EMPLOYMENT TRIBUNALS

Claimant: Mr P Carr

Respondent: Estée Lauder Cosmetics Limited

Heard at: Manchester **On:** 23-26 July 2024

Before: Employment Judge Phil Allen
Mr A Egerton
Mrs P Owen

REPRESENTATION:

Claimant: In person
Respondent: Ms K Balmer, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of unfair dismissal is not well-founded. The claimant was not unfairly dismissed.

2. The complaint of breach of contract in relation to notice is not well-founded. The respondent was entitled to terminate the claimant's contract without notice as a result of the claimant's fundamental breach of the contract.

3. The claimant did not prove that at the relevant time he was a person with a disability as defined by section 6 of the Equality Act 2010 because of cranial damage.

4. At the relevant time the claimant was a person with a disability as defined by section 6 of the Equality Act 2010 because of depression.

5. The complaint of indirect disability discrimination is not well-founded and is dismissed.

6. The complaint of breach of the duty to make reasonable adjustments for disability is not well-founded and is dismissed.

7. The claim for holiday pay is dismissed on withdrawal.

REASONS

Introduction

1. The claimant was employed by the respondent as a counter manager for the Le Labo concession within the Selfridges Store in the Trafford Centre. His continuous employment commenced on 4 November 2018. He was dismissed on 9 May 2022. The claimant alleged that his dismissal was unfair and in breach of contract (regarding notice) and he brought claims of disability discrimination (indirect discrimination and breach of the duty to make reasonable adjustments). He relied upon depression and/or cranial damage when contending that he had a disability at the relevant time. The respondent did not accept that the claimant had a disability at the relevant time, denied discrimination, and contended that the claimant was fairly dismissed as a result of gross misconduct.

Claims and Issues

2. There was a preliminary hearing (case management) conducted on 17 March 2023. The issues were clarified, and a list of issues was appended to the case management order sent following that hearing. The respondent provided an updated list of issues, and that updated list was agreed at the start of this hearing. The issues which needed to be determined as recorded in the list are appended to this case management order.

3. At the start of this hearing, it was confirmed that the claimant was relying upon two impairments as being the disability or disabilities at the relevant time: depression; and/or cranial damage.

4. The claimant had brought a complaint for holiday pay, but it was agreed/confirmed by him that that complaint would be dismissed on withdrawal.

5. It was agreed that the liability issues would be determined first and (after they were determined and if the claimant succeeded) remedy issues would be determined later. However, at the start of the hearing the following issues were identified as being ones which would be determined alongside the liability issues even though they were technically remedy issues: 2.7; 2.8.4; 2.8.5; 2.8.9; 2.8.10; and 7.7. It was confirmed that there were no arguments relating to the ACAS code of practice and so issues 2.8.6-2.8.8 and 7.8-7.11 were deleted from the list of issues.

Procedure

6. The claimant represented himself at the hearing. Ms Balmer, counsel, represented the respondent.

7. The hearing was conducted in-person with both parties and all witnesses attending in-person at Manchester Employment Tribunal.

8. An agreed bundle of documents was prepared in advance of the hearing. Where a number is referred to in brackets in this Judgment, that is a reference to the

page number in the bundle. We read only the documents in the bundle to which we were referred, including in witness statements, or as directed by the parties.

9. We were also provided with witness statements from each of the witnesses called to give evidence at the hearing. On the first morning, after an initial discussion with the parties, we read the witness statements and the documents referred to.

10. In the case management order made following the preliminary hearing on 17 March 2023, there was included a proposed timetable which proposed that the respondent's witnesses would give evidence first and the claimant second. On the first morning of the hearing, the respondent's counsel proposed that the evidence be heard the other way around with the claimant giving evidence first. The claimant objected and said that he had prepared for the hearing in the expectation that the order in the proposed timetable would be followed. As a result, the respondent accepted that the evidence would be heard in that order.

11. The respondent called to give evidence: Ms Chloe Rains, Area Sales and Education Manager for Killian Paris, Frederic Malle, Le Labo, and Tom Ford Beauty and the claimant's line manager at the relevant time; Ms Katherine Reynolds, the Area Sales & Education Manager for Scotland and the Northeast of England for MAC and the person who conducted the disciplinary hearing; and Ms Antonia Papargiris, National Omni Sales Manager and the person who heard the appeal. Statements had been provided. Ms Rains gave evidence on the afternoon of the first day. The other two witnesses gave evidence on the morning of the second day. They were each cross-examined by the claimant, we asked questions, and they were asked a few questions in re-examination.

12. We heard evidence from the claimant, who was cross examined by the respondent's representative, before we asked him questions. He confirmed under oath the truth and accuracy of both his witness statement and his disability impact statement (83). He gave evidence on the afternoon of the second day and the morning of the third.

13. The claimant also provided statements from a number of witnesses who did not attend to give evidence, but for all of whom we were provided (unsigned) written statements. Statements were provided for: Anne Greenaway; Hayley Shaw (two statements); Chrystal Caskie; Dominique Cherry; Debbie Holt; and Carlton Cameron. We read the statements provided, but as they did not attend and their evidence was not able to be challenged, we gave their evidence less weight. The respondent submitted that the statements should not be given any weight at all.

14. After the evidence was heard, each of the parties was given the opportunity to make submissions. They each provided a document and were given the opportunity to also make submissions orally. The documents were read at the start of the afternoon of the third day. The respondent's representative also made oral submissions during the afternoon of the third day. The claimant chose not to make any oral submissions and relied upon what we had heard and what he had written (and was asked one question about an aspect of his case).

15. After submissions were heard, we informed the parties that we were reserving our decision. We used the remaining time available, the fourth day, to consider and

reach our decision (in chambers). This document contains our Judgment and reasons on the liability issues and those specific remedy issues which it was identified would be determined at the same time.

Facts

16. The claimant started working for Le Labo on 4 November 2018. He transferred to the respondent when Le Labo staff did so. We were provided with a copy of his contract with the respondent (96) effective from 1 March 2019, which recorded that he was the Counter Manager for the Le Labo brand at the Selfridges store at the Trafford Centre.

17. The contract had a provision on conflicts of interest (101). It expressly provided that the respondent was entitled to dismiss the claimant at any time without notice if the claimant committed a serious breach of his obligations or was guilty of gross misconduct. The contract referred to the handbook for details of the relevant notice period.

18. We were also provided with a copy of the respondent's employee handbook (105). That included a section on disciplinary rules and procedures (155). With regard to notice (121), the handbook recorded that for those with three years' service the notice required from the company was three weeks. It also included a number of policies including a policy on equal opportunities and diversity.

19. It was the claimant's evidence that at interview for Le Labo, he discussed barbering and it was considered to be a positive on the part of the interviewer who went on to be his line manager. It was his evidence that his line manager as at recruitment knew that he undertook some barbering. We did not hear from the interviewer/manager and no evidence from him was obtained by the respondent during their investigation.

20. Ms Rains, the claimant's line manager at the relevant time, recorded in her witness statement that the claimant was good at his job and had a great profile in store. It was the claimant's evidence, that he informed Ms Rains that he undertook barbering and that it was common knowledge. It was Ms Rains' evidence that she knew he had an interest in barbering, but she did not accept that the claimant ever told her that he was working as a barber. This was a direct conflict of evidence.

21. On the relevant concession, there were a limited number of employees. In June 2021 there were three staff, being the claimant, Mr Stefan Murrell, and Mr Chris Hoyte. When they all worked, one would usually work an early, one a mid-shift, and one a late shift, albeit that with holidays and days off there were many days when there was only someone working an early and a late shift. The store was open for twelve hours on most days (but not Sundays). There was no formal system for clocking in and out. Selfridges used a swipe card system for employees and those who worked for concessions to access the staff entrance and certain other parts of the store, such as toilets and the stock room. However, that system recorded only when a swipe card was used at an access point and it was common ground between the parties (including from the evidence of those from whom the claimant provided statements) that swipe card use was not rigidly enforced and entrances were frequently accessed by following someone else who used a card.

