EMPLOYMENT TRIBUNALS

Claimant: Mr A. Sarkozy

Respondent: Amalga Ltd

Heard at: Watford (hybrid hearing) **On:** 24, 25, 26 and 27 July 2023

Before: Employment Judge McNeill KC
Mrs L. Thomson
Mr S. Bury

Appearances
For the claimant: Ms M. Balazova, lay representative/friend of claimant
For the respondent: Mr R. Hignett, Counsel

Reasons for Judgment sent to the parties on 13 September 2023, requested by the claimant on 25 September 2023

(1) The claimant's request for written reasons for the judgment dated 27 July 2023, sent to the parties on 13 September 2023, was referred to me on 5 January 2024. The record of the full reasons given orally at the hearing could not be retrieved electronically. These written reasons reflect the substance of the reasons given orally but are not a verbatim repetition of those reasons. If they include any typographical or factual errors, the parties should provide written comments to each other and the Tribunal within 14 days of the date on which these written reasons are sent to the parties, limited to identifying the matter to be corrected and setting out the precise correction that is sought. Comments should not address matters of substance, analysis or conclusion.

Introduction

(2) This case has a complicated procedural history. The claimant presented his claim to the employment tribunal ("the Tribunal") on 4 October 2020. His claim form included specific reference to claims for unfair dismissal, disability discrimination and a failure to pay notice pay. The respondent

presented a response on 25 October 2020. It disputed the claimant's claims and contended that it did not have adequate information to respond to the discrimination claim.

(3) The claimant provided further particulars of his claim in January 2021, which were responded to by the respondent in February 2021. The claimant's particulars referred to claims not included in the original claim form, including a claim for a redundancy payment, a claim for indirect race discrimination and a claim for breach of a duty of care causing personal injury. The claimant referred to his own alleged disability but also to alleged disability of his parents, which he contended had a causal connection with his dismissal. The respondent continued to deny the claimant's claims and specifically denied that the claimant or his parents were disabled within the meaning of the Equality Act 2010 ("the EqA").

(4) On 3 July 2021, a preliminary hearing was listed for 17 November 2021 to consider any applications to amend or strike out. At that hearing, it was recorded that the claimant confirmed that he was only bringing claims for unfair dismissal and disability discrimination (including discrimination by association) but no judgment was issued dismissing the claimant's other complaints. A five-day hearing was listed to start on 21 November 2022 and a preliminary hearing to determine the issue of disability was listed for 17 June 2022. Case management orders were made.

(5) The claimant did not comply with the case management orders and on 10 March 2022, the respondent applied to strike out the claimant's claim or, in the alternative, for an unless order. An unless order was made on 23 May 2022.

(6) The questions of whether the claimant had complied with the unless order and whether time should be extended for compliance with that order were added to the issues to be determined at the hearing on 17 June 2022. The claimant by that time was living in Slovakia. If he were going to give evidence, as he would need to on the issue of disability, he was advised that there would need to be compliance on the applicable guidance for giving evidence from abroad, to which he was referred.

(7) The hearing on 17 June 2022 was listed before EJ Hanning. Although the issue of disability had been listed to be determined on that date, no medical records or disability impact statement had been provided by the claimant. The claimant was living in Slovakia and could only give evidence from Slovakia if the requisite permission had been obtained, which it had not. EJ Hanning determined that there has been substantial compliance with the unless order and did not strike out the claims. He gave fresh directions in relation to the disability issue and re-listed the preliminary hearing to determine the issue of disability on 11 August 2022. He directed that if the claimant had not obtained permission to give evidence from Slovakia by 28 July 2022, that hearing would be vacated and disability would be dealt with at the final hearing listed to start on 21 November 2022.

(8) The claimant provided medical records and disability impact evidence in relation to himself but not his parents. The respondent did not concede the issue of disability. The claimant was informed by the Tribunal on 13 July 2022 that a request had been submitted for permission for the claimant to give evidence from Slovakia.

