



## **EMPLOYMENT TRIBUNALS**

**BETWEEN:**

**Claimant**  
Mr N Ferns

And

**Respondent**  
Dignity Funerals Limited

## **AT A FINAL HEARING**

**Held:** On 6 December 2021, at Leicester as a hybrid hearing.  
On 7 & 8 December 2021, remotely by CVP  
In chambers, on 6 January 2022, without parties.

**Before:** Employment Judge R Clark  
Mr J Purkis  
Mr S Connor

### **REPRESENTATION**

**For the Claimant:** Mr Gray-Jones of Counsel  
**For the Respondent:** Mr McGrath of Counsel

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## **JUDGMENT**

1. The claim of unfavourable treatment because of something arising in consequence of his disability under s.15 of the Equality Act 2010 **succeeds**.
2. The respondent shall pay the claimant compensation in the sum of **£6,631.86**.
3. The claim of failure to make a reasonable adjustment **fails and is dismissed**.
4. The claim that the respondent failed to provide written reasons for dismissal **fails and is dismissed**.

# **REASONS**

## **1. Introduction**

1.1 By a claim presented on 21 October 2019, Mr Ferns brings a claim of disability discrimination relating to the termination of his employment on 24 June 2019.

## **2. Preliminary issues**

2.1 The preparation for this hearing has been varied. There are a number of lists of issues prepared by either side. None is agreed. We spent time identify the actual issues in the claims at the outset and we set those out below.

2.2 We also had to deal with an application to adduce additional documentation. The claimant's medical records were not in the bundle. Mr Gray-Jones sought permission to include them. The respondent opposed the application. The documents were said to go to the issue of whether the claimant's absences arose in consequence of the disability. We noted the state of the evidence between the parties already on this disputed issue and that the initial burden rested with the claimant. We noted the claimant advanced a positive case in his witness evidence, the respondent did not positively advance a contrary case in its evidence. We had concerns about the timetable for the hearing in any event. We were not told how extensive the additional documentation was and how long we would have to allow for its content to be digested by the respondent's counsel, if admitted. The reason the documents had been omitted was not satisfactorily explained. We decided that the risk of practical consequence to the conduct of the final hearing outweighed the prejudice to the claimant of refusing the documents and declined to permit them to be adduced.

2.3 During the course of cross examination, the absence of the medical records was put not only to confirm that there was no evidence of certain matters before the tribunal on the "arising from" issue but was put in a way which appeared to question the very fact of the claimant attending various medical appointments. At a break in the evidence, Mr Gray-Jones renewed his application and framed it in response to that new state of affairs. It focussed on the potential abuse of process for the respondent to advance a factual case which was at odds with findings of fact made by EJ Jeram in the earlier preliminary hearing and the injustice to the claimant of us reaching findings of fact contrary to clear and simple documentary evidence of the appointments. Significantly, we were now told that the documentation amounted to merely a handful of pages. Mr McGrath asked to reflect on the application over-night which we permitted. The respondent maintained its objection, based largely on the fact we had already ruled not to admit those documents. It offered an admission of the date of the medical appointment and an agreed summary of the diagnosis.

2.4 We were satisfied that there was a material change in the issue now before us, and the application made at the outset of the first day. The issue of whether something arose from the disability was not before EJ Jeram, but the attendance at various medical appointments

was something we were told she had relied in the oral judgment given at the time. That was consistent with what we would have expected to be included in the issues she was deciding and raised the question of findings of fact that had already been made. Unfortunately, the reasons for EJ Jeram's judgment had not been produced in writing and the proportionality of admitting the documents was no longer a concern due to their limited number. There was a real risk there could not only be a perception of injustice but an error in law for us to potentially reach findings trespassing on ground already covered by the tribunal or actually reaching contrary conclusions. We concluded the injustice of not admitting exceeded that of admitting. Mr Ferns was still giving evidence at the time and could be cross examined and there was no practical implication to the timetable as it was clear the respondent and its Counsel had access to the documents overnight in order to be able to make the admissions. Indeed, Mr McGrath confirmed he did not require any further time to continue with his cross examination. On that basis we admitted those documents.

### **3. The issues**

3.1 The claims are brought as claims of disability discrimination under section 15 and 20 the Equality Act 2010 ("the 2010 Act"). We agreed with the parties that there was no reason to depart from the order listing this hearing that it would determine both liability and remedy.

3.2 The issues between the parties were canvassed at the start drawing from each sides' proposed list of issues. We determined the issues for us were as follows: -

3.3 The section 15 claim: -

- a) There is no dispute the claimant was dismissed and that dismissal amounts to unfavourable treatment.
- b) Was the reason for dismissal sickness absence and / or an inability to be mobile?
- c) Did the said sickness absence / mobility arise in consequence of the claimant's disability?
- d) There is no justification defence. The respondent's case is that it did not and could not reasonably be expected to know of the disability and in any event, that it dismissed for a different reason, namely because of a dubious claim for expenses.

3.4 The reasonable adjustment claim: -

- a) The first of three PCP's alleged is "a requirement not to take medical appointments during working hours". The claimant says this puts him at a substantial disadvantage compared to non-disabled persons as "he was more likely to require medical appointments during working hours and as such more likely to be subjected to sanctions/dissmissed.
- b) The second PCP is alleged to be "a requirement not to take 5 days or more of sickness absence and/or more than one period of sickness absence during employment

and/or during the employee's probationary period. The claimant says this puts him at a substantial disadvantage compared to non-disabled persons as "he was more likely to be absent from work on sickness absence and as such more likely to be subjected to sanctions/dismissed.

c) The third PCP is alleged to be "a practice of disallowing the claimant to work shortened hours during periods of flare up". The claimant says this puts him at a substantial disadvantage compared to non-disabled persons as he was more likely to perform his work more slowly and as such more likely to be subjected to sanctions/dismissed.

3.5 The adjustments contended for are: -

- a) Allowing the claimant to work part time and or shortened hours during periods of flare up.
- b) A dispensation for disability related absences before triggers disciplinary policy
- c) Allowances for slower performance.
- d) Not dismissing him.

3.6 The remaining adjustments pleaded in the claim form were not maintained, it being accepted they do not amount to reasonable adjustments.

3.7 Whilst the reasonable adjustment claim remains before us, we explored its utility in these claims alongside the section 15 claim as they may add nothing. The issues identified were these. First, if the respondent did not have, and could not reasonably be expected to have knowledge of disability, the reasonable adjustment claims cannot succeed. Secondly, if it did have sufficient knowledge, and if the claimant was dismissed for something arising in consequence of his disability, the reasonable adjustment claim will not add anything as it arises at the same time and in the same context. Thirdly, any potential utility as part of evaluating of the proportionality of any legitimate will not arise as there is no justification defence advanced. Finally, it became apparent that the claimant has not addressed this part of the claim in his witness statement and as such, there would appear to be considerable difficulties for him in establishing some, if not all, aspects of these claims.

3.8 For completeness, the claimant has also claimed a statutory award in respect of an allegation the respondent failed to provide written reasons for his dismissal. This has not been pursued and as will appear from our findings of fact, the respondent did prove written reasons for dismissal.

#### **4. Evidence**

4.1 We have heard from Mr Ferns himself.

4.2 For the respondent we have heard from Mr Stephen Bradley, the claimant's regional manager who made the decision to dismiss the claimant. We heard from Mr Hollingsworth,

an ex-colleague of the claimant from a previous employment who speaks to the circumstances of the claimant's resignation from that employment and the disciplinary allegations that he then faced. We heard from Mrs Nicola Green, one of the claimant's managers in that same previous employment who also speaks to the circumstances of his resignation from that employment and her perception of the effect of his disability.

4.3 We also received a witness statement from Mr Ian Johnson who was not called and we have not considered further. Similarly, we did not hear from Mr Neil Reeves who was a significant player in the relevant events. He was the claimant's manager at material times and with whom various discussions and meetings are said to have taken place. We suspect his evidence would have been important. We note how the respondent has pleaded that a number of the factual allegations about discussions with Mr Reeves were denied and that "evidence will be brought to the substantive hearing concerning this". We understand the respondent failed to serve a witness statement from Mr Reeves as ordered and its subsequent application to adduce it out of time was refused. The respondent was, therefore, left with a significant gap in the evidence it might adduce.

