EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr C Thatcher		**Premiere Care (Southern) Ltd**

Heard at: London South Employment Tribunal **On:** 17 & 18 August 2020
In Chambers on 10 November 2020

Before: Employment Judge Hyams-Parish
Members: Mr C Rogers and Mrs C Bonner

Representation:
For the Claimant: Mr R Dobson (Solicitor)
For the Respondent: Ms P Hall (Solicitor)

RESERVED JUDGMENT

The claim of unfair dismissal is well founded and succeeds.

The claim of direct disability discrimination is well founded and succeeds.

The claim of failing to make reasonable adjustments is well founded and succeeds.

REASONS

Claims and Issues

1. By a claim form presented to the Tribunal on 24 July 2019, the Claimant brings claims of unfair dismissal and disability discrimination. The disability discrimination claims are brought pursuant to s.13 and s.20 Equality Act 2010.

2. The issues in the case were agreed at a previous case management

hearing on 7 January 2020. These are as follows:

Unfair dismissal (S.98 Employment Rights Act ("ERA"))

a. Did the Respondent genuinely believe the Claimant to be guilty of misconduct?

b. Was that belief based on reasonable grounds?

c. At the time of forming that belief, had the Respondent carried out as much investigation as was reasonable in the circumstances?

d. Did the dismissal fall within the range of reasonable responses open for the Respondent to take?

e. Was the dismissal procedurally fair?

f. If the Claimant's dismissal was unfair, should there be a "Polkey" reduction in the compensation awarded and if so, by how much?

g. Did the Claimant contribute to the dismissal and if so, by how much, if any, should any basic and compensatory awards be reduced?

Direct disability discrimination (s.13 EQA)

h. Did the Respondent treat the Claimant less favourably than it treats, or would treat, others?

   The act of less favourable treatment alleged by the Claimant is his dismissal and he compares himself to a hypothetical comparator.

i. If the answer to (h) is yes, did the Respondent treat the Claimant less favourably because of a protected characteristic (in this case, the Claimant's disability)?

Failing to make reasonable adjustments (S.20 EQA)

j. Did the Respondent apply the following PCP to the Claimant:

   i. Proceed with an investigation meeting on 4 February 2019 without a sign interpreter;

   ii. Notify the Claimant of his suspension verbally on 28 February and then in writing on the same day, without an interpreter or any other adjustment to the written letter.

k. Did the above PCPs put the Claimant to a substantial disadvantage

compared to persons who are not disabled?

l. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant would be put to such disadvantage?

m. Did the Respondent fail to make reasonable adjustments that would have avoided the above disadvantage?

3. It is not in dispute that at all material times, the Claimant was a disabled person within the meaning of s.6 EQA. The disabilities relied on by the Claimant, and conceded by the Respondent, are profound deafness and illiteracy.

Practical matters

4. This case was conducted using the HMCTS video conferencing facility called CVP. This is because at the time of this hearing, no in person hearings were being held due to COVID 19. Both parties had agreed to proceed using CVP.

5. Due to the Claimant's disability, there were two sign interpreters present throughout the hearing who swapped at 30 minute intervals. Despite the potential challenges of using CVP, bearing in mind the Claimant's disability, the hearing proceeded very smoothly. The Claimant and his solicitor sat in the same room and the Claimant was able to fully participate in the hearing with the assistance of his solicitor and the sign interpreters.

6. During the hearing, the Tribunal heard evidence from the Claimant and the following witnesses on behalf of the Respondent:

- Cara Cole – Director of the Respondent and the Appeal officer
- Ugo Ezinwa – Home Manager and the Claimant's line manager
- Roxanne Jenkins – HR Manager
- Ruth Brokenshire – Administrator

7. The parties had agreed a bundle of documents consisting of 193 pages to which the Tribunal was referred throughout the hearing. References to numbers in square brackets in this judgment are references to page numbers in the agreed bundle.

8. As there was insufficient time to hear closing submissions at the end of the hearing, both parties agreed that they would submit written submissions. Those submissions were received by the Tribunal and have been considered prior to reaching the decisions below.

Background findings of fact

9. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all the evidence given by witnesses during the hearing, together with the documents referred to. Only findings of fact relevant to the issues necessary for the Tribunal to determine, have been made below. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

10. The Claimant was born on 8 May 1963. In 1964 the Claimant was diagnosed as profoundly deaf. At the age of four, the Claimant attended a state school and then at the age of seven, he moved to a school for the deaf. The Claimant struggled at school due to little effective teaching in the early years. He left school aged sixteen with few qualifications and unable to communicate effectively. Not only was he profoundly deaf but he was also illiterate.

