EMPLOYMENT TRIBUNALS

Claimant:	Mr S Dymek		
Respondent:	Woodhead Brothers Neerock Limited		
Heard at:	Lincoln	**On:**	20, 21 and 22 May 2026
Before:	Employment Judge Quickfall		

Representation
Claimant: Mr M Eisenbarth, counsel
Respondent: Mr A Adamou, counsel

Interpreters Mr M Korbel (on 20 and 21 May 2026)
Ms A Thorpe (on 22 May 2026)
(for use by the claimant)

RESERVED JUDGMENT

1. The claimant's application for permission to rely upon the witness statement of his wife is dismissed on withdrawal.

2. The complaint of unfair dismissal is not well founded and is dismissed.

3. The complaint of discrimination arising from disability contrary to section 15 of the Equality Act 2010 is not well founded and is dismissed.

REASONS

Introduction

1. The complaints arise from the claimant's employment as a butcher at the respondent's abattoir in Spalding, Lincolnshire ("the abattoir"), from 2/12/10 until 28/3/24 (13 years).

2. The respondent was a wholly owned subsidiary of Wm Morrison Supermarkets Limited, trading as Morrisons. The respondent produced

meat for Morrisons. The claimant worked on a production line at the abattoir. His role was to remove the cheeks from beef cattle heads as they appeared in front of him on a conveyor.

3. The complaints relate to the period from 18/8/21, when the claimant had an accident at work due to a ceiling lamp fitting falling onto him, until 28/3/24, when he was dismissed with payment in lieu of notice. The complaints relate to absence levels during that period and the reasons for them.

4. By the date of the dismissal, the claimant was disabled by reason of the impairments of back and neck pain, numb and trembling hands, depression and memory loss ("the impairments").

5. An appeal against dismissal was refused on 29/4/24.

Preliminary matters

6. The claimant complains that the dismissal (effective from 28/3/24) was unfair and contrary to section 15 of the Equality Act 2010 ("EqA").

7. The complaints were referred to ACAS on 16/5/24. ACAS issued a certificate on 20/5/24. The claim form was presented on 30/5/24. A response resisting the claims was presented on 15/7/24.

8. The complaints were considered by Employment Judge Brewer at a case management preliminary hearing on 26/9/24 and listed for final hearing at Lincoln on 18, 20 and 21 May 2026. These dates were subsequently changed to 20 to 22 May 2026 to accommodate new local listing arrangements.

9. At the preliminary hearing, the claimant asserted that his disabilities were the impairments set out above (43). On 21/3/25, the respondent conceded that, at the time of his dismissal, the claimant was disabled by reason of the impairments. At the final hearing, the claimant contended that he was disabled by these conditions with effect from 18/8/21 (the date of his accident at work).

10. The complaints were listed for final hearing before a full panel. However, only one non-legal member was available for the hearing. By order dated 19 May 2026, Regional Employment Judge Clark ordered that the hearing would proceed before a judge sitting alone. The hearing was originally listed before Employment Judge Paul Smith. However, after Employment Judge Smith notified the parties that he had previously been instructed on an occasional basis by the solicitors instructed by the respondent, the claimant successfully applied for the complaints to be determined by another employment judge.

11. Over the course of three days from 20th to 22nd May 2026, the Tribunal heard oral evidence from the claimant and from two witnesses on behalf of the respondent: Mr Andrew Modd and Mr Allan Norman. Mr Modd was employed by the respondent as the site production manager at the abattoir and decided to dismiss the claimant. Mr Norman was employed by the

respondent as the site manager. Mr Norman had overall responsibility for the abattoir and refused the claimant's appeal against his dismissal.

12. The claimant is a Polish national. He gave evidence with the assistance of Polish language interpreters who also assisted him with understanding what was being said during the hearing. Mr Mateusz Kamil Korbel was the interpreter on 20 and 21 May 2026. Ms Anna Eliza Thorpe was the interpreter on 22 May 2026.

13. As the claimant needed regular breaks due to back pain and all questions and answers needed translating, the claimant's evidence did not finish until halfway through the second day of the 3-day hearing. Mr Norman then gave evidence on the afternoon of day 2 and Mr Modd gave evidence on the morning of day 3. That left the afternoon of the final day for closing oral submissions; thus, an *ex temporare* judgment within the original hearing window was not possible. Between 13.00 and 14.00, which was before the lunch break, counsel for the respondent delivered his closing oral submissions. There was then a lunch break. At 15.00, counsel for the claimant informed the Tribunal that he was not ready to deliver his closing oral submissions and he applied for permission to rely on written submissions that he had not yet prepared. As a reserved judgment was inevitable by this stage in the proceedings, and counsel for the respondent did not oppose the application, it was allowed. The claimant was ordered to produce his written submissions by 29 May 2026. The respondent was permitted a right of reply limited to the law and any objections to any perverse factual submissions by 5 June 2026. A case management order was promulgated in relation to closing written submissions.

14. The Tribunal was provided with an agreed bundle of documents running to 634 pages. A pay slip for the pay period ending 21/8/22 was added with the agreement of the parties at page 635. I made it clear to the parties that I would only read the pages to which I was referred during the hearing. Numbers in brackets herein refer to pages in the agreed hearing bundle.

15. I was also provided with witness statements from the claimant, Mr Modd and Mr Norman which I have considered alongside their oral evidence.

16. Counsel for the respondent made oral closing submissions. I was provided with written closing submissions on behalf of the claimant and a reply to the same on behalf of the respondent. I have carefully considered all the submissions provided.

Issues

17. The parties agreed that the Tribunal would determine liability in the first instance in relation to the following claims / issues as set out by Employment Judge Brewer following the preliminary hearing for case management on 26/9/24 (48-51) and as amended with the consent of the parties at the outset of the final hearing.

Unfair dismissal

18. What was the principal reason for the dismissal? The respondent says the reason was capability / some other substantial reason: sickness absences contrary to an attendance management policy.

19. Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

    a. The respondent adequately warned the claimant and gave him a chance to improve.
    b. Dismissal was within the range of reasonable responses.

Discrimination arising from disability (Equality Act 2010 section 15)

20. By email dated 21/3/25, the respondent conceded that the totality of the claimant's physical and mental impairments of neck and back pain, numb and trembling hands, depression and memory loss ("the impairments") rendered him disabled for the purposes of section 6 of the Equality Act 2010 at the date of dismissal (55).

21. The claimant relies on the dismissal as the unfavourable treatment.

22. The respondent did not dispute that it treated the claimant unfavourably by dismissing him.

23. Did 80% of the claimant's sickness absence in the two years prior to his dismissal (29/3/22 to 28/3/24) arise in consequence of the claimant's disability?

24. Did the respondent dismiss the claimant because of that sickness absence? The respondent conceded that it dismissed the claimant for his level of sickness absence but denied that the sickness absences resulting in the dismissal arose from the claimant's disabilities. The parties agreed at the outset of the hearing that if the absences which resulted in the dismissal were not because of the impairments, then the section 15 claim would fail.

25. Was the dismissal a proportionate means of achieving a legitimate aim? The respondent relies on the aim of maintaining attendance / appropriate staffing levels to meet the needs of clients. The claimant did not challenge the legitimacy of the respondent's aim.

26. The Tribunal will decide in particular:

    a. was the treatment an appropriate and reasonably necessary way to achieve those aims;
    b. could something less discriminatory have been done instead;
    c. how should the needs of the claimant and the respondent be balanced?

27. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date? The claimant asserts that the respondent had knowledge from the date of the accident on 18/8/21. The respondent denies knowledge.

Findings of fact

28. I have decided the findings of fact referred to below on the balance of probability, having considered all the evidence given by the witnesses during the hearing, together with the documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that I have failed to consider it.