(9) By 9 August 2022, permission had not been given by the Slovakian embassy for the claimant to give evidence from Slovakia. The hearing listed on 11 August 2022 was therefore postponed. On 1 October 2022, the Tribunal directed the claimant by 10 October 2022 to provide an update on the application for permission to give evidence from Slovakia. The claimant did not comply with that direction.

(10) On 11 October 2022, the respondent made a further application to strike out on the grounds that the claimant was not complying with case management orders or participating in the proceedings.

(11) On 7 November 2022, the claimant was notified by the Tribunal that, as it was unlikely that he would be given permission to give evidence from Slovakia before the listed hearing, he should make arrangements either to attend the hearing in the UK or give evidence from a state which had already granted permission for oral evidence to be given by video or telephone. He could, in the alternative, rely on a written witness statement and make oral submissions. On the same day, he was also given a strike-out warning. A further application to strike out was made by the respondent on 14 November 2022. The claimant asked for a hearing to consider the issue of strike out, which was listed to be heard on 21 November 2022.

(12) By 21 November 2022, the claimant did not have permission to give evidence from Slovakia. The Tribunal postponed the five-day hearing. The claimant was directed to confirm by 25 November 2022 why he had not made arrangements to travel to the UK for the hearing and to respond to the application to strike out.

(13) The claimant complied with that direction and his claim was relisted to be heard on 24-28 July 2023.

(14) On 9 March 2023, the respondent requested confirmation that the hearing would be an “in-person” hearing. That was confirmed on 31 March 2023. Pre-hearing checklists were completed in early July 2023. An application to have the hearing transferred to Leeds, where the claimant’s representative was based, was then refused. The Tribunal did, however, accede to an application that the claimant attend the hearing from the UK remotely with his representative, who has caring responsibilities. In the event, the hearing proceeded on 24 July 2023 with the Tribunal panel “in person” and the parties and their representatives and witnesses attending by video (CVP).

(15) A 314 page bundle was prepared for the hearing and various documents were provided during the course of the hearing, including a phone record, various fit notes and an unsigned deed of amendment between the respondent and a contractor, Mace Ltd, relating to changes in contractual

arrangements between Mace and the respondent as a result of the COVID-19 pandemic.

(16) During the course of the hearing, the Tribunal heard evidence from the claimant, Mr Nick Walker and Mrs Lucy Walker (both Directors of the respondent).

(17) At the start of the hearing, the claimant confirmed again that he pursued only claims for unfair dismissal, wrongful dismissal (notice pay) and disability discrimination. He agreed that the remaining claims should be dismissed on withdrawal. He also agreed that a claim for a failure to make reasonable adjustments, which he was not pursuing, should be dismissed on withdrawal.

(18) There was a dispute as to whether the claimant should be permitted to pursue a claim under section 15 of the EqA for discrimination arising from disability. The Tribunal considered that the claimant had provided sufficient information in his ET1 as particularised to enable that claim to be pursued but was in any event prepared to give permission to amend to allow that claim to be pursued on the basis that it was in the interests of justice to do so. The Tribunal applied the guidance in *Selkent v Moore.* It did not accept that the respondent was prejudiced by the introduction of a section 15 claim. The claimant did not seek to rely on evidence beyond that relied on in relation to his section 13 EqA claim, which the respondent had already addressed in its evidence to be adduced before the Tribunal. The claimant was not legally represented (although he had had some legal advice in the past) and the fine distinctions between different types of disability discrimination claim under the EqA are not always easily understood.

Findings of Fact

(19) The claimant's employment with the respondent commenced on 16 October 2014. He was employed as a General Operative. The respondent specialises in airside support services and employs staff across various airport sites. The claimant was based at the respondent's Heathrow Airport site. His duties included general labouring duties including but not limited to assisting tradespersons on site, waste management, manual handling, moving materials across construction sites, assisting with site strip outs, and maintaining a clean and tidy site.

