



EMPLOYMENT TRIBUNALS

Claimant: Nathan Mccarthy

Respondent: Tesco Stores Limited

Heard at: London South, by CVP

On: 27, 28 and 29 August 2024

Before: Employment Judge Rice-Birchall

Mr Corkerton

Mr Huggins

Representation

Claimant: M Todd, counsel

Respondent: Ms Corby, counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed. There is a 50% chance that the claimant would have been fairly dismissed in any event. The claimant did not cause or contribute to the dismissal by blameworthy conduct.
2. The following complaint of direct disability discrimination is well-founded and succeeds: (a) Fail to follow its disciplinary procedures by pulling the Claimant into an office without offering him representation and showing him CCTV footage from a manager's mobile phone.
3. The remaining complaints of direct disability discrimination are not well-founded and are dismissed.
4. The complaint of harassment related to disability is not well-founded and is dismissed.
5. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.
6. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

REASONS

Background

1. The claimant presented his claim on 20 February 2023. Early conciliation started on 6 January 2023 and ended on 13 February 2023.

Issues

2. An agreed list of issues included the following issues:

UNFAIR DISMISSAL

1.1 Was the Claimant dismissed?

- 1.1.1 Did the Claimant resign with immediate effect on 10 November 2022?
- 1.1.2 If the Tribunal finds that the Claimant did not resign, was the Claimant dismissed?

1.2 Fairness

- 1.2.1 If the Claimant was dismissed, what was the reason or principal reason for the dismissal?
- 1.2.2 Did the Respondent conduct a reasonable investigation?
- 1.2.3 Did the Respondent have reasonable grounds to believe that the Claimant had committed misconduct?
- 1.2.4 Did the Respondent believe that he had committed misconduct?
- 1.2.5 Was dismissal within the range of reasonable responses open to the Respondent?
- 1.2.6 Did the Respondent and the Claimant comply with the ACAS Code of Practice?

2. DISCRIMINATION - DISABILITY

2.1 Jurisdiction

- 2.1.1 Was the claim form submitted more than 3 months after some of the conduct complained of?
- 2.1.2 If so, did that conduct form part of a chain of continuous conduct which ended within 3 months of the claim form being submitted?
- 2.1.3 If not, would it be just and equitable for the Tribunal to hear that part of the claim which relates to the conduct which occurred more than 3 months before the claim was submitted?

2.2 Was the Claimant disabled?

- 2.2.1 Did the Claimant have a physical or mental impairment? The Claimant relies on two separate disabilities, Klinefelter Syndrome and depression.
- 2.2.2 Did that impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
- 2.2.3 Was that adverse effect long-term?
- 2.2.4 Was the Claimant disabled at all relevant times?
- 2.2.5 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

2.3 Direct discrimination

- 2.3.1 Did the Respondent do the following:

(a) Fail to follow its disciplinary procedures by pulling the Claimant into an office without offering him representation and showing him CCTV footage from a manager's mobile phone;

(b) Fail to follow its absence procedures by accepting the Claimant's reported sickness absence on 12 November 2022; and

(c) Fail to follow its resignation procedures by accepting a resignation letter from the Claimant which was obtained through deception.

2.3.2 Was the above less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no real difference between their circumstance and the Claimant's. The Claimant is relying upon a hypothetical comparator.

2.3.3 If so, was it because of the Claimant's disability?

2.4 Discrimination arising from a Disability.

2.4.1 Did the Respondent get the Claimant to provide a dictated/signed document in the knowledge that he misunderstood or belief that he may misunderstand the nature of the document.

2.4.2 Was the above unfavourable treatment?

2.4.3 If so, was that as a consequence of something arising in consequence of the Claimant's disability? The Claimant claims that the 'something arising from' the Claimant's disability is his difficulty reading and tendency to become confused.

2.4.4 Was the treatment a proportionate means of achieving a legitimate aim? The aim relied upon by the Respondent is the need to accept and process resignation letters received from colleagues who indicate that they wish to resign.

2.5 Harassment

2.5.1 Did the Respondent do the following things:

(a) Fail to follow its disciplinary procedures by pulling the Claimant into an office without offering him representation and showing him CCTV footage from a manager's mobile phone;

(b) Fail to follow its absence procedures by accepting the Claimant's reported sickness absence on 12 November 2022; and

(c) Fail to follow its resignation procedures by accepting a resignation letter from the Claimant which was obtained through deception.

2.5.2 If so, was that unwanted conduct?

2.5.3 Did it relate to the Claimant's disability?

2.5.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

2.5.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

2.6 Failure to make reasonable adjustments

2.6.1 Did the Respondent have the PCP of holding an informal meeting without accompaniment.

2.6.2 Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?

2.6.3 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage? For clarity, the substantial disadvantage the Claimant claims is him not getting additional support in reading documents and processing written information.

2.6.4 What adjustments could have been made to avoid the disadvantage? The Claimant's claims that the following adjustments should have been made:

(a) Modifying the disciplinary procedure/lifestyle procedure/resignation procedure to ensure that a vulnerable employee has the option to be accompanied to assist in understanding and ensuring they are not taken advantage of.

2.6.5 Was it reasonable for the Respondent to have to take those steps and when?

2.6.6 Did the Respondent fail to take those steps?

3. REMEDY

3.1 If the Claimant's claims are upheld:

3.1.1 What remedy does the Claimant seek?

3.1.2 If the Claimant seeks reinstatement or reengagement, is it practicable for the Respondent to comply with such an Order?

3.1.3 What financial compensation is appropriate in all of the circumstances? 3.1.4 Should any compensation awarded be reduced in terms of *Polkey v AE Dayton Services Ltd* [1987] ICR 142 and, if so, what reduction is appropriate? 3.1.5 Should any compensation awarded be reduced on the grounds that the Claimant's actions caused or contributed to their dismissal and, if so, what reduction is appropriate?

3.1.6 Has the Claimant mitigated their loss?

Evidence

3. The claimant submitted a witness statement and gave oral evidence. There were two witness statements from the respondent, that of Mr Galagma, Store Manager and one from Mr Arulampalan, Store Manager.
4. Mr Arulampalan was on holiday in France and no permission had been received for him to give his evidence from France, so the Tribunal did not have the benefit of his oral testimony. Therefore, although the Tribunal considered Mr Arulampalan's witness statement, it could not be challenged. Nonetheless, the Tribunal took into account his written evidence when seeking to establish the facts of the case on the balance of probabilities.
5. The Tribunal also watched some video extracts which related to an allegation of theft against the claimant and a video of a call which the claimant alleges was a call made by himself to Mr Arulampalam on 12 November 2022.
6. The claimant struggled with dates and understanding some of the questions posed during oral evidence. This was consistent with his alleged learning difficulty/disability and the claimant's account that his mother dealt with any paperwork on his behalf (and in work Mr Arulampalam and others assisted with paperwork). The claimant's memory of dates and documents was poor. In particular, he could not remember many of the Lets Talks or the final written warning (see below) despite there being no indication or allegation that they had not actually been given or received.
7. Mr Galagma prepared a witness statement and the Tribunal heard his oral testimony. However, he had no first-hand knowledge of the key facts of the case and had little to add despite having investigated the claimant's grievance.

Findings of fact on the balance of probability

The claimant's alleged disabilities

Klinefelters Syndrome

8. The claimant has Klinefelters Syndrome (KS). This is a genetic condition which is a testosterone deficiency. The claimant takes steroids to alleviate some of his symptoms, as well as testosterone.
9. Information which was provided by the claimant about KS described that it can have a number of effects including learning difficulties, fatigue, mood swings and depression, and gynecomastia (breast tissue). It says: "Klinefelter's Syndrome...can have far-reaching consequences for those who have the condition. Some with KS have moderate learning difficulties and reduced intellectual capabilities which could severely limit employment prospects. However, while the majority have the normal range of intelligence, many have less obvious "learning difficulties" and many experience difficulties in the workplace."
10. It then lists some of the most common problems which include poor expressive and receptive language skills; widespread difficulty in understanding and remembering instructions or explanations particularly when given verbally and information processing difficulty; and poor social skills.
11. The claimant's impact statement described that the claimant "has difficulty understanding verbal instructions, particularly under pressure; has difficulty understanding social cues such as body language. Little understanding of the nuance of behavior, language and emotion. Everything is black and white to the claimant. The claimant has reduced IQ with difficulty in reading and writing...and difficulty in organizing himself to attend social gatherings, meetings or appointments..".
12. The claimant described himself as someone who struggles to understand and to communicate and, during his evidence, it was apparent that he did struggle to express himself clearly and did not always understand the questions he was asked. He had particular difficulties with dates and documents. He was identified at school as having special educational needs and had support throughout his school life. He explained that he also struggled with relationships. The Tribunal considered that this was demonstrated by some of the conduct issues which had occurred in the workplace (see the Lets Talks explained below) and the relationship with his then girlfriend.
13. The claimant was not diagnosed with KS until December 2016, though he had some symptoms from puberty, and has, as set out above, had some learning difficulties all his life. He never informed the respondent of his diagnosis.
14. Although it was clear to the Tribunal that the claimant did have some degree of learning difficulty, the only evidence provided of any learning difficulty, other than the claimant's oral testimony, was the information from the claimant's schooling. There was no evidence to link the claimant's learning difficulties to the KS.