22. The system used by the respondent to record working hours was a sheet completed by the claimant. We were provided with a copy for the relevant period (229). For the 11, 12, 13, 14, 15 and 16 of June 2021, the claimant recorded P against his name, which recorded that he had been present for his shift. For other dates in the relevant month, the claimant recorded H where he was on holiday and O for an authorised day off. It was not in dispute that: completing that sheet was a part of the claimant's responsibilities; that the area managers relied upon and placed trust in the managers to complete it; that pay-roll and related decisions were made based upon it; and that it would be serious misconduct if someone were to complete the sheet recording that they had worked when they had not.

23. On 14 June the claimant exchanged text messages with Mr Murrell, one of the respondent's employees who also worked on the Le Labo concession (220). He asked Mr Murrell to work the late shift on 15 June, but Mr Murrell said that he could not do so. When questioned about this email exchange, the claimant's evidence was confusing. He gave evidence that he could not remember whether the person exchanging messages was him, when it was clear from the texts and what was said about the shift to be worked that it clearly was.

24. On 15 and 16 June, the claimant was due to work for the respondent a late shift on each day (222). It was not in dispute that there were no swipe card records for those dates which recorded the claimant as using his swipe card to access any of the areas at the Selfridges store. The claimant was recorded as processing no sales transactions on either day, but he had processed sales on 13 and 14 June (221).

25. We were provided with some exchanges of emails between Ms Rains and the claimant on 22 June 2021 (230-1). The claimant thanked Ms Rains for her time and said it had been nice to catch up. He informed Ms Rains that he owed two hours from 15 and 16 (one hour each) and said he would make them up by working a longer shift the following day.

26. On 24 June 2021 the claimant suffered a health issue. He was told to attend the Accident and Emergency department for tests. He underwent tests for a potential bleed in the brain. The claimant told us that he was told that blood had been found in his brain. The medical documents which were provided to us did not record a bleed on the brain having been identified. We were provided with a copy of the discharge summary (492) (which was somewhat difficult to read) which recorded that there were no acute or chronic signs of venous thrombosis, there was no acute intercranial haemorrhage, no acute major cranial (although that word is not clear) infarction, and normal grey-white matter differentiation. It was our understanding that what was reported was that no cranial damage had been identified. A different discharge summary was also provided as part of the claimant's medical records (829), which is addressed below in the section of the facts where the medical records are recorded.

27. On 28 June the claimant emailed a further copy of the time and attendance sheet including further entries for the month (236-7). The entries for 15 and 16 June remained that the claimant had been present. The claimant had completed the entries required for the end of the month showing authorised days off and sickness absence.

28. The claimant had a period of absence from work due to ill health. While the claimant was absent, Ms Rains was contacted by Mr Murrell who asked for a conversation. She spoke to him by telephone. The conversation was not noted. Mr Murrell informed Ms Rains that the claimant had not turned up for work on 15 or 16 of June despite being on the rota to work. Mr Murrell informed Ms Rains that neither he nor Mr Hoyte had seen the claimant on either of those two days.

29. Following the call, Ms Rains checked the rota. She emailed Mr Neil Antrobus, the Selfridges Department Manager (233), who reported that the claimant was not recorded on the swipe access data on the two days in question, and that neither Mr Antrobus nor his colleagues had had any conversations with the claimant about absence. In her email, Ms Rains asked about CCTV access and whether that showed that the claimant had been in the business, but Mr Antrobus did not respond. Ms Rains did not enquire further or ask for the CCTV to be retained. In her evidence to us, Ms Rains was certain that the CCTV from the days in question (had it been available) would have shown whether the claimant had been in work or not.

30. The swipe card data for the claimant was obtained and provided to us (240). That showed the claimant using his swipe card on a number of occasions on the other days when he worked in June 2021. On 14 June he swiped his card on six occasions. He had swiped his card on 20 June on eight occasions.

31. Ms Rains also checked the sales transaction report for the claimant for 15 and 16 June. It was her evidence that it was unusual not to have any transactions for an employee over two days.

32. The claimant returned to work on 15 July 2021. Ms Rains expected the claimant to work a late shift and endeavoured to speak to him by telephone before his shift started. In fact, the claimant worked an earlier shift. He spoke to a member of agency staff who had been asked to work and was surprised to see the claimant. The claimant was critical of the fact that he discovered that something was happening via the agency staff member and contended there had been a breach of confidentiality as a result.

33. Ms Rains conducted a return-to-work interview with the claimant, when she spoke to him by telephone on 15 July. What he said was recorded by her on the relevant form which was provided to us (243). In that form the claimant was recorded as having said that he had had a spontaneous aneurism and the Doctor had said the bleed could have started some time before. It was said that it had felt like vertigo and the Doctors prescribed tablets and, following a questionnaire, the claimant had been told to go straight to hospital. The document went on to say:

> "*Bleed on the brain, drain spinal fluid and hospital stay with tests to ensure no further aneurism.*
>
> *Been advised the imbalance in fluid can correct – further calls with a neurologist.*
>
> *Pain relief, other medication for balance, nausea, inflammation & blurred vision.*

Doctor has advised that some changes in personality – forgetfulness and not being with it.

Currently feel like jet lag and over tired …"

34. The form also recorded that the claimant had had a two-week sick note. Nothing specifically was required as support on his return to work (save for time off to see the neurologist). It was also said that the claimant felt fine at the moment after two weeks on the medication.

35. After the return-to-work interview, Ms Rains then went on in the same call to inform the claimant that he was suspended. She did not tell him the reason why he had been suspended. A virtual meeting was arranged for the following day.

36. In her evidence to us, Ms Rains explained why she had undertaken the conversation by telephone rather than attending the Trafford Centre in-person. The reason was related to Covid and the risks arising from it (and the specific factors as they applied to her).

37. Ms Rains sent the claimant a letter confirming his suspension. The letter did not detail the reason for suspension. The claimant was told not to have contact with any work colleagues at Selfridges Trafford Centre concerning the issue (albeit at that time the claimant would not have known what the issue was) (253).

38. Emails were exchanged between the claimant and Ms Rains on 15 July regarding the suspension and the claimant's criticisms of it. Ms Rains explained in summary the reason for the suspension in one of the emails (263). Ms Rains explicitly addressed potential adjustments for the meeting in that email and explained that breaks could be taken, and the claimant would be able to turn his camera or microphone off to gather his thoughts. She also offered to give the claimant the weekend to review and then have a further opportunity to share information before a decision was made, as an adjustment in the light of his conditions.

39. On 16 July Ms Rains spoke to the claimant at greater length about his suspension. The conversation was conducted by Teams, but the claimant declined to turn his camera on. We were provided with a note of the conversation taken by Ms Stuart, another Area manager who also took part in the Teams call (268). When the claimant was asked about shifts, he said he could not answer off the top of his head and that all the weeks seemed to blend into one at the moment. He said he would need to check the rotas and documents and get back to Ms Rains, when he was asked about working on 15 and 16 May.

40. The claimant said that he had a diary which he had left at work which he wished to refer to. Ms Rains tried to arrange for the diary to be returned to the claimant. The diary could not be located.

41. Another issue regarding stock, and the sale of stock, was also asked about during that meeting. That was not central to the issues which we needed to decide as it was not an allegation which was found at the disciplinary hearing.

42. A further issue was brought to Ms Rains attention. We were provided with a post (950), dated 19 June 2021, which the claimant had placed on a social media

account called Phil_Tigercuts, in which he displayed certificates which he had obtained from the London School of Barbering. In it, the claimant said that he had finished his level two and three barber training and had set up a second account for his barbering. Ms Rains googled the course and identified from what she saw that it was a one-week course undertaken during the weekdays in the relevant week. Ms Rains formed the view that the claimant may have been undertaking the barbers course referred to during the days when she believed he may have been absent on 15 and 16 June 2021. In evidence to us, the claimant denied that he had undertaken the course that week and said that he had completed the course outside working hours. The claimant did not give evidence about exactly when he had undertaken or completed the course.

