EMPLOYMENT TRIBUNALS

Claimant: **Mr K Hughes**

Respondent: **Wilko Limited**

Heard at: **Cardiff** **On: 5, 6, 7, 8 June 2023 and 2 and 3 September 2024**

Before: **Employment Judge R Vernon**
Ms P Palmer
Ms K Smith

Representation:
Claimant: Mr G Pollitt (Counsel)
Respondent: Mr A Hodge (Counsel)

RESERVED JUDGMENT

JUDGMENT

The unanimous Judgment of the tribunal is as follows:

1. The claimant's complaint of constructive unfair dismissal contrary to section 94 and 98 of the Employment Rights Act 1996 is well-founded and succeeds.

2. The claimant's complaint of breach of contract (wrongful dismissal) is well -founded and succeeds.

3. The claimant's complaint of unlawful deductions from wages contrary to section 13 of the Employment Rights Act 1996 is well founded and succeeds.

4. The claimant's complaint of discrimination arising from disability contrary to section 15 of the Equality Act 2010 fails and is dismissed.

5. The claimant's complaint of indirect disability discrimination contrary to section 19 of the Equality Act 2010 fails and is dismissed.

6. The claimant's complaint of a failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 fails and is dismissed.

7. The claimant's complaint of harassment contrary to section 26 of the Equality Act 2010 fails and is dismissed.

8. The claimant's complaint of discriminatory dismissal contrary to section 39 of the Equality Act 2010 fails and is dismissed.

9. The claimant's complaint of unpaid holiday pay is dismissed upon withdrawal.

REASONS

Introduction

1. By an ET1 Claim Form presented to the Tribunal on 18 May 2022, the Claimant has brought complaints of constructive unfair dismissal, wrongful dismissal and disability discrimination together with complaints of unlawful deduction from wages and unpaid holiday pay. The disability discrimination complaint comprises complaints of discrimination arising from disability, indirect discrimination, failure to make reasonable adjustments and disability related harassment.

2. The Claimant's complaints focus on events which took place during the period September 2021 to January 2022 up to and including the Claimant's resignation from employment, without notice, on 20 January 2022. In summary, the Claimant's complaints principally relate to the following:

   2.1 The Respondent's decision to subject the Claimant to a disciplinary procedure in September 2021, the manner in which that disciplinary procedure was dealt with and the decision to issue the Claimant with a Final Written Warning in early October 2021;

   2.2 The Respondent's decision to withhold Company Sick Pay ("CSP") from the Claimant during a period of sickness absence which commenced shortly after the Claimant was issued with the Final Written Warning and which continued until his resignation in January 2022;

2.3 The way in which the Respondent dealt with a) the Claimant's appeal against the Final Written Warning and b) the Claimant's grievance regarding the decision to withhold CSP, and the Respondent's decisions to dismiss the appeal and not uphold the grievance;

2.4 The conclusions reached by the Respondent during the course of the disciplinary and grievance procedures that the Claimant's period of sickness absence following the Final Written Warning a) was taken in "bad faith" or b) was "premeditated".

3. The Claimant's constructive unfair dismissal complaint relies on alleged breaches of a) the Claimant's asserted entitlement to CSP and/or b) the implied term of trust and confidence. The Claimant's claim relies upon a "final straw" event. The event relied on by the Claimant as the "final straw" was his receipt of information in January 2022 indicating that the Respondent was going to be closing the store at which he worked later that year.

4. On 4 July 2022, the Respondent filed its response to the claim. The Respondent denies the claim in its entirety. The Respondent's response to the claim can be summarised as follows:

4.1 The Claimant resigned and was not dismissed. The Respondent maintains that it did not commit any breach of the Claimant's contract of employment (repudiatory or otherwise) entitling the Claimant to resign and treat himself as dismissed;

4.2 The Respondent handled the disciplinary procedure which led to the Claimant's final written warning and the Claimant's subsequent appeal and grievance in an appropriate way and the conclusions reached and decisions made during those procedures were reasonable, appropriate and justified;

4.3 The Respondent was entitled to withhold CSP from the Claimant in accordance with the Claimant's contract of employment and the Respondent's absence policy;

4.4 Accordingly, the Respondent did not discriminate against the Claimant in any of the ways alleged by him or at all, and the Claimant was not unfairly dismissed.

5. A preliminary hearing took place on 6 September 2022 before Employment Judge Frazer. Permission was granted for a minor amendment to be made to the Claimant's claim to include the Claimant's alleged dismissal as an act of discrimination in addition to the other acts of discrimination already set out in the Particulars of Claim. The claim had already been listed for a three day final hearing but, after a discussion at the Preliminary Hearing, that hearing was vacated and the case was re-listed for a five day final hearing to consider issues of liability and remedy. Various other standard case management orders were also made. It was also agreed that counsel for the parties would prepare and agree a list of issues for the use of the Tribunal at the final hearing.

6. A further preliminary hearing took place on 25 May 2023 before Employment Judge Sharp. She gave permission for one of the Respondent's witnesses to attend the final hearing remotely by video with all other participants still to attend in person. It was also noted that one of the Respondent's other witnesses (Sian John) was unable to attend the final hearing until day four as a result of a pre-booked holiday.

7. As a result of judicial availability, the five-day time estimate was reduced to four days (with the agreement of both parties) by Employment Judge Brace on 2 June 2023.

The hearing and evidence

8. The Tribunal was provided with a bundle of documents for use at the hearing. The bundle comprised pages 1 to 1018. In addition to the documents bundle, the Tribunal was also provided with the following documents:

8.1 An agreed chronology;
8.2 An agreed cast list;
8.3 A proposed timetable for the hearing, agreed between the parties;
8.4 The list of issues agreed between counsel; and
8.5 A copy of the Respondent's policy on Performance Improvement Plans dated July 2019.

9. The Tribunal was also provided with five witness statements. The Claimant provided a witness statement and also gave oral evidence. The Claimant called no other witnesses to give evidence on his behalf. For the Respondent, the Tribunal was provided with statements and heard oral evidence from:

   9.1 Sian John, the Respondent's Regional Manager for South Wales and the Claimant's line manager at the time of the events in question;
   9.2 Edward Spence, an Employee Relations Partner employed by the Respondent;
   9.3 Joe Thorne, a HR Business Partner employed by the Respondent; and
   9.4 Leila Tambling, the Respondent's Regional Manager for the South Coast from January 2019 to May 2022.

10. The final hearing took place over the reduced four day time estimate. After dealing with some housekeeping issues and allowing time for pre-reading, the Tribunal began hearing the evidence of the witnesses on the afternoon of day one. The Claimant gave his evidence first. His evidence was complete by approximately 10:30am on day two. The Tribunal then heard evidence from the Respondent's witnesses, albeit slightly out of what would have been the logical order given that Ms John could not attend until day four. Mr Spence and Ms Tambling gave evidence during the remainder of day two. Mr Thorne then gave evidence on day three. His evidence was complete by midday on day three, however the hearing then had to be adjourned until the morning of day four to allow Ms John's evidence to be heard before hearing submissions.

11. Sian John attended and gave evidence on the morning of day four. Her evidence was completed shortly before midday. Thereafter, and before lunch, the Tribunal heard submissions from counsel who had also each provided written submissions.

12. At the conclusion of the submissions the Tribunal informed the parties that the Tribunal would commence its deliberations on the afternoon of day four however, in light of the number of issues and complaints to be determined, the Tribunal indicated that it was unlikely that deliberations would be completed that day. The parties were also informed that, due to the availability of the Tribunal (including the sitting pattern

of Employment Judge Vernon) the Tribunal would be unable to reconvene to complete deliberations until September 2023.

Events post-hearing

13. On 22 August 2023 the Tribunal received correspondence from PWC indicating that the Respondent had entered administration and that joint administrators had been appointed. The correspondence referred the Tribunal to paragraph 43(6) of Schedule B1 to the Insolvency Act 1986 which provides effectively for a stay on any proceedings where a company has entered administration except with the consent of the administrators or the permission of the court. The letter pointed out that neither exception applied and therefore the proceedings should be stayed.

14. On 6 September 2023 the Tribunal wrote to the parties informing them that the case was stayed pending any further developments.

15. On 14 December 2023, the joint administrators of the Respondent wrote to the Tribunal. The letter included the following:

"… *We write now to request that the stay of proceedings is lifted for the purpose of releasing the liability judgment only, as we understand that a liability judgment is pending following the liability hearing in this claim which took place on 5 – 8 June 2023.*

The Joint Administrators are bound to ensure that the costs of administration are kept to a minimum, which will protect the interests of those creditors who may make some financial recovery in the administration. In these circumstances we cannot in fairness to those creditors instruct any advisors or incur costs in the defence of, or otherwise engaging with, these proceedings.

As above, we are however aware that the hearing for this claim has taken place, liability has been decided and a judgment is available. As such, we are prepared for the stay to be lifted in these specific circumstances and for this purpose only, so that the judgment can be released and the matter of liability can be determined. This will, subject to the findings of the pending judgment, enable the parties to enter into

constructive dialogue regarding the resolution of the claim within the Respondent's administration.

Please note that once the judgment has been released, the stay on the claim would recommence by way of paragraph 43(6) of Schedule B1 of the Insolvency Act 1986 … This is on the basis that the circumstances of the Companies remain as they were when the stay was first confirmed on 22 August 2023. On this basis, any remedy hearing is unable to proceed."

16. Although the letter from the joint administrators was based on an erroneous belief that the issue of liability had been determined and that a judgment was then available, the Tribunal acted upon the correspondence and lifted the stay. Regrettably, there was some delay in the correspondence being referred to an Employment Judge following its receipt. Thereafter, the Tribunal scheduled further time for the completion of deliberations at the earliest opportunity. Unfortunately, it was not possible for the Tribunal to reconvene until early September 2024.