4.4 We received a bundle running to 174 pages and to which further documentation was relied on (175-183 medical records)

4.5 Both Counsel produced written closing submissions and supplemented them briefly with oral amplification and replies.

4.6 Finally, we should record our sense that this case has not been one of the best examples of parties addressing the issues in the evidence they adduce. It has led to time being lost in dealing with applications. In the end, the picture became a little clearer on both sides. Potential gaps on the claimant's case were, to some degree, cross examined into evidence. Potential gaps in the respondent's evidence were, to some degree, conceded by the claimant in his evidence.

## **5. Facts**

5.1 It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. Our focus is to make such findings of fact as are necessary to answer the issues in the claim before us and to put them in their proper context. Against that background we make the following findings of fact.

5.2 The respondent is a large employer running a number of funeral services. It employs in excess of 4000 employees. We can see it adopts various internal systems covering the employment relationship. We have seen aspects of those administrative processes in respect of recruitment, sickness absence notification, return to work meetings and claiming expenses. We have not been shown any written policies relating to those or any matters of relevance.

5.3 In December 2018, Mr Ferns applied to the respondent for a post of funeral service operative (“FSO”). We accept that this is a role which is essentially generic across the industry. Any differences from one employer to the next are minimal and irrelevant.

5.4 Mr Ferns had a history working as an FSO in the funeral industry, most recently at Co-op Funeral Services. At the time of his application, he had also been employed by other funeral operators but did not disclose this to this employer. We find the reason related to the circumstances in which he left the Co-op. Whilst it appeared to us at the outset that those circumstances might have had a significant bearing on the issues in this case, we are satisfied that in fact they do not. The reasons, and the way they have been articulated to the employer and to us in evidence do, however, go to credibility. In fact, the manner in which both parties have put their cases before us has been such that credibility has played a much greater role in assessing the witnesses than might be expected in a case such as this.

5.5 Based on his C.V. and application form, the claimant was interviewed. So far as disability, impairments, ill health or potential issues with carrying out the duties of an FSO are concerned, we find as follows: -

- a) The job description describes physical work for which the application must be fit and able to carry and handle bodies of the deceased, coffins and drive large funeral limousines.
- b) The job description and person specification are well defined and, on balance, we find were available to Mr Ferns in advance of the interview.
- c) The application form prompted disclosure of whether the applicant had any disabilities that required reasonable adjustments to the recruitment selection and interview process. The claimant replied “no”. We find that was an honest and correct answer to the question posed. That is not surprising as he did not need any and completed a professional driving test to the respondent’s satisfaction as part of the process. Contrary to Mr Bradley’s interpretation, we do not accept this question was a general question about disability or impairment. It was specifically about the recruitment process only.
- d) The claimant’s CV suggested he was able to perform the role without difficulty.
- e) He attended a “competency based interview” lasting about an hour which we find explored his ability to perform aspects of the role. No issues, deficiencies or potential disadvantages were declared or identified. Mr Ferns agreed that this was the opportunity to raise any difficulties. We find he did not perceive he had any difficulties as his condition was largely controlled or managed.

5.6 After selection, Mr Ferns completed and signed an equality monitoring form on 16 January 2019. That carried an explicit question whether the claimant considered himself to be disabled to which he answered “no”.

5.7 Much was made of Mr Ferns positive denial of a disability during this selection and recruitment process, his subsequent recruitment and selection process and, indeed, at other times. We agree that his denials are particularly relevant especially where they are specific to the impairment. We do not, however, find the denial of being disabled in itself to be that unusual. People will deny the status of being disabled for different reasons. That might include fear of how it will be received by an employer. In Mr Ferns case, we find it was more to do with his own perception of his abilities and the social concept of disability. He explained to us how he was not in a wheelchair and gave examples of other serious conditions he did consider to be disabilities. Although permanent and by its nature likely to be degenerative, the effects of his arthritis were controlled outside intermittent periods of flare up. A flare up typically manifests in a build-up of fluid on the joint causing extreme pain but often being short-lived as aspiration or other treatment relieve the pressure. Outside such a flare up, he was able to perform his duties and other aspects of his life.

5.8 Indeed, in the time since leaving this respondent's employment Mr Ferns has suffered a stroke. The effect of that has been such that he does now recognise and describe himself as disabled. None of this subjective view of his status means he is not in fact disabled. At a preliminary hearing in February 2021, EJ Jeram found that he was disabled at material times due to the impairment of osteoarthritis. This is a condition he has managed since 2009. Has been formally diagnosed with since 2014. Has undergone a total knee replacement of the right knee and was, at the relevant time, controlling symptoms in his left knee.

5.9 Following the recruitment process, a conditional offer was made subject to various matters. The first matter was that he passed a professional driving test. This was undertaken and the subsequent report identified no issues with driving or the operation of the hearses and limousines. We find the process of operating the clutch pedal places some strain on the driver's left leg. There was nothing raised or identified that suggested any issues with Mr Ferns' knees, legs or arthritis. This is consistent with Mr Ferns own evidence that these events all took place at a time when his condition was well under control.

5.10 The second matter was the receipt of satisfactory past employment references. All were satisfactory. Curiously, two references were received from the Co-op. One was a standard, limited confirmation of dates of employment sent by head office. The other was from the claimants' previous line manager, apparently in breach of the Co-op's policy statement set out in the other reference that it would not provide any further opinion. This reference had been provided by completing respondent's reference questionnaire. It was a positive reference. We do not know why there were two or, given the other circumstances of the case, how or why a positive reference was given. However, the issue for us is that the references disclose no concern that any impairment may have had on Mr Ferns' ability to carry out what were essentially identical duties to the role he was applying for.

5.11 The third matter was an occupational health assessment. Mr Ferns denies completing an online pre-employment health check in the form of the blank questionnaire we were shown. The respondent has not adduced the actual form. This has been one of a number of odd aspects of this case we have had to navigate in our essential findings of fact. On

balance, we are satisfied that Mr Ferns did complete such a form. First, there is evidence before us of the requirement for him to complete the form being sent to him on an internal checklist. Secondly, there is evidence of the Occupational Health report stating that he was fit for work with no adjustments needed. Whilst it is not impossible, on the balance of probabilities we do not accept that such a professional opinion would be issued without any information being presented about the candidate. In any event, Mr Ferns accepted in evidence that if he had completed the form, he would have answered the relevant questions in the negative. In particular, question 4 (on page 163) which would have denied that he had any past issue with his joints or otherwise.

5.12 So far as knowledge of disability is concerned, at this stage of events the various declarations and statements were held centrally in HR. The only operational knowledge would be that gleaned from the application form that Mr Bradley would have been aware of. That stated Mr Ferns did not have a disability which required adjustments to the recruitment process. As we have already pointed out, it does not say, as Mr Bradley interpreted it, that he did not have a disability at all although, frankly, little turns on that in this case as even it had asked that question, we can be confident Mr Ferns would have answered no.

5.13 The claimant started work on 21 January 2019. His appointment was subject to a vague and inconsistent period of probation expressed as “24 weeks (6 months)”. It seems to be common ground that the parties understood that probation period to expire on 20 June 2019. We find Mr Ferns did the job to a satisfactory standard. There were no issues with driving, standing or carrying bodies or coffins or any other aspects of the role. He did not take any time off work, whether sickness or otherwise, during the initial 4 months or so.

5.14 We find the funeral industry is a small world. FSO’s from one operator are generally known to those working at other operators. They all have regular opportunity to meet up in the course of their duties, for example at busy times outside a local crematorium. It was not long before the circumstances of Mr Ferns leaving his employment at the Co-op found its way back to the respondent. Although in his evidence to us Mr Ferns initially denied having any discussions with Mr Bradley, he later accepted that Mr Bradley had asked him about the circumstances of his departure from the Co-op. This was sometime within the first 4-6 weeks or so of his employment starting. We find the rumours had reached Mr Bradley that the claimant had resigned before a disciplinary hearing at which he had been accused of matters potentially justifying his dismissal. Mr Ferns was challenged about why he had resigned. He replied that he simply wanted a fresh start. We find Mr Bradley accepted that explanation at face value. Whilst we have had some concerns about what was influencing the respondent’s actions later in the chronology, that account is consistent with the fact the claimant’s employment continued for another 4-5 months. Moreover, we accept Mr Bradley’s assertion in evidence that any such rumours did not play a role in his later thinking.