11. The Claimant found it difficult to find work as he could not complete job applications. He could not communicate at job interviews and job opportunities were therefore very limited. At some stage, his father gave up his job and started a business as a painter and decorator which meant that the Claimant could work with him. However, that work ended when his father passed away. The Claimant could not continue running the business because he could not speak to potential customers; he could not understand them or make himself understood.

12. The Respondent operates a number of care homes for the elderly, based in the South East, mostly accommodating residents with particular needs arising from mental health problems, dementia and sensory impairments. The company employs in the region of 150 staff. It is a family business, run and owned by the “Cole” family.

13. In 2013, the Claimant's niece was working at the Respondent’s Forest Hill Home and recommended the Claimant to Shawn Cole, a member of the Cole family who was at the time working at the business as its maintenance manager. At the Claimant's interview, it was immediately apparent to the Respondent that the Claimant was deaf, and he also told them about his illiteracy, which was not a problem for them. The Claimant was told that as long as he could hear a fire alarm, his deafness would not be a problem.

14. Desperate for the job, the Claimant agreed to wear hearing aids which, he was told, would satisfy any concerns about him not hearing the fire alarm. The hearing aids did not, however, enable the Claimant to hear what was being said to him; they enabled him to recognise that there was noise, which the Claimant could then react to. He would generally communicate with people by reading their lips.

15. The Claimant commenced employment for the Respondent on 28 May 2013 working at the Respondent's Hamilton Lodge Care Home and Pennerley Lodge Care Home as a maintenance worker.

16. Adjustments were made very early on in the employment relationship to accommodate the Claimant's disabilities. Mr Cole communicated with the Claimant by sending him texts which his niece, or Ms Brokenshire, would read for him. Ms Brokenshire was the Claimant's main day to day contact, and would often assist the Claimant by using sign language which the Claimant understood. She acted as a liaison between the Claimant and management. Mr Cole simplified his instructions to the Claimant, for example by asking the Claimant to follow him to a work site and pointing out the work that needed to be done using hand gestures, diagrams, drawings and allowing the Claimant to lip read. Mr Cole looked at the Claimant when speaking and spoke clearly so that lip reading was easier.

17. In 2018, Mr Ezinwa replaced Mr Cole as the Claimant's line manager. Mr Ezinwa's management style was different to Mr Cole; Mr Ezinwa preferred not to communicate directly with the Claimant, but rather he gave the majority of his instructions for daily jobs to Ms Brokenshire. Ms Brokenshire effectively became the Claimant's line manager as she gave the Claimant his jobs and he reported back to her.

18. The Claimant gave evidence that it was apparent, as soon as Mr Ezinwa joined the Respondent, that he did not like the Claimant or like dealing with him; he had no time for the Claimant, criticised his work and refused to look at the Claimant when speaking so that the Claimant could not read his lips. The Tribunal accepts this evidence as fact.

19. One practice that had worked well between the Claimant and Mr Cole was the Claimant sending Mr Cole photographs of the work that he had done so that Mr Cole could see that he had completed his jobs. The Claimant said that the above practice worked well from 2013 until 2018 when Mr Ezinwa took over as the Claimant's line manager.

20. Until 2018 the Claimant had a clean disciplinary record. However, on 2 July 2018 the Claimant received a first and final written warning for unprofessional behaviour (namely, getting angry and shouting at a colleague) and failing to follow a management request given to him by Mr Ezinwa. The warning was placed on his file for 12 months. This warning has not been challenged in these proceedings except there appeared to be a dispute whether the Claimant was offered a sign interpreter at the disciplinary hearing. It is now accepted that he was, and that a sign interpreter attended that disciplinary hearing to assist the Claimant.

21. On or about 21 January 2019, the Respondent received a written complaint about the Claimant from fellow workers Chelsea Collins (Care Activities

Coordinator) and Natasha Woods (Health Care Assistant) [105]. Each of them wrote a separate complaint. In Ms Collins' complaint, she wrote [sic]:

> ***On 19 January 2019 it was brought to my attention that while taking one of our residents for a cigarette out in the garden due to Colin repairing the decking, that Maria made myself and Natasha aware that Colin was taking pictures of her on his personal mobile. I also feel very uncomfortable being around Colin he is always making comments about me under his breath and facial expressions which is now making me feel I don't want to come to work. The matter started when Colin actually asked me to stop what I was doing, which was actually what I was meant to be doing activities, to do something for him from then onwards I feel he is harassing me in the workplace and his presence makes me feel very uncomfortable. I feel nothing is being done about this ongoing issue and it's not fair. I have to come to work and feel this way. I would like something to be done about this as soon as possible and to be informed of the action being taken.***

