EMPLOYMENT TRIBUNALS

Claimant: Mr Nick Thoday

Respondent: John Lewis Plc

Heard at: Cambridge Employment Tribunal

On: 22 July 2024 (Tribunal reading day)
23, 24, 25, 26 July 2024 (4 hearing days)
29 July 2024 (Tribunal deliberation day)
30 July 2024 (Tribunal to give judgment due to unforeseen sickness this was postponed and judgment reserved)

Before: Employment Judge Hutchings
Mr C. Grant
Miss W. Smith

Representation
Claimant: in person and Mrs Emmerson, lay representative
Respondent: Ms Nicholls, counsel

RESERVED JUDGMENT

It is the unanimous decision of this Employment Tribunal that:

1. At the relevant times the claimant was not a disabled person as defined by section 6 Equality Act 2010 because of long covid.

2. At the relevant times the claimant was not a disabled person as defined by section 6 Equality Act 2010 because of a heart condition.

3. The complaint of health and safety detriment under section 44 of the Employment Rights Act 1996 was not presented within the applicable time limit. It was reasonably practicable to do so. The complaint of health and safety detriment is therefore dismissed.

4. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

5. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

6. The complaint of unfair dismissal is not well-founded and is dismissed. The claimant was fairly dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent, a brand of department stores, as a chef in one of the kitchens located at Magna Park 1 in the respondent's Fenny Park distribution centre. Following a short period as an agency worker with the respondent, the claimant's employment started on 15 September 2015 and continued until his dismissal on 27 July 2021, the respondent says on the grounds of ill health and the claimant's inability to achieve and maintain a reasonable level of attendance.

2. ACAS consultation started on 29 September 2021 and a certificate was issued on 8 November 2021. By claim form dated 21 December 2021 the claimant made complaints of unfair dismissal and disability discrimination. Case management hearings before Employment Judge Drake in November 2022 and Employment Judge Palmer in February 2023 clarified the legal basis of the factual complaints made in the claim form, and these are recorded in the list of issues below.

3. The complaints are:

    3.1. Health and safety detriment contrary to section 44 of the Employment Rights Act 1996; the claimant says his complaints to Mr Sparks and Ms Chapman in May 2020 about colleagues failing to wear masks and social distance resulted in him being singled out by Mr Sparks following a health and safety presentation in June 2020.

    3.2. Unfair dismissal contrary to section 94 of the Employment Rights Act 1996; the claimant says he was dismissed at a time when he was diagnosed with chronic Chronic Obstructive Pulmonary Disease ('COPD'), a heart condition and long covid.

    3.3. Discrimination arising from disability contrary to section 15 of the Equality Act 2010; the claimant says his treatment was unfavourable as he was dismissed because of these conditions.

    3.4. Failure to make reasonable adjustments contrary to section 20 and 21 of the Equality Act 2010; the claimant cites 3 adjustments which he says should have been made to avoid his dismissal.

4. By grounds of resistance the respondent denies that Mr Sparks singled the claimant out, submitting in any event that this claim is out of time. The respondent denies that the dismissal was unfair, asserting the reason given to the claimant for his dismissal (namely capability and the claimant's inability to achieve and maintain a reasonable level of attendance) was a fair reason and that it followed a fair process to effect the dismissal. The respondent accepts the claimant had COPD at the relevant time; it does not accept he had a heart condition or long covid at the relevant time. The respondent accepts the claimant's dismissal amounted to unfavourable treatment; the respondent contends it had legitimate reasons for dismissing the claimant. The respondent

asserts that there were no reasonable adjustments that could have been made, in addition to the process the respondent followed to effect dismissal, that would have avoided the claimant's dismissal, and this was confirmed by the occupational health referrals.

5. We note that several times during the hearing the claimant sought to raise claims which are not within in the jurisdiction of the Employment Tribunals (by which we mean that we do not have the power to make a decision about a complaint) or sought to rely on facts about which he had not complained either in his claim form or witness statement. Specifically, he sought to complain that the respondent had breached Covid-19 regulations in the kitchen where he worked, with the view that this was something the Employment Tribunals could consider. We explained the reasons we could not several times during the hearing. In our deliberations we decided that it is important to record in this introduction why we could not address the claimant's concerns and why a copy of the kitchen plan was not relevant to his claim.

6. The health and safety claim we can consider is whether the claimant raising concerns about covid masks and social distancing to Mr Sparks and Ms Chapman caused Mr Sparks to subsequently ask the claimant a question at a health and safety presentation and whether the question alleged was a detriment. This we can, have had, determined. An Employment Tribunal cannot decide whether an organisation has breached health and safety regulation generally.

Evidence and procedure

7. The Tribunal had the benefit of a 720 hearing file. At the start of the hearing the claimant told us the hearing file was not agreed; commenting he had not read the hearing file or the witness statements. The Tribunal took the first day to read the evidence and suggested to the claimant he do the same, having explained to him the process of an Employment Tribunal hearing, setting out an outline timetable. We gave the claimant and Ms Emmerson guidance on asking questions of the respondent's witnesses mindful that the claimant is representing himself and of rule 2 of the Employment Tribunals Rules of Procedure 2013, particularly to ensure parties are on an equal footing.

8. The claimant raised concerns that the file did not include an NHS Covid shielding letter he says he sent to the respondent by post. We have addressed the concerns he raised about the covid letter in our reasons.

9. On 15 July 2024 the claimant had delivered by hand a 38 page bundle of documents, which included some document already in the hearing file. The respondent did not object to these documents being admitted as evidence.

10. Parties also submitted a separate 34 page bundle of Tribunal correspondence, which we also admitted as evidence.

11. The claimant represented himself with support from a friend, Mrs Marie Emmerson. Both gave sworn evidence. The claimant also provided a witness statement from his father, who he told us was not able to attend the hearing. This statement did not provide direct evidence of the events about which the claimant complains.

12. The respondent was represented by Ms Nicholls of counsel who called sworn evidence from:

    12.1. Mr Graham Sparks, section manager for partner's dining rooms, including the site at which the claimant worked;
    12.2. Ms Annette Chapman, who at the relevant times was section manager at the Magna Park dining room where the claimant worked; and
    12.3. Ms Melanie Ridley, a manager in the respondent's Appeal Office.

