Case No:- 3301390/2022.

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Goss	v	Parravanis Ice Cream Limited

Heard at: Norwich **On:** 15 and 16 January 2024

Before: Employment Judge M Warren

Members: Mrs J Buck and Mr M Fulton-McAllister

Appearances:
For the Claimant: In person
For the Respondent: Mr B Brooks, Consultant

JUDGMENT having been sent to the parties on 7 February 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. Mr Goss was employed by the Respondent as a Delivery Driver from 6 April 2021 until the expiry of his notice on 8 December 2021. The Respondent company sells and distributes ice cream.

2. There was Early Conciliation between 20 December 2021 and 26 January 2022. These proceedings were issued on 10 February 2022. Mr Goss claimed disability discrimination, notice pay and holiday pay. The claims for notice pay and holiday pay have subsequently been withdrawn.

3. The case was case managed by Employment Judge George on 9 November 2022. She set out an excellent List of Issues which begins in her decision of that day at paragraph 43.

4. There was also a Public Preliminary Hearing before Employment Judge Laidler on 23 January 2023, to decide the preliminary issue of whether or not Mr Goss meets the definition of a disabled person contained in the Equality Act 2010, by reason of Crohn's disease, anxiety and depression. Employment Judge Laidler's decision was that Mr Goss did at all material

times meet the definition of a disabled person by reason of those impairments and had done so since at least 2015.

The Issues

5. The issues in this case were as I have just mentioned, identified by Employment Judge George at the Case Management Preliminary Hearing before her. These are cut and pasted from that Hearing Summary below:-

1. Wrongful dismissal / Notice pay

1.1 What was the claimant's notice period?

1.2 What was the claimant due to be paid in that notice period?

1.3 What did the respondent pay the claimant in respect of the period 8 or 9 November 2021 and 8 December 2021?

1.4 Is the claimant owed any compensation for breach of contract in respect of a failure to pay his full contractual entitlement for that notice period?

2. Disability [Decided by EJ Laidler]

2.1 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 respondent accepts that the claimant had Crohn's disease, that this was a disabling physical impairment in his case and that they knew about it at the time of the events that the claim is about.

2.2 The Tribunal will decide:

2.2.1 Did the claimant have a mental impairment of depression and anxiety?

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

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

2.2.4 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?

2.2.5 Were the effects of the impairment long-term as at the date of the acts complained of which is the second period of sickness absence from 5 October 2021 and 23 December 2021? The Tribunal will decide:

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

2.2.5.2 if not, were they likely to recur?

Something is 'likely' to happen in this context if it can be said that it 'could well' happen.

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

3.1 Did the respondent do the following things:

3.1.1 Dismiss the claimant with effect on the 8 December 2021? It is common ground that the employment ended after expiry of a notice period on 8 December 2021. The claimant alleges that he was dismissed. The respondent alleges that the claimant's role was made redundant and he declined an alternative role.

3.2 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 s/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.

3.3 If so, was it because of disability?

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1 Did the respondent treat the claimant unfavourably by:

4.1.1 holding a dismissal meeting on 8 November 2021 in the claimant's absence? The respondent accepts that there was a meeting on 8 November but their case is that the meeting was to discuss the claimant's role because the full time driver role was redundant and that it was held in his absence but that was done with his consent.

4.1.2 dismissing the claimant with effect on 8 December 2021?

4.2 Was the claimant absent from work on 13,14 and 15 September 2021 because of ill health (as alleged by the claimant) or was he on a day off on 13 September 2021, at work on 14 & 15 September 2021 and did he leave work early on 16 September 2021 because of ill health (as contended for by the respondent)?

4.3 If the claimant was absent from work on 13, 14 and 15 September 2021 because of ill health, did that absence arise in consequence of the claimant's disability of Chron's disease?

4.4 Did the following things arise in consequence of the claimant's alleged disability of depression and anxiety?:

4.4.1 The claimant's absence from work between 5 October 2021 and the end of his employment.

4.5 Did the respondent hold the meeting of 8 November 2021 in the claimant absences because of that sickness absence set out in paragraphs 4.3 and 4.4?

4.6 Did the respondent dismiss the claimant because of that sickness absence set out in paragraphs 4.3 and 4.4?

4.7 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

4.7.1 (in respect of holding the meeting in the claimant's absence) Progressing a reorganisation that was needed to reduce overheads and to save jobs;

4.7.2 To reduce overheads and to save jobs and protect the viability of the company.

4.8 The Tribunal will decide in particular:

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

4.8.2 could something less discriminatory have been done instead;

4.8.3 how should the needs of the claimant and the respondent be balanced?

4.9 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

5. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

5.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

5.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

5.2.1 PCP1 - To dismiss employees who have had/who may have a month or more sick leave each year;
5.2.2 PCP2 – To disapply the standard dismissal procedure for those who do not have 2 years' continuous service;
5.2.3 PCP3 – To proceed with a dismissal meeting in an employee's absence;
5.2.4 PCP4 – To not amend the dates of meetings with employees;
5.2.5 PCP5 – To not make any attempts to make reasonable adjustments listed on doctor produced fit notes when employees are deemed 'may be fit to work'?

5.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that

5.3.1 PCP1 placed the claimant at a substantial disadvantage because he was more likely to require time off due to his disabilities;
5.3.2 PCP2 placed the claimant at a substantial disadvantage because those with disabilities are in greater need for a fair absence management procedure (due to propensity to need further time off in comparison to those without disabilities);
5.3.3 PCP3 placed the claimant at a substantial disadvantage because disabled staff are more likely to be unavailable owing to their health;
5.3.4 PCP4 placed the claimant at a substantial disadvantage because disabled staff are more likely to have to re-arrange a meeting or be unable to attend the date suggested owing to their health;
5.3.5 PCP5 placed the claimant at a substantial disadvantage because disabled staff are more likely to require reasonable adjustments to be implemented?

