EMPLOYMENT TRIBUNALS

Claimant: **Mr A Hadafmand**

Respondent: **John Lewis PLC**

Heard at: **London South, by CVP** **On: 16, 17, 18 and 19 January 2024**

Before: Employment Judge Rice-Birchall
Ms Bonner
Mr Harrington-Roberts

Representation
Claimant: Mr Clement, Counsel
Respondent: Mrs Holden, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant's claim of unfair dismissal is not well founded. The claim fails and is dismissed.

2. The claimant's complaint of unfavourable treatment because of something arising in consequence of disability is not well founded and is dismissed.

REASONS

Background

1. The claimant was employed by the respondent at its department store in Bluewater, Kent (the "Branch"), from 2005/6 until 23 October 2021 when he was summarily dismissed. The claimant worked on Saturdays only and was contracted for 9.92 hours a week. The claimant's role was Selling Partner.

2. At all material times, the claimant worked full time, Monday to Friday, for another employer. This employment will be referred to as the claimant's "main employment".

3. This claim, which was brought on 29 December 2021 following a period of early conciliation between 17 November 2021 and 28 December 2021, arises out of the termination of the claimant's employment.

Evidence

4. The Tribunal had the benefit of a Bundle of documents. An additional document, dealing with the claimant's absence, was disclosed the night before the hearing, and a further version of that document was disclosed during the course of Mr Whitehead's evidence. The Bundle included the claimant's impact statement and medical evidence.

5. The claimant had prepared a witness statement and gave oral evidence. Reece Whitehead, Team manager; Emma Scowen, Team manager and dismissing officer; Karen Wise, Team manager; and Tracy McReadie, Appeals Manager, had prepared witness statements and gave evidence on behalf of the respondent.

List of Issues

6. The claims are of:

7. Unfair dismissal contrary to s.98 Employment Rights Act 1996;

8. Discrimination arising from disability contrary to s.15 of the Equality Act 2010.

<u>Unfair dismissal</u>

9. What was the reason for dismissal:

    a. The Respondent says it was misconduct namely the Claimant being on unauthorised absence from work on 11 and 18 September 2021;

    b. The Claimant accepts that this was, factually the reason for dismissal, but contends it was not misconduct in the circumstances.

10. If there was a potentially fair reason for the dismissal was the dismissal fair in all the circumstances? The Claimant says in particular that:

    a. He made clear he had gone to the Netherlands because his anxiety made him feel compelled to do so and made him unable to think the matter through properly. In particular, he was unable to properly understand the complex rules around self-isolation on return.

    b. The Claimant notified the Respondent in advance of the shifts on 11 and 18 September that he was required to self-isolate;

c. The Respondent failed to get medical advice, for instance from Occupational Health.

11. If the Claim succeeds to what remedy is the Claimant entitled?

a. Should a Polkey reduction be made?

b. Should a reduction to the basic and / or compensatory award be made?

Disability status

12. Was the Claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at the relevant times. He relies upon the impairment of recurrent depression and anxiety.

13. Did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities (taking into account deduced effects if needs be)?

14. Was the impairment long term?

Discrimination arising from disability, s.15 Equality Act 2010

15. Was the Claimant treated unfavourably?

a. The unfavourable treatment complained of is dismissal and the rejection of the appeal against dismissal.

16. Was the unfavourable treatment because of something arising in consequence of disability?

a. The reason for treatment was that the Claimant was absent from work on 11 and 18 September 2021;

b. Further that the absence occurred in circumstances in which the Claimant had a live final written warning;

c. The Claimant says that these matters arose in consequence of disability as follows:

i. Anxiety made the Claimant feel compelled to go to the Netherlands to visit his then girlfriend. His mental health problems prevented him from thinking things through properly, such as the need to self-isolate on return which depended on complex rules.

ii. The Claimant says the poor timekeeping that led to the final written warning (and the prior to warnings that preceded it) was caused by his disability.

17. Was the unfavourable treatment a proportionate means of achieving a legitimate aim?

18. The Respondent relies upon the following aims:

a. properly managing the absence and performance of the respondent's workforce;

b. encouraging satisfactory attendance amongst the respondent's workforce;

c. ensuring the operational efficiency of the respondent's business;

d. ensuring the respondent's ability to meet customer demands;

e. dealing with travel to another country and quarantine under the respondent's Covid Policy for Travel Overseas consistently; and

f. ensuring a sufficient and reliable workforce.

19. Did the Respondent know, or ought it reasonably to have known, that the Claimant was a disabled person.

Facts

The respondent's policies and procedures

20. At the time these events took place, the respondent had a Covid Policy.

21. The respondent's Covid Policy states, under the heading; "Holidays abroad", "Where a period of quarantine is required, you mustn't book a holiday abroad until you get agreement from your people manager that you can have the time off including the ten days quarantine period."

22. The respondent's Partnership handbook (the "Handbook") includes a disciplinary policy which states: "Conduct refers to how you behave in relation to the standard required by the Partnership, such as timekeeping, absence, theft, harassment or bullying. If you fail to meet the standard we require as a result of carelessness, negligence, or because you chose not to do something - we tend to regard this as misconduct."

23. The policy also confirms that "in certain cases, your conduct may be considered so serious that you may be dismissed summarily, whether or not you have been warned about such conduct on a previous occasion and regardless of your performance or length of service".

24. The Handbook contains examples of serious misconduct which can result in summary dismissal. These examples include "serious breach of Partnership rules and procedures" and "unauthorised absence."

25. The Handbook makes it clear that failure to comply with notification and/or authorisation requirements may result in absence being unauthorised which may result in an employee being subject to disciplinary proceedings.

26. The Handbook also states as follows: "For most cases other than serious misconduct, you will not normally be dismissed for a first offence.

However, closure could eventually be the outcome if there is no improvement or if further disciplinary issues occur. Warnings will run for 12 months. If during the period in which the warning is live the same (or similar) issue which gave rise to the sanction occurs again, or if your performance fails to improve within the period set, then a more serious sanction up to and including closure may be taken following an investigation. The Partnership disciplinary procedure should be started in relation to any further conduct or performance issue in the usual way."

Claimant's mental health disclosure

27. On 23 April 2017, the claimant disclosed that he had problems with his mental health to Mr Paige who was then the claimant's team leader. In explaining the claimant's recent absence, it is noted: "Personal difficulties with Mental Health implications. LM (line manager) only individual who is aware. Partner not in a stable condition for others to be aware so would prefer LM to deal end to end. It is then noted: Partner to advise on health condition regularly and take steps to limit further absence. As partner only works Saturdays he will call on weds before shift if having difficulties that week. If no improvement seen further action could be taken. OHA permission not given." This was at a time when the claimant had been absent from work due to sciatica.