13. On day 4 of the hearing (25 July 2024) the claimant produced emails dated 4 May 2021 and 15 June 2021 between Ms Chapman and Melanie Trenfield. The Tribunal admitted these short emails as evidence; they are contemporaneous documents relevant to the history and order of the CCN reports produced by Ms Trenfield.

14. The Tribunal took regular breaks, starting at 10am and finishing no later than 4pm each day. On day 1 the claimant confirmed he did not require any reasonable adjustments.

Preliminary applications

15. On day 1, we accepted the respondent's amended Grounds of Resistance sent to the Tribunal on 9 July 2024, in which the respondent accepted that the claimant had a disability of ("COPD") at the relevant time.

16. On day 2 the claimant sent the Tribunal and respondent an email applying to strike out the response pursuant to rule 37(1)(b) of the Employment Tribunals Rules of Procedure 2013 (the 'Rules) 'that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious.' In summary the email made 2 points:

    16.1. The respondent's representative had not disclosed a shielding letter the claimant says he received by post only and had given to the respondent sometime in January 2021; and
    16.2. Documents had been 'adjusted', were 'fabricated' for the benefit of the respondent, and 'documents within the bundle have been altered to cover the poorly managed dismissal procedure.'

17. Ms Nicholls made oral submissions opposing the application on behalf of the respondent, rejecting "in the strongest possible terms" that the respondent's representative had altered documents.

18. The application was refused and reasons given orally at the hearing, as follows. The nature of any shielding letter is a matter of evidence, which must be explored by the Tribunal in the context of all oral and documentary evidence. It is for the Tribunal to decide whether the letter was a postal document, whether it was handed to the respondent and, if so, then the Tribunal will consider why it is not in the hearing file.

19. The claimant has not provided any basis to support a very serious allegation that documents have been changed. Where the content of a document is challenged, it is for the Tribunal to determine if there has been any change to the document. The matters raised by the claimant are not supported by any

evidence that the conduct of the claimant is scandalous (irrelevant and abusive of the other side). The respondent has included an NHS letter related to covid in the hearing file. This document was sent to the claimant by email. To include claimant evidence in the hearing file is not scandalous. It is due process. The respondent's conduct is not vexatious (has 'little or no basis in law); the respondent has challenged the existence of a postal covid letter and denies that it received any such paper document from the claimant. The claimant has challenged the content of documents. Both are matters which must be considered at a full hearing. A fair trial is still possible.

Agreed list of issues

20. The hearing file contained a 'draft agreed list of issues', prepared by the respondent's representative. The claimant told us he had not agreed this list of issues. We considered the list of issues when reading the evidence on day 1. We are satisfied this list accurately summarises the complaints. On day 2 we explained the purpose of the list of issues to the claimant and Ms Emmerson, now they had read it, and why we considered it accurate.

21. We have made our decisions by reference to this list of issues, which is below:

<u>1. Jurisdiction – time limits</u>
1.1. Were all the Claimant's complaints presented within the time limits set out in section 123(1)(a) of the Equality Act 2010 and section 111(2)(a) of the Employment Rights Act 1996?
(i) The Claimant entered into ACAS early conciliation on 29 September 2021 and was issued with his certificate on 08 November 2021. The Claimant was dismissed on 28 July 2021. His ET1 claim form was presented on 02 December 2021.
1.2. If applicable, do any of the Claimant's complaints amount to a continuing act under s123(3)(a) Equality Act 2010?
1.3. If any of the claims are considered to be out of time, would it be just and equitable for the tribunal to extend time under s123(1)(b) Equality Act 2010.
1.4. Further, if any of the claims are considered to be out time was it not reasonably practicable for the complaint to be presented before the end of 1. Jurisdiction – time limits 1.1. Were all the Claimant's complaints presented within the time limits set out in section 123(1)(a) of the Equality Act 2010 and section 111(2)(a) of the Employment Rights Act 1996? (i) The Claimant entered into ACAS early conciliation on 29 September 2021 and was issued with his certificate on 08 November 2021. The Claimant was dismissed on 28 July 2021. His ET1 claim form was presented on 02 December 2021. 1.2. If applicable, do any of the Claimant's complaints amount to a continuing act under s123(3)(a) Equality Act 2010? 1.3. If any of the claims are considered to be out of time, would it be just and equitable for the tribunal to extend time under s123(1)(b) Equality Act 2010. 1.4. Further, if any of the claims are considered to be out time was it not reasonably practicable for the complaint to be presented before the end of the period of three months pursuant to s111(2)(b) Employment Rights Act 1996?

<u>2. Health and safety detriment – under s44 Employment Rights Act 1996</u>
2.1. Did the Claimant work at an employer where there was no health and

safety representative or safety committee, or if there was such a representative or safety committee was it not reasonably practicable for the Claimant to raise the matter by those means in accordance with Section 44(1)(c) of the Employment Rights Act 1996?
2.2. If so, has the Claimant brought to the Respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety in accordance with Section 44(1)(c) of the Employment Rights Act 1996?
2.3. The Claimant avers he brought health and safety concerns to the Respondent on two separate occasions:
(i) 19 May 2020 at 2pm, at a meeting between the Claimant and Annette Chapman (the Claimant's line manager); and
(ii) 29 May 2020 at 3.30pm, at a meeting between the Claimant, Ms Chapman and Graham Sparks (Section Manager).
2.4. The Claimant avers that the nature of the disclosures made were that the kitchen staff were not adhering to guidelines by failing to wear masks and failing to socially distance.
2.5. If so, has the Claimant been subject to the alleged detriment on the grounds that he brought to the Respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety pursuant to Section 44(1)(c) of the Employment Rights Act 1996?
2.6. The Claimant avers that the alleged detriment he suffered took place during a meeting on 3 June 2020. After watching a training video on safety at work, Mr Sparks allegedly asked the Claimant in front of other attendees "Nick, you mentioned you had concerns about working safely. What are your thoughts on the presentation?"
2.7. Is the Claimant's claim under Section 44(1)(c) of the Employment Rights Act 1996 out of time? If so, was it reasonably practical for the Claimant to have presented the claim in time?

