EMPLOYMENT TRIBUNALS

Claimant: **E Stewart**

Respondent: **London & Quadrant Housing Trust**

HEARD AT: Manchester **On:** 19-23 February 2024

BEFORE: Employment Judge Batten
C Nield
N Williams

REPRESENTATION:
Claimant: In person
Respondent: L Quigley, Counsel

JUDGMENT having been sent to the parties on 6 March 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By a claim form presented on 2 January 2022, the claimant pursued complaints of unfair dismissal, disability discrimination, race discrimination and also automatic unfair dismissal for a protected disclosure. On 28 February 2022, the respondent presented its response.

2. The disability relied on is depression and anxiety. That disability was conceded in part by the respondent and, at a preliminary hearing on 7 February 2023, Employment Judge Dunlop held that the claimant was disabled, from 29 July 2021, for the purposes of his disability discrimination complaints.

3. There have been 3 preliminary hearings, being: 2 case management preliminary hearings in private; on 12 July 2022 before Employment Judge Liz Ord; and on 23 November 2022 before Employment Judge Whittaker. On 7 February 2023, there was a public preliminary hearing before Employment Judge Dunlop at which it was determined that the claimant was disabled at the material time by reason of depression and anxiety.

Evidence and Witnesses

4. The Tribunal was provided with an agreed bundle comprising 2 lever arch files of over 660 pages with a number of inserts.

5. The claimant gave evidence himself from a witness statement. The respondent called 4 witnesses, being: Will Pope, the claimant's line manager for part of the period of his employment; Mike Prescott, Operations Manager and the investigator; Deborah Elgar, Director of Social Enterprise, who dismissed the claimant, and Julian Massel, who was the respondent's Director of Technology at the material time and the appeal officer. Each of the respondent's witnesses gave evidence from witness statements and all the witnesses for each party were subject to cross-examination.

6. The Tribunal was also provided with an agreed cast list and chronology.

7. At the conclusion of the evidence, both parties tendered written submissions which they then expanded upon in oral submissions.

The issues

8. A list of issues for determination at the final hearing had been finalised between the parties. At the commencement of the final hearing, the Tribunal discussed the list of issues with the parties. It was agreed that the complaints and issues to be determined by the Tribunal were as follows:

1. <u>Time limits</u>

1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about some of the claims may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010 ("EqA")? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. <u>Direct disability discrimination</u> (EqA section 13)

2.1 Did the respondent treat the claimant less favourably than his comparator(s) in materially similar circumstances? The actions relied on as less favourable treatment are:

2.1.1 The respondent not agreeing to a phased return to work from 29 July 2021;

2.1.2 The respondent not postponing the disciplinary hearing on 17 September 2021 (which was itself postponed from 7 September 2021);

2.1.3 By dismissing the claimant.

2.2 If so, was this because of the claimant's disability?

2.3 The claimant relies on a hypothetical comparator, being someone who also required a phased return to work following a back injury but who did not share the claimant's impairment of anxiety and depression.

3. <u>Discrimination arising from disability</u> (EqA section 15)

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

3.2 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

3.2.1 The respondent not agreeing to a phased return to work from 29 July 2021?

3.2.2 The respondent not postponing the disciplinary hearing on 17 September 2021 (which was itself postponed from 7 September 2021)?

3.2.3 By dismissing the claimant?

3.3 Did the following things arise in consequence of the claimant's disability:

3.3.1 The claimant's previous poor sickness record?

3.3.2 The claimant being unable to return to immediately work on a full-time basis following his back injury?

3.3.3 The claimant leaving his work without leave on 2 August 2023?

3.3.4 The claimant being unable to attend the proposed disciplinary meeting?

3.4 Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

3.5 If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

3.6 If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

3.6.1 To ensure the safety of the claimant and his colleagues in the workplace, specifically to ensure protection was put in place for a lone worker;

3.6.2 To ensure the smooth running of neighbourhood servicing team requiring employees to follow reasonable management instructions.

3.7 The Tribunal will decide in particular:

3.7.1 was the treatment an appropriate and reasonably necessary way to achieve those aims?

3.7.2 could something less discriminatory have been done instead?

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

4. <u>Direct race discrimination</u> (EqA section 13)

4.1 Did the respondent treat the claimant less favourably than his comparator(s) in materially similar circumstances? The actions relied on as less favourable treatment are:

4.1.1 The respondent not giving the claimant the Silver Uplift (pay award) after two years' service;

4.1.2 Dismissal.

4.2 If so, was this because of the claimant's race?

4.3 The claimant relies on the following comparator(s):

4.3.1 In respect of the silver uplift - Leo Duffy, Margaret Duff and Jack Webster, or, alternatively, a hypothetical comparator with the same service record as the claimant;

4.3.2 In respect of the dismissal – Leo Duffy, or, alternatively, a hypothetical comparator who left without authorisation in the same circumstances as the claimant.

5. <u>Protected disclosures</u>

5.1 Did the claimant make a qualifying disclosure(s) as defined in section 43B of the Employment Rights Act 1996 ("ERA")? The claimant says he made one disclosure in an email sent on 21 May 2021 to Ellie Bifield and Deborah Elgar [B375.1-375.6]. The Tribunal will decide:

5.1.1 Did he disclose information?

5.1.2 Did he believe the disclosure of information was made in the public interest?

5.1.3 Was that belief reasonable?

5.1.4 Did he believe it tended to show that:

5.1.4.1 the health or safety of any individual had been, was being or was likely to be endangered?

5.1.5 Was that belief reasonable?

5.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

6. <u>Unfair dismissal</u>

6.1 What was the reason for the claimant's dismissal?

The respondent says that it was conduct.

The claimant says that it was (1) because of his disability; and 2) because he made a protected disclosure.

6.2 If the reason or principal reason for dismissal was that the claimant had made a protected disclosure, he will be regarded as unfairly dismissed – section 103A ERA 1996.