Claimant's disciplinary record

28. On 1 December 2018, the claimant received a first written warning for failing to arrive for work on time.

29. On 8 February 2020, the claimant received a further written warning for unacceptable levels of timekeeping.

30. On 30 October 2020, the claimant received a final written warning for unacceptable timekeeping and breach of the warning dated 8 February 2020. The letter required immediate improvement to the claimant's poor timekeeping and no further misconduct. The warning was to remain "live" for 12 months until 30 October 2021. The warning was not appealed by the claimant and there was no mention during the disciplinary process of any mental health issues by the claimant whether as mitigation or otherwise.

Events leading to the termination of the claimant's employment

31. The claimant was in a relationship and his partner lived in the Netherlands. Because they had been separated for a significant period of time as a result of COVID, which was causing difficulties in their relationship, the claimant, prompted by his partner's mother, decided to go to the Netherlands to visit his partner. COVID restrictions were in place. His reason for travel was to seek to resolve the relationship difficulties which had implications for his mental health and wellbeing.

32. Although he had originally considered that his period of travel would include a weekend, he managed to obtain time off from his main employment and so did not plan his period of travel to be over a weekend when he would be required to work for the respondent.

33. On 8 September 2021, the claimant went to the Netherlands to visit his partner, returning to the UK on 10 September 2021. At this time, the Netherlands had been placed by the UK Government on the "amber list" due to the COVID-19 risk it posed. Because he was not fully vaccinated, on his return to the UK, the claimant was required by the NHS to self-isolate for 10 days. As a result of these requirements, the claimant was unable to work his contracted shifts for the respondent on 11 and 18 September 2021. However, at no point did the claimant notify the respondent of his intention to travel or request time off in accordance with the respondent's Covid Policy. His absence was therefore unauthorized.

34. The claimant was in the slightly unusual position that he did not need to have booked holiday for his trip to the Netherlands with the respondent, as his time away itself did not include a Saturday when the claimant would have been expected to work. Had the claimant been planning to be away over a weekend, he would have booked leave from the respondent as appropriate and/or informed his managers. He had booked leave from his main employment as required for the trip itself (but not for any period of isolation). Had he needed to book holiday from the respondent, then they would have known about his travel plans.

35. Under the terms of the Covid Policy, which the claimant was unaware of, the claimant was expected to have informed the respondent of his intention to travel abroad so that they could have the opportunity to approve/manage/decline any necessary time off. However, even if he was not aware of the COVID policy, he would be aware that, if he were unable to attend work without approval, that would be classified as unauthorized absence.

36. At the time of the claimant's trip, information relating to COVID-19 travel restrictions was changing rapidly, but was readily available online. The UK Government had classified countries into red, amber and green categories, depending on the COVID-19 risk that they posed, and self-isolation was usually required upon return to the UK if travelling to a country on the "red" or "amber" list. This may have been affected by a person's vaccination status.

37. On his return to the UK on 10 September 2021, the claimant spoke on the telephone with Reece Whitehead (Team Manager) and informed him that he had been contacted by the NHS and was required to self-isolate with immediate effect due to his trip to the Netherlands, meaning he would miss his shifts on 11 and 18 September 2021. This was the first the respondent had heard of the claimant's trip to the Netherlands. As a result, the respondent had to arrange cover for the claimant's shift on 11 September 2021 with only one days' notice. 18 September was also unauthorized absence as it had not been pre-approved by the respondent.

First investigation meeting

38. Mr Whitehead undertook a formal investigation. During an investigation meeting on 2 October 2021, he informed the claimant that they were there to discuss his unauthorized absences on 11 and 18 September 2021. The claimant admitted that he did not realize that he would have to self-isolate on his return. He admitted that he was aware that, at the time of his trip,

the Netherlands was on the amber list but said he had only checked what he needed to do to get there. He said he had booked the trip one or two weeks in advance. The claimant also accepted that he was "at fault" and that he "should have paid more attention" to the rules around travel restrictions in place at the time. The claimant confirmed that he understood that it was his responsibility to research the rules around COVID-19 travel restrictions and could not produce a reason for not informing the respondent of his trip before taking it.

39. The claimant also confirmed that he was not fully vaccinated. Mr Whitehead confirmed the terms of the COVID policy and explained that any period of isolation was not covered by the respondent and must be used as holiday unless the partner is able to arrange lieu time or authorized unpaid leave or time banking.

40. The claimant did not at any point during the meeting mention any issues with his mental health.

Second investigation meeting

41. Mr Whitehead considered that there was a disciplinary case to answer and the case was referred to Ms Holly Baker (Team Manager) who, on 8 October 2021, wrote to the claimant to invite him to a disciplinary hearing on 16 October 2021. Ms Baker decided further questions needed to be put to the claimant, and, on 9 October 2021, Karen Wise (Team Manager) met with the claimant to put those questions to him.

42. Some of those questions related to another absence on 4 September 2021, which was later discounted as a disciplinary issue.

43. The claimant said that he had had to "choose between personal responsibilities and coming into work".

44. The claimant did not attend the meeting on 16 October 2021. It appears that he did not receive the invitation letter in time.

Disciplinary hearing

45. On 21 October 2021, Emma Scowen, Manger, Operations (Ms Baker was unavailable), wrote to the claimant to invite him to attend a disciplinary hearing on 23 October 2021. That letter attached the respondent's Covid Policy and the claimant's final written warning dated 30 October 2020.

46. The disciplinary hearing took place on 23 October 2021, chaired by Ms Scowen. The claimant was informed of his right to be accompanied by a colleague/trade union representative, but chose to speak with Ms Scowen alone. An independent note taker was also in attendance.

47. The first thing the claimant said to Ms Scowen was that he had spoken to his old manager, Mr Paige about something and that it was relevant to the hearing. This was with reference to his mental health, though Ms Scowen did not know that until later.

48. The claimant admitted that he had not read the covid guidance thoroughly and had thought other options were available, by which he meant that he believed he had the option of test and release. He explained that the trip was very important to him personally because of his relationship issue.