5.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

5.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

5.5.1 Offer more tolerance in relation to sickness and disability related absences;
5.5.2 To adjust their absence management policy to consider that a disabled individual may need more than usual time off owing to their disability;
5.5.3 To have provided alternative dates to the claimant for his dismissal meeting, or the option of a remote hearing;
5.5.4 To be open to rescheduling meeting dates if individuals cannot attend for legitimate reasons, such as ill health;
5.5.5 To at least have discussed reasonable adjustments with the claimant. The claimant's fit note stated that he was unable to do delivery driver work, no alternatives were discussed. The respondent also should have discussed a phased return to work, amended duties altered hours and workplace adaptations.

5.6 Was it reasonable for the respondent to have to take those steps?

5.7 Did the respondent fail to take those steps?

6. Remedy for discrimination

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

6.2 What financial losses has the discrimination caused the claimant?

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

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

6.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

6.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.7 Should interest be awarded? How much?

7. Holiday Pay (Working Time Regulations 1998) [Withdrawn]

7.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

7.2 The claimant alleges that he was due 11.2 days' holiday pay on termination of employment amounting to £819.28 before deductions for tax and national insurance and was not paid this sum.

7.3 The respondent alleges that the claimant was due £1,116.25 in respect of holiday accrued but not taken on termination of employment and that he was paid this sum in full.

Evidence

6. We had before us a paginated Bundle of documents running to page 313. We had both paper and electronic copies. We also had witness. statements for the Claimant from Mr Goss alone and for the Respondents from: General Manager Mr Adrian Nichols and from Production Manager Mr Chris Holmes. We read the witness statements and read or looked at the documents referred to therein during a break at the beginning of the hearing. We then heard oral evidence from each of the witnesses.

7. We explained to the parties that we do not read all of the documents in the Bundle, only those to which we have been referred.

8. A note about Representation: Mr Goss had been represented throughout these proceedings by solicitors, but he has represented himself during the course of this hearing. The Respondents have been represented by Mr Brooks, who has variously been described as a Consultant or an Advisor. He identified himself to us at the start of this case as a Consultant.

The Law

Disability Discrimination

9. Disability is a protected characteristic pursuant to s.4 of the Equality Act 2010.

10. Section 39(2)(c) and (d) proscribes discrimination by an employer by either dismissing an employee or subjecting him to any other detriment.

11. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

12. Section 39(5) imposes a duty on an employer to make reasonable adjustments.

Knowledge of Disability

13. In respect of disability related discrimination, section 15(2) provides:

> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

14. In respect of reasonable adjustments, paragraph 20 at Part 3 of Schedule 8 to the Act provides:

> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know-
>
> …
>
> (b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

15. The question of knowledge has been considered by HHJ Eady QC in A Ltd v Z UKEAT/0273/18/BA. HHJ Eady QC set out the following principles:

> (1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see York City Council v Grosset [2018] ICR 1492 CA at paragraph 39.
>
> (2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that

impairment had a substantial and (c) longterm effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see Pnaiser v NHS England & Anor [2016] IRLR 170 EAT at paragraph 69 per Simler J.

(3) The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

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

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

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665).

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

16. The EHRC code of practice is referred to in the quote above, paragraphs 5.14 and 5.15. An example is given at 5:15 as follows:

Example: A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened.

The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability.

17. In the context of reasonable adjustments, the code at 6.19 reads:

> For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

Reasonable Adjustments – ss. 20 & 21 Equality Act 2010

18. Section 20 defines the duty to make reasonable adjustments, which comprises three possible requirements, the first of which might apply in this case set out at subsection (3) as follows:-

> "(3) The first requirement is a requirement, where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage

19. Section 21 provides that a failure to comply with such requirements is a failure to make a reasonable adjustment, which amounts to discrimination.

20. There are five steps to establishing a failure to make reasonable adjustments (as identified in the pre-Equality Act 2010 cases of Environment Agency v Rowan [2008] IRLR 20 and HM Prison Service v Johnson [2007] IRLR 951). The Tribunal must identify:

    20.1. The relevant provision criterion or practice applied by or on behalf of the employer;

    20.2. The identity of non-disabled comparators, (where appropriate);

    20.3. The nature and extent of the substantial disadvantage suffered by the disabled employee;

    20.4. The steps the employer is said to have failed to take, and

    20.5. Whether it was reasonable to take that step.

21. The employer will only be liable if it knew or ought to have known that the Claimant was disabled and that he was likely to be affected in the manner alleged, see Schedule 8 paragraph 20 and Wilcox v Birmingham CAB Services Ltd EAT 0293/10 where Mr Justice Underhill said of the equivalent provision in the Disability Discrimination Act 1995 that an employer will not be liable for a failure to make reasonable adjustments unless it has actual or constructive knowledge both that the employee was disabled and that he or she was disadvantaged by the disability.

22. The Equality and Human Rights Commission: Code of Practice on

Employment (2011) at paragraph 4.5 suggests that PCP should be construed widely so as to include for example, formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. It may also be a decision to do something in the future or a one off decision.

23. The decision of Mrs Justice Simler DBE, (then President) in Lamb v the Business Academy Bexley UKEAT/0226/JOJ assists with identifying what is and what is not, a PCP. The phrase is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer from disability. It may in certain circumstances include one-off decisions, (paragraph 26). She approved though, the comments of the former President, Langstaff J in Nottingham City Transport Ltd v Harvey UKEAT/0032/12 where he referred to, "practice" as having an element of repetition. In the former case, a teacher was dismissed after a long period of absence during which a grievance was investigated and an outcome provided. The PCP was the requirement to return to work without a proper and fair investigation. There were repeated failures to properly investigate and repeated delays; that was a practice. In the latter case, a claimant suffering from depression, returning to work and confused by a new swipe card system, altered his time sheet. The EAT held that the one-off application of a flawed disciplinary procedure did not amount to a, "practice". More recently in Ishola v Transport for London 2020 EWCA Civ 112, CA, Lady Justice Simler, (as she now is) affirmed that approach, the Court of Appeal holding that the words provision criterion or practice carry the connotation of a state of affairs indicating how similar cases will be treated in the future; a one off act can amount to a practice if there is some indication that it would be repeated if similar circumstances were to arise in the future. She said at paragraph 35 that the words:

> *"…are not terms of art but ordinary English words … they are broad and overlapping… not to be narrowly construed or unjustifiably limited in their application".*

24. She also said at paragraph 37, that not every unfair act amounts to a PCP. If such an act is found not to be direct discrimination, it would be wrong by a process of abstraction, to seek to convert it into the application of a PCP.