5.15 In or around May 2019, Mr Ferns says he tripped at work and aggravated his left knee. We accept that something happened to aggravate his arthritis. We do not accept it was such as to report it as an accident at work or to be noticed, despite the way he has described it in his witness statement. In any event, he did not report it. We do, however, accept whatever



happened to jar his knee left him in pain. He may have limped whilst at work but we find this was not noticed by his colleagues or raised by him with anyone. Whatever the circumstances, however, it was enough to cause a flare up in his arthritic knee joint. We do not accept the claimant's account he was wearing only one shoe whilst at work. We do accept there were difficulties encountered but we cannot accept he attended work, drove, lifted bodies etc wearing only one shoe. It might be that he was able to remove a shoe in certain circumstances, such as when sat at a desk, but again if this is what he was doing we do not accept this was noticed by colleagues or brought to their attention. On balance, removing a shoe is more likely to have been something he did outside work.

5.16 On the morning of 15 May 2019, the claimant attended a GP appointment. This is significant for a number of reasons. First, we find on balance that he must have told his manager, Mr Reeves, of his flare up and the need to attend the GP. The appointment was mid-morning. The respondent has a policy of permitting employees to attend GP appointments and the like during the paid working day of up to 2 hours provided permission is obtained in advance and it is convenient to do so. The fact that it happened in this case and was not itself the subject of any later challenge by the employer, confirms to us that permission was obtained.

5.17 The claimant was absent on sick leave on Thursday 16 and Friday 17 May 2019. We therefore find, on balance, that Mr Ferns returned and worked the rest of the day on the 15<sup>th</sup>. Again, we note the respondent's policy and contractual expectation was that the claimant had to report his sickness absence to his manager before 9 am. We find he did report his absence to Mr Reeves. The return to work form explicitly confirms he did comply with the reporting requirements. Again, the alternative would be that he was in breach of the employer's requirements and yet this does not feature in any later concerns. We also find, therefore, that Mr Ferns told Mr Reeves the nature of his actual impairment and the consequences. Whilst we have no doubt Mr Ferns continued to consider himself as someone who was not a disabled person so far as the lay person's 'label' was concerned, we cannot conceive the necessary factual explanations and discussions could have taken place without reference to the physical problems with his joints and knee. We reach that conclusion notwithstanding the need to be cautious about Mr Ferns' evidence. There is a difference between denying disability status and explaining the factual reason for an absence. The context of what was happening and the contemporaneous documentation leads us to accept Mr Ferns did tell Mr Reeves of his problems with knees and joints.

5.18 Mr Ferns was absent for two days and returned to work on Monday 20 May 2019. A self-certification form was completed and Mr Ferns and Mr Reeves also completed a return to work form. We find the form and boxes were completed by Mr Reeves. We are cautious in the absence of any evidence from him about how each box came to be ticked as it was. The inference is they were in response to question and answers between the two. That caution aside, we find on his own evidence that it was signed by Mr Ferns to say the information given and discussed was complete and correct and a clear presentation of the return to work interview. It told the employer the following: -

- a) The reason for the absence was stated as “gout”.
- b) Whether it was likely to recur was ticked “no”.
- c) It stated he had not fully recovered.
- d) Whether it gave rise to limitations or restrictions was ticked “N/A” (not applicable)
- e) Whether work had contributed to the absence and whether it was linked to a disability were both also ticked as “N/A”
- f) Whether it was part of an overall pattern was ticked “No”
- g) Whether there was an agreed action plan was ticked “No”

5.19 The answers ticked as “N/A” also had options of Yes or No. It is not clear why N/A was ticked in preference to either, more positive statement of the position.

5.20 The respondent has relied on the “N/A” answers as if they were positive negative answers. Significantly, there is a question at box 8 of “Currently taking medication / treatment that we the employer need to be aware of that may impact on work?”. That question was answered “yes”.

5.21 At this time, therefore, we find Mr Ferns had described a physical impairment related to his joints and knees which he labelled as gout. We accept he also indicated that he had not fully recovered from that illness. We find the effect meant he had difficulty with weight bearing and was still in lot of pain but that he implied he could continue his duties.

5.22 The claimant has suggested his sickness absence was a problem. We accept that he gained a sense from Mr Reeves of it being a problem. We are reluctant to make more of this than that and it may be no more than a manager’s frustration of the effect a sudden absence would have on the planned work activities, as opposed to Mr Reeves necessarily having an adverse view of the claimant and his absence as a matter of principle. However, we do find sickness absence during probation is a flag to the employer and Mr Bradley gave evidence to the effect that it was unusual for probationers to be off sick at all.

5.23 After his return to work, we find Mr Ferns continued to work for the next 2 weeks and 2 days without any particular incident in his performance or health. We accept that he was having to manage the problem with his left knee and was doing so even more actively than usual whilst combatting increased pain and discomfort. There were no subsequent meaningful discussions about his condition, about problems or about adjustments.

5.24 Mr Ferns was then absent on sick leave for a second period of 3 days from Wednesday 5 to Friday 7 June 2019. That absence fell immediately before a period of 2 weeks off work on pre booked annual leave. We return to the findings in respect of that period of absence. Before then we need to deal with a separate relevant issue arising during this period concerning Mr Ferns’ uniform.

5.25 Mr Ferns' clothing size was, at the time, quite large. The respondent had been unable to provide the claimant with its chosen uniform due to his particular size requirements being out of stock with the supplier. We find it was unable to supply the suit until July 2019 at the earliest. We find Mr Reeves suggested to the claimant that he buy himself a suitable suit to wear at work and claim back the cost. In the absence of Mr Reeves or any other clear evidence of the exact date, the best we can say is that this occurred around the week of 20 May.

5.26 We find Mr Ferns accepted the suggested. We can see from the contemporaneous claim forms that on 23 May 2019, Mr Ferns presented a claim for a two piece suit valued at £108.50. The claim was supported by a printout of an "order confirmation". Mr Ferns told us this was an online order through a supplier that his wife had an account with. It was to be delivered to his wife's workplace. We can see that the order confirmation was not a receipt, it did not show any account being debited or other payment method. It did not show any VAT number or further information confirming the order. Nevertheless, it is clear that Mr Reeves accepted the claimant's claim. We find he completed the internal claim form which Mr Ferns signed and it was sent to Mr Bradley as the regional manager for authorisation.

5.27 We find that form got to Mr Bradley's desk about a week later. We find he counter-signed the claim form as was required by the internal procedures. On balance, so far as Mr Bradley did not regard the printout of the "order confirmation" as proof of payment he asked that Mr Ferns provide proof of payment to accompany the claim. We do not accept this was anything more than an administrative process being followed at this stage. We do not accept that there was any sense of fraud or dishonesty arising in this claim. The matter had been initiated by the employer, not the claimant. The form had been accepted by the line manager and it is odd that Mr Bradley countersigned, even on the condition that he tells us he did, if there was anything concerning him at all about the honesty of the claim. We accept that this employer's usual system for expense claims adopts what we find to be a perfectly logical first response to any deficient expense claims. In short, that is simply that they are not authorised until the claim adequately complies with evidence of expenditure.

5.28 We find this need for proof of payment was put to Mr Ferns by Mr Reeves on or around 4 June. That is consistent with the form being signed by Bradley on Wednesday 29 June and taking a similar period of 6 days to get sent back to Mr Reeves as it first took to get from Reeves to Bradley. It is also a date referred to in the dismissal letter which we find reflects the author's belief at least of when the discussion took place.