Conduct

6.3 If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

6.3.1 The respondent genuinely believed the claimant had committed misconduct;

6.3.2 This belief was based on reasonable grounds;

6.3.3 at the time the belief was formed, the respondent had carried out a reasonable investigation;

6.3.4 the respondent followed a reasonably fair procedure;

6.3.5 dismissal was within the band of reasonable responses.

7. <u>Remedy</u>

7.1 What basic award is payable to the claimant, if any?

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

7.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

7.3.1 What financial losses has the dismissal caused the claimant?

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

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

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

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

7.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.5 Did the respondent or the claimant unreasonably fail to comply with it?

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

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

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

7.9 Does the statutory cap of fifty-two weeks' pay apply?

7.10 In addition to the above, In respect of the discrimination claims:

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

7.10.2 Should interest be awarded? if so, how much?

Findings of Fact

9. The Tribunal made its findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

10. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making any further findings of fact. The Tribunal has not simply considered each particular allegation but has also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

11. The findings of fact relevant to the issues which have been determined are as follows.

12. The claimant was employed by the respondent, which was then called 'Trafford Housing Trust' from 2 January 2018, as a Neighbourhood Servicing Operative. At one point he was the caretaker of a tower block, Princess Court. Later, he worked on the respondent's bulk waste facility.

13. The claimant is a disabled person within the meaning of section 6 and schedule 1 of the Equality Act 2010 by reason of depression and anxiety from 29 July 2021.

14. The respondent has a number of relevant policies and procedures that appear in the hearing bundle, to which the tribunal were referred in the course of evidence as follows:

    The grievance and disciplinary policy starts at page 146, wherein the approach to matters of gross misconduct appears at page 152 and a list of gross misconduct appears in annexe 1, at page 155.

    The salary and payments policy starts at page 157. This includes details of the silver pay award, for competency and values demonstrated, which is usually paid around the completion of 2 years' service, when an employee has shown competence and excellent standards of work and is working in line with the respondent's values.

    The colleague equality, diversity and inclusion policy starts at page 203.1.

The sickness and absence management policy starts at page 271.

The health and safety policy starts at page 340.

15. On 4 February 2019, the claimant was subject to capability proceedings chaired by Ms Elgar, due to a period of absence. As a result, Ms Elgar offered the claimant a phased return to work on medical advice due to his depression, which had been the reason for his absence.

16. In December 2019, the claimant attended a second capability meeting with Ms Elgar where the claimant was told that he needed to maintain sustained return to his role. Ms Elgar made it clear to the claimant that without improvement, the claimant risked dismissal. In the course of the meeting, the notes record Ms Elgar apologising to the claimant for being blunt, and she was blunt in pointing out to the claimant exactly what were the likely consequences of his continuing absence.

17. As a result of the claimant's then return to work, Ms Elgar arranged for in-house counselling for the claimant.

18. On 24 March 2020, the claimant presented a grievance against Mr Pope, his then line manager, about a failure to award the claimant a silver pay award. This grievance appears in the bundle at pages 242 and 243.

19. At the time, although the claimant had passed 2 years' service, his absence rate stood at over 40%. This meant that Mr Pope had insufficient time to assess the claimant's competency and performance as was required for the silver award. Effectively, the claimant had little over 1 year's service, in terms of being present at work.

20. On 22 April 2020, Stuart Faulkner arranged a grievance meeting and ultimately turned down what was the claimant's appeal against the failure to award him a silver award. The claimant appealed that decision on 22 June 2020 and there was an appeal meeting on 16 July 2020, but the outcome, delivered on 21 July 2020, was that the claimant's grievance was not upheld.

21. On 28 September 2020, the claimant received a silver pay award (which the claimant says was 10 months late). The Tribunal considered, from the evidence, that a silver award is not an automatic right and, given the claimant's attendance record, the Tribunal found that the timing of the award to the claimant was not unreasonable.

22. The claimant relied upon certain 'comparators' whom, he contended had received a silver award upon reaching 2 years' service despite some sickness absence. The Tribunal considered these but did not find them to be appropriate comparators as follows: Mr Duffy had only had 5 days of sickness absence in his first 2 years; Margaret Dufford had 2 days of sickness absence; and Jack Webster had had 15 days of sickness absence. Those figures are in stark contrast to the claimant's 154 days of sickness absence in his first 2 years of service.

23. In evidence, the claimant accepted that the delay in him receiving his silver award and/or its timing had nothing to do with his race. The Tribunal found there was no evidence to suggest any connection to the claimant's race. The respondent's explanations for why the claimant's silver award was granted in September 2020 were entirely reasonable and understandable, given the claimant's attendance record. In addition, bizarrely, the claimant pointed to a white colleague who also had not received a silver award upon completion of 2 years' service, a fact which negates the suggestion that race discrimination was at play.

24. In January 2021, the claimant was the caretaker of a tower block, Princess Court, when there was a fire. The fire alarm went off, but the claimant did not call 999. Instead, he rang a colleague to ask about what to do and who to ring. In the meantime, Arc Alarms (the contracted alarm company) rang the claimant's manager, Mr Doyle, who was their primary contact on call. The Tribunal considered this to be sensible because, whilst employees worked shifts, it was apparent that Mr Doyle was in charge and paid to be on call for such eventualities. When the matter was looked into, and the claimant was asked why he had not first telephoned 999, the claimant told Mr Doyle that he had had a panic attack.

25. As a result, on 26 January 2021, the claimant was removed from the post of caretaker. The Tribunal heard that the respondent acted out of concern for the claimant - management were mindful of the claimant's apparent inability to cope with a stressful situation and the impact on his mental health. In the circumstances, the Tribunal considered that the respondent's decision to remove the claimant from Princess Court was reasonable particularly because of how the claimant had described his reaction to the fire situation and its effect on him. In evidence, the claimant accepted that the respondent was being supportive of him by removing him from the caretaker responsibilities.

26. Nevertheless, on 10 March 2021, the claimant presented a grievance about his removal from Princess Court. The Tribunal heard evidence that the claimant had initially been unhappy about being posted to work as caretaker at Princess Court because of his mental health. Then, after the fire, he was not happy to be removed from Princess Court.