25. In Fox v British Airways Plc UKEAT/0315/14, HHJ Eady QC agreed that, "practice" required an element of repetition and also suggested that an act of dismissal itself, (as opposed the application of a PCP that led to the dismissal) is not a PCP.

26. The obligation to make reasonable adjustments is on the employer. That means that it must consider for itself what adjustments can be made, thus for example in Cosgrove v Caesar and Howie [2001] IRLR 653 the duty was not discharged simply because the Claimant and her GP had not come up with what adjustments could be made. An employer that does not make enquiries as to what might be done to ameliorate the disabled persons disadvantage, runs the risk that it fails to make a reasonable adjustment. That is not the same as saying that there is an obligation to consult, just that the failure to do so, or to inform oneself of the relevant

facts and reflect on them, runs the risk of placing oneself in the position where a breach of the obligation to make reasonable adjustment occurs, out of ignorance, (see Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664).

27. The duty is to make "reasonable" adjustments, to take such steps as it is reasonable for the employer to take to avoid the disadvantage. The test is objective. Our focus should be not on the process followed by the employer to reach its decision but on practical outcomes and whether there is an adjustment that should be considered reasonable. It is for the tribunal to determine, objectively, what is reasonable. It is not a matter of what the employer reasonably believed. Unusually, the tribunal may substitute its view for that of the employer and it is permissible for the tribunal to conclude that different adjustments would have been reasonable from those contended for by the Claimant: see Smith v Churchills Stairlifts Plc [2006] ICR 524 CA; Royal Bank of Scotland v Ashton [2011] ICR 632 EAT; Garrett v LIDL Ltd UKEAT 0541/08; Southampton City College v Randal IRLR 2006 18; Project Management Institute v Latiff [2007] IRLR 579.

28. The employer's reasoning or other processes that lead to the failure to make reasonable adjustments are irrelevant, Owen v Amec Foster Wheeler Energy Ltd 2019 ICR 1593, CA.

29. The EHRC Code at paragraph 6.28 sets out examples of matters we might take into account in evaluating whether proposed steps are reasonable as follows:

    29.1. The effectiveness in preventing the substantial disadvantage;

    29.2. Its practicability;

    29.3. The financial and other costs and the extent of any disruptions that may be caused;

    29.4. The employer's financial or other resources;

    29.5. The availability of financial or other assistance, (eg through Access to Work), and

    29.6. The type and size of the employer.

30. On the question of comparators, the Code states at 6.16 that the purpose of comparison with people who are not disabled is to establish whether it is a PCP, physical feature or lack of auxiliary aid that places the disabled person at a disadvantage and therefore there is no need to identify a comparator whose circumstances are the same as the Claimants, (in contrast to such a requirement in claims of direct and indirect discrimination).

Direct Disability Discrimination – s.13 Equality 2010

31. Direct discrimination is defined at s.13 as follows:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others…

32. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the Claimant, but not having his protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The Claimant must show that he has been treated less favourably than that real or hypothetical comparator.

33. In a case of direct disability discrimination, the comparator would be a person in the same circumstances as the claimant, but who is not disabled as defined in the Equality Act 2010, see London Borough of Lewisham v Malcolm [2008] UKHL 43.

34. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).

Discrimination Arising from Disability – s.15 Equality Act 2010

35. Sometimes referred to as Disability Related discrimination, this is defined at s.15 as follows:

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

36. Determining whether treatment is unfavourable does not require any element of comparison, as is required in deciding whether treatment is less favourable for the purposes of direct discrimination. There is a relatively low threshold of disadvantage for treatment to be regarded as unfavourable. It entails perhaps placing a hurdle in front of someone, creating a particular difficulty or disadvantaging a person, see Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] UKSC.

37. The difference between Direct Discrimination on the grounds of disability and Disability Related Discrimination is often neatly explained in these terms: direct discrimination is by reason of the fact of the disability, whereas disability related discrimination is because of the effect of the disability.

38. As for the difference between making a reasonable adjustment and disability related discrimination, in General Dynamics v Carranza UKEAT 0107/14/1010 HHJ Richardson explained that reasonable adjustments is about preventing disadvantage, disability related discrimination is about making allowances for that persons disability.

39. There are 2 separate causative steps: firstly, the disability has the consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular something, (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN)

40. There is no requirement that the employer was aware that the disability caused the particular something, City of York Council v Grosset [2018] EWCA Civ 1105 although, as the Court of Appeal observed in that case, if the employer knows of the disability, it would be, "wise to look into the matter more carefully before taking the unfavourable treatment".

41. Simler P, (as she then was) reviewed the authorities and gave helpful guidance on the correct approach to s15 in Pnaiser v NHS England [2016] IRLR 170 which may be summarised as follows:

> The tribunal should first identify whether the claimant was treated unfavourably and if so, by whom.
>
> Secondly, the tribunal should determine what caused the treatment, focussing on the reason in the mind of the alleged discriminator, possibly requiring consideration of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive is irrelevant.
>
> Thirdly, the tribunal must then determine whether the reason for the unfavourable treatment was the, "something arising" in consequence of the claimant's disability. There could be a range of causal links. The question of causation is an objective test and does not entail consideration of the thought processes of the alleged discriminator.

42. If there has been such treatment, we should then go on to ask, as set out at s.15(1)(b), whether the unfavourable treatment can be justified. This requires us to determine:

    42.1. Whether there was a legitimate aim, unrelated to discrimination;

    42.2. Whether the treatment was capable of achieving that aim, and

    42.3. Whether the treatment was a proportionate means of achieving that aim, having regard to the relevant facts and taking into account the possibility of other means of achieving that aim.