5.29 We can see nothing in the circumstances of the claim form itself which elevates it from a deficient claim to a fraudulent claim. We must also take out of the equation any sense this was conduct of a similar nature to that which Mr Ferns was accused of whilst working at the Co-op. We do that because Mr Bradley was insistent that it did not feature in his thinking at all. We ask ourselves what, then, did elevate it to a dishonest attempt at fraud in Mr Bradley's thinking? The principal reason seems to be that he believed there had been repeated requests for Mr Ferns to provide the necessary proof of payment which he had failed to respond to. We do not accept there were repeated challenges. We find there was only this

one and that it was no more than a statement of fact that Mr Ferns needed to provide a suitable receipt of payment to claim the expenses.

5.30 We do not accept Mr Bradley's contention or belief at the time that Mr Ferns simply absented himself on 5-7 June in response to being asked to provide that information. We have exercised some caution about Mr Ferns' own account that he sent a text to Mr Reeves at the start of this period of absence as we have not seen it and it has not been disclosed. It does not appear to have been secured or its absence explained despite the fact Mr Ferns visited solicitors within 6 weeks of his employment ending. Nevertheless, we have not heard a contrary account from Mr Reeves. We are satisfied Mr Ferns must have reported sick to Mr Reeves in a similar way as he had done only three weeks before. We are in no doubt that Mr Ferns told Mr Reeves the essential nature of his medical situation when explaining why he was not in work and we see no reason to doubt that Mr Ferns would not have conveyed his need for his knee to be aspirated to cure the pain. We have no doubt that there was a further genuine acute flare up of his knee and was a period of sick leave. The absence of any sickness forms before us is not as significant as it first seemed. We note that the process of completing a self-certification form as was previously completed meant it gets completed on return to work alongside the return to work interview and on this occasion the opportunity for this to happen was overtaken by the other events on Mr Ferns' first day back at work. We do note that the respondent's internal attendance records show these three days as sickness absence which, again, supports a finding Mr Reeves knew the absence was sickness absence and the only way that could happen is if Mr Ferns told him. We accept the absence was necessary for Ferns to attend an emergency hospital appointment and it is beyond doubt that the reason for his absence related to his condition with his left knee. As a result of undergoing an emergency MRI scan and a procedure to aspirate the build-up of fluid on the knee, we find the clinical opinion was now moving towards the need for a total knee replacement of his left knee. We also find the existing clinical diagnosis of gout was being doubted.

5.31 On the balance of probabilities, we also accept that Mr Ferns contacted Mr Reeves a second time to check about him continuing to take his pre-booked 2-week holiday. That would seem unlikely if the absence that week had otherwise been unauthorised and taken in absence of any reasoning explaining the absence. We are further satisfied that Mr Ferns had some sense of concern arising from his impression that his absences were a problem to Mr Reeves and we accept this is more likely than not to have prompted this contact. As to whether there is any inconsistency in the claimant being sufficiently unwell on the Wednesday but able to take his annual leave by the Friday, we do not accept that is so. Despite the fact this is a serious condition, it is generally well controlled and it is only the build-up of fluid which affects mobility and pain to the extent it did. The evidence suggests the emergency aspiration of the fluid was enough to settle the flare up. Moreover, there is nothing to suggest that the claimant would not still be in recovery over his period of annual leave.

5.32 We find that this period of absence, and the earlier two days in May were both absences due to the deterioration in the claimant's left knee. We do not need to apply any lay medical opinion as to whether "gout" is part of the disability or not or related to the clinical

diagnosis of osteoarthritis or not. Whilst our lay assessment is that gout can be related to arthritis, we note that there was an issue arising after the hospital appointment in June that gout may have been a misdiagnosis. The issue for us is not to second judge the clinical diagnoses. The issue for us is only whether the underlying impairment that gives rise to the disability was itself causative of these periods of absence. We are satisfied that it was. The absences arose in consequence of the underlying impairment with his joints in his knees which has been found to amount to a disability.

5.33 Before Mr Ferns returned to work, we find as a fact that Mr Bradley had reached the decision to terminate the claimant's employment. He did this under the shroud of the 6-month probation period albeit that there was approximately 3 weeks yet to go.

5.34 Mr Ferns returned to work on the morning of Monday 24 June 2019. We find Mr Ferns asked Mr Reeves for permission to be absent later that afternoon to attend a follow up medical appointment. We find Mr Reeves deferred the decision as there was a lot to do that day. We find Mr Reeves had no idea that Mr Bradley intended to dismiss the claimant.

5.35 Mr Bradley attended at the claimant's workplace together with a colleague called Mr Goddard. We have not heard from Mr Goddard. We find they asked to see Mr Ferns. We find there were two issues raised in very brief terms in a meeting lasting a matter of minutes. One was the claim for the suit, the other was Mr Ferns periods of absence. We find neither issue was put to the claimant with any intention to explore the issues. He was not asked about them, he was simply told of them as the reasoning for the decision that had already been reached to terminate his employment in the probation period. That predetermined decision meant Mr Bradley did not ask Mr Ferns anything about his sickness absences, or his health or at all. We find there was enough for Mr Bradley to be on notice by his own evidence that the claimant's absence levels were "unusual" during probation. There does not appear to have been any reason why he could not have explored the reasoning for the absence with Mr Ferns. Moreover, the evidence shows he did not explore that with Mr Reeves either so as to discover anything Mr Reeves might have known of the reason for the absences. Much of the case was advanced on the basis that the second period of absence was some sort of petulant response to him being asked about the receipt for the suit. That should have been clear to Mr Bradley was not in fact a period of unauthorised absence and, indeed, the dismissal letter refers to this as being due to illness. Had Mr Bradley simply asked him about the absences we find he would have been told about the serious knee problem, the past history with his right knee, the current state of the diagnosis and it now doubting the original diagnosis of gout, the emergency appointment for an MRI, the draining of the fluid on the knee and the future treatment plan for a total knee replacement. Whilst we find Mr Ferns was more likely than not to downplay the label of "disabled", we reach a different conclusion on the bare facts underlying the situation. We find the facts that would have been conveyed would have established the essential elements of an impairment that was long term and with the potential for adverse effects on the ability to carry out normal day to day activities.

5.36 We make the following findings of fact on the background to this decision.

5.37 The first is the extent to which Mr Bradley discussed matters with Mr Reeves. We find it more likely than not that Mr Reeves told Mr Bradley that the claimant was off sick again at the time of the second absence. We suspect he also confirmed he had conveyed to Mr Ferns the inadequacy of his claim for expenses and the need to provide a receipt. Beyond that, we have to reject Mr Bradley's contention that he discussed and agreed with Mr Reeves that the claimant's claim for expenses was an attempt at dishonestly obtaining money from the company. We find that Mr Reeves had no knowledge of Mr Bradley's intention to dismiss the claimant on his return to work on Monday 24 June 2019. The reason for that finding is a conflict in Mr Bradley's evidence elsewhere that he said he did not in fact discuss his plans with Mr Reeves. This was tested by the tribunal in the evidence as we found it surprising that a regional manager would not only reach a decision about an employee's employment without informing the first line manager, but would then execute it without informing him in advance. Despite us considering that odd, it was a position that Mr Bradley maintained so we accept it as a fact.

5.38 Further, we find Mr Reeves' actions on 24 June, as recounted by Mr Ferns, to be consistent with him not knowing of Mr Bradley's intention or decision. Not only do we find his response to Mr Ferns' request to attend the medical appointment to be genuinely deferring a decision until they knew how the work was going that day, but the reaction to his later dismissal is also consistent. We find after Mr Ferns was dismissed and told to leave the building that Mr Reeves challenged him about where he was going and only then did he learn of his dismissal. It follows, therefore, that we find whatever beliefs Mr Bradley had operating on his decision to terminate Mr Ferns' employment, they had been arrived at without any real of meaningful discussion with Mr Reeves and what he might add to the state of understanding.

5.39 The second matter goes to the actual reasoning. We remain unable to understand how the deficient claim for expenses has been elevated to that of an attempted fraud on the evidence before Mr Bradley. That is particularly so as his evidence was that the rumours of the claimant's departure from the Co-op did not feature in his thinking. We have to accept Mr Bradley's evidence on that and doing so is consistent with the absence of any reference to it in the meeting or the subsequent dismissal outcome letter. It is also consistent with the delay since the co-op issue was raised in February 2019.