29. I have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

30. The claimant's employment with the respondent as a level 3 line boner started on 2/12/10 (59) and ended on 28/3/24 (343). The claimant had 13 years' service. The claimant's role was as a head boner in the cattle abattoir. It was his job to remove the cheeks from the heads of cattle. The cattle heads would appear in front of him on a conveyor belt and he cut out the cheeks. He wore personal protective equipment ("PPE") including wellington boots, an apron, a bump hat and a chainmail glove.

31. The respondent was a wholly owned subsidiary of Wm Morrison Supermarkets Limited. The respondent operated an abattoir and meat processing plant in Spalding in Lincolnshire with approximately 620 employees.

32. Mr Modd was the site production manager and dismissing officer. Mr Norman was the site manager and appeal officer.

Attendance management policy

33. The respondent's attendance management policy ("AMP") (65-74) had the following stated purpose (65):

> "*We care about our colleagues and appreciate they may experience ill health from time to time. We also recognise the additional pressures sickness absence adds on the business and other colleagues, increasing costs and reducing our ability to serve our customers better. The policy aims to offer support to absent colleagues, and those with health conditions to help alleviate these pressures whilst enabling us to continue to meet customer needs*."

34. The AMP states that colleagues are expected to be reliable and consistent in their attendance, enabling the respondent to serve their customers better.

35. The AMP operated by reference to absence 'trigger' points to help identify when the respondent needed to work with colleagues to improve attendance at work. The trigger points were:

    a. An absence rate of 3% or more in a rolling 12-month period.

    b. 3 or more separate occasions of absence in a rolling 6-month period.

c. Unacceptable patterns of absence, for example absence is usually the day after a Bank Holiday or a Saturday evening shift.

36. The AMP provided for the following triggers after a colleague had received a record of improvement or formal warning:

    a. Absence percentage has not improved and remains above 3%.

    b. A further occasion of absence in the 6-month period following their last review.

    c. Continue to have an unacceptable pattern of absence.

37. The AMP provided that if a colleague had already been issued with an absence Record of Improvement (ROI) and had hit a further trigger, then there should be consideration of progressing to the formal stage. There were 3 stages to the formal process: first absence warning (valid for 12 months), final absence warning (valid for 12 months) and dismissal. A right of appeal had to be offered at each stage, and stages were not to be skipped.

38. Some types of absences are excluded from consideration in relation to the AMP, such as those related to pregnancy and maternity. However, genuine sickness absences and absences related to accidents at work are not so excluded.

39. On the claimant's oral evidence, I find that the claimant was aware of the AMP, aware that he was expected to provide consistent and reliable attendance with an absence rate of less than 3%, that he should not be absent on more than 3 separate occasions in a 6-month period and that breaches of the AMP could result in warnings and dismissal.

Sickness absence history

2020

40. On 26/10/20, the claimant received a first absence warning pursuant to the AMP.

41. Although it was not included in the agreed hearing bundle, I find that the warning was issued. I have relied on the evidence of Mr Modd (for the respondent) at paragraph 5 of his witness statement, which was not challenged by the claimant.

2021

42. During the first half of 2021, the claimant was absent due to sickness on 15 working days (92).

43. On 15/6/21 or 16/7/21, the claimant was issued with a final absence warning pursuant to the AMP.

44. Although it was not included in the agreed hearing bundle, I find that the final absence warning was issued. For the June date, I have relied on the unchallenged evidence of Mr Modd (paragraph 5 of his witness statement). For the July date, I have relied on the unchallenged evidence of a contemporaneous note of a return-to-work interview on 8/2/22 (109).

45. On 18/8/21, the claimant was hit on the head by a ceiling strip light fitting ("the accident"). At the time of the accident, the claimant was wearing a bump cap and was working on beef cattle heads (75-79).

46. Following the accident, the claimant was absent due to sickness for 4 months from 18/8/21 until 17/12/21 (101), save for 6 days of annual leave from 4/10/21 until 11/10/21 and an unsuccessful attempt at returning to work for a day and a half on 12/10/21 and 13/10/21.

47. On 26/11/21, occupational health produced a report which stated that the claimant remained unfit for work due to the accident with lower back pain, neck and shoulder pain, shaking affecting both arms, and numbness in his hand when pressing down (93-95). The claimant had difficulty lifting and carrying anything over 3 kilograms. Although the claimant was able to lift his arms above his shoulders to his head, the movement caused considerable pain. The claimant was unable fully to bend or kneel, he had problems putting on his shoes and socks, and he needed support to get up from a kneeling position. The claimant's mental health was said to be affected due to pain, being unable to work, and the embarrassment of being unable to help his wife with household chores and shopping.

48. On 20 and 21 December 2021, the claimant briefly returned to work before taking another period of sickness and annual leave which took him to the end of the 2021 calendar year.

49. The claimant's sickness absences during the 4 months following the accident were not treated by the respondent as breaches of the AMP continuing from the pre-accident final warning for sickness absence. Instead, when the claimant returned to work after the accident, the respondent gave the claimant a fresh start such that when he started to have sickness absences in 2022, the AMP was applied to the claimant from the start, with the issuing of a record of improvement.

2022

50. The claimant returned to work on 3/1/22.

51. The claimant was off sick for 2 days on 11 and 12 January 2022 with neck and back pain and with a minor ailment on 26/1/22 (113).

52. The claimant admits that he was off work due to an eye infection which was unrelated to his disabilities on Friday 4th and Monday 7th February 2022 (113, 108A, 108B and 109).

53. The claimant was off work due to neck and back pain on 22 and 23 February 2022 and 3rd March 2022 (125).

54. The claimant agrees that he was off work due to back pain on 1/4/22 (114, 117, 119).

55. On 31/5/22, a second occupational health report was produced in relation to the claimant which stated that he was suffering with neck and back pain, trembling in his hands and numbness in his left hand ongoing since the accident in August 2021. There was difficulty with manual dexterity. The claimant was not said to be disabled at that stage as the symptoms had not lasted long enough. A full recovery was expected with time. The claimant was said to be comfortable in his role but not for long hours as

standing for long hours induced back pain (120-122). The claimant did not want to change his role or reduce his hours for financial reasons.

56. Between 11 and 18 July 2022 (6 working days), the claimant admits that he was absent from work due to pre-planned eye surgery for cataracts which were not related to his disabilities (126-132). No action was taken by the respondent in relation to this period of absence (128 and 190).

57. On 5/8/22, the claimant admits that he was absent for half a day due to his wife's asthma. The absence was not recorded as sickness absence by the respondent, nor was it regarded as a trigger for the purposes of the AMP.

58. On 2/9/22, the claimant was absent from work due to back pain (137-143).

59. On 8/9/22, at a welfare meeting to discuss the claimant's absence from work on 2/9/22, the respondent decided to refer the claimant to occupational health (149).

60. The claimant admits that he was absent from work for 9 working days from 27/9/22 until 7/10/22 with a heart and back problem (160-163).

61. On 10/10/22, following the above absences and an absence level of 28.84%, the claimant was issued with a record of improvement ("ROI") (166-167). The claimant told me he had no recollection of receiving the ROI but he accepted that he had signed to say he had received it. I therefore find that the claimant received the ROI.

62. There was no appeal against the ROI. The claimant did not challenge the issuing of the ROI, either at the time or as part of this Tribunal claim. An ROI is the initial informal stage of the AMP.

63. On 13/10/22, a third occupational health report stated that the claimant had chronic lower back pain, plus neck and left arm issues 14 months on from the accident (168). Lower back pain was said to increase after 4 to 5 hours of working and the claimant was said to struggle greatly with pain if he worked beyond 7.5 hours a day. The report also stated that since 4 to 5 months previously (May/June 2022), the claimant had been experiencing what he felt were heart related problems. Occupational health considered these likely to be related to anxiety and mental health due to the long-term effects of the accident.