43. A further meeting was arranged for 20 July. The claimant declined to attend because it was his day off. In an email of 19 July, the claimant said that stress was a trigger for his condition, and he asked for this to be considered and adjustments to the process to be made so as not to aggravate his symptoms (275). Ms Rains responded by proposing to pause the investigation process pending a referral to occupational health which she said was to "*understand how we can support further with any reasonable adjustments*" (274).

44. In practice, the occupational health referral delayed the investigation process until mid-August 2023. The claimant raised a grievance on 2 September and the process was paused until late December pending the completion of the grievance process and grievance appeal. Ms Rains took no further part in the investigation, as she stepped away from the investigation after the claimant raised his grievance. In her evidence to us, Ms Rains made clear that she had not completed her investigation.

45. We were provided with the occupational health report of 11 August 2021 written by the occupational health advisor following a telephone appointment with the claimant (278). The advice provided was that the claimant was unfit for work, and it was difficult to predict his return date. The advice was that the claimant was not ready to attend any meetings but, in order to complete initial investigations, it was said the claimant would welcome questions being sent via email so that he could take time and care in answering them. The report envisaged the claimant being fit to attend meetings in the future and, as adjustments for those meetings, it was recommended that the claimant be accompanied, have questions in advance to plan and take time whilst trying to recall what had happened, and meetings should be face-to-face and not by telephone.

46. The report also said:

> "*Philip stated that approximately 6 weeks ago he underwent a hospital procedure to establish the cause of his debilitating headaches. These have caused him pain, memory loss and a lack of concentration. He reported that he was diagnosed with a small bleed to the brain and a further unruptured aneurism in his brain.*
>
> *Philip has also suffered from a mental health illness for approximately 2½ years and restless leg syndrome…*

> *I am not in a position to comment on the veracity of the account provided by Philip of his employment circumstances with the organisation …*
>
> *Philip described how he is feeling very low in mood due to the allegations made against him and said the way the work internal investigation has been handled has exacerbated his anxiety which is affecting his sleep and motivation. This coupled with some memory loss and concentration, which his GP has advised he could have had for some time, he feels has affected his judgement in some situations…*
>
> *Due to his ongoing symptoms of headache, back ache, memory loss and some confusion, in my opinion, Philip is not ready to attend any meetings ...*
>
> *Based on the presented evidence, Philip is likely to be covered by the disability provisions of the Equality Act 2010. (Ultimately this would be a legal decision)"*

47. The claimant raised a grievance on 2 September 2021 (286). In it he raised a number of points, which it is not necessary to reproduce in this Judgment.

48. Ms Thompson took on responsibility for the disciplinary investigation from Ms Rains following the grievance being raised. We did not hear evidence from her. We were provided with an exchange of emails between Ms Thompson and Mr Hoyte on 21 September (323), in which Mr Hoyte recounted the shifts which he had worked in the relevant week and said that he was pretty sure it was just Mr Hoyte and Mr Murrell who had worked on the counter on the days he had worked that week (which included the Wednesday). He said, "*I think that week Phil was away due to his dad being ill?*".

49. In late September, the claimant received some messages from colleagues as they understood he was leaving, and a manager was being recruited for the claimant's position. Unsurprisingly, the claimant was upset about such messages, and he believed a breach of confidence had occurred.

50. A grievance hearing took place on 21 September 2021 via Zoom, attended by the claimant, Ms Tweddle (an Employee Relations Advisor), and Mr Jordan (Sales Director UK & I) who heard the grievance. We were provided with a grievance outcome letter of 15 November 2021 (406). The claimant's grievances were not upheld. We did not hear evidence from either Ms Tweddle or Mr Jordan. A grievance appeal hearing took place on 6 December by Zoom attended by the claimant, Ms Tartufolo (Employee Relations Manager) and Mr Ashford-Reid Vice President/General Manager UK & Ireland Tom Ford Beauty, Le Labo & Artisanal Fragrances. An outcome letter, not upholding the appeal, dated 10 December was included in the bundle (433). We did not hear evidence from Ms Tartufolo or Mr Ashford-Reid.

51. We were provided with some screenshots which appeared to show the claimant's services being offered as a barber at two locations for the same barbers. A website offered the claimant (with photo) at £45 (380). Appointments were available with the claimant for a haircut and shave in October (365). He was also in a list of employees who could be selected at £30 (391).

52. On 21 December 2021, Ms Thompson wrote to the claimant confirming his suspension and explaining that the investigatory process was being reconvened following the conclusion of the grievance and appeal process (460). In that letter she explained that new allegations had come to light and referred to secondary employment and conflict of interest. Ms Thompson asked some further questions (in writing) of the claimant.

53. In late December 2021, the claimant emailed Ms Thompson and provided an email from Ms Hodgson at the London School of Barbering (472). Her email confirmed that the claimant had attended some morning sessions at LSB and had not been paid for any work at the premises. She said that the claimant had shadowed and attended training sessions in his own time, albeit it was not clear to us how Ms Hodgson would have known when the claimant's own time had been.

54. On 7 January 2022, Mr Murrell emailed Ms Rains (499) and confirmed that it was his recollection that the claimant was supposed to have worked with him on 15 June but had been off, and that for the remaining days between the 15 and 19 that it was only Mr Murrell and Mr Hoyte who had worked. He said he had pulled off the till report and he stated it showed only Mr Murrell and Ms Manning (from a neighbouring concession and not the respondent's employee) who had put sales through on 15 June. This was the only record of Mr Murrell's account provided to us. The claimant was critical of the fact that it was only obtained in January 2022. There was no real explanation as to why a written account/email from Mr Murrell had not been obtained earlier.

55. During the internal disciplinary process, the only medical records made available were the two occupational health reports, a letter from Dr Mohammed which explained that the claimant had attended hospital displaying symptoms consistent with an intracranial haemorrhage (527) and a letter from a chiropractor dated 15 March 2022 regarding a recent history of neck and back pain (532). The claimant did not consent to the disclosure of his GP records to the respondent or the occupational health providers, and the other documents provided to us were not available to the respondent.

56. We were provided with a letter of 4 March 2022 from Ms Reynolds to the claimant confirming his suspension and inviting him to a disciplinary hearing (528). The letter set out clearly the allegations being considered at that time and the enclosed evidence which was to be considered. The claimant was invited to a meeting to be held by Zoom, but it was acknowledged that the claimant had previously requested to communicate only by written communication and it said that if the claimant would prefer to communicate by email, Ms Reynolds would support that decision.

57. We were provided with documents in which the claimant was asked questions by Ms Reynolds in writing and provided his responses. It was the evidence that we heard, that this was the claimant's chosen approach to providing evidence for the disciplinary decision and he did not ask to, or agree to, attend the hearing in-person or via a platform.

58. In one of his answers (479), the claimant said that he visited friends' barber shops to get out of the house and for human contact. He said he was not working; he was helping out.

59. The claimant's written responses addressed at some considerable length the allegation relating to product. When asked about whether or not he had attended work on 15 and 16 of June 2021, the claimant explained that he had suffered from memory loss and confusion, he said that he did not remember off the top of his head his whereabouts nine months ago, and he said that he could not say one way or the other. With regard to barbering, the claimant said he had always barbered since he joined the company and he referred to having told his manager at recruitment. He also said he had informed Ms Rains and she had not cared. He said that, since being suspended, he had regularly visited a friend's barber shop. He said he was not being paid as the majority of what he did was training.

60. In answer to a specific question asked seeking clarification about whether the claimant could not remember whether he was in work on the relevant day or whether he was saying he had made an error as a result of his health condition, the claimant said (560) "*as pointed out several times I have memory and personality change issues. I'm not saying they are or are not the cause. It was so long ago I doubt anyone could remember off the top of their head. I'm being asked the same sort of questions that I can only give the same answer to. Occupational health and my doctor have discussed grow my memory etc was affected so why do ii have to keep explaining the same point over and over*".