22. In Ms Woods' complaint she wrote [sic]:

> ***On Saturday 19th January one of our residents came to me and explained that Colin had taken a picture of her whilst she was outside (Moira) smoking. I informed my head of care. It has now been brought to my attention that Colin has taken pictures of myself and other staff who were on duty on Saturday 19th January. Now feel very uncomfortable as the pictures were taken on his personal mobile phone. I do not feel comfortable around Colin now and feel that he should be addressed about this. I feel worried that the pictures of myself and the resident are still on his mobile phone.***

23. On 4 February 2019, both Ms Collins and Ms Woods were interviewed by Ms Jenkins. In her interview with Ms Collins [108] Ms Jenkins opened the meeting by saying that it was an "*investigatory meeting to find out some information*". Ms Collins said in the interview that she was outside having a cigarette with a resident who she described "*had full capacity*". She referred to the resident saying to her "*that man is taking pictures of me*". She said that the Claimant was taking photos of the resident but also added "*its not only that, he has taken pictures of staff*". Ms Collins then went on to refer to bullying behaviour by the Claimant, stating [108]:

> ***I've had non stop issues with him. It started when one time he asked me to do something but I was in the middle of an activity. Now my job description clearly states I am an activities coordinator. He wanted me to pack away some shopping for him but I said no because I was busy. From then onwards he's been bullying me, I would say, every time he sees me he makes gestures with his mouth and does facial expressions in an aggressive way and actually I spoke to Ugo about this but I didn't write a statement….***

24. There is very little discussion between Ms Collins and Ms Jenkins about the allegation that he took photos of residents and staff, indeed only what is referred to above. The majority of the interview is taken up discussing other

complaints Ms Collins had about the Claimant.

25. Ms Woods was interviewed on the same day [103]. She said that she didn't actually see the Claimant take any photos; she said that "*it had just been brought to my attention by Ugo so I was unaware that these pictures were being taken*". The remainder of the interview was spent discussing how Ms Woods felt uncomfortable around the Claimant.

26. On the same day, the Claimant was required, without warning, to attend a meeting with Ms Jenkins, who was accompanied by Ms Brokenshire. Ms Jenkins informed the Claimant that the meeting was being held "*in regard to you taking photos of staff".* The Claimant was asked at the meeting whether he had taken any photos of staff and the Claimant denied doing so, stating that the only photos he took were of things that were broken at the home. The Claimant proceeded to show Ms Jenkins his phone to prove that he had not taken such photos and to show Ms Jenkins the photos that he had taken. After asking about the taking of photos, Ms Jenkins then proceeded to ask the Claimant about an occasion on Monday 28 January 2018 when it was alleged that he left work at 2.30pm rather than 3pm, when he was due to finish. The Claimant explained in the meeting that he had to go to the doctors to pick up some tablets.

27. The Claimant was then asked about an incident where it was alleged that the Claimant provoked aggressive behaviour by a resident when he walked into his room without knocking. Ms Jenkins also put to the Claimant that on the previous Friday, he locked two members of staff out in the garden whilst they were smoking and that he locked the laundry door. The Claimant could not give a reply to this allegation because he could not recall anything about it, and did not know what Ms Jenkins was referring to.

28. On 27 February 2019 the Respondent wrote a letter to the Claimant stating that he was suspended with immediate effect, to allow for an investigation into allegations of threatening behaviour against Mr Ezinwa. The allegations arose from two incidents, the details of which the Tribunal read from two incident report forms completed by Mr Ezinwa [114 and 117]. They read as follows [sic]:

> ***Incident report 1***
>
> ***On the 27/02/2019 around 1430 pm whilst interviewing was going on, Colin came towards the door screaming and gesticulating in anger pointing at his phone and at the same time his head which seems to mean in my opinion that I was stupid, senseless etc. It was quite obvious he was irritable, annoyed. The lady being interviewed was distracted by his behaviour at that point in time that caused her to turn toward the office door because of the ranting noise coming from that direction .***
>
> ***I decided to remain in the office and pretended that everything was fine but I felt dis respected and mortified at his actions. After the interview I***

went to look for Colin to find out why such disrespectful behaviour was expressed by him whilst an interview was going on but he had left for the day.