27. The claimant's grievance appears in the bundle at pages 316-319. A meeting took place on 30 March 2021 chaired by Peter Payton. The grievance was unsuccessful, and the claimant appealed the outcome on 11 May 2021.

28. In the course of his grievance appeal, on 21 May 2021, the claimant provided further information which he says amounted to a protected disclosure. That information appears in the bundle at pages 375.1 to 375.6. The claimant's case on this protected disclosure is that it was about health and safety, but upon reading that document, the Tribunal found no mention of health and safety matters except in passing, at the very end.

29. In the course of these proceedings, the claimant provided further information about this protected disclosure, including how what he said in that further information amounted to a protected disclosure. The further information

appears in the bundle at pages 47-75 and 104-105 and amounts to a contention that it is part of a grievance and therefore it must be a protected disclosure; and also because the further information is critical of the respondent's processes. At the end of the further information provided to the respondent, which the claimant contends amounts to a protected disclosure, the claimant has listed certain reports which contain indications of areas for improvement in the respondent's procedures or checks that should be carried out. The Tribunal did not consider any of the information to be about serious failings or matters that endangered the health and safety of individuals. At best, the Tribunal considered that the claimant had made an allegation that the respondent was not very good at health and safety, or that it could be better, because third parties had said so. In any event, the Tribunal found no evidence of any link between any of the claimant's suggestions about health and safety, set out in in this document (even if it constituted a protected disclosure) and the claimant's ultimate dismissal.

30. In May 2021, the claimant suffered a back injury, which the claimant said was sustained at work albeit there is no evidence of an accident/incident or that such an injury was reported by the claimant at the time, or at all. Around 10 May 2021 the claimant was off sick for approximately 11 weeks, returning to work on 29 July 2021.

31. On 15 June 2021, the claimant was assessed by Occupational Health who advised the claimant to undertake physiotherapy. During the claimant's absence, he did not maintain "regular contact" with the respondent as required. The claimant's manager, Mr Prescott, had to chase him for updates on his health condition. In response to several of Mr Prescott's attempts to make contact, the claimant did not respond directly and instead sent a further GP sick note, to HR rather than to Mr Prescott. Each of the sick notes identified back pain as the reason for the claimant's absence. The claimant said in evidence that one cause of the lack of communication was because his work phone was faulty, albeit he had a separate, personal phone and also access to work emails in order to keep in touch, and he could have used those methods of communication but chose not to.

32. On Monday 26 July 2021, the claimant emailed Ms Elgar, rather than Mr Prescott, to inform her that he would be returning to work on Thursday 29 July 2021. He gave no explanation as to why he would be returning to work at that point.

33. On Thursday 29 July 2021, the claimant attended work. In the course of the day, he was sent an email about a formal absence review meeting which was to take place on the following day, 30 July 2021. The meeting was called because, by then, the respondent had calculated that the claimant's absence rate was 28.3% against the respondent's workforce average of 4.6%. The letter pointing this out and inviting the claimant to the meeting, appears in the bundle at page 408.

34. The claimant had a brief conversation with Mr Prescott who decided to refer the claimant to Occupational Health who managed to speak to the claimant

later that same day. Occupational Health reported that the claimant had not undertaken the recommended physiotherapy, and raised a concern about the length of time the claimant had been off, for a soft tissue injury. Occupational Health concluded that the claimant did not require a phased return to work. As a result of that advice, when the claimant asked for a phased return to work, Mr Prescott refused to agree, citing the Occupational Health advice.

35. As it was, the claimant then worked a full day on Thursday 29 July 2021 and a full day on Friday 30 July 2021. To assist the claimant, Mr Prescott put the claimant into a 3-person team, to ease the workload on the claimant after his lengthy absence.

36. In the afternoon of Friday 30 July 2021, the claimant produced a sick note from his GP which appears in the bundle at page 411. This states that the claimant has 'chronic back pain' and suggests that the claimant "may benefit from" a phased return to work and altered hours over the next four weeks. The fit note states that this suggestion is "if available" and "with your employer's agreement", and it also says that if adjustments are not available then the employer should treat the employee as unfit. However, the Tribunal found that the respondent did not treat the claimant as unfit, because the claimant attended work and had said very clearly that he wanted to work and that returning to work was part of his therapy.

37. On Monday 2 August 2021, the respondent held a return-to-work meeting (the notes of which appear in the bundle at pages 412-418) at which the claimant again asked for a phased return-to-work and the respondent repeated its refusal, on the basis of the Occupational Health advice. At that point, the claimant declared that he would follow his GP's advice regardless and that he would implement a phased return to work unilaterally.

38. The respondent asked for permission for its Occupational Health advisers to speak to the claimant's GP, in light of what was apparently conflicting medical opinions on the appropriateness of a phased return to work. Whilst the claimant was reluctant to give consent to this, he eventually did so. He also said that being off work was not good for his mental health. The respondent pointed out that the phased return to work recommended by the GP was for the claimant's back injury and that this was the first time the claimant had raised his mental health in relation to his absence. Whilst not mentioned to the respondent at the time, in evidence to the Tribunal, the claimant pointed to an adverse effect of the painkillers he was taking at the time.

39. The respondent decided that it would follow its Occupational Health advice and that there would be no phased return to work. The claimant said this was unfair and he is recorded (in the bundle at page 415) as saying "I won't stand by and just take it". The claimant indicated that he would take legal advice and follow his GP's advice and that he would not be working his full hours that day. The respondent told the claimant that any departure from work early was not authorised, and it would be classed as "Absent Without Leave". The claimant was told that, if he was to leave site or work, he must tell his manager, Mr Prescott, what he was doing.

40. Later that day, the claimant left work early, but he did not tell his manager despite the instruction to do so. At the time, the claimant was working with another employee who drove him back to the respondent's depot. The claimant's departure meant that the other employee was left to work alone.