5.40 We do not accept there were repeated requests to the claimant to provide a receipt in the short time available for such requests. Mr Bradley did suggest the claimant had said he had returned the suit during the interview which was not put to the claimant but even if it was said, cannot in any event have been the basis for his suspicion as his decision was settled before then.

5.41 The decision was said to be with immediate effect although after Mr Ferns chased for written confirmation, it was provided in a letter dated 1 July 2019 signed by Mr Bradley. The relevant part stated: -

***As you are aware, it was necessary for Neil Reeves, Funeral Manager, to speak to you regarding the alleged purchase of a suit following which you immediately were absent from work due to illness prior to then taking annual leave for the next two weeks.***

***We feel that your attendance during your short time with us has not been satisfactory.***

***Regrettably I have concluded that the standards we would expect to be applied to your role during your probationary period are not acceptable. I therefore confirm that your employment with the company should now be terminated with effect from 24 June 2019.***

5.42 The letter said he would be paid one week notice and that he was not required to attend work. The evidence is that this is not entirely consistent with the instruction that dismissal was immediate on the previous Monday. In any event, it is common ground that the claimant was only paid up to 28 June 2019.

5.43 The letter also explicitly provided a right to appeal. It stated that: -

***You have the right to appeal against this decision. If you wish to do so, you should send your appeal to me within seven days of receipt of this letter, stating the grounds for your appeal.***

5.44 There is no dispute that the claimant did not appeal against the decision.

5.45 The terms of this letter confirming dismissal inform certain findings of fact going to the reason said to have been relied on by the employer.

- a) First, we see no reference to fraud or a dishonest attempt to obtain money from the company. The reference to the claim for the suit arises only in the context of a potential trigger for a period of absence arising “immediately”. The highest that can be said is that it is framed as an “alleged” purchase.
- b) Secondly, there is only one occasion on which the claimant was said to have been told about the claim form, not a series of occasions chasing him about it.
- c) Thirdly, all reference to the reasoning for dismissal is in the context of attendance. The only periods of absence we have in evidence are the two short episodes of sickness absence and the two weeks’ annual leave.

5.46 Mr Bradley confirmed that there was nothing improper with the claimant taking the two weeks pre booked annual leave. That leaves only the two periods of sickness absence.

5.47 We are entirely satisfied that the claimant’s two episodes of sickness absence were not only a material part of the reason to dismiss the claimant but the evidence shows it to be the main reason. The respondent’s evidence softened from denying it was a reason at all to relegating it to the minor reason of more than one. Mr Bradley had to accept it was an issue. Moreover, the letter of termination makes explicit reference to the periods of sickness absence. We do not accept that the fact that the letter was drafted by HR affords the respondent any basis to distance itself from the content. Our conclusion is also reinforced by Mrs Green’s hearsay evidence of a discussion she had with Mr Goddard. He was in attendance at the disciplinary hearing and she volunteered how he had told her that the claimant’s absence was the reason for his dismissal.

5.48 A further significant aspect of the absence was Mr Bradley's evidence of his perception of its unusually high frequency and level during a period of probation. His evidence was that this was unusual to see during probation periods and his experience was that most probationers did not take any absence or, at most, would have the odd day of absence. He felt this case stood out. He stressed that he would not dismiss anyone for 5 days absence but, in this case, we find that is exactly what he did.

5.49 After his dismissal, we find the claimant was shocked at being dismissed. He decided that appealing against the decision made by Mr Bradley to Mr Bradley again was futile. We accept he initially felt "debilitated" by the decision to dismiss him. He describes being "concerned" at how he had been treated and "feeling completely let down" by the respondent. He did, however, begin a search for new employment almost immediately. We accept much of that arose out of economic necessity and that the effect of the decision will have had some negative consequences on him and how he went about things for a time in the immediate aftermath but there is nothing before us to suggest the effect of the dismissal inhibited that search or his ability to obtain that new employment. He was able to engage with solicitors after about a month or so and commenced early conciliation within 6 weeks. He fortunately found new employment in a different sector within nine weeks in which he continues today.

5.50 We find he made a positive decision not to return to the funeral industry which was principally as a result of his prior experiences before joining this respondent. We are unable to say whether there were opportunities for better paid employment or not in that sector at the time but, on balance, do accept that there was something of an expansion in the sector through 2020 related to the effect of the pandemic. We find Mr Ferns has not continued to seek any new employment after obtaining the employment with Sytner.

5.51 We note that in securing that new employment, the claimant again completed the pre- and post-employment recruitment forms in terms which denied he was disabled or more particularly that he had any conditions that might have an effect on that employment. The reason, as before, is that he did not think of himself as disabled and continued to hold that view until he suffered the stroke.

## **6. Discrimination Arising from Disability**

6.1 Section 15 of the Equality Act 2010 provides: -

***(1) A person (A) discriminates against a disabled person (B) if—***

***(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.***

6.2 To succeed in this form of discrimination, Mr Ferns must establish that he was subject to unfavourable treatment. He must then show that the "something" he says arises in



consequence of his disability. He must then establish facts from which the tribunal could conclude that the unfavourable treatment arose because of that something, in the sense that it played some material part in the reasoning.

6.3 The respondent may then seek to defend the claim either by showing there was no unfavourable treatment or that it was in no way whatsoever because of the something arising or that it did not have the necessary knowledge or that the treatment was itself justified, being a proportionate means of achieving a legitimate aim. In this case not all of those issues arise. The termination happened and is accepted as being unfavourable treatment. The only live issues are: -

- a) Was the dismissal in any material way because of the sickness absences?
- b) Did that sickness absence arise in consequence of the disability?
- c) Has the respondent shown that it did not know or could not reasonably be expected to know that the claimant was disabled?

6.4 It follows from our findings of fact that we are satisfied the absences were a material factor in the decision to dismiss the claimant. It also follows from our findings that we are satisfied that the reason for those absences directly related to the physical impairment relied on to establish Mr Fern's disability status. As such we are satisfied that the sickness absence did arise in consequence of the disability. We have considered the respondent's challenge to this and that the claimant has not adduced any expert evidence to that effect. We note that there is no expert evidence either way including from the respondent to say it does not. The claimant does, however, give his lay evidence that his absences do arise in consequence of his disability and, again, there is no positive case by the respondent (whether expert or lay evidence) to the contrary. We have accepted that the build-up of fluid is part of the symptomology and history of the claimant's arthritis and that there was a flare up and later fluid, in the reason for these episodes of absence. That is all part of the physical impairment. As to whether gout is, or is not, part of the disability we have been careful not to embark on an analysis beyond our proper scope. Our lay understanding is that it can be related to the same physical impairment that engages the claimant's disability but we do not need to answer the point. It is sufficient for the reasons we gave in our findings of fact that the impairment relied on to establish disability was materially connected as a fact to the absence for it to be said to arise in consequence. We note that not only is there no evidence adduced to the contrary, but there is nothing in the surrounding circumstances showing extraneous or unrelated potential causes for the absence that might cause us to question whether the causal link had been broken.

6.5 As a result of those conclusions, the only live issue remaining is knowledge. For understandable reasons, the test has often been paraphrased as "knowledge" or "constructive knowledge" during the proceedings. For our part, we prefer to keep in mind the actual statutory wording. That is whether the respondent has shown it did not know and could not reasonably be expected to know the claimant was disabled. Applying the statutory words helps keep in mind not only the correct test, but also where the burden lies of

establishing it. In respect of the latter, it is worth stating that the claimant has thus far established all he needs to succeed on this claim until and unless the respondent establishes that test of absence of knowledge. We accept at the outset that the way the claimant has represented himself in his contemporaneous dealings, and to some extent the way his evidence has been put, have meant this issue is firmly engaged and demands close consideration of the relevant law and guidance derived from the authorities.

a) First, whether an employer could reasonably be expected to know of a person's disability is a question of fact for the tribunal. (**Jennings v Barts and The London NHS Trust UKEAT/0056/12**)

b) The burden (given the way the statute is expressed) is on the employer to show it did not and could not reasonably be expected to have the required knowledge.

c) Para 5.14 and 5.15 of the EHRC code of practice states: -

***5.14 - It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.***

***5.15 - An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment.....***

d) We remind ourselves that were we to find the employer has failed to take reasonable steps to inform itself of the true state of affairs, we must also consider the likely knowledge that may have been acquired if such enquiry had been made. If the results would still have not reasonably led to knowledge or further steps that ought to have been taken, the omission will not deprive the respondent of a knowledge defence (**A ltd v Z [2019] IRLR 952**).