3. Unfair Dismissal – s96 Employment Rights Act 1996
3.1. Was there a potentially fair reason for the Claimant's dismissal?
3.2. The Claimant submits that the principal reason for his dismissal was on the grounds of his ill-health and inability to achieve and maintain a reasonable level of attendance.
3.3. Was the decision to dismiss the Claimant fair and reasonable in all the circumstances (taking into account the size and administrative resources of the Respondent)?
3.4. Did the Respondent follow a fair disciplinary and dismissal procedure?
3.5. The Claimant submits the dismissal procedure was not fair and the Respondent should have provided him with suitable offers of alternative employment and/or should have extended the timeframe for the Claimant to look for alternative jobs during the period.

4. Disability
4.1. Does the Claimant's disability of anxiety, his heart condition and/or COPD meet the definition of disability for the purposes of s6 and Schedule 1 of the Equality Act 2010:
(a) Is it a mental or physical impairment that has lasted or is expected to last for 12 months or more?; and
(b) Did the impairment have a substantial impact on the Claimant's ability to carry out his day-to-day activities?

4.2. Did the Respondent know (or could reasonably be expected to have known) of the Claimant's disability at the relevant times?

5. Failure to make reasonable adjustments – s20/21 Equality Act 2010

5.1. What was the provision, criterion or practice "PCP" that the Respondent applied to the Claimant?
5.2. The Claimant submits that the Respondent applied the following PCP:
(i) Subjecting the Claimant to the absence management policy/procedure after a certain level of absences.
5.3. Does the above amount to a PCP?
5.4. If so, did that PCP place the Claimant at the substantial disadvantage identified by the Claimant when compared with people who did not have the Claimant's disability?
5.5. The Claimant submits that he suffered the following disadvantages because of the above PCP:
(i) He was dismissed from his role as Chef on 28 July 2021.
5.6. Did the Respondent know, or could it reasonably have been expected to know, that that PCP placed or was likely to place the Claimant at the disadvantage in question?
5.7. The Claimant avers that the Respondent failed to take steps to avoid these disadvantages. Such steps that could have been taken include:
(i) Provided more support for access to internal vacancies.
(ii) Extending the trigger points under the absence management policy for disability-related absences
(iii) Extending the timeframe to allow the Claimant further time to fully engage with the redeployment process.
5.8. In respect of the proposed reasonable adjustments identified above, would each of the adjustments have alleviated the disadvantage suffered by the Claimant and did the Respondent make or offer to make any of those reasonable adjustments?
5.9. Would it have been reasonable for the Respondent to have to take those steps?

6. Discrimination arising in consequence of disability – s15 Equality Act 2010

6.1. Was the Claimant treated unfavourably because of something arising in consequence of his disability? The Claimant relies on his dismissal on 28 July 2021 as the alleged unfavourable treatment.
6.2. Did this treatment occur because of something arising in consequence of his disabilities? The Claimant avers the something arising was his disability related absences
6.3. Was there a legitimate aim to the less favourable treatment?
6.4. If so, was the treatment of the Claimant by the Respondent a proportionate means of achieving that legitimate aim?

22. In deliberations we noted that in his claim form the claimant identifies 3 impairments in his claim of disability discrimination, which are recorded in the November 2022 case management order of EJ Drake:
    22.1. 'COPD', which the respondent accepts is a disability applying the legal definition (section 6 Equality Act 2010);

    22.2. 'Heart condition'; the respondent does not accept that this impairment satisfies the section 6 legal definition of disability. Therefore, we must determine if it does; and

22.3. 'Long covid'; the claimant's impact statement dated 23 May 2023 refers to "suspected long covid". Long covid is not recorded in the February 2023 case management hearing or the list of issues. The respondent does not accept that the claimant had or has a disability of long covid. As it is referred to by the claimant in his claim and noted by Employment Judge Drake as a condition on which the claimant seeks to rely in his discrimination claim, we must determine whether long covid is a disability under section 6 of the Equality Act 2010.

23. In the claimant's disability impact statement dated 23 May 2023 he refers to a mental impairment of anxiety. Anxiety was first referenced at the February 2023 case management hearing, before which the claimant had provided further and better particulars of his claim. The respondent did not accept the claimant's anxiety is a disability applying the legal definition. In giving oral evidence on day 3 of the hearing the claimant told the Tribunal that his anxiety was heightened as a result of his dismissal and that it was not a reason for the behaviour alleged. After a discussion with the claimant (detailed in the Tribunal's record of hearing) we are satisfied with the claimant's confirmation that that he is not relying on anxiety as a disability other than in any award for injury to feelings. Therefore, we do not need to decide whether the claimant's anxiety satisfies section 6.

Findings of fact

24. Mindful the claimant is not legally represented, we explained during the hearing that we make findings of fact as to what we consider, on balance, happened, when the claimant's and respondent's witnesses recollection of events differ and the facts our relevant to the complaints. There are our findings.

<u>May 2020 meeting</u>

25. The claimant complains that on 19 May 2020 he told Ms Chapman that colleagues were not adhering to Covid 19 guidelines on social distancing and wearing masks. He alleges he repeated this complaint to Ms Chapman and Mr Sparks in a meeting on 29 May 2020. Neither Ms Chapman or Mr Sparks have a recollection of meeting the claimant on these dates; they have checked their contemporaneous calendars and there is no record of these meetings.

26. However, in her witness statement Ms Chapman acknowledges while she does not recall meetings on the dates suggested by the claimant, she and Mr Sparks were having lots of conversations with colleagues about this topic around that time. Mr Sparks' witness statement aligns with this recollection; he recalls the claimant mentioning that there had been some crossing over between colleagues which did not comply with the 2 metre rule in place at that time. Indeed, in the amended grounds of resistance the respondent accepts that the claimant did raise these concerns. Given the claimant's self-confessed difficulty with brain fog and his inability when giving oral evidence to recall events in detail, and in the absence of any contemporaneous documentary evidence that the claimant attended meetings on these dates (for example he had not provide his own diary entries), we find that, on balance, the claimant did raise concerns at some time in May 2021, most likely in informal conversations with Mrs Chapman and Mr Sparks, but not necessarily on these dates. This is corroborated by the concession at paragraph 41 of the amended Grounds of Resistance.