Issues

17. As agreed at the Preliminary Hearing in September 2022, the parties produced and agreed a list of issues for the use of the Tribunal at the final hearing. The list of issues was set out over nine pages and encompassed all of the Claimant's complaints. The Tribunal accepted and adopted the proposed list of issues.

18. Issue number 7 on the agreed list of issues related to disability i.e. whether the Claimant was a disabled person at the material time within the meaning of the Equality Act 2010. At the start of the final hearing, Mr Hodge indicated that the Respondent now conceded that issue and accepted that the Claimant was a disabled person at all material times as defined by the Act.

Facts

19. The Claimant is now aged 61 and worked in retail all of his working life until his resignation from his employment with the Respondent in January 2022. His employment history began in 1979 and, since then, he worked for a number of different employers. For most of his career, he has worked in a managerial role.

20. The Claimant's employment with the Respondent commenced in October 2004. A copy of his principal statement of terms and conditions of employment on joining the Respondent appears at page 39 of the bundle. Those terms and conditions give the start date of his employment as 11 October 2004. The Claimant's job title on joining was "Management Trainee". The Claimant signed those terms and conditions on 1 October 2004.

21. In paragraph 3 of his witness statement, the Claimant says that upon completing his initial training programme with the Respondent, he then worked as a manager at a number of stores throughout South Wales. He also says that until the events relevant to these proceedings, he had never had any disciplinary issues during his employment with the Respondent. His evidence was not challenged.

22. In December 2019, the Claimant agreed to relocate to the Merthyr Tydfil store and to take up the role there of store manager. The change to the Claimant's contract of employment was recorded in a form which appears at page 40 of the bundle. That form recorded that, at that time, the Claimant would be working 39 hours per week and his annual pay would be £37,075. The Claimant signed that amendment form on 9 December 2019.

23. On 2 June 2021, a compliance audit was carried out at the Merthyr Tydfil store in order to evaluate the performance of the store against a number of performance indicators. The audit was carried out by Paula Clarke, the Respondent's Profit Protection Compliance Manager. The audit required Ms Clarke to score the store against nine specific criteria before then giving an overall compliance score. The Respondent required scores of 85% or more against any performance indicator to be acceptable. Out of the nine specific criteria, Ms Clarke scored the store as acceptable on five and unacceptable on four. One of the measures which she scored as being unacceptable was "cash management" which she scored at 76%. Overall, Ms Clarke scored the store 86% which was within the Respondent's acceptable range.

24. One of the factors which was considered by Ms Clarke when evaluating the store's performance on cash management was the way in which the store dealt with CCI

pouches, which are pouches where bank notes can be securely kept beside a till point in a locked metal box where bank notes can be fed in. The Respondent's policy on removing cash from the pouches was that the pouches were to be emptied once they reached a maximum limit of £3,000 or £1,500 on the night before banking took place. Once removed, the pouches would be taken to the cash office pending collection by a cash collection company. Ms Clarke found that one of the tills (till 1) was consistently removed when it was over the £3,000 limit. She also noted that daily spot checks on the CCI pouches were not always being carried out. An action plan was drawn up following Ms Clarke's audit. That action plan included the following in respect of CCI pouches: "*On GK Portal, check Cash pouches overview for values and times of pouch removals*". The persons identified as responsible for those actions within the action plan were Lauren Canavon and Julia Richards, two of the store supervisors.

25. On 16 July 2021, an update audit of the Merthyr Store was carried out. The outcome of that update audit is shown at page 134 of the bundle. The store had improved markedly in relation to Health and Safety (now assessed at 100% compliance) and so the store was now considered to be performing acceptably against six of the nine performance indicators. The assessment in relation to cash management remained unacceptable (at 76%). The overall compliance score remained in the acceptable range having increased slightly to 89%.

26. In the late summer of 2021, Sian John made the Claimant the subject of an informal Performance Improvement Plan ("PIP"). A copy of the informal PIP document appears at page 229 of the bundle. The plan identified four key areas for improvement. The performance objectives within the PIP referred to improving store standards and overall profitability, although there was no specific mention of any issues regarding cash management within the store. A review took place (as recorded within the document) on 15 September 2021 when some improvement was noted in two of the four highlighted areas. The informal PIP continued thereafter and was due for further review on 15 October 2021.

27. The Respondent's PIP process was set out in the Performance Improvement Plan policy. The policy contained a flowchart showing an overview of the different stages

of a PIP. The first stage is identified as an informal process and provides for an informal one to one discussion followed by a plan in writing and a review in 4 weeks time. The policy goes on to say that if the manager has failed to make significant improvement (achieved at least 3 of 4 objectives) the manager should be informed that the process is moving to the formal stage. At no time prior to his resignation was the Claimant informed by the Respondent that he was going to be moved from an informal PIP to any formal stage.

28. In early to mid-September 2021, the Respondent was carrying out a programme of replacing CCI pouches at a number of its stores, including the Merthyr Tydfil store. Details were sent to the managers of the relevant stores by email. An example of the type of email sent appears at page 234 of the bundle. The email included the following information:

"*There are some important actions required prior, during and post the installation, details of exactly what you need to do is included within the attachments. If these actions are not completed this will cause a significant delay to the installation and could cause cash errors/loss."*

29. Amongst the attachments to the email was a Method of Work document. That method of work included a flowchart entitled "Pre (Night before), During and Post installation". Step 5 was the final step in the "Pre (Night before)" section of the flowchart and required the following steps to be taken:

"*Remove all pouches from the tills before your installation. The normal process should be followed when doing this."*

30. The installation of new CCI pouches at the Merthyr Store was due to take place on Monday 20 September 2021. The Claimant was not going to be at work on that day because of pre-planned annual leave. The Claimant was in fact due to be absent from work (as a result of leave and one non-working day) from Friday 17 September to Tuesday 21 September inclusive.

31. In accordance with his normal practice, the Claimant prepared a handover note for the assistance of the store supervisors during his absence. When the Claimant was not working, no other manager was employed at the Merthyr Tydfil store. Instead, the store was managed during those periods by the store supervisors. The handover note prepared by the Claimant listed 14 tasks for the supervisors to action during the Claimant's absence. The note was headed "The next few days while I'm away" and item 13 on the list said "CCI Replacement Process: engineer coming Monday". As well as preparing the handover note, the Claimant also printed off any relevant documents and placed them with the handover note for the attention of the supervisors. One of the documents that was printed and left was the Method of Work document, including the flowchart. The Claimant wrote "Visit Monday 20th" on the top of the Method of Work document.

32. The Tribunal did not receive any evidence from any of the store supervisors regarding the events of 20 September 2021. The Claimant could not give any direct evidence about what happened that day because he was not at work. However, it is common ground between the parties that, in the course of the engineer attending the store and replacing the CCI pouches, two pouches were replaced and removed from the store without being emptied. The amount of money contained within those pouches was in excess of £12,000. Thankfully, the issue was identified no later than the following day and the pouches (and the cash within them) were recovered without any loss being suffered by the Respondent. Once the issue had been resolved, Sian John spoke with Mr Spence and a decision was taken to carry out a disciplinary investigation into the events of that day.

33. Sian John was tasked with carrying out the investigation. The aim of the investigation was to understand how two cash pouches had managed to leave the store with the engineer without being emptied beforehand.

34. Ms John conducted interviews on 23 September and spoke initially with the three supervisors who were working on 20 September, namely Lauren Canavon, Julia Richards and Kalum Palmer. Those interviews took place between 10:55am and 2:45pm. Notes of those interviews were made and appear in the hearing bundle. Those notes can be summarised as follows:

34.1 Lauren had seen the Claimant's handover note on Friday 17 September but didn't see the Method of Work document until the morning of Monday 20th. Lauren accepted that she should have read the Method of Work document but she said she had not realised how important it was;

34.2 Kalum was not aware of the engineer's visit until the engineer arrived at the store and he had not seen or read the Method of Work document;

34.3 Julia was not at work the week before the engineer's visit and had not seen the Method of Work which she only became aware of for the first time on Tuesday 21 September;

34.4 At times when the Claimant was on holiday, it was his normal practice to leave a handover note of jobs/tasks to be done by the supervisors. The Claimant did not list the tasks in any particular order and did not assign tasks to any person. The order in which tasks were carried out and the distribution of tasks was left to the supervisors to work out between them;

34.5 Julia Richards had not read the Claimant's handover note but had taken instructions from Lauren on the tasks which needed to be completed;

34.6 Lauren accepted that all of the supervisors were responsible for following the process for emptying the CCI pouches but accepted that improvement was needed in that area;

34.7 All three supervisors accepted that they were trained in the Respondent's cash processes;

34.8 Kalum Palmer had signed the engineer into the store. When the engineer arrived, Kalum sent him with Julia Richards up to the shop floor to carry out the necessary processes on the tills. Once the removal of the pouches was complete, Kalum then signed the engineer back out of the store. He did

not check with the engineer or anyone else what work had been done before signing the engineer out;

34.9 Lauren recalled a conversation she had with Julia on Monday 20th when she recalled Julia asking whether the CCI pouches should have been taken off before the engineer visited. Julia did not recall this conversation when Sian John asked her about it;

34.10 Julia Richards recalled the engineer asking her whether the CCI pouch on till 3 was empty before he replaced it. The pouch was not empty and so Julia removed it and took it to the cash office. No further checks were then made of any other pouches on the other tills although Julia said she assumed the engineer would check with her whether the pouches were empty before removing them;

34.11 Kalum Palmer said that it was common sense that if the CCI pouches were leaving the building it was necessary to check they were empty;

34.12 Julia said she had noticed later in the day that there was some discrepancy in the figures showing the amount of cash which should have been in the store and she contacted Kalum that evening. They agreed that they would need to speak to Lauren about it the following day;

34.13 No action plan had been put in place by the Claimant at the store to address the regular failure to remove the CCI pouches in accordance with the Respondent's policy but Lauren Canavon said the Claimant would not be aware that the policy was not being followed because the end of day cash processes were completed by the supervisors and not the Claimant. Kalum and Julia also said that the Claimant did not carry out cash processes and that was a job completed by the three supervisors.