64. The recommendation of occupational health was for the claimant's shifts be limited to 8 hours a day to avoid excessive pain and to help with long term pain management and mental health (169). The claimant was said to be fit for work if his hours could be limited to 8 hours a day and if he could be permitted mini breaks if sudden neck or head movements caused severe excruciating pain.

65. There was no mention of depression or memory loss in any of the occupational health reports.

66. On 16/11/22, the claimant participated in a work meeting to discuss the occupational health report (172-77). It was agreed that the claimant could restrict his working hours to 8 hours a day in line with his wishes and occupational health advice subject to a review in 2 months (174 and 177).

67. From 30/11/22 until 12/12/22, the claimant admits that he was off work for

9 working days due to flu symptoms / chest infection and Covid-19 ("flu/Covid") and that these symptoms were unrelated to his disabilities (185).

68. The respondent treated this period of absence as the trigger for the formal stage of the AMP because the absence was within 6 months of the issuing of the ROI. The claimant was invited to an absence review meeting (187).

69. On 22/12/22, the claimant was issued with a first written absence warning pursuant to the AMP to remain in force for 12 months (190-191).

70. The first absence warning was issued against a stated background of a 12-month absence percentage said to be at 17.69%, a Covid related absence following the issuing of a ROI on 10/10/22, and there having been 3 occasions of absence in the previous 26 weeks excluding the absence for pre-planned surgery: on 2/9/22 due to back pain; from 27/9/22 until 7/10/22 due to heart and back problems; and from 30/11/22 until 12/12/22 due to flu symptoms, a chest infection and Covid.

71. On 28/12/22, the claimant appealed against the first absence warning on the basis that accident-related and Covid-related absences should not have been included in the reasons for the warning (192-193).

2023

72. In February 2023, the claimant attended various meetings in relation to an appeal against the outcome of a pay-grade related grievance which was unrelated to his sickness absence record.

73. On 27/2/23, the claimant was invited to an appeal hearing on 2/3/23 to discuss his appeal against his first written absence warning (233).

74. On 2/3/23, the claimant participated in an appeal hearing at which the respondent agreed to investigate the cause of the sickness absences and whether removing accident-related absences would bring the claimant's absence rate below 3% (235-239).

75. On 8/3/23, the causes of the claimant's sickness absences over the 12-month period prior to the issuing of the first absence warning were set out in an email (247). The email set out an analysis of the causes which was said to show that, even if all the sickness absences were disregarded save for the eye infection in February 2022 and the flu / Covid absence in December 2022, which the claimant accepted were not accident-related, the claimant's sickness absence rate was 4.2% which was above the 3% benchmark in the AMP (247).

76. On 8/3/23, the claimant participated in a meeting to discuss the above findings (251-254). The respondent explained to the claimant that if absences for neck and back pain were accident related and therefore disregarded and the absence for eye surgery was also disregarded, that left 3 absences and an absence rate of 7.6%. If absence related to heart problems 10 months after the accident were also accident related, as the claimant was alleging, that left 2 occasions of absence which the claimant admitted were unrelated to his impairments (for the eye infection and Covid) and a rate of 4.2% which the claimant admitted was above the respondent's benchmark. The first absence warning dated 22/12/22 would therefore remain in place (253).

77. On 13/3/23, the appeal against the first absence warning was refused in writing (255).

78. I find that the sickness absences due to the eye infection in February 2022 and to flu/Covid in December 2022 - which resulted in the respondent refusing to set aside the first written absence warning - did not arise from the claimant's disabilities. In his closing written submissions, the claimant accepted that eye infections and flu/Covid were unconnected to his disabilities.

79. On 30/5/23, the claimant admits that he was off work for a day with a right ear infection unrelated to his disabilities (259).

80. Although this absence could have triggered progression to the second stage of the AMP, it did not do so initially. On 19/7/23 the respondent decided to take no further action at that stage (following an absence review meeting on 19/6/23) because the claimant's absence level had improved (276). However, I find that the respondent was entitled to revisit this absence following another sickness absence shortly thereafter. The claimant has not submitted otherwise.

81. On 10/7/23, an hour before the end of his shift, a piece of meat entered the claimant's eye (279). The incident was not reported at the time, but the claimant's eye became very red, so he attended hospital and was advised to take eye drops (279).

82. On 11th and 12th July 2023, the claimant admits that he was off sick for two days due to getting meat in his eye and that this absence was unrelated to his disabilities.

83. On 20/7/23, the claimant admits that he attended an absence review meeting (277-281) to discuss the absence related to his having got meat in his eye. The claimant was informed that he would be receiving a final written absence warning to remain in force for 12 months (281). The claimant appealed against the warning the same day on the ground that most of the absences related to an accident at work and his absence level had decreased (283-5).

84. On 24/7/23, the final absence warning was issued in writing to remain in force for 12 months (288). The warning was issued because the claimant had been absent on 2 occasions while the first written absence warning remained in force, and his absence rate remained above the 3% benchmark at 9.23%.

85. I find that both absences were triggers for the purposes of the AMP. The first of these absences (on 30/5/23) occurred within 6 months of the previous absence review meeting (on 21/12/22). The second of these absences (on 11/12 July 2023) occurred within a month of the previous absence review meeting (on 19/6/23). The claimant has not challenged the respondent's entitlement to treat the absences as triggers for progression to the next stage of the AMP.

86. I find that neither of the sickness absences which resulted in the final written absence warning arose from the claimant's disabilities. In May 2023, the claimant was absent due to an ear infection and in July 2023 he was absent due to an eye infection. In his closing written submissions,

the claimant accepted that any ear or eye infection was unconnected to his disabilities.

87. On 7/8/23, the claimant participated in an appeal hearing (293-297).

88. On 9/8/23, the appeal was refused because absences were recorded regardless of the reason for them, there was no way for the respondent to verify whether the claimant had had an accident at work in relation to the meat in the eye as it was not reported at the time, the absences since the first written warning had not related to any previous accidents, the claimant's absence rate remained in excess of 3% at 9.23%, and there had been two occasions of absence after the issuing of the first absence warning (298).

2024

89. On 2nd January 2024 the claimant reported he was suffering from bad chest and stomach pains. He was absent from work on sick leave on 3/1/24 (301-305).

90. As I have been provided with no medical evidence linking a bad chest and/or stomach pains to the claimant's disabilities and the claimant accepted in his closing written submissions that chest and stomach pains were unconnected to the pleaded disabilities, I find that the sickness absence on 3/1/24 did not arise from the disabilities.

91. On 15/1/24, the claimant was invited to an absence review meeting on 31/1/24 as there had been another occasion of absence within 26 weeks of the issuing of a final written absence warning (306).

92. The claimant was on annual leave from Monday 15 January 2024 until Tuesday 30 January 2024 inclusive (335). During his period of annual leave, the claimant went on holiday to Mauritius.

93. The claimant returned to work on Wednesday 31 January 2024 following a 12-hour flight from Mauritius (491). The claimant did not attend the absence review meeting arranged for that day as he says he did not receive the invitation, although he accepted before me that it appeared from the bundle to have been posted to the correct address.

94. Following the flight from Mauritius, the claimant suffered a swollen right leg which worsened on Friday 2nd February 2024 such that it was hot and very painful, and he was unable to stand on it for more than a minute (491).

95. The claimant was absent due to his right leg pain (which was subsequently diagnosed as a deep vein thrombosis ("DVT")) for 5 weeks (25 working days) from Monday 5 February 2024 until Friday 8 March 2024 inclusive (335).