June 2020

27. The claimant complains that he was singled out in a presentation on 3 June 2021. Mr Sparks does not recall a meeting on that date nor does he have a diary record of this presentation. He told the Tribunal that "we had a number of meetings with staff to discuss changes to the rules and guidance, and to make sure these were properly understood…this could have said one such meeting." While in his witness evidence Mr Sparks does not specifically recall using these words, at paragraph 41 of the amended Grounds of Resistance the respondent "accepts that during a meeting at some point in mid-2020 Mr Sparks used words to the effect of "Nick, you had concerns about working safely. What are your thoughts on the presentation?" Therefore, on balance, we find that Mr Sparks did say this to the claimant, most likely on 3 June 2020.

28. The claimant submits the complaint of health and safety detriment is out of time. The time limit for bringing this claim is 3 months less a day from the incident about which the claimant complains. Therefore, the claimant had until 2 September 2021 to bring this claim to the Employment Tribunals. At no time after 3 June 2021 and before commencing these proceedings on 2 December 2021 has the clamant complained that Mr Sparks single him out. By his own admission, neither during his employment or since has the claimant raised this concern with anyone at the respondent. At the hearing the claimant told the Tribunal the first time he considered complaining to a Tribunal about what Mr Sparks asked him was on the day of his dismissal (28 July 2021), 13 months after the comment was made. After this comment was made, apart from a short period of absence, the claimant was working until 28 October 2020. Therefore, we find he had about four and a half months to raise any concerns he had about being asked this question. He did not.

29. We have found that Mr Sparks said "Nick, you mentioned you had concerns about working safely. What are your thoughts on the presentation". This question was reasonable in the circumstances of the Covid-19 pandemic, when the respondent had just presented a training video about safety at work. We have found that the claimant had expressed concerns about adherence to Covid-19 regulations in the kitchen. Given he had done so it is also entirely appropriate this question was asked of him. It is not singling out. It is a question asked to check that someone who had raised concerns was reassured by the content of a training video.

Disabilities

30. The respondent accepts that it knew the claimant had a disability of COPD at the relevant time. The claimant has withdrawn anxiety, telling us this was as a result of the alleged treatment and he does not consider any anxiety a reason for it. We must decide whether his alleged impairments of long covid and heart failure are disabilities within the section 6 definition.

Long covid

31. In the claim form the claimant says he was "diagnosed with long covid". In his disability impact dated 23 May 2023 the claimant refers to a physical impairment of "suspected long covid". We have considered the medical evidence submitted by the claimant in May 2023 to support his assertion he

had long covid; his December 2020 GP documents record 3 negative covid tests. The medical records submitted by the claimant do not record a diagnosis of long covid.

32. In evidence the claimant repeatedly referred to receiving an NHS shielding letter. The only letter the claimant has produced to the Tribunal is a one page letter dated 22 January 2021. The claimant told us he did not receive this letter by email. This is incorrect. It is clear on the face of the document that it was sent by nhs.patient.list@notfications.service.gov.uk to the claimant's gmail address on 22 January 2021. The claimant forwarded this letter to Ms Emmerson on 10 August 2021. The claimant would not accept this until the Tribunal highlighted these email references to him. Ms Emmerson confirmed receipt of this email to the Tribunal. The claimant suggested that this document was more than one page. The claimant and Ms Emmerson were given several opportunities during the course of the hearing to produce additional pages to this document, given both had received it by email, the claimant commenting on day 4 that he would be able to find it on his phone (contrary to his earlier evidence that he only received a hard copy letter). Neither was able to do so.

33. This 22 January 2021 email is not a shielding letter or a diagnosis of long covid. It is a letter notifying the claimant is "now [22 January 2021] considered to be at the highest risk of becoming very unwell if you [the claimant] catches Covid-19. It is not a letter advising the claimant to shield; nor is it a diagnosis of long covid.

34. In his witness statement the claimant says that soon after 19 January 2021 he sent an "extremely clinically vulnerable certificate" to Annette Chapman by post. There is no evidence of him receiving such a certificate or of him sending it by post to Ms Chapman. Ms Chapman has no recollection of receiving a covid document from the claimant.

35. On 22 March 2023 the claimant had an OH telephone assessment with OH Melanie Trenfield. The record of his assessment states that the claimant told Ms Trenfield he had an NHS shielding letter but had advised his managers of this. There is no evidence of him sharing any such letter with her. Ms Trenfield's contemporaneous record of her March 2021 conversation with the claimant is that he had not provided a copy of his shielding letter to his manager; this written note aligns with Ms Chapman's evidence that she had never received any information about a shielding letter.

36. In evidence the claimant says this written record of the conversation is incorrect. We find the claimant's recollection is not feasible. He did not receive a shielding letter. He received the email telling him he was vulnerable. The claimant recharacterized this email as a shielding letter. Therefore mindful that Ms Trenfield's note is contemporaneous and aligns with Ms Chapman's recollection, the fact we have found the claimant recharacterized the email as a shielding letter and, by his own admission, he experiences brain fog in recalling things, on balance, we prefer the respondent's evidence that the claimant did not provide his manager with a shielding letter in January 2021. The notification he received was the 22 January 2021 email noting he was vulnerable, likely due to his COPD.

37. In making our findings we have considered the claimant's "statement of fitness for work". The claimant seeks to link his heart failure to symptoms of long covid.

There is no diagnosis of long covid. There is a reference to "possible long covid syndrome" in the 14 December 2020 fit note. However by the fit notes for the period 25 December 2021 to 7 January 2021 there is no reference to possible long covid. Based on his medical evidence, taking the claimant's case at its highest, it is possible he had long covid for 2 weeks in December 2021. However, this is not evidenced with a positive covid test or a diagnosis of long covid during the period of the claimant's employment.

38. We find the claimant did not have a diagnosis of long covid, nor was he told to shield by the NHS.

Heart condition

39. The claimant also relies on a 'heart condition' as a disability in his discrimination claims. There is no reference to a heart condition being the reason the claimant was not fit for work in his fit notes. The first reference the claimant makes to a condition related to his heart is in the meeting with Ms Chapman on 11 June 2021 when he suggests the muscle around his heart his inflamed. There is no medical evidence of a heart condition diagnosis at this time. Indeed the claimant himself acknowledges this is something which is still being investigated at that time. On 28 July 2021 the claimant refers to a problem with his left ventricle. Therefore, we find that the claimant had some concerns about his heart, which he mentioned to Ms Chapman in his June and July meetings, but does not present any medical evidence at that time to evidence his concerns.