35. After that, at around 3pm, she also interviewed the Claimant. Notes of that interview also appear in the hearing bundle. During the course of his interview, the Claimant said the following:

35.1 The email with the Method of Work had arrived by email on Monday 13 September 2021. The Claimant had "scanned it" and put the date of the visit on it. He commented that the supervisors were more knowledgeable than him in respect of cash processes;

35.2 He left the Method of Work for the supervisors with his handover note but didn't do anything else with it. The Claimant had not given any verbal instructions to any of the supervisors;

35.3 The Claimant said there was nothing different in the removal of the CCI pouches on this occasion than any other time that task was completed;

35.4 The Claimant accepted that there were still occasions when pouches were not being emptied within the Respondent's guidelines. No particular action had been taken to address that issue;

35.5 The Claimant confirmed that when he was away from the store he would leave a handover note for the supervisors setting out any jobs for them to do together with any relevant documents but he would not assign any priority to any task or assign any tasks to any individual. The supervisors did not always finish the tasks the Claimant left for them during his absences. The Claimant said that, in future, he would assign tasks to individuals;

35.6 The Claimant was asked whether he would have communicated differently if he had read the Method of Work, particularly regarding the emptying of the pouches the night before the engineer's visit. He initially said that he would have, but then went on to say that the supervisors were fully familiar with the process of removing the pouches and so he would not have done anything differently.

36. The interview with the Claimant was adjourned at 4:30pm. After interviewing the Claimant, Sian John met again with each of the three supervisors. Ms John

determined whether or not each of the supervisors should be referred to a disciplinary hearing. She had decided that none of them would be subjected to any formal disciplinary process. She informed each of them that there were some learnings and expectations which would be set out in her outcome letter. Although some doubt was expressed about it by the Claimant in his evidence and the documents were not produced by the Respondent, the Tribunal accepts Ms John's evidence that she sent letters of concern to all three supervisors. The letters of concern did not amount to any formal disciplinary action by the Respondent against the supervisors.

37. Sian John also determined that the Claimant should be subjected to a formal disciplinary process in respect of his role in the events of 20 September. Ms John met again with the Claimant at 6:30pm that day and informed him of her decision. She explained her reasoning to him at the time.

38. On 24 September 2021, Ms John sent a letter to the Claimant confirming that decision and inviting him to attend a disciplinary hearing on 1 October 2021 which would be conducted by Craig Barnes, another regional manager. A copy of the letter appears at page 300 of the bundle. The letter stated the reason for the hearing was to discuss the Claimant's alleged misconduct, particularised in the letter as follows:

    "*Failure to follow a business instruction which has led to a potential serious financial loss of the business*
    Failure to effectively communicate a process of change to your team
    Failure to uphold an action plan from a Profit Protection audit"

39. The letter informed the Claimant of his right to be accompanied to the disciplinary meeting. It also informed him of the possible consequences which might arise from the meeting i.e. that he might be issued with "a formal disciplinary sanction in line with the company Disciplinary Policy".

40. The Respondent had a written disciplinary policy. A copy of the policy appears in the bundle starting at page 582. The policy included the following features:

40.1 Reasons for disciplinary action included performance, capability and conduct. The policy states that performance "covers under performance that arises from a team member not being capable of carrying out their duties and responsibilities to the required standard" but went on to say that the Respondent's first course of action will always be to offer appropriate assistance, but if the employee in question fails to demonstrate relevant capability, the disciplinary procedure will be followed. Conduct, under the policy, covers misconduct or gross misconduct caused through a team member's behaviour and/or actions and is generally when there has been a deliberate act of wrongdoing, a failure to follow rules and regulations or neglect";

40.2 The outcome of any disciplinary hearing may be that an employee receives a formal warning for issues regarding their conduct or performance;

40.3 The policy distinguished between misconduct and gross misconduct;

40.4 For performance issues, any sanctions would normally be escalated through the process of warnings, starting with an oral warning and proceeding to a final written warning or dismissal. For misconduct, sanctions may start at any stage depending on the seriousness of the alleged misconduct;

40.5 When read as a whole, the policy provided that, for misconduct (as opposed to gross misconduct) the most severe sanction which could be imposed was a final written warning. This was confirmed in the oral evidence of the Respondent's witnesses, namely Ms John, Mr Spence and Mr Thorne.

41. The Claimant attended the disciplinary hearing on 1 October 2021. He was accompanied by a trade union representative. The hearing was conducted by Craig Barnes and Eddie Spence was present to assist Mr Barnes and to provide any HR advice and support. A transcript of the disciplinary hearing was prepared and appears in the bundle starting at page 302.

42. At the conclusion of the disciplinary hearing Mr Barnes informed the Claimant that he had decided to issue him with a final written warning for misconduct. Mr Barnes went through each of the three allegations that had been set out in the letter inviting the Claimant to the disciplinary hearing and informed the Claimant of his conclusions and reasons for reaching those conclusions. The reasons given to the Claimant were as follows:

    42.1 Allegation 1 – failure to follow business instructions which has led to a potential serious financial loss of the business. The conclusions reached were that, by his own admission, the Claimant had not read or fully understood the Method of Work and had therefore not communicated the method of work to the supervisors to ensure that the CCI pouches were cleared before the engineer's visit. The Claimant had also failed to address an issue regarding the CCI pouch on till 1 which often exceeded the Respondent's limits and should have led to greater detail in the instructions given to the supervisors;

    42.2 Allegation 2 – failure to effectively communicate process and change to the team. The handover note was insufficient communication to ensure a smooth running of the removal of the CCI pouches which was a high risk action and not part of routine operations. There should have been greater clarity and support for the supervisors. Notwithstanding the capabilities of the supervisors, the Claimant is personally responsible for what happens in the store;

    42.3 Allegation 3 – failure to uphold an action plan from a protection audit. The failure to follow correct CCI processes had been picked up in June and July 2021 but was still not being followed by September 2021. This showed a lack of focus on the actions needed to mitigate the risks of loss to the business by not following the required processes.

43. On 4 October 2021, Mr Spence sent an email to the Claimant attaching a letter setting out the outcome of the disciplinary hearing. The letter appears at page 340 of the bundle. The contents of the letter were consistent with what Mr Barnes had already

told the Claimant at the end of the disciplinary hearing. The letter confirmed the decision to issue the Claimant with a final written warning on the grounds of conduct. The letter informed the Claimant of his right to appeal against the decision.

44. The Claimant was not due to work on 5 October 2021 as it was his day off for that week. He spoke to his doctor and his doctor issued him with a fit note advising that the Claimant was not fit for work due to "anxiety states". The fit note was for a period of 3 weeks commencing on 5 October 2021.

45. On the same day, the Claimant made a telephone call to Duncan South, the Respondent's manager in Cwmbran. The content of that conversation is particularly significant in relation to the decision that was subsequently made by Sian John to withhold CSP from the Claimant. The Tribunal did not hear any evidence from Mr South and he had not provided any witness statement. However, he was spoken to during the course of the investigation into the Claimant's grievance and the notes of his interview appear in the bundle at page 860. In his witness statement, the Claimant says that the account given by Duncan South in that interview is "how I recall the conversation". The Claimant therefore accepts, at least in broad terms, the contents of those interview notes. The account given by Mr South was as follows:

"*I got a phone call on Tuesday 5/10 from Ken Hughes, when I was covering Sian, he stated he was now off sick on advice from his doctors. He stated it was to do with receiving a final written warning, which was to do with the CCI's, and he was actually off with work related stress. He then said to me that the final written warning was the last straw. He had been picked on, unfairly, and would be putting in a letter of appeal but just felt he was not fit for work in any respect.*"

46. As part of the interview, when Mr South was then asked to confirm that the Claimant had stated that he was going off sick due to a disciplinary sanction he had received, Mr South said, "*Yes, it was the final straw. He was already on medication that he told me, but this one sent him over the edge, but he was going to appeal it.*"

47. On 8 October 2021, the Claimant sent an email to Mr Spence attaching notification of his appeal against the final written warning. The email which the Claimant sent said,

"*I am happy to attend an appeal meeting with my representative whilst on sick leave. The reason I am currently off work is due to work related stress and this unfortunate episode has impacted greatly on me and added to the overall stress. Therefore I feel it necessary to deal with this appeal as quickly and as smoothly as possible*". The grounds of the Claimant's appeal included the following:

47.1 The Respondent's disciplinary policy and procedure had not been followed correctly. This was broken down to include assertions that a) the intention all along was to blame the Claimant despite the involvement of the supervisors, b) the questioning conducted by Sian John was only intended to highlight the Claimant's alleged failures and not any culpability on the part of the supervisors and c) Sian John should not have been the investigator as she is related to Kalum Palmer;

47.2 The investigation carried out was not sufficient, the full facts were not considered or further evidence should be considered; and

47.3 The decision made was too harsh or was inconsistent. The Claimant felt the sanction he received was too harsh given his length of service, his clear disciplinary record and the severity of the incident in question. He also highlighted the lack of action taken against the supervisors.

48. The point raised that Sian John should not have carried out the investigation arose from the terms of the Respondent's own Code of Conduct policy. A copy of the policy appears in the hearing bundle at page 863. On page 2 of the policy, albeit under the heading "Recruitment", the following appears:

"*It is our policy not to recruit a relative of a store manager, assistant manager or security guard into the same store or department.*

…

You should not be involved in decisions relating to discipline, promotion or pay for any team member who is a relative or partner"

49. The policy defined the term relative as including "Uncle or Aunt" and therefore Sian John was a relative of Kalum Palmer for the purposes of that policy.