49. During the meeting the claimant disclosed to Ms Scowen that he suffered from anxiety. He spoke to Ms Scowen alone in order to make this disclosure, as he did not want the notetaker to be present. Prior to this, Ms Scowen had no knowledge of any such condition. The claimant informed Ms Scowen that the only person he had spoken to about his condition was Mr Paige, a former Team Manager who had since left the respondent. He said that he found his current line managers unapproachable and hence had not been able to share his mental health problems with them.

50. During the adjournment, Ms Scowen reviewed all of the relevant evidence, including documentation gathered during the investigation and the notes of the investigation meeting with the claimant. Ms Scowen then sought advice internally. The record of that advice being sought states: ”Going to consider the options, does not think its reasonable the P did not know the rules and is the P's responsibility to check before going, rules are set by the gov and are widely known. In a pandemic, likely their will be travel rules so the P should have known to check. P said does suffer with MH, unable to demonstrate how this affected his ability to check the travel guidance.”

51. Although Ms Scowen had been inclined to dismiss the claimant on the basis that he had a live final written warning, Ms Scowen was advised that she should not take into account the warning and should take the misconduct alleged on its own merit.

52. In light of that advice, Ms Scowen concluded that it was appropriate to dismiss the claimant with immediate effect on the grounds of serious misconduct, namely a serious breach of procedure. In doing so, Ms Scowen says that she took into account that the claimant had a poor record of timekeeping and had received several warnings in relation to it, including one in 2018 which had been issued by her.

53. Ms Scowen decided not to refer the claimant to occupational health (OH). She considered that although the claimant had made the point that he needed to go to the Netherlands due to his anxiety and depression, he did not say that his condition had prevented him from being able to research the applicable travel rules. Nonetheless, she considered whether his condition may have prevented him from doing so, and found that his condition had not affected his main employment or his work with the respondent and could not see how the claimant’s condition would impact on his ability to read the rules when it had no effect on his ability to perform his roles.

54. Ms Scowen also considered that the claimant’s managers were supportive and could not understand why, if he was having a difficult time with the second floor managers, he would come into the respondent on Saturday purely for social contact.

55. Ms Scowen believed that the claimant had brought in his mental health as “last minute” mitigation once he appreciated he was at risk of dismissal.

She considered that he had not provided any convincing explanation for how these conditions would have prevented him from researching the relevant travel rules, booking the necessary time off or speaking with his manager.

56. Ms Scowen reconvened the meeting and informed the claimant of her decision, in the briefest terms, which was confirmed in writing on 29 October 2021. The letter confirmed that the claimant had been summarily dismissed, with effect from 24 October 2021, for "serious misconduct, namely serious breach of procedure". The claimant was informed of his right to appeal.

Appeal

57. On 28 October 2021, the claimant wrote to the respondent appealing against the decision to dismiss him. His appeal focused on his mental health and on his inability to discuss it with his managers. He also appealed on the basis that a fair process was not followed.

58. On 29 October 2021 the claimant was invited to an appeal hearing by telephone on 9 November 2021. The letter informed the claimant of his right to be accompanied by a work colleague or trade union representative but he chose to attend the telephone hearing alone.

59. The appeal meeting was chaired by Ms McCreadie (Manager, Appeals). The claimant explained his grounds of appeal to Ms McCreadie and the claimant and Ms McCreadie agreed on the points that would be investigated.

60. The claimant's primary point was that Ms Scowen had not taken into account his mental health condition. He made the point that he had found his managers difficult to talk to.

61. Following an investigation, in which she interviewed Ms Scowen, Mr Whitehead, Connor Dailie (Operations Manager) and Georgie Morley (notetaker), Ms McCreadie concluded that Ms Scowen's decision to dismiss the claimant for serious misconduct should be replaced with a sanction of dismissal on the grounds that his absence from work on 11 and 18 September 2021 without management permission was misconduct in breach of the claimant's Final Written warning issued on 30 October 2020. Ms McCreadie found that none of the essential facts were in doubt and that all relevant circumstances had been taken into account in reaching the decision to dismiss the claimant. Ms McCreadie also believed that the respondent's procedures had been properly followed and that the claimant had not been treated unfairly.

62. On 17 November 2021, Ms McCreadie wrote to the claimant confirming that his appeal was not upheld and that he would be dismissed for misconduct with effect from 24 October 2021. She confirmed that she understood and accepted Ms Scowen's reasons for not referring the claimant to OH, and reported back that Ms Scowen did not see any connection between the claimant's mental health and being able to research travel restrictions, and that his mental health did not provide adequate mitigation for his actions. Ms McCreadie also checked with Mr

Whitehead whether he had noticed the claimant's mental health, but he had not noticed any change in performance.

63. As a result of downgrading the disciplinary sanction, Ms McCreadie confirmed that the Claimant would be paid in lieu of notice.

Disability

64. The material time for assessing the claimant's disability status is 23 October 2021 to 17 November 2021 (the dates of the dismissal and appeal).

65. The claimant relies on the mental impairment of recurrent anxiety and depression.

66. The claimant's medical evidence records that episodes are "momental" in 2021. It records that, whilst the claimant suffers from "low mood", "E +D is ok, and sleeping ok, able to still get on with his day and go to work." The claimant denies suicidal thoughts or self-harm.

67. In the claimant's oral evidence he described panic attacks which would pass very quickly. He was able to continue to work in both his main employment and for the respondent. No one working with him (other than his previous line manager as mentioned above) had any knowledge that the claimant had any mental health issues.

68. The medical records indicate that, in 2003, that panic attacks started as a result of the claimant smoking cannabis.

69. In 2004 and 2006, more acute symptoms are described as a result of accidents.

70. When he visited the GP in 2008, the records state: "well kempt, good eye contact, good rapport, speech and thought normal."

71. The medical records indicate that panic episodes in 2016 were related to a previous motor vehicle accident and tended to be when he was on the motorway.

72. The claimant's impact statement describes: "low mood and sadness, and I feel tired and have difficulty motivating myself. I can't perform my usual daily activities and I have difficulty starting my day and I am unable to perform simple tasks such as getting out of bed, brushing my teeth and even taking a shower." He describes difficulties concentrating, which impacts on reading and writing as well as processing information, and "severe" panic attacks during which he loses a sense of time and space and even passes out in some instances. He describes periods in which he felt lethargic and unable to get out of bed, resulting in absence from work or lateness.

73. The Tribunal finds that much of the claimant's impact statement does not relate to the relevant period as he states that, since he was dismissed by the respondent his mental health has deteriorated severely, with a severe

impact on his self-confidence and self-assurance, and more regular panic attacks.