43. There is guidance in the Equality and Human Rights Commission's Code

of Practice on Employment, which reflects case law on objective justification in other strands of discrimination and which can be relied on in the context of disability related discrimination.

44. Thus, in Hensam v Ministry of Defence UKEAT/10067/14/DM the EAT applied the justification test as described in Hardys & Hansons Plc v Lax [2005] EWCA Civ 846. The test is objective. In assessing proportionality, the tribunal uses its own judgment, which must be based on a fair and detailed analysis of the working practices and business considerations involved, particularly the business needs of the employer. It is not a question of whether the view taken by the employer was one a reasonable employer would have taken. The obligation is on the employer to show that the treatment complained of is a proportionate means of achieving a legitimate aim. The employer must establish that it was pursuing a legitimate aim and that the measures it was taking were appropriate and legitimate. To demonstrate proportionality, the employer is not required to show that there was no alternative course of action, but that the measures taken were reasonably necessary.

45. The tribunal has to objectively balance the discriminatory effect of the treatment and the reasonable needs of the employer.

46. "Legitimate aim" and "proportionate means" are 2 separate issues and should not be conflated.

47. The tribunal must weigh out a quantitative and qualitative assessment of the discriminatory effect of the treatment, (University of Manchester v Jones [1993] ICR 474).

48. The tribunal should scrutinise the justification put forward by the Respondent, (per Sedley LJ in Allonby v Accrrington & Rosedale College [2001] ICR 189).

Burden of Proof

49. In respect of the burden of proof, s.136 reads as follows:

> *"(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."*

Time

50. Section 123 of the Equality Act requires that claims of discrimination must normally be made within 3 months of the act complained of, or such further period as the Tribunal considers just and equitable. Where an act

continues over a period of time, time runs from the end of that period, from the last act.

Findings of Fact

51. As I have already explained, Employment Judge Laidler found that Mr Goss was at all times disabled by reason of Crohn's disease, anxiety and depression.

52. The Respondents are an ice cream manufacturer. There were ten employees at the relevant time: two in the office, two working on production, Mr Holmes the Production Manager, who was overseen by Mr Nichols the General Manager, and four Drivers. The Shareholder Directors are not directly involved in day to day management of the business.

53. By way of relevant background, Mr Nichols is Mr Goss' partner's brother-in-law.

54. Also by way of background, these events are during the time of Covid and we remind ourselves that there was a lockdown between March and June 2020 and a second lockdown in January 2021, which gradually eased over the coming months from about March 2021.

55. Mr Nichols was under pressure from his family to give Mr Goss a job in the business. He sent him an email on 15 February 2021, (page 90 of the Bundle) outlining for Mr Goss the job role of a Delivery Driver that was likely to become available. That involved making deliveries to hotels, pubs, restaurants, coffee shops, ice cream parlours and so on.

56. On 25 March 2021, Mr Goss was interviewed by Mr Nichols and two others. There is a dispute as to what may or may not have been discussed between Mr Goss and Mr Nichols regarding his anxiety and depression. Mr Goss says that he told Mr Nichols about his anxiety and depression and that Mr Nichols told him to keep quiet about it. Mr Nichols denies that. We have had to resolve that issue of fact.

57. We have reached the conclusion that we accept what Mr Goss has told us and we do so for the following reasons:

    57.1. Firstly, as we will hear in due course, the Respondent's approach to disability is ill informed and inappropriately robust;

    57.2. Secondly, we noted references in the Respondent's pleaded case in its witness statements and in oral evidence, to Mr Goss, *"playing the disability card"*. They express cynicism and make unsympathetic references to his absences only beginning after the end of his three month probation period;

    57.3. Thirdly, the Respondent's pleaded position was that it did not know about Mr Goss' depression at all. That position was taken in the face of an email, one that we will come to in due course, from Mr Holmes on 28 September 2021 from which it is clear the Respondents did know;

57.4. Fourthly, there was the clearly untrue assertion pleaded in the Claim at page 40, paragraph 6, that Mr Goss was offered a phased return to work when he was feeling better and elsewhere in the pleaded claim, where there were suggestions that reasonable adjustments had been offered and clearly they had not;

57.5. Fifthly, there is the suggestion in the ET3 and during the hearing that Mr Goss should report his depression to the DVLA and that should somehow disqualify him from driving;

57.6. Sixthly, as we will come to in a moment, at page 118 there is a New Starter Form on which there is the question 'Please disclose any medical conditions…" on which Mr Goss has disclosed Crohn's disease, but not his depression. Why did he not disclose his depression? It might be because of the stigma that some people may perceive or may be regarded in if they admit to suffering from depression, but it might also be because Mr Nichols told him to keep quiet about it.

57.7. Seventhly, as was suggested a number of times, the Respondents seem to be under the misapprehension that because Mr Goss had allegedly not disclosed that he has depression before the start of his employment, he cannot complain about the way he is treated later. This is most certainly not the case, there is no obligation to disclose one's disability during a recruitment process; and

57.8. Eighthly, the last point to make about this is the family connection, that Mr Nichols was under pressure from his family to recruit Mr Goss. He says that Mr Nichols knew about his anxiety and depression, Mr Nichols says he did not. It seems to us unlikely that Mr Nichols did not know about it and it seems to us likely that Mr Nichols wanted to assist him.

Chronology

58. A job offer was made on 29 March 2021, page 91 of the Bundle. That offer was accepted. The terms and conditions are at page 107 of the Bundle; Item 14 says,

> "The person to contact regarding a Disciplinary Appeal is the General Manager."

59. The contract is included in the Bundle starting at page 110. There is nothing in particular to refer to there. We have already dealt with the New Starter Form at page 118.

60. Employment began on 6 April 2021. Three months' probation therefore expired on 6 July 2021 and up to that point, there had been no issues with Mr Goss' employment.

61. Mr Holmes says that in July 2021, he spoke to Mr Goss and discussed with him whether in future he might be interested in doing Ice Cream Van work as well as wholesale deliveries. He says that Mr Goss was adamant that he did not want to do that work because it would involve working in

the evenings and at weekends and that it was not something he wanted to do because of other things he was doing. Mr Goss denies that conversation took place.