41. As a result of his actions, the claimant was suspended on 2 August 2021. The suspension letter appears in the bundle at page 419. The claimant was suspended on full pay for a refusal to work his designated hours despite being advised that he was not authorised to undertake a phased return to work.

42. On 9 August 2021, an investigatory meeting took place between Mr Prescott and the claimant, who attended with his trade union representative. As part of the investigation, Mr Prescott interviewed Mr Doyle, the claimant's supervisor. He then emailed the claimant with some questions about his absence and his failure to keep in contact with the respondent whilst off sick, specifically the claimant's failure to maintain contact with Mr Prescott during that period. Page 427 of the bundle is the claimant's reply with a list of contacts he made. The Tribunal reviewed this document and found that the contacts made were not regular, certainly in the later weeks of absence. There is mention of the effects of painkillers on the claimant's health and his resulting inability to respond to Mr Prescott's messages from time to time. The Tribunal considered that this demonstrated a pattern of the claimant responding to attempts to contact him by producing another fit note, often on the same day as the respondent tries to contact the claimant, with the fit note being sent not to Mr Prescott, as required, but to HR instead.

43. Mr Prescott compiled an investigation report which recommended proceeding to a disciplinary hearing. The report is in the bundle at pages 437-468, with a number of appendices of evidence. As a result, on 27 August 2021, the claimant was invited to a disciplinary meeting that was set for 7 September 2021.

44. On 2 September 2021, the claimant sent the respondent a letter from his GP asking for a postponement of the disciplinary hearing on 7 September 2021, for 2 weeks, due to the claimant's mental health, and stating that the process that the respondent was undertaking was impacting the claimant's sleep. The GP said that the matter would be reviewed in 2 weeks, to see how the claimant was coping (page 471 in the bundle).

45. As a result of the GP letter, the respondent postponed the disciplinary hearing for exactly 2 weeks, rearranging it for 17 September 2021 (page 472 of the bundle).

46. On 13 September 2021, the claimant sent the respondent a further GP letter, requesting a further delay to the disciplinary process, because the claimant had reported a worsening of his mental health stemming from his suspension and that the claimant felt he would be unable to represent himself fully. The GP did not specify the length of any delay that might be required (page 473 of the bundle).

47. At some point thereafter, Occupational Health spoke to the claimant's GP and reported to the respondent by email (page 474 of the bundle) that the GP had described the claimant's condition as “subjective” and that the GP had said that they could “only go off what Errol said”, that a phased return to work was only advice and ultimately it had to be agreed with the respondent. Importantly, it was reported that the GP had stated that they could not provide any medical evidence to suggest why the claimant could not have returned to his normal working hours.

48. From the Occupational Health report, the respondent understood that the GP had not in fact examined the claimant and had only suggested a phased return to work because the claimant had said that he might benefit from such. The respondent considered the request for a phased return to work to be the product of the claimant’s self-diagnosis and that the GP’s letters and information reflected that position.

49. On 16 September 2021, as a result of the conversation between Occupational Health and the GP, the respondent told the claimant that the disciplinary hearing would go ahead the next day, 17 September 2021, as arranged and that, if the claimant felt unable to attend, he was offered the options of either sending in written submissions in or to attend by video. The claimant declined to do either of these.

50. On 17 September 2021, the disciplinary hearing took place in the claimant's absence conducted by Ms Elgar (the notes are at pages 475.1 to 475.3 in the bundle). There were three allegations laid against the claimant:

    (1) Leaving site early on 2 August 2021 without approval and with the intention of doing so over 4 weeks going forward;

    (2) The failure to remain in regular contact whilst off sick;

    (3) The failure to report an injury at work.

51. The claimant made much of the fact that it took only 17 minutes for the respondent to decide to decide to dismiss him. The Tribunal considered that this was because the claimant did not attend, and he had not supplied written submissions. In the circumstances, Ms Elgar based her decision on the evidence available and the information provided, which did include the GP letter supplied by the claimant and the fit note which had suggested a phased return to work. Ms Elgar preferred the opinion of Occupational Health to the effect that the claimant did not need a phased return to work. The Tribunal considered whether the respondent should have postponed the hearing, again, for a short period but concluded, on a balance of probabilities, that a postponement would have made no difference to the outcome.

52. On 22 September 2021, the disciplinary outcome sent to the claimant who was summarily dismissal for gross misconduct (pages 476-478 in the bundle). All three allegations were found proven.

53. The claimant appealed, on the basis that:

- the decision to dismiss was harsh for a first offence;
- the claimant was following GP orders in relation to the phased return to work;
- provision for his return to work were inadequate and he should have been advised to go back off sick rather than be forced to work without a phased return to work;
- the treatment of him had been unreasonable, discriminatory and unfair.

54. On 18 October 2021, an appeal meeting took place, conducted by Mr Massel. The claimant attended with his trade union representative. The appeal hearing took the form of a re-hearing of all the evidence, after Mr Massel himself had read all of the documentation and interviewed all of those concerned again.

55. The claimant's appeal was unsuccessful, and the outcome was communicated to him on 9 November 2021. In evidence at this hearing, the claimant did not challenge much of Mr Massel's evidence about the appeal hearing nor his reasons for rejecting the appeal.

The Applicable Law

56. A concise statement of the applicable law is as follows.

Discrimination

57. The complaints of discrimination were brought under the Equality Act 2010 ("EqA"). Disability is a relevant protected characteristic as defined in section 6 and schedule 1 EqA. Race is a relevant protected characteristic as set out in section 9 EqA.

58. Section 39(2) EqA prohibits discrimination by an employer against an employee by subjecting him to a detriment. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.

59. The EqA provides for a shifting burden of proof. Section 136(2) and (3) so far as is material provides 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.*

60. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to

show that there has been no contravention by, for example, identifying a different reason for the treatment.

61. In *Hewage v Grampian Health Board* [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in *Igen Limited v Wong* [2005] ICR 931 and was supplemented in *Madarassy v Nomura International plc* [2007] ICR 867. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct disability and/or race discrimination

62. Section 13 EqA provides that 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. The relevant protected characteristics include disability and race.