74. Prior to the claimant's dismissal, he had been attending work regularly and on time, and had been performing his work adequately with no one noticing or being aware, or made aware of any mental health issues and had attended all of the disciplinary hearings.

Law

Unfair Dismissal

75. An employee has the right under section 94 ERA not to be unfairly dismissed (subject to certain qualifications and conditions set out in ERA).

Reason for Dismissal

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

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

78. Where an employer alleges that its reasons for dismissing the claimant was related to conduct the employer must prove:-

    a. that at the time of the dismissal it genuinely believed the claimant had committed the conduct in question and
    b. that this was the reason for dismissing the claimant.

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

Fairness

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

81. Section 98(4) ERA provides that "the determination of the question whether (a) the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and (b) shall be determined in accordance with equity and the substantial merits of the case".

82. The Employment Appeal Tribunal (EAT) set out guidelines as to how this test should be applied to cases of alleged misconduct in the case of **British Home Stores Limited –v- Burchell** 1980 ICR 303. The EAT stated that what the Tribunal should decide is whether the employer had reasonable grounds for believing the claimant had committed the misconduct alleged and had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

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

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

85. Under the Code, employers should give employees an opportunity to put their case before any decisions are made. The Code identifies the need for a disciplinary meeting. It also provides that, when notifying an employee of a disciplinary meeting, the notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. Furthermore, at the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered.

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

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

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

dismiss is reached (**Sainsbury's Supermarkets Limited –v- Hitt** 2003 IRLR 23).

89. In **Ladbroke Racing –v- Arnott** 1983 IRLR 154, the Court of Session confirmed that the EAT had not erred in holding that the respondent had acted unreasonably in dismissing its employees on grounds of placing bets on behalf of outside persons notwithstanding that the disciplinary rules specified that such conduct would result in immediate dismissal.

90. The Court of Session stated that a rule which specifically states that a breach will result in dismissal cannot of itself necessarily meet the requirements of a fair dismissal. The statutory test of fairness is super-imposed on the employer's disciplinary rules which carry the penalty of dismissal. The standard of acting reasonably requires an employer to consider all the facts relevant to the nature and cause of the breach including the degree of its gravity.

91. If, therefore, the employer has a rule prohibiting a specific act for which the stated penalty is instant dismissal, it does not satisfy ERA by imposing that penalty without regard to any facts or circumstances other than the breach itself. If that was a legitimate approach it would follow that any breach of rules so framed would constitute gross misconduct warranting dismissal irrespective of the manner in which the breach occurred.

Disability Discrimination

Is the claimant disabled?

92. S6 EqA 2010 [The burden of proof is on a claimant to show that;]
(1) A person (P) has a disability if—
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-today activities.

93. Schedule 1, para 2 EqA 2010 Long-term effects
(1) The effect of an impairment is long-term if— (a) it has lasted for at least 12 months, 3 (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.
(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

94. Recurring condition: Likely to recur means' that 'it could well happen' (para C3 of the Equality Act 2020 Guidance). The Guidance (para C6) states that the effects are to be treated as long term if they are likely to recur beyond 12 months after the first occurrence (see para C6). The example is given of a young man with bipolar affective disorder, a recurring form of depression. His first episode occurred in months one and two of a 13-month period. The second episode took place in month 13. This will satisfy the requirements of the definition of disability in respect of the meaning of 'long-term' because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period.

95. By contrast, the Guidance gives an example of a woman who has two discrete episodes of depression within a ten-month period. Even though she has experienced two episodes of depression, she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression that is likely to recur beyond the 12-month period. However, if there was evidence to show that the two episodes did arise from an underlying condition of depression the effects of which are likely to recur beyond the 12-month period she would satisfy the long-term requirement.

96. In **Swift v Chief Constable of Wiltshire Constabulary** 2004 ICR 909, EAT, the EAT emphasised that the question for the tribunal is not whether the impairment itself is likely to recur but whether the substantial adverse effect of the impairment is likely to recur. It suggested that four questions should be asked:

    a. Was there at some stage an impairment which had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?
    b. Did the impairment cease to have such an effect and, if so, when?
    c. What was the substantial adverse effect?
    d. Is that substantial adverse effect likely to recur?

97. The likelihood of the recurrence of a disability must be assessed at the date of the act of discrimination, and the tribunal must disregard recurrences that take place after the alleged discriminatory act (**McDougall v Richmond Adult Community College** [2008] IRLR 227).

98. In **Sullivan v Bury Street Capital Ltd** [2021] EWCA Civ 1694, although the tribunal found that there was a substantial adverse effect on the employee's ability to carry out normal day-to-day activities during episodes lasting from May to September in 2013 and from April to July in 2017, the Court of Appeal held that it was entitled to find that in neither case was it likely that the substantial adverse effect would continue for at least 12 months or recur so as to constitute a substantial and long-term adverse effect within the meaning of the EqA 2010.

99. Schedule 1, para 5 EqA 2010: Effect of medical treatment:

    (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if— (a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect.
    (2) “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.
    (3) Sub-paragraph (1) does not apply— (a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed; (b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

100. Substantial adverse effect/ day to day life: the word substantial means more than minor or trivial (s212 EqA 2010).

101. The activities affected must be "normal". The Guidance states at paragraph D3: "In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities."

102. Timing of assessment: the time at which to assess disability is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd** 2002 ICR 729, EAT). This includes the question of how long an impairment is likely to last (**McDougall v Richmond Adult Community College** 2008 ICR 431, CA), which should also be determined at the relevant date rather than the date of the tribunal hearing. Anything that occurs after the date of the discriminatory act will not be relevant (Equality Act 2010 Guidance, para C4).

103. Impairment: In the case of **J v DLA Piper** 2010 ICR 1052, EAT, the EAT identified the correct approach to determining disability; (para 40) Accordingly in our view the correct approach is as follows:

> (1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.
> (2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para. 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.
> (3) These observations are not intended to, and we do not believe that they do, conflict with the terms of the Guidance or with the authorities referred to above.

104. There is not necessarily an error of law in a tribunal seeking to identify whether a person has an impairment or not first (**Khorochilova v Euro Rep Ltd** [2020] 2 WLUK 674).

S15: discrimination because of something arising from disability

105. Section 15 of the Equality Act 2010 (EA) states that “a person discriminates against a disabled person if:

a. he treats the disabled person unfavourably because of something arising from, or in consequence of, that disabled person’s disability, and
b. he cannot show that the treatment is a proportionate means of achieving a legitimate aim, and
c. he knew, or could reasonably have been expected to know, that the disabled person had the disability.”