62. Mr Nichols says that in August 2021 he had a conversation with Mr Goss in which they discussed what the Respondent's call the Dual Driving role; that is the role of both doing wholesale deliveries and Ice Cream Van work. Mr Nichols says that Mr Goss said he did not want to do that. Mr Goss denies it.

63. Again, what we have here is a conflict of evidence that we need to resolve. In this instance, we have some documentary evidence to assist us in the form of a note of a meeting on 7 September 2021, between Mr Nichols, Mr Holmes and Mr Brooks. This document is not, we acknowledge, without its difficulties because we see in there it being recorded as having been discussed that at that time Jamie, the Delivery Driver, was sick. Actually, on 7 September 2021 he was not. This does suggest there may be some retrospectiveness in the preparation of this particular document. However, it was not put to us as a document that was contemporaneous, prepared at the time of the meeting. The document does state that Mr Holmes and Mr Nichols both commented that they had previously spoken to Mr Goss about combining the two roles and that Mr Goss had said he would not be interested. On the basis of that corroboration, we accept that conversations with that gist, were held in July and August of 2021.

64. Next in the chronology, we come to this meeting on 7 September 2021. It's relevance is that it sets out the Respondent's position financially at that time. It records the Respondent as having suffered losses during the pandemic and lockdown, which is of course entirely credible. It refers to the 2020 turnover as being in the region of £750,000 to £850,000 per year and that having dropped by 60% in 2020 / 2021. It records reduction in staff hours to various members of staff and the Respondent's witnesses confirmed this during their oral evidence. For example: Mr Holmes was working one day a week less and one hour per day less, the two Administration staff were taking a day off each per week and working an hour less per day and the days worked by the factory staff were cut down. A situation was identified as the Respondents approached winter time, when of course there is a natural down turn in business, in which there was a need to make savings.

65. The note records that a decision had been made that the remaining Delivery Driver role should be made redundant. There were two other Drivers, one called Phil Senior who was off permanently sick, (with a brain hemorrhage which subsequently led to his employment coming to an end) and another individual called Darren, who was working the Ice Cream Van, not the deliveries. The note records that they resolved to offer a dual role to Mr Goss as Delivery Driver and Ice Cream Van Driver.

66. Mr Holmes was tasked with discussing that with Mr Goss when he got back from his holidays.

67. On 27 September 2021, Mr Goss began a period of absence through ill health. The first week was self-certified, although the Self-Certificate was never provided. During his absence, Mr Goss received statutory sick pay

only. His uncertified absence lasted to 4 October 2021, (page 137) and then a Doctor's Certificate, (a Fit Note) was produced for the period 5 October 2021 to 1 November 2021, (page 83 of the Bundle).

68. This Fit Note records Mr Goss' absence as being due to low mood and anxiety. The doctor has ticked the box to indicate that he may be fit to work taking into account the following advice, that is:-

    68.1. A phased return to work;

    68.2. Altered hours;

    68.3. Amended duties; and

    68.4. Work place adaptions.

69. The doctor also wrote that Mr Goss felt unable to do Delivery Driver work at that time because of his low mood.

70. A second Fit Note was provided for the period 3 – 30 November 2021, (at page 86 of the Bundle). This does not contain the same references to the possibility of being fit to return to work with certain adjustments being put in place. On that occasion a doctor has simply ticked the box to say, "you are not fit for work".

71. In the meantime, on or about 28 September 2021, Mr Goss made Mr Holmes aware that the reason for his absence was depression, (pages 131 and 132) and also informed him that he was taking Sertraline for his condition, (page 133).

72. On 31 October 2021, Mr Goss warned the Respondent that he was about to be signed off for four more weeks, (page 139).

73. There follows an email chain which starts at page 143 and runs through to page 148 of the Bundle.

74. On 3 November 2021, Mr Holmes emailed Mr Goss and asked him to attend a meeting the following week on 8 November 2021 to discuss his job role. Mr Goss replied saying that he is off with depression and anxiety, that going to a meeting would make him feel worse and with the benefit of having had some advice, he requests that the meeting should take place upon his return to work, (page 144). Mr Goss wrote,

> *"Can the meeting take place at the end of November as I am not in the right place. A doctor's note will follow."*

75. Mr Holmes replied later on 3 November 2021, (page 145) offering his apologies and saying that it would not be possible to change the date of the meeting,

> *"With the needs of the company changing and moving forward, we need to have this meeting on 8 November.*
>
> *It is your best interest that you attend this meeting."*

76. Mr Goss replied,(page 146)

> *"Okay unfortunately I cannot make it, can you just email me what you need to say as I am off work."*

77. The next day Mr Goss wrote again, (page 147) saying,

> *"As I am off I am not available 8th, I can come on 22nd as you know I am not well Jamie."*

78. Notwithstanding that email correspondence, the Respondent went ahead with a meeting about Mr Goss on 8 November 2021 in his absence. At that meeting, Mr Nichols and Mr Holmes decided to dismiss Mr Goss. They wrote him a letter (page 312 and 313) in which they say the issue needed to be sorted sooner rather than later. The letter refers to difficulties experienced by the business due to Covid-19 and the need to adapt procedures and the workforce. It reads,

> *"Unfortunately these changes will affect some members of staff and a decision has been made to terminate your employment with Parravanis Ice Cream, reason of redundancy."*

79. Mr Goss was given a month's notice, so that his employment was to terminate on 8 December 2021. He was told the Respondent was unable to identify suitable alternative employment, they expressed the opinion that a fair and reasonable objective process had taken place and he was invited to return the company's possessions at the end of the notice period. He was told that he had the right to appeal against his redundancy dismissal and that,

> *"If you wish to do so you should inform the General Manager in writing by 15 November 2021 stating your grounds for Appeal in full."*

80. Mr Goss did not appeal.

81. A further email was in fact sent on 9 December 2021, (page 148) reminding him of his right to appeal and that such should be emailed to Mr Nichols by 15 November 2021.

