcome, at this first stage of the analysis by the Tribunal, will usually depend on the inferences which it is proper to draw from the primary facts found by the Tribunal. The Tribunal is looking for primary facts to consider which inferences of secondary fact might be drawn. 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. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourable on the ground of [here] race, it is then for the respondent to prove that it did not commit that act. That requires a Tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but, further, that it is adequate to discharge the burden of proof, on the balance of probabilities, that race was not a ground for the treatment in question.

15. **Hewage v Grampion Health Board** [2012] UKSC 37 expressly endorsed the two-stage test which had been laid down in **Igen v Wong** [2005] EWCA Civ 142, namely:-
    a. The first stage requires the complainant to prove facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant; and
    b. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld.'

16. In **Madarassy v Nomura plc** [2007] IRLR 246, the Court of Appeal held that a simple difference in status and a difference in treatment was not sufficient to shift the burden of proof. It was incumbent on the claimant to establish "something more." Unreasonableness or unfair treatment is also not sufficient to shift the burden of proof. (see **Bahl v Law Society** [2003] IRLR 640).

17. Further, if the tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then it is not improper for a tribunal to find that even if the burden of proof has shifted, the employer has given a fully adequate explanation of why they behaved as they did and it had nothing to do with a protected characteristic (see **Laing v Manchester City Council** [2006] ICR 1519*)*.

Conclusions

Unfair dismissal

18. The Tribunal is satisfied that the reason or principal reason for dismissal was the claimant's conduct in failing to return from a two week holiday, as agreed. The rationale is clearly set out in the disciplinary hearing notes and the dismissal letter which categorises the reason for dismissal as conduct and goes further to say that it was conduct that undermined the respondent's trust in the claimant. There is no reason to doubt that that indeed was the reason for dismissal.

19. Further, the claimant was already on a final written warning for past conduct which remained live (and was never appealed).

20. The Tribunal is satisfied that the respondent genuinely believed the claimant had committed misconduct. The claimant's failure to return to work was consistently investigated throughout the investigation process and carefully considered by Mr Naylor in the context of the claimant's approach to the similar leave requests in previous years; his conversation with Mr King a few weeks before his holiday; and his having failed to book a flight before his departure even though flights were available at the time. The respondent genuinely believed that the claimant had committed misconduct by having no intention of returning to work despite the fact that his request for extended leave had been denied.

21. The claimant put forward a proposition that management at two sites, Ms Mayor and, at certain points, his union representatives were all conspiring against him because he was Polish and they were not. The Tribunal found no evidence to support this allegation. The respondent made reasonable decisions on the evidence before it.

22. There were reasonable grounds for the respondent's belief that the claimant had committed misconduct by travelling to Poland with no plan to return to work for the week in between his two periods of annual leave, so creating a breach of trust. The claimant had previously taken extended holiday at the same time of year; the claimant had spoken to Mr King about the possibility of a five week period of leave, from which it could be

inferred that the claimant was already contemplating staying in Poland for five weeks, as he ultimately did; and the claimant admitted in the interview that he intended to fly back from Poland and then back to his family after the week of work but had not booked flights before he left even though on the claimant's own version of events flights had been available when he left for Poland.

23. At the time the belief was formed the respondent had carried out a reasonable investigation. Mr Osborn, the investigating manager, held a meeting with Mr King and held an investigation meeting with the claimant at which the claimant was accompanied by his trade union representative. At the end of the meeting, the claimant was told that he would be put forward for a disciplinary hearing.

24. The respondent otherwise acted in a procedurally fair manner. The claimant knew the case against him and had every opportunity to state his case. He knew that he was at risk of dismissal. The claimant had two opportunities to appeal against the decision to dismiss him. Both appeals were conducted by senior managers who held appeal hearings with the claimant.

25. Although the claimant suggested in his evidence before the Tribunal that his language difficulties rendered the dismissal process unfair, the claimant had not raised this previously and did not request an interpreter at the disciplinary hearing. When he did request an interpreter for the first stage appeal hearing his request was granted. Further, he signed the notes of the disciplinary hearing to say that they were an accurate reflection of the meeting.

26. The claimant's suggestion that the disciplinary process was unfair because of his outstanding grievances is unfounded. The respondent paused the disciplinary process between 24 August 2020 and 28 September 2020 to allow the claimant's second grievance to be completed. The only grievances which were outstanding were the third and fourth grievances. In any event, the third grievance had already been investigated and the fourth grievance related to the systems used which had already been addressed.

27. Dismissal was within the range of reasonable responses open to a reasonable employer. It was reasonable for the respondent to treat the conduct reason, taken with the final written warning, as sufficient to dismiss the claimant. As regards the final written warning, the claimant admitted to having sworn at Mr Fordham and to having walked out of the investigation meeting before it finished. There is no basis to conclude that the final written warning was not issued in good faith.