106. This provision is of relevance where a disabled person is treated unfavourably because of something arising from, or in consequence of, his disability, such as the need to take a period of disability-related absence, rather than because of the disability itself.

107. Unfavourable treatment is different from a 'detriment'. It means placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person.

108. The Tribunal must determine first whether the employer treated the employee unfavourably because of an identified ‘something’, and, second, whether that ‘something’ arose in consequence of the employee's disability?

109. The first question involves an examination of the employer’s state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of the employer's attitude to the relevant ‘something’. The second question involves an examination of whether there is a causal link between the employee’s disability and the relevant ‘something’. The ‘something’ that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

110. In **Pnaiser v NHS England and another** [2016] IRLR 170, the EAT summarised the proper approach to claims for discrimination arising from disability as follows:

a. The tribunal must identify whether the claimant was treated unfavourably and by whom

b. It then has to determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the motive of the alleged discriminator in acting as he or she did is irrelevant

c. The tribunal must then determine whether the reason was "something arising in consequence of [the claimant's] disability", which could describe a range of causal links. That stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator

d. The knowledge required is of the disability; not knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

111. In **Charlesworth v Dransfields Engineering Services Ltd** EAT 0197/16 the EAT considered the cases of **Basildon and Thurrock NHS Foundation Trust v Weerasinghe** and **Hall v Chief Constable of West Yorkshire Police** (in which it was held that, for a S.15 claim to be made out, it is necessary simply to establish that the claimant’s disability was a significant influence on the unfavourable treatment, or a cause which is not the main or the sole cause but is nonetheless a significant cause of the

unfavourable treatment). Mrs Justice Simler concluded that while the words 'arising in consequence of' in a S.15 claim may give some scope for a wider causal connection than the words 'because of' in the context of a direct discrimination complaint, the difference, if any, will in most cases be small. She rejected the claimant's argument that a connection less than an operative cause or influence is sufficient to satisfy the causation test. A 'significant' influence is required, not a mere influence. The EAT's approach in Hall clearly required an influence or cause that operates on the mind of a putative discriminator, whether consciously or subconsciously, to a significant extent and so amounts to an effective cause. Anything less would be insufficient.

112. If it has been established that the disabled person was treated unfavourably because of something arising from, or in consequence of, his disability, the next stage is to consider whether the treatment was a proportionate means of achieving a legitimate aim. It is for the employer to prove justification.

113. As to proportionality, the Employment Code of Practice notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

Knowledge

114. Where someone does not know, and could not reasonably have been expected to know, that the person he treats unfavourably has the disability he in fact has, that treatment will not amount to actionable discrimination.

115. The approach to actual or constructive knowledge was analysed by HHJ Eady QC in **A Ltd v Z** [2020] ICR 199. 23. In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles apply:

a. 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;

b. 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:

    i. suffered an impediment to his physical or mental health, or

    ii. that that impairment had a substantial and long-term effect: see **Donelien v Liberata UK Ltd** (unreported) and **Pnaiser v NHS England [**2016] IRLR 170.

c. The question of reasonableness is one of fact and evaluation: see **Donelien v Liberata UK Ltd** [2018] IRLR 535, para 27; none the less, 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.

d. 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 Equality Act purposes (see **Herry v Dudley Metropolitan Borough Council** [2017] ICR 610 , per Judge David 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 has not [already] done so", per Langstaff J in **Donelien**

e. 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 inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.”

f. It is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so: **Ridout v TC Group** [1998] IRLR 628 ; **Secretary of State for Work and Pensions v Alam** [2010] ICR 665 .

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

Claims of unfair dismissal and disability discrimination

117. The tests for unfair dismissal and discrimination should be considered separately as they are different tests. This was highlighted by the EAT in **Perratt v City of Cardiff Council** EAT 0079/16 when it held that an employment tribunal had erred in treating the claimant’s unfair dismissal claim as ‘parasitic’ on her claims for failure to make reasonable adjustments and discrimination arising from her disability.

Conclusions

Unfair dismissal

Reason for dismissal

118. The respondent says that the reason for the claimant's dismissal was misconduct, namely the claimant's unauthorised absence from work, in breach of its policies and procedures, on 11 and 18 September 2021.

119. In the list of issues, the claimant accepts that this was, factually the reason for dismissal, but contends it was not misconduct in the circumstances. The claimant explained this during cross examination by saying that he did not accept that his actions amounted to misconduct because his actions were based on a misunderstanding and the alleged misdemeanor was not intentional.

120. The Tribunal concludes that this was misconduct and that this was the reason for dismissal.

121. The respondent's disciplinary policy has a broad definition of misconduct. That policy states: "Conduct refers to how you behave in relation to the standard required by the Partnership, such as timekeeping, absence, theft, harassment or bullying. If you fail to meet the standard we require as a result of carelessness, negligence, or because you chose not to do something - we tend to regard this as misconduct."

122. As such, it is irrelevant, in terms of the respondent's policy, whether the claimant intended to commit misconduct. It didn't have to be deliberate for the respondent to classify the claimant's unauthorized absence as misconduct.

123. It is noteworthy that the claimant had a live final written warning on his file dated 30 October 2020. He was dismissed for the misconduct which breached that warning, and was paid in lieu of notice.

124. The respondent has proven that it dismissed the claimant for a potentially fair reason, namely a reason relating to the claimant's conduct, which is a potentially fair reason falling within Section 98(2).

Did the Respondent genuinely believe the Claimant to be guilty of misconduct?

125. The Tribunal accepts the evidence of the respondent's witnesses in respect of their genuine belief in the misconduct committed. Although the claimant suggested in his witness statement that some of the respondent witnesses had a vendetta against him, there was no evidence to demonstrate that this was the case and it did not seem to the Tribunal to be a realistic allegation.

126. In any event, the allegation was not extended to Ms McCreadie who upheld the decision to dismiss on appeal. Therefore, there is no evidence to undermine the respondent's genuine belief in the claimant's misconduct in this regard.

127. The claimant submits that the respondent cannot have genuinely believed the claimant was guilty of gross misconduct as the claimant was not aware of the policy and his actions were based purely on a misunderstanding. However, whether or not the claimant was aware of the covid policy, he knew that any absence from work must be authorized, and that unauthorized absence was a disciplinary offence.

128. Further, whilst the claimant's actions were based on a misunderstanding, the respondent believed that his actions were careless, negligent, or were because he chose not to do something, which is categorized as misconduct in the respondent's disciplinary policy. Whatever the cause, the result was the same: the claimant was unable to attend work. And in the case of 11 September 2024 in particular, that was at very short notice.