50. Upon receipt of the Claimant's appeal, Mr Spence asked for the Claimant's consent to make a referral to Occupational Health in respect of the work related stress which the Claimant had raised. The Claimant confirmed later that day that he was happy for the referral to be made. That afternoon, Mr Spence sent a further email to the Claimant confirming that the OH referral had been made.

51. On 11 October 2021, and having received the Claimant's fit note (which the Claimant had posted to the Respondent), Sian John wrote a letter to the Claimant. The letter was entitled "Letter to Confirm Withholding of CSP". After acknowledging receipt of the fit note covering a period of 3 weeks, the letter went on to say the following:

"*As much as I appreciate your grounds for seeking a medical note signing you off from work I feel the need to remind you that in line with our company attendance policy the company reserves the right to withhold company sick pay where it is believe [sic] there are genuine grounds to do so:*

If a team member is absent due to illness during notice periods, suspension, during investigations and/or disciplinary hearings or when their performance is being formally managed, and it is believed that the absence is as a direct result to delay/avoid the formal process. If no action is taken at the end of the formal process, the withheld CSP will be re-instated (subject to the absence levels as detailed under the 'short term absence' section below)

As you are aware prior to being signed off from work you had been issued with a disciplinary sanction which is within its appeal stage as I am told. I have reasonable belief to suggest your current absence is linked to the formal action taken against you.

Therefore, I have taken the decision to withhold any further Company Sick Pay from 5th October 2021, I request you provide your verbal consent to visit our Occupational Health Provider PAM Assist whereby an assessment of your current state of health

can be obtained. My main concern is to understand and assist I us [sic] in determining the triggers which maybe causing your work-related stress."

52. The section in bold italics in that letter was a reference to the Respondent's absence policy which appears in the bundle from page 570 onwards. The relevant section of the policy is section 6, entitled Company Sickness Pay Benefit (CSP). The first paragraph of that section provides that:

"*Wilko's CSP benefit is in place to support team members who need to take time off work due to illness. CSP is entirely discretionary and is not a contractual right or legal requirement. The Company reserves the right to vary or withdraw CSP at any time and for any reason.*"

53. Payment of CSP under the policy was dependent on three issues, namely eligibility for CSP (based on length of service and start date with the Respondent), the "Absence Category" and other grounds for withholding CSP.

54. Section 6.1 of the policy provided that team members who commenced employment prior to 1 November 2020 and had over 5 years of service prior to the start of the current financial year (such as the Claimant) were eligible to receive 1 week of CSP for each completed year of service up to a maximum of 26 weeks.

55. Section 6.3 of the policy then provided "General grounds for withholding CSP" and said the following:

"*In addition to the exceptions explained in the Absence Category section above wilko reserves the right to withhold CSP in certain circumstances and where it is believed there are genuine grounds to do so. Such grounds overrule any of the eligibility mentioned in 6.1 and 6.2 above and are (please note that this is not an exhaustive list):*

- *…*
- *If a team member is absent due to illness during notice periods, suspension, during investigations and/or disciplinary hearings or when their performance*

is being managed, and it is believed that the absence is as a direct result to delay/avoid the process. If no formal action is taken at the end of the process, the withheld CSP will be re-instated (subject to the absence stage & category and spell of absence as detailed under the 'short term absence' section below)

- *…*
- *Cases of misconduct indicating the absence is not genuine*
- *…*

If a decision is made to withhold CSP then consideration will be given as to whether further action is required on the grounds of misconduct as per section 8 below. If a team member believes the reasons given for withholding CSP is not correct, then they are able to raise a grievance against the decision to withhold payment and there would be one right of appeal against the initial grievance outcome"

56. On 14 October 2021 the Claimant raised a formal grievance against the decision to withhold CSP from him. The Claimant's grievance pointed out that his mental health had declined long before any performance or disciplinary discussions had taken place and had been documented by his doctor for a significant time. He said his medication had been increased twice over the preceding twelve months. He said the recent impact on his mental health had been overwhelming and had resulted in him being unfit for work. The Claimant denied that his absence had stopped or delayed any process as he had been fully engaged in meetings and he had asked for his appeal against the Final Written Warning to take place as soon as possible. He said the decision to withhold CSP had not helped his situation and had added yet further pressure on him.

57. Later that day Mr Spence acknowledged receipt of the Claimant's grievance and said that he thought it might be best to hear the grievance and the disciplinary appeal at the same time, one after the other.

58. On 15 October 2021, Mr Spence wrote to the Claimant again and asked if he would be able to attend a hearing to deal with the appeal and grievance on 21 October 2021. The Claimant responded later that day to say that his trade union representatives were not able to attend on that date.

59. On 18 October 2021, PAM OH Solutions produced an Occupational Health report for the Respondent in relation to the Claimant. The report appears in the bundle at page 371. The report contained the following information and opinions:

"*Current Issues*

As you are aware, Kenneth has been absent from work since 04/10/2021. He reports work related stress and is currently under the care of the GP. He advises he is taking antidepressant medication and this was recently increased. He tells me there has been an incident in work which requires resolving as it is adding to his stress. He reports struggling to sleep, low mood and poor motivation at present and his stress symptoms are his main barrier to returning to work at present.

OH Opinion

On assessment today, Kenneth was open, engaging and a good historian. He appeared to have insight into his condition. He appears to be managing some activities of daily living but reports struggling generally due to stress symptoms. Following completing two well validated assessment tools, it showed he perceived his symptoms to be severe. He has been given wellbeing advice today. ….

….

Management Advice

Kenneth is not fit for work and is unlikely to be fit for work in the next 4-6 weeks due to his ongoing symptomology. Unfortunately, I am unable to give any clear timescales on this colleague's return to work, nor offer a prognosis of recovery at this time as he feels unable to move forward until his meeting with management is completed. Furthermore, there are no adjustments or modifications that could be put in place to facilitate a return to work at this time, as his current symptomology remains to have a significant impact on him. …

Kenneth appears able to understand the allegations made, distinguish right from wrong and has a reasonable understanding of the proceedings. General medical evidence shows that undue delay in dealing with 'stressors' can result in an

exacerbation of symptoms and so our advice is to conclude matters with normal care, concern and sensitivity and in a timely manner by scheduling a meeting. … You may wish to consider a further OH review in about four weeks' time. Ideally his management meeting should take place before his next OH review."

60. On 20 October 2021 Mr Spence again wrote to the Claimant asking whether he would be available to attend on either 2 or 3 November 2021. The Claimant responded the following day to say he was waiting for confirmation regarding the availability of his trade union representative. Mr Spence asked the Claimant to confirm as soon as possible and informed him that Ms Tambling would be hearing his appeal and grievance.

61. By an emailed letter dated 22 October 2021, the Respondent invited the Claimant to attend a hearing to deal with his disciplinary appeal and his grievance on 2 November 2021 with Leila Tambling. The Claimant was informed of his right to be accompanied. Later that day, Mr Spence sent a copy of the occupational health report to the Claimant.

62. On 26 October 2021, the Claimant was issued with a further fit note by his doctor which stated that he was not fit for work for a further 4 weeks due to anxiety states.

63. In an exchange of emails between Mr Spence and the Claimant on 1 November 2021, the Claimant was told that the hearing scheduled for 2 November 2021 had to be cancelled as Ms Tambling was unwell. At the Claimant's suggestion, the hearing was rearranged for 9 November 2021 and the Claimant was informed that Sandra Birch would now be dealing with his appeal and grievance on that date. Those arrangements were subsequently confirmed in a letter dated 3 November.

64. The Claimant attended the hearing with Sandra Birch on 9 November 2021 and was accompanied by his trade union representative. Mr Thorne was also present to provide HR support to Ms Birch. A transcript of the hearing appears in the bundle at page 390. The notes of the meeting indicate that the Claimant was asked a large number of questions regarding the issues which had led to his final written warning and he was given an opportunity to answer and to set out his position in respect of

the appeal. All those present played an active part in the hearing including Mr Thorne and the Claimant's trade union representative.

65. Once all of the issues related to the appeal were heard, Ms Birch then went on to hear the Claimant's grievance. A separate transcript of that part of the hearing was made and appears at page 436 of the bundle. The same participants were present. Again, the Claimant was able to set out what he wanted to say in respect of the grievance and various questions were asked of him. No decisions were made on the day by Ms Birch in respect of either the appeal or the Claimant's grievance.

66. Following the hearing, Ms Birch then conducted further interviews with Lauren Canavon, Sian John and Duncan South.

67. On 1 December 2021 Ms Birch wrote to the Claimant with the outcome of his disciplinary appeal and his grievance. She dismissed both, setting out her reasons for doing so in the letters. In summary, her reasons for dismissing the appeal were as follows:

    67.1 The investigation and disciplinary process was fair, thorough and transparent;

    67.2 The involvement of the supervisors does not have any bearing on the Claimant's own accountability to the store. While there were opportunities for the supervisors to prevent the near miss loss, as the store manager it was open to the Claimant to have prevented the incident altogether by more effective communication and setting the team up with the information they needed;

    67.3 The outcome for the supervisors had no bearing on the outcome for the Claimant;

    67.4 The accountability for the actions on the action plan in respect of profitability was a matter for the Claimant. Although the Claimant is not the person who actually carries out the task of emptying CCI pouches, it is his job to ensure

the supervisors are doing what they should be doing and following correct procedures and insufficient progress has been made on this issue;

67.5 Several failings led to the near loss and the first failing was the Claimant's poor communication with his team. If he had communicated better, the subsequent string of events would not have happened.