61. A second occupational health report was provided dated 12 April 2022 (573), written by Dr Pugh, a consultant in occupational medicine. It was Ms Reynolds' evidence that she considered the second report when reaching her decision. The report described that the claimant's anxiety/depression had the biggest impact upon him. He was described as having had a long history of anxiety and depression for which he was receiving appropriate treatment, but which had been exacerbated by his protracted suspension from work. The report recorded recurrent headaches which were probably migraines. It also referred to a possible intracranial haemorrhage. It said "*This required his admission to hospital in June last year. A hospital discharge note seems to indicate a normal CT scan, but I am unaware what further investigations were carried out and what they revealed*". The report recorded that the claimant had not consented to the release of his medical records. It said that, as a consequence of the claimant's depression, the investigation process should continue to be in writing rather than asking the claimant to attend face-to-face meetings. It said the claimant was "*suffering from severe anxiety/depression. Based on what he has told me this is being exacerbated by the protracted uncertainty brought about by the ongoing investigations… Any problems Philip has with his memory and concentration are most likely to be arising from his anxiety/depression ... Based on my assessment of him Philip is still having some cognitive difficulties principally stemming from his anxiety/depression rather than any other cause*". The claimant's symptoms were described as persistent, but expected to improve once the investigatory process was concluded and he should improve and be able to return to his role.

62. We were provided with Ms Reynolds' decision letter of 9 May 2022 (577). She addressed each allegation in detail. She found the following allegations proven (with

one not proven) and set out in some detail why: unreasonable and/or unexplained absence from work; deliberate falsification of records and /or company documentation; serious breach of company rules, specifically in relation to secondary employment; and failure to adhere to the company policy on conflicts of interest, specifically in relation to secondary employment. She stated that it was her decision to summarily dismiss the claimant for gross misconduct.

63. In her evidence to us, Ms Reynolds explained her decision and the reason for it. We found her to be a genuine and credible witness and we accepted her evidence that she made the decision to dismiss the claimant for the reasons set out in her decision letter and in her evidence to the Tribunal.

64. On the day after the disciplinary decision, an email from Ms Lawler was emailed to the respondent by the claimant, including to Ms Reynolds (587). Ms Lawler's email referred to things Mr Murrell had said. It did not state that the claimant had worked on 15 and 16 June the previous year. Ms Reynolds' evidence was that (in summary) it was too late and, in any event, did not relate to the matters upon which she had based her decision.

65. The claimant appealed against his dismissal on 12 May 2022 (592). Ms Papargiris was appointed to hear the appeal and she introduced herself by email to the claimant on 16 June (610). In response, the claimant asked to conduct the appeal by email, to which Ms Papargiris agreed. On 7 July, Ms Papargiris sent the claimant some questions (617) to which the claimant replied (618). Ms Papargiris also spoke to Ms Rains and provided her with an email recording what had been discussed on 26 July 2022 (626) and she followed the same process with Ms Reynolds (628).

66. Ms Papargiris approached Ms Butler-Birkett at Selfridges on 27 July 2023 asking if it was possible to arrange for her to speak to Ms Lawler and Ahmer (635). She told us in evidence that she did so because they were not the respondent's employees and that was the correct way to approach them. Ms Butler-Birkett responded to say that Ms Lawler had left the business and a contact at the third party company who employed him was provided for Ahmer. Ms Papargiris approached that third person but was told that they had spoken to Ahmer and he had declined to answer the questions and kindly wished not to be involved (638).

67. Ms Papargiris approached Selfridges regarding swipe cards. She was provided with the name of the correct person to ask questions. She emailed him on two occasions, but no response was received (636).

68. The appeal outcome was provided in a letter from Ms Papargiris dated 17 August 2022 (656). The decision to dismiss was upheld. The decision letter addressed each of the points that Ms Papargiris believed had been raised in the appeal. She explained the steps undertaken as detailed in the previous two paragraphs of this Judgment. She explained that the CCTV footage had not been provided because it was not available at the time of the request. In evidence before us, Ms Papargiris explained her decision. We found her to be a genuine and truthful witness and we accepted the evidence which she gave about her decision.

69. We were shown a social media page (944) which described that the claimant was based at a particular barbers, was able to be booked on line, and walk ins were welcome.

70. We were provided with a large amount of medical documentation, including the claimant's GP records. We were not referred to it all nor do we need to reproduce all that we were referred to. Of note:

a. In a report dated 14 March 2023 (663) Dr Mohammed, a GP, addressed an 18-24 month period, recorded that the claimant had presented with "*significant, red flag headaches*" and "*in December 2021, he presented following 6 months of symptoms and the complete inability to cope. Symptoms included: anxiety, insomnia, low mood, worsening headaches and breathing issues which had a significant impact on his life*";

b. It was accepted by the claimant in cross-examination that his GP records did not record him as telling them he was contemplating suicide and, on occasion, said the opposite;

c. In an entry on 24 June 2021 (686) Dr Saleem recorded a telephone encounter with the claimant, and said there was dizziness and two weeks of constant headaches and other symptoms (that being the entry which led to the hospital referral); and

d. A discharge summary from Salford Royal Hospital following the discharge on 24 June 2021 (829), recorded that the CT scan did not show anything abnormal and said the neurologist had believed the headaches were due to poorly controlled migraine. It also said CSF tests and the CT scan were essentially normal.

71. The claimant had prepared a disability impact statement (83). He said he had suffered from depression and anxiety for well over a decade. He described various affects of his mental health, including severe migraines, low mood, suicidal thoughts, forgetfulness, inability to make decisions, insomnia, difficulty getting up in the morning and constant fear or dread. He specifically described occasions during bad spells when he had not been able to collect his child from school or even answer the phone. His statement was not time-specific and did not explain which contents had occurred when, save for an element towards the end of the statement when the claimant described his symptoms leading up to what he described as his hospitalisation. In that period, he said he suffered from crippling headaches, migraines, dizziness, vertigo like symptoms and he said his memory suffered and he became easily confused. The statement did not state that the claimant had suffered cranial damage nor did he refer to it.

72. We were also provided with an impact statement prepared by the claimant's wife (85). That provided information about the claimant's mental health and the impact of it. It was not clear about when the statement was addressing and to what extent what was said had occurred since the end of the relevant period. The statement did not refer to cranial damage.

73. In his evidence under cross-examination, the claimant said that he was told that there had been blood in his brain at the hospital. Unsurprisingly, he could not recall who exactly had told him that.

74. During the claimant's cross-examination he was asked about his barbering. His witness statement had not said when he worked as a barber or when (if ever) he had been paid to do so. We found that the answers the claimant gave when he was cross-examined about this issue to be confusing and vague. We sought clarity from him about what he was telling us. When we did so, for the first time the claimant confirmed that he had been paid for barbering whilst employed by the respondent.

75. We heard a lot of evidence. This Judgment does not seek to address every point about which we heard or about which the parties disagreed. It only includes the points which we considered relevant to the issues which we needed to consider in order to decide if the claims succeeded or failed. If we have not mentioned a particular point, it does not mean that we have overlooked it, but rather we have not considered it relevant to the issues we needed to determine.

The Law

76. For the unfair dismissal claim brought under section 94 of the Employment Rights Act 1996, the respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for misconduct. If the respondent fails to persuade us that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair.

77. If the respondent does persuade us that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. We must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. That is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

78. In conduct cases, when considering the question of reasonableness, we are required to have regard to the test outlined in **British Home Stores v Burchell** [1980] ICR 303. The three elements of the test are:

(1) Did the employer have a genuine belief that the employee was guilty of misconduct?

(2) Did the employer have reasonable grounds for that belief?

(3) Did the employer carry out a reasonable investigation in all the circumstances?