If there was a potentially fair reason for the dismissal was the dismissal fair in all the circumstances?

129. We turn first to the claimant's points identified in the list of issues. The claimant says, first, that he made clear he had gone to the Netherlands because his anxiety made him feel compelled to do so and made him unable to think the matter through properly. In particular, he says he was unable to properly understand the complex rules around self-isolation on return.

130. The Tribunal does not accept that the claimant made it clear to the respondent that he had gone to the Netherlands because his anxiety made him compelled to do so. In the disciplinary meeting and in the appeal the claimant states that he was prompted by his partner's mother to visit his partner in order to repair his relationship with her. He did not, at any point, spell out that he felt compelled to do so because of his mental health issues, or that he was unable to understand the rules on isolation. In fact, he admitted in the first investigation meeting that he should have looked into the rules and it had been his error, and, in the disciplinary hearing he admitted that he had not read the covid guidance thoroughly and had thought other options were available, by which he meant that he believed he had the option of test and release. He was unable to demonstrate how his mental health affected his ability to check the travel guidance, and in fact, did not draw a link between his mental health and the travel guidance. At the second investigation meeting, the claimant suggested that he had to choose between personal responsibility and going to work.

131. Secondly, the claimant says that he notified the respondent in advance of the shifts on 11 and 18 September that he was required to self-isolate. The Tribunal accepts this to be the case and that, in fact, the claimant contacted the respondent immediately on his return to the UK once he was informed by the NHS that he had to self-isolate. The Tribunal also finds that the respondent would not have known the claimant had been abroad unless he had told them. The claimant was open and honest with the respondent and could have called in sick if he wanted to avoid any disciplinary sanction.

132. Third, it is true that the respondent did not obtain medical advice from Occupational Health (OH). Ms. Scowen attached weight to the timing of the

claimant's disclosing his mental health condition to her, "at the last minute as mitigation once he appreciated he was at risk of dismissal." She continued:".. and, moreover, he had not provided any convincing explanation for how these conditions would have prevented him from researching the relevant travel rules, booking the necessary time off or speaking to his manager if he had any doubts. It was for this reason that I decided not to make a referral to Occupational Health." (Ms. Scowen's statement).

133. Ms. McCreadie accepted that she could have adjourned the appeal hearing to seek advice from OH but chose not to do so. However, the claimant did not make a link between his mental health and his ability to research and/or comply with rules. Ms McCreadie agreed with the decision not to refer to OH for reasons which included that there was no evidence that the claimant's performance at work had changed and she believed that the evidence supported a conclusion that the claimant was simply not careful enough about checking rules when booking time off.

134. Significantly, there was no suggestion at any point that the claimant's previous warnings, including the final written warning, were related to his mental health condition.

135. The Tribunal accepts that it was within the band of reasonable responses not to refer the claimant to OH in this case, in particular because the claimant did not make a link between the misconduct alleged and his mental health. Whilst the Tribunal does not consider that it would be reasonable to fail to refer the claimant to OH because of the timing of the claimant's disclosure about his mental health, the decision not to refer at appeal stage was taken exclusively because the link between the claimant's mental health and his inability to research the quarantine rules had not been made.

136. Turning to the **Burchell** test, the Tribunal must consider, first, whether there were genuine grounds for the respondent's belief that the claimant was guilty of misconduct.

137. Most significantly, the respondent's employee handbook makes it clear that failure to comply with notification and/or authorisation requirements may result in absence being unauthorised, which may result in an employee being subject to disciplinary proceedings. Whether or not the claimant knew of, or knew the content of, the respondent's Covid policy, he did know he could not take unauthorized absence and that such absence could be a disciplinary offence.

138. It was not disputed by the claimant that he did not seek permission for leave on 11 and 18 September 2021, and only notified the respondent the day before his shift. This did not give the respondent proper notice or the option to properly approve or reject the leave. The claimant admitted he was at fault; that he should have paid more attention when he booked his holiday; and that it was his responsibility to know the full detail.

139. The Tribunal is satisfied that the respondent had genuine grounds for its belief that the claimant was guilty of misconduct.

At the time the belief was formed, had the respondent carried out a reasonable investigation?

140. The respondent conducted an investigation meeting on 2 October 2021, which gave the claimant the opportunity to put his case forward. There was further investigation on 9 October 2021.

141. A disciplinary hearing was held when the claimant also had chance to put his case forward.

142. At appeal stage the claimant had the opportunity to put his case and further investigation was carried out which included interviews with Ms Scowen, Mr Whitehead, Connor Dailie (Operations Manager) and Georgie Morley (notetaker).

143. In this regard, the claimant's case focuses on the respondent's failure to refer him to OH. However, the claimant did not mention his health at the investigation stage. At the disciplinary stage, the claimant did not make any link between his mental health condition and his failure to follow the procedure and to have his absences authorized. Notably, the claimant stated in the investigation meeting that he had booked his travel a couple of weeks in advance, which did not indicate a spur of the moment decision. The Tribunal concludes that, in such circumstances, it was within the band of reasonable responses not to refer the claimant to OH, as stated above.

144. It is important to note that at no stage of the disciplinary process was there any suggestion by the claimant that the previous warnings related to his mental health condition, so there was no reasonable basis to refer to OH or investigate that matter further as regards the previous warnings.

145. The Tribunal is further satisfied that the respondent had carried out a reasonable investigation at the time the belief that the claimant was guilty of misconduct was formed.

Did the respondent otherwise act in a procedurally fair manner?

146. The respondent followed a fair procedure. It held investigation, disciplinary and appeal hearings with the claimant at which he had the opportunity to put forward his case. The claimant was offered the right to be accompanied at those hearings. The claimant knew the case against him.

Was dismissal within the range of reasonable responses?

147. The Tribunal finds that Ms Scowen's decision to dismiss did not fall within the band of reasonable responses open to a reasonable employer.

148. In light of the contemporaneous evidence of the internal advice, we find that, despite being told not to consider past misconduct, the fact that the claimant had previous written warnings, which in fact had expired, did influence Ms Scowen's decision to treat the claimant's conduct as serious misconduct. The label of serious misconduct was a way of getting the outcome she felt the claimant deserved in light of his previous misconduct.

149. Serious misconduct was not a label which it was reasonable to attach to the claimant's misconduct in light of some of the factors Ms Scowen's witness statement indicates that she took into account in reaching that conclusion. She took into account the claimant's previous disciplinary record, which was not live, which it was not within the band of reasonable responses to take into account.