68. A separate letter was sent giving the outcome of the Claimant's grievance regarding the withholding of CSP from him. That letter explained the decision in the following way:

"*The decision to withhold your company sick pay was taken by Sian following a call you had with Duncan South, who was covering the region in Sian's absence at the time. Having spoken with Duncan about that conversation, he stated that the primary reason you told him you were going off was due to the final written warning issued to you by Craig Barnes. While I do not doubt that the disciplinary process may have had an impact on your mental health, you presented fit for work during the whole process and were able to participate in the meetings to make your case and discuss your points of mitigation. You were also at the time still on a performance improvement plan, albeit informally.*

The reasons in the absence policy for withholding company sick pay are non-exhaustive, and it is my belief you decided to go absent from work in bad faith following the conclusion of the disciplinary process, rather than begin to move forward from the process.

…

I am unable to substantiate the points of your grievance and I will not be overturning the decision to withhold your company sick pay."

69. On 2 December 2021, the Claimant appealed the decision to dismiss his grievance. He set out the grounds of his appeal, albeit in summary form, in a document which appears at page 476 of the bundle. Amongst the reasons for his appeal were a) his

sickness absence was genuine and was supported by fit notes, b) he had always followed the Respondent's policy on CSP and c) the final written warning was not the primary reason for his absence.

70. On 10 December 2021, Mr Spence wrote to the Claimant asking if he could attend an appeal hearing on 15 December 2021. By 13 December 2021, the parties had agreed that the appeal could take place on 15 December 2021. The arrangements were confirmed in writing. The Claimant would be accompanied again by his trade union representative.

71. The grievance appeal hearing took place on 15 December 2021 and was chaired by Leila Tambling. A transcript of the meeting was prepared and appears at page 488 of the bundle. The main substance of the appeal was that the reasons given for withholding CSP from him, namely that his absence was not genuinely by reason of ill health and/or that it was designed to delay or avoid a formal process, were not true.

72. Ms Tambling decided to reject the Claimant's appeal and again upheld the original decision to withhold CSP from him. The reasons for her decision were set out in a letter to the Claimant dated 21 December 2021 which appears at page 512 of the bundle. Whilst the letter responded to each of the points raised by the Claimant, the principal reasoning of Ms Tambling appears under points 2 and 6 in the letter. In summary, Ms Tambling said that she had concluded that the Claimant's absence from work was "premeditated" and that Sian John's decision to withhold CSP and Ms Birch's decision to reject the Claimant's grievance against that decision were both correct in the circumstances.

73. A further Occupational Health report was produced dated 7 January 2022. The report appears at page 518 of the bundle. In summary, the report concluded that the Claimant remained unfit for work due to the reported impact and severity of his symptoms. Further, the report stated that the Claimant was unlikely to be fit until the work related issue had been resolved.

74. On or about 10 January 2022, the Claimant received a telephone call from Sian John. Ms John informed him that the Respondent had decided to close a number of stores

nationally before the end of 2023 and that Merthyr Tydfil was one of the stores affected. Ms John told the Claimant that the store would close in mid-September 2022. Ms John then read from a pre-prepared script to the effect that those affected would have priority over other applicants for roles in the business plus help and support.

75. The Claimant sets out further detail about the conversation in his witness statement at paragraph 106. He was not challenged as to the accuracy of that evidence and, although Ms John did not accept the accuracy of the Claimant's evidence when she gave oral evidence, the Tribunal accepts the Claimant's account. The Claimant's account was that he asked Ms John what the announcement meant for him and she responded by saying "I do not know what you mean, what are your intentions, I do not know if you intend to come back or not." The Tribunal finds that the response from Ms John was unhelpful and dismissive towards the Claimant in tone and content. That approach to the Claimant is also consistent, in the Tribunal's view, with the general view that Ms John has of the Claimant as set out in the early parts of her witness statement.

76. On 18 January 2022, the Claimant received a letter from the GMB union confirming the plan to close stores including Llanelli and Merthyr Tydfil. For the reasons set out in his witness statement, the Claimant formed the view on reading that letter that the decision to close the store in Merthyr had been made significantly earlier than the Respondent was suggesting.

77. On 20 January 2022, the Claimant wrote to the Respondent resigning from his employment. A copy of his letter of resignation appears at page 530 of the bundle. The Claimant informed the Respondent that he was resigning from his employment with immediate effect and said he was doing so "on the grounds of constructive dismissal, disability discrimination and breach of contract for several reasons". The specific issues the Claimant then set out included:

    77.1 The Respondent had never believed that he was suffering from workplace stress;

77.2 The Respondent had unlawfully and unfairly withheld CSP from him and had accused him of taking disability related sick leave in bad faith;

77.3 He had been unreasonably and unfairly given a final written warning;

77.4 He had not been treated in a reasonable manner under the Respondent's disciplinary, grievance or sickness policies.

78. During the period after he was invited to the disciplinary hearing, the Claimant made some enquiries as to the possibility of re-training as a HGV driver. His initial email enquiries were made on 27 and 28 September 2021. The company he had contacted provided information to him by email on 29 September 2021. It was put to the Claimant during cross-examination that he had made his decision to leave his employment with the Respondent as long ago as 27 September 2021 when he made that enquiry. The Claimant denied that suggestion and said that his enquiries were simply him considering his options in the event that the worst happened and he lost his job given that he had been invited to a disciplinary hearing. He said that, other than the initial enquiries, he took the matter no further until the end of October i.e. after he had been given the final written warning and his CSP had been withheld. His evidence is corroborated by the documentation which shows he sent an email to the organisation on 25 October 2021. However, even then, he was simply exploring his options for re-training. The Claimant's oral evidence was that he found himself off work and with limited income (in light of the withholding of his CSP) and so needed to consider his options. He also said that he would not have chosen to leave his retail job with the Respondent and take up work as a HGV driver. All of his working life had been spent in retail and the HGV work was hard and physically demanding. The Tribunal found the Claimant's evidence compelling on this issue and the Tribunal accepts that he had not decided to leave his employment in September 2021 or at any stage until he tendered his resignation in January 2022.

Applicable law

Constructive unfair dismissal

79. Section 94 of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer.

80. Pursuant to section 95 ERA 1996, an employee is dismissed in circumstances where the employee terminates the contract under which he is employed in circumstances in which he is entitled to terminate without notice by reason of the employers conduct.

81. Where it is in dispute, as in this case, the burden of proving a dismissal rests upon the claimant.

82. The relevant principles to be applied are well-known and derive from the case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**. The claimant must show that there has been a breach of contract by the employer, that the breach is sufficiently important to justify the employee resigning, that he resigned in response to the breach and not for some other unconnected reason and that he did not delay too long in terminating the contract so that it can be said that he has either waived the breach or affirmed the contract. The test of whether there has been a repudiatory breach of contract is an objective test.

83. One of the terms of the contract said to be breached in this case is the implied term of trust and confidence. That term is a term that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (**Malik and another v BCCI SA (in compulsory liquidation) [1998] AC 20**).

84. In deciding whether there has been a breach of the term the tribunal must look at the employers conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it (**Woods v WM Car Services**).

85. In circumstances in which there is said to be a last straw which prompted the resignation of the employee, as is the Claimant's case, a series of relatively trivial breaches in which the final one is a last straw can amount to a breach of the implied term. However the alleged last straw must contribute something to the breach of the implied term. It cannot be utterly trivial. An entirely innocuous act cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and

destructive of confidence (**London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493**). The EAT had earlier said, in **Hamill v J Strong & Co [2001] All ER (D) 18** that:

"… *a Tribunal confronted with this sort of situation must look and see if the final incident is sufficient of a trigger to revive the earlier ones. This will, it seems to us, involve looking at the quality of the incidents themselves, the length of time both overall and between the incidents, and it will also involve looking at any balancing factors which may have, at any point, been taken to constitute a waiver of earlier breaches.*"

86. In terms of affirmation of a contract, as set out by Lord Denning in the **Western Excavating** case, where there has been a repudiatory breach by the employer an employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving he will lose his right to treat himself as discharged and will be regarded as having elected to affirm the contract.

87. However, the passage of time is not by itself capable of establishing affirmation. The employee will demonstrate affirmation generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do (**Chindove v William Morrisons Supermarkets plc UKEAT/0201/13**.

Discretion in contracts/unlawful deductions from wages

88. Section 13(1) ERA 1996 provides that an employer shall not make a deduction from the wages of a worker unless the deduction is required or authorised by a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. Section 13(3) provides that where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated as a deduction made from the worker's wages on that occasion.

89. Where there is a discretion afforded to an employer under the terms of an employee's contract of employment, the parties agreed that the relevant principles to be considered are set out in the judgment in **Clark v Nomura International plc [2000] IRLR 766** as follows:

"*Quite apart from the additional contractual straitjacket for the discretion in this case, the employer's discretion is in any event, as a result of the authorities, not unfettered, as both sides have accepted to be the law in this case. Even a simple discretion whether to award a bonus must not be exercised capriciously. … My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) i.e. that no reasonable employer would have exercised his discretion in this way. … Such test of perversity or irrationality is not only one which is simple, or at any rate simpler, to understand and apply, but it is a familiar one, being that regularly applied in the Crown Office or, as it is soon to be, the Administrative Court. In reaching its conclusion, what the court does is thus not to substitute its own view, but to ask the question whether any reasonable employer could have come to such a conclusion.*"

Discrimination arising from disability

90. Section 15 of the Equality Act 2010 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."

91. The Claimant has identified the unfavourable treatment he says he received because of something arising from his disability, as identified in the agreed list of issues at paragraph 9, namely:

91.1 Refusing to pay the Claimant CSP;

91.2 Delaying the Claimant's disciplinary appeal;

91.3 Failing to reverse the decision to withhold CSP once the Respondent was in receipt of medical advice regarding the Claimant's sickness absence; and

91.4 Dismissing the Claimant.

92. Once the tribunal has identified the treatment complained of, it should focus on the words "because of something" and identify the "something" that is said to give rise to the treatment. It should then consider whether the "something" arose in consequence of the claimant's disability (***Basildon and Thurrock NHS Foundation Trust v Weerasinghe*** **[2016] ICR 305**).