63. Section 23 EqA provides that on a comparison for the purposes of establishing less favourable treatment between B and others in a direct discrimination claim, there must be no material difference between the circumstances of B and of the comparator(s).

64. The effect of section 23 EqA as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person not of the claimant's protected characteristic. In analysing whether an act or decision is tainted by discrimination, an Employment Tribunal may avoid disputes about the appropriate comparator by concentrating primarily on why the claimant was treated as she was, known as the "reason why" approach, in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11. Addressing the "reason why" involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, race or disability) had any material influence on the decision, the treatment is "because of" that characteristic.

65. Very little direct discrimination is overt or even deliberate. In *Anya v University of Oxford* [2001] IRLR 377 CA guidance was given that Tribunals shall look for indicators from a time before or after the particular act which may demonstrate that an ostensibly fair-minded decision was or was not tainted by bias; in *Anya* it was racial bias. Discriminatory factors will, in general, emerge not from the

act in question but from the surrounding circumstances and the previous history.

Discrimination arising from disability

66. The prohibition of discrimination arising from disability is found in section 15 EqA. Section 15(1) provides:

> *(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.*

67. The proper approach to causation under section 15 was explained by the Employment Appeal Tribunal in paragraph 31 of *Pnaiser v NHS England and Coventry City Council* EAT /0137/15 as follows:

> *(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
>
> *(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
>
> *(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant …...*
>
> *(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links …[and] may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

(e) ….. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) …..

(h) Moreover, the statutory language of section 15(2) makes clear …. that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so.

68. In *City of York Council v Grosset* [2018] WLR(D) 296 the Court of Appeal confirmed the point made in paragraph (h) in the above extract from *Pnaiser:* there is no requirement in section 15(1)(a) that the alleged discriminator be aware that the "something" arises in consequence of the disability. That is an objective test.

Time limits – discrimination complaints

69. The time limit for presenting complaints of unlawful discrimination is found in section 123 EqA, which provides that such complaints may not be brought after the end of: -

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable.

70. Conduct extending over a period of time is to be treated as done at the end of that period and a failure to do something is to be treated as occurring when the person in question decided on it, or does an act inconsistent with doing it, or on the expiry of the period in which that person might reasonably have been expected to do it. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question.

71. In *British Coal Corporation –v- Keeble* [1997] IRLR 336, the Employment Appeal Tribunal confirmed that, in considering the just and equitable extension, a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in *Keeble*,

"… It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;
(c) the extent to which the party sued had cooperated with any request for information;
(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

72. In *Robertson –v- Bexley Community Centre (T/A Leisure Link)* [2003] IRLR 434 the Court of Appeal considered the application of the "just and equitable" extension and the extent of the discretion and concluded that the Employment Tribunal has a "wide ambit". Subsequently in *Chief Constable of Lincolnshire –v- Caston* [2010] IRLR 327 the Court of Appeal, in confirming the *Robertson* approach, held that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied. The Tribunal is however required to consider all the circumstances of the case when considering whether to extend time: *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23.

Protected disclosures and dismissal

73. Section 103A ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure as defined in section 43A and 43B ERA.

74. Disclosures qualifying for protection are defined by s43B ERA, the material provisions being the following:

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

…

(d) that the health or safety of any individual had been, was being or was likely to be endangered …

75. Qualifying disclosures are protected where the disclosure is made in circumstances covered by ss43C-43H ERA. These include where the disclosure is made to the employer (s43C).

76. The protected disclosure regime came under valuable scrutiny from the Employment Appeal Tribunal in *Cavendish Munro Professional Risks Management Ltd-v-Geduld* [2010] ICR 325. Giving judgment, Slade J stressed that the protection extends to disclosures of *information*, but not to mere opinion or allegations. Disclosing information means conveying facts.

Unfair dismissal

77. Section 98 ERA sets out a 2-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal, or the principal reason, and that reason must be a potentially fair reason for dismissal. The respondent contends that the reason for dismissal was the claimant's conduct which is a potentially fair reason for dismissal under Section 98 (2) (b) ERA.

78. If the reason for dismissal is found to be for making a protected disclosure, the dismissal shall be automatically unfair because of that reason, and considerations of reasonableness shall not apply.

79. Otherwise, if the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98 (4) ERA, namely whether, in the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason, i.e. conduct, as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

80. In considering the reasonableness of the dismissal, the Tribunal must have regard to the test laid out in the case of *British Home Stores -v- Burchell* [1978] IRLR 379 and consider whether the respondent has established a reasonable suspicion amounting to a genuine belief in the claimant's guilt and reasonable grounds to sustain that belief and the Tribunal must also consider whether the respondent carried out as much investigation as was reasonable in the circumstances.

81. The issue of the reasonableness of the dismissal must be looked at in terms of the set of facts known to the employer at the time of the claimant's dismissal, although the dismissal itself can include the appeal; so matters which come to light during the appeal process can also be taken into account: *West Midlands Co-operative Society Ltd -v- Tipton* [1986] IRLR 112.

82. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: *Iceland frozen Foods Ltd -v- Jones* [1982] IRLR 439. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: *Sainsbury's Supermarkets Ltd –v- Hitt* [2003] IRLR 23.

83. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal for conduct. Although compliance with the ACAS Code is not a statutory requirement, a failure to follow the Code should be taken into account by a Tribunal when determining the reasonableness of a dismissal.