Depression

15. As for depression, it was the claimant's evidence that low mood was a constant in his life and that he had always struggled with his mental health.
16. The claimant had a period of absence from work in January 2022 (two weeks) following a relationship breakdown. What'sapp messages demonstrate that the claimant was struggling with his mental health around that time.

The respondent's policies and procedures

17. The respondent has the following:
 - a. a Staff Room Purchases and Staff Shopping Procedure which states that, 'All items taken from the shop floor must be paid for in full before they are taken and eaten. Upon starting your shift, if you have any items that Tesco sell that you don't have a receipt for you must show the items to the person responsible for running the shift before starting.';
 - b. a Non-Negotiables Policy which requires a till receipt to be kept and signed by another colleague for any staff purchases;
 - c. a Lifestyle Break policy which states that a colleague who wishes to take a lifestyle break is usually required to give four weeks' notice and must complete a Leave Request form; and
 - d. a Guide to Leavers and Retirement which states:

1. What do I do when someone gives me their notice?

If someone gives you their notice or tells you that they intend to leave, you should have an informal discussion with them about their reasons for leaving.

If they're a colleague that you'd like to stay, you should ask them if there's anything you can do which would support them to stay. If there is, you should take these points away and discuss them with your Manager, telling the colleague you'll come back to them shortly. Remember, while some things are possible to change, some aren't and it's important not to commit to anything without speaking to your Manager first.

If you don't wish to keep them or if the colleague still wishes to leave, you should accept their resignation and provide them with a letter confirming their leaving date. For Distribution Centres you'll need to ask your Manager to provide the letter.

Please complete the [Leaver's Checklist](#) to make sure you cover everything you need to.

The claimant's employment

18. The claimant worked at the respondent's Angel Hill Store as a customer service assistant. He commenced employment on 16 September 2013. He worked overtime at the Lower Road Store. As a customer assistant, his duties included tasks such as serving customers on the check outs and stocking shelves.
19. There was an ongoing issue with the claimant's lateness for work. Not only would he arrive late, but he would fail to follow any notification process or clock in when he arrived. This resulted in a number of "Let's Talks" which are, effectively, an informal conversation with an employee to alert them to conduct which is not acceptable, but in respect of which a formal warning is not required. It seems to the Tribunal that the claimant was given a good deal of leeway and that there was an understanding that the claimant struggled to be on time and so on.

20. A number of other issues were also covered in the Lets Talks including use of the claimant's phone, for example. These informal but recorded conversations were held between the claimant and a number of different managers including "Chandra" and, latterly, Mr Arulampalam, who was then the dual site Store Manager at both the Angel Hill and Lower Road stores. Mr Arulampalam became the claimant's line manager from August 2018.
21. A number of adjustments were made informally to assist the claimant: he was assisted with paperwork and was not given some responsibilities with which it was understood that he would struggle, such as cash handling, which he found difficult.
22. The claimant was issued with a formal written warning by Mr Arulampalam on 26 May 2021 over his failure to follow the correct process when selling alcohol.
23. Around the beginning of 2022, the claimant had some time off as he became unwell due to an abusive relationship which then broke down. On 25 January 2022 he was signed off by his GP as not fit for work due to anxiety state for two weeks. It was acknowledged by the claimant that Mr Arulampalam was very supportive during this time.

The claimant's final written warning

24. On 11 April 2022, the claimant was issued with a final written warning by Mr Arulampalam, again because of lateness; not following the correct procedure when he was late; and then not clocking in when he was late to his shift. The claimant did not recall the final written warning being given, though he did recall conversations about being late. The final written warning was to remain live on the claimant's file for one year and stated that any further incidents of misconduct during the period the warning was live would be likely to lead to further disciplinary action which could lead ultimately to dismissal.
25. Mr Arulampalam issued the claimant with a further Let's Talk when he was four hours late on 18 August 2022. Again, the claimant did not remember this, but the Tribunal does not understand the claimant's case to be that the Let's Talk wasn't given. This was indicative of what was a lenient approach to the claimant's timekeeping as the respondent (particularly Mr Arulampalam) appeared to acknowledge that he was unable to change: the "Let's Talk of July 2021 specifically states: "He can't be changed". This is also an example of Mr Arulampalam being lenient with the claimant, as in fact, Mr Arulampalam could have used the circumstances of the Let's Talk as an excuse to dismiss the claimant if he felt inclined to do so.

7 November 2022

26. On 7 November 2022, Mr Arulampalam received a complaint from a colleague of the claimant known as Matty. He claimed to have been verbally abused by the claimant "using bad words and aggressive talking" after highlighting some performance issues to him on 5 November 2022. Matty concluded: "I don't feel comfortable to work with Nathan (the claimant) who

is insulting me and failed to respect my position in the store, as a shift leader I feel so stressed after this incident.”

9 November 2022

27. Around 9 November 2022, Mr Arulampalam was alerted to a possible theft of some stock by the claimant by Chandra. Chandra reviewed CCTV footage in relation to a new gantry as the respondent suspected some stock was missing. Chandra texted Mr Arulampalam to say that she had come across footage of the claimant taking items from the shop floor and going upstairs to the staff room with the items without paying for them.
28. Surprisingly, this CCTV footage, from August 2022, was available and being reviewed in November 2022, when the respondent’s policy was to delete all CCTV footage after 30 days. Certainly, the CCTV footage of 10 November meeting (below) was not available to the claimant despite his requests and despite Mr Galagama having viewed it during the grievance investigation. Although surprising that the old CCTV footage was available, the Tribunal is satisfied that it was a coincidence that Mr Arulampalam was informed of this footage shortly after the incident with Matty, when disciplinary proceedings were likely in any event.
29. Mr Arulampalam reviewed the CCTV footage and considered that it showed the claimant taking two protein bars and walking past the checkouts without paying for the bars (as it was too early for the tills to be open).

10 November 2022

30. During the claimant’s next shift, on 10 November 2022, Mr Arulampalam invited the claimant into his office. Both the claimant and the respondent’s evidence is that the allegation of theft was discussed, as well as the incident with Matty, and that the claimant wrote and signed a handwritten letter but the content of the meeting and the letter is disputed. It resulted in Mr Arulampalam processing a letter confirming the claimant’s resignation (which the claimant says he never received). The meeting lasted 40-45 minutes.
31. In the bundle there was a letter inviting the claimant to an investigation meeting which stated that it was “hand delivered”. There was also a letter of resignation which stated: “Dear Piranavan, I would like to resign with immediate effect due to my personal circumstances. Could you please authorize my request next week. Thank you.” There was a resignation acknowledgement letter dated 10 November 2022 which was addressed to the claimant from Mr Arulampalam and marked as hand delivered. That letter states: ‘I write to confirm that I have received your resignation letter dated 10/11/2022 in which you have resigned effective from date 10/11/2022 end of the shift. I would like to assure you that the current investigation/disciplinary process hasn’t been predetermined, and I hope you have not resigned on the basis of this belief’.
32. As stated above, the CCTV footage of this meeting was not available despite the claimant having specifically requested it on 27 November 2022 and thereafter and despite Mr Galagama having reviewed it during the grievance process.

Claimant's version of 10 November meeting

33. The claimant says that Mr Arulampalam wanted to speak to him. The claimant assumed it was about the incident with Matty, which was correct in part, as confirmed by Mr Arulampalam. Mr Arulampalam then went on to say that he had some evidence that the claimant had been stealing and showed him some CCTV footage on his phone of the alleged theft from August 2022, which included the claimant eating something. The claimant said that it did not show him stealing. Mr Arulampalam told the claimant that he had shown it to another manager who agreed that it showed the claimant stealing. The claimant asked Mr Arulampalam for evidence of him actually taking something, rather than just eating. Mr Arulampalam said he couldn't but that this could lead to him being arrested and a criminal record; that no one would believe the claimant over him and that he was "f@#@D". The claimant says he did not receive any letter inviting him to the disciplinary investigation. The claimant says he then got very shaky and was panicking and says he was offered a lifestyle break which he had never heard of. He says Mr Arulampalam offered it to him because he had had a difficult year and that he should look for a job whilst he was off. He was told to date it from the following week so it wouldn't look suspicious and not to tell other colleagues as he could get into trouble and lose his job. The claimant believes that he wrote a letter requesting a lifestyle break and that Mr Arulampalam then went on to write the resignation letter himself using the claimant's letter which he had written requesting a lifestyle break to model the claimant's writing and style.
34. The claimant says he was told to write a letter which Mr Arulampalam told him how to write and helped him with the spelling. The claimant believed that this was a letter requesting a lifestyle break from the following Monday (15th November). The claimant says that he agreed to write the letter requesting a lifestyle break because he felt under duress with the threat of prison and felt something was not right. He says that he did not resign.
35. The claimant says Mr Arulampalam agreed to him returning to work for the rest of the shift and said that he would see him on Saturday.