40. In making this finding we are mindful that the claimant contests the authenticity of these meeting notes. He refused to sign them. The first time the claimant raises concerns about these meeting notes is in his appeal hearing dated 7 September 2021 with Melanie Ridley; however he acknowledges he did not raise concerns with Ms Chapman and is has not presented details to Ms Ridley or in his witness statement; in cross examination the claimant could not identify how the notes are inaccurate. When the Tribunal asked him to explain his recollection of the June 2021 meeting the claimant's version did not differ much from the contemporaneous note.

41. The claimant was able to recall with stark clarity the % absence put to him in June 2021 but could not recall the detail of more recent events, he says due to brain fog. The claimant's ability to recall detail was sharper when considering events 3 years ago than recalling overnight directions made by the Tribunal at the hearing. This discrepancy calls into question his evidence at the hearing that the June and July 2021 meeting notes are inaccurate. It does seem that when the notes support the claimant's case he does not dispute them; when they do not he does. Indeed, the claimant's own recollection in oral evidence is not clear and consistent in his recollection of events We agree with Ms Nicholls submission that there is either undisputed documentary evidence or clear witness evidence on the matters the claimant disputes. That is because the notes of these meetings, taken by independent scribes were accurate. For these reasons, when the claimant's recollection diverges from the contemporaneous written record, we must prefer the written contemporaneous record.

42. Returning the heart condition. Based on the notes of the June and July meeting we find that the claimant flags general concerns but does provide any further

information about his heart during his employment. His diagnosis of a heart condition (on 15 November 2021) post-dates his dismissal. By December 2021 a consultant's letter records that the claimant's "cardiac examination is normal with no evidence of heart failure". The claimant's impact statement does not set out what he says he cannot do as a result of problems with his heart. We find that the claimant experienced an issue with his heart in mid-November 2021 which was resolved by December 2021.

Sick leave

43. The claimant's period of sick leave commenced on 28 October 2020. We find Ms Chapman acted promptly to refer the claimant to occupational health ('OH') (Ms Trenfield) to obtain advice on supporting him during his sickness.

OH referrals and CNN reports

44. On 28 November 2020, Ms Chapman refers the claimant for an OH assessment as his absence falls within the long term category of respondent's policy titled "Absence management standard" paragraph 3.1.13 as by this point his absence had exceeded the 4 weeks period. We find that Ms Chapman managed the claimant's absence in line with this policy, exercising her judgment as guided by the policy to request a medical assessment (known as a management referral) by OH.

45. Parties are agreed a telephone assessment took place between Ms Trenfield and the claimant on 3 December 2020. Ms Trenfield assesses the claimant as not fit for work and is unable to say when he will be.

46. On 11 March 2021 Ms Chapman makes a second referral. In this referral she asks Ms Trenfield to answer the following 5 questions (the reference to Partner is to the claimant):

    46.1. *Are there any restrictions on Partner's ability to perform their current role? What are they?*
    46.2. *How long are (these difficulties) likely to last?*
    46.3. *Can the Partner do anything to improve the impact of their condition (to help themselves)?*
    46.4. *Are there any roles within the Partnership that would be suitable either on a temporary or permanent basis?*
    46.5. *Is there an expected return to work date? If so, when? If not, do we have an indication?*

47. Parties agree a further telephone conversation took place between the claimant and Ms Trenfield on 22 March 2021; this is recorded in her report dated 23 March 2021. Again, Ms Trenfield records the claimant as not fit for work, noting his diagnosis of COPD.

48. The respondent says a third telephone conversation took place on 28 April 2021; she records in her report dated 30 April 2021 "review call with Nick dated 28 April 2021". Taking account of our findings about the inconsistencies in the claimant's evidence, the fact he told the Tribunal he experiences brain fog which impacts his ability to recall events, the fact the note is made by a professional in a contemporaneous report, received by the claimant at the June 2021 meeting, that he did not challenge the content of that report at the time,

only doing so when asked about it at this hearing, and that we have found that the claimant relies only on evidence supporting his claim, disregarding counter evidence, including, we prefer the record in Ms Trenfield's report that she spoke with the claimant on 29 April 2021. For the claimant to suggest otherwise, is simply not credible or feasible.

49. The April report records that the claimant is still not able to return to his role as a chef. However, it does not answer the 5 questions put by Ms Chapman in her initial referral. Following an email on 4 May 2021 querying this, Ms Trenfield issues a final report on 4 May 2021 Ms Trenfield does so, telling Ms Chapman she cannot identify any adjustments which can be made for the claimant to assist his return to work.

50. We have seen the log of Ms Chapman's contact with the claimant at this time and find that she maintained an appropriate level of contact with him.

First return to work meeting

51. On 28 May 2021 Ms Chapman writes to the claimant inviting his to a meeting on 11 June to discuss his attendance. The letter tells the claimant of his right to be accompanied and references [by "please find enclosed"] enclosures. Ms Chapman says the April OH report, (known as a CCN report), his return to work records and attendance records were enclosed. The claimant told us these documents were not enclosed. This is the first time he raises this. On 4 June 2021 the claimant emails to acknowledge receipt of the letter. He does not state the documents are not enclosed. Had they not been enclosed, we would have expected the claimant to have mentioned it in this email. Based on our assessment of the claimant's credibility, inaccuracies with some of his recollections, due to brain fog, and the fact that, when the April CCN report is referred to subsequently at the meeting on 11 June 2021 the claimant does not reference not receiving it as an enclosure with the letter, we find these documents were enclosed.