84. The Tribunal also considered a number of cases to which it was referred by the parties in submissions. The cases were:

Bilka-Kaufaus GmbH v Weber von Hartz [1986] IRLR 317
Polkey v A E Dayton Services Limited [1987] UKHL 8
Rainey v Greater Glasgow Health Board [1987] IRLR 26 HL
Zafar v Glasgow City Council [1998] IRLR 36 HL
Nagarajan v London Regional Transport [1999] IRLR 572
Barry v Midland Bank plc [1999] ICR 859
Law Society v Bahl [2003] IRLR 640
Hardys & Hansons plc v Lax [2005] EWCA Civ 846
Starmer v British Airways [2005] IRLR 862
Kuzel v Roche Products Ltd [2008] EWCA Civ 380
MacCulloch v ICI [2008] IRLR 846
London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220 CA
London Borough of Islington v Ladele [2009] IRLR 154
Lockwood v DWP [2013] EWCA Civ 1195
CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439
Land Registry v Houghton [2015] All ER (D) 284
Williams v Michelle Brown UKEAT/0044/19/OO

The Tribunal took those cases as guidance and not in substitution for the provisions of the relevant statutes.

Conclusions

85. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Direct disability discrimination

86. The claimant contended for 3 acts of less favourable treatment.

87. Firstly, the claimant complained about the respondent not agreeing to a phased return to work from 29 July 2021. The Tribunal has found that the respondent did refuse the claimant's request for a phased return to work – see paragraph 34 above. In the course of the hearing, the claimant cited a comparator, Mr Morgan. The Tribunal was told that, in Mr Morgan's case, Occupational Health had recommended a phased return-to-work as rehabilitation, for 2 weeks, following a back complaint whilst off sick. The Tribunal however, accepted the respondent's contention that, when considering conditions for a return-to-work, it looked at each individual employee's circumstances, on a case-by-case basis and that there were significant differences between the claimant's and Mr Morgan's circumstances. In the claimant's case, for example, Occupational Health was not recommending that the claimant would benefit from a phased return to work. In addition, the claimant's GP was also not saying that the claimant could benefit from a phased return to work. The evidence showed that the GP did not reach any conclusion about this aspect from an examination of the claimant; rather, the GP admitted that he had put the issue of a phased return to work onto the sick note of 30 July 2021 only because the claimant wanted him to do so.

88. In cross-examination, the claimant was challenged about his expectation of a phased return. The claimant appeared to suggest, because he had been given a phased return to work in 2019, when he had been off work with stress and anxiety, that he should always be offered a phased return to work. However, there was no evidence, medical or otherwise, to support that contention. The respondent's approach was to look at each employee returning to work on a case-by-case basis. The Tribunal considered that approach to be reasonable, and further considered that approach would apply to comparators in the same way as to the claimant, thereby leading the Tribunal to conclude that no less favourable treatment had been shown.

89. Further, the Tribunal considered that Mr Morgan was not a valid comparator as he was returning to work after a relatively short period, following a back complaint and that Occupational Health had recommended a phased return for rehabilitation. It was apparent that Mr Morgan had been allowed a phased return because of the medical position and Occupational Health recommendations.

90. Secondly, for his direct discrimination complaint, the claimant relied upon the fact that the respondent had not postponed the disciplinary hearing on 17 September 2021. The Tribunal has found that it was not postponed and that the decision to proceed with the disciplinary hearing was as a result of the conversation between Occupational Health and the claimant's GP, and also because the claimant was suspended on full pay, at a time when there was no return-to-work date identified nor any defined period for recovery. In addition, the respondent considered that the claimant needs to return to work - the evidence was that the disciplinary process was damaging the claimant's mental health – that was the GP's observation. In those circumstances, the Tribunal considered that it was reasonable for the respondent to get on with matters. In any event, whilst the claimant's anxiety and depression formed part of the reason not to postpone that hearing, the Tribunal did not consider this to be an act of less favourable treatment; rather, the respondent proceeded because the medical advice support that course of action, as beneficial to the claimant's mental health.

91. The third act of direct disability discrimination contended for was the claimant's dismissal. This is dealt with in more detail below, in the Tribunal's findings on the unfair dismissal claim. However, the Tribunal did find that the claimant was dismissed because of three allegations of misconduct which were found proven. On the evidence before the Tribunal, there was no link shown between the decision to dismiss and the claimant's mental health or his disability, which formed no part of the respondent's decision to dismiss. In this regard, the Tribunal accepted the respondent's witnesses' explanation for the decision to dismiss. The Tribunal also considered that the respondent was acting in recognition of the effect on the claimant's mental health of a drawn-out process. The fact is that the claimant did not attend the disciplinary hearing; he gave no cogent evidence which might have supported a postponement, and no cogent evidence as to why he should not be dismissed in the face of the misconduct allegations. In those circumstances, the Tribunal

concluded that the claimant's dismissal was in no sense because of disability nor an act of direct discrimination.

Discrimination arising from disability

92. The respondent did know, and could reasonably be expected to know, that the claimant had the disability at the material time. The Tribunal heard evidence that the claimant told the respondent about his anxiety and depression in 2018 and 2019. In the bundle (page 164) there is an email of 9 October 2018, to that effect and which the Tribunal considered put the respondent on notice of disability. If the respondent was unclear or uncertain, they could have and should have made further enquiries. Indeed, Mr Prescott was aware of the claimant's mental health issues, from at least 2019, because he talked of making 'adjustments' to the claimant's role at that time. In addition, Ms Elgar arranged counselling for the claimant, presumably having been alerted to the claimant's mental health issues.

93. The Tribunal looked at each of the acts of unfavourable treatment contended for, and reached conclusions as follows:

93.1. Not agreeing to a phased return to work – the Tribunal did not find this to be unfavourable treatment. The phased return to work was what the claimant wanted but there was no medical evidence to support it. In essence the claimant was asking for more favourable treatment, and not agreeing to his request was reasonable in the circumstances, and in the absence of medical evidence to support such. Here the Tribunal took note of the fact that the claimant's GP admitted that it was not his advice and was included in the fit note at the claimant's request.