Conclusions

Direct Disability Discrimination – s.13 Equality 2010

82. The detriment relied upon is dismissal. Mr Goss is saying that he was dismissed because he was disabled. There is no actual comparator. In other words, there was no real person in the same position as Mr Goss, but who was not disabled, that he could be compared to. Therefore, we have to consider what the position would have been with a hypothetical comparator. We imagine somebody in exactly the same situation as Mr Goss, a person who is not disabled, but who has been absent for the same period of time, who is doing the same job, who has not attended the proposed meeting, in a situation where the financial imperatives facing the Respondent are exactly the same.

83. We are satisfied that such hypothetical comparator would have been

treated just the same way as Mr Goss. In other words, the hypothetical comparator would also have been dismissed. So there is no difference in treatment between Mr Goss and a person in the same situation as him, but not disabled. There are no facts on which we could properly conclude otherwise, even without considering any explanation put forward by the Respondent.

84. The Claim of direct disability discrimination therefore fails.

Discrimination Arising from Disability – s.15 Equality Act 2010

85. There are two elements of unfavourable treatment relied upon. The first is the holding of a meeting in Mr Goss' absence. The Respondents did hold a meeting in his absence. To do that is obviously unfavourable from the employee's perspective, for the employee then has no say in the matters under discussion and the potential outcome. The second element unfavourable treatment relied upon is dismissal. He was dismissed and obviously, dismissing somebody is unfavourable treatment.

86. The alleged, "something arising" in both instances is Mr Goss' absence. The relevant periods of absence are those in October; the List of Issues referred to some days of absence in September, but it was accepted during the hearing that there is no suggestion Mr Goss was absent through ill health on those dates in September. Did Mr Goss' absence beginning in October arise from his disability, i.e. his depression and anxiety? Yes, it did. His absence from work was as a consequence of his depression and anxiety.

87. Did the Respondent hold that meeting on 8 November 2021 without Mr Goss being present, because of his absence from work? Yes, it did. Mr Nichols and Mr Holmes decided to proceed with the meeting because Mr Goss was absent from work and the issue needed dealing with, "sooner rather than later", (in their view).

88. Did the Respondent dismiss Mr Goss because of his absence? The Respondent's evidence was that if Mr Goss had attended the meeting, they would have offered him the dual role. Because he was not at the meeting, they did not offer him the dual role, they decided to dismiss him. Therefore, his dismissal was also because of his absence, caused by his depression and anxiety.

89. The question then arises, was going ahead with the meeting in Mr Goss' absence and was the dismissal, each a proportionate means of achieving a legitimate aim? In other words, can the Respondents justify its conduct?

90. The legitimate aims relied upon as identified in the List of Issues, at 4.71 and 4.72, are the need to progress a reorganisation, to reduce overheads, save jobs and to protect the viability of the company. They are clearly legitimate aims.

91. Was the means to achieve those legitimate aims proportionate? We bear in mind that this is a small employer, a small business. But Mr Goss was only in receipt of statutory sick pay, so it is not as if he was an expensive overhead whilst he was absent from work. There was no compelling

evidence before us as to why it was so important that Mr Goss be dealt with on 8 November 2021, rather than upon his return to work after his period of illness, or on 22 November 2021 as he proposed. The Respondent's witnesses' answer was that this would have gone on and on. We are not sure on what basis they make that statement and in any event, the cost to the Respondent would have been minimal because he was in receipt of statutory sick pay.

92. We also note, the Respondents did not seek more information from Mr Goss, or from his doctor, about his illness and the prognosis. It is standard practice to do so in employee relations in these situations.

93. Also, we note the Respondent did not tell Mr Goss what the meeting was about. He invited them to explain and they ignored his request. The Respondent did not attempt, for example, to put to Mr Goss the situation it found itself in: the need to make savings and the options that Mr Goss might have. In particular, that it was a case of either take the dual role Delivery Driver and Ice Cream Vans, or be dismissed. They did not give him the opportunity to make a decision about that. It might be argued that would not have been a good idea, given that he was off with depression, but the Respondent could and should have made enquiries of his GP to find out for example whether he would be well enough to discuss these matters and / or to attend a meeting. It seems that the Respondent did not even appreciate that it could approach his GP, or appoint an Occupational Health Advisor, to seek such information.

94. In short, it was not reasonable and it was not necessary, to take the steps of holding the meeting in Mr Goss' absence and to dismiss him. Adjustments could have been made to avoid this turn of events by delaying the meeting, or by providing him with the information so that he could make a decision. The Respondents did not consider Mr Goss' personal situation at all. There was no element of balance in their approach.

95. Our conclusion is that whilst there were legitimate aims, dismissing Mr Goss and holding the meeting in his absence were not proportionate means of achieving those aims.

96. The question arises still, whether the Respondents knew, or ought reasonably to have known about his disability of depression. Certainly from 28 September 2021, they did. But further, on our findings of fact, actually they knew from the start of his employment via Mr Nichols.

97. This aspect of Mr Goss' Claim succeeds.

Reasonable Adjustments – ss. 20 & 21 Equality Act 2010

98. There are five PCPs, (provision, criterion or practices – ways of doing things) relied upon. These are:-

    98.1. To dismiss employees who have had, or who may have, a month or more sick leave each year. There was no evidence before us on which we could conclude that there was such a PCP, or that such a step would necessarily be taken in the future, therefore we find that

there is no such provision, criterion or practice in that regard.

98.2. To disapply the standard dismissal procedure for those who do not have two years' continuous service. There was no evidence before us that the Respondents adopted such a PCP. We find that there was no such PCP.

98.3. To proceed with a dismissal meeting in an employee's absence. That is clearly what occurred in this situation; the Respondents proceeded to hold a meeting at which they decided to dismiss Mr Goss, in his absence. We have already found in our reasoning that a hypothetical comparator would have been treated in the same way. A non-disabled person in exactly the same circumstances would also have been dismissed. The mindset of the Respondent and its lack of awareness of appropriate employee relations practice is such that it is something that might occur again. Our conclusion is that there is evidence upon which we can find that there is such a PCP. The Respondents have not satisfied us otherwise. We find that there was such a PCP.