52. The first fitness to work meeting takes place on 11 June 2021. We have explained why we have found the meeting notes accurate. Despite his suggestion otherwise, the claimant knew the purpose of the meeting; it was explained in the invite letter and Ms Chapman tells him at the start of the meeting. Ms Chapman refers to the claimant's attendance statistics. However, these have not triggered the conversation. The meeting results from the Ms Chapman using her judgment, in line with the requirements of the respondent's attendance policy, to take 'appropriate action' under the long term sickness aspects of the policy, by referring the claimant to OH when he had been absent for more than 4 consecutive weeks. This is reflected in what she says at the meeting: that she is "looking today at your ability to return to work so I want to look at the CCN report" then referring to the April conversation. The claimant does not refute speaking to Ms Trenfield in April, as he does now to the Tribunal. The notes record that the claimant tells Ms Chapman he does not feel fit in his current role. She explores alternative roles telling the claimant to set himself up on Workday to identify roles himself. This was a reasonable request and it was incumbent on the claimant to do so.

53. Parties agree to keep in touch weekly for 6 weeks. In his witness statement the claimant does not challenge Ms Chapman's recollection of contact over this 6 weeks. Ms Nicholls put Ms Chapman's evidence for each week to the claimant

in cross examination. He broadly agreed with Ms Chapman's recollection. Based on our assessment of credibility and Ms Chapman's contemporaneous notes of when she spoke with the claimant, we accept her evidence of her contact with the claimant in the 6 weeks following the 11 June meeting.

54. The claimant says he could not get on Workday. He was given support by Ms Chapman to do so. The responsibility for accessing Workday sits with the claimant. If he was unable to do so, it was because he did not avail himself of the support offered to him by the respondent. Indeed, on 2 occasions the claimant received emails from the respondent with possible vacancies; these emails did not require him to access Workday to consider alternative roles. We find he did not engage with the redeployment progress at any time during this 6 period, when it was reasonable for him to have done so. Indeed, we have no reason to believe that if he had been given more time it would have made any difference. At no time did the claimant engage with the process or demonstrate a willingness to explore alternative jobs, or demonstrate that he was seeking alternative employment himself.

Second return to work meeting

55. On 15 July 2021 Ms Chapman invited the claimant to a second fitness to work meeting. He is told the meeting is to discuss his inability to achieve and maintain a reasonable level of attendance, and dismissal is a possible outcome of the meeting. The meeting takes place on 28 July 2021. Ms Chapman discusses the claimant's health and explores what the claimant has done to find alternative role. Mindful of our earlier finding these notes are an accurate record of the meeting, we find the claimant maintains he is too unwell (which aligns with his oral evidence he was not it for to return to his role at this time) as a chef. He has not engaged with finding an alternative role. During the 6 weeks between the first return to work meeting and this meeting the claimant did not explore the options presented to him, now using lack of access to Workday as an excuse for not doing do nor did he seek alternatives options himself. The claimant only has himself to blame for not identifying an alternative role during this time.

56. After a break in the meeting Ms Chapman informs the claimant he is dismissed due to capability and not maintaining an adequate level of attendance. The claimant receives a dismissal letter dated 28 July 2021. This letter contains an unfortunate typo (a reference to a disciplinary process). However this does not alter the substance of the letter which confirms the reason for his dismissal and notifies the claimant of his right of appeal.

Appeal

57. The claimant appeals by email dated 6 August 2021 and is invited to a hearing by email dated 9 August 2021. He is told of his right to be accompanied. His appeal was heard by Melanie Ridley on 7 September 2021. Ms Ridley interviewed Mr Furr (responsible for health and safety), Mr Sparks, Ms Chapman and Ms Trenfield. We find this was a thorough investigation, interviewing the colleagues relevant to the claimant's points of appeal. Ms Ridley sent a detailed appeal outcome letter dated 28 September 2021.

58. Her decision accords with guidance in the respondent's handbook, which is incorporated into the claimant's employment contract by clause 20 and states:

"Frequent or excessive absence may result in a formal process being engaged whether on a disciplinary or capability basis and may result in disciplinary action, up to and including closure without notice"

59. The decision also accords with the long-term absence policy which we have found guided the approach taken by Ms Chapman. This states:

60. *"As a last resort, where there are no RA that would enable a partner to remain in their existing role and there are no alternative roles in the Partnership that the Partner could perform, a decision may be taken to close their contract on the grounds of ill health"*

Relevant law

Jurisdiction – time limits

61. Section 123 s123 of the Equality Act sets the time limits. The ACAS early conciliation procedure covers discrimination claims. The primary time-limit is within 3 months of the discriminatory action. If the claim is late, the tribunal has a 'just and equitable' discretion under s123(1)(b) to extend time. *In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96*, the Court of Appeal held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts. There needs to be some kind of link or connection between the actions.

Health and safety detriment – under s44 Employment Rights Act 1996

62. Section 44 of the Employment Rights Act 1996 provides (relevant subsections):

An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a)having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b)being a representative of workers on matters of health and safety at work or member of a safety committee—

(i)in accordance with arrangements established under or by virtue of any enactment, or

(ii)by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c)being an employee at a place where—

(i)there was no such representative or safety committee, or

(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

Unfair Dismissal – s96 Employment Rights Act 1996

63. Section 94 of the Employment Rights Act 1996 (the '1996 Act') confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. An unfair dismissal claim can be brought by an employee (section 94) with 2 years continuous employment (section 108) who has been dismissed (section 95). This is also satisfied by the respondent admitting that it dismissed the claimant (within section 95(1)(a) of the 1996 Act).

64. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

65. Here the respondent replies on the reason of capability and inability to maintain a reasonable level of attendance.

66. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

67. The compensatory award if a claim of unfair dismissal is successful must be 'just and equitable'. As a result of the decision in *Polkey v AE Dayton Services Ltd [1987] IRLR* 503 a Tribunal may reduce the compensatory award to reflect the chance that the claimant would have been dismissed in any event had the dismissal followed a fair process. The Tribunal assesses this possibility by reference to the actual employer in the claim. To substitute the Tribunal's own mindset is an error of law.

Disability

68. Section 6 of the Equality Act 2010, provides as follows:

> Disability
>
> (1) A person (P) has a disability if-
>
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.

69. As we indicated at the beginning of the Hearing, it is well established that the onus of proving a disability is on the Claimant, on the balance of probabilities (Morgan v Staffordshire University [2002] IRLR 190) to show that he falls within the definition of disability.

70. Section 212 of the Equality Act 2010, clarifies that:

> (1) In this Act-
> …
> 'Substantial' means more than minor or trivial.