150. Ms Scowen also considered that the claimant's managers were supportive and could not understand why, if he was having a difficult time with the second floor managers, he would come into the respondent on Saturday purely for social contact. That was not something that Ms Scowen should have considered: the claimant's reasons for working on a Saturday were a matter for him and were not relevant to the consideration of what the appropriate disciplinary sanction should be.

151. The Tribunal finds that it was not within the band of reasonable responses for Ms Scowen to take these factors into account in concluding that the claimant's misconduct was serious misconduct (the respondent's equivalent of gross misconduct).

152. However, this was rectified on appeal, when Ms McCreadie determined that the claimant should be dismissed, but based not on a single act of serious misconduct, but rather because he already had a live final written warning for misconduct and had committed a further act of misconduct. On appeal, it was the cumulative effect which caused the dismissal.

153. It is notable that Ms McCreadie was one step removed from Ms Scowan and the appeal was therefore objective in nature.

154. The claimant argued that the respondent should have exercised its discretion and not relied on the final written warning given that the final written warning had almost expired. It was the claimant's evidence that he had tried hard not to breach the final written warning by trying hard to be on time, which he had achieved for the previous eleven months. However, the Tribunal finds that, in relying on the final written warning which was still live, the respondent acted within the range of reasonable responses. The fact is that the warning was live and the respondent was entitled to take it into account. They could have ignored it but they chose not to. In relying on it, they acted in accordance with their own disciplinary policy.

155. As the claimant had not sought authorization in advance from the respondent, the respondent did not have the opportunity to decline the request or to make alternative arrangements. Although this was more applicable to the 11th than the 18th, nonetheless the policy was that the claimant should have sought approval prior to making any booking to travel. Whilst the Tribunal accepts that he could not do so if he didn't realize he had to self-isolate, that was the claimant's own act of carelessness in not properly checking the rules.

156. Accordingly, the claimant breached the live final written warning. Dismissal, though it was harsh, given that the claimant had made a mistake and had admitted to his mistake, and further the final written warning had almost expired, fell within the respondent's policy and the band of reasonable responses open to a reasonable employer. Although

the claimant had long service, he also had a live final written warning which made his length of service less relevant, as his record was not unblemished.

157. There are two additional points made by the claimant which need to be addressed. The first is that the appeal couldn't bring the dismissal within the band of reasonable responses because the claimant didn't have the chance to appeal against the respondent's reliance on it to dismiss him.

158. The Tribunal rejects this argument as there is no right of appeal against an appeal outcome. The very fact that the sanction was considered and downgraded on appeal means that the appeal was taken seriously and the appropriate outcome considered. The claimant knew he had a final written warning in any event, and would have known that it was still live and could have been taken into account on appeal.

159. The second is that the claimant suggested that, if he had felt he could approach his managers they might have told him he needed to quarantine. However, there is not obligation on an employer to have approachable managers. The manager's role is to manage, not to be friendly, or approachable.

160. The Tribunal is mindful that a rule which specifically states that a breach will result in dismissal cannot of itself necessarily meet the requirements of a fair dismissal. The statutory test of fairness is super-imposed on the employer's disciplinary rules which carry the penalty of dismissal.

161. The Tribunal considers that the respondent has satisfied the statutory test. Fundamentally, employers need employees to attend work. When they don't, particularly if that is a result of carelessness, employers are entitled to take action. In this case, as there was a live final written warning, the respondent acted within the band of reasonableness in treating the claimant's unauthorized absence as misconduct entitling them to dismiss him.

162. In summary, the respondent's decision to dismiss the claimant was harsh, but within the band of reasonable responses open to a reasonable employer. It acted within the range of reasonable responses open to a reasonable employer by treating the claimant's conduct in relation to his absences on 11 and 18 September as misconduct which could result in dismissal when considered in light of the final written warning.

<u>Disability discrimination</u>

Was the Claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at the relevant times. He relies upon the impairment of recurrent depression and anxiety, which results in panic attacks.

163. For the purposes of this claim, the relevant times are between the claimant's dismissal (23 October 2021) and appeal (17 November 2021).

164. The Tribunal finds that the claimant does suffer from depression and anxiety from time to time and that those are impairments within the meaning of the Equality Act 2010.

Did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities (taking into account deduced effects if needs be)?

165. The Tribunal finds that the claimant's impairments did not have a substantial adverse effect on his ability to carry out normal day to day activities at the material times.

166. In the claimant's oral evidence he described panic attacks which would result in him being late for work. However, he also confirmed that he had not been late for eleven months prior to his dismissal. He also confirmed that no one would have noticed his panic attacks as they were momentary and would be alleviated by stepping off the shop floor for a few moments. That is backed up by the claimant's medical evidence, which records that episodes are "momental" in 2021.

167. That medical evidence, from 2021, also records that, whilst the claimant suffers from "low mood", "E +D is ok, and sleeping ok, able to still get on with his day and go to work." The claimant denies suicidal thoughts or self-harm. The claimant also said that he would always be well-presented at work, in fact he took pride in his appearance, and would engage in conversations with customers. The Tribunal does not accept that the claimant's normal day to day activities were impacted at the material times. He could use the telephone, he was eating and drinking regularly. Whilst the claimant indicated that he may have to allow a little more time for travel, that is not a substantial adverse effect on day to day activities. He was safe to drive and did so. The main evidence from the claimant was that he was able to manage his anxiety. He was still able to work for the respondent despite him saying that the workplace was an open noisy space which was a trigger for him.

168. The claimant's medical records are very sporadic. Whilst the Tribunal accepts that, as a young man determined to try to get on with his life, he may not rush off to the doctor every time he had a panic attack, the fact remains that the medical evidence is sparse and does not reveal a substantial impact on day to day activities.

169. We have also taken into account the fact that the claimant may have been reluctant to talk about his mental health issues and have considered that a reluctance to talk about an issue does not mean it is not there. Nonetheless the Tribunal has concluded that there was no substantial adverse effect on day to day activities at the material time.

170. In 2008, the records describe the claimant as "well kempt, good eye contact, good rapport, speech and thought normal".

171. Whilst it is accepted that there were acute symptoms in 2006 and 2004, these were both following a motor traffic accident. In 2003, there is a record of dizziness as a result of smoking cannabis.