96. On 5/2/24, the claimant's GP signed the claimant as unfit for work from 5/2/24 until 11/2/24 due to leg pain awaiting further investigation (310).

97. On 13/2/24, the claimant's GP signed the claimant as unfit for work from 11/2/24 until 10/3/24 because of Deep Vein Thrombosis (DVT) (312).

98. As I have been provided with no medical evidence linking the DVT to the claimant's disabilities and the claimant accepted in his closing written

submissions that the DVT was unconnected to the pleaded disabilities, I find that the 5 weeks of sickness absence from 5/2/24 to 8/3/24 did not arise from the claimant's disabilities.

99. On 11/3/24, the claimant returned to work and stated in a return-to-work meeting that his absence was due to knee pain and high anaemia levels (315). The claimant asked for restricted hours (317).

100. On 13/3/24, the claimant participated in a welfare meeting at which he was offered a role in the PPE store which was a seated role as he was struggling to stand. However, the claimant insisted on continuing in his usual role (325).

101. On 22/3/24, the claimant was invited to an absence review meeting which was to take place on 27/3/24 to discuss the two further absences since the issuing of the final written warning and an absence rate of 11.54%.

102. On 27/3/24, the claimant participated in an absence review meeting to discuss the reasons for his recent absences (336-339). The claimant explained that in January 2024 he had been feeling unwell looking very pale, so he had been taken home by his wife. In relation to the second period of absence, the claimant said he had attended his GP with leg pain, had been scanned at hospital, diagnosed with thrombosis and had been signed off by his doctor for 4 weeks (337). The claimant explained that he could not walk as he had a painful and swollen leg. The claimant had returned to work on a phased return involving light duties and restricted hours.

103. At the end of the meeting, Mr Modd adjourned to consider his decision. He considered whether to issue another final absence warning but did not feel that this would lead to the required level of improvement. Mr Modd's thinking is set out at paragraph 15 of his witness statement which was unchallenged by the claimant:

> *Ultimately, I took the decision to dismiss the claimant due to his continued levels of unacceptable absence. His overall history of absence was poor both before and after the incident in August 2021. He was not suggesting any adjustments which we could make and I did not feel the need to commission a further occupational health report. We had offered him support and assistance. He did not dispute the accident records which were produced. I did consider whether to issue a further final absence warning, but in all the circumstances, I did not feel that this would lead to the required level of improvement.*

104. On 28/3/24, the absence review meeting was reconvened so that the claimant could be given the outcome of the absence review meeting. The respondent explained that it was not questioning the genuineness of the absences but his absence rate continued to be above the 3% benchmark and he was being dismissed because he had had two further absences since a final written warning had been issued and the warnings had been issued for absences unrelated to his accident in August 2021. The claimant said that he understood the impact of his absences on business service and colleague morale (341). The claimant stated that he

believed he was being dismissed because he had suffered a thrombosis (342). The respondent stated that it was not questioning the reason for the absence, but it could not sustain such high levels of absence (342).

105. On 29/3/24, the claimant was dismissed with payment in lieu of notice with effect from 28/3/24 (343) because of an absence in January 2024 due to not feeling well and in February / March 2024 due to leg pain and DVT. The claimant's absence percentage was said to be at 11.54% which was considered by the respondent to be above the company target of 3% and unsustainable due to the impact on the claimant's colleagues and the business. The claimant's warnings were said to be unrelated to absences from the 2021 accident at work. The respondent reminded the claimant that it was not questioning the genuineness of the absences. The claimant was given a right of appeal (344).

106. On 8/4/24, the claimant appealed the decision to dismiss on the basis that the dismissal was unfair and contrary to the Equality Act 2010 (351). The claimant alleged for the first time that the accident-related back pain qualified as a disability, that the final written warning had wrongly taken account of disability related absences and that reasonable adjustments should have been made for him (352).

107. I have already found that the final written warning had been issued for absences related to an ear infection and an eye infection which were unrelated to the claimant's disabilities.

108. On 25/4/24, there was an appeal meeting (369-375). The claimant stated that the accident in 2021 had caused shaking in his hands and pain in his back and neck. The claimant said he had been issued with an unjustified final written warning in July 2023 for absence because of meat in his eye. The claimant said he was disabled because he could not lift his left arm above his head and could not lift more than 5 kg. He stated that the company had made him an invalid and had dismissed him. In relation to reasonable adjustments, he said he had not requested any and his role and workstation were comfortable for him.

109. The meeting was adjourned so that Mr Norman could consider his decision. The meeting took place on a Friday, and I find that Mr Norman considered his decision over the weekend before preparing his outcome letter on Monday 28/4/24 (para 7, Mr Norman's witness statement). Mr Norman set out his thinking at para 8 of his witness statement:

> *I believe I took all matters into consideration and could find no reason to interfere with that decision. No further evidence had been presented, and I was satisfied that the dismissal was fair in all the circumstances and that Mr Dymek had been given every opportunity to put his case. Despite his claims of disability discrimination, I was satisfied that his latest absences which had triggered the final absence review meeting, (following which he was dismissed) were not related to the conditions from which he claimed to be suffering which he attributed to his original accident.*

110. On 29/4/24, the appeal was rejected because the absences which resulted in the absence warnings were not related to the accident in 2021 or to the disabilities referred to in the appeal hearing and the claimant had

advised that his workstation was comfortable. The appeal officer considered that the claimant's role did not require any heavy lifting and that no documents had been provided in relation to the alleged disability and the claimant's doctor had not diagnosed a disability (377-378).

111. The respondent's AMP entitled it to issue absence related written warnings where there was an occasion of absence within 6 months of a previous absence review or where the absence level remained above 3% and had not improved.

112. I find that the warnings issued to the claimant before he was dismissed were issued in compliance with the AMP. The claimant has not submitted otherwise.

113. At the time of the final written absence warning, the claimant's absence rate for the 12-month rolling period remained above the 3% target level set out in the AMP, even when potentially accident-related or disability-related absences were disregarded.

114. I find that each warning was issued following a meeting at which the claimant was permitted to be represented by a colleague or trade union representative and at which the facilities of an interpreter were provided. The claimant was also permitted a right of appeal in relation to each warning. The AMP was fairly and properly applied to the claimant. The claimant has not submitted otherwise, save to submit that the respondent should have exercised its discretion and not progressed to dismissal.

Relevant law

Unfair dismissal

115. Employees with more than 2 years' service (s. 108(1) Employment Rights Act 1996 ("ERA")) have the right not to be unfairly dismissed (s. 94(1) ERA).

116. Per s. 98(1) ERA, in determining whether the dismissal of a qualifying employee is fair or unfair, it is for the employer to show the reason or principal reason for the dismissal and that it falls within subsection (2) of s. 98 ERA or is some other substantial reason so as to justify the dismissal of an employee holding the position which the dismissed employee held.

117. Per *Wilson v Post Office* [2000] IRLR 834, CA, where the reason for the dismissal is the claimant's failure to comply with his employer's attendance procedure, the reason for dismissal is some other substantial reason. Per *Ridge v HM Land Registry*, EAT, 0485/12, where recurring short-term absences for a variety of reasons are the reason for dismissal, the better label may be SOSR under s. 98(1)(b) ERA. In *Tagro v Royal Mail Group* [2013] NICA 30, NICA, a postal worker was absent several times triggering all three stages of his employer's attendance procedure. Following a final stage three hearing, T was dismissed for breaching the attendance procedure. The NICA upheld a finding by the Tribunal that this constituted a SOSR dismissal which was fair in all the circumstances.

118. Per s. 98(4) ERA, where the employer has fulfilled the requirements of subsection (1) of s. 98 ERA, the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on: (a) whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and (b) shall be determined in accordance with equity and the substantial merits of the case.