93.2. Not postponing the disciplinary hearing on 17 September 2021 – the Tribunal noted that there had already been one postponement, on 7 September 2021. The Tribunal was referred to the respondent's disciplinary procedures which provide for postponement for up to a month (page 151 of the bundle). Such a postponement is discretionary, and not compulsory. In light of the surrounding circumstances, the Tribunal considered that the claimant was seeking to put off a difficult hearing and to prolong matters. However, there was no timescale identified within which he might otherwise be able to attend such a hearing and take part. The respondent took account of the claimant's contradictory position: of saying he needed to get back to work and that work was therapy, but that he could not come to a work meeting just yet. There was no medical evidence to justify a further delay and ample statements from the claimant about wanting and needing to get back to work. The Tribunal also took account of the fact that the respondent was cognisant of the fact that the claimant was suspended on full pay. In light of all the evidence and circumstances, the Tribunal did not consider that the respondent's failure to postpone the disciplinary hearing again, on 17 September 2021 amounted to unfavourable treatment.

93.3. Dismissing the claimant – this is accepted to be unfavourable treatment.

94. The Tribunal then considered whether the following things contended for arose in consequence of the claimant's disability, and, if so, whether there was a link to the unfavourable treatment, namely the claimant's dismissal.

94.1. First, the claimant contended that his previous poor sickness record arose in consequence of his disability. In the bundle, on page 408, is a table that shows the claimant had 105 days off sick from September 2018 to February 2019, for stress and anxiety and then 73 days' absence at the end of 2019 for stress and anxiety. There are also several periods of absence for a variety of other reasons, so not all of the claimant's poor sickness record was disability-related, but the Tribunal found that the majority of the claimant's sickness absence (178 out of 258 days) was disability-related.

94.2. Second, the claimant contended that being unable to return to work immediately, on a full-time basis, following his back injury, was disability related. However, the Tribunal found no evidence of such an inability to return immediately, nor that any such inability, if it existed, was something which arose in consequence of the claimant's disability of depression and anxiety. The relevant fit note simply states: "chronic back pain". In any event, the claimant decided to return to work of his own volition and worked 2 full days, on 29 and 30 July 2021, before he decided unilaterally that he should have a phased return to work. Only then did he contact his GP with a view to obtaining a fit note to that effect. The Tribunal found that the suggestion of a phased return to work was included in the fit note, as the GP told Occupational Health, because the claimant asked his GP to do so.

94.3. Third, the Tribunal considered that the fact of the claimant leaving work without permission on 2 August 2021 was not something which arose from the claimant's disability. It was the claimant's decision to leave work when he did. He decided that he wanted a phased return to work, and he gave a reason which related solely to his back condition: not wanting to be on his feet for 8 hours. There was no evidence that the claimant's action, in leaving work, arose in any way from his disability. Rather, the claimant left work because he had decided that he wanted a phased return to work, and he decided that he would unilaterally implement one.

94.4. Fourth, the claimant contended that his being unable to attend the proposed disciplinary meeting was something arising in consequence of his disability. The GP letters to the respondent, of 2 and 13 September 2021, suggest the ongoing process was affecting the claimant's mental health. In those circumstances, the Tribunal considered that the disability may have affected the claimant's ability to attend the meeting in that sense.

95. The Tribunal has found that only the dismissal was unfavourable treatment. However, the Tribunal considered that the claimant's sickness record had no effect on the decision to dismiss, which the Tribunal found was for misconduct. The claimant was not dismissed because he could not attend the disciplinary hearing. The Tribunal found that Ms Elgar based her decision to dismiss on the evidence available to her at the time, and the information provided, including both GP letters and the fit note which the claimant suggested pointed to a phased return to work. In that regard, Ms Elgar preferred the opinion of Occupational Health to the effect that the claimant did not need a phased return to work.

96. The Tribunal took account of the fact that the claimant was not at the disciplinary hearing on 17 September 2021. Ms Elgar said in evidence that it would have been better if the claimant was there, but that she felt it was right to proceed. There was no medical reason to postpone again. Ms Elgar's evidence was that it was a difficult decision, and the Tribunal had some sympathy for the respondent's position. The hearing had already been postponed once and the question arises as to, if it is postponed again, for how long should a further postpone be for? In the circumstances of this case, the respondent decided to proceed. The claimant knew that was a possibility, and he was given alternative options for his involvement – written submissions or attendance via Zoom. The Tribunal concluded that the fact that the claimant did not take up those options did not make the respondent's decision to proceed with the hearing and dismiss either unreasonable or discriminatory. In any event, the subsequent appeal hearing, which Mr Massel conducted, gave the claimant the opportunity to put his case. It was a re-hearing which the claimant attended with his trade union representative.

97. Despite that the Tribunal has not found that there was any unfavourable treatment because of something arising in consequence of the claimant's disability, the Tribunal nevertheless considered the justification defence propounded by the respondent. Both aims contended for are manifestly legitimate. In the circumstances of this case, the unfavourable treatment (dismissal) was appropriate, in light of the claimant's conduct, in going AWOL and, when challenged, being adamant that he would do it again. The claimant displayed a wilful resistance to the respondent's reasonable instructions, and it is possible to imagine that the claimant's conduct would have the potential to endanger the safety of others and certainly to interrupt the respondent's service provision.

98. For all the above reasons, the complaint of discrimination because of something arising from disability must fail.

Direct Race Discrimination

The Silver Award

99. As a fact, the Tribunal has found that the respondent did not give the claimant the silver award upon 2 years' service albeit that the claimant did eventually receive a silver award, just a bit later. The claimant accepted in his evidence that this award, and its timing, had nothing to do with his race, and the

Tribunal found absolutely no evidence to suggest any connection between the timing of the silver award and the claimant's race. The Tribunal considered the respondent's explanation for the matter was entirely reasonable, given the claimant's attendance record. The respondent needed 2 years of working days in order to assess the claimant's performance and, eventually, after the equivalent of 2 years of working days being completed, spread over a longer period due to the claimant's absences, the award was achieved and made. In addition, somewhat strangely, the claimant gave an example in evidence of a white colleague who also did not get a silver award at 2 years' service, thus perhaps negating that claim by showing that the claimant was not alone in the treatment complained of, which was regardless of race.