6.6 The first issue is whether as a matter of fact, the respondent has shown that it did not have *actual* knowledge. We are satisfied that the respondent has shown Mr Bradley did not. His first-hand knowledge was based on a competency-based interview with the claimant in which he displayed more than sufficient ability to perform the role without any hint of restrictions or any disability. Mr Bradley also had knowledge of the application form which stated no adjustments were necessary and although we found Mr Bradley has misread what that form was saying, it cannot be said to have given him knowledge of a disability. After the selection, the claimant completed forms which we found were held by HR and occupational health but, again, nothing in those forms would give actual knowledge of disability.

6.7 We are less satisfied that the respondent has shown that Mr Reeves did not have actual knowledge. We have accepted that he was told the underlying reasons for the sickness absence and conducted the return to work interview. Again, whilst we have no doubt the claimant would answer the question "are you disabled?" in the negative for the reasons stated, we are equally satisfied that he would not have withheld the actual state of affairs

affecting his joints and knees, the treatment and the prognosis in the context of the two episodes of absence when the issue was engaged at the time.

6.8 Even if we were wrong to conclude that Mr Reeves did not have actual knowledge, we are satisfied that the respondent has not established the second limb of the test that it could not reasonably be expected to know.

6.9 The example given in the code in para 5.15 is particularly relevant for the circumstances of this case. It gives an example of two relevant factors. One is the identification of a state of affairs that is in some way out of the ordinary. The second is a disciplinary decision being made without taking or giving any reasonable opportunity for further enquiry into those underlying circumstances.

6.10 Those factors are relevant here where the reason for dismissal was two spells of sickness absence related to the same impairment only 2 ½ weeks apart. The organisation had knowledge that the underlying condition was (i) not fully recovered and (ii) subject to medication that the employer needed to know about as it could impact on work. In that context, we are satisfied that the circumstances of the absences in themselves sufficiently puts and employer on notice that some further enquiry should take place. That conclusion is reinforced by Mr Bradley's own evidence that this level of absence was unusual during probation. We are then faced with what the employer relies on to explain why it was not reasonable for Mr Bradley to make those enquiries either with the clamant or with Mr Reeves, neither of which happened. Both seem to us to have been painfully simple and easy steps to take. Having regard to the example in the code, we do not consider either the implied or explicit representations made by Mr Ferns to Mr Bradley during the selection process to be enough to absolve him of making that simple enquiry. Had such simple steps been taken and had they returned a denial of any underlying conditions or adverse effects, we are inclined to think that that would have been the end of the matter. But in this case the enquiry was not made and we have to turn our analysis to what the likely result would have been of such an enquiry.

6.11 As we have already stated, we are satisfied that if asked the simple question "are you disabled?", Mr Ferns would have answered no as he did previously and would in due course do again in his new employment. That enquiry alone may not have been sufficient in the unusual circumstances of the absences and the decision to dismiss to overcome the ought to have question. That takes us to consider what information would have been acquired if the enquiry had focused on the reason for absences which is itself no less simple an enquiry to make. We are satisfied he would have answered such factual enquiries in a way that would, on balance, have given the full facts of his knee problem, the treatment and the future treatment plan. They would have established a long-term degenerative condition of arthritis, the deterioration of his left knee. The ability to control it outside, but not during, flare ups. The fact that he had had two acute episodes of flare up (or possibly one unresolved flare up) over the previous 5 weeks, that he had had to attend an emergency hospital appointment, that he had undergone and MRI scan and had the fluid on his knee aspirated, that the

diagnosis of gout was now doubted and that the prognosis was a need for a total knee replacement.

6.12 Had Mr Bradley made those enquiries with Reeves he ought to have learned a similar picture in addition to the answers given in the previous return to work interview. Whilst the respondent has sought to focus on the answer given that the condition is *not* likely to recur, there was equally information in that form that showed Mr Ferns was taking medication that the respondent needed to be aware about as it may impact on work.

6.13 We are satisfied that the information then likely to be obtained would either then establish in itself the necessary elements of the definition of disability or would at least have meant decisions ought not to have been taken or executed without first taking further steps to satisfy itself of the position. That might be either with the claimant's own health care providers or the respondent's occupational health advisers. Either of those steps would be likely to confirm the underlying elements of a disability.

6.14 It follows that we have reached the conclusion that the respondent has not discharged the burden of showing it could not reasonably be expected to know of the claimant's disability. For that reason, the claim succeeds.

## **7. Failure to make a reasonable adjustment**

7.1 So far as is relevant to the circumstances of this case, the duty to make adjustments arises under section 20(3) of the 2010 Act 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.*

7.2 In determining whether the duty has arisen, the Tribunal must identify each element of the section in turn, that is to identify the provision, criterion or practice ("PCP"); the identity of a non-disabled comparator (where appropriate) and the nature and extent of the substantial disadvantage suffered. Only by breaking down those elements can a proper assessment be made of whether the adjustment contended for was reasonable or not. (**Environment Agency v Rowan [2008] IRLR 20 EAT**)

7.3 Whether a disadvantage is substantial or not is to be measured against the statutory definition of more than minor or trivial. It is a low threshold, but a threshold nonetheless, which we have to be satisfied is surpassed.

7.4 Paragraph 20 of part 3 of schedule 8 of the 2010 Act imports a requirement of knowledge on the employer in respect of both the employee's disability and that he is likely to be placed at the disadvantage created by the PCP. Unless there is or ought to have been the required level of knowledge of both elements, the duty to make a reasonable adjustment does not arise. (**Secretary of State for the Department of Work and Pensions v Alam [2010] IRLR 283**)

7.5 Whether an adjustment is reasonable or not is a question of fact for the Tribunal taking into account all the relevant circumstances and applying the test of reasonableness in its widest sense. Guidance similar to that which used to exist under s.18B of the repealed Disability Discrimination Act is now found in the code of practice.

7.6 The first of three PCP's alleged is "a requirement not to take medical appointments during working hours". There is no evidence of any issues arising about that that might engage a disadvantage. We found as a fact that he did attend a medical appointment during working hours on 15 May 2019 at 11 am which was otherwise a working day. There is simply no evidence of any detriments arising about that appointment. We also heard evidence of a policy, the degree of formality of which we cannot say but we are satisfied there was a practice of permitted up to 2 hours paid time off during a working day to attend such appointments. Secondly, there is reference to an appointment in the afternoon of 24 June. That is the dismissal day. Mr Fern's evidence is that he had a discussion in passing that morning with Mr Reeves. That is the extent of the respondent's knowledge of that appointment. It is also clear to us that Mr Reeves did not deny the time off but deferred a decision on it until later. The claimant's own account of the reason for that being that there was lots of work to do that day. It is also clear that the dismissal decision maker had not spoken to Mr Reeves that day and had no knowledge of the possibility of the appointment or it seems, the previous one. There is simply no basis to properly concluded this was a PCP applied by the respondent.

7.7 Consequently, the alleged disadvantage that "he was more likely to require medical appointments during working hours and as such more likely to be subjected to sanctions/dismissed has not been made out. There was no duty to make a reasonable adjustment, even before the question of knowledge of disability or disadvantage is engaged. Indeed, the only evidence is that he did attend a GP appointment during working hours, must have done so with permission and suffered no detriment as a result.

7.8 Jumping to the third PCP, this is alleged to be "a practice of disallowing the claimant to work shortened hours during periods of flare up". There is simply no evidence that this was an issue, was raised, was requested or was in any way relevant or considered at any point in the chronology either way – for or against. We are simply left with nothing to base any conclusion on to support the allegation that there was a PCP applied by the respondent.