(20) On 15 February 2017, the claimant signed a Written Statement of Terms and Conditions of Employment. He acknowledged that he had read the Statement and the Employee Handbook referred to in the Statement and that he understood that the Statement and Handbook together contained the terms that formed the basis of his contract of employment with the respondent.

(21) The claimant's Statement of Terms and Conditions provided (paragraph 13.1) that the conditions applicable to his employment if he were unable to work because of sickness or injury or if he were absent from work for any

other reason were set out in the Employee Handbook. Various policies and procedures included in the Employee Handbook were adduced before the Tribunal, including the respondent's disciplinary and unauthorised absence policies.

(22) At paragraph 13.2 of the claimant's Statement of Terms and Conditions, it was provided that if he was unavailable for work for any reason then either he or someone on his behalf should contact the respondent within half an hour of the start of his shift to inform the respondent of the reason for his absence and how long he expected to remain absent. A text message/SMS or email was stated not to be acceptable.

(23) Specific reference was made at paragraph 19 of the Statement of Terms and Conditions to the respondent's disciplinary procedure. Further, at paragraph 23.4, the respondent reserved the right to make reasonable changes to the claimant's terms and conditions of employment. At the time of his dismissal, the claimant was entitled to 5 weeks' notice of termination of his employment.

(24) The respondent's disciplinary procedure set out examples of matters that would normally be regarded as misconduct (1.12) and matters that would normally be regarded as gross misconduct (1.14). Both lists were stated to be intended as a guide and not as exhaustive. "Unauthorised absence from work" was included under the heading "misconduct" and was not referred to under the heading "gross misconduct".

(25) Under the heading "disciplinary penalties", it was stated (1.43) that dismissal would usually only be appropriate for gross misconduct (or misconduct during a probationary period or where there was an active final written warning on the employee's record).

(26) Under a separate "Unauthorised Absence" policy, it was stated that an absence that did not comply with the provisions of the claimant's contract of employment relating to holidays or sickness or which had not been expressly authorised by the respondent in advance would be regarded as an unauthorised absence and "treated as misconduct". If an employee did not report for work for more than 7 consecutive days (other than notified sickness and holiday absences) the respondent would assume resignation from employment on the first day of unauthorised absence.

(27) During the course of his employment, the claimant had a number of periods of sickness. As well as short periods of sickness with flu-like illness, abdominal pain, gastroenteritis and gout, in November 2019 the claimant was absent from work for a month suffering from stress. From 3 December 2019 his GP certified him as unfit for work for a total of three months, with "ongoing neurology/psychiatric investigations".

(28) The claimant started to experience sleep-walking episodes towards the end of 2016, having worked night shifts for three year. He mentioned these to his then manager and asked to move to day shifts. This did not happen.

(29) In September 2017, the claimant saw a doctor in Slovakia who suggested that he undergo examinations such as MRI and CT scans to determine the cause of his sleepwalking. He consulted his GP in the UK who said that he would first need to try medication.

(30) During 2018 and 2019, the claimant worked sometimes on day shifts and sometimes on night shifts. His sleepwalking episodes decreased when he was working day shifts. When he was moved from day shifts to night shifts, his health deteriorated.

(31) In September 2019, the claimant requested and was granted two months' unpaid leave. He was concerned about his health. He returned to Slovakia and shortly after experienced an episode where he was sleepwalking and unresponsive to communication. He needed assistance from his girlfriend to get to and from the toilet. He was sick several times. An ambulance was called. He was referred to a neurologist and psychiatrist who diagnosed work-related stress and advised that the claimant should not work any more night shifts. He was prescribed antidepressants and blood-thinning medication and continued medical treatment in Slovakia.

(32) From 9 October to 18 November 2019, the claimant was recorded by a healthcare professional in Slovakia as having light depression, generalised anxiety disorder and a response to heavy stress. His condition improved over that six-week period.