Incident report 2

On the 28/2/2019 around 8am I noticed Colin was in the building; staff room to be precise. I said to him that I wanted to see him in my office. Prior to that I had spoken to Patricia (Head of Care) to be present whilst I speak to him. Colin came to the office, I showed him his suspension letter that was sent to him by HR (posted and emailed). Colin said that he was not going anywhere. He became verbally aggressive gesticulating in anger pointing his finger at me that he was going to deal with me. He threatened to monitor and follow me home. I said to Colin I was going to call the police if he doesn't listen to me. He stormed out of my office and went back to the staff room.

At that point I rang the police informing them about the threat [my life and children] I was receiving from a staff that was suspended and wasn't supposed to be in the building. The police arrived, after speaking to the operation manager, they retrieved his work keys and were able to escort Collin out of the building.

29. By letter dated 1 March 2019 from Ms Jenkins to the Claimant, the Claimant was invited to a disciplinary hearing to be held on 6 March 2019 to discuss the allegations of taking photos of fellow workers and leaving work early without authorisation on 25 and 28 January 2019. The letter enclosed investigation meeting notes, statements by Ms Woods and Ms Collins, together with actual clocking times for the 25 and 28 January 2019.

30. On 5 March 2019 solicitors instructed by the Claimant wrote to the Respondent [121] complaining about the manner in which the 4 February 2019 meeting with the Claimant had been conducted, notably that the Claimant did not know what it was about and had not been provided with the assistance of a sign interpreter. The letter alleged disability discrimination and said that the Claimant had been advised to raise a grievance. Finally the letter stated that the Claimant would not attend the disciplinary hearing because he had been given insufficient notice.

31. We assume as a result of the letter from the Claimant's solicitor, the Respondent wrote to the Claimant, by letter dated 7 March 2019 [125] that the date of his disciplinary hearing had been changed to 13 March 2019. By letter dated 8 March 2019, the Respondent wrote to the Claimant confirming the disciplinary hearing on 13 March 2019 and also adding additional allegations that would be considered at the hearing. These additional allegations were threatening behaviour towards Mr Ezinwa (the subject of the above incident reports at paragraph 28) and refusing to leave the premises on 28 February 2019 resulting in it being necessary to call the police.

32. By letter dated 14 March 2019 [129] the Respondent wrote to the Claimant

informing him that the date of the disciplinary hearing had been changed to 19 March 2019. The letter set out the allegations as follows [sic]:

> ***1. It is alleged that on 19th February 2019 whilst on duty, you took pictures of the fellow employees Natasha Wood and Chelsea Collins with your personal phone without their agreement.***
>
> ***2. It is alleged that you left early without it being authorised by your manager on 28th January 2019, despite our meeting in November 2018.***
>
> ***3. It is alleged that on the 26th February 2019 you had an aggressive and threatening behaviour towards your manager Yugo Ezinwa following the notification of your suspension from work on the 26th February 2019 in relation to the above allegations.***
>
> ***4. It is further alleged that on the 27th February 2019 you refused to leave the premises meaning that the police were called to remove you from the premises***
>
> ***5. It is alleged failure to follow a reasonable management instruction, namely that you failed to attend without notification, or good reason an investigation meeting issued to you in writing by Libby Quinnear to carry out 13th March 2019.***

33. By letter dated 21 March 2019 [128] the Respondent wrote to the Claimant informing him that the disciplinary hearing had again been changed to 28 March 2019. This change was due to the availability of the sign interpreter.

34. The disciplinary hearing was conducted by George Hickman, on behalf of Peninsula, the Respondent's legal advisers. He upheld allegations 2, 3 and 4 referred to at paragraph 32 above. He did not uphold allegations 1 and 5. He said that ordinarily he would have recommended that the Claimant be dealt with by way of final written warning but because he was already subject to a final written warning concerning allegations which were "*directly referable to the current matters of serious misconduct*" the appropriate sanction would be dismissal with notice [155].

35. Following that hearing, Ms Jenkins wrote to the Claimant on 8 May 2019 in which she said:

> ***As you know we engaged a third party consultant to conduct a disciplinary meeting on Friday 26 April 2019. Please find attached their report. Having considered the report of their findings it is my decision to dismiss with immediate effect.***
>
> ***This will take effect immediately and you will be paid 4 weeks pay in lieu of notice and any outstanding annual leave will be paid 30 May 2019.***
>
> ***You have the right of appeal against my decision and should you wish to do so, you should write to Shawn Cole, within 5 working days of receiving this letter giving the full reasons why you believe the disciplinary action taken against you is too severe or inappropriate.***

36. The Claimant appealed against his dismissal by letter dated 16 May 2019 [167]. The appeal was heard by Ms Cole and the appeal was dismissed.