119. The test referred to at s. 98(4)(a) ERA is often referred to as the so-called '*band of reasonable responses*' test. It is to be applied in line with the authority of *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, EAT, as follows:

a. The tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the … tribunal) consider the dismissal to be fair;
b. In judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
c. in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
d. the function of the … tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band, it is unfair.

120. In *International Sports Co Ltd v Thomson* [1980] IRLR 340, EAT, it was held that, where an employer is concerned with the impact of an unacceptable level of intermittent absences due to unconnected minor ailments, it is necessary:

> *firstly, that there should be a fair review by the employer of the attendance record and the reasons for it; and, secondly, appropriate warnings, after the employee has been given an opportunity to make representations. If then there is no adequate improvement in the attendance record, it is likely that in most cases the employer will be justified in treating the persistent absences as a sufficient reason for dismissing the employee.*

121. In *Lynock v Cereal Packaging Ltd* [1988] ICR 670, the EAT set out some of the relevant factors which might be considered when dismissing for intermittent absences due to genuine and unconnected illnesses, particularly where, as in that case, the dismissal results from the application of a reasonable absence management policy which the

employee is saying has been applied too strictly:

> *the nature of the illness; the likelihood of it recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching.*

122. In *Kelly v Royal Mail Group Limited*, EAT, 14/2/19, Choudhury P held that, in relation to a dismissal for unreliable attendance after progression through the stages of an absence management policy, conduct by the employer in line with the absence management policy is likely to be fair.

Section 15 EqA: Discrimination arising from disability

123. Section 15 EqA provides as follows:

> *(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.*

124. Per *Pnaiser v NHS England and another* [2016] IRLR 170, EAT, Simler J, the correct approach to a s. 15 claim is as follows:

a. The Tribunal must identify whether there has been unfavourable treatment and by whom.

b. The tribunal must determine the reason for the unfavourable treatment focusing on the conscious or unconscious thought processes of the alleged discriminator.

c. The reason is the ‘something’ for the purposes of s. 15. If there is more than one reason for the unfavourable treatment, the ‘something’, must have had a more than trivial influence so as to amount to an effective reason for or the cause of it.

d. The tribunal will then have to decide whether the cause of the unfavourable treatment (the 'something') arises in consequence of the disability.

e. There may be more than one link in the chain of causation.

125. The unfavourable treatment must be a proportionate means of achieving a legitimate aim.

126. The legitimate aim must not be discriminatory in itself and it should represent a real, objective consideration, such as the operational needs of the business.

127. The EHRC Employment Code sets out guidance which provides that the measure adopted (the unfavourable treatment) need not be the only possible way of achieving the legitimate aim, but it will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (para 4.31). The Tribunal is expected to undertake a critical evaluation on the question of objective justification, weighing the needs of the employer against the discriminatory impact on the employee. The Tribunal must carry out its own assessment rather than simply asking whether the employer acted reasonably.

128. Per *O'Brien v Bolton St Catherine's Academy* [2017] ICR 737, CA, where the unfavourable treatment is dismissal (such as for long-term sickness absence consequent on disability), the test of reasonableness in an unfair dismissal claim (the band of reasonable responses) and the proportionality assessment under section 15 EqA will generally lead to the same result. It is not inevitable that they will do so, but it is undesirable and unlikely that the two statutory tests will lead to different results.

129. In *General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169, EAT, HHJ Richardson, the claimant had stomach adhesions and was disabled for the purposes of the EqA. After long periods of absence from work, for both disability and non-disability reasons, he was issued with a final written warning. Following further absence for a shoulder injury and medical advice that periods of absence were likely to continue, he was dismissed. Claims of unfair dismissal and failure to make reasonable adjustments succeeded at first instance but were overturned on appeal. At paragraph 47, HHJ Richardson gave the following guidance as to the approach to be taken if the reasonable adjustment claim had been pursued as a section 15 EqA claim:

> *If the case had been put that way* [i.e. as a section 15 EqA claim] *it would to my mind in any event have been doomed to failure. It might have been established that the dismissal and the underlying written warning were unfavourable treatment. But it was legitimate for an employer to aim for consistent attendance at work; and the carefully considered final written warning was plainly a proportionate means of achieving that legitimate aim. The employment tribunal as a whole proceeded on that basis, and the majority found against the employers only because they had shown some mercy before the last lengthy period of absence. It was really unarguable that dismissal after that further very substantial absence was not a proportionate means of achieving a legitimate aim.*

130. In relation to knowledge of disability, the issue is whether the employer had actual or constructive knowledge of the facts constituting the claimant's disability, regardless of whether it comprehended that these facts amounted, as a matter of law, to a disability. An employer cannot deny relevant knowledge by relying on an unquestioning adoption of occupational health advice; it must make its own factual judgment as to whether an employee is disabled – *Gallop v Newport City Council* [2014] IRLR 211, CA.

Submissions

131. The respondent made oral submissions on conclusion of the evidence. As the claimant's counsel was not ready to provide oral submissions thereafter, and, by that stage, a reserved decision was inevitable in any event, I permitted the claimant to rely upon written submissions which were filed and served within a week of the hearing. I also permitted the respondent a limited right of reply which the respondent exercised.

132. I have not repeated here all the submissions made by the parties, but I can assure the parties that I have considered them all carefully. I have set out below, the ones I consider most relevant to my determination of the issues.

133. The claimant made many concessions in his written submissions.

134. The claimant accepted that an AMP existed, trigger points were reached after each of which there was an absence review, warnings were issued after each of which there was an opportunity for appeal, and the claimant's sickness absence rate remained above target after each warning.

135. The claimant accepted that the AMP was properly followed, that the respondent had genuine operational concerns in relation to the claimant's sickness absence levels, that the respondent was entitled to enforce its AMP and to expect reliable attendance, that consequences could properly flow from progression through the AMP, and that his dismissal followed exhaustion of the earlier stages of the AMP.

136. In relation to the complaint of unfair dismissal, the claimant's central complaint was that the AMP was applied to him in an overly mechanistic way without full regard to all the circumstances which included his 13 years of service, that his absences were genuine, that there was no misconduct, that there was a background of disabilities caused by an accident at work, health issues formed a major part of the background context, some absences had a clear anxiety or depression context, the claimant did not always communicate his position clearly and the final decision was heavily based on policy progression. The claimant submitted that exhaustion of the AMP should not inevitably result in dismissal.

137. The claimant submitted that dismissal was not the only possible reasonable outcome, and it was therefore outside the band of reasonable responses in all the circumstances. The claimant submitted that a

reasonable employer would have issued another final warning to provide another opportunity for review, to consider whether the health-related context justified dismissal. The respondent submitted that a reasonable employer would not have issued another final warning because such a warning would have been the third 'final' warning issued to the claimant and the previous two final warnings had each been preceded by a first warning.

138. In relation to the complaint of discrimination arising from disability, the claimant submitted that his sickness absences arose from his disabilities.

139. However, the claimant accepted that sickness absences related to eye and ear infections, flu/Covid, chest and stomach pains, and leg pain, were unconnected to his disabilities.

140. The claimant submitted that managing severe day-to-day pain and mental distress wears down physical resilience making an individual more vulnerable to secondary illnesses and therefore less capable of working due to minor ailments that a non-disabled colleague might withstand. In so doing, the claimant attempted to connect sickness absences to his disabilities which he accepted were unconnected. The respondent objected to this submission as it was unsupported by any medical evidence.

141. In relation to knowledge of disability, the claimant submitted that the respondent had constructive knowledge of the disabilities by the date of the dismissal because he had had so much time off with neck and back pain since an accident at work 2.5 years earlier (in August 2021) and there was previous occupational health involvement.