Dismissal

100. The claimant also pursued an argument that his dismissal was an act of direct race discrimination. The claimant compared himself with Leo Duffy, a white employee, who was disciplined because he had not completed valid health and safety checks. In contrast to the claimant, Mr Duffy had been apologetic about his actions, he took responsibility and had not gone AWOL, nor was he defiant nor was he saying he was going to do it again. The respondent provided unchallenged evidence that, at the relevant time, Mr Duffy faced significant personal circumstances including his mother's illness and the Tribunal heard that the respondent had exercised its discretion to be lenient in those circumstances. Mr Duffy was sanctioned by being prevented from working overtime for a year which the Tribunal understood to be a lucrative addition to an employee's earnings, which Mr Duffy was denied. In addition, in reaching its conclusion that the claimant's dismissal was not an act of race discrimination, the Tribunal took account of the statistics, which appear in the bundle at page 485 which show no apparent bias against non-white employees in respect of dismissal or disciplinary decisions.

<u>Protected Disclosures</u>

101. In addition to complaints of discrimination, the claimant pursued an argument that he was a whistle-blower, relying on an email he sent to Ms Bifield and Ms Elgar on 21 May 2021, which appears in the bundle at pages 375.1 – 375.6, and in which the claimant makes 5 points about a fire investigation report by a third party which was already in the public domain. The Tribunal reviewed the document relied upon by the claimant and considered that none of the points made amounted to a disclosure of information. At best the claimant's points comprised allegations or opinion about the report being factually incorrect or reaching incorrect conclusions, in the claimant's view. None of the points made are about breaches of health and safety; rather they are suggestions of corrections, areas of work to be reviewed and perhaps dealt with differently. The Tribunal did not doubt that the claimant believed that the points he raised were in the public interest, in that he considered health and safety matters to be in the public interest. However, the Tribunal considered that the points made by the claimant did not satisfy the definition of a protected disclosure for the purposes of a whistle-blowing complaint. In any event, the Tribunal did not find that the claimant was dismissed for whistleblowing, or that the email relied

upon, or its contents, played any part in the respondent's decision to dismiss the claimant.

Unfair dismissal

102. The Tribunal considered that the respondent had clearly shown in evidence that this was a dismissal for misconduct. The respondent genuinely believed that the claimant had committed misconduct and had reasonable grounds for sustaining that belief. Firstly, the claimant refused to work a full day on Monday 2 August 2021, after having previously worked 2 full days on Thursday and Friday, 29 and 30 July 2021. He left work on the Monday without notice or authority and, when challenged about this, he insisted that he would do so again and that he intended to implement his own 'phased return' to work. Such a dereliction of duties and insubordination must amount to gross misconduct.

103. In respect of the second allegation about a failure to keep in regular contact with work whilst off sick, it was apparent from the evidence that the claimant had simply not kept in regular contact despite being asked to do so on several occasions (as recorded by the claimant himself, on page 427 of the bundle). The Tribunal accepted the respondent's submission that this behaviour was, at least, misconduct.

104. For the third allegation, it was apparent that the claimant had failed to report an injury at work promptly, as he should have done, albeit the Tribunal found that the claimant did email HR at the start of the next week, on Monday 10 May 2021, mentioning in passing that he had injured his back lifting bulky waste onto a wagon with no tail lift (see page 366 of the bundle) and his email was acknowledged by Ms Byfield. There was, however, no evidence that Ms Bifield had then advised the claimant of the need to report his injury or accident, and the respondent's HR officers did not chase the matter up when no accident report was filed. Having said that, the Tribunal accepted on a balance of probabilities that employees such as the claimant would know that accidents need to be reported; such is a basic premise of health and safety law and practice.

105. The investigation carried out by the respondent was not challenged by the claimant and in any event the Tribunal considered that the respondent's managers had carried out a reasonably thorough investigation. "Procedures" include the appeal, which the Tribunal found to have been conducted in a thorough manner, as a re-hearing, and thereby could be said to have corrected any deficiencies in the original process/hearing leading to dismissal.

106. Lastly, the Tribunal found that the respondent's decision to dismiss the claimant fell squarely within the band of reasonable responses open to an employer, in the circumstances of the case. Further, the Tribunal concluded that this would most likely be the case even if the respondent had postponed the disciplinary hearing as the claimant requested, for a short period of time. On the balance of probabilities, the Tribunal considered that such a postponement would have made no difference to the eventual outcome.

Time Limits

107. The issue of time limits arises in respect of the complaint about the silver award. The cause of action was not being given a silver award when the claimant achieved 2 years' service, in early 2020; alternatively, when the claimant's grievance about the silver award was not upheld, in July 2020. In any event, the claimant did not appeal the decision about which he has since sought to complain, and he got his silver award in September 2020. The complaint about the silver award is a single or stand-alone complaint against Mr Pope - there was no suggestion that he was somehow connected to the individuals involved in the claimant's dismissal. Even if this complaint had succeeded on its facts (which it did not – see paragraph 99 above), the Tribunal considered that it was well out of time and that there was no reason to extend time on a just and equitable basis. The Tribunal considered that the claimant would likely have been advised by his trade union about an appeal and about relevant time limits, but concluded that the claimant must have then been content because he did not complain thereafter until he included it in his Tribunal claim. There is no reason to extend time in those circumstances.

Closing remarks

108. In the course of these proceedings, and at this hearing, much has been said about the respondent and its support for mental health. The Tribunal has seen a lot of evidence of care and concern for the claimant's mental health, the patient and generous approach to him by managers through his difficulties, particularly in the early years of the claimant's employment, notwithstanding the claimant's attendance record. The Tribunal commends the respondent and its managers for that approach.

109. Secondly, the Tribunal wishes to record that the claimant has represented himself very ably, putting his case to the Tribunal carefully and with good grace. Representing oneself in a Tribunal hearing can be stressful and demanding and the claimant has done a very good job despite that he has not succeeded with his complaints.

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Employment Judge Batten
Date: 26 July 2024

REASONS SENT TO THE PARTIES ON

Date: 6 August 2024

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FOR THE TRIBUNAL OFFICE

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