Law

(a) Unfair dismissal

37. The law relating to the right not to be unfairly dismissed is set out in s.98 ERA. Section 98(1) says as follows:

> ***(1) In determining….whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) A reason falls within this subsection if it—***
>
> ***(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***
>
> ***(b) relates to the conduct of the employee,***
>
> ***(c) is that the employee was redundant, or***
>
> ***(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.***
>
> ***(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—***
>
> ***(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and***
>
> ***(b) shall be determined in accordance with equity and the substantial merits of the case.***

38. What is clear is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the Tribunal must consider whether the employer has proved the reason for dismissal. Secondly, the Tribunal must consider whether the Respondent acted fairly in treating that reason as the reason for dismissal. For this second part, neither party bears the burden alone of proving or disproving fairness. It is a neutral burden shared by both parties.

39. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness.

40. In a conduct case, it was established in the well-known case of ***British Home Stores v Burchell*** that a dismissal for misconduct will only be fair if, at the time of dismissal: (1) the employer believed the employee to be guilty of misconduct; (2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and (3) at the time it held that belief, it had carried out as much investigation as was reasonable.

41. In another case called ***Iceland Frozen Foods Ltd v Jones***, it was said that the function of the Employment Tribunal in an unfair dismissal case is to decide whether in the particular circumstances 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.

42. In ***Sainsburys Supermarket Ltd v Hitt*** it was said that the band of reasonable responses applies to both the procedures adopted by the employer, as well as the dismissal.

43. Finally, in ***London Ambulance NHS Trust v Small*** the court warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. It is therefore irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "substitute its view" for that of the employer.

44. In a gross misconduct case, a Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case. Here, the employer's rules and policies are important because a particular rule which makes clear that a certain type of behaviour is likely to be categorised as gross misconduct, may make it reasonable for the employer to dismiss for such behaviour.

45. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought, compensation is awarded by means of a basic and compensatory award.

46. Section 123(1) provides that the compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (***Polkey v A E Dayton Services***

Limited [1988] ICR 142.

47. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

> ***Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.***

48. A reduction to the compensatory award is primarily governed by section 123(6) as follows:

> ***Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding……***

49. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in ***Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111***. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

(b) Direct discrimination

50. The EQA sets out provisions prohibiting direct discrimination. Section 13 EQA states:

> ***A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.***

51. The focus in direct discrimination cases must always be on the primary question "*Why did the Respondent treat the Claimant in this way?"* Put another way, *"What was the Respondent's conscious or subconscious reason for treating the Claimant less favourably?"* It is well established law that a Respondent's motive is irrelevant and that the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment. In ***R v Nagarajan v London Regional Transport [1999] IRLR 572*** it was said that "*an employer may genuinely believe that the reason why he rejected the applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim, members of an Employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, that race was the reason why he acted as he did*".

52. The provisions relating to the burden of proof are set out at Section 136(2) and (3) of EQA which state:

> ***(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
>
> ***(3) But subsection (2) does not apply if A shows that A did not contravene the provision.***

53. It is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination. Only if that burden is discharged would it then be for the Respondent to prove that the reason it dismissed the Claimant was not because of a protected characteristic. Therefore, it is clear that the burden of proof shifts onto the Respondent only if the Claimant satisfies the Tribunal that there is a 'prima facie' case of discrimination. This will usually be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases given the unlikelihood of there being direct, overt and decisive evidence that a Claimant has been treated less favourably because of a protected characteristic.

54. When looking at whether the burden shifts, something more than less favourable treatment than a comparator is required. The test is whether the Tribunal "*could conclude*", not whether it is "*possible to conclude*". In ***Madarassy v Nomura International plc 2007 ICR 867, CA*** it was said that the bare facts of a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "*could conclude*" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. However, 'the "more" that is needed to create a claim requiring an answer need not be a great deal. In some instances, it can be furnished by non-responses, an evasive or untruthful answer to questions, failing to follow procedures etc. Importantly, it is also clear from case law that the fact that an employee may have been subjected to unreasonable treatment is not necessarily, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift.

55. Notwithstanding what is said above, in ***Laing v Manchester City Council and anor 2006 ICR 1519, EAT***, the point was made that '*it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question where there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment*'.

(c) Failing to make reasonable adjustments

56. A claim for failure to make reasonable adjustments is to be considered in two parts. First the Tribunal must be satisfied that there is a duty to make reasonable adjustments; then the Tribunal must consider whether that duty has been breached.