7.9 Consequently, there is no disadvantage arising and no duty to make reasonable adjustments.

7.10 The second PCP is alleged to be "a requirement not to take 5 days or more of sickness absence and/or more than one periods of sickness absence during employment and/or during the employee's probationary period". We have considered this last as it is conceptually close to the section 15 claim we have found to be made out. The essence of how this alleged PCP has been constructed flows from the fact the claimant had in fact taken 5 days sickness absence over two occasions. That is the only evidence on which to support the possibility of any such PCP.

7.11 We remind ourselves that the claimant is legally represented and it is a matter for his and his professional advisers how he chooses to frame his claim. The PCP alleged here is very precise. We have no evidence of the trigger itself at that level or frequency being applied. We do accept that the evidence demonstrates a general expectation of adequate attendance (or minimal absence) and that is particularly so during the probation period. We are uncomfortable drawing an inference that the triggers alleged were in any specific sense in play. We are unable to conclude that any other employee having two episodes of sickness during their probation period would be dismissed. Similarly, we are unable to conclude that anyone else having 5 days of absence during their probation period would be dismissed. Looking at the alleged triggers in the PCP from a different point of view, we cannot say that if the claimant had had only 4 days absence on one occasion, his fate would have been any different yet he would not have met the trigger in this PCP on either front. The policy he says existed did not, at least in the form argued.

7.12 For those reasons, we cannot be satisfied that the claimant has shown that the pleaded PCP was applied. Although it is not for us to recast the claimant's claim, we do take the view that there was a more general PCP of a requirement of minimal absence / adequate attendance during probation. We can reach that conclusion because (a) he was dismissed for that reason and (b) Mr Bradley's own expression of surprise how unusual it was to see that level absence during probation. If that PCP were before us we would have little hesitation in concluding it was applied, that the claimant had been subject to the disadvantage of having a much greater exposure to sanction or dismissal than a non-disabled employee and that it was reasonable to adjust the PCP either to discount some or all of the disability absences or not to dismiss him, at least at that point in time. If we are wrong to reach the conclusion we have on the application of the PCP, we would have concluded that claim was made out for the same reasons.

7.13 For what it adds, however, we repeat the observation made at the outset that the reasonable adjustment claim does not add anything to the mix in this case. The proportionality of the treatment was not in play as a defence and the role the presence or absence of a reasonable adjustment might have had in that was not engaged. Similarly, had the reasonable adjustment claim succeeded it would add nothing to the result of this claim or the compensation that flows.

7.14 As a result, we dismiss the reasonable adjustment claims in their entirety.

## **8. Remedy**

8.1 The claimant claims substantial compensation for financial loss and injury as set out in a detailed schedule of loss prepared by his solicitors. We start with the financial loss. This is split into two periods. The first is the period of 9 weeks and 3 days during which the claimant was unemployed and is said to amount to a loss of £2,648.07 of wages and £95.81 in employer's pension contributions. That loss is said to be calculated from 28 June 2019, the last day on which the claimant was paid in lieu of notice. The issue of that notice payment was raised before us in the context of remedy. It is common ground that the attempt at

paying in lieu his one week's notice was actually paid short by three days. If there had been a claim of breach of contract, which there is not, the claimant would have been entitled to damages for the shortfall. As things stand, the claim appears to correctly calculate the losses starting from 29 June which overlaps with what would be the notional notice period and shortfall.

8.2 The claimant then claims a second period of loss over a further 2 years for the ongoing shortfall between his earnings in his new employment and that he previously earned. There is no challenge to the arithmetic of these financial losses but two matters are engaged for us to address. The first is the respondent's challenge to the claimant failing to mitigate his loss. The second is whether the circumstances engage the principles established in **Chaggar v Abbey National [2009] EWCA Civ 1202 CA** such that losses should stop at any time or be reduced to reflect the chance of a fair and non-discriminatory dismissal.

8.3 We do not accept that the claimant has failed to mitigate his loss during this initial period of unemployment. We have to consider whether the claimant has failed to act as a reasonable person would who had lost their employment and yet did not have any expectation of recovering compensation. The challenge was based on an assertion that the funeral industry was in a period of growth, particularly into 2020, and that there would have been opportunity for the claimant to obtain work sooner and at or above the level of earnings he enjoyed at the respondent. We were not given evidence of the level of vacancies although the claimant did not disagree with the broad principle and we would also be prepared to take some notice of the effect Covid had on the industry in 2020 so as to find that employment opportunities probably did exist in the claimant's area, at least from the second half of 2020. Despite the limited evidence on the existence of opportunities, there is at least some possibility that closing off this area of employment meant he was unemployed for longer and could have earned more than he ultimately has in his new employment. We have had to consider the reasonableness of the claimant's positive choice not to return to the sector. Within the previous year he had had lost three jobs in this close-knit sector. The circumstances of the resignation from the Co-op are not fully before us. Whether he jumped before he was pushed or was facing an unfair accusation does not make any difference to our assessment that he had reason not to return to one of the major employers in the sector. He then lost new employment with another funeral director on the back of the rumours about his departure from the Co-op. He then lost this employment. The choice not to remain in the sector cannot be said to be unreasonable. We do not therefore conclude that the claimant has failed to mitigate his loss during the initial period of unemployment whilst he was actively searching for suitable work outside the funeral sector. For different reasons, however, we do accept the respondent has shown the claimant has failed to mitigate his ongoing loss once he found that new employment. Since 2 September 2019 he has been earning £33.38 less per week than he previously earned. We find he has accepted this employment as his new permanent employment and has not continued with any efforts to seek or obtain any alternative better paid work or otherwise make up the shortfall. We therefore consider just and equitable that the financial loss for which the respondent is liable ends on 1 September 2019.

8.4 We then turn to whether, but for this discriminatory dismissal, there was a chance that his employment would have come to an end in a fair and non-discriminatory manner. There are three points in the case that might engage consideration of that. One is the allegation of an attempt to obtain funds from the employer in respect of the suit. The other is in respect of the claimant's departure from the Co-op. The third is in respect of his absence/attendance record. In respect of the first, we simply do not have the evidence to conclude that the claimant attempted to dishonestly claim money from the employer. This is not a lightweight allegation. It is a serious allegation of dishonesty and although we make findings on the balance of probabilities, the cogency of the evidence to prove such an allegation has to be commensurate with the seriousness of it. We do not accept that there is evidence at all, never mind to this standard. That is so in respect of both that which was before the employer at the time and in respect of what has been put before us in these proceedings. We are unable to say that would have given rise to any prospect of a future fair and non-discriminatory dismissal.

8.5 The second potential issue similarly falls away. The claimant was questioned in terms that he had "been rumbled" about the circumstances of his departure from the Co-op and it seemed for much of the case that this line would feature in the circumstances of the dismissal and/or the likelihood of a later fair and non-discriminatory dismissal. On the evidence we heard from the respondent, however, that did not arise. The claimant was challenged about his departure from the Co-op but very early on in his employment, the response he gave was accepted and we were told and accepted that it played no part in the circumstances of the dismissal. If it played no part then, we see no reasonable basis for assessing the chance it would have played a part in any later dismissal within the period up to 1 September 2019 after which, for other reasons, we have concluded the respondent is no longer liable for financial losses. That is not to say that it was impossible that the issue could not have been reopened at some point in the future with some consequence to the claimant's continued employment. The evidence of that potential comes from Mrs Green and her evidence could well have led to the employer gathering the evidence we in fact heard from Mr Hollingsworth. However, Mrs Green did not start her employment with the respondent until after October 2019. If there could have been anything she might have brought to the employer to reopen this issue, we conclude it would not have happened until after the point in time we have, in any event, found the respondent's liability for losses stops flowing.

8.6 The final issue was the claimant's absence. There was only really an issue with his impairment and the need for absence during flare ups. There would, however, have been the likelihood of an extended period of absence as and when the total knee replacement advised eventually took place. We do not understand that operation to have happened yet. In any event, the fair and non-discriminatory dismissal for a disabled employee's absence would have to meet the proportionate test of any justification. It is not impossible that at some point in the future that could possibly have been met but we would expect to have to see some significant deterioration in Mr Ferns' health first. However, once again as we have limited losses to 1 September for other reasons, the focus is whether there is a chance that Mr Ferns' employment could be ended lawfully within that period. We are not satisfied the



respondent has shown there was such a chance for this or any of the potential reasons engaged. We therefore make no adjustment to the financial losses claimed. The financial compensation awarded is £2,743.88.