79. The additional question, is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach.

80. It is important that we do not substitute our own view for that of the respondent. The respondent's representative, in her written submissions, quoted from the decision in **Trust Houses Forte Leisure Ltd v Aquilar** [1976] IRLR 251 when it was highlighted that there may well be cases where reasonable management may take either the decision to dismiss or not to dismiss, but it does not mean that the respondent has not acted fairly if it dismissed. It was also submitted that it is not for us to ask whether a lesser sanction would have been reasonable.

81. In considering the investigation undertaken, the relevant question for us is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted. In her submissions, the respondent's representative relied upon **Whitbread plc v Hall** [2001] ICR 699 and said that the question is whether the procedure adopted by the respondent was, taken as a whole, one which no reasonable employer could adopt. She also emphasised that breaches of procedure were merely factors to take into account, but the weight to be given to them would vary depending upon the circumstances. Specifically, she said that the fact that certain evidence was not obtained or made available would not render a dismissal procedurally unfair (relying upon **Fuller v Lloyds Bank plc** [1991] IRLR 336 and she submitted that the fact that a specific witness was not interviewed or a piece of evidence not obtained, would not render the dismissal unfair unless the overall investigatory process fell outside the band of reasonable responses). A fair appeal hearing is capable of remedying earlier defects in the disciplinary process, because, in considering fairness, we must look at the process followed as a whole, including the appeal (the claimant referred to **Tayler v OCS Group Ltd** [2006] IRLR 613 and **Whitbread & Co plc v Mills** [1988] IRLR 501).

82. In the case of **Polkey** [1987] IRLR 503 the House of Lords held that the fact that the employer can show that the claimant would have been dismissed anyway (even if a fair procedure had been adopted) does not make fair an otherwise unfair dismissal. However, such evidence (if accepted by us) may be taken into account when assessing compensation and can have a severely limiting effect on the compensatory award. If the evidence shows that the claimant may have been dismissed properly in any event, if a proper procedure had been carried out, we should normally make a percentage assessment of the likelihood and apply that when assessing the compensation. In applying a **Polkey** reduction we may have to speculate on uncertainties to a significant degree. In this case the respondent contended that any reduction should be one hundred percent. The onus is on the respondent to adduce evidence to show that the dismissal would (or might) have occurred in any event.

83. Section 122(2) of the Employment Rights Act 1996 provides that the basic award shall be reduced where the conduct of the employee before dismissal was such that it would be just and equitable to do so. It is important to note that a key part of the test is determining if it is just and equitable to do so. Section 123(6) of the Employment Rights Act 1996 provides that if we find that the claimant has, by any action, to any extent caused or contributed to his dismissal, we shall reduce the amount of the compensatory award by such amount as we consider just and equitable having regard to that finding. This test differs from the test which applies to the basic award. The deduction for contributory fault can be made only in respect of

conduct that persisted during the employment and which caused or contributed to the respondent's decision to dismiss. There are three factors required to be satisfied for us to find contributory conduct: the conduct must be culpable or blameworthy; it must have caused or contributed to the dismissal; and it must be just and equitable to reduce the award by the proportion specified.

84. For wrongful dismissal and breach of contract, the test is different to that which we have described for unfair dismissal. For that claim, we must decide whether the respondent dismissed the claimant in breach of contract. That involves deciding whether the misconduct alleged actually occurred, and whether that misconduct meant that the respondent was entitled to dismiss the claimant summarily. If the claimant did not commit a repudiatory breach of contract, the respondent would not have been entitled to dismiss summarily.

85. Section 6 of the Equality Act 2010 provides that:

> **"***A person (P) has a disability if:*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.***"**

86. Section 212 of the Equality Act 2010 provides that "*substantial*" means more than minor or trivial.

87. Schedule 1 Part 1 of the Equality Act 2010 includes further provisions regarding determination of disability. Paragraph 2 provides that:

> *"The effect of an impairment is long-term if:*
>
> *(a) It has lasted for at least 12 months;*
>
> *(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.*
>
> *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"*

88. Schedule 1 Part 1 of the Equality Act 2010 also includes provisions which relate to the effect of medical treatment.

89. The guidance on matters to be taken into account in determining questions relating to the definition of disability, issued by the Secretary of State, confirms that "*likely*" should be interpreted as meaning that it could well happen. That guidance also addresses: substantial; the effects of behaviour; the meaning of adverse effects on the ability to carry out normal day-to-day activities; and day to day activities. In her submissions, the respondent's representative listed the examples of normal day-to-day activities in the guidance. She also quoted from what it said about the

meaning of substantial, that "*is more than would be produced by the sort of physical or mental conditions experienced by many people who have only minor effects".*

90. The burden is on the claimant to prove that the relevant condition was a disability at the relevant time. As the respondent submitted, it is not required to disprove the claimant's alleged disability or disabilities.

91. The respondent submitted that what must be found is a substantial adverse effect, not any adverse effect. The examination must be on what a person cannot do, rather than what they can (**Goodwin v Patent Office** [1999] IRLR 4).

92. The relevant time for determining disability is when the alleged discriminatory conduct is said to have taken place, which in this case was 9 May 2022 (it is not whether the claimant had a disability as at the date of this hearing).

93. The respondent's submissions also referred to **McDougall v Richmond Adult Community College** [2008] ICR 431 and submitted that the prediction as to the likely recurrence of a condition must be made on the basis of the evidence available at the time of the discriminatory act complained of, not retrospectively at the date of the hearing.

94. Section 19 of the Equality Act 2010 provides:

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

95. When considering a claim of indirect discrimination, it is necessary to consider the statutory test in stages:

a. The first stage is to establish whether there is a PCP;

b. If we are satisfied that the PCP contended for has been or would be applied, the next step is the analysis of whether there is a particular disadvantage for those with the relevant protected characteristic when compared to those that do not share the protected characteristic. The

comparative exercise must be in accordance with section 23(1) of the Equality Act 2010. In relation to disability, it is therefore necessary to consider those with the claimant's particular disability.

c. If the group disadvantage is established, then it must be shown that it did or would put the claimant at that disadvantage.

96. The burden of proving those elements is on the claimant. In her submissions, the respondent's representative emphasised that for (b) and showing some disparate adverse impact on the group with the claimant's disability, it is not enough that the claimant was himself disadvantaged.

97. With regard to justification (that is proving that the PCP was a proportionate means of achieving a legitimate aim), the burden of proof is on the respondent to establish justification. There is no statutory definition of a legitimate aim, but it must be given a wide definition (**Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601). We must be satisfied that the measures must correspond to a real need and are appropriate with a view to achieving the objectives pursued and are necessary to that end. We must apply the proportionality principle. Necessary means reasonably necessary. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the respondent. The more serious the disparate adverse impact, the more cogent must be the justification for it. It is for us to weigh the reasonable needs of the respondent against the discriminatory effect of the respondent's measure and to make our own assessment of whether the former outweigh the latter.

98. Section 20 of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20(3) provides that the duty comprises the requirement that where a provision, criterion or practice of the employer's puts a person with a disability at a substantial disadvantage in relation to a relevant matter in comparison with people who do not have a disability, to take such steps as it is reasonable to have to take to avoid the disadvantage. That requires not only the existence of a disability, but also: identification of a PCP; and knowledge (actual or constructive) on the part of the employer.

99. Section 21 of the Equality Act 2010 provides that a failure to comply with the requirement set out in section 20 is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work.

100. The matters we must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of an employer;

b. the identity of non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage suffered by the claimant.

101. The requirement can involve treating disabled people more favourably than those who are not disabled.

102. Whether something is a provision, criterion or practice (PCP) should not be approached too restrictively or technically, it is intended that phrase should be construed widely. A one-off act can be a PCP, but it is not necessarily the case that it is.

103. The respondent's representative emphasised that the claimant must demonstrate that any PCP placed him at a substantial disadvantage in comparison to non-disabled persons (relying upon **Royal Bank of Scotland v Ashton** [2011] ICR 632).