57. Section 20 of EQA deals with when a duty arises, and states as follows:

> ***(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.***
>
> ***……***
>
> ***(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.***

58. Section 21 of the EQA states as follows:

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

59. The duty to make adjustments therefore arises where a provision, criterion, or practice, any physical feature of work premises or the absence of an auxiliary aid puts a disabled person at a substantial disadvantage compared with people who are not disabled.

60. The EQA 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, applying the evidence adduced during a case, and is assessed on an objective basis.

61. In determining a claim of failing to make reasonable adjustments, the Tribunal therefore has to ask itself three questions:

    a. What was the PCP?

    b. Did that PCP put the Claimant at a substantial disadvantage compared to someone who is not disabled?

    c. Did the Respondent take such steps that it was reasonable to take to

avoid that disadvantage?

62. The key points here are that the disadvantage must be substantial, the effect of the adjustment must be to avoid that disadvantage and any adjustment must be reasonable for the Respondent to make.

63. The burden is on the Claimant to prove facts from which this Tribunal could, in the absence of hearing from the Respondent, conclude that the Respondent has failed in that duty. So here, the Claimant has to prove that a PCP was applied to them and it placed them at a substantial disadvantage. The Claimant must also provide evidence, at least in very broad terms, of an apparently reasonable adjustment that could have been made.

64. It is a defence available to an employer to say "*I did not know and I could not reasonably have been expected to know*" of the substantial disadvantage complained of by the Claimant.

65. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply (***Ishola v Transport for London [2020] EWCA Civ 112***)

Analysis, conclusions and associated findings of fact

66. Turning first to the Tribunal's assessment of the witness evidence, the Tribunal found the Claimant to be an honest, credible and reliable witness. Where there were areas of disputed fact, the Tribunal largely preferred the evidence of the Claimant. By contrast the Tribunal found Ms Jenkins to be wholly unreliable. Despite her evidence, and her role with the Respondent, suggesting that she was experienced in HR matters, the Tribunal concluded that she seemed to lack basic knowledge in good HR practice, preferring to rely completely on advice given to her by Peninsula, even blindly guided by them, leading the Tribunal at one point to remind Ms Jenkins that Peninsula were simply the advisers, and that the actual decision making was hers or the Respondent's responsibility. The Tribunal was surprised, to say the least, by her "*no comment*" responses to certain questions and her lack of insight in to decisions she had been responsible for making.

67. Ms Jenkins was questioned by the Tribunal about who made the decision to dismiss. The dismissal letter, written by Ms Jenkins, clearly states "…*it is my decision to dismiss with immediate effect…*" However when it was put to her that the ACAS code stated that separate people should conduct the investigation and disciplinary hearing (the latter implicitly including the decision whether to dismiss) Ms Jenkins appeared to row back from that position and say that the decision to dismiss was a decision made by the senior management team ("SMT") comprised of Michelle Jenkins (the

mother of Roxanne Jenkins), Ms Cole and Mr Cole. Then, when it was pointed out that Ms Cole was both decision maker as to the dismissal, but also the person who conducted the appeal, she returned to her position that she was the decision maker.

68. On balance, the Tribunal concluded that Ms Jenkins was not the true decision maker, albeit she may have contributed to the discussion with the SMT. The revelation that Ms Cole had been at the meeting was only made at the end of Ms Jenkins' evidence. Therefore Ms Cole was not questioned about her role during that meeting, as Ms Cole requested that she give her evidence at the beginning of the second day, before Ms Jenkins, as she had a meeting to attend.

69. A further revelation during Ms Jenkin's evidence, which surprised the Tribunal, was that Michelle Jenkins had participated in, and assisted Ms Jenkins with, the investigation, particularly in circumstances where she participated in the discussion when it was decided to dismiss the Claimant.

70. Finally, the Tribunal was disturbed to hear from Ms Jenkins that she had concluded that there was no case to answer in respect of the allegation that the Claimant had taken photos of Ms Wood and Ms Collins but that she allowed the matter to remain in the set of allegations to be determined by Mr Hickman. When asked why she had allowed the allegation to remain in the invitation to the disciplinary hearing and in the list of allegations to be determined by Mr Hickman, she could not explain the decision. The Tribunal also noted that the allegation seemed to morph into an allegation purely about taking photos of staff, which did not seem to be the primary concern of Ms Woods and Ms Collins.

71. Turning now to the questions which it was agreed that the Tribunal would need to address in order to decide this case, as set out at paragraph 2 above, this is set out below.