Respondent's version of 10 November meeting

36. Mr Arulampalam's witness statement states that Mr Arulampalam, having seen the CCTV footage and received the complaint from Matty, had set up an investigation meeting with Hardish Patel, for which he had prepared a letter of invitation which referred to the claimant showing aggressive and threatening behaviour by punching a cage and continuously swearing at a Shift leader and for taking and consuming two protein bars from the shop floor without paying for them.
37. Mr Arulampalam invited the claimant into his office to inform him of the need for the investigation meeting. He informed the claimant of the allegations being made against him but at no point showed him any CCTV footage. He denies telling the claimant that he "would have him arrested" or that he would "get a criminal record".

38. Mr Arulampalam says that the claimant was naturally very worried about these serious allegations and that he became flustered and red in the face and asked about the possibility of a lifestyle break. Mr Arulampalam, says that he was surprised as he had not expressed interest previously. Mr Arulampalam said he could not authorize a lifestyle break while the claimant was under investigation but that he could look into it later. The claimant then asked if he could resign and Mr Arulampalam, explained, if he definitely wanted to resign, that he needed to put it in writing. The claimant did so. Mr Arulampalam says that he did not dictate the letter but read the letter and said it was ok. After accepting the resignation, he typed out and gave the claimant the acknowledgement.
39. Mr Arulampalam says he allowed the claimant to go back to work at the claimant's request. He says that the claimant was issued with a letter acknowledging his resignation with immediate effect on 10 November 2022 and that he then processed the claimant as a leaver by contacting HR "after the conversation".

Events following 10 November meeting

40. After the meeting, the claimant completed his shift of which approximately 30 minutes remained.
41. The claimant alleges that he telephoned Mr Arulampalam on 12 November 2022, which was when he was next due on shift, and informed him that he would not be attending work that day. Mr Arulampalam's written evidence says he does not remember the call. The Tribunal saw a video of the claimant making a call to someone, who the claimant alleges was Mr Arulampalam, who accepted the call and said "OK". Mr Arulampalam did not challenge the claimant when he said he would not be attending work, by saying, for example, that the claimant had resigned and did not need to phone him to explain that he would not be attending work. The respondent denied in its response that the claimant made that call. The Tribunal finds, on the balance of probability, that the claimant did make that call to Mr Arulampalam. It is not clear to the Tribunal why the claimant would have made the call or recorded it but it was likely to have been because he was unclear about what had happened and whether he had resigned with immediate effect or from the following Monday (as his resignation letter asked for the resignation to be "authorized" the following week). It is likely, on the balance of probabilities, that, as Mr Arulampalam had not processed the resignation at this stage, and as the letter asked for it to be authorized the following week, he did not think to challenge the claimant.
42. On 15 November, the claimant texted Mr Arulampalam to say: "just wondering why everyone is saying I resigned from work when I haven't. When you told me to take the lifestyle break I come back in three months". Five minutes later Mr Arulampalam called the claimant, but the claimant did not answer.
43. Mr Arulampalam processed the claimant as a leaver on 15 November 2022.
44. The claimant says that he received a letter in the post sometime later and at that point realized that what he had been told about the lifestyle break was incorrect and that he had been dismissed.

The claimant's grievance

45. The claimant raised a grievance on 17 November 2022 on the basis that he had been tricked into resigning by Mr Arulampalam and had been bullied and discriminated against. He said: "I was weak on the day I was forced to sign the Lifestyle break letter due to my condition and also not having ever been through a meeting like that previously...". He said he had been forced to sign a three-month lifestyle break to save him from getting arrested for theft.
46. The claimant attended a grievance hearing on 6 December 2022 with Mr Galagama. The claimant was accompanied by his mother and by his trade union representative.
47. In his grievance, the claimant explained that he had been shown two lots of CCTV footage which allegedly showed him stealing. The claimant stated that he had said that the first video was too blurry to see and in other he had been eating. He asked whether he could be shown other angles of the store, but Mr Aralampulam said that he couldn't. The claimant said that Mr Aralampulam said that another manager who had seen the footage agreed that the claimant was stealing.
48. The claimant said that he was asked by Mr Arulampalam to sign his name and ask for a lifestyle break on a piece of paper. The claimant said Mr Arulampalam offered him a lifestyle break because of the stress he had been under. The claimant confirmed that he had KS. His mother explained it to Mr Galagama. The claimant confirmed that Mr Arulampalam did not know of his condition but knew about the mental stress he had been under because of a difficult year.
49. Mr Galagama interviewed Mr Arulampalam on 14 December 2022. Mr Arulampalam said the claimant had requested a lifestyle break when he had read out allegations to him and invited him to an investigation meeting. He said the claimant then asked him how to resign and handed him the resignation letter in writing.
50. Mr Galagama also interviewed Kiritharan Nanthagopla, as the claimant said that he had spoken to this colleague who told him that he should take the matter further. Kiritharan Nanthagopla did not recall speaking to the claimant and telling him to take matters further, as alleged by the claimant.
51. Mr Galagma reviewed the CCTV footage of Mr Arulampalam's office during his conversation with the claimant on 10 November 2022. However, the camera angle was poor. Mr Galagma could see Mr Arulampalam and the claimant entering the office and then sitting at the desk having a discussion. He said there was nothing heated about their discussion and the footage did not show Mr Arulampalam forcing the claimant to write a letter or showing him anything on his mobile phone, but neither did it show any letter being handed to Mr Arulampalan at all, which was both Mr Arulampalam's and the claimant's evidence.
52. The Tribunal find that the claimant's grievance was not thoroughly investigated and that Mr Galagma did not really engage with the grievance.

For example, he said it was clear that there was no letter written during the meeting between Mr Arulampalam and the claimant despite it being common ground that a letter was written. This should have led to further investigation. In his oral evidence, Mr Galagma suggested that the letter could have been written in the canteen or handed in later, but this was not the evidence of either of those present and Mr Galagma should have satisfied himself as to when the letter was written and in what circumstances in order to properly consider the claimant's grievance.

53. The claimant's grievance was not upheld. Mr Galagma found that the claimant had resigned with immediate effect because of the live final written warning. The claimant was not given a right of appeal as he had already left the respondent's employment.

Law

Tribunal procedure and witness evidence

54. Rule 4 of the Employment Tribunal Rules states: "The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. ***The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.***"
55. **Hovis Ltd v Louton** UK EA 2020 000973-LA (Wrongful Dismissal appeal heard by HHJ Auerbach)– paragraph 53 states: "*I therefore conclude that the Judge has fallen into an error of principle in her approach to the evidence. She has proceeded on the basis that, having heard evidence from the claimant in person, and in the absence of evidence in person from at least one of the [Sittres], and notwithstanding that she had their hearsay statements and other evidence said to support the respondent's case, she could not make a finding of fact the claimant was smoking. That error of principle means that ground 2 succeeds.*"
56. In **Hovis**, the two witnesses to the alleged gross misconduct had not been present to give oral testimony at tribunal. However, their written statements that had been used at the internal disciplinary hearing were put into evidence as hearsay. The EAT held that the tribunal had been wrong in law to say that it was unable to evaluate their credibility against the claimant's oral testimony and that it therefore could not make a finding that the misconduct had occurred. However, the weight to be given to the hearsay evidence was a matter for the tribunal

Whether an employee has been dismissed

57. The employment relationship is based on a contract between the employer and employee. It is capable of being terminated by either party, or by both parties agreeing to bring it to an end. If the employer terminates the contract, that is a dismissal of the employee, but if employment terminates either by the employee resigning or by mutual agreement, there is no dismissal.

58. Whether an employee agrees to bring a contract to an end is a question of fact (**Martin v Glynwed Distribution Ltd** [1983] ICR 511), and the particular situation they find themselves in will be relevant to whether they can truly be said to have 'agreed' to terminate their employment.
59. The general rule is that unambiguous words of dismissal or resignation may be taken at their face value without the need for any analysis of the surrounding circumstances. The leading case is **Sothorn v Franks Charlesly and Co** 1981 IRLR 278, CA, where the claimant office manager for a firm of solicitors, after some months of mutual friction, attended a partnership meeting and said, 'I am resigning.' The firm took her at her word, accepted the oral statement of resignation and recruited a replacement the next day. The Court of Appeal held that, on the facts, these were unambiguous words of resignation and were understood as such by the employer. That concluded the matter: there was no room to consider what the employee actually intended or what a reasonable employer might have assumed she intended.
60. If there is undue pressure, then there may be a dismissal. In those circumstances, as Lord Justice Ackner put it in the Court of Appeal case of **Birch and Humber v University of Liverpool** [1985] IRLR 165, the issue is one of fact and degree: "Was there any pressure placed upon the employee to resign?; and if so, was the degree of pressure such as to amount in reality to a dismissal?"
61. It is well established that if an employee is told expressly that they have no future with the employer and are invited to resign then they are to be regarded as having been dismissed. The EAT held that the effect of the letter informing him of the changes was to amount to a dismissal. Similarly, if an employee is deceived into signing a letter of resignation (where they did not understand what they were signing) that will not amount to a resignation.
62. It is relatively common for employees who are facing disciplinary proceedings to resign rather than suffer the ignominy of dismissal. In those circumstances, it will usually be the employee who is held to have terminated the contract, provided it can be said that the resignation came about through his or her genuine choice: see **Staffordshire County Council v Donovan** 1981 IRLR 108, EAT.