98.4. The requirement or practice to not amend the dates of meetings with employees. For the same reasons just discussed in regard to PCP 3, we find that there is such a provision, criterion or practice.

98.5. To not make any attempts to make reasonable adjustments recommended on Fit Notes supplied by GPs when it is stated that the employee may be fit to work. The Respondents ignored the recommendations of Mr Goss' GP contained on his fit Note of 5 October 2021. Given the Respondent's obvious ignorance about matters relating to disability and disability discrimination, it seems to us more likely than not there was such a PCP. That is what happened to Mr Goss and it would be likely to happen again with anybody else who produced such a Fit Note. We find that there was such a PCP.

99. The next question is, was Mr Goss put at a disadvantage by these PCPs?

100. With regard to PCPs 3 and 4, (proceeding with a meeting and not changing the dates) those clearly place Mr Goss at a disadvantage, because the Respondent was making a decision on the employee's future without any input from him. Equally plainly, not implementing a doctor's recommended adjustments in accordance with a Fit Note, places an employee and placed Mr Goss at a disadvantage because those adjustments may enable the employee to return to work, avoiding loss of income and reduced risk of disciplinary action arising out of periods of absence.

101. The Respondent knew of the disability. As a matter of common sense the Respondent ought to have known of the disadvantages and certainly would have been aware of the disadvantages had they sought further advice or clarification from Mr Goss's GP or from an Occupational Health advisor, as they should have done.

102. It would have been reasonable for following adjustments to have been put

in place:

102.1. To have held the dismissal meeting on a later alternative date, as proposed by Mr Goss, (PCP 3 & 4), and

102.2. To have discussed and implemented the adjustments recommended by Mr Goss' GP.

103. For these reasons, the Claim for Reasonable Adjustments in respect of PCPs 3, 4 and 5, also succeed.

Remedy

104. After giving our decision on liability, we proceeded to hold a short hearing as to remedy. Mr Goss returned to the Witness Table. He answered some questions from the Tribunal about his losses resulting from the discrimination as we have found it and he was asked some more questions by Mr Brooks.

Law on remedy

105. Where a claim has succeeded before an Employment Tribunal under the Equality Act 2010, section 124 provides that the Tribunal may order the Respondent to pay to the complainant compensation of an amount corresponding to the damages the Respondent might have been ordered to pay by a county court. Section 119(1) sets out what a County Court may order, which is to grant any remedy which could be granted in the High Court in proceedings for tort or judicial review, which includes compensation for financial loss and personal injury. Such compensation can include damages for injury to feelings, (s119 (4). Those damages would be payable by reason of a statutory tort on the part of the Respondent, the measure of damages in respect of which is to place the Claimant, so far as is possible, in the position that he would have been in but for the discrimination, (see Ministry of Defence v Channock [1994] IRLR 509 EAT).

106. Placing a Claimant in the position he would have been in, but for the discrimination, will entail an assessment of what might have happened, but for the discrimination, (see for example Chagger v Abbey National Plc [2009] EWCA Civ 1202 CA, [2010] IRLR 47).

107. Damages are assessed under two headings; General Damages for pain, suffering, loss of amenity or injury to feelings and Special Damages in respect of the financial losses flowing directly from the discrimination.

Injury to feelings

108. We have had regard, in broad terms, to the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases, so as to have in mind the levels of awards made in personal injury cases.

109. In the case of (1) Armitage, (2) Marsden and (3) HM Prison Service v Johnson [1997] IRLR 162 the EAT set out five principles to consider when assessing awards for injury to feelings in cases of discrimination:

109.1. Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

109.2. Awards should not be too low as that would diminish respect for the policy of the legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

109.3. Awards should bear some broad general similarity to the range of awards in personal injury cases. This should be done by reference to the whole range of such awards, rather than to any particular type of award.

109.4. In exercising discretion in assessing a sum, Tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

109.5. Tribunals should bear in mind the need for public respect for the level of awards made.

110. Further guidance was given on the range of awards by setting out three bands of compensation for injury to feelings by the Court of Appeal in the case of Vento v Chief Constable of West Yorkshire Police (2) [2003] IRLR 102. Those bands were as follows:

110.1. The top band is for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race.

110.2. The middle band should be used for serious cases, which do not merit an award in the highest band.

110.3. Awards in the lower band are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

111. The thresholds of the bands are amended to reflect inflation each year, by Practice Direction issues each year by the Presidents of the Employment Tribunals for England and Wales and for Scotland. The apply in respect of proceedings issued on or after 6 April in the year in question. For the year commencing 6 April 2022 the band thresholds are:

- lower band (less serious cases): £990 to £9,900
- middle band: £9,900 to £29,600
- upper band (the most serious cases): £29,600 to £49,300

Special Damages

112. Special Damages is the name given to the award that is to compensate for

financial losses that flow from the discrimination. They fall into 2 elements; losses to the date of the hearing, (which can usually be calculated with some precision) and future financial losses, (which invariably involve speculation as to what the future may hold for the claimant).

113. As the object is to place the claimant in the same position that he would have been in had he not been subjected to discrimination, we have to compare hid income as it has been, as it will be and as it would have been. That means that we have to take into account income that he has received in income from state benefits that he would not otherwise have received had he remained in work.

ACAS uplift

114. Tribunals now have the power to uplift or reduce any award by up to 25% where a party has unreasonably failed to comply with an ACAS Code of Practice. This is provided for in the Trade Union and Labour Relations (Consolidation) Act 1992 at section 207A which reads

> "(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

Interest

115. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provide that interest is payable on awards of compensation in cases of discrimination. It is to be awarded regardless of whether an application is made. The rate of interest payable stood at 0.5% as from 1 July 2009 and increased to 8% for proceedings issued after 28 July 2013. Interest should be calculated from the 'day of calculation' which in a case of injury to feelings, is the period beginning on the date of the contravention or act of discrimination complained of, through to the date of calculation. In respect of other damages, interest is calculated from the midpoint, half way through the period in question, to the date of calculation. A Tribunal has a discretion where it considers a serious injustice would be caused if interest would be awarded, in respect to the periods specified, to calculate interest for such different period as it considers appropriate.