172. It is clear from the claimant's impact statement that the impact on the claimant's day to day activities has significantly worsened since the termination of his employment. It is noted that the claimant's medical records indicate further attendances for mental health issues in 2022 and 2023 along with counselling treatment which is consistent with the period during which the claimant was experiencing the worsened symptoms outlined in his impact report.

173. It appears from the medical evidence that life events such as road traffic accidents have caused flare ups of mental health issues from time to time.

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

174. There was no evidence that the claimant took any medication.

Were the effects of the impairment long-term?

Lasted 12 months?

175. The Tribunal considers that the effects of the claimant's impairment did not last for at least 12 months. On the appointment log for 18 October 2021, it suggests that the claimant had been experiencing anxiety episodes for three months. Prior to that the medical records indicate an episode in 2016.

176. Although the claimant suggests in the appeal meeting that he started to suffer from the condition in 2020, there is no contemporaneous evidence to support this and in cross examination the claimant appeared to accept that he managed his condition over this period so it would not have had the requisite substantial adverse effect.

Likely to last 12 months?

177. It cannot be said that the claimant's anxiety and/or depression would be likely to last 12 months. The medical records indicate that previous episodes were short lived. As stated above, the effects on the claimant appeared only to arise in response to life events, in the case of 2021 because of relationship issues and covid. These are matters which are likely to resolve within a 12 month period.

Recurring condition

178. Although the Tribunal does consider that the claimant's mental health issues were likely to recur when stressful life events occurred, such as accidents, bereavement, or relationship issues, the evidence does not suggest that there would be a substantial adverse effect on the claimant's day to day activities.

179. The Tribunal reminds itself that the likelihood of the recurrence of a disability must be assessed at the date of the act of discrimination, and the tribunal must disregard recurrences that take place after the alleged discriminatory act. In this case, the impact on the claimant of his mental

health issues has worsened. Prior to this, as stated above, the evidence does not suggest that there would be a substantial adverse effect on the claimant's normal day to day activities.

Discrimination arising from disability, s.15 Equality Act 2010

Was the Claimant treated unfavourably?

180. The respondent accepts that the claimant was dismissed and that his appeal against dismissal was rejected. This was unfavourable treatment by Ms Scowen, who took the initial decision to dismiss the claimant for serious misconduct and by Ms McCreadie, who took the decision, on appeal, to dismiss the claimant on notice for further misconduct when a live written warning was in place.

Was the unfavourable treatment because of something arising in consequence of disability?

181. The claimant says that the reason for treatment was that the claimant was absent from work on 11 and 18 September 2021. The respondent says that is was not his absence but the claimant's failure to follow procedure to authorize the absence which was the reason for the finding of misconduct. The Tribunal accepts the respondent's position in this regard. The claimant's dismissal was because of misconduct which was the claimant's failure to follow the respondent's procedures resulting in unauthorized absence.

182. It was also not disputed that the absence occurred in circumstances in which the claimant had a live final written warning, which was in the mind of Ms McCreadie when she determined the appeal.

183. The tribunal is satisfied that the reason for the decision to dismiss the claimant was not "something arising in consequence of [the claimant's] disability".

184. The claimant submits that anxiety made him feel compelled to go to the Netherlands to visit his then girlfriend and that that was something that arose from his disability. The respondent submits that the claimant's reason for travel was unrelated to the claimant's mental health and was because he needed to mend his relationship with his then girlfriend.

185. The Tribunal finds that the reason for travel was the need to mend his relationship. The visit was prompted by contact from his then girlfriend's mother, who had contacted him. Although the Tribunal accepts that repairing his relationship would have improved his mental health, his mental health was not the reason for the trip.

186. The Tribunal also finds that the reason the claimant was dismissed was not because he felt compelled to go to Holland, but because the trip had resulted in unauthorized absence, as the claimant had not realized he needed to isolate on return, having failed to fully research the travel guidance.

187. The claimant invites the Tribunal to find that his mental health problems prevented him from thinking things through properly, such as the need to self-isolate on return which depended on complex rules, and that that was something arising from his disability.

188. The Tribunal is not satisfied that the claimant was prevented from thinking things through properly by his mental health and that that was something arising from his mental health issues. In particular, the claimant's responses at the time (during the investigation and disciplinary process) suggest that he simply failed to pay proper attention. The claimant did not suggest any link between his mental health and his inability to absorb the rules. In any event, at the time he was continuing to work in his main employment, as his evidence was that he booked a flexible ticket a couple of weeks in advance of travel, but was deciding the best dates on which to travel, and whether he would take time off from his main employment and/or from his work with the respondent. His mental health did not impact on his ability to book the trip and find out what was required to travel to Holland, nor did it prevent him from booking holiday with his main employer.

189. Whilst the Tribunal has some sympathy with the claimant, in that he clearly made an honest mistake in failing to anticipate that he would need to isolate which would entail time off work, the situation was entirely of his own making, as he admitted in the investigation meetings where he appears to describe his trip as a choice between personal responsibility and work commitments.

190. The claimant's contemporaneous medical records did not suggest any link between the claimant's mental health and his ability to think things through properly. There is also no suggestion that his ability to concentrate was affected at the material time and he was able to work effectively both for the respondent and in his main employment.

191. In any event, at the time, although the rules were changing, it was difficult to travel, and particularly so for those who were not fully vaccinated. Information about travel and the consequences of it, for example as to the need to quarantine, was readily available. Given that the claimant said in oral evidence that he had booked a flexible ticket a couple of weeks earlier, he had time to consider and absorb the consequences of travel. It was not something he had to do quickly.

192. The claimant further alleges that the poor timekeeping that led to the final written warning (and the prior to warnings that preceded it) was something arising from his disability.

193. The Tribunal does not find this to be the case. In particular, once the claimant had received his final written warning, he stopped being late, which demonstrates that it was avoidable. He said he did this by leaving earlier, but he could have left earlier before he received the warnings. Most notably, it was never suggested by the claimant at any point during any of the disciplinary processes that his final written warning was linked to his alleged disability. Further, the claimant had been told by Mr Paige to advise on any mental health difficulties, but he did not do so. Even if he had felt

uncomfortable to discuss those issues with members of his team, other avenues were open to him within the respondent.

194. The Tribunal does not find that any of these things arose from the claimant's alleged disability and that therefore the claimant's dismissal was not discrimination because of something arising from disability

195. The claimant's claims fail and are dismissed. The remedy hearing scheduled for April 25 2024 is vacated as it is not necessary.

Employment Judge Rice-Birchall
Date: **3 April 2024**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
10 April 2024

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FOR EMPLOYMENT TRIBUNALS

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