Unfair dismissal

63. Employees have a right not to be unfairly dismissed under s.94 of the Employment Rights Act 1996 ('ERA 1996'). However, in order to bring a claim, an employee must have been dismissed.

Reason for Dismissal

64. When a complaint of unfair dismissal is made, it is for the employer to prove that it dismissed the claimant for a potentially fair reason, namely a reason falling within Section 98(2) ERA or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held.

65. A reason relating to the employee's conduct is a potentially fair reason falling within Section 98(2).
66. Where an employer alleges that its reasons for dismissing the claimant was related to her conduct the employer must prove:-
- a. that at the time of the dismissal it genuinely believed the claimant had committed the conduct in question and
 - b. that this was the reason for dismissing the claimant.
67. The test is not whether the Tribunal believes the claimant committed the conduct in question but whether the employer believed the claimant had done so.

Fairness

68. If the respondent proves that it dismissed the claimant for a potentially fair reason, the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) ERA.
69. Section 98(4) ERA provides that "the determination of the question whether (a) the dismissal is fair or unfair (having regard to the reason shown by the employer) 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".
70. The Employment Appeal Tribunal (EAT) set out guidelines as to how this test should be applied to cases of alleged misconduct in the case of **British Home Stores Limited –v- Burchell** 1980 ICR 303. The EAT stated that what the Tribunal should decide is whether the employer had reasonable grounds for believing the claimant had committed the misconduct alleged and had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.
71. The concept of a reasonable investigation can encompass a number of aspects including making proper enquiries to determine the facts, informing the employee of the basis of the problem, giving the employee an opportunity to make representations on allegations made against them and put their case in response and allowing a right of appeal.
72. In 2009, ACAS issued its current code of practice on disciplinary and grievance procedures. The Tribunal must take into account relevant provisions of the code when assessing the reasonableness of a dismissal on the grounds of conduct (section 207(3) TULRCA).
73. Under the Code, employers should give employees an opportunity to put their case before any decisions are made. The Code identifies the need for a disciplinary meeting. It also provides that, when notifying an employee of a disciplinary meeting, the notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary

meeting. Furthermore, at the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered.

74. In applying section 98(4), the Tribunal must also ask itself whether dismissal was a fair sanction for the employer to apply in the circumstances. The test is an objective one. It is irrelevant whether or not the Tribunal would have taken the same course had it been in the employer's place, similarly it is irrelevant that a lesser sanction may have been reasonable. Rather section 98(4) requires the Tribunal to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (**Iceland Frozen Foods Ltd –v- Jones** 1982 IRLR 439). This "range of reasonable responses" test applies equally to the procedure by which the decision to dismiss is reached (**Sainsbury's Supermarkets Limited –v- Hitt** 2003 IRLR 23).

Remedy

75. If a claim of unfair dismissal is well founded, the claimant may be awarded compensation under Section 113(4) ERA. Such compensation comprises a basic award and a compensatory award, calculated in accordance with sections 119 to 126 ERA.

76. Where the Tribunal considers that any conduct of the claimant prior to dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, it must reduce the amount accordingly (section 122(2) ERA). In this regard, the question is not whether the employer believed the claimant committed the conduct in question but whether the Tribunal so believes.

77. The Tribunal's power to reduce a basic and/or compensatory award under s.122(2) and s.123(6) of the ERA on account of contributory conduct was summarised in **Frith Accountants v Law** [2014] ICR 805. It can only be exercised in respect of conduct that is culpable or blameworthy (para.4).

78. As explained in **Steen v ASP Packaging Ltd** [2014] ICR 56, the Tribunal should ask itself: What is the conduct which might give rise to a finding of contributory fault? Is that conduct blameworthy? Did that conduct cause or contribute to the dismissal? To what extent the award should be reduced and to what extent it is just and equitable to reduce it?

79. So far as the compensatory award is concerned, ERA provides that the amount of compensation shall be such amount as is just and equitable based on the loss arising out of the unfair dismissal. In **Polkey –v- A E Dayton Services Limited** 1987 ICR 142 the House of Lords stated that the compensatory award may be reduced or limited to reflect the chance that the claimant would have been fairly dismissed in any event had a fair procedure been followed.

80. The **Polkey** principle was helpfully summarised in **Hill v Governing Body of Great Tey Primary School** [2013] ICR 691. Langstaff J(P) said: [24]... "A "Polkey deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what

were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done.”

81. Separately, if it appears to the Tribunal that either the employer or the employee has unreasonably failed to follow or comply with the ACAS Code referred to above, the Tribunal may increase or decrease any compensatory award by up to 25% if it considers just and equitable in all the circumstances to do so (s207A TULRCA).

82. Furthermore, where the Tribunal finds that dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s123(6) ERA). As with any reduction under s122(2), the question is not whether the employer believed the claimant committed the conduct in question but whether the Tribunal so believes.

Disability discrimination

Disability

83. s.6 Equality Act 2010 provides:

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

84. (6) Schedule 1 (disability: supplementary provision) has effect.

Per Schedule 1, para 2:

- (1) The effect of an impairment is long-term if—
 - (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.

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

86. For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

87. Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

88. Per Schedule 1, para 5

- (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
 - (a) measures are being taken to treat or correct it, and
 - (b) but for that, it would be likely to have that effect.

(2) “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.

89. There is no requirement that the claimant have a diagnosed psychiatric condition in order to have a ‘mental impairment’.

90. The Tribunal should reach a decision as to whether the claimant had a physical or mental impairment and separately the question of adverse effects. However this decision does not have to be made in a particular order and, in some cases, a decision on the latter may inform the decision on the former. Per the EAT in **J v DLA Piper UK LLP** [2010] ICR 1052:

40. Accordingly in our view the correct approach is as follows:

(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.

(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense... to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.

91. The Tribunal went on to make the following observations in relation to the impairment of depression:

41. The facts of the present case make it necessary to make two general points about depression as an impairment....

42. The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as “clinical depression” and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – “adverse life events”. ... We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians ... and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as “depression” (“clinical” or otherwise), “anxiety” and “stress”. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a

claim under the Act. This is because of the long-term effect requirement. If, as we recommend at paragraph 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived.

43. We should make it clear that the distinction discussed in the preceding paragraph does not involve the restoration of the requirement previously imposed by para. 1(1) of Schedule 1 that the claimant prove that he or she is suffering from a "clinically well-recognised illness" '... The distinction applied in the present case relates to whether there is an impairment at all, which is a different matter.'

92. The burden is on the claimant to show that he is disabled. It is not necessary for expert evidence to be submitted to establish that an individual meets the definition under s.6 EqA 2010 but the claimant must nonetheless put forward sufficient evidence to discharge that burden. So, in **Royal Bank of Scotland plc v Mr M Morris** UKEAT/0436/10/MAA, Underhill P stated as follows:

*55. The burden of proving disability lies on the claimant. There is no rule of law that that burden can only be discharged by adducing first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment, and in **Morgan v Staffordshire University** [2002] ICR 475 this Tribunal, Lindsay P presiding, observed that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion" (see para. 20 (5), at p. 485 A-B); and it was held in that case that reference to the applicant's GP notes was insufficient to establish that she was suffering from a disabling depression (see in particular paras. 18-20, at pp. 482-4). (We should acknowledge that at the time that Morgan was decided paragraph 1 of Schedule 1 contained a provision relevant to mental impairment which has since been repealed; but it does not seem to us that Lindsay P's observations were specifically related to that point.)...*

63. ...The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted.

93. The above authorities were considered by HHJ Auerbach in the case of **Igweike v TSB Bank PLC** UKEAT/0119/19/BA at paras 26-45. At para 50 he summarised the position as follows:

50. *Secondly, while there is no longer a rule of law that a mental impairment must be clinically well-recognised, nor is there any rule that such an impairment cannot ever be made out without medical evidence, nevertheless, as the discussion in both **J v DLA Piper UK LLP** and **Morris** explains, it is a practical fact that, in some cases of this type, the individual's own evidence may not be sufficient to satisfy the Tribunal of the existence of an impairment. In some cases, even contemporary medical notes or reports may not be sufficient, and expert evidence prepared for the purposes of the litigation may be needed. To say all of this is not to introduce either of these legal heresies by the back door. The question is a purely practical or evidential one, which is sensitive to the nature of the alleged disability, the facts, and the nature of the evidence, in the given case.*
94. 'Substantial' means more than minor or trivial (s.212 EqA 2010). The Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability ('the Guidance') explains that factors that may be relevant to considering whether an impact is 'substantial' include matters such as the time taken and way in which an activity is carried out, the cumulative effects of an impairment or impairments, how far a person can reasonably expected to modify their behaviour and the extent that environmental factors impact on effects.
95. As a matter of principle, it is impermissible for a tribunal to seek to weigh what a claimant can do against what they cannot (**Ahmed v Metroline Travel Limited** [2011] EQLR 464). However, also per **Ahmed**, where what an employee cannot do is in dispute, it may be relevant to consider what they can do.
96. The Guidance says that in general, 'day-to-day activities are things people do on a regular or daily basis' (D3) and can include general work-related activities.
97. There must be a causal link between the impairment and the substantial adverse effect, although it need not be direct (**Sussex Partnership NHS Foundation Trust v Norris** EAT0031/12, EAT; **Primaz v Carl Room Restaurants Ltd t/w Mcdonald's Restaurants Ltd and ors** [2022] IRLR 194, EAT).
98. When considering the potential effects of an impairment in the absence of treatment and whether the effects were likely to last for more than 12 months, 'likely' should be interpreted as 'could well happen' (**Boyle v SCA Packaging Ltd** (Equality and Human Rights Commission intervening) [2009] ICR 1056, HL (NI)).