93. In the case of ***Pnaiser v NHS England*** **[2016] IRLR 170** the EAT framed the process as: -

(a) The tribunal first identifies whether there was unfavourable treatment and by whom;

(b) It should then determine what the cause of the treatment was. Here, the tribunal should focus on the reason in the mind of the alleged discriminator, consider the conscious or unconscious thought processes of that person (the motive of the alleged discriminator is irrelevant);

(c) The next issue is whether the "something" arose "in consequence of the claimant's disability". This could involve considering a range or chain of causal links. This is an objective assessment, where the alleged discriminator's thought processes are not relevant to the issue of whether the 'something' did, or did not, arise from the disability.

(d) The knowledge required on the part of the respondent is of the disability, not necessarily that the 'something' arose from the disability.

94. This clarifies that it is sometimes best to consider first (although the order is not essential) what the 'something' is, and to establish whether – objectively – it arises from the disability. In considering this, it may be necessary to look at whether there are further 'links in the chain' to connect the alleged 'something' to the disability.

95. It is not necessary for the Tribunal to establish that the respondent knew that the 'something' arose from the disability as distinct from knowing that the claimant did in fact have a disability. The 'something' in this case is said to be the Claimant's sickness absence. It is agreed between the parties that this is something which arose from his disability.

96. The next issue is whether the treatment alleged to have taken place did in fact take place, and if so whether it was in fact unfavourable.

97. The tribunal would then need to address whether the proven unfavourable treatment was caused by the 'something', using effectively the same test on causation that is set out in ***Nagarajan***. The claimant's disability (or the 'something') should have had 'significant' influence on the unfavourable treatment, or it can be a cause which is not the main or the sole cause, but which was nonetheless an effective cause of that treatment (***Gallop v Newport County Council*** **[2014] IRLR 211** (a case which preceded the EqA)).

98. If it is proven that the unfavourable treatment was caused by the something arising, the next step is for the Tribunal to consider whether that treatment on the part of the respondent was a proportionate means of achieving a legitimate aim (s.15(1)(b)).

Indirect discrimination

99. 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"

100. The first requirement is to demonstrate a PCP. The PCP can 'be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites qualifications or provisions.' (EHRC Code).

101. If the Claimant's PCP is determined to be valid, the Tribunal would also be required to consider the group disadvantage, and whether an identifiable group is adversely affected, whether actually or potentially, by the ostensibly neutral requirement (***Eweida v British Airways plc*** **[2010] ICR 890**). The point for consideration is the extent to which the members of the pool have suffered a 'particular disadvantage'.

102. The tribunal would also need to address causation, most recently addressed by the Supreme Court in the case of ***Essop v Home Office*** **[2017] I.C.R. 640**.

103. As set out in section 23 of the Equality Act 2010, for the purposes of the necessary comparison of cases when determining complaints of indirect discrimination under section 19, there must be no material difference between the circumstances relating to each case. Section 6(3) EqA 2010 provides that in relation to the protected characteristic of disability a reference to a person who has a particular protected characteristic is a reference to persons who have a particular disability.

Failure to make reasonable adjustments

104. The requirement to make reasonable adjustments for employees is in s. 39(5) EqA and is set out in detail in ss. 20, 21 and 22 and Schedule 8. Section 20 reads:

> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) 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.*
>
> *…*
>
> *(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.*
>
> *(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.*

105. Section 21 provides that a failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments (section 21(1)) and A discriminates against a disabled person if A fails to comply with that duty in relation to that person (section 21(2)).

106. In ***Environment Agency v Rowan*** **[2008] IRLR 20** it was noted (in relation to the then current provisions in the DDA) that a tribunal considering a claim of failure to make reasonable adjustments should identify:

a) the provision, criterion or practice applied by or on behalf of an employer, or
b) the physical feature of premises occupied by the employer,
c) the identity of non-disabled comparators (where appropriate) and
d) the nature and extent of the substantial disadvantage suffered by the Claimant.

107. It was further said that unless the four factors above (or three if (b) is not relevant) are considered the tribunal cannot properly determine whether any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person at a substantial disadvantage.

108. In respect of the PCP, Paragraph 6.10 of the 2011 EHRC Code ('the Code') suggests that 'provision, criterion or practice' should be "*construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions*." The Claimant relies upon the same PCP as she does for the indirect discrimination claim, namely '*not advertising the Area Directors Posts for recruitment/promotion internally*'.

109. The comparison in relation to reasonable adjustments is to establish whether the claimant is placed at a substantial disadvantage, thus there is no need for the comparator or comparator group to have the same disability as the claimant.

110. On the meaning of 'substantial disadvantage, paragraph 6.15 of the Code refers to s.212 of the EqA and says: *"The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis."* It is also necessary for the Tribunal to consider whether the respondent knew or could it reasonably be expected to have known that the Claimant would be placed at the

alleged substantial disadvantage (Part 3; Sched 9 EqA)? The fact that the failure to advertise the post was a mistake may be relevant to the Tribunal's consideration of this point.

Harassment

111. Section 26 EqA 2010 provides as follows:

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)A also harasses B if—

(a)A engages in unwanted conduct of a sexual nature, and

(b)the conduct has the purpose or effect referred to in subsection (1)(b).

(3)A also harasses B if—

(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b)the conduct has the purpose or effect referred to in subsection (1)(b), and

(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

Equality Act claims – burden of proof

112. Section 136 EqA 2010 makes specific provision for the burden of proof in complaints of discrimination pursuant to that Act. The section operates so as to

require that, if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred but that does not apply if the respondent shows that the alleged discriminator did not contravene the provision i.e. for 'disability neutral' reasons.

113. In summary, there must be some facts proven by the Claimant (who bears the initial burden of proof) from which the Tribunal can draw inferences to establish a prima facie case of discrimination. A prima facie case requires that a tribunal could properly conclude from all the evidence that there has been discrimination (**Madarassy v Nomura International plc [2007] IRLR 246 (CA)**).

Discussion

Constructive unfair dismissal

114. There is no dispute between the parties that the Claimant resigned from his employment on 20 January 2022. The issue in this case is whether the Claimant was entitled to do so and treat himself as dismissed by reason of a repudiatory breach of contract on the part of the Respondent.

115. Paragraph 2 of the list of issues sets out the events which the Claimant relies on as the conduct of the Respondent amounting to the required repudiatory breach. The Claimant's case relies on the breach of two separate, but partly related contractual breaches i.e. the withholding of CSP and the alleged breach of the implied term of trust and confidence.

116. The Tribunal has considered issues (a), and (c) to (f) inclusive together as they are all issues connected with the decision to subject the Claimant to a disciplinary process and the issuing of a final written warning together with the alleged inconsistent approach taken to the three supervisors.

117. The Tribunal considers the following matters to be significant:

117.1 The decision to refer the Claimant to a disciplinary meeting for his perceived part in the events of 20 September 2021 was made by Sian John;

117.2 Sian John also made the decision to issue letters of concern only to the three supervisors who were present in the store, and were effectively managing the store on that date;

117.3 The relevant Method of Work document had been given to the Claimant by email and he had printed it out, marked it with the date of the engineers visit and included details of the visit in his handover note which all witnesses accepted was the Claimant's normal practice when leaving tasks for the supervisors during periods in which the Claimant was absent from work;

117.4 The Claimant had therefore passed on the relevant information to the supervisors in exactly the same way as it had been given to him and had done so at least 3 days before the engineer was due to visit;

117.5 The supervisors all knew that the Claimant worked in that way and, in the first interview with Lauren Canavon, the Respondent had evidence that she had seen the Method of Work on the Monday morning before the engineer had visited;

117.6 There were numerous opportunities for the supervisors on the day to identify that the CCI pouches had not been emptied and therefore prevent the potential loss occurring. On the basis of her initial evidence to Sian John, Lauren had seen the Method of Work and so should have actioned it. Kalum Palmer made no checks of the work done by the engineer (as he should have) prior to allowing the engineer to leave. Julia Richards had been alerted to the fact that the CCI pouches may not have been empty when she actually emptied the pouch on one of the tills. Further, Kalum Palmer told Sian John that it was common sense that the pouches would have to be empty before they could be removed from the store. None of those events were within the control of the Claimant and, given the basic nature of those errors, it is irrational to think that the Claimant could have ensured any different outcome;

117.7 Further, given the amount of cash which was removed from the store, it must follow that the supervisors had not been emptying the pouches as part of their regular duties as required under the Respondent's policies in the

Claimant's absence. Although the Claimant was the store manager, all witnesses agreed that the supervisors were the ones who generally carried out the cash management procedures. That was also confirmed by the supervisors Day In the Life Of (DILO) document;

117.8 Although the Claimant accepted in his oral evidence that the events of that date were potentially serious involving a potential loss to the Respondent, the decision to subject him to a formal disciplinary process but not take any formal action against the supervisors was irrational, illogical and perverse;

117.9 The decision then taken to issue the Claimant with a final written warning is even harder to understand. A final written warning was the most severe penalty which could have been imposed on the Claimant for the events of that day. The Respondent considered the conduct of the Claimant to amount to misconduct and not gross misconduct and so could not have imposed any greater penalty. For all of the reasons already set out above, the Respondent could not reasonably have concluded that the Claimant's conduct was such that it was deserving of that level of punishment. That conclusion is exacerbated and reinforced again by the severe inconsistency in approach taken to the Claimant when compared with the supervisors;

117.10 Further, the Respondent included one issue in the disciplinary process which could not reasonably have been considered to be a disciplinary issue at all. The removal of the CCI pouches generally as part of the overall cash management processes at the store was an issue identified within the earlier action plan and was not even part of the Claimant's informal PIP. It was plainly an issue related to the Claimant's performance and one which could only reasonably have been dealt with in a manner not forming part of any disciplinary process.