72. With the caveat that other factors were at play when deciding whether to dismiss the Claimant, as explained in paragraph 78 below, the Tribunal finds that the reason for the dismissal was misconduct. The Tribunal acknowledges that this is a fairly low bar for the Respondent to overcome in an unfair dismissal case, and no alternative suggested reason has been put forward by the Claimant other than the fact that it was a decision that was influenced by his disability.

73. The Tribunal also makes the following findings in relation to the disciplinary process:

    - The Claimant was not interviewed about the two incidents occurring on 27 and 28 February 2019 involving Mr Ezinwa and about which Mr Ezinwa completed the two incident reports referred to at

paragraphs 28 above. He was not able to give his response to these allegations at the investigatory stage and the Respondent was not able to pursue any lines of enquiry suggested by the Claimant which may have pointed to his innocence.

- The Respondent did not interview a witness to both incidents, Patricia Mukandara (Head of Care). This person is named as a witness in both incident reports. Whilst Ms Jenkins suggested in her evidence to the Tribunal that her mother had interviewed this witness, there is nothing in the bundle as evidence of that fact.

- Mr Ezinwa was not interviewed about the 27 and 28 February incidents. His incident reports were therefore left unchallenged by the Respondent and no further detail was sought.

- Mr Ezinwa was not questioned about his involvement in the allegations that the Claimant had taken inappropriate photos of staff/residents. He was given information, it would seem, by a concerned resident and then passed this to Ms Woods.

- The Claimant was not asked who he considered should be interviewed as part of the investigation. Had he been asked, he might have suggested interviewing Mr Cole as he was someone who knew the Claimant and was aware of the more informal arrangements regarding leaving work to attend appointments, for which the Claimant was disciplined.

- Ms Brokenshire was not interviewed, yet she was able to give direct evidence as to the complaint that the Claimant left work early without permission.

- The Claimant was interviewed about the allegation that he left work early on 28 January 2019 but not about the allegation that he left work early without permission on 25 January 2019.

- The Claimant did not have the benefit of a sign interpreter at the investigatory meeting on 4 February 2019. The Tribunal accepts the Claimant's evidence that he did not understand everything that was being discussed at the meeting because Ms Jenkins spoke too fast.

- Mr Hickman did not question the Claimant about leaving work early on 25 January 2019; he only asked about 28 January. Yet he found against the Claimant in relation to both dates in his conclusion.

- Mr Hickman did not halt the disciplinary hearing in order to arrange for further investigation to be conducted. This is despite him saying, in connection with one response by the Claimant "*so we can ask Mr*

Ezinwa to confirm that?"

74. None of the above failings were remedied on appeal. Infact it appeared to the Tribunal that Ms Cole had failed to properly examine the process leading to dismissal. It was difficult to know exactly upon what basis, and for what reasons, she decided to uphold the dismissal.

75. The Tribunal had to ask itself whether the above failures fell outside the band of reasonable responses open for an employer to take. Taking into account all the matters referred to at paragraphs 66-74 above, the Tribunal did not find it difficult to conclude that their actions fell significantly outside the band of reasonable responses. No reasonable employer would have acted in the way the Respondent did in dismissing the Claimant.

76. Next the Tribunal went on to consider whether the dismissal was an act of direct discrimination. To decide this issue, the Tribunal found it necessary to apply the burden of proof. The Tribunal were clear that the Claimant had proved a prima facie case of less favourable treatment and, for the following reasons, concluded that the burden of disproving discrimination should pass to the Respondent:

- Ms Jenkins chose to allow the allegation that the Claimant had taken photographs of Ms Collins and Ms Wood to proceed to a disciplinary hearing, despite being clear in her own mind, and knowing, that there was no case to answer and the Claimant could prove that he had not done what was alleged. To the Tribunal's surprise, Ms Jenkins candidly admitted this during her evidence and could not explain why she then chose to leave the allegation in the list of misconduct to be considered at a disciplinary hearing. However, the Tribunal concluded that there was more to it. Having looked at the interviews of Ms Collins and Ms Wood, it was apparent that they misinterpreted and misunderstood the Claimant's mannerisms and behaviour which were attributed to his disability. For example, Ms Collins complained that the Claimant "*made gestures with his mouth*" and does "*facial expressions in an aggressive way*" which she perceived to be threatening. The Tribunal finds that Ms Jenkins knew full well the real reason behind the Claimant's behaviour yet there was no attempt to help Ms Collins or Ms Wood understand that such mannerisms may be a symptom of trying to communicate in circumstances where the Claimant could not hear. Neither was there any attempt to pose an alternative reason why the Claimant was taking photos, which Ms Jenkins knew to be true. It is quite possible that Ms Collins and Ms Wood had built up prejudices through their own ignorance, which Ms Jenkins did not think to investigate further. Instead, she pursued allegations against the Claimant which she must have known were distressing to him but which she knew to be untrue.