(33) On 14 November 2019, in a medical record from Slovakia (translated into English), the claimant was recorded as having had a medical check-up and an MRI scan on 4 November 2019. The MRI was recorded as showing "chronic leukoencephalopathy v.s. vascular, mild dif. of brain atrophy". Some heart problems were recorded following an EEG. The doctor's conclusion was "overload even psychic exhaustion at frequent night work". The doctor recommended regular day work and a daily rhythm of sleeping/waking with melatonin therapy.

(34) The respondent was not provided with the medical report from Slovakia before the claimant's dismissal.

(35) On 13 August 2020, the claimant's GP provided a letter stating that the claimant had been suffering with stress from work over the past year, which he associated with alternating between day and night shifts. The GP referred to a neurologist in Slovakia agreeing that the claimant was suffering with exhaustion and stress. The GP recorded that the claimant had first been prescribed Sertraline (an anti-depressant) in September 2019 and that he had since had the dose increased, with Mirtazapine (also an anti-depressant) at night. It was stated that the medication was to be taken long-term.

(36) The claimant returned to the UK in February 2020 to resume work. Due to the medication he was on, it was not recommended that he undertake work involving driving or operating machinery.

(37) The claimant's sleepwalking, work-related stress and depression, one or more of which conditions had been symptomatic to varying degrees since early 2017 at the latest, had a negative effect on his mood. He lost interest in and enjoyment of his hobbies. His energy was low and he found it difficult to meet with friends or undertake shopping and cooking. His concentration and attention were reduced; his sleep was disturbed; and his appetite was diminished. He had reduced self-confidence with ideas of guilt and unworthiness. He felt negative about the future. He found it difficult to follow instructions, prepare written documents or keep to a timetable. The claimant confirmed that he took the medication prescribed for him.

(38) The claimant filled in Health Questionnaires from time to time during the course of his employment. In May 2017, he brought no conditions to the respondent's attention. In February 2019 also he recorded no medical problems. In February 2020, he recorded a left-sided hearing loss present from birth, which did not impact on his work. He also ticked a box for "mental illness and/or stress-related problems (mental fatigue, anxiety, depression, panic attacks)". He referred to stress and a period of long-term sickness and to "ongoing investigation" but said he was now fit to work. He recorded that he was taking Sertraline and Mirzaten.

(39) At the time of the claimant's dismissal, the respondent had knowledge of the claimant's long-term absence due to "reasons relating to neurology/psychiatry" and his mental ill-health, attributed to stress at work.

(40) After the claimant returned to work at the end of February 2020, he worked for the respondent on a contract for Mace Ltd at Heathrow Airport. With the effects of the COVID-19 pandemic in March 2020, much of the respondent's work ceased. On 25 March 2020, the respondent decided to take advantage of the Government's Coronavirus Job Retention Scheme ("the furlough scheme") and offered its employees, including those working at the Mace site at Heathrow, the opportunity to be furloughed.

(41) On 25 March 2020, the respondent sent to the claimant (among others) a letter setting out the proposed furlough arrangements, to which the claimant agreed on 27 March 2020 ("the furlough agreement"). The nature of furlough was clearly explained in the letter. It was explained that the employee's terms and conditions of employment would be amended; that the employee would not be required to work; and that they would be entitled to pay and benefits limited to 80% of their wage costs up to a maximum of £2,500 a month. Other terms and conditions continued to apply.

(42) It was made clear in the letter that if suitable alternative work became available while an employee was on furlough, the employee could be contacted at short notice and asked to return to work. The employee was

expected to remain available for work and be contactable by the respondent. The claimant confirmed when cross-examined that he understood this.

(43) On 4 July 2020, while still on furlough, the claimant was called by his brother asking for help with their elderly parents in Slovakia. The claimant's brother had been looking after their parents, who had health issues, but had to return to work. Their parents were requiring help with tasks such as preparation of meals, cleaning and shopping and the claimant's mother also required help with personal care. The claimant, in his witness statement, described his father as having undergone five operations in the past four years and his mother as having broken her ankle in three places, having suffered a stroke (which he explained at his later disciplinary hearing was two years previously) and having broken her toe and hip. The claimant's parents did not always have someone looking after them as the claimant worked in the UK and his brother worked about 100 miles away from his parents' home. At the time of the hearing, his father took care of his mother and his brother returned home on Friday to Sunday but in July 2020 that was not possible because of his father's physical condition following an operation.