104. In terms of knowledge of disability and reasonable adjustments, the duty only applies if the respondent: knew or could reasonably be expected to know that the claimant had the disability; and knew or could reasonably be expected to know that the claimant was likely to be placed at a substantial disadvantage compared with persons who are not disabled (that is aware of the disadvantage caused by the application of the PCP). The question of whether the respondent could reasonably be expected to know of the disability and/or the substantial disadvantage is a question of fact for us to decide. The focus is on the impact of the impairment and whether it satisfies the statutory test and not the label given to any impairment.

Conclusions – applying the Law to the Facts

Unfair dismissal

105. The first issues which we needed to consider were whether the respondent had shown the principal reason for dismissal and whether that was a potentially fair reason under section 98 of the Employment Rights Act 1996? The respondent contended that the reason was conduct. The person at the respondent who made the decision to dismiss the claimant was Ms Reynolds. We found her to be a genuine, credible, and clear witness. We accepted that she made the decision to dismiss for the reason which she told us, and which was recorded in her dismissal letter. That reason was conduct. In any event, in cross-examination the claimant accepted that the reason why Ms Reynolds had made her decision was the reason she gave. We found that the reason for dismissal was conduct and that is a potentially fair reason under section 98.

106. The third issue for us to decide, was whether the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? That is, we needed to determine whether or not the dismissal was fair applying the test set out in section 98(4) of the Employment Rights Act 1996.

107. In the list of issues, was set out five questions which we needed to ask ourselves in determining whether the dismissal was fair. Those questions reflected the key questions which needed to be determined as set out in the section on the law above and following the cases including **Burchell**. Accordingly, we considered each of those questions as part of reaching our decision.

108. Issue 1.3.1 asked whether the respondent genuinely believed the claimant had committed misconduct? We have in practice already addressed this question. The decision-maker was Ms Reynolds. We accepted her evidence. For the appeal the decision-maker was Ms Papargiris. We found Ms Papargiris to be a genuine witness and we also accepted that she made the decision in the appeal for the reasons she explained both in evidence and in her appeal decision letter. We found that all of the respondent's witnesses genuinely and obviously believed that the claimant was guilty of the misconduct alleged and found by them to have occurred.

109. For issue 1.3.2, we needed to decide if there were reasonable grounds for that belief? We found that there were reasonable grounds. The respondent's decision-makers did not have to find that the misconduct occurred beyond all reasonable doubt. On the balance of probabilities, we found that there was clearly sufficient evidence to support the decisions that: the claimant had not attended work on 15 and 16 June 2021 and had completed the form to say that he had; and that he had undertaken work as a barber whilst he was employed. There were reasonable grounds for the decisions taken.

110. Issue 1.3.3 was about reasonable investigation and, in practice, was a central part of the case which we heard. We needed to determine whether, at the time the belief was formed, the respondent had carried out a reasonable investigation. We did not find that the investigation undertaken was perfect or was the best which could have been undertaken from the outset. There was a lack of formal statements from two employees and the documents recording what they had to say were not taken at the relevant time. It was also not ideal that the CCTV footage for the two days was not obtained from Selfridges while it was still available, and/or that greater efforts were not made to persuade Selfridges to provide it (when available). In her submissions, the respondent's representative accepted that it was not a perfect investigation but argued that it did not need to be. We agreed with her. The question which we needed to determine, was whether the investigation fell within the range of reasonable investigations which a reasonable employer could have adopted. We found that it did. We were also mindful that we needed to determine whether a reasonable investigation had been undertaken at the time that the decision was made. Prior to reaching her decision, Ms Reynolds undertook the steps she reasonably should have undertaken to ensure that she had the best material available (and by that time confirmatory emails from Mr Murrell and Mr Hoyte had been obtained and the CCTV was no longer available). Similarly, Ms Papargiris took all appropriate and reasonable steps prior to reaching her appeal decision. We found that the investigation undertaken was one a reasonable employer would undertake. Focussing on the 15 and 16 June, there were two employees who said the claimant had not been at work, that was corroborated or supported by the absence of any swipe card records for the claimant or any till transactions undertaken by him, and there was no other specific evidence available at the time of the decision which would have established whether or not he had been in work on those days.

111. Issue 1.3.4 asked whether the respondent followed a reasonably fair procedure? We found that it did. We do not need to recap upon the full process followed and the steps undertaken.

112. A focus of the claimant's complaints about the process, was the manner of his suspension and what he was told when he was suspended. Ms Rains could have

told the claimant why he was suspended when he was suspended, and (ideally) she (or someone else) could have suspended him in-person and not by phone. We did also question whether Ms Rains should have carried on with the suspension immediately after she was told what the claimant told her in the return-to-work meeting/conversation, without further consideration. However, we decided that none of those things were ultimately decisive in determining whether a fair procedure had been conducted in the context of the dismissal, and we did not find that any of those things rendered the process unfair, even if they could have been done differently. Suspension was, of course, a neutral act, as was made clear to the claimant, and he was informed about the subject of the allegations the following day and given an opportunity to explain and respond shortly after the suspension.

113. We did also consider the issue of delay. There was ten months from the start of the procedure until the decision to dismiss was made. The claimant highlighted that was a long time, which it was. However, we found that, whilst the process took a long time to complete, we had no criticism of the respondent for the period when the reasons for it were considered including for delaying the investigation to obtain occupational health advice and, thereafter, to allow time for the grievance and grievance appeal to be determined. We also did not find that the delay in the process ultimately impacted upon the fairness of the process (with the only adverse impact being the fact that the CCTV was no longer available, something which we were told would have occurred early in the process in any event).

114. Issue 1.3.5 asked whether dismissal was within the range of reasonable responses? For the findings made by Ms Reynolds, as they related to the two days when the claimant was found to have not been in work but had recorded that he had been present, and the breach of trust identified as a result, we found that dismissal was an entirely appropriate sanction which could be imposed by a reasonable employer. Had we been considering the allegations arising from the claimant's barbering only and in isolation, this issue might have been more finely balanced, but we did not need to decide whether dismissal for the barbering allegations in isolation would have been within the range of reasonable responses, because the respondent dismissed the claimant based upon its finding on all the allegations. It was Ms Reynolds' evidence that she linked the two things and made the decision based upon all the allegations found together. Collectively, based upon what Ms Reynolds found, we had no doubt whatsoever that the decision to dismiss was within the band of reasonable responses which a reasonable employer could reach.

115. As a result and having considered the issues 1.3.1-1.3.5, we found that the respondent acted reasonably in all the circumstances in treating the claimant's misconduct as a sufficient reason to dismiss him. We did not find that the dismissal was unfair.

Polkey and contributory fault

116. As a result of our decision, we did not need to go on and determine the remedy issues which it had been agreed would be determined alongside the liability issues for unfair dismissal (issues 2.6-2.8.5 and 2.8.9-2.8.11). The so-called **Polkey** issues could only really be determined where unfairness had been identified. However, we did find that had the matters which we have identified in relation to the investigation not being perfect been found to have meant that the dismissal was

unfair (which we did not), we would in any event have found that there would have been a one hundred percent chance that the claimant would have been fairly dismissed in any event (and that his compensation should be reduced accordingly). In terms of contributory fault, we also would have found that the claimant contributed to his dismissal one hundred percent and would have reduced both awards accordingly (applying the relevant test as it applied to each of the two types of award, it would have been just and equitable to reduce both awards because of the conduct of the claimant before dismissal and because he contributed to his dismissal by blameworthy conduct).

Wrongful dismissal

117. We then considered issue three, wrongful dismissal (and notice pay). The claimant's notice period was three weeks. The claimant was not paid for his notice period or employed for it. The question we needed to decide was whether the claimant fundamentally breached the contract of employment thereby entitling the respondent to dismiss him without notice?