8.7 We then turn to non-pecuniary loss. The claimant claims injury to feelings and values compensation in the middle “Vento” band, broadly in the region of £17,500. Little more has been said about this part of the claim in evidence and submissions and the assessment of the evidence of the injury and the valuation of quantum has been left to us.

8.8 We start with noting that the claimant has given some evidence of injury to feelings in the witness statement. It is extremely brief and amounts to him feeling shocked and devastated by losing his job and extremely upset and let down by the respondent. For reasons we have already touched on, there are aspects of his evidence to us which have demanded some caution including the preparation of his evidence. However, we are satisfied this is enough for the issue of injury to feelings to be engaged. We are not bound to make an award, but there is nothing in this case which leads us to conclude it would not be just and equitable to do so. That then leads us to assess the extent of the injury and to value it as best that money can.

8.9 The direct evidence being so limited, we have considered other points in the evidence and other factors that may arise with this particular type of injury although when those matters are considered in this case, they feature more by virtue of their absence of potential aggravating features. We have considered the medical records adduced. They do not deal with the post-employment period and offer no insight to this injury. We have considered the other documentation in the case such as the ET1 and schedule of loss. Although not evidence, they provide matters on which the claimant could have been questioned. Again, there is little insight into the extent of the injury although the schedule of loss does draw a relationship with the period of unemployment and we accept that duration of any injury is itself one relevant factor. As is common, we find there was an initial acute response described as being shocked and devastated. We find, however, that very soon after losing his employment, the claimant was engaged with reasonable attempts to find new employment. Although we accept there is a large measure of necessity in that, there is nothing to suggest this injury hindered that or continued for an extended period. We find the injury was largely resolved by the time the claimant obtained his new employment although we accept there was minor, residual aspects of injury ongoing. That is particularly so as this case has continued over two years during which Mr Ferns has been put to proof not just of his liability case but his disability status. Aside from that, however, we can see no evidence of any particular continuing effect of the injury on Mr Ferns’ new employment or his life in general. We note he denied disability in the new recruitment process but do not regard that as being in anyway because of this dismissal. It was at a time he did not regard himself as being disabled and it mirrored the approach he took when applying for employment with the respondent. It is, again, an absence of a factor which potentially aggravates or extends the injury. We note also that the claimant chose not to appeal the decision but then engaged with solicitors within weeks to begin this claim. That could potentially point both ways as to the presence or absence of continuing injury although he is silent on it. What is clear is that the

claimant did not regard himself as disabled and the effect of the dismissal itself has not therefore been rationalised in his own reflections of events as being linked to his “disability”. We stress, however, that it is not necessary in law that a claimant knew the treatment was related to a protected characteristic in order for injury to feelings to arise. All that is needed is a finding that the injury was caused by the discriminatory treatment which is a finding we reach. On the other hand, where it *is* known that a protected characteristic was material to the treatment, it is likely to be an aggravating feature to that injury. That is not the case here.

8.10 We note there is no personal injury claim and no claim for aggravated damages. Although separate heads of award for which care has to be taken not to double count, they often give some insight into the nature, extent or duration of injury to feelings. Again, we do not have in this case either.

8.11 Against those factors, we do not regard the evidence of this injury to be properly characterised as a “serious case” to warrant an award in the middle band as defined in **Vento v Chief Constable [2002] EWCA Civ 1871**. Although not argued in this case, it is sometimes put that dismissal is always a serious act of discrimination and warrants an award in the middle band. We do not accept the **Vento** guidance and other authorities require or even permit that approach. The **Vento** guidance is illustrative of the types of injury that one might expect to see in different discriminatory situations from one off events to lengthy campaigns of discriminatory harassment but it is clear the Court of Appeal in **Vento** restated the compensatory nature of the award and the underlying principles as had previously been set out in cases such as **Prison Service –v- Johnson [1997] ICR 275**. The nature and manner of the discrimination is not itself a factor in valuing compensation, but it is potentially a relevant factor in how we reach our findings of fact on the injury and on which we then value the compensation.

8.12 The question, then, is where in that lower band does a fair and just award lie? We start by noting that this claim was presented in the year after 6 April 2019. As updated in **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879** and the subsequent applicable presidential guidance, the applicable band is valued from £900 to £8800.

8.13 We do not regard this case as being at the very bottom of the band for which a token or minimal award would be appropriate. Whilst the evidence of injury is thin, we are satisfied there was initial distress, albeit short lived. We have considered the level of awards made for pain suffering and loss of amenity in personal injury cases as providing some benchmark. We note the current Judicial College guide in its 15<sup>th</sup> edition is to be renewed imminently. The figures it contains are dated November 2019. We stress that in considering these guidelines, there is no particular type of personal injury that we have regard to, merely the general level of awards made. We do observe a theme amongst them for relatively short-lived physical injury with complete recovery in three months tends to warrant awards up to £2,300 and less severe psychiatric injury fully resolving within 2 years up to around £7,680.

8.14 We do not regard the evidence of injury in this case warranting an award anywhere near the top of the band. Doing the best, we can with such broad concepts, we assess the award for injury to feelings at £3000.

8.15 We must then address the relevance of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. In this case, there are arguments on both sides although neither have been extensive.

8.16 For the respondent's part, it is said it has unreasonably failed to comply with the ACAS code No1 in respect of grievance and disciplinary matters. We accept that the code applied as the respondent was purporting to terminate for reasons relating to his conduct. We are also satisfied that section 207A is engaged as schedule A2 to the 1992 includes claims under sections 120 and 127 of the Equality Act 2010.

8.17 We must then consider the extent of the breach. The employer did not set out any concerns in advance, there was no chance for the claimant to consider the evidence and be accompanied at the meeting. We have found the meeting provided next to no opportunity to comment on the concerns and its essential purpose was simply to convey the decision. The employer did then put that decision in writing and provide opportunity for the claimant to appeal.

8.18 For the claimant's part, he did not appeal. He accepted in his evidence that he could have provided evidence of proof of purchase of the suit if he had been asked and we have found that even minimal enquiries into his absences would have established facts which would have explained and justified the 5 days of sickness absence and, more particularly, the elements of disability status. We are reluctant to criticise the claimant for what is a process the respondent largely controls but we can't avoid the conclusion that there was a real prospect Mr Bradley's decision could have been overturned on there being any form of procedure subsequently adopted. As such we cannot say it was reasonable not to appeal. The code says an employee who feels the decision was wrong or unjust should appeal against the decision (our emphasis).

8.19 We are therefore faced with failings on both parts with broadly equal weight as to the contribution they each made to things going wrong or not being put right. It is not a provision we interpret as requiring distinctions in fine degrees but a broad-brush approach to the relevant factors. For that reason, whilst the powers under both section 207A(2) and (3) are potentially engaged, we have decided that the circumstances are such that it is not just and equitable to make any adjustment in this case, either way.

8.20 The final matter for us is to consider interest under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. We are bound to consider this under regulation 3 notwithstanding the fact that it has not been claimed in the schedule of loss, although it was pleaded in the amended ET1. We take the view it is just and appropriate to award interest. The claimant has been kept out of his compensation for 2 years and the figures we have used to assess the non-pecuniary loss are themselves 2 years old.

8.21 We take the date of dismissal of 24 June 2019 as the date of the discriminatory act and start of the relevant period under regulation 6. The calculation date is 5 February 2022. We calculate that there are 927 days between the two dates. The interest rate under regulation 3 is currently set at 8%.

8.22 Applying regulation 6(1)(a), the award of £3000 for injury to feelings attracts interest of £609.53 for the full period. ( $£3000 \times 8\% = £240 / 365 \times 927$ ).

8.23 Applying regulation 6(1)(b), the award of £2743.88 for financial loss attracts interest of £278.45 from the midpoint of the period. ( $£2743.88 \times 8\% = £219.51 / 365 \times 463$ ).

8.24 The total compensatory award is therefore £6,631.86 ( $£3,000 + £609.53 = £2,743.88 + £278.45$ )

EMPLOYMENT JUDGE R Clark

DATE 5 February 2022