Knowledge of disability

99. Where the protected characteristic is disability, the employer's knowledge of the disability is relevant to the question of whether the employer treated the employee less favourably on the grounds of that protected characteristic. The requisite knowledge that the employee is disabled may be actual or constructive and is of the facts constituting the disability, namely (as also clarified by the Equality Act 2010 (EqA), Sch 1) a physical or mental impairment, and that the impairment has a substantial

and long-term adverse effect on the employee's ability to carry out normal day-to-day activities.

100. Provided that the employer has actual or constructive knowledge of such facts, it need not be shown that the employer was aware, as a matter of law, that these facts meant the employee was a 'disabled person' within the meaning of the legislation.
101. It is for the employer to make its own judgment as to whether or not it considers the employee to be disabled, and not to simply rely on the opinion of an adviser.
102. Knowledge of disability in one part of an organisation, or on the part of one individual in an organisation, does not mean that that knowledge can be imputed to the organisation generally, or to any or all of its employees, for all purposes, and in particular in the context of deciding whether there has been direct discriminatory conduct.
103. In **Gallop v Newport City Council** 2014 IRLR 211, CA the Court of Appeal held that it will be sufficient to establish knowledge of disability if the employer knew or ought to have known the facts which when analysed satisfy the statutory definition of disability. That requires knowledge of an impairment but not necessarily a diagnosis; knowledge that that impairment has a substantial effect on ordinary day to day activities; and knowledge of the facts that establish the long term condition.
104. This does mean that knowledge of a label or bare diagnosis, such as 'dyslexia' is not conclusive. That is because the range of experiences is wide and the effect of the condition is variable, so not all will satisfy the Eq A statutory tests. The respondent must also have knowledge of the substantial effect on ordinary day to day activities and that it has lasted at least a year, or is likely to do so.
105. This also means that for constructive knowledge, more than the bare label is required – some expression of disability or need, or an identification of difficulty, something to trigger or prompt a deeper check.
106. It also follows that the threshold for triggering constructive knowledge is a low one – see also Code of Practice para 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. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.' Whether or not the employer is found to have constructive knowledge turns on what would have reasonably been known to it after those enquiries had been made.
107. If there was too high a standard for triggering constructive knowledge, that would reward ignorance and put the emphasis back on the process of what was done or not done and why. It would defeat the

object of the legislation. However, that has to tie up with the standard for knowledge and constructive knowledge in **Gallop**.

Burden of proof

108. S.136 EqA 2010 provides: (1) This section applies to any proceedings relating to a contravention of this Act. (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.
109. The guidance set out in **Igen v Wong** [2005] ICR 9311, CA (approved by the Supreme Court in **Hewage v Grampian Health Board** [2012] ICR 1054, SC and **Efobi v Royal Mail Group Ltd** [2021] ICR 1263, SC) still sets out the correct approach to interpreting the burden of proof provisions. In particular:
- a. it is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude that the employer has committed an act of discrimination, in the absence of an adequate explanation (para 79(1), see also **Ayodele v Citylink Ltd and anor** [2018] ICR 748, CA at paras 87 - 106);
 - b. it is unusual to find direct evidence of discrimination and '[i]n some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in"' (para 79(3));
 - c. therefore the outcome of stage 1 of the burden of proof exercise will usually depend on 'what inferences it is proper to draw from the primary facts found by the tribunal' (para 79(4));
 - d. 'in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts' (para 79(6));
 - e. where the claimant has satisfied stage 1 it is for the employer to then prove that the treatment was in no sense whatsoever on the grounds of the protected characteristic on the balance of probabilities' (para 79(11)-(12)).
110. In **Igen v Wong** the Court of Appeal cautioned tribunals 'against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground' (para 51).
111. In **Madarassy v Nomura International PLC** [2007] ICR 867, CA Mummery LJ stated that: 'The bare facts of a difference in status and a difference in treatment only indicate 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’ (para 58).

Direct discrimination

112. S.13 EqA 2010 provides: (1) 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.
113. It is not enough for treatment to be different in order to be ‘less favourable’, but the claimant does not have to experience actual disadvantage (see **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065, HL).
114. The Equality and Human Rights Commission Employment Statutory Code of Employment (the ‘Employment Code’) provides: 3.5 The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.
115. Treatment can be ‘because of’ a protected characteristic if it is inherently discriminatory.
116. However, more commonly treatment is found to be ‘because of’ a protected characteristic not because it is inherently discriminatory, but because the conscious or subconscious reason the alleged perpetrator is treating someone less favourably is the protected characteristic.
117. In such cases the focus in determining whether there has been direct discrimination is on the motivation, intention and knowledge of the decision maker (knowledge of others cannot be imputed) (**Gallop v Newport City Council (No.2)** [2016] IRLR 395). The protected characteristic must be the conscious or subconscious reason for treatment.
118. For treatment to be ‘because of’ a protected characteristic, the characteristic does not have to be the only or main reason for treatment, it only has to be an effective cause (**Nagarajan v London Regional Transport** [1999] ICR 877, HL).
119. In the context of direct disability discrimination, it is not necessary for the decision maker to have actual knowledge of a specific condition or cause of a disability or that the individual as a matter of law satisfies the test under s.6 EqA 2010. The question is whether the alleged perpetrator has knowledge of the underlying facts which amount to the disability (ie., the presence of an impairment with a long-term and substantial adverse effect on the individual’s ability to carry out normal

day-to-day activities): **Urso v Department for Work & Pensions** [2017] IRLR 304 paras 52 – 60.

Harassment related to disability

120. S.26 EqA 2010 provides: (1) A person (A) harasses another (B) if— (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.
121. The same acts cannot amount to both harassment and 'a detriment' s.212(1) EqA. Accordingly, if the Tribunal upholds the Claimant's claims of direct discrimination it does not need to go on to consider whether any of the same conduct amounted to harassment (or vice versa).
122. 'Unwanted conduct' covers a wide range of conduct and essentially means the conduct was unwelcome or uninvited (see paras 7.7-7.8 of the Employment Code).
123. 'Related to' is a broad test, which requires an assessment of evidence in the round. The perpetrator's own knowledge or perception of the alleged victim's protected characteristic will be relevant, as will their view of whether or not the conduct related to the protected characteristic, but neither is conclusive (see **Hartley v Foreign and Commonwealth Office Service** UKEAT/0033/15/LA at paras 23-24).
124. An individual does not have to be disabled themselves in order to suffer from harassment 'related to' disability: the harassment could be related to disability if it is directed at someone because they are perceived to have a disability.
125. For treatment to be 'related to' disability, a claimant must establish that there is the necessary link between the disability and treatment (for example, **Private Medicine Intermediaries Limited v Miss C Hodkinson and ors** UKEAT/0134/15/LA at paras 36-38, in which the EAT overturned the ET's finding of harassment related to disability where the ET found that the treatment complained of was in the context of an illness suffered by the claimant, but had not found that the illness was related to her disability).
126. The concepts of violating an employee's dignity or creating an intimidating, etc., environment, convey a degree of seriousness, as per the guidance given by Elias LJ in **Land Registry v Grant** [2011] ICR 1390 at para 47: Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being

caught by the concept of harassment. The claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the tribunal did as subjecting the claimant to a “humiliating environment” when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.

Failure to make reasonable adjustments

127. S.20 EqA 2010 provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

128. Schedule 8, para 20 provides:

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

129. The term ‘provision, criterion or practice’ (‘PCP’) should be construed widely to include any informal policies, criteria, conditions or prerequisites (para 4.5 of the Employment Code).

130. S.212 EqA states that: “‘substantial’ means more than minor or trivial’. It is necessary for the Tribunal to identify the substantial disadvantage faced by a claimant (**Environment Agency v Rowan** [2008] ICR 218, EAT) as a result of any PCP. The proper comparator for the purposes of identifying if an employee is put to a substantial disadvantage in comparison with persons who are not disabled should be identified by reference to the specific disadvantage relied on (**Griffiths v Work and Pensions** [2017] ICR 160, CA at paras 20 and 21).

131. An employee must show on the balance of probabilities that they were in fact put to the substantial disadvantage relied on and the Tribunal must have regard to the overall picture, not just medical evidence. The focus of the Tribunal should be on the result of the adjustment or lack of

adjustment, not on the process followed by an employer (**Royal Bank of Scotland v Ashton** [2011] ICR 632, EAT at paras 20 – 24 and authorities cited therein).