118. We found that, on the balance of probabilities, the claimant did not attend work on 15 and 16 June 2021, based upon the evidence relied upon by the respondent: two employees who said he did not attend work at that time; an absence of any swipe card use by the claimant on those days (in contrast to his use on other adjacent days); there being no till transactions made by the claimant on the two days; the text message sent by the claimant telling a colleague he could not work his shift on one of the days and asking the colleague if he could do so; and there being no other evidence available which showed that the claimant had been in or near the Trafford Centre or attended work on the relevant days. The claimant did record that he had been present on the two days. He held a management role and was in a position of trust. In so recording when he had not worked, the claimant was in fundamental breach of contract and the respondent was entitled to dismiss him without notice as a result.

119. For the barbering allegations alone, we would not have found the claimant to have been in fundamental breach of contract, but the fact that we would not have done so does not impact upon the decision we have reached based upon the allegation arising from 15 and 16 June 2021. The respondent did not prove to us, or provide sufficient evidence that, any barbering undertaken by the claimant was in fact a fundamental breach of the contract. However, because of our decision based upon the 15 and 16 June, the claimant's breach of contract claim did not succeed.

Disability

120. In his disability discrimination claims, the claimant relied upon two potential disabilities: cranial damage; and depression. We dealt with the two alleged disabilities entirely separately, albeit that we were aware that the focus of the Equality Act is on the impact of the relevant impairment and not the definition of it.

121. We first considered the claimant's claim that he had cranial damage and that was a disability at the relevant time (which was May 2022). The first question (issue 4.1.1) was whether he had a physical or mental impairment? In this context the question was whether the claimant had cranial damage? It was for the claimant to

prove that he did. We found that the claimant did not have the impairment relied upon.

122. In reaching this decision, we took particular notice of the two discharge summaries provided which recorded what was said about the tests undertaken by the hospital on 24 June 2021 (492) (829). They did not record any cranial damage and the test results appeared to identify no abnormality. We also noted the claimant's own disability impact statement (83) did not state that he had suffered cranial damage. In his claim form (8), the claimant described a brain injury. In his evidence under cross-examination, the claimant said that he was told that there had been blood in his brain at the hospital, but that was not supported by any of the medical evidence. We also took into account that the claimant had described to Ms Rain in his return-to-work conversation on 15 July 2021 (243), that he had had a spontaneous aneurism and a bleed on the brain but noted that those were not statements supported by medical evidence.

123. It is for the claimant to prove that he had the disability relied upon and that he had the impairment relied upon. For the alleged cranial damage, we did not find that the claimant had done so. We placed particular emphasis on the hospital records and the absence of any evidence of cranial damage in them, but in any event did not find that any of the genuine evidence provided to us supported the claimant's contention that he suffered cranial damage or had had a bleed on the brain. As a result of our decision on that issue, we did not and could not go on to consider issues 4.1.2-4.1.5 in relation to cranial damage.

124. We then considered the question of depression and found the position to be somewhat different because there was far greater evidence in support of the claimant's depression and his argument that it was a disability at the relevant time. It was accepted in the respondent's representative's submissions that the claimant had a mental impairment of depression, and the respondent's solicitor's letter of 15 June 2023 (91) recorded that the claimant's medical records evidenced that he had attended his GP for anxiety and depression dating back to January 2004. The diagnosis of depression was recorded in the claimant's own medical records and was confirmed in his disability impact statement. We found that the claimant did have a mental impairment as a result.

125. Issue 4.1.2 asked whether it had a substantial adverse effect on his ability to carry out day-to-day activities? The respondent emphasised that it must have a substantial impact. We noted that substantial in this context means, only, more than minor or trivial. In his disability impact statement, the claimant stated that he has had severe migraines, something which was supported by the other medical evidence (including the reason for his hospital referral in June 2021). He also told us that he suffered from low mood and insomnia. In his statement, he described occasions when he was unable to leave the house or collect his children from school and he described being unable to answer a phone call. Whilst we gave it very limited weight, that was also broadly corroborated by the claimant's wife's impact statement (85) – we would note that a difficulty with that statement was that it was not possible to identify when she was describing matters which had occurred at the relevant time and when she was describing subsequent matters. The respondent challenged the claimant's evidence in his impact statement that he had suffered from suicidal thoughts based upon the absence of any reference to them in the medical records

(and statements to the contrary), so we put that element of his evidence to one-side when reaching this decision. We found that, on balance, and based upon what the claimant said in his disability impact statement, the claimant's depression did have a substantial adverse effect on his ability to carry out day-to-day activities, because picking children up from school and answering the phone are normal day-to-day activities and the requirement is that the impact is more than minor or trivial.

126. Issue 4.1.5 was for us to determine whether the disability was long-term. The test is set out more fully in the list of issues and in the section on the law above. We found that the effects of the claimant's depression on him had clearly been long-term because the condition and its impact on the claimant had lasted from 2004 until 2021 (as at the relevant time) and a condition and its effects are long-term even where the impact is not constant throughout the relevant period. When considering depression, we did not find the symptoms described by the claimant or the impacts on his day-to-day activities to be stand-alone episodes, we found that the impact was long-term and therefore the definition of disability was met at the relevant time for the depression.

127. We did not need to consider issues 4.1.3 and 4.1.4 as a result of that finding, but would confirm that the claimant did not produce sufficient evidence about the medical treatment he received to have enabled us to have found that the impairment would have had a significant long-term adverse effect on his ability to carry out normal day-to-day activities if he had not had treatment or been given medication.

128. We agreed with the respondent's submission that the claimant had, on occasion, exaggerated the impact of his conditions. However, the fact that he had on occasion done so, did not mean that we did not find that the claimant had the disability found. We also noted that our decision was consistent with the view expressed in the first occupational health report by the advisor (albeit that was correctly caveated as not being definitive because it is a legal decision).

Indirect disability discrimination

129. For the indirect disability discrimination claim, we first needed to consider whether the respondent had the provision, criterion or practice (PCP) relied upon. The contended PCP was a requirement for employees under disciplinary investigations to be able to remember and provide evidence about the events in question. The respondent took issue with the word requirement in this contended PCP. We agreed with that submission. There was not a requirement for employees to remember things or provide evidence during a process. That was not the respondent's policy. As a result, we did not find that the respondent had or applied the specific PCP relied upon. However, we would have found that the respondent applied a PCP, if the PCP relied upon had been that there was an expectation that employees under disciplinary investigations would be able to remember and provide evidence about the events in question. As a result, we proceeded to consider the other indirect discrimination issues considering that PCP, but not the one alleged or relied upon.

130. Applying the potential PCP identified at paragraph 129, we found that the respondent did apply that PCP to the claimant. It was also a PCP which the

respondent applied to everyone facing disciplinary allegations of a similar nature (issue 5.3).

131. Issue 5.4 asked us to determine - did the PCP put persons with whom the claimant shares the characteristic - those who have the same disability - at a particular disadvantage when compared with other people in that, if not guilty of the misconduct alleged, they will not be able to remember and provide evidence about the events in question? That required us to decide whether the PCP we have identified did place people with depression at a disadvantage when compared with those who do not? The respondent's representative submitted that many individuals with depression are able to answer questions about their conduct during disciplinary investigations without suffering any particular disadvantage in doing so. We agreed with that submission. Having depression does not mean that an individual will have memory loss or be unable to recall what occurred. We did not find that the PCP placed persons who shared the claimant's disability at a disadvantage.

132. Issue 5.5 asked whether the claimant was put at that disadvantage? We noted that there was limited other evidence of the claimant suffering memory loss, besides his inability to recall what had happened on the relevant two days. He was able, for example, to provide the respondent with a detailed account about something which had occurred on 13 June which related to the allegation which was not found. There was no medical evidence which genuinely backed up the claimant's assertion of memory loss, save where the reports had clearly been recording only what the claimant had told the advisor.