(44) The claimant felt that he had no choice but to return to Slovakia and he returned the next day (5 July), which was a Saturday. His family was his priority. He explained in cross-examination that if his family had a problem, he would straightaway buy a ticket and fly home. The claimant did not notify or obtain permission from the respondent before returning to Slovakia.

(45) The claimant first notified the respondent of his return to Slovakia on 8 July. He knew that his line manager (Mr Vost)'s phone was off at the weekend so he tried to call him on Monday 7 July 2020. He had contact details for Mr Christopher Hope, Operations Director, and Mrs Lucy Walker, who was dealing with HR matters at the relevant time, but he did not contact them as he never spoke to them about work matters. Mr Vost did not answer. The claimant said that Mr Vost texted him to say he was exhausted and had some personal family issues and asked the claimant to call him back the following day. The claimant did not produce phone records or a copy of the text message that would support this part of his evidence. A recording was produced of a conversation that took place between the claimant and Mr Vost on 8 July. The Tribunal accepted that the claimant made some attempt to contact Mr Vost on 7 July. Without a copy of the text message and in the light of the phone records that were produced, it was not able to make a finding in relation to the alleged text.

(46) Phone records produced by the respondent indicated that Mr Vost made some brief attempt to contact the claimant on 7 July on three occasions between 16.52 and 17.24. However, the recording of the number (lacking a zero) suggested there was some problem with the calls on that date and the recorded calls lasted only a second.

(47) At about this time, there was work available on the Mace project on which the claimant had previously worked. On 7 or 8 July, the respondent wished the claimant to return to work.

(48) As at 8 July, the rules applying on testing and quarantine meant that the claimant would need to quarantine in Slovakia for a number of days and then again for 14 days in the UK on his return.

(49) Mr Vost spoke to Mrs Walker on 8 July, after learning that the claimant was in Slovakia. He advised the claimant on the phone to contact Mrs Walker. The tone of the call was friendly, but it was made clear that the claimant must keep the respondent properly informed. He was told that he could be "reactivated" (meaning required to return to work) within 24 hours.

(50) The claimant sent an email addressed to Mrs Walker at 15.33 on 8 July. Although the email was addressed to Mrs Walker, it was sent to Mr Vost's email address. The claimant said that he was in Slovakia because of family reasons. He would be at home in quarantine until the following Monday (13 July) waiting for a COVID-19 test result. He said he would buy a ticket to fly back to the UK "next week" and would book himself in for a COVID-19 test in the UK and let Mrs Walker know the result as soon as possible. Mr Vost did not forward that email to Mrs Walker until 28 July, although he did make her aware of the contents of the email.

(51) On 9 July 2020, the respondent invited the claimant to a disciplinary hearing to take place the following Monday, 13 July. It was noted that the meeting would have to take place in the claimant's absence as he was travelling back from Slovakia and would need to quarantine for 14 days. He was told that an investigation carried out by Mr Hope indicated that he had taken unauthorised leave from 27 June 2020 while on furlough in breach of his contract of employment; that he was in breach of the furlough agreement as he was overseas without approved leave and was not available at short notice for work; and that he had travelled to and was remaining in Slovakia and was unable to return to work on request because of the requirement to quarantine for 14 days on his return. The procedure for the disciplinary hearing was explained to him and he was warned that the disciplinary hearing could lead to his demotion or dismissal. He was told of his right to be accompanied at the hearing.