132. In considering whether an adjustment was reasonable, the Tribunal must consider whether the adjustment contended for would or could have removed the disadvantage (**Romec Ltd v Rudham** [2007] 7 WLUK 408 at para 38), although it does not need to be guaranteed to be a success (**Griffiths** at para 29).

Discrimination arising from disability

133. S. 15 EqA 2010 provides:- (1) A person (A) discriminates against a disabled person (B) if— (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

134. In relation to causation, in **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** UKEAT/0397/14, EAT, Langstaff P held that there were two distinct steps to the test to be applied by tribunals in determining whether discrimination arising from disability has occurred:

- a. Did the claimant's disability cause, have the consequence of, or result in, "something"?
- b. Did the employer treat the claimant unfavourably because of that "something"?

135. As to the discriminators alleged motivations, Simler P in **Secretary of State for Justice and anor v Dunn** EAT 0234/16 said the following: '[Counsel for the claimant asserts] that motive is irrelevant. Moreover, he submits that the claimant did not have to prove the reason for the unfavourable treatment but simply that disability was a significant influence in the minds of the decision-makers. We agree with him that motive is irrelevant. Nonetheless, the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability... [I]t need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary'.

Conclusions

136. The Tribunal was faced with two conflicting accounts of the meeting, one of which was presented by the claimant who was cross examined, and the other by the respondent, primarily in Mr Arulampulan's written witness statement. Although the Tribunal's findings do not entirely

accord with either version of events and has found the following facts on the balance of probabilities.

137. The Tribunal finds that the claimant was asked to go into Mr Aralampulam's office with him. It is clear that the focus of the meeting at the outset was the two allegations as regards the claimant's conduct, namely the altercation and the resulting complaint from Matty and the allegation of theft evidenced, according to the respondent, by the August CCTV footage reviewed by Chandra. That focus was confirmed by both the claimant and the respondent. The claimant was informed of the allegations and of the fact that the allegations would be taken further, commencing with an investigation meeting.

138. The severity of these two allegations was apparent to the claimant, as, by his own evidence, his anxiety kicked in and he became red and panicky. Again, this was confirmed by Mr Aralamuplan's written statement which said that the claimant "seemed to panic. His face went red, and he started sweating."

CCTV footage

139. There is a significant conflict in evidence as regards the CCTV footage. The claimant says he was shown CCTV footage by Mr Arulampalam at the hearing, on Mr Arulampalam's mobile phone, whilst Mr Aralampulan says he never showed the claimant any CCTV footage during that meeting.

140. The Tribunal prefers the claimant's evidence in this regard on the basis that the claimant, in his grievance meeting, prior to which he would have had no further opportunity to review the CCTV footage, describes what he saw with sufficient detail to demonstrate to the Tribunal that he did see that footage during that meeting. For example, at the grievance hearing, he states that the first footage was too blurry and that the second was showing him eating something but not stealing or, indeed, taking anything. Having reviewed the footage itself, the Tribunal further finds that it would be natural for the claimant to ask, as he did, whether there was other footage available from other angles given the angles from which the CCTV footage was taken and the fact that there did not appear to be any evidence of the claimant actually taking anything.

141. Although Mr Galagma stated during cross examination that the CCTV footage he saw of the meeting between the claimant and Mr Aralampulam did not show any CCTV footage being seen or watched, the Tribunal could not place any weight on that evidence as Mr Galagma stated that the CCTV footage did not show the claimant writing a letter, even though the common position between the claimant and the respondent is that a letter was written at that meeting, albeit that the terms of that letter are disputed.

142. Further, the Tribunal finds it surprising that a meeting, which was ostensibly to invite the claimant to an investigation meeting, in advance of

which it would be important to explain to the claimant that nothing had been predetermined and that it would be at the investigation meeting that the respondent would hear the claimant's side of the story, would last as long as 30-45 minutes. The length of that meeting is another reason why the Tribunal finds, on the balance of probabilities, that the CCTV footage was shown.

143. The Tribunal finds that showing the CCTV footage at this meeting was inappropriate and would inevitably have caused the claimant anxiety and put him under significant pressure. It was also likely to make the claimant believe that the outcome of the investigation was predetermined.

144. The Tribunal also preferred the claimant's evidence and considered that Mr Aralampulam did make warnings of police involvement. Again, the Tribunal finds that this would have put the claimant under significant stress and pressure.

Letter of invitation to the investigation meeting

145. The letter of invitation to the investigation meeting stated on it that it was hand delivered and was unsigned. There was no evidence in the bundle or otherwise of any communication, such as an exchange of emails, between Mr Aralampulam or HR and Mr Patel (who was named as the investigator) to set up the meeting. There was no evidence of any involvement with HR to either inform them of the investigation or to liaise to find a suitable investigation manager. There was no evidence on the CCTV footage of the letter being given, according to Mr Galagma, who also confirmed that the letter would usually be prepared by the investigating manager, in this case, Mr Patel. The letter does not include the details of a notetaker. It is not clear whether a letter was actually given to the claimant. The claimant does not recollect being given such a letter. On the balance of probabilities, the majority of the Tribunal prefers the claimant's evidence, despite his generally poor recollection of documents, and finds that the letter was not given to the claimant for the reasons stated above.

The letter of resignation

146. Based on the resignation letter itself, and the balance of probabilities, the Tribunal finds that the claimant did write the letter of resignation and does not believe that that is a forged document. It appears, at least, to be in the claimant's handwriting, and the claimant, in his grievance, refers to having been "tricked" into resigning.

147. However, the Tribunal finds that, having been shown the CCTV footage and having been informed of the allegations against him, and having discussed a lifestyle break, the claimant would have been under pressure from Mr Arulampalam to resign. This was not just Mr Arulampalam telling the claimant he was going to have to attend an investigation meeting, but was more than that, in that Mr Arulampalam, improperly, showed the claimant the CCTV footage and mentioned criminal records and police involvement.

148. The Tribunal finds that Mr Arulampalam's conduct at that meeting was inappropriate and not fitting, which resulted in the claimant being under significant pressure to resign. It is not appropriate to rush anyone into a resignation without giving them chance to consider their decision. That is particularly the case where a person has learning difficulties and requires (albeit informally) support in the workplace. Even if Mr Arulampalam did not know specifically that the claimant had a disability, the Tribunal has found that he knew that the claimant required additional support given the help he received with paperwork. It would have been appropriate to ask the claimant to take some time to consider his decision and/or to speak to his union representative or his family before taking such a significant decision. Mr Galagma confirmed in his evidence that, in practice, when someone resigns, it would be usual to ask them if they wanted time to think about it or allow time to reflect on the decision before accepting it. As both parties agreed that the lifestyle break was discussed, Mr Arulampalam should have ensured that there was no confusion on the claimant's part and should have, when assisting the claimant to write the letter, or, on his own evidence, checked it over, ensured that the terms of the letter and the consequences were crystal clear to the claimant.
149. The Tribunal finds that Mr Aralampulam pressured the claimant to resign, motivated by avoiding the need for a disciplinary process. Mr Arulampalam hurried the claimant through the process without ensuring that the claimant fully understood what he was doing. Even on his own account, he immediately printed out and gave the claimant a letter of acknowledgement during the meeting, allowing no time for reflection or consideration.
150. The Tribunal considers it significant that the confirmation of resignation letter stated: "I would like to assure you that the current investigation/disciplinary process hasn't been predetermined, and I hope you have not resigned on the basis of this belief". The Tribunal considers that this wording indicates that it was clear to Mr Arulampalan that the claimant had felt forced into resigning.

After the alleged resignation

151. After that meeting, the claimant completed his shift of which approximately 30 minutes remained.
152. Mr Arulampalam processed the claimant as a leaver by contacting HR. Although his witness statement suggests that that notification took place immediately, in fact it was not done until 15th. There was no leaver's checklist or leaver's interview as per the respondent's policy.

Was the Claimant dismissed?

153. Although it is not uncommon for employees who are facing disciplinary proceedings to resign rather than suffer the ignominy of dismissal, the Tribunal is satisfied in this case that the resignation did not come about by the claimant's genuine choice, but was brought about by the additional pressure brought to bear on the claimant by Mr Arulampalam improperly showing him the CCTV footage and referring to police involvement and criminal records.

154. The Tribunal finds that there was no genuine consent to the termination on the part of the employee. He felt pressured into it by Mr Arulampalam's conduct at that informal meeting. The claimant wrote the resignation letter but was told what to write by Mr Aralampulam and the letter was checked by him. The claimant signed the letter but without the benefit of having been able to discuss it with a family member or representative. Immediately, Mr Arulampalam, on his own evidence, printed out an acknowledgment, despite Mr Galagma's confirmation that, when someone resigns, you would ask them if they wanted time to think about it, or allow time to reflect on the decision before accepting it. The Tribunal finds that although the claimant knew what he was doing (he said in evidence that he knew what a resignation was) he was put under significant pressure to resign by Mr Arulampalam.