142. In relation to whether the dismissal was a proportionate means of achieving a legitimate aim, the claimant accepted that the respondent had several legitimate and substantial aims: reliable attendance, operational efficiency, staffing stability, fair operation of the AMP, and managing disruption caused by sickness absence. The claimant accepted that an employer running a food business must be able to manage attendance, that unreliable attendance creates operational problems and that the application of the AMP "*must have consequences*".

143. However, the claimant submitted that balancing the business needs of the respondent against the discriminatory impact of the dismissal should lead to a finding that the dismissal was not a proportionate means of achieving the legitimate aims.

144. The claimant submitted that the respondent had not shown that the dismissal was truly necessary in all the circumstances, that less severe alternatives were impossible, or that a further warning or review period would not have achieved the same aims. The claimant submitted that the respondent relied too heavily on progression through the AMP to dismiss a long-serving employee with poor health despite the absences being genuine and there being no evidence of misconduct.

145. The claimant submitted that a less discriminatory measure than dismissal would have been to have issued another final warning. The respondent submitted that another final warning was inappropriate /

disproportionate because such a warning would have been the third final warning issued and the previous final warnings had each been preceded by a first warning. The respondent submitted that the needs of the parties had been balanced by allowing the claimant reduced hours, no rotation of duties and half day sickness absences had been disregarded.

146. The claimant submits he relies heavily on paragraph 32 of the Court of Appeal decision in *Hardys & Hansons plc v Lax* [2005] EWCA Civ 846, which he submits is authority for the proposition that the Tribunal must assess whether the dismissal was "truly necessary in all the circumstances" in the sense that no other proposal was possible.

147. I reject that submission for two reasons. Firstly, para 32 of Lax states: "*The employer does not have to demonstrate that no other proposal is possible*. *The employer has to show that the proposal … is justified objectively notwithstanding its discriminatory effect*." Secondly, para 4.31 of the EHRC Employment Code states that the measure adopted need not be the only possible way of achieving the legitimate aim.

148. I have considered carefully all the authorities put before me. I have applied them to the facts of this case where I have found it relevant to do so. I have not found it necessary to repeat all the authorities to which I was referred.

Conclusions

Reasons for the dismissal

149. I find that the claimant was dismissed with notice with effect from 28/3/24 because he had been absent from work for 5 weeks due a DVT in February / March 2024 and off work for a day with chest and stomach pains in January 2024. The claimant was dismissed for these absences because they occurred during the currency of a final written absence warning and he had progressed to the final stage of the respondent's AMP.

150. The dismissal occurred when the claimant's absence rate was 11.54%, which was above the AMP target of 3%.

151. The claimant had received a final written absence warning in July 2023 because he was absent due to an eye infection in July 2023 when his absence rate was 9.23% and during the currency of a first written absence warning.

152. The claimant was issued with a first written absence warning in December 2022 because he had been absent from work for Covid-related reasons. The absence rate at the time was 17.69%. If all absences save for those related to Covid and another eye infection were disregarded, the absence rate was still 4.2% and therefore above the 3% AMP target.

153. In June or July 2021, the claimant was issued with a final written absence warning pursuant to the AMP which was due to absences unrelated to any of the impairments. This was prior to the claimant's accident at work in August 2021 which he submitted (at the outset of the hearing) rendered him disabled.

154. The sickness absences which resulted in the warnings were due to Covid / flu, eye infections, chest / stomach pains, and DVT. The claimant conceded in his written submissions that these conditions were unconnected to his disabilities. There was no evidence linking these conditions to the claimant's disabilities.

155. I therefore find that none of the sickness absences which resulted in the warnings and then the dismissal arose from the claimant's disabilities of neck / back pain, numb / trembling hands, depression and memory loss.

Unfair dismissal

156. I find that the respondent has shown that the principal reason for the dismissal was some other substantial reason of a kind such as to justify the dismissal of an employee for the purposes of s. 98(1)(b) ERA, namely sickness absences contrary to the AMP which led to the issuing of warnings and ultimately to dismissal.

157. This was against a background of the claimant having previously been issued with a final written warning and thereafter having been given another chance. When the claimant suffered an accident at work due to which he was off work for 4 months, the AMP was not applied to him. Had it been, then the claimant could have been dismissed in 2022. However, the respondent gave the claimant another chance. When sickness absences continued in 2022, the application of the AMP to the claimant was started from the beginning, from the first stage, with the issuing of a record of improvement in October 2022 which was not challenged. The claimant was also given another chance in relation to an absence for an ear infection in May 2023. That absence was not initially used to trigger a final warning because the claimant's absence record was improving, although it was above target. It was only when there was another absence due to an eye infection in July 2023, that the claimant progressed to a final warning.

158. I therefore reject the submissions that the respondent was too strict and mechanistic in its application of the AMP to the claimant and that it was outside the band of reasonable responses to dismiss the claimant for absences during the currency of the final written absence warning on the basis that a reasonable employer would have given the claimant another chance. I accept the submission of the respondent that the claimant received two first absence warnings and two final absence warnings before he was dismissed and that it was unreasonable of the claimant to expect to be issued with a third final absence warning instead of dismissal merely because of his length of service and the fact that his absences were genuine and not his fault. None of the warnings were issued for disability-related absences. The claimant accepted that the respondent was not obliged to retain him indefinitely given his poor sickness absence history. The claimant says that the time for dismissal had not yet been reached and he should have been given another chance. I respectfully disagree.

159. The claimant had reached the final stage of the AMP after having received two final written absence warnings and when his absence record was nearly 3 times the level the respondent required it to be for the proper

running of its business.

160. The respondent has proved that the claimant was dismissed due repeatedly to triggering the AMP with sickness absences unrelated to his disabilities.

161. The AMP was properly and fairly applied to the claimant. The claimant did not point to any breaches of the AMP by the respondent.

162. The claimant accepted in his written submissions that an AMP existed, trigger points were reached, warnings were issued, there was an opportunity for appeal, and the claimant's attendance did not improve sufficiently for the respondent following the issuing of each warning.

163. The claimant says that his dismissal was unfair because his absences were genuine, he was a long-serving employee, there was no suggestion of misconduct, health issues formed a major part of the background context, some absences had a clear anxiety or depression context, the claimant did not always communicate his position clearly and the final decision was heavily based on policy progression.

164. Although I accept that the absences were genuine, that the claimant was a long-serving employee and that there was no suggestion of misconduct, I have already set out above my reasons for rejecting the submission that the claimant was progressed through the AMP in an overly strict or mechanistic way. For the same reasons, I reject the submission that the final decision to dismiss was heavily based on policy progression. As I have set out above, the respondent put the claimant back to the start of the AMP process by issuing a record of improvement when it could have progressed the claimant to stage 3 of the process. The claimant had 4 months off sick following a workplace accident shortly after having been issued with a final absence warning. Rather than progress to a consideration of dismissal at that stage, the respondent did not treat that absence as a trigger within the AMP. Instead, a year later, it treated the claimant as at the start of the AMP process by issuing a record of improvement. In my judgment, such conduct is the opposite of an employer progressing through the stages of an AMP strictly or mechanistically regardless of the employee's individual circumstances.

165. It was within the band of reasonable responses for the respondent to dismiss the claimant for continued high absence levels when he had progressed fairly and properly through an AMP which the respondent was entitled to apply to the claimant to improve his level of attendance. Neither genuine nor accident-related sickness absences were excluded from consideration for the purposes of triggering stages of the AMP. I reject the submission that the reasons for the absences which resulted in progression through the AMP were due to any underlying health conditions or any of the disabilities such that the dismissal was outside the band of reasonable responses. The warnings which led to the dismissal and the dismissal itself were for sickness absences unconnected with the disabilities.