(52) The hearing, conducted by Mr Hope, went ahead on 13 July 2020 and the claimant attended remotely from Slovakia. Although he had been given the opportunity to be accompanied, he attended on his own. He did not ask for further time to arrange for someone to accompany him. He explained that he had not gone to Slovakia until 5 July 2020, which the respondent in due course accepted. He explained that he had gone to Slovakia to support his family and referred to the ill-health of his parents. The respondent was concerned that it had continued to make payments to the claimant under the furlough scheme when he was not available for work, which could be in breach of the furlough scheme. The respondent (Mr Hope) warned the claimant that deductions may have to be made from the claimant's pay

under the furlough scheme for the period when he was on unauthorised leave. The claimant pleaded with Mr Hope not to do this as he was already substantially in debt. The claimant referred to two colleagues, Mr Aurillan Telibassa and Mr Mariusz Lutecki. He said that Mr Telibassa had travelled to Romania to spend time with his family over the furlough period and that Mr Lutecki had not taken all the holiday he was required to take and was laughing at the respondent and saying that he would not do what was asked of him.

(53) Mr Hope stated that the respondent would need to investigate both whether the claimant had broken his furlough agreement and whether he had received money he was not entitled to when he was on unauthorised leave.

(54) On 14 July, the claimant was sent the outcome of the disciplinary hearing. It was noted that he accepted that he had broken the agreement in relation to furlough and his explanations were not acceptable. His behaviour had been found to constitute gross misconduct and he was dismissed with immediate effect. He was offered a right of appeal.

(55) By a letter dated 18 July 2020, the claimant notified the respondent that he wished to appeal against the decision to dismiss him. He said that he had not had time to arrange for an adequate adviser to assist him at the disciplinary hearing. He set out again his answers to the disciplinary charges. He said that he was not aware that he could not leave the UK while on furlough, as the respondent had not informed him of this. He said there was no job for him to do and he had not been called back to work. He anticipated that there should be no requirement to quarantine on return from Slovakia after 20 July. He pointed out that this was the first misconduct ever found against him and blamed the respondent for poor provision of information. He said that he had never received his employment contract.

(56) The appeal was conducted by Mr Nick Walker, Managing Director of the respondent. The claimant, who was still in Slovakia, attended remotely. He was accompanied by a trade union representative, Mr Paul Lomax. At the appeal, the claimant focused first on alleged underpayments of wages. In relation to breaching the terms of his furlough agreement with the respondent, the claimant contended that the agreement did not say that he could not go overseas, only that he should be available for work at short notice. He said that Mrs Lucy Walker had said that it was all right to go to Slovakia. Mr Walker checked this after the appeal hearing and found that this was not the case.

(57) Mr Lomax, on the claimant's behalf, said that the claimant had informed the respondent that he had left the country on the day he left. This was not correct. Mr Walker's understanding was that Mr Vost had called the claimant three times on 7 July 2020 and had only managed to get hold of the claimant to ask him to return to the Mace job at Heathrow Airport on 8 July 2020.

(58) Mr Lomax said that the claimant had shown him the numbers of calls the claimant had tried to make. Mr Walker suggested that the claimant could have requested leave or booked it on "Breathe/PeopleHR". Mr Lomax suggested that the claimant was not claiming furlough while he was away, which was also not correct. Mr Walker confirmed that he was receiving payments. Mr Walker was very concerned that the respondent should not fall foul of the rules and regulations surrounding the scheme. Mr Walker said work had now been found for most of the respondent's site staff. Mr Lomax asked the respondent to treat what happened as a misunderstanding.

(59) On 3 August 2020, Mr Walker informed the claimant that his appeal was rejected. He accepted that the claimant went to Slovakia on 5 July and not on any earlier date but concluded that the claimant would not have informed the respondent that he was out of the country if he had not been asked to return to work. Mr Walker considered that the furlough agreement made it quite clear that staff must be available for work at short notice and that the claimant must have understood that he would need to check with the respondent before leaving the country. The terms of the furlough agreement were clear that he had to be available for work at short notice and contactable. He was not available as he was overseas and could not be available at short notice as he would need to quarantine for 14 days on his return. He concluded that the claimant had not informed the respondent of his absence until 8 July.