155. For these reasons, the Tribunal finds that the claimant was dismissed by the respondent.

Unfair dismissal

156. No potentially fair reason for dismissal was put forward by the respondent and the claimant's dismissal is therefore unfair. Even if the dismissal was for a conduct reason, no process was followed, and the dismissal was unfair.

Polkey/Contribution

157. The respondent's fallback position is that, in light of the extant final written warning, the evidence of likely theft and the complaint about the claimant's conduct, even if the claimant had not resigned, dismissal after investigation would have been inevitable and/or the claimant is culpable for his dismissal.

158. As regards Polkey, the Tribunal does not consider that dismissal was a certainty, nor does it consider that the employer definitely would not have dismissed.

159. It does not consider that dismissal was a certainty as the video evidence did not show the claimant taking a bar and was not, in the Tribunal's opinion, conclusive by any means. Further, the Tribunal cannot say that the respondent definitely would not have dismissed. The claimant was already on a final written warning and there were two further allegations of misconduct which needed to be investigated and considered in light of the claimant's explanation.

160. Given those facts, the Tribunal concludes that the respondent could fairly have dismissed and must go on to consider what the chances were that the respondent would have done so.

161. The Tribunal concludes that there must have been some realistic chance that the employee would have been dismissed, on the basis that he was on a FWW and there were two further allegations of misconduct against him which were due to be investigated. The Tribunal has little information about the alleged altercation with Matty, other than Matty's email of complaint, and

has seen some video clips of the alleged theft which, it considers, inconclusive.

162. That said, there is no doubt about the genuine need for an investigation. The video clips and the altercation required some explanation. But it is possible that an explanation could have been forthcoming, and mitigating factors presented as regards the altercation. As such, the Tribunal considers that the percentage chance of a fair dismissal must be put at 50%: it considers it equally possible that a fair dismissal could have resulted from the disciplinary process as that an explanation could have been given by the claimant which did not result in a disciplinary sanction.
163. The Tribunal's power to reduce a basic and/or compensatory award on account can only be exercised in respect of conduct that is culpable or blameworthy.
164. The conduct which might give rise to a finding of contributory fault, and relied on by the respondent in that regard is the "likely theft" and complaint about the claimant's conduct. As stated above, whilst both matters required investigation, it is impossible to know what the outcome of that investigation would be. The Tribunal cannot find that the claimant's conduct was blameworthy: the video evidence was not conclusive and there is insufficient information about the altercation on which to form that view as there may have been provocation or mitigating circumstances raised by the claimant.
165. Whilst the Tribunal does consider that the claimant's conduct did cause or contribute to the dismissal, in that it was the basis on which Mr Arulampalam managed to persuade the claimant to resign, the Tribunal is satisfied that it would not be just and equitable to reduce either the basic or compensatory award for the reasons set out above.

Disability

Depression

166. The claimant has identified the impairment of depression.
167. The Tribunal accepts that the claimant was signed off from work in January 2022 for anxiety state. However, this was the only period of absence that the claimant had for a mental health condition during his nine years of employment.
168. The Tribunal finds that this period of anxiety was a reaction to an adverse life event, namely the abusive relationship between the claimant and his girlfriend at the time and the breakdown of that relationship. There is no evidence to suggest that this was symptomatic of a longer-term condition of depression.
169. The only evidence of mental health issues at other times was the claimant's evidence that he suffered from low mood and low self-esteem related to his gynecomastia and that this was a constant throughout his life. However, there was no evidence of these mood issues persisting after

diagnosis of KS: indeed, the medical evidence points to improved mood at this time.

170. There is also no evidence of any impact on the claimant's day to day activities at any time other than the two-week period in January 2022 when he was off work.
171. The only evidence of any medication given for depression was from May 2023, though the claimant said he thought he was prescribed citalopram from early 2022. The claimant's medical records did show his prescriptions and there was no evidence of medication for depression in 2022. May 2023 is after the material period for this claim, which is November 2022, being when the claimant's employment terminated.
172. The Tribunal finds that the claimant was not disabled within the meaning of the Equality Act 2010 by reason of depression. The claimant has not established that there was any significant impact on his day to day activities that was long term or recurring or likely to recur other than in reaction to adverse life events.

Klinefleter's Syndrome

173. The medical evidence is clear that the claimant has Klinefelter's Syndrome (KS).
174. As regards impairment, the claimant relies on learning difficulties as the significant adverse effect on his day to day activities, in circumstances in which it is clear from the medical evidence that the claimant does suffer from the condition.
175. It is clear that learning difficulties are the impairment relied upon from the nature of the allegations outlined in the list of issues, for example, in the discrimination arising from claim, the something arising is the claimant's difficulty reading and tendency to become confused, and in the reasonable adjustments claim, the disadvantage the claimant claims is him not getting additional support in reading documents and processing written information. Further, the claimant suggests that he should have been accompanied at meetings to assist in understanding. The respondent could be under no misapprehension that learning difficulties were what was being complained about, albeit having been put under the general title of KS.
176. However, there was no evidence before the Tribunal, other than the claimant's oral testimony, to link the claimant's learning difficulties to KS. It is not clear from the evidence or the medical information therefore that the claimant's mental impairment is part of KS. The only evidence given was a general information sheet about KS which indicates that people who have KS *may* have a mental impairment, as well as a letter from the claimant's GP which indicates that KS "has been associated with learning difficulties" but makes no specific observation as regards the claimant.
177. It is important to note that "disability" is not the same as "impairment". If a person has a physical or mental impairment, which has a substantial and long-term adverse effect on his ability to carry out normal day to day activities, then he has a disability. The statutory approach is a functional

one directed towards what a claimant cannot do at a practical level. The emphasis is on the effect of an impairment rather than its categorization or its cause.

178. It seems to the Tribunal therefore, that the question for it to resolve is whether the claimant was disabled because of his impairment, which can be broadly described as his learning difficulty. It is not necessary for us to conclude that that impairment was caused by KS. The crucial point is whether the claimant's learning difficulties, which are clearly what the claim is about, had a substantial and long-term effect on the claimant's day to day activities. The Tribunal is reluctant to be bound by labels. The Tribunal considers that the correct approach is for the Tribunal to take evidence of the claimant's health "in the round" looking at the effects and to determine whether it has a more than minor or trivial adverse effect on his ability to carry out normal day to day activities.
179. This is of course a consideration of disability which may be different to that advanced by the claimant: that he relies on KS. The respondent says that the claimant had confined his case on disability to KS as the sole relevant impairment.
180. However, the claim form refers to the claimant's "learning disability" and does not refer to KS, which is relied on for the first time at the case management hearing. Nonetheless, as stated above, it is clear that the claimant is relying on learning difficulties from the issues raised. The claimant then submitted an Amended Grounds of Claim in which he stated: "At all material times the Claimant had been diagnosed with KS. This is a chromosome disorder that comes with associated learning difficulties."
181. It is clear to the Tribunal therefore that there can be no disadvantage to the respondent in considering whether the claimant has learning difficulties, and whether those, in fact, amount to a disability within the meaning of the Equality Act 2010. We find therefore that it is not necessary to conclude whether the impairment of learning difficulties is caused by KS or by something else. The claimant has consistently taken the approach that he was relying on his learning difficulties, which he considered to be a symptom of KS.
182. Turning then, to the question of whether the claimant is disabled due to his learning difficulties, the Tribunal notes the documentation which showed that the claimant required some additional support during his education. This dates back to 2007. The claimant's impact statement explains that, when the claimant was six he was assessed by the educational psychologist and was found to have learning difficulties and lower than average IQ. He was also referred to a speech therapist. He continues: "The claimant has difficulty understanding verbal instructions particularly under pressure. The claimant has difficulty understanding social cues such as body language, little understanding of the nuance of behaviour, language and emotion. Everything is black and white to the claimant. The claimant has reduced IQ with difficulty in reading and writing...and has difficulty in organizing himself to attend social gatherings meetings or appointments."
183. The Tribunal finds that the claimant does have learning difficulties: it was apparent from his oral evidence that the claimant struggled to express

himself clearly; that he had difficulties with dates; and that his comprehension was basic. During his evidence he described himself as someone people would call “thick”. It was also apparent from his employment history, including the let's talks, that there were similar issues, and the Tribunal accepted the claimant's evidence that he had support at work for paperwork and training. He also was given slightly adjusted duties, as he did not handle cash for example. The let's talks – he can't change. This was supported by the fact that he required support for learning during his school years.

184. The Tribunal accepts that the claimant's learning difficulties have a significant impact on his day-to-day activities. He was unable to deal with paperwork, and his mother deals with it. He has difficulty recalling dates with any accuracy. He struggles with comprehension and communication.
185. However, here the claimant's claim relies on a number of symptoms which he says are attributable to KS, including learning difficulties. It is evident from the claim form and the list of issues that the claimant was relying on mental impairment: the issues talk about “misunderstanding”; “difficulty reading” and being confused”. It is not necessary to have a clear diagnosis of a mental impairment.
186. The Tribunal finds that the claimant is disabled within the meaning of the Equality Act 2010. He has a long-term mental impairment which has a significant impact on his day to day activities, namely under the category of memory or ability to concentrate, learn or understand. The claimant has cognitive difficulties and has difficulties understanding spoken and written information.