Our Conclusions on Remedy

116. The net pay with the Respondents for Mr Goss was £319.17 per week. Loss of earnings should be calculated from 8 December 2021, which is when his notice expired.

117. Mr Goss, in short, told us that he was not fit to work again until July 2022.

I am afraid to say that we did not believe him about that, for the following reasons:

117.1. He admitted during our questions, it slipped out, that he had been doing 'cash' odd jobs at about £100 a week which we find was from January of 2022;

117.2. There were many Facebook entries which indicated that a business he had previously set up, was up and running again. It had been revived by him from March / April time of 2022. For example:

117.2.1. At page 264 is an entry for 19 March 2022 proclaiming that the business had now employed a cleaner and asking if anybody wanted cleaning work. In answer to questions from the Tribunal, Mr Goss said that if somebody had responded looking for a cleaner, either he would have done it or somebody else would have done it for him;

117.2.2. There was an entry at page 258, for 27 March 2022, advertising that Mr Goss' business had spaces in its diary, that everything was getting full but there were a few spaces for the following weeks. There are many Facebook entries to that affect in the Bundle. Mr Goss' answer to that is in short, this was all just mere 'puff', he was advertising and just trying to see if there was business there to be had, he was trying to drum up business.

117.2.3. Another example was at page 269; there are couple of entries there, one was an entry about somebody having made use of his services twice by then, in May 2022, and an entry for 31 May 2022 about a particular customer on whom they had attended and who had been rude to them.

117.3. It seemed to us that Mr Goss was working. He was running his Facebook account, he was trying to find work, he clearly felt that he was fit to work. The business was clearly up and running and using customers.

117.4. Another aspect that concerned us was the absence of bank statements from the business to show what its earnings were, or were not, during the mitigation period.

118. Our finding, therefore, is that by 6 April 2022 Mr Goss was fit to work and he should have been in a position to bring his financial losses as a consequence of the discrimination to an end. If not through his business, then by finding other work, for at this time, (April 2022) the country was coming out of lockdown and we know from our own experience in this area, that employers were crying out for labour in the hospitality and construction industries in particular. The Claimant should, therefore, have been able to find work promptly at that time.

119. Other facts relevant to the calculations are that Mr Goss told us he was in receipt of Universal Credit from December 2021 onwards in the sum of £597.77 per month.

120. We should also add that Mr Goss is entitled to interest to what is called the mid-point on the financial losses and for the entire period to date in respect of injury to feelings.

121. Our calculations are: there is a 17 week period of loss between 8 December 2021 and 6 April 2022. During those 17 weeks, Mr Goss would have earned £5,425.89. He in fact earned between 4 January 2022 and 6 April 2022, over a period of 13 weeks, cash in the sum of £1,300 we find. He received Universal Credit 4 x £597.77 = £2,391.08

122. When one deducts from what he would have earned, what we find he earned in cash and his Universal Credit, one arrives at £1,734.81.

123. That then brings us to his breach of the ACAS Code by not appealing against his dismissal. We accept his point, well made, that the indications were in the Respondent's documentation that any appeal would be to Mr Nichols and he may well have had little faith in Mr Nichols dealing fairly with his appeal. We also take into account that Mr Goss was unwell with depression at the time and may not have been thinking quite as clearly as he might otherwise have been. On the other hand, we know that he had the benefit of legal advice at that time and the law relating to deductions from compensation for failing to follow the ACAS Code is designed to encourage people to make use of the full disciplinary procedures before resorting to litigation and his lawyers would have known that. If he had appealed, he or his lawyers on his behalf, would have been able to make great issue with the Respondents if they had not arranged for somebody independent and not Mr Nichols, to have considered the appeal.

124. Weighing these matters in the balance, we concluded that it would be just and equitable to make a deduction of 5% from the compensation awarded to Mr Goss because he did not appeal. On the loss of earnings figure of £1,734.81 that 5% is £86.74 leaving a total net loss of earnings of £1,648.06. We calculated interest to the mid-point at 8% as is prescribed by statute, in the sum of £143.72.

125. That then brings us to injury to feelings. In the Schedule of Loss, Mr Goss' Solicitors have pitched very sensibly at the top of the Lower Vento Band at £9,000. This is certainly a Lower Vento Band case and it is probably one that belongs towards the top end of that Band. The matters that we have taken into account are that although this is in effect a one off act, comprising two elements: the dismissal and the refusal to move the date of the meeting, it does entail Mr Goss losing his job. This will undoubtedly will have set back his recovery from depression and we accept his evidence in that regard, although we find that when he says it set back his recovery until August 2022, he is exaggerating. We note that in his witness statement at paragraph 44, the only reference that we have to his feelings in any way, he writes,

"I found the ordeal with the Respondent quite upsetting and frustrating."

126. Having regard to the foregoing, the figure we arrive at for injury to feelings is £8,000.

127. From that we deduct 5% as previously explained, because he had failed to appeal. A deduction of £400. The injury to feelings award becomes £7,600. Interest at 8% on that from the date of discrimination, (8 November 2021) through to today's date, amounts to £1,271.11.

128. In summary, our award of compensation is as follows:

128.1. Financial losses:	£ 1,648.06
128.2. Interest on Financial losses:	£ 143.72
128.3. Injury to feelings:	£ 7,600.00
128.4. Interest on injury to feelings:	£ 1,271.11
128.5. TOTAL Judgment:	**£10,662.89**

Employment Judge M Warren

Date: 29 February 2024

Judgment sent to the parties on
6 March 2024

.....

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For the Tribunal office

Public access to Employment Tribunal decisions

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Recording and Transcription

Please note that if a Tribunal Hearing has been recorded you may request a transcript of the recording, for which a charge is likely to be payable in most but not all circumstances. If a transcript is produced it will not include any oral Judgment or Reasons given at the Hearing. The transcript will not be checked, approved or verified by a Judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/