118. The Tribunal is also satisfied that it was inappropriate and in breach of the Respondent's own policies to allow Sian John to investigate the events of 20 September 2021 and to make the decision not to subject the supervisors to any formal disciplinary action. She was the Aunt of Kalum Palmer. It would not have been possible to rationally conclude that one of the supervisors should be treated

differently compared to the other two supervisors on the evidence that was available to the Respondent. The decision whether or not to subject them to disciplinary action, whilst not deciding their guilt of any misconduct or imposing any sanction, was the first step in a disciplinary process. In fact, as a result of Sian John's decision, Kalum Palmer was not subjected to any formal disciplinary action at all. Although most of the Respondent's witnesses did not (or felt unable to) accept the suggestion that the policies had been breached, Mr Thorne accepted that it was probably not a wise decision to have allowed Sian John to play the part that she did. The Tribunal agrees with Mr Thorne and has come to the conclusion set out above. Given the inconsistent approach taken towards the Claimant by Sian John, the Tribunal is satisfied that the Claimant justifiably had his trust in the process undermined as a result. That was further exacerbated when, shortly after the Claimant had received his final written warning, Kalum Palmer was then promoted to be store manager at a different store and Ms John was involved in the promotion panel. That was the evidence of the Claimant and the Tribunal accepts it. Although she did not accept the point in her evidence, Ms John's evidence on this point was vague and unimpressive.

119. Issue (g) in the list of issues relates to the Respondent's decision to withhold CSP from the Claimant in mid-October 2021. That decision was also taken by Sian John. For the reasons which follow, the Tribunal has also concluded that her decision was irrational, illogical and perverse. The Claimant's contract of employment makes no mention of any right to receive CSP. The eligibility of an employee to receive CSP is dealt with in the Absence Policy which makes clear that it is wholly discretionary. However, as set out in the applicable law section of this Judgment, and as agreed between counsel, the exercise of such discretion must not be irrational, illogical or perverse.

120. The Respondent's witnesses effectively accepted in cross examination that the Absence Policy sets a default position that an employee will receive CSP unless there are grounds to withhold it. The evidence of Mr Thorne was that it was a rare event for CSP to be withheld from an employee. Neither Mr Spence or Ms John, when asked, were able to give any evidence of other specific cases where it had happened.

121. When making her decision to withhold CSP from the Claimant, Sian John identified one ground within the policy which she said justified doing so. She could have identified another ground (particularly given that the policy said the list of grounds was not exhaustive) but she did not. The basis for her decision was the ground identified in her letter to the Claimant dated 1 October 2021. In cross examination, all of the Respondent's witnesses who were asked about it accepted that the ground relied on had two elements, namely the absence of the employee during a formal process and a belief that the absence was to avoid or delay the process. Whilst there was no real dispute that the Claimant was absent during a formal process (i.e. a disciplinary process that was ongoing in light of the Claimant's appeal) there was no evidence that the Claimant was seeking to delay or avoid the process by being absent. In fact, such evidence as there was pointed to the opposite conclusion. The Claimant's appeal had indicated he wished it to proceed as quickly as possible even though he was absent from work. The Claimant had attended all meetings and was willing to attend any meetings the Respondent suggested. In the circumstances, there was no rational basis for Sian John to conclude that the ground upon which she decided to withhold CSP from the Claimant applied to the Claimant's circumstances.

122. Further, the decisions taken during the grievance process to uphold the decision to withhold CSP are similarly difficult, if not even more difficult, to understand. The conclusions reached by the decision makers at the two stages of the grievance process were that the Claimant had gone off absent from work "in bad faith" or that his absence was "premeditated". The conclusions were apparently reached on the basis of the information given by Duncan South. The Tribunal is satisfied that each of the decision makers (Sian John, Sandra Birch and Leila Tambling) each interpreted that information as meaning that the Claimant had gone on sick leave as a result (and because) of the final written warning imposed on him. The Tribunal accepts that they each genuinely came to that view.

123. However, the Tribunal also finds that such a view was irrational and/or perverse and was not a reasonable conclusion which could have been reached on the available evidence by any of them. The Claimant had suffered with mental health issues for some time before the events involved in this case. He had informed a

line manager about it previously. His absence from 5 October 2021 was supported by a doctor's note declaring that he was not fit for work. Whilst, the Claimant had told Mr South that the final written warning was the last straw and that he was not fit for work, the issuing of the final written warning cannot reasonably have been looked at in isolation from the other information and evidence available to the Respondent. The issue was reinforced later in the process when the Respondent was in receipt of the OH report which also confirmed that the Claimant was not fit for work, in addition to further fit notes to the same effect from the Claimant's GP.

124. The conclusions reached by Ms Birch and Ms Tambling are, in the Tribunal's view fatally undermined by and wholly at odds with the medical evidence which was available to them at the time they made their decisions. The conclusions they reached amount to saying that the Claimant was not genuinely ill or was hiding behind his illness and was actually absent from work for other, unconnected reasons. None of the Respondent's witnesses were prepared to say under cross examination that they thought the Claimant was not genuinely ill. That is hardly surprising given the medical evidence.

125. In the circumstances, the Tribunal has concluded that the withholding of CSP from the Claimant and the subsequent rejections of his grievance and grievance appeals (particularly bearing in mind the reasons for each of those decisions) was illogical and perverse. The Claimant should not have had CSP withheld from him and, once it had been withheld by Sian John's decision, it should have been reinstated either by Ms Birch or by Ms Tambling.

126. Issue (k) relates to the delays in concluding the disciplinary and appeal processes. The Claimant's case is that the delays were unreasonable. The Tribunal does not agree. There were no meaningful delays in the process between the Claimant being invited to a disciplinary meeting and the hearing of his disciplinary appeal and grievance on 9 November 2021. Any delays which there were arose in circumstances outside of the Respondent's control. The Tribunal takes the same view in respect of the Claimant's grievance appeal.

127. The final act complained of in paragraph 2 of the list of issues was the Respondent notifying the Claimant in mid-January 2022 that his store was to close later that

year. There is no dispute that Sian John communicated that information to the Claimant.

128. The next issue for the Tribunal to consider is whether the conduct of the Respondent amounted to a fundamental breach of the Claimant's contract of employment. The Tribunal has concluded that it did. For the reasons set out above, the decision taken to withhold CSP from the Claimant was a decision which was irrational and perverse and amounted to a breach of contract. Further, the Tribunal is also satisfied that the Respondent acted in such a way as to breach the implied term of trust and confidence. The Respondent's conduct in subjecting the Claimant to disciplinary action, imposing a final written warning and then rejecting the Claimant's appeal was, for the reasons above irrational, illogical and perverse. It was exacerbated by the fact that Sian John should not have been appointed to investigate the issues, and nor should she have been the person to decide whether or not to refer the Claimant or any of the supervisors to a disciplinary meeting. As set out above, the decisions taken in respect of CSP were similarly irrational and perverse. Each of those actions, either individually or cumulatively, in the Tribunal's view were likely to destroy or seriously damage the trust and confidence between the parties and there was no reasonable or proper cause for the Respondent's actions.

129. The final straw event relied upon by the Claimant (i.e. informing him of the planned store closure) was not in itself an unreasonable act on the part of the Respondent or a breach of any term of the contract of employment. However, the Tribunal is satisfied that it was capable of adding something to the events that had gone before. In particular, the Tribunal accepted the Claimant's evidence as to the tone and content of the conversation he had with Sian John. The Tribunal is satisfied that the Claimant was justified in thinking that the approach adopted towards him was dismissive with no proper information or support being given as to the likely effect on him of any store closure.

130. Based on the findings set out earlier in this judgment, the Tribunal is satisfied that the Claimant did resign in response to the breaches of his contract of employment identified above and not for some other reason. In particular, the Tribunal has

rejected any suggestion that the Claimant had already decided to leave his employment before receiving the final written warning.

131. The Tribunal is also satisfied that the Claimant did not behave in a way which can be said to have waived any breach or affirmed the contract. Up to and including January 2022, there was an ongoing series of events involving the final written warning and the Claimant's grievance regarding the withholding of CSP. The Claimant was also absent from work by reason of ill health. The passing of time cannot, by itself, indicate waiver or affirmation and all of the Claimant's other actions were consistent with him protesting against the breaches committed by the Respondent i.e. his appeals and his grievance.

132. In the circumstances, the Tribunal has concluded that the Claimant was dismissed from his employment in the sense that he resigned from his employment in circumstances where he was entitled to do so as a result of a breach of his contract of employment committed by the Respondent.

133. During submissions, Mr Hodge accepted that if the Tribunal concluded that the Claimant had been dismissed, the dismissal was unfair.

134. Accordingly, the Tribunal concludes that the Claimant's complaint of unfair dismissal is well-founded and succeeds.

Breach of contract (wrongful dismissal)

135. The principal issue between the parties in respect of this complaint was whether or not the Claimant was dismissed from his employment. For the reasons set out above, the Tribunal has concluded that he was dismissed.

136. There is no dispute that the Claimant's employment was terminated without notice. In those circumstances the Respondent accepts, as set out in paragraph 40 of Mr Hodge's written submissions, that the Claimant is entitled to be compensated for the notice period he would have been entitled to if he had not been dismissed without notice.

137. Accordingly, the Claimant's complaint of breach of contract (wrongful dismissal) is well-founded and succeeds.

Unlawful deductions from wages

138. On behalf of the Claimant, Mr Pollitt submitted that this complaint was closely related to the issue raised as part of the constructive dismissal complaint regarding the withholding of CSP. In summary, Mr Pollitt submitted that if the Tribunal concluded that the Respondent had exercised its discretion in an irrational or perverse manner when withholding CSP in circumstances where it would otherwise have been paid to the Claimant then that would amount to an unlawful deduction of wages as the Claimant would not have received the full amount of wages that were properly payable on each occasion he was paid after Sian John's decision to withhold CSP was made.