166. I find that the respondent had adequately warned the claimant and he had been given sufficient opportunity to improve his attendance levels before he was dismissed.

167. The respondent was entitled to expect reasonable attendance levels which were necessary for the effective management of its business. The claimant does not submit otherwise. The claimant had demonstrated over a period of three years that he was unable to maintain sufficient attendance levels for a sufficient period. The respondent was entitled to apply its AMP to the claimant. It did so fairly and properly.

168. In my judgment, the dismissal was within the range of reasonable responses in all the circumstances, and it was therefore fair. The complaint of unfair dismissal is not well founded, so it will be dismissed.

169. In reaching this judgment, I have considered all the factors set out at paras 120 to 122 above.

Discrimination arising from dismissal

170. The dismissal was unfavourable treatment. The respondent has not submitted otherwise.

171. The dismissal was because of sickness absences which followed the issuing of a first and then a final warning for sickness absences. Those sickness absences were the ‘something’ for the purposes of section 15 of the Equality Act 2010.

172. As the parties agreed, the first issue for me in relation to the s. 15 complaint is whether the sickness absences which resulted in the warnings arose from the disabilities.

173. I have found that they did not.

174. As has been stated above, the disabilities were: neck and back pain, numb and trembling hands, depression and memory loss (“the impairments”).

175. The sickness absence which resulted in the first absence warning was due to flu/Covid which the claimant admitted did not arise from any of the impairments.

176. The sickness absences which resulted in the final absence warning were due to an ear infection and then an eye infection which the claimant admitted did not arise from any of the impairments.

177. The sickness absences which resulted in the dismissal was due to a day off work with chest and stomach pains, followed by 5 weeks off work due to a DVT. The claimant admitted that neither of these conditions arose from any of the impairments.

178. Notwithstanding the claimant’s submission that flu/Covid, eye and ear infections, chest and stomach pain, and the DVT were unconnected to his disabilities, the claimant attempted to link the conditions to his disabilities by submitting that managing severe day-to-day pain and mental distress wears down physical resilience making an individual more vulnerable to secondary illnesses and therefore less capable of working due to minor ailments that a non-disabled colleague might withstand. However, I have not been provided with any evidence in support of such a submission. For example, the eye infection was caused by meat in the

eye. The DVT followed a 12-hour flight. I cannot find that such conditions arose from the disabilities in the absence of any medical evidence. I have been provided with no evidence that neck and back pain or depression made the claimant more vulnerable to Covid, the DVT or any of the other conditions which resulted in warnings and ultimately dismissal. I therefore reject the submission.

179. For completeness, I return to the list of issues to consider whether 80% of the claimant's sickness absence during the two years prior to dismissal (29/3/22 to 28/3/24) arose in consequence of the claimant's disabilities.

180. I find that 20% of the claimant's sickness absence during the two years prior to dismissal arose in consequence of the disabilities, in that the reason given for the absence referred to one of the impairments. On my factual findings set out above, between 29/3/22 and 28/3/24, the claimant had 55 working days of sickness absence. 11 of those days (20%) mentioned back pain as at least one of the reasons. None of the reasons given for the 55 days of sickness absence referred to any neck or hand symptoms, or to depression or memory loss.

181. The parties agreed that if the claimant failed to prove that the sickness absences which resulted in his dismissal were because of his impairments, his section 15 claim would fail.

182. As the claimant was **not** dismissed because of sickness absences arising in consequence of his disabilities, his complaint of discrimination arising from disability contrary to section 15 of the Equality Act 2010 is dismissed.

Remaining issues

183. It is therefore unnecessary to decide the remaining issues of knowledge and proportionality in relation to the section 15 claim. However, for the sake of completeness, and in case I am wrong in relation to whether the dismissal was because of something arising in consequence of the disabilities, I do so below.

Knowledge

184. The claimant has not submitted that the respondent had actual knowledge of the disabilities, and it was not put to the respondent's witnesses that they had actual knowledge. The claimant did not allege that he was disabled until the appeal against the dismissal. For these reasons I find that the respondent did not have actual knowledge of the impairments at the time of dismissal.

185. In relation to constructive knowledge, the claimant relies on the occupational health reports and his absence history to submit that the respondent could reasonably have been expected to know of the impairments in the final stages of the AMP process, which I interpret as when deciding whether to dismiss.

186. There were three occupational health reports in the agreed hearing bundle which I was asked to consider. They were dated 26/11/21, 31/5/22 and 13/10/22. I have made factual findings about their content above. Although none of them referred specifically to the claimant being disabled

for the purposes of the Equality Act 2010, the question for me is whether they set out any facts from which the respondent could reasonably have been expected to know of the impairments.

187. All three reports referred to the claimant having suffered from neck and back pain, and numb and trembling hands since his accident at work on 18/8/21.

188. The first report (26/11/21) set out the impact of the symptoms on day-to-day activities. There was reference to: difficulty lifting and carrying anything over 3 kg, lifting the arms above the shoulders to the head causing considerable pain, difficulty bending and kneeling, problems putting on socks and shoes, and needing support to get up from a kneeling position.

189. The second report (31/5/22) referred to ongoing accident-related neck and back pain and numb and trembling hands causing difficulties with prolonged standing and manual dexterity. The claimant was not considered to be disabled at that time by his physical symptoms as his symptoms had not lasted long enough.

190. The third report (13/10/22) did not mention whether the claimant was disabled but, 14 months after the accident, it referred to chronic lower back and neck pain and left arm issues since the accident, and the lower back pain increasing after 4 to 5 hours of working. The report stated that the previous reports should be re-read, from which I infer that the impact on day-to-day activities of the ongoing neck, back and hand symptoms set out therein was continuing.

191. By the date of the third report (13/10/22), in my judgment, the respondent could reasonably have been expected to know that the claimant had been suffering from neck and back pain and numb and trembling hands which had substantially adversely impacted his day-to-day activities for more than 12 months.

192. I therefore find that, by 13/10/22, the respondent could reasonably have been expected to know that the claimant was disabled by reason of his physical impairments.

193. However, I do **not** find that the respondent had any knowledge (whether actual or constructive) of the claimant's mental impairments of depression and memory loss.

194. There is no mention of these conditions in the occupational health reports or in any of the reasons for sickness absence.

195. Although the first report refers to the claimant's mental health being affected by pain, an inability to work and to help his wife with chores and shopping, and the third report refers to the claimant struggling with mental health due to the effects of the accident and there is mention of anxiety, there is no evidence of the claimant suffering with depression and memory loss and (of more relevance) no mention of any day-to-day activities substantially affected by depression or memory loss. The focus of all three reports is on the adverse impact of ongoing neck and back pain. There is no mention of any depression or memory loss, let alone any mention of any specific adverse impact of such conditions on day-to-day

activities.

196. The claimant submits that so-called constructive knowledge can be inferred from his absence history. However, there is no evidence that any sickness absences were due to depression or memory loss. All the absences were due to physical symptoms. The closest the claimant came to proving that he had an absence due to a mental impairment was an absence for 9 days from 27/9/22 to 7/10/22 due to heart and back problems. The final occupational health report dated 13/10/22 referred to a discussion about the claimant's mental health (169) and to the claimant reporting that he thought he had been experiencing heart related symptoms for 4 to 5 months (therefore since May/June 2022) which the occupational health advisor thought were likely to be related to anxiety and mental health. That is not the same as the occupational health advisor opining that the claimant had the impairments of depression or memory loss or that such conditions were adversely impacting the claimant's day-to-day activities in the long-term or that the absence from work from 27/9/22 to 7/10/22 was due to depression or memory loss.