71. We are mindful of the case of *Anwar v Tower Hamlets College* [2010] UKEAT0091/10, which clarified that an effect more than trivial may still be minor.

72. There are supplementary provisions in relation to disability in Schedule 1 of the 2010 Act. Guidance has been issued by the Secretary of State regarding matters to be taken into account by Employment Tribunals in determining questions relating to the definition of disability.

73. We are required to take into account any aspect of the Guidance which appears to be relevant. Paragraph A2 of the Guidance contains a helpful analysis of Section 6 of the Equality Act 2010:

> Main elements of the definition of disability-
>
> A1 …
>
> A2 This means that, in general:
>
> - the person must have an impairment that is either physical or mental;
> - the impairment must have adverse effects which are substantial;
> - the substantial adverse effects must be long term; and
> - the long term substantial adverse effects must be effects on normal day to day activities.
>
> All of the factors above must be considered when determining whether a person is disabled.

74. Paragraph 2(1) of Part 1 of Schedule 1 to the Equality Act 2010, clarifies:

> Long term effects-
>
> (1) 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.

75. The relevant date is whether or not a claimant is subject to such an effect at the time of the alleged discrimination *McDougall v Richmond Adult Community College* [2008] IRLR 227.

76. Paragraph 2(2) of Part 1 of Schedule 1 to the Equality Act 2010, says:

> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

77. Paragraph 5(1) of Part 1 of Schedule 1 to the Equality Act 2010 addresses where an individual receives treatment for an impairment.

> (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
>
> (a) measures are being taken to treat or correct it, and
> (b) but for that, it would be likely to have that effect.
>
> (2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid

78. In reaching our decision we have considered the guidance is issued by the Secretary of State under section 6(5) of the Equality Act 2010.

Failure to make reasonable adjustments – s20/21 Equality Act 2010

79. Section 20 EqA sets out the duty on an employer to make adjustments; the duty comprises the following three requirements.

> …..
>
> (3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4)The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

80. Section 21 provides:

> (1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

81. In the case of *Mr J Hilaire v Luton Borough Council* [2022] The Court of Appeal held that, however widely and purposively the concept of a PCP was to be interpreted, it did not apply to every act of unfair treatment of a particular employee. All three words ("provision", "criterion" and "practice") carried the connotation of a state of affairs indicating how a similar case would be treated if it occurred again; although a one-off decision or act could be a practice, it was not necessarily one.

Discrimination arising in consequence of disability – s15 Equality Act 2010

82. Section 15 of EqA 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.
(2)Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Analysis and conclusion

83. We set out below our conclusions by reference to the list of issues.

Disability (issue 4)

84. The respondent accepts that the claimant had a disability of COPD at time of the events about which he complains. On day 4 of the hearing the claimant withdrew his reliance on anxiety as a disability, explaining that he considered his heightened anxiety as consequence of the events about which he complains.

85. Therefore, we must determine whether the claimant was disabled by reason of long covid and/ or heart failure. The burden of proof is on the claimant to show he had the conditions, that he did so for at least 12 months or that the conditions were likely to continue for more than 12 months, and that these conditions had a substantial adverse effect on his ability to carry out day to day activities.

Long covid

86. The claimant's evidence about long covid varies. He refers to having a diagnosis of long covid in his claim form; in his impact statement he refers to suspected long covid. We have found there are some references to long covid in his medical notes but these are also framed in the context of a suspicion by the clinicians; they do not record a positive covid test or a diagnosis of long covid. The claimant's May 2023 impact statement does set out how he says his suspicion of long covid impacted his ability to carry out day to day activities. There is a reference to long covid in his December 2020 statement of fitness for work. However, this is not referenced in the 7 January 2021 note. Taking the claimant's case at its highest, it is possible the claimant had covid for 2 weeks in December 2021. However, this is not evidenced with a positive covid test or a diagnosis of long covid during the period of the claimant's employment.

87. Given the lack of diagnosis and lack of evidence about impact we must conclude that the claimant's concerns that he had long covid do not satisfy the definition of section 6 of the Equality Act 2010. The claimant has not discharged the burden to prove, on balance, he had long covid at the relevant time, that it had lasted or would last more than 12 months and that it had a substantial impact on his ability to carry out day to day activities.

Heart condition

88. We have found the first reference the claimant makes to a condition related to his heart is in the meeting with Ms Chapman on 11 June 2021 when he suggests the muscle around his heart his inflamed. His diagnosis of a heart condition is dated 15 November 2021, after the claimant's dismissal. By December 2021 a consultant's letter records that the claimant's "cardiac examination is normal with no evidence of heart failure". The claimant's impact statement does not set out what he says he cannot do as a result of problems with his heart. Again, the claimant has not discharged the burden to prove he had long covid at the relevant time, that it had lasted or would last more than 12 months and that it had a substantial impact on his ability to carry out day to day activities.

Time issues (issue 1)

89. The discrimination claims, taking account of the dates of ACAS conciliation, are either in time, or given the claimant's disability of COPD we conclude it is just and equitable to extend time.

Health and safety detriment: time limit for claim (issue 2.7)

90. We have found the deadline for the claimant to bring his claim of health and safety detriment to the Tribunal was 2 September 2020. This is not extended by the period of ACAS conciliation which did not start until 29 September 2021, over a year later. The claim was submitted on 2 December 2021. It is 14 months out of time.

91. Therefore we must consider whether it was reasonably practicable for the claimant to bring his claim in time. We have found that the claimant was in work following the 3 June presentation for almost 5 months. He was sufficiently well enough to work and sufficiently well enough to raise any concerns he had about the June meeting. The claimant has not given any explanation as to why he did not complain about Mr Sparks comments until 18 months after the presentation. As he was well and at work until 28 October 2021, we find it was reasonably practicable for the claimant to bring his complaint of health and safety detriment to the Tribunal before the 3 September 2021.

92. As we have concluded the H&S claim is out of time we do not need to consider the substantive issues in this claim. However, we make the observation that we have found Mr Spark's question was neither offensive nor harmful. There is no detriment.