Knowledge

187. The claimant admitted that he never explicitly sat down and told the respondent that he had KS or learning difficulties. But the Tribunal accepts the claimant's position that the signs of learning difficulty were obvious.
188. The Tribunal further accepts the claimant's evidence that the claimant had support in the workplace in that Mr Arulampalam helped him with paperwork; he couldn't work with cash and was therefore not expected to; and could not be a shift lead. These unofficial adjustments were put into place because it was accepted and understood, though never expressly stated, that the claimant had some learning difficulties.
189. Mr Arulampalam also allowed the claimant significant leniency as regards lateness. Again, the Tribunal finds that this was because Mr Arulampalam knew the claimant had difficulties and that this was not simply a case of the claimant now being bothered to turn up to work on time.
190. Significantly, the Let's Talk on 6 July 2021 indicates that the claimant “can't be changed” which indicates an understanding of the claimant's difficulties. That Let's Talks indicates a number of issues, including that the claimant doesn't use common sense; doesn't pay attention; and has difficulty working with colleagues. If the respondent did not understand that the claimant had learning difficulties it is likely that it would have instigated the capability procedure in respect of such matters

191. Accordingly, the Tribunal concludes that the respondent, and Mr Arulampalam in particular, had constructive knowledge of the facts constituting the disability, namely of the learning difficulties which were the mental impairment, and that the impairment has a substantial and long-term adverse effect on the employee's ability to carry out normal day-to-day activities, and accordingly that the claimant was disabled
192. The Tribunal finds that Mr Arulampalam knew of an impairment, namely the claimant's learning difficulties, even if he didn't know of the diagnosis. He had knowledge that that impairment has a substantial effect on ordinary day to day activities; and knowledge of the facts that establish the long-term condition. If he did not know, then he ought to have known. There were sufficient signs for Mr Arulapalam to have needed to make further enquiries.
193. The Tribunal finds that the respondent, namely Mr Arulampalam had the requisite knowledge at the material dates.

Direct discrimination

Failure to follow disciplinary procedures

194. The Tribunal has found that the respondent, namely Mr Arulampulam, did fail to follow its disciplinary procedures by pulling the claimant into an office without offering him representation and showing him CCTV footage from his mobile phone. He went too far, in what was supposed to be an informal meeting to invite the claimant to an investigation meeting.
195. The Tribunal does not consider that this treatment is inherently discriminatory. However, the Tribunal concludes that the claimant's disability was the reason, consciously or subconsciously, for the claimant's treatment. The Tribunal considers that the claimant's disability was the effective cause of the claimant's treatment by Mr Arulampalam.
196. In reaching this conclusion, the Tribunal has borne in mind that, in the context of direct disability discrimination, it is not necessary for Mr Arulampalam to have actual knowledge of KS. The question is whether Mr Arulampalam had knowledge of the underlying facts which amount to the disability (ie., the presence of an impairment with a long-term and substantial adverse effect on the individual's ability to carry out normal day-to-day activities). The Tribunal is satisfied that Mr Arulampalam did have that knowledge because of the adjustments the Tribunal found were made by him for the claimant, as set out above.
197. The Tribunal is satisfied that this was less favourable treatment, and that the claimant was treated worse than someone else would have been treated who did not have the claimant's disability. The Tribunal is satisfied that a hypothetical comparator without the claimant's disability would be treated according to the disciplinary policy and invited to an investigation meeting in an informal meeting, but without a conversation which led the claimant into a resignation by including reference to police and criminal records.
198. The Tribunal finds that the reason for Mr Arulampalam's treatment of the claimant was the claimant's disability. The Tribunal finds that Mr

Arulampalam thought he could “get away with it” because of the claimant’s disabilities or may even have thought that he was doing the claimant a favour in pushing him to resign to avoid the disciplinary process, because of the nature of his disability.

199. As this allegation is made out, it is not considered under “harassment” below.

Failure to follow absence procedures

200. Mr Arulampalam did fail to follow the respondent’s absence procedures by accepting the claimant’s reported sickness absence on 12 November 2022 and then failing to record it. This relates to the telephone call between the claimant and Mr Arulampalam on 12 November in which Mr Arulampalam, the Tribunal finds, based on the video evidence of the claimant, accepted the claimant’s sickness absence. The claimant says it should not have been accepted because the claimant had resigned and, further, that the sickness was not recorded. The Tribunal finds that Mr Arulampalam’s acceptance of the claimant’s sickness absence, and his failure to report it, was a failure to follow the absence procedures.

201. However, the Tribunal is not satisfied that the claimant was treated less favourably than a hypothetical comparator without the claimant’s disability. It is likely, on the balance of probabilities, that, as Mr Arulampalam had not processed the resignation at this stage, and as the letter asked for it to be authorized the following week, he did not think to challenge the claimant.

202. The Tribunal finds that, if a person without the claimant’s disability had resigned with immediate effect, but the resignation letter asked for the resignation to be processed the following week, it is likely that Mr Arulampalam would not have recorded an absence, in the knowledge that that employment had terminated.

203. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude that the employer has committed an act of discrimination, in the absence of an adequate explanation. The claimant has failed to do so in respect of this allegation.

204. On any event, the Tribunal finds that the reason for the treatment was that the claimant had resigned and would not be returning to work, so it would not be necessary to record his absence.

Failure to follow resignation procedures

205. The Tribunal finds that the respondent, through Mr Arulampalam, did not fail to follow its resignation procedures by accepting a resignation letter from the claimant which was obtained through deception. The Tribunal finds, as set out above, that the resignation letter was not obtained by deception, rather that the claimant was not given a genuine choice about it.

206. It was the claimant’s claim that Mr Arulampalam had forged the letter of resignation. The Tribunal did not find that that was the case, instead finding that, although there was no genuine consent to the termination, the claimant wrote the resignation letter, albeit that he was told what to write by Mr

Aralampulam and the content was checked by him. Although the Tribunal has found that the claimant was confused about what he was writing and the context of it and did not have the benefit of a family member or representative to discuss the situation with, the Tribunal does not conclude that the resignation letter was obtained by deception, in that it was not a forged document and was written by the claimant. The claimant did know what he was doing but was put under pressure to resign. Therefore, this allegation is not made out.

Discrimination arising from a Disability

207. The Tribunal finds that the respondent did not get the claimant to provide a dictated/signed document in the knowledge that he misunderstood or belief that he may misunderstand the nature of the document. For reasons stated above, the Tribunal is satisfied that the claimant did know what he was doing and understood what he was doing but was put under too much pressure to resign. For this reason, the allegation, as set out in the list of issues, is not made out.

Harassment

208. As stated above in the context of the direct discrimination claim, Mr Arulampalam did fail to follow the respondent's absence procedures by accepting the Claimant's reported sickness absence on 12 November 2022 and then failing to record it. This relates to the telephone call between the claimant and Mr Arulampalam on 12 November in which Mr Arulampalam, the Tribunal finds, based on the video evidence of the claimant, accepted the claimant's sickness absence. The claimant says it should not have been accepted because the claimant had resigned and, further, that the sickness was not recorded. The Tribunal finds that Mr Arulampalam's acceptance of the claimant's sickness absence, and his failure to report it was a failure to follow the absence procedures.

209. The Tribunal has also found that, if a person without the claimant's disability had resigned with immediate effect, but the resignation letter asked for the resignation to be processed the following week, it is likely that Mr Arulampalam would not have recorded an absence, in the knowledge that that employment had terminated. The Tribunal finds that Mr Arulampalam's failure to follow the absence procedures was not related to the claimant's disability. The claimant has not established the necessary link between the disability and the treatment. The claimant could not have known until later that his absence as not recorded and again the Tribunal is not persuaded that when the claimant did hear that his absence had not been recorded, that it had the effect of violating the claimant's dignity or creating an intimidating etc environment. It simply was not serious enough to satisfy that definition.

Failure to follow resignation procedures

210. This allegation is not made out as set out above.

Failure to make reasonable adjustments

211. The Tribunal accepts that the respondent had the PCP of holding informal meetings without accompaniment.

212. Informal meetings are not meetings at which decisions are made. They are informal because they will not result in a disciplinary sanction being imposed. The Tribunal does not therefore accept that that PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability. The claimant had attended numerous informal meetings without accompaniment, including in respect of the Let's Talks and had never considered that he was at a substantial disadvantage in comparison to others without his disability. As informal meetings do not lead to sanctions being imposed, the claimant could not be at a substantial disadvantage in relation to those meetings by not being accompanied, in comparison to a person without the claimant's disability.

213. In this case, the Tribunal considers that what caused the disadvantage for the claimant was not the fact that the respondent had the PCP of holding informal meetings without accompaniment, but the fact that Mr Arulampalam went beyond the remit for an informal meeting to invite the claimant to an investigation hearing. Accordingly, it is not the PCP of holding informal meetings without accompaniment which put the claimant at a significant disadvantage.

214. Accordingly, this allegation is not upheld.

Remedy

215. A remedy hearing will be scheduled and case management orders made in relation to that hearing.

Employment Judge Rice-Birchall

Date: 13 December 2024

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