139. Mr Hodge did not argue to the contrary either in his written or oral submissions and, in the Tribunal's view, accepted the analysis advanced by Mr Pollitt.

140. In any event, the Tribunal accepts the submission made on behalf of the Claimant. For the reasons already set out, the Tribunal has concluded that the Respondent exercised its discretion pursuant to the Absence Policy in a manner which was irrational, illogical and perverse and, had it not been for that decision, the Claimant would have received CSP.

141. In those circumstances, the Tribunal is satisfied that the Claimant's complaint of unlawful deductions from wages is well founded and succeeds in respect of each occasion on which he was due to receive wages (in the form of CSP) after 11 October 2021.

Discrimination arising from disability

142. At the start of the final hearing, the Respondent conceded that the Claimant was a disabled person within the meaning of the EqA 2010 at all times material to the claim. In his written outline submissions and also in oral submissions, Mr Hodge also accepted that the Respondent knew or could reasonably be expected to have known that the Claimant was a disabled person at the material times.

143. The unfavourable treatment which the Claimant alleges he was subjected to is set out in paragraph 14 of the list of issues. It is not in dispute that the Respondent

refused to pay CSP to the Claimant and that it later refused to reverse that decision. It is also conceded by the Respondent that the refusal to pay amounts to unfavourable treatment. It follows, in the Tribunal's view, that the failure to reverse the original decision also amounts to unfavourable treatment.

144. The Tribunal does not accept that the Claimant was subjected to unfavourable treatment by reason of any delay in the disciplinary appeal. As set out above, the Tribunal does not consider that there was any meaningful delay in that process or, alternatively, any delay was entirely outside of the control of the Respondent.

145. The final allegation of unfavourable treatment is the Claimant's dismissal. In light of the conclusions above, the Tribunal is satisfied that the Claimant was dismissed. There can be no doubt that dismissal amounts to unfavourable treatment.

146. For the purposes of the complaint under section 15 EqA 2010, the "something arising" relied on by the Claimant is his disability-related absence from work. The Tribunal is satisfied that the Claimant was absent from work from 5 October 2021 onwards and that he was absent by reason of his disability or symptoms arising from it.

147. The real issue between the parties in respect of this complaint is the issue of causation. In order for the complaint under section 15 to succeed, the Tribunal has to be satisfied that the Claimant was subjected to unfavourable treatment <u>because of</u> something arising in consequence of his disability. The Respondent submits that the decision to withhold CSP from the Claimant was not made because the Claimant was absent from work but because of the information given to Sian John by Duncan South which she interpreted as meaning that the Claimant had taken sick leave in response to, and because he was unhappy about, the final written warning imposed on him.

148. The Tribunal has found that the reason for the decision taken by Ms John was her understanding of the position outlined to her by Mr South. Although the Tribunal has concluded that the view she came to was irrational and perverse, the Tribunal has nonetheless accepted that it was genuinely her view. The Tribunal has arrived at the same conclusion in relation to the later decisions of Ms Birch and Ms Tambling when they dealt with the Claimant's grievance regarding CSP.

149. On balance, the Tribunal has concluded that the reason the Respondent withheld CSP from the Claimant and then refused to reinstate it was the view taken by the respective decision makers that the Claimant had gone off work on sick leave as a direct response to the final written warning and, in doing so, had acted in a premeditated manner or in bad faith. The Tribunal accepts the submission made by the Respondent that the decisions were not made because of the Claimant's absence itself, but rather the reasons and motivation behind the absence. Those matters are not "something arising" in consequence of the Claimant's disability and the complaint under section 15 EqA 2010 therefore does not succeed insofar as it relies on those issues.

150. The Tribunal will address the remaining allegation which relies on the Claimant's dismissal later in the judgment when determining the allegation of discriminatory dismissal.

Indirect discrimination

151. The starting point when considering this complaint is the provision, criterion or practice. The PCP relied on by the Claimant is put in this way: "*The use of certain eligibility criteria in order to give rise to an entitlement to company sick pay during a disciplinary process*". The Respondent accepts that it applied that PCP to the Claimant. The Tribunal is also satisfied that it applied to all employees as it forms part of the Respondent's Absence Policy.

152. The second element of any indirect discrimination complaint is that the PCP puts, or would put, persons with whom the Claimant shares the characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share it. In other words, there needs to be a comparison between the effect the PCP has on the Claimant and those with the same disability as him (bearing in mind the terms of section 6 and section 23 EqA 2010) and those who do not (i.e. non-disabled employees and those with different disabilities).

153. In his submissions on behalf of the Claimant, Mr Pollitt said that evidence relevant to this issue had been requested from the Respondent but had not been provided. He therefore accepted that there was no direct evidence to assist the Tribunal to

determine this issue. He invited the Tribunal to fill that gap by drawing an inference that people with mental health disabilities are more likely to be impacted by the PCP than others.

154. The Tribunal has considered that submission but concludes that no such inference can be drawn. Firstly, in the absence of some evidence on the point (which the Claimant has not produced) the Tribunal is cautious about drawing an inference of the type suggested by Mr Pollitt. Secondly, and in any event, the Tribunal has concluded that there is a further difficulty faced by the Claimant. The relevant part of the eligibility criteria in this case and which was actually applied to the Claimant (and is therefore the only relevant criteria in the context of this case) has two elements as Mr Pollitt established during cross examination of the Respondent's witnesses. The second element is that there must be a belief that the absence of an employee during a formal process is to avoid or delay that process. The Tribunal has determined that the second element may be related to but is separate from the first element of the criteria. There is no evidence to show that those with mental health disabilities are at any greater risk of the Respondent concluding that any absence is to avoid or delay a formal process than others. If anything, it seems less likely that the Respondent would come to that conclusion as there is likely to be a good explanation for the absence of anyone suffering with mental health disabilities who are absent from work during a period of increased stress, including during formal procedures such as disciplinaries or grievances.

155. In the circumstances, the Tribunal does not consider it necessary to consider the remaining elements of the statutory test for indirect discrimination as the complaint cannot succeed for the reasons given.

156. The Claimant's complaint of indirect discrimination is dismissed.

Failure to make reasonable adjustments

157. The complaint under sections 20 and 21 also requires the Tribunal to be satisfied that the relevant PCP places the Claimant at a substantial disadvantage compared to non-disabled persons. The PCP relied upon by the Claimant is the same for this complaint as for the indirect discrimination complaint.

158. Although the statutory test is different, the Tribunal has concluded that this complaint has the same difficulties when it comes to showing the relevant substantial disadvantage as the indirect discrimination complaint does in showing the relevant particular disadvantage.

159. In summary, the Tribunal is not persuaded on the evidence available either a) that it was any more likely that the Claimant would become unwell during a disciplinary process or, even if that could be established, that b) it was any more likely that the Claimant would be seen as delaying or avoiding the disciplinary process by being absent from work. For the reasons given above, the Tribunal considers the opposite conclusion is more likely.

160. For those reasons, the Claimant's complaint of a failure to make reasonable adjustments fails and is dismissed.

Harassment

161. The two allegations of harassment in this case are not factually disputed by the Respondent. It is accepted that Ms Birch wrote to the Claimant in terms that she thought the Claimant's sickness absence was taken in "bad faith" and that Ms Tambling wrote to him in terms that he had acted in a "premeditated" way by going off on sick leave. It seems to the Tribunal to be obvious that the conduct on the part of the Respondent complained about was unwanted conduct within the meaning of section 26 EqA 2010. No employee absent from work through genuine, disability-related reasons would want to be told that they were absent in bad faith or that they had behaved in a premeditated manner.

162. The Respondent's central argument on this complaint is that the conduct of Ms Birch and Ms Tambling was not "related to" the Claimant's protected characteristic. In short, the decisions made by Ms Birch and Ms Tambling and the manner in which they expressed those decisions was a direct result of what Duncan South had said and their respective interpretations and understanding of that. For reasons already given, the Tribunal has accepted that the views (however erroneous) were views genuinely held by both decision makers.

163. The Tribunal has concluded that the comments made by both Ms Birch and Ms Tambling were not related to the Claimant's disability so as to satisfy the relevant test under section 26. In truth, and although Ms Tambling could not bring herself to admit it during her oral evidence, the decisions made and comments made effectively amounted to saying that they did not believe the Claimant was genuinely ill and that he had gone off on sick leave as a reaction to receiving a sanction which he did not agree with. That is a conclusion which is, in the Tribunal's view, different and distinct from the Claimant's disability and is not related to it.

164. The Claimant's complaint of harassment is also dismissed.

Discriminatory dismissal

165. The parties accepted that the determination of whether the Claimant's dismissal was an act of discrimination would depend on the conclusions reached on the separate complaints of discrimination. As the Tribunal has concluded that the Respondent did not commit any acts of unlawful discrimination, it follows that the Claimant's dismissal cannot have been an act of unlawful discrimination either. This part of the Claimant's claim is therefore also dismissed both as part of the section 15 complaint, and as a standalone issue.

Holiday pay

166. The Claimant's complaint of unpaid holiday pay was withdrawn during the oral submissions made by Mr Pollitt. It will be dismissed upon withdrawal.

Remedy

167. The Respondent remains in administration. In accordance with the letter from the joint administrators of the Respondent, the stay imposed on these proceedings in August 2022 was only lifted for the purposes of the Tribunal arriving at and issuing this judgment. Now that this judgment has been issued, and in accordance with the relevant provisions of the Insolvency Act 1986, the proceedings are again stayed.

Employment Judge R Vernon

Dated: 5 September 2024

REASONS SENT TO THE PARTIES ON 9 September 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche

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