Failure to make reasonable adjustments (issue 5)

93. The respondent accepts that it had an absence management provision which it applied to the claimant. We have found that Ms Chapman applied the long

term absence policy in making the OH referral on 29 November 2020 and it was this policy that guided her subsequent referrals, June and July 2021 meetings and informed the decision to dismiss the claimant. In doing so, the respondent through Ms Chapman's actions subjected the claimant to the respondent's absence management procedure, specifically its long term absence policy.

94. We have found that, ultimately, the result of applying this policy was the claimant's dismissal on 28 July 2021. Given the policy was applied due to sickness absences as a result of the claimant's COPD, we conclude the respondent knew that its absence management policy would place the claimant as a disadvantage. Indeed, we have found that in Ms Chapman's letter dated 15 July 2021 inviting the claimant to his second return to work meeting, she draws his attention to the fact that one possible outcome of the meeting is his dismissal.

95. We have found that over a 6 week period the respondent provided the claimant with support in identifying internal vacancies. We have found that the claimant did not engage with this process, nor the support available to him to resolve any issues he experienced accessing Workday to review alternative roles. We have found that had the claimant been given more time the situation would have been the same as there is no evidence before the Tribunal that the claimant did anything to engage with the process, that would warrant more support or an extension of time. In short, you can lead a horse to water but cannot make it drink. Ms Chapman took reasonable steps to lead the claimant to alternative roles; it was he who did not engage by failing to take any steps to resolve his issues with Workday, despite support being available, or by seeking alternative employment options with the respondent advertised in the public domain.

96. We have found Ms Chapman relied on the long term sickness policy; this did not have trigger points. The policy applied to an employee with more than 4 weeks continuous absence. She started the process on 28 November 2021, more than 4 weeks after the claimant started his sick leave on 28 October 2021. There was no trigger point to extend. There was no reason for the respondent to extend this 4 week period; the first step was to refer the claimant to OH, to obtain advise to enable the respondent to support him in his aim of returning to work. The second step was to support him in identifying alternative roles to achieve the same. For these reasons we conclude that it would not have been reasonable for the respondent to have taken the steps put forward by the claimant; they would have made no difference to the timing of and decision to dismiss. Indeed, we concur with Ms Trenfield that, given the claimant's COPD and his own comments on his health at that time, and his lack of engagement in searching for an alternative role, by the July 2021 meeting the respondent had done all it could. In our judgement, there were no other reasonable steps the respondent could have taken to avoid the claimant's dismissal.

<u>Discrimination arising in consequence of disability (issue 6)</u>

97. The respondent accepts the claimant's absence from 28 October 2020 resulted from his COPD. As we have found that long covid and heart disease are not disabilities s defined by the EqA this absence cannot be a result of these conditions. The respondent accepts that the claimant was treated unfavourably as a result, in that his period of absence led to his dismissal.

98. The respondent relies on several legitimate aims to justify this dismissal. In evidence Ms Chapman told us of the impact of the claimant's absence on colleagues and the need to ameliorate this. In our judgment this accords with the respondent's stated aims of alleviating stress on colleagues, enabling workforce and resource planning and, in particular, ensuring a sufficient and reliable workforce. Absence over several months must be addressed. It was. The fact that the claimant did not engage with the respondent's attempts to achieve a resolution by placing him in alternative employment only reinforces these aims, particularly the need to ensure a sufficient and reliable workforce. The claimant failed to give any thought to or engage his mind with the idea of what alternative work might look like. He was the one with the knowledge about his COPD who was best placed to tell the respondent the type of alternative work he could engage in. In the 6 week period he was given by Ms Chapman to explore alternative work he did not do so. In this context, when the absence of a colleague places stress of those with whom that colleague works and that colleague is not willing to work with his employer to improve the situation, it is vital the employer has a policy which aims to ensure fairness to all employees by ensuring colleagues are not put under undue pressure as a consequence. We conclude that by dismissing the claimant, the respondent alleviated stress on colleagues as well as ensuring that it had a sufficient and reliable workforce.

Unfair dismissal (issue 3)

99. The potentially fair reason relied on by the claimant is sickness and capability. This is a fair reason. The record of the action taken by the respondent, in particular Ms Chapman set out at paragraph 16 of Ms Nicholls written submissions accords with our factual findings of the action taken by the respondent from 28 November 2021 to 28 July 2021 and subsequently by Ms Ridley when considering the claimant's appeal. Without question this evidences that the reason these actions were taken was the fact that as at 28 November 2021 the claimant was on long term sick and he had been absent from work for more than 4 weeks and continued to be so, without engaging with the solutions put to him to resolve this situation (a non-competitive interview for an alternative suitable role identified by him). The reason given by the respondent also accords with our finding that throughout this period in his conversations with Ms Trenfield and Ms Chapman that claimant repeatedly stated he was not well enough to return to his job as a chef. Therefore, based on our findings we conclude the reason for the claimant's dismissal was capability in that he could not do his job as a chef and a long term sickness of 9 continuous months.

100. We must decide whether the decision to dismiss was fair and reasonable in all the circumstances given the respondent's size and resources. We conclude it was. Drawing on its resources, the respondent had obtained 3 OH reports which could not identify any adjustments which could be made to support the claimant's return to work. The respondent had identified and shared with the claimant alternative jobs and advised him to look at available positions on Workday (signposting him to support to access this system when he expressed concerns he could not) and suggesting he look at positions with the claimant advertised externally, as well as sending him emails with vacant positions. He did not engage with this process during the 6 weeks. Given his lack of engagement there was nothing to be gained from allowing further time. We conclude the decision to dismiss after 9 months of sick leave, the advice of 4 reports based on 3 separate conversations with the claimant and a 6 week

period to enable the claimant to find alternative role, during which he did not provide any suggestions, was a fair and reasonable one.

101. We must decide whether the respondent followed a fair dismissal process. It did. It sought OH advice on multiple occasions and gave support to enable the claimant to identify an alternative role, held 2 return to work meetings with the claimant to explore options for achieving this and conducted a robust and through investigation into the concerns he raised in appealing his dismissal. We have found extending time period would not have made a difference based on our finding that he showed no willingness to engage by suggesting alternative roles, accepting offers of support with Workday. The claimant had ample time to engage and did not do so There was no more that the R could have had done. The dismissal was fair.

Employment Judge Hutchings

12 August 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
5 September 2024

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FOR THE TRIBUNAL OFFICE

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