- Ms Jenkins decided to interview the Claimant on 4 February 2019 without offering him a sign interpreter, in circumstances where she knew he would have to answer to some serious allegations and they would potentially have serious consequences for his career. She knew that the Claimant had benefited from a sign interpreter before when he faced disciplinary allegations. She also knew that the Claimant was finding it difficult to understand what she was saying.

- In evidence, the Tribunal was surprised to hear Mr Ezinwa use the term “deaf and dumb” to describe the Claimant. This is consistent with Mr Ezinwa’s behaviour as described to the Tribunal by the Claimant which suggested a pattern of intolerance, prejudice, and a lack of sympathy, with the Claimant’s disabilities, and very little interest in adjusting his communication style to make it easier for the Claimant to understand. The Tribunal concluded this to be a relevant factor to take into account because it finds that he played a part in reporting the allegation of taking photos of staff and patients.

77. The burden having shifted, the Tribunal considered whether the Respondent had proved that the decision to dismiss the Claimant was in no sense whatsoever motivated or influenced by the Claimant's disabilities. Here, the Respondent was reliant on the evidence of Ms Jenkins, which the Tribunal found to be unreliable. However, as is clear from the above finding, the actual decision was made by those on the SMT. Ms Cole gave evidence in her role as the appeal officer and therefore was not questioned about her role during the meeting when the decision to dismiss was made. This was because that fact only came to light during Ms Jenkins evidence and Ms Cole did not divulge that she had taken part in a meeting where the Claimant's dismissal was discussed.

78. Looking at the case as a whole, and taking into account the significant failings in the process leading to dismissal, the Tribunal could not be satisfied that the decision made by those at the SMT was in no sense whatsoever influenced or motivated by the Claimant's disabilities. For this reason, the Tribunal concluded that the claim of direct discrimination should succeed.

79. Finally the Tribunal considered the claims of failing to make reasonable adjustments.

80. The Tribunal is satisfied that the Respondent applied to the Claimant the following PCPs which put him to a substantial disadvantage compared to non-disabled persons:

    a. The requirement to attend an investigatory meeting without assistance;

b. Being given a suspension letter without sitting the Claimant down to go through it.

81. In relation to the 4 February 2019 meeting, the Tribunal accepts that the Claimant found it difficult to understand what he was being questioned about, and at some point during the meeting asked for a sign interpreter to be present. Whilst Ms Jenkins and Ms Brokenshire denied this, at a certain point in her evidence to the Tribunal, Ms Brokenshire described the Claimant as becoming "*agitated*". When asked by the Tribunal why he became agitated, Ms Brokenshire, said "*it was because he didn't understand what was being said I assume*". The Tribunal believes it was a reasonable adjustment for a sign interpreter to be present. It is an adjustment the Respondent had previously made for the Claimant. The Respondent knew that the Claimant was significantly disadvantaged by virtue of his disability. For the above reasons, this claim succeeds.

82. The Tribunal finds that the Claimant was sent a suspension letter by whatsapp and that it was received by the Claimant. However the Tribunal accepts that the Claimant was not able to read it and when he went to work on 28 February 2019 he did not know that he had been suspended. When he was handed the letter again on 28 February 2019, no steps were taken to sit the Claimant down in order to go through the letter with him. The Tribunal considers that, given the importance of the letter, this was a reasonable adjustment to make and may have avoided the problems which resulted in the police being called. The Respondent's failure to make this adjustment means that this claim also succeeds.

83. The Tribunal considered whether any Polkey reduction should be made to any compensation awarded to the Claimant or any reduction on the grounds of contributory fault. The Tribunal concluded that the failures at paragraph 73 above were so significant that it found it impossible to speculate what might have happened had they acted fairly. For this reason no *Polkey* reduction is appropriate.

84. The Tribunal concluded that a very small reduction should be made for contributory fault. The Tribunal found that the Claimant had left 30 minutes early on 25 and 28 January 2019. The Tribunal concludes that, notwithstanding the mitigating factors, the Claimant should have done more to ensure that he had the authority to leave early from Mr Ezinwa. However, it did not believe the reduction should be any more than 15%. The Tribunal could not be satisfied, on the evidence, that the Claimant was culpable or blameworthy in any other way or that it would be just and equitable to reduce it further.

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Employment Judge Hyams-Parish
18 November 2020

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