197. In his appeal letter dated 8/4/24, in which the claimant refers for the first time to being disabled for the purposes of the Equality Act 2010, the claimant alleges he is disabled by reason of his chronic neck and back issues but there is no mention of any alleged disability due to depression or memory loss (351).

198. In a lengthy appeal form dated 11/4/24, the claimant alleges he is disabled by reason of chronic neck and back pain but there is no allegation that he is disabled due to depression or memory loss. There is no mention of any such conditions at all, let alone as them qualifying as a disability (357). Although the claimant referred in the form to having attached medical evidence, the claimant accepted before me, and I therefore find, that no medical evidence was attached or provided to the respondent before disclosure in these proceedings.

199. There is no evidence to which I was referred to support a finding that the respondent could reasonably have been expected to know that the claimant was disabled for the purposes of the Equality Act 2010 due to depression and/or memory loss when it decided to dismiss the claimant or when it refused his appeal against the dismissal decision.

200. In summary, for the above reasons, I find that, when the respondent decided to dismiss and then refuse his appeal against that decision, the respondent did not know of the claimant's physical impairments of neck and back pain or numb and trembling hands, but it could reasonably have been expected to know that the claimant had the physical impairments with effect from 13/10/22. In relation to the mental impairments of depression and memory loss, I find that the respondent did not know, and could not reasonably have been expected to know, that the claimant had the mental impairments. Thus, at the date of dismissal, the respondent had constructive knowledge of the physical impairments but no knowledge (whether actual or constructive) of the mental impairments.

Proportionality

201. In relation to whether the dismissal was a proportionate means of

achieving a legitimate aim, I would have found that it was, even if I had found that the dismissal was because of sickness absences arising in consequence of the claimant's physical impairments of neck and back pain and numb and trembling hands.

202. The claimant accepted that the respondent had several real, substantial and legitimate aims that it sought to achieve by the operation of the AMP in relation to him which ultimately resulted in his dismissal.

203. The claimant accepted that the respondent was entitled to manage disruption caused by absence by operating the AMP in relation to him to achieve the legitimate aims of reliable attendance, operational efficiency, and staffing stability. The claimant accepted that an employer running a food business must be able to manage attendance, that unreliable attendance creates operational problems and that the application of a policy (such as the AMP) must have consequences.

204. The claimant submits that balancing the business needs of the respondent against the discriminatory impact of the dismissal should lead to a finding that the dismissal was not a proportionate means of achieving the legitimate aims because the dismissal ended a long and dedicated period of employment, it arose from genuine sickness absence, the respondent relied heavily on policy progression, the claimant's health-related circumstances were not given sufficient weight at the final stage, anxiety and depression were heavily part of the factual matrix, and less severe alternatives were not shown to be impossible.

205. Although I accept that the dismissal ended a long period of service and that the absences were genuine, I find that the dismissal was a proportionate means of achieving the respondent's legitimate aims because it was reasonable for the respondent to progress through the AMP in the fair way that it did. As the claimant himself submitted, the fair operation of an AMP with real and substantial aims "*must have consequences*". The application of the AMP to the claimant was a proportionate means of achieving the aims, and therefore, the dismissal which resulted from the application of the AMP to the claimant, was also a proportionate means of achieving the respondent's legitimate aims.

206. I have already found, in relation to the complaint of unfair dismissal, that the respondent was not obliged to give the claimant another chance to improve his attendance because it had been trying to improve the claimant's attendance levels since at least as far back as 2020. I have already found that the respondent did not apply the AMP to the claimant in an overly strict or mechanistic way because it had previously exercised its discretion not to progress from final written warning to dismissal when the claimant had 4 months off work after the accident at work. Instead, when the respondent applied the AMP to the claimant in late 2022, it did so from the start of the process by issuing a record of improvement, it did not simply progress from the final written warning stage.

207. The claimant's attendance was poor before October 2022 when the respondent could not reasonably have been expected to know that the claimant was disabled. In 2020, he was issued with a first absence warning and in 2021 he was issued with a final absence warning. The claimant has not contended that he was disabled when these warnings

were issued. Despite disregarding 4 months of accident-related absences in late 2021 for the purposes of the AMP, sickness absences continued in 2022, 2023 and 2024, and the absence rate remained above the expected level for the efficient operation of the business.

208. In 2022, the claimant was absent for 34 working days. Although 17 of those days (50%) were due to back pain, none of those days post-dated the October 2022 occupational health report on which I have found that the respondent could reasonably have been expected to know that the claimant was disabled by his physical impairments. As I have already found, the first absence warning at the end of 2022 was not issued because of any of the absences related to back pain but because of 9 days off work due to flu/Covid which I have already found was not connected to his disabilities.

209. In the first half of 2023, the claimant had 3 days off work due to eye and ear infections which I have already found were unrelated to his disabilities and which resulted in a final absence warning.

210. In the early part of 2024, the claimant had 26 days off work which I have already found was unrelated to his disabilities and which resulted in the decision to dismiss. One day was because the claimant was feeling unwell with chest and stomach pains and 25 days was due to a DVT.

211. Although the claimant has submitted that "*anxiety and depression were heavily part of the factual matrix*", I have found otherwise. None of the sickness absences gave depression or anxiety as a reason for the absence. There was no evidence on which I could have found that the respondent knew or could reasonably have been expected to know that the claimant was disabled by depression. The claimant does not rely on anxiety as one of his impairments rendering him disabled and none of the absences gave anxiety as a reason for the absence.

212. Balancing the needs of the claimant and the respondent carefully, I would have found that dismissal after 4 years of poor attendance levels dating back to 2020, particularly where warnings had not been issued for disability related absences, was a proportionate means of achieving the legitimate aim of maintaining acceptable attendance levels.

213. Even when all the disability related absences were excluded from the sickness absence rate, it remained above the 3% target by the time that each stage in the AMP was reached. That the claimant was a long serving employee without any evidence of misconduct, did not mean that it was disproportionate to dismiss him for genuine sickness absences for which he was blameless. The claimant accepted that the respondent was not obliged to retain the claimant's employment indefinitely. The claimant wanted to be given another chance to improve. He submitted that it was disproportionate that he was not given another 'final' written warning as an alternative to dismissal. For the reasons set out above, I disagree. That the claimant was not given what would have been his third 'final' absence warning in less than 3 years did not make the dismissal a disproportionate means of maintaining acceptable attendance levels.

214. As was held by HHJ Richardson in the EAT in *Carranza* (referred to above) dismissal after a substantial period of absence following absence-

related warnings can be a proportionate means of achieving consistent attendance at work.

215. As was found by the Court of Appeal in *O'Brien v Bolton St Catherine's Academy* [2017] ICR 737, where the unfavourable treatment is dismissal in a section 15 claim, the test of reasonableness for the unfair dismissal claim and the proportionality assessment for the section 15 claim will generally lead to the same result.

216. There is a time in relation to intermittent genuine absences for minor ailments which have triggered the various stages of an AMP when it is reasonable for an employer to say enough is enough such that dismissal is a proportionate means of achieving the legitimate aim of maintaining a satisfactory level of attendance. The respondent had reached that point in this case. No lesser sanction would have achieved the same aim; it would have been the third final absence warning in 3 years. There was no evidence that a third final absence warning would have resulted in a satisfactory attendance level. On the contrary, the opposite can be inferred from the evidence. There was evidence that the claimant had been repeatedly off sick and that warnings were not achieving the required attendance level.

Summary

217. The dismissal was **not** unfair, and it was **not** because of something arising in consequence of the claimant's disability.

218. The complaints are therefore not well founded and will be dismissed.

Approved by:

Employment Judge Quickfall

25 June 2026

JUDGMENT SENT TO THE PARTIES ON

29/06/2026

J. Woolley
FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at https://www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

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