28. Given that he was already on a final written warning, the claimant was found to have travelled to Poland with no intention of returning for a week of work on the agreed date.

29. The claimant knew of the respondent's extended leave policy having previously been granted an extended period of leave. He also knew that extended leave could be granted only once in any five year period. He

know that five weeks was an extended period of leave. The Tribunal considers that the extended leave policy was a reasonable policy designed to allow all employees to have a period of extended leave if required.

30. The claimant's claim of unfair dismissal fails and is dismissed.

Direct race discrimination

31. The claimant did not put forward any basis on which the Tribunal could conclude that any failure or act constituted less favourable treatment of the claimant because he was Polish.

32. The respondent did not fail to investigate adequately or at all the four grievances lodged by the claimant.

33. The outcome to the first grievance showed a measured and proportionate response after appropriate investigation. It is significant that parts of that grievance were either upheld or partially upheld, which demonstrates a measured and thorough approach.

34. The second grievance lodged in August 2020 was directed against Mr Steven King. The grievance was not upheld but it was dealt with, and investigated appropriately. The outcome was delivered on 28 September 2020.

35. As regards the third and fourth grievances, it was reasonable for the respondent to take the approach it did.

36. Even if the respondent did fail to investigate the grievances, the claimant put forward no basis on which the Tribunal could conclude that that failure was because he was Polish.

37. The allegation that the dismissing officer, Mr Naylor, despite being appraised there were ongoing grievances, failed to take those into account in determining to dismiss the claimant is not upheld. In fact, Mr Naylor did not know about the grievances when making his decision to dismiss. Even had he known, it would have made no difference as both the third and fourth grievances were irrelevant to the disciplinary process.

38. Even if Mr Naylor did fail to investigate the grievances, the claimant put forward no basis on which the Tribunal could conclude that that failure was because he was Polish.

39. It is accepted that the claimant was dismissed. However, the dismissal was not less favourable treatment. The tribunal must 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 he was treated worse than someone else would have been treated. The claimant has not named anyone in particular who he says was treated better than he was and so a

hypothetical comparator would be a British man with the same disciplinary record who has been found to have intentionally failed to return from holiday to work . The Tribunal has no doubt that such a person would also have been dismissed and so the reason for the claimant's dismissal has nothing to do with his race.

40. The claimant put forward a proposition that management at two sites, Ms Mayor and, at certain points, his union representatives were all conspiring against him because he was Polish and they were not. The Tribunal found no evidence to support this allegation. The respondent made reasonable decisions on the evidence before them. If he did believe that management were conspiring against him, then the claimant gave them an opportunity to dismiss him by failing to return from holiday when he did, given that he was already on a final written warning.

41. The claimant's claim of direct race discrimination fails and is dismissed.

Direct disability discrimination

42. The claimant did not have a disability as defined in section 6 of the EqA at the time of the events the claim is about, which was in 2017.

43. In 2017, the claimant had a left inguinal hernia only.

44. The left inguinal hernia did not have a substantial adverse effect on the claimant's ability to carry out day-to-day activities. The claimant's evidence was that he had to lie down for a couple of hours if it bulged but that it did not have any impact on any other activities.

45. The claimant did not have medical treatment, including medication, or take other measures to treat or correct the impairment.

46. Accordingly, the claimant's disability discrimination claim fails.

47. In any event, the claim is out of time. Given the dates of early conciliation (29 December 2020 – 4 February 2021) and the claim form (4 March 2021), any discrimination claim by the claimant was brought outside the primary time limit if it relates to an act occurring before 30 September 2020.

48. There is no continuing act (there is no later allegation of disability discrimination) and the claimant gave no explanation as to why he had waited so long to bring his claim.

49. The balance of prejudice falls in favour of the respondent as this allegation occurred approximately six years before the hearing when memories have faded, and in any event, the claimant has a number of other claims he was able to pursue.

50. Finally, the Tribunal is satisfied on the evidence before it, that Mr King did not fail to take into account the claimant's hernia in 2017. The respondent adopted , post transfer to it, the reasonable adjustments previously agreed in relation to the claimant and he had an adjustment passport as referred

to above, to remind or inform managers of the need for the claimant to avoid heavy lifting.

Wrongful dismissal / Notice pay

51. The claimant's notice period was ten weeks and he was paid ten weeks' notice pay. The time he was engaged as an agency worker does not count towards his continuous service.

52. The claimant's claim for notice pay fails and is dismissed.

Employment Judge **Rice-Birchall**

Date: **6 January 2024**

JUDGMENT SENT TO THE PARTIES ON
Date: **11 January 2024**
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FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.