(60) The claimant's financial concerns had been looked into and the conclusion reached that he had been overpaid by £465.30. The Respondent did not seek to recover this amount from him.

Analysis and conclusions

Disability

(61) On the basis of the facts found, the Tribunal concluded that, at the date of his dismissal, which was the relevant date for the purposes of his claim, the claimant was a disabled person within the meaning of section 6 of the EqA.

(62) The claimant had a mental impairment, involving anxiety, depression and sleepwalking. These conditions individually and together had a substantial adverse effect on his day-to-day activities. They affected his sleep, his concentration, his ability to carry out household duties and his ability to socialise. The effects were long-term, having commenced in late 2016/early 2017 and being ongoing to some extent up to the date of his dismissal. His symptoms fluctuated so that, for example, he was fit for work in February 2020 after a lengthy period of sickness related to his mental health. The claimant remained on anti-depressant medication, without which it is reasonable to conclude that his symptoms would have been significantly more debilitating.

(63) The respondent knew or ought to have known of the claimant's disability at the latest by February 2020 when it received his completed Health Questionnaire and after he had been absent from work because of ill-health since September 2019.

(64) In relation to the claimant's parents, it is possible that they were both disabled within the meaning of the EqA but there was insufficient evidence for the Tribunal to carry out the sort of analysis that would enable it to form a conclusion as to whether they were disabled within the meaning of section 6 of the EqA. There was no medical evidence or disability impact statements relating to the claimant's parents. Although medical evidence is not essential to establishing disability and there was some evidence that both parents had physical impairments that at least for a time impacted on their day-to-day activities in a way that was more than trivial, there was very little evidence in relation to the long-term impacts on either of them. The Tribunal did not conclude that they were disabled persons within the meaning of section 6 of the EqA as at the date of the claimant's dismissal.

Unfair Dismissal

(65) The first issue for the Tribunal to determine was what was the reason or principal reason for the claimant's dismissal.

(66) The contemporaneous evidence, on its face, was overwhelmingly consistent with the respondent having dismissed the claimant because he had breached the terms of the furlough agreement by going abroad without permission and being unavailable to return to work at short notice.

(67) The Tribunal considered whether this stated reason was in fact not genuine but rather a pretext for dismissing an employee who had been on long-term sick and whom the respondent no longer wished to employ. The Tribunal could find no evidence that supported such a contention. The matter of the claimant's absences was not brought up at the disciplinary hearing and the evidence indicated that his ill-health-related absences were dealt with properly and fairly. The claimant's complaint as articulated at the hearing before the Tribunal was not that what he had done was treated as misconduct; he accepted that he had committed an act of misconduct. His complaint was that it should not have been treated as gross misconduct.

(68) The Tribunal therefore found that the reason for the claimant's dismissal was his conduct, which was a potentially fair reason within the meaning of section 98(2) of the Employment Rights Act 1996 ("the ERA").

(69) The Tribunal went on to consider whether the respondent could reasonably reach the view that the claimant's conduct amounted to gross misconduct, justifying a decision to dismiss summarily. Unauthorised absence is given as an example of ordinary misconduct and not gross misconduct in the disciplinary policy. However, the examples given in the policy are only examples. The fact that unauthorised absence is referred to as misconduct

does not mean that unauthorised absence can never amount to gross misconduct.

(70) The current case arose in the context of furlough. Employers were expected to act with integrity. The furlough scheme was a publicly funded scheme and employers should use it only when they fell within the ambit of the scheme. Employees benefitting from the scheme would also be expected to act with integrity and to comply with lawful furlough agreements. Mr Walker was properly concerned that he should not be taking advantage of the furlough scheme in a way that was not legitimate, by taking the benefit of furlough in relation to an employee who was not available for work. The scheme was not intended to apply to employees who were unavailable to carry out the jobs in respect of which they were receiving furlough payments, when work became available for them, because they had chosen to go abroad.