133. We found the evidence the claimant gave when cross-examined about the text messages of 14 June, when he struggled to accept they could be to/from him when they clearly were, to have been an attempt to mislead us. His evidence about barbering, including what he informed the respondent during their internal procedures – when he admitted to us that he had undertaken some paid barbering whilst employed – was, at best, misleading and, more realistically, was not honest. Similarly, the claimant's inability to confirm the details of, and dates of, the course he undertook caused us to doubt his credibility. As a result, we accepted the respondent's representative's submission that we should only accept the claimant's evidence where it was supported or corroborated, because of our findings about his credibility. On that basis, and in the absence of any medical evidence that genuinely demonstrated memory loss, we did not find that the claimant had suffered the memory loss alleged. As he did not do so, the claimant had not proved that he was put at a disadvantage by the PCP.

134. Issue 5.6 was whether the respondent had shown that the PCP was a proportionate means of achieving a legitimate aim? The aims relied upon are set out in the appended list of issues. We found that the aims recorded, together, were clearly legitimate. We also found that the PCP was a proportionate means of achieving those aims. Therefore, even had we found for the claimant on all of the other aspects of the indirect discrimination claim, we would have found the respondent's approach to have been justified. Giving employees the opportunity to provide evidence about the issues being investigated and give their recollection of the events, is the right and fair way for an employer to conduct a disciplinary process. We did not find that there was something less discriminatory (or potentially discriminatory) which could have been done instead.

The duty to make reasonable adjustments

135. Issue 6.2 raised the same issues as issue 5.1. For the same reason, we did not find that the respondent applied the PCP relied upon. As with the indirect discrimination claim, we considered the other issues as they related to a PCP of expectation rather than requirement.

136. As with issue 5.4, for issue 6.3 we did not find that the PCP placed people who shared the claimant's disability at a particular disadvantage when compared to others.

137. Issue 6.4 and 6.1 addressed the respondent's knowledge. The claimant clearly informed the respondent about what he asserted were his memory issues and the impact that he said it had on him for reasons relating to his disability. Had we found that the claimant suffered the memory issue upon which he relied, the respondent was clearly and fully aware of the impact which he said it had upon him. We were surprised that the respondent argued that it was unaware in the light of the substantial correspondence from the claimant during the process that was provided.

138. Issue 6.5 looked at the reasonable adjustments the claimant contended the respondent should have made. The first such adjustment contended was that the respondent should have interviewed the witnesses that the claimant suggested, being Dawn Lawler, Chris Hoyles, and Ahmer Aleem. The respondent did interview Mr Hoyles and a document was produced which confirmed what he said. The respondent attempted to arrange an interview with Ms Lawler and Mr Aleem. That occurred during the appeal process, which is when the claimant asked the respondent to do so. The respondent was unable to arrange an interview with either of those two individuals. As a result, we did not find that interviewing those two individuals was an adjustment that the respondent could reasonably make. It was not a reasonable adjustment for the respondent to interview an ex-employee of another company, or an employee of another company who it had been informed did not wish to be interviewed.

139. The second adjustment contended at 6.5.2 was that the respondent should have carried out the claimant's request and involved the Selfridges security department. The same position applies as for 6.5.1, as the respondent did endeavour to involve the relevant person at the Selfridges department at the appeal stage (using the name provided) and he did not respond.

140. For both 6.5.1 and 6.5.2 we also found that the adjustment sought would not have addressed any contended disadvantage arising from the application of the PCP in any event. Taking the steps proposed would not have provided any evidence about whether the claimant was in work on 15 and 16 March. For Ms Lawler and Mr Aleem it was not genuinely proposed that it would and it would in any event not have done so for all the proposed people, over a year later after the events as they would not have recalled whether he was in work on those days.

141. We have already stated that obtaining the CCTV footage at the outset of the investigation would have been best practice, or at least taking greater steps to try to obtain it would have been. It was not available by the time of the disciplinary decision. It was requested at the start of the investigation by Ms Rains and was not

provided (or retained), but that was not followed up. The respondent was not the organisation responsible for the CCTV, its retention or destruction. By the time the claimant requested the CCTV footage, the evidence before us was that it no longer existed. As a result, it was not a reasonable adjustment which the respondent was legally required to make, at the time the claimant requested it (as alleged).

142. The final reasonable adjustment relied upon was recorded at 6.5.4 as being "*taken into account the claimant's memory loss*". In practice this added nothing to the decisions we had already made. When asked at the time of submissions, the claimant was unable to explain precisely what the respondent should have done under this alleged adjustment. We accepted that both Ms Reynolds and Ms Papargiris took into account the claimant's alleged memory loss when reaching their decisions, but it did not change their decisions. We fully accepted the reasons they gave as to why it did not do so and should not have done so. In practice we have already addressed any potential adjustment in our other findings.

Summary

143. For the reasons explained above, the Tribunal did not find for the claimant in any of his allegations.

Employment Judge Phil Allen
6 August 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 8 AUGUST 2024

FOR THE TRIBUNAL OFFICE

Annex
List of Issues

1. Unfair dismissal

Reason

1.1 Has the respondent shown the reason or principal reason for dismissal? The respondent says the reason was gross misconduct.

1.2 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

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

1.3.1 The respondent genuinely believed the claimant had committed misconduct;

1.3.2 there were reasonable grounds for that belief;

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

1.3.4 the respondent followed a reasonably fair procedure;

1.3.5 dismissal was within the band of reasonable responses.

2. Remedy for unfair dismissal

2.1 N/A

2.2 N/A

2.3 N/A

2.4 N/A

2.5 N/A

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

2.7 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?

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

2.8.1 What financial losses has the dismissal caused the claimant?

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

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

2.8.4 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?

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

2.8.6 N/A

2.8.7 N/A

2.8.8 N/A

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

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

2.8.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

3. Wrongful dismissal / Notice pay

3.1 What was the claimant's notice period?

3.2 Was the claimant paid for that notice period?

3.3 If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

4. Disability

4.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about, namely his dismissal in May 2022? The Tribunal will decide:

4.1.1 Did he have a physical or mental impairment?

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

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

4.1.4 If so. would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

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

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

4.1.5.2 if not, were they likely to recur?

5. Indirect discrimination (Equality Act 2010 section 19)

5.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

5.1.1 A requirement for employees under disciplinary investigations to be able to remember and provide evidence about the events in question.

5.2 Did the respondent apply the PCP to the claimant?

5.3 Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic, or would it have done so?

5.4 Did the PCP put persons with whom the claimant shares the characteristic - those who have a disability with similar impairments - at a particular disadvantage when compared with other people in that, if not guilty of the misconduct alleged, they will be able to remember and provide evidence about the events in question?

5.5 Did the PCP put the claimant at that disadvantage?

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

5.6.1 To apply the respondent's disciplinary policy in a fair, consistent, and objective manner; and

5.6.2 To ensure employees have a full and fair opportunity to communicate all key information relating to the allegations against them and to provide an opportunity for that information to be verified and/or tested.

5.7 The Tribunal will decide in particular:

5.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

5.7.2 could something less discriminatory have been done instead; The claimant says that the respondent should have taken into account his memory loss and carry out the steps noted as reasonable adjustments (below);

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

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

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

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

6.2.1 A requirement for employees under disciplinary investigations to be able to remember and provide evidence about the events in question.

6.3 Did the PCP put persons with whom the claimant shares the characteristic - those who have a disability with similar impairments - at a substantial disadvantage when compared with other people in that, if not guilty of the misconduct alleged, they will be able to remember and provide evidence about the events in question?

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

6.5 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

6.5.1 Interview witnesses that the claimant had suggested:

6.5.1.1 Dawn Lawler
6.5.1.2 Chris Hoyes
6.5.1.3 Amar Aleem

6.5.2 carried out the claimant's requests to involve Selfridges security department;

6.5.3 carried out the claimant's request to review CCTV footage;

6.5.4 taken into account the claimant's memory loss.

6.6 By what date should the respondent reasonably have taken those steps?

7. Remedy for discrimination or victimisation

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

7.2 What financial losses has the discrimination caused the claimant?

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

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

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

7.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

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

7.8 N/A

7.9 N/A

7.10 N/A

7.11 N/A

7.12 Should interest be awarded? How much?