(71) The respondent could reasonably conclude that the claimant had flown to Slovakia without seeking permission or notifying the respondent before his departure and that there was no prospect of him returning promptly to undertake work which became available for him because of the testing and quarantining rules that applied at the time.

(72) The respondent was faced with a dispute during the disciplinary process as to whether the claimant had tried to inform the respondent of his absence as soon as he could or whether the respondent had discovered that the claimant was in Slovakia only when it was attempting to get him to return to work. It was not unreasonable for the respondent to assess the credibility of the two different accounts in the way it did, and the Tribunal must not substitute its view for that of the employer.

(73) In relation to the process followed, there was little significant criticism of the procedure followed by the respondent, which the Tribunal considered, in the round, to be a reasonable procedure.

(74) The Tribunal considered whether the decision to dismiss was outside the band of reasonable responses. The Tribunal acknowledged that the claimant had to make a very difficult decision in what were very challenging times for many, many people. The choice that he made, however understandable from a human perspective, led to a serious breach of his terms and conditions of employment as varied by the furlough agreement. While other employers may reasonably have reached a different decision as to the appropriate disciplinary sanction, the Tribunal considered that the decision reached by the respondent was a decision that a reasonable employer could make. It was not outside the range of reasonable responses to dismiss the claimant for gross misconduct given all the circumstances.

(75) The claimant's claim for unfair dismissal was therefore not upheld.

Wrongful dismissal

(76) In spite of the reference to unauthorised absence as "misconduct" and not "gross misconduct" in the Employee Handbook referred to in the claimant's contract of employment, the Tribunal concluded in the particular circumstances of the case that the claimant's actions in leaving the UK before seeking permission from the respondent and in making himself unavailable for work for a significant period while taking the benefit of the furlough scheme involved a repudiatory breach of his contract of employment. It is of the essence of a contract of employment that an employee should be available for work when they have agreed to be available. While not every unauthorised absence amounts to a repudiatory breach of contract, this unauthorised absence involving an inevitable substantial absence (because of quarantine regulations) in the context of the furlough scheme was a repudiatory breach.

(77) The breach was accepted by the respondent in dismissing the claimant summarily and no damages are due to the claimant. The wrongful dismissal claim (the claim for notice pay) is therefore dismissed.

Disability discrimination

(78) The key issue in relation to disability discrimination was the issue of causation. Was there any causal connection between the claimant's disability and the decision to dismiss him?

(79) In relation to both his claim under section 13 and his claim under section 15 of the EqA, there was no hint in the contemporaneous written evidence that the claimant's dismissal was for reasons other than those given. He had returned to Slovakia at short notice without first informing the respondent that he was doing so and as a consequence of returning to Slovakia and the applicable rules on testing and quarantine at the time, he was unable to return to work at short notice.

(80) The comparator relied on by the claimant, Mr Telibassa, who had travelled back to spend time with his family in Romania during the furlough period, was not a true comparator. He had booked annual leave and returned to work when he was asked. His situation was materially different from the claimant's situation. The claimant appeared to rely on a further comparator, Mr Lutecki, but did not pursue that comparison in submissions. In any event, Mr Lutecki had not been called back to work and his circumstances were different from the claimant's circumstances.

(81) In relation to the section 15 claim, there was no connection between anything arising from the claimant's disability and the decision to dismiss him.

(82) Had the claimant made out that he had been dismissed because of something arising in consequence of his disability (or indeed the disability of his parents), the Tribunal would in any event have found that the respondent's treatment of the claimant was justified. It was legitimate for the respondent to ensure that there was compliance with the rules of the

furlough scheme and of the furlough agreement between the claimant and the respondent: that the claimant should be available for work and that standards of conduct, including the requirement not to take unauthorised absence, were maintained. Dismissal was a proportionate means of achieving that aim given the nature of the claimant's actions in the context of the furlough scheme.

(83) The claimant's disability discrimination claims were therefore also dismissed.

_____

Employment Judge McNeill KC

Dated: 23 January 2024

Sent to the parties on:

24 January 2024

For the Tribunal: