Case Number:- 3301401/2021;
3311036/2022;
3306954/2023.

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Andrej Ziga	**v**	Anglian Windows Limited

Heard at: Norwich

On: 13, 14, 15, 20 & 21 May 2024.

In chambers 19 and 22 July 2024.

Before: Employment Judge M Warren

Members: Ms J Buck and Mr A Chin-Shaw

Appearances
For the Claimant: In person
For the Respondent: Mr Ashley, Counsel

RESERVED JUDGMENT

1. The Claimant's complaint of the Respondent's failure to make reasonable adjustments succeeds.

2. The Claimant's complaints of disability related discrimination, direct disability discrimination, of victimisation and of unfair dismissal, all fail and are dismissed.

3. The remedy to which the Claimant is entitled will be determined at a Remedy Hearing at the Norwich Employment Tribunal on Friday **6 December 2024.**

REASONS

Summary

1. Mr Ziga's complaint of the Respondent's failure to make reasonable adjustments succeeds in so far only as it relates to a period of 4 shifts on 1

to 4 December 2020. Subject to hearing evidence and submissions on remedy, it is likely that the compensation the Tribunal will award Mr Ziga in this respect will be modest.

2. In all other respects, Mr Ziga's complaint of failure to make reasonable adjustments and all of his other claims, have failed.

3. If any further case management orders are necessary, the parties should write to the tribunal by email explaining what they consider to be required. The email subject matter should contain the case numbers and capitalised as for the attention of Employment Judge M Warren.

Background

4. Mr Ziga was employed by the Respondent as a Line Operative from 17 February 2014 to 20 April 2023. The Respondent says that it dismissed him for Gross Misconduct. There are 3 claims, which have been consolidated:

   4.1. 3301401/2021 filed on 23 February 2021 after early conciliation on 25 January 2021;

   4.2. 3311036/2022 filed on 26 August 2022 after early conciliation between 25 July and 23 August 2022, (29 days), and

   4.3. 3306954/2023 filed on 13 June 2023 after early conciliation between 26 May and 8 June 2023, (14 days).

5. The case was listed for hearing over 7 days, 13 to 17, 20 & 21 May 2027. Unfortunately, 16 and 17 May 2024 were judicial training days and had to be vacated. The Tribunal convened in chambers to reach this decision on 19 and 22 July 2024.

Evidence

6. We had before us witness statements for Mr Ziga as follows:

   6.1. From Mr Ziga consisting of 5 paragraphs dated 23 February 2023;

   6.2. From Mr Ziga consisting of 9 un-numbered paragraphs dated 23 February 2023;

   6.3. From Mr Ziga consisting of 5 paragraphs dated 12 March 2024;

   6.4. From Mr Ziga consisting of un-numbered paragraphs dated 17 March 2024

   6.5. From James Thompson consisting of 8 paragraphs dated 19 February 2023

6.6. From James Thompson consisting of 3 paragraphs dated 17 March 2024

6.7. From Andrew Willrich dated 9 May 2022, and

6.8. From Steven Clare dated 25 November 2021.

7. For the Respondent, we had witness statements from:

7.1. Kerry Parker, HR Advisor;

7.2. Alison Bulto-Dowd, Head of Continuous Improvement;

7.3. Mark Cook, Night Shift Area Manager;

7.4. Paul Jackson, Head of Production Control and Logistics;

7.5. Sheila Nelis, Unit Manager;

7.6. Shaun Ream, Shop Floor Area Manager;

7.7. Rasa Duzinskiene, HR Advisor;

7.8. Paul Kellet , Head of Quality & Technical, and

7.9. Wayne Nicholls, Group Manufacturing and EHS Director.

8. We had before us a bundle in 2 lever arch files, properly indexed and paginated, running to page number 601.

9. We also had a bundle containing medical information which was numbered from pages 504 to 852.

10. We had a chronology provided by the Respondent.

11. During a break for most of Day One, we read the witness statements and either looked at or read in our discretion, the documents referred to in the witness statements. We explained that we do not read the whole bundle and we did not read all of the documents referred to, it was up to to the parties to make sure they referred us to what they consider the important passages in the documents during evidence.

The Issues

Disability

The Claimant relies on the conditions of (1) depression and anxiety, (2) psoriasis, (3) hypertension, (4) psoriatic arthritis, (5) vitiligo and (6) spondylitis.

1. Was the Claimant a disabled person within the meaning of s.6 Equality Act 2010? Specifically: 1.1 Did the Claimant suffer from a physical or mental impairment?
1.2 If so, what was the nature of that impairment?
1.3 If so, did the impairment have an adverse effect on the Claimant's ability to carry out normal day to day activities?
1.4 If so, was the adverse effect a substantial one i.e. one which was more than minor or trivial?
1.5 If so, was the substantial adverse effect 'long-term' within the meaning of Schedule 2 paragraph 2(1) of the 2010 Act?
1.6 If so, during what period was the Claimant disabled?

2. Did the Respondent know, or ought the Respondent to have known, of the facts that led to the Claimant being a disabled person?

3. If so, on what date did the Respondent acquire actual or constructive knowledge of the facts constituting the Claimant's disability?

Failure to make reasonable adjustments

4. Did the Respondent have a provision, criterion or practice of requiring all employees to work for 12-hour shifts?

5. If so, did this PCP place the Claimant at a substantial disadvantage compared to persons who are not disabled?

6. If so, what was the nature and extent of the substantial disadvantage suffered by the Claimant?

7. If so, did the Respondent know, or ought it to have known, both that the Claimant was disabled and that his disability was liable to affect him in this manner?

8. If so, would it have been reasonable for the Respondent to permit the Claimant to remain working a 10-hour shift to avoid the disadvantage?

Discrimination arising from disability

9. Did the Respondent treat the Claimant unfavourably by requiring him to work 12-hour shifts?

10. If so, what was the reason for the Respondent treating the Claimant in this way?

11. Did the Respondent's reason arise in consequence of the Claimant's disability?

12. If so, did the Respondent know, or ought it to have known, that the Claimant was disabled?

13. If so, was the unfavourable treatment a reasonably necessary and proportionate means of achieving a legitimate aim?

A: Direct Discrimination

Did the Respondent do the following things:

2.1.1 On 28 April 2022, Mr Shaun Ream dealing with the Claimant unfairly, screaming at the Claimant 'Get in there' multiple times, pointing his finger and shouting at the Claimant (as set out in the ET1 box 8.2);
2.1.2 The Respondent not dealing with the grievance the Claimant raised in respect of the incident with Mr Ream on 28 April 2022 in accordance with its normal policy.
2.1.3 The Respondent initiating disciplinary proceedings against the Claimant after 28 April 2022.

2.2 Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who s/he says was treated better than he was.

2.3 If so, was it because of disability?

Victimisation

14. Did the Claimant by the raising of his grievance dated 29th November 2020, in good faith do a protected act within the meaning of s.27 of the 2010 Act?

15. If so, did the Respondent subject the Claimant to a detriment by:
a. unreasonably delaying in the consideration of his grievance; and
b. unreasonably rejecting his grievance.

16. If so, did the Respondent subject the Claimant to a detriment because he had done the protected act (or because the Respondent believed that the Claimant had done or may do the protected act)?

A16.1 Did the Claimant by the issuing of Claim 1, in good faith do a protected act within the meaning of s.27 of the 2010 Act?

A16.2 If so, did the Respondent subject the Claimant to a detriment because he had done the protected act?

The Claimant relies upon the things alleged at issue A2.1.1 – 2.1.3

Time limits (discrimination claims)

17. Was the Claimant's claim presented within time having regard to the requirements of s.123 of the 2010 Act?

18. If not, would it be just and equitable for the Tribunal to extend the time limits? The Tribunal will decide:
18.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
18.2 If not, was there conduct extending over a period?
18.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
18.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? 18.4.1 Why were the complaints not made to the Tribunal in time?
18.4.2 In any event, is it just and equitable in all the circumstances to extend time?

Remedy for discrimination or victimisation

19. What financial losses has the discrimination caused the Claimant?

20. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

21. If not, for what period of loss should the Claimant be compensated?

22. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

23. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

24. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

25. Did the Respondent or the Claimant unreasonably fail to comply with it?

26. If so is it just and equitable to increase or decrease any award payable to the Claimant?

27. By what proportion, up to 25%?

28. Should interest be awarded? How much?

Unfair Dismissal

29. What was the reason or principal reason for the Claimant's dismissal? The Respondent relies upon a reason relating to the Claimant's conduct.

30. Did the Respondent act reasonably or unreasonably in treating the Claimant's conduct as a sufficient reason for dismissing him? The Tribunal will usually decide, in particular, whether:
30.1 there were reasonable grounds for that belief;

30.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;
30.3 the Respondent otherwise acted in a procedurally fair manner;
30.4 dismissal was within the range of reasonable responses.

The Claimant will say that the Respondent failed to comply with its own disciplinary procedure and/or the ACAS Code of Practice 1: Disciplinary and Grievance Procedures and that these failures rendered the process unfair.

31. Would the Claimant have been dismissed by the Respondent even if a fair procedure had been followed?

32. Did the Claimant contribute to his dismissal?

Remedy for unfair dismissal

33. If there is a compensatory award, how much should it be? The Tribunal will decide:
33.1 What financial losses has the dismissal caused the Claimant?
33.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
33.3 If not, for what period of loss should the Claimant be compensated?
33.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
33.5 If so, should the Claimant's compensation be reduced? By how much?
33.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
33.7 Did the Respondent or the Claimant unreasonably fail to comply with it?
33.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
33.9 If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
33.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

34. What basic award is payable to the Claimant, if any?

35. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

The Law

Disability Discrimination

12. Disability is a protected characteristic pursuant to s.4 of the Equality Act 2010.

13. Section 39(2)(c) and (d) proscribes discrimination by an employer by either dismissing an employee or subjecting him to any other detriment.

14. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

15. Section 39(5) imposes a duty on an employer to make reasonable adjustments.

Definition of Disability

16. For the purposes of the Equality Act 2010 a person is said, at section 6, to have a disability if they meet the following definition:

"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.

17. The burden of proof lies with the Claimant to prove that he is a disabled person in accordance with that definition.

18. The expression 'substantial' is defined at Section 212 as, *'more than minor or trivial'*.

19. Further assistance is provided at Schedule 1, which explains at paragraph 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 least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

(2) 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".

20. As to the effect of medical treatment, paragraph 5 provides:

"(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 …"

21. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled, 'Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability'. Although I acknowledge that the guidance is not to be taken too literally and used as a check list, (Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19) much of what is there is reflected in the authorities, (or vice versa).

22. As to the meaning of 'substantial adverse effects', paragraph B1 assists as follows:

"The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect".

23. Paragraph C2 explains that the cumulative effect of related impairments should be taken into account in deciding whether an effect is long term. If there are 2 different impairments which have lasted less than 12 months, one has to consider whether the second has developed from the first, see Patel v Oldham Metropolitan Borough Council & Others [2010] ICR 603 EAT.

24. In Goodwin v Patent Office [1999] ICR 302 the EAT identified that there were four questions to ask in determining whether a person was disabled:

1. Did the Claimant have a mental and/or physical impairment?
2. Did the impairment effect the Claimant's ability to carry out normal day-to-day activities?
3. Was the adverse condition substantial? and
4. Was the adverse condition long term?

Knowledge of Disability

25. In respect of disability related discrimination, section 15(2) provides:

(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.

In respect of reasonable adjustments, paragraph 20 at Part 3 of Schedule 8 to the Act 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.

26. The question of knowledge in relation to reasonable adjustments was considered by the court of Appeal in Gallop v Newport City Council [2013] EWCA Civ 1583. Lord Justice Rimer said at paragraph 36:

Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts *constituting the employee's disability as identified in s 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Sch 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a "disabled person" as defined in s 1(2). I agree with counsel that this is the correct legal position.*

27. The employer will only be liable if it knew or ought to have known that the Claimant was disabled and that he was likely to be affected in the manner alleged, see Schedule 8 paragraph 20 and Wilcox v Birmingham CAB Services Ltd EAT 0293/10 where Mr Justice Underhill said of the equivalent provision in the Disability Discrimination Act 1995 that an employer will not be liable for a failure to make reasonable adjustments unless it has actual or constructive knowledge both that the employee was disabled and that he or she was disadvantaged by the disability.

Burden of Proof

28. Section136 reads as follows:

"(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."

Reasonable Adjustments

29. Section 20 defines the duty to make reasonable adjustments, which comprises three possible requirements, the first of which might apply in this case set out at subsection (3) as follows:-

"(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"

30. Section 21 provides that a failure to comply with such requirements is a failure to make a reasonable adjustment, which amounts to discrimination.

31. There are five steps to establishing a failure to make reasonable adjustments (as identified in the pre-Equality Act 2010 cases of Environment Agency v Rowan [2008] IRLR 20 and HM Prison Service v Johnson [2007] IRLR 951). The Tribunal must identify:

31.1. The relevant provision criterion or practice applied by or on behalf of the employer;

31.2. The identity of non-disabled comparators, (where appropriate);

31.3. The nature and extent of the substantial disadvantage suffered by the disabled employee;

31.4. The steps the employer is said to have failed to take, and

31.5. Whether it was reasonable to take that step.

32. It is important for the claimant to identify the PCP relied upon and for the Tribunal to makes its decision on the PCP advanced by the claimant, see Secretary of State for Justice v Prospere UKEAT/0412/14.

33. Claimants are not required to prove that they were disadvantaged, it is not a test of causation, it is a comparative exercise to test whether the PCP has the effect of disadvantaging the disabled Claimant more than trivially in comparison with others who are not disabled, see Sheikholeslami v University of Edinburgh 2018 IRLR 1090.

34. The obligation to make reasonable adjustments is on the employer. That means that it must consider for itself what adjustments can be made, thus for example in Cosgrove v Caesar and Howie [2001] IRLR 653 the duty

was not discharged simply because the Claimant and her GP had not come up with what adjustments could be made. An employer that does not make enquiries as to what might be done to ameliorate the disabled persons disadvantage, runs the risk that it fails to make a reasonable adjustment. That is not the same as saying that there is an obligation to consult, just that the failure to do so, or to inform oneself of the relevant facts and reflect on them, runs the risk of placing oneself in the position where a breach of the obligation to make reasonable adjustment occurs, out of ignorance, (see Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664).

35. The duty is to make "reasonable" adjustments, to take such steps as it is reasonable for the employer to take to avoid the disadvantage. The test is objective. Our focus should be not on the process followed by the employer to reach its decision but on practical outcomes and whether there is an adjustment that should be considered reasonable. It is for the tribunal to determine, objectively, what is reasonable. It is not a matter of what the employer reasonably believed.

36. The employer's reasoning or other processes that lead to the failure to make reasonable adjustments are irrelevant, the duty to make reasonable adjustments is about outcome, not process, see Owen v Amec Foster Wheeler Energy Ltd 2019 ICR 1593, CA. 80.

37. The EHRC Code at paragraph 6.28 sets out examples of matters we might take into account in evaluating whether proposed steps are reasonable as follows:

The effectiveness in preventing the substantial disadvantage;

Its practicability;

The financial and other costs and the extent of any disruptions that may be caused;

The employer's financial or other resources;

The availability of financial or other assistance, (eg through Access to Work), and

The type and size of the employer.

38. The effectiveness of a proposed adjustment is one of the factors to be evaluated by the tribunal; it is sufficient for the Claimant to raise the issue for there to be a chance that the step would avoid the disadvantage: South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley (UKEAT/0341/15/DM) at [17]-[18].

39. The more practical an adjustment is to implement, the more likely it is to be reasonable. A step that is recommended or contemplated in an employer's own policies is likely to be practical. An adjustment which is recommended in an employer's own policy is one that is likely, at least as a starting point, to be a reasonable adjustment to make: see Linsley v Commissioners for Her Majesty's Revenue and Customs (UKEAT/0150/18/JOJ) (7 December 2018) at [24]. One should expect a good reason for departing from such a policy; ignorance by the relevant managers is not a good reason: see Linsley at [24]-[25].

40. The resources, financial and otherwise, available to the employer are relevant as is its size. For example redeployment is more likely to be reasonable for a large employer.

41. The effect of an adjustment on others is relevant. But one should not forget that employers are under a statutory obligation to take positive action.

42. On the question of comparators, the Code states at 6.16 that the purpose of comparison with people who are not disabled is to establish whether it is a PCP, physical feature or lack of auxiliary aid that places the disabled person at a disadvantage and therefore there is no need to identify a comparator whose circumstances are the same as the Claimants, (in contrast to such a requirement in claims of direct and indirect discrimination). Simler P observed in Sheikholeslami v University of Edinburgh [2018] IRLR 1090 at [48]-[49] that it is a question of whether the PCP bites harder on the Claimant, she said:

"Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

43. Rentokil Initial UK Limited [2024] EAT 37 assists with the burden of proof. Section 136 requires that the claimant prove that the PCP was applied, and that it placed them at a disadvantage. They should also put forward and identify some potentially or apparently reasonable adjustment. If they do that, the burden of proof then shifts to the respondent that it would not have been reasonable to expect them to have made the adjustment, (paragraph 43 of Rentokil).

Direct Discrimination

44. Direct discrimination is defined at s.13 as follows:

(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…

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

45. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the Claimant, but not having his/her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The Claimant must show that he/she has been treated less favourably than that real or hypothetical comparator.

46. In a case of direct disability discrimination, the comparator would be a person in the same circumstances as the claimant, but who is not disabled as defined in the Equality Act 2010, see London Borough of Lewisham v Malcolm [2008] UKHL 43.

47. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).

48. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

49. The treatment of non-identical comparators in similar situations can also assist in constructing a picture of how a hypothetical comparator would have been treated: Chief Constable of West Yorkshire v Vento (No. 1) (EAT/52/00) (8 June 2000) at [7].

Disability Related Discrimination

50. Disability Related discrimination is defined at s.15 as follows:

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

51. Determining whether treatment is unfavourable does not require any element of comparison, as is required in deciding whether treatment is less favourable for the purposes of direct discrimination. There is a relatively low threshold of disadvantage for treatment to be regarded as unfavourable. It entails perhaps placing a hurdle in front of someone, creating a particular difficulty or disadvantaging for a person, see Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] UKSC.

52. The difference between Direct Discrimination on the grounds of disability and Disability Related Discrimination is often neatly explained in these terms: direct discrimination is by reason of the fact of the disability, whereas disability related discrimination is because of the effect of the disability.

53. As for the difference between making a reasonable adjustment and disability related discrimination, in General Dynamics v Carranza UKEAT 0107/14/1010 HHJ Richardson explained that reasonable adjustments are about preventing disadvantage, disability related discrimination is about making allowances for that persons disability.

54. There are 2 separate causative steps: firstly, the disability has the consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular something, (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN)

55. There is no requirement that the employer was aware that the disability caused the particular something, City of York Council v Grosset [2018] EWCA Civ 1105 although, as the Court of Appeal observed in that case, if the employer knows of the disability, it would be, “wise to look into the matter more carefully before taking the unfavourable treatment”.

56. Simler P, (as she then was) reviewed the authorities and gave helpful guidance on the correct approach to s15 in Pnaiser v NHS England [2016] IRLR 170 which may be summarised as follows:

56.1. The tribunal should first identify whether the claimant was treated unfavourably and if so, by whom.

56.2. Secondly, the tribunal should determine what caused the treatment, focussing on the reason, (not motive) in the mind of the alleged discriminator, possibly requiring consideration of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive is irrelevant. There may be more than one cause of the treatment, the "something" need not be the main or sole reason, but it must have a significant, (more than trivial) influence and amount to an effective cause of the unfavourable treatment.

56.3. Thirdly, the tribunal must then determine whether the reason for the unfavourable treatment arose because of the claimant's disability. There could be a range of, more than one, causal links. However, the more links there are, the harder it may be to establish the required connection. The question of causation is an objective test and does not entail consideration of the thought processes of the alleged discriminator. There is no requirement that the respondent know of the causal link between the disability and the, "something arising".

57. If there has been such treatment, we should then go on to ask, as set out at s.15(1)(b), whether the unfavourable treatment can be justified. This requires us to determine:

57.1. Whether there was a legitimate aim, unrelated to discrimination;

57.2. Whether the treatment was capable of achieving that aim, and

57.3. Whether the treatment was a proportionate means of achieving that aim, having regard to the relevant facts and taking into account the possibility of other means of achieving that aim.

58. Applying s136 on the burden of proof to section 15 means that the claimant will have to show:

58.1. That he was disabled at the relevant time;

58.2. That he had been subjected to unfavourable treatment;

58.3. A link between the unfavourable treatment and the, "something", and

58.4. Evidence from which the tribunal could properly conclude that the, "something" was an effective cause of the unfavourable treatment.

59. It the claimant proves facts from which the tribunal could conclude that there was section 15 discrimination in this way, the burden of proof shifts to the respondent to prove a non-discriminatory explanation, or justification.

Victimisation

60. Section 27 defines victimisation as follows:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

…

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

61. Whether a particular act amounts to detriment should be judged primarily from the perspective of the alleged victim.

62. To be an act of victimisation, the act complained of must be, "because of" the protected act or the employer's belief. See the references to Nagarajan v London Regional Transport [1999]ICR 877) above.

Time

63. Section 123 of the Equality Act requires that claims of discrimination must normally be made within 3 months of the act complained of, or such further

period as the Tribunal considers just and equitable. Where an act continues over a period of time, time runs from the end of that period, from the last act.

64. A failure to make a reasonable adjustment is not an act, or a continuing act, but a failure to act, an omission. In the case of Kingston Upon Hull City Council v Matuszowicz [2009] ICR 1170 it was explained that in the context of reasonable adjustments, time runs from either when the omission was decided upon, or if there is no evidence of a deliberate decision, when the decision to make the adjustment might reasonably have been expected to have been made.

65. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 the Court of Appeal further explained that whilst the duty to make reasonable adjustments arose as soon as the employer was able to take steps to avoid the disadvantage, the assessment of when the employer might reasonably be expected to comply, ought to be assessed from the claimant's point of view, having regard to the facts known or that ought reasonably to have been known by the claimant.

Unfair Dismissal.

66. Section 94 of the Employment Rights Act 1996 contains the right not to be unfairly dismissed. Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal, one of which at subsection (2)(b) is the conduct of the employee. Section 98(4) then sets out the test of fairness to be applied if the employer is able to show that the reason for dismissal was one of those potentially fair reasons. The test of fairness reads:

> "*Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)*
>
> *(a) depends on whether in the circumstances including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

67. We have guidance from the appeal courts on how to apply that test where the grounds for dismissal relied upon by the employer is misconduct. The first is the test set out in the case of British Home Stores v Burchell [1980] ICR 303. The Tribunal must be satisfied that the employer holds a genuine belief, based upon reasonable grounds and reached after a reasonable investigation. It is for the employer to show the genuine belief, the burden

of proof in respect of the reasonable grounds and the investigation is neutral.

68. If the employer is able to satisfy that test, the Employment Tribunal must go on to apply the test set out in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. The function of the Tribunal is to determine whether in the particular circumstances a decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If a dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

69. The band of reasonable responses test also applies to the question of whether or not the employer's investigation into the alleged misconduct was reasonable in all the circumstances. See Sainsbury v Hitt [2003] IRLR 23.

70. We should look at the overall fairness of the process together with the reason for dismissal. It might well be that despite some procedural imperfections, the employer acted reasonably in treating the misconduct as sufficient reason for dismissal. We should not be distracted by questions such as whether an appeal is a rehearing or a review, see Taylor v OCS [2006] IRLR 613.

71. In this case, the Respondents say that Mr Ziga was guilty of gross misconduct justifying dismissal without warning. The test for gross misconduct, or repudiation, is that the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in its employment, see Neary v Dean of Westminster Special Commissions [1999] IRLR 288.

72. Section 207(2) of the Trade Union & Labour Relations Act 1992 provides that any Code of Practice produced by ACAS under that Act which appears to an Employment Tribunal to be relevant shall be admissible in evidence and shall be taken into account. One such code of practice is the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015), to which we have had regard in reaching our decision.

Findings of Fact

73. The Respondent manufactures, supplies and installs home improvement products.

74. The Respondent's Grievance Policy starts at page 83. It sets a time frame of 5 days for each step; for arranging an initial meeting, informing of an outcome, within which an appeal should be heard for when an appeal outcome should be provided. In each instance, the policy states that the

relevant step should, "normally" be taken within 5 days. Section 3 of the policy states that time limits may be varied, "as appropriate".

75. The Claimant's employment as a Factory Operative began on 10 February 2014. He was employed to work on the Respondent's Manufacturing Night Shift, known as the 'Back Shift', from 4.30pm to 5am.

76. On 15 February 2019, Mr Ziga was issued with a written warning of 12 months duration for being unco-operative and refusing a reasonable management request, his behaviour during the Disciplinary Hearing having been described as animated, insulting, unwarranted and unacceptable. The warning was down graded to a verbal warning on appeal on 10 April 2019. See documents at pages 139 and 149.

77. On 31 May 2019, Mr Ziga was certified as not fit for work until 16 June 2019 by reason of mixed anxiety and depressive disorder, (Page 167). That was followed by a series of fit notes recommending an implemented phased return to work starting on a 6 hour shift, rising gradually to a 10 hour shift from 16 July 2019, (page 173). He continued thereafter to work 10 hour shifts until the events of November 2020.

78. On 1 August 2019, the Respondent's occupational health advisors, UNITY, reported in relation to Mr Ziga that he had told them he had several physical long term medical problems affecting his blood sugars, skin and bowels, currently stable on medication and that he had recently been off work for three to four months with anxiety and depression, perceived as related to work related stress. The advisor, Dr Betts, stated that Mr Ziga was currently working a reduced 10 hour night shift and that he was, "keen to continue this for the foreseeable future (2-3 months)". He is reported as saying that longer hours would adversely affect his mood and sleep. Dr Betts offered to review Mr Ziga in two months' time to assess progress. He expressed the view that the Equality Act 2010 applies, given the ongoing nature of the conditions and (page 175).

79. Mr Ziga was issued with a Fit Note on 16 August 2019, which makes reference to Mixed Anxiety and Depressive Disorder and states that he may be fit to work, subject to his working up to 10 hours per day maximum.

80. On 3 March 2020, Mr Ziga's then Area Manager, Mr Adrian Huckle, referred him to UNITY, stating on the referral form, (page 184),

> "Andrej suffers from stress / anxiety and depression which is linked to work situation".

81. A second referral by Mr Huckle was made on 5 March 2020, (page 186) on which he wrote,

> "After a recent attendance meeting Andrej mentioned that he feels that there is a lot of anxiety and depression / stress related to work. He feels that this also affected other issues that he suffers with his seriosis [sic]. Is Andrej taking any medication for this and also help from external services he is currently using."

82. The quotation continues with, "(pto)" but there is no further page of this referral included in the Bundle.

83. On 9 March 2020, Mr Ziga was issued with a further Fit Note referring to the condition of Mixed Anxiety and Depressive Disorder and stating that he may be fit to work subject to altered hours, namely 10 hours per day maximum. The duration of that Fit Note was to 8 April 2020.

84. On 23 March 2020, the country went into lockdown due to the Covid outbreak and the Respondent's production operations ceased. Mr Ziga was placed on furlough, from which he returned on 20 July 2020, when he resumed working 10 hours on a 12 hour shift.

85. In November 2020, the Respondent decided to tackle an issue which had developed with regard to the productivity of its Night Shift. A number of its Night Shift workers were, for a variety of reasons, leaving a matter of hours before the end of the shift. This had the effect of the production line becoming disrupted, levels of production being reduced in respect of both the Night Shift and the Day Shift, the latter having to spend time at the beginning of the Day Shift to resolve over running and disruptive issues.

86. We see in the Bundle, email exchanges between members of the Respondent's Human Resources Department, (Miss Bulto-Dowd, Gemma Crane and Kerry Parker) which identifies seven individuals on the Night Shift in the unit on which Mr Ziga worked, who were working shorter hours, including Mr Ziga. In respect of Mr Ziga, in an email dated 12 November 2020 of which Miss Parker is the author, addressed to Miss Bulto-Dowd and Ms Crane, (page 233A) Miss Parker wrote,

> "A Ziga – needs to return to full time hours".

87. A meeting was scheduled with the various individuals concerned with their Manager, Mr Mark Cook and with Miss Bulto-Dowd. In an earlier email of 12 November 2020, Miss Parker had written that Mr Cook had all the relevant information he needed to,

> "progress the individuals".

88. In cross examination, Miss Parker told us that Mr Cook would not have had medical information, he would have had such Fit Notes as may have been given to him directly from Mr Ziga, but he would not have had occupational health reports. She told us the information he would have had is: who was leaving their shift and when, what the reason for that was

i.e. whether it was pursuant to flexible working arrangements, medical issues or childcare.

89. Mr Ziga met with Miss Bulto-Dowd and Mr Cook on 25 November 2020. In this meeting, they asked him if he would be able to return to a 12 hour shift. He became angry. He said that he was not able to work 12 hour shifts due to a medical issue and that they had no right to raise the issue with him. When Miss Bulto-Dowd asked Mr Ziga what the medical reason was, he shouted at her, saying that he would not discuss the issue. He said that he would continue to leave the shift early. Miss Butlo-Dowd did not make fun of him or humiliate him, as he has alleged. Mr Ziga left that meeting with the impression that he would have to work a 12 hour shift or face disciplinary action, as confirmed by the letter set out below.

90. On 26 November 2020, Mr Ziga received a letter from Miss Bulto-Dowd, (page 237) which reads as follows,

> "As you will be aware from our conversation, the company runs a 12-hour night shift. In order to maintain productivity, we need our employees to work the entirety of the shift, at present you have been leaving work at 3.15am. This is no longer sustainable for the business and with effect from Monday 30 November 2020 you are required to be present for the full 12-hour shift.
>
> I note that previously you have submitted FIT Notes to support your request to leave the shift early and would take this opportunity to remind you that the business will no longer be able to support FIT Notes for leaving shift early and will instead ask you to remain at home whilst deemed "unfit" for work and return when you are able to support a full 12-hour shift.
>
> I would also take this opportunity to advise you that with effect from Monday 30 November 2020 any hours you are unable to work will be entered onto the system as un-paid leave and will accrue absence points (should points be applicable in line with the company's Policies and Procedures) and as such if your absence from the end of shift continues then formal disciplinary action may be taken."

91. Upon receiving that letter, Mr Ziga telephoned Miss Bulto-Dowd. He was angry and shouted at her. She tried to explain to him that he should go to his GP if was not able to work a full shift. Mr Ziga was adamant that he would not go to see his GP. He told her that he would be taking her and the Respondent to court.

92. Miss Bulto-Dowd recorded contemporaneously the nature of that conversation in an email that she sent to Miss Parker on 26 November 2020, (page 234) as follows:-

"AZ was clearly upset and very loud as he reminded me that he has an Occupational Health Report supporting his claim for reduced hours. He also reminded me that I am not a Doctor and that I had no right to send him the letter. He also informed me that he has sought legal advice from his solicitor and he plans to take Anglian to court. He accused me of bullying and harassing him so it was a lot to take in via the telephone.

When I got a chance to respond I referred back to the letter and reiterated the content and that as of Monday we would be expecting him to return to normal working hours and that if he is unwell and cannot do so he should seek his GP. He got even louder at this stage as he made it blatantly clear that he only wants to see the company Doctor and he refuses to see his own GP. When I reminded him that the OH Report was from August 2019 and all recommendations had now expired, he said that this was Anglian's fault as he should have seen the Company Doctor last year. I again advised him to go back to his GP if he cannot fulfil his hours as of Monday.

He told me no, he would not see his GP and he would continue to work his reduced hours then he ended the call as he did not want to discuss it any longer."

93. On 29 November 2020, Mr Ziga submitted a grievance by email against Miss Bulto-Dowd, (page 239) which reads:

"1. Breach of duty of care – Equality Act 2010 – disability discrimination

Last year I have consulted the company doctor discussed that 12 hour shift making bad impact on my medical conditions, so I agreed to temporary reduce 12 hour shift to 10 hours. Dr Betts told me that after two or three months I should see him again, so we can review a situation. I am still waiting for the meeting with the Dr Betts, which company failed to make. The meeting with a company doctor I have been promised on another two occasions, which aint happened. In attachments you could find the letter which Alison send me without me having the meeting with a company doctor. Alison ordered me start 12 hours shift with the start from 30 November. She treating me unfairly because of my disabilities and medical conditions. In consequences she offends the Equality Act 2010, which is unacceptable.

2. Breach of duty of care – Equality Act 2010 – harassment

> On 25 November 2020 I had the meeting with Alison Bulto-Dowd without inform me ahead and give me possibility to prepare for that meeting. On the meeting she was asking me very personal thinks such as, what are my medical conditions, which make me uncomfortable, and I have to repeat her twice, that I am not comfortable speaking about my medical conditions. This action is harassment which offends the Equality Act 2010.
>
> Actions of Alison Bulto-Dowd stresses me out, and make the medical conditions worse. It is unacceptable that person which act unlawfully and offends one of the basic human rights working as a manager for Anglian Windows. Please arrange the meeting in the next 5 to 7 working days, so we can discuss all details."

94. Mr Ziga also on 30 November 2020 wrote to Miss Parker to request that,

> "The status quo applies to my reduced hours until a decision is made about my grievances."

95. To which Miss Parker replied,

> "You are required to work the hours requested of you by your Line Manager whilst the Grievance Procedure is carried out."

96. On 1 December 2020, Miss Bulto-Dowd made a referral to occupational health in which she wrote,

> "Please obtain medical information from the employee's GP pertaining to the capability that the employee has in order to return to full time employment."

97. On 4 December 2020, Mr Ziga telephoned HR to chase for a grievance hearing date and at 13:54 that day, Miss Parker wrote setting out options bearing in mind that Mr Ziga was scheduled to be on holiday the following week: either he could have his hearing whilst he was on leave or it would be set for the following January. Mr Ziga replied to request that the hearing be the following week whilst he was on leave, (page 283). Miss Parker obliged and scheduled the grievance meeting for 10 December 2020 at 12pm. Mr Ziga replied asking for the hearing to be set after 5pm. Miss Parker replied to say that she could not do that and the timing ought not to matter as he was on leave, to which Mr Ziga replied,

> "I have right to have my meetings in my working hours, and my shift starts quarter past five in the afternoon, if you unable to make a meeting, I will contact my lawyer that HR department ignore grievance, and I will take legal steps against company." (page 282)

98. By letter dated 9 December 2020, Mr Ziga was invited to attend a Grievance Hearing on 10 December 2020 at 4.30pm.

99. Until end of November 2020, the Respondent's time keeping records, (known as Kronos, see page 310) show that Mr Ziga worked a 10 hour shift, with an additional 2 hours treated as, "excused absence". On 1 to 4 December 2020, the Respondent recorded him as working a 10 hour shift, with the additional 2 hours treated as, "unexcused absence". On 8 December the records return to treating the additional 2 hours as excused absence.

100. The Grievance Hearing proceeded on 10 December 2020 as arranged. The grievance was heard by Mr Paul Jackson, Head of Production Control and Logistics. HR presence was Miss Parker. Mr Ziga was accompanied by his GMB Representative, Mr Clare (from whom we heard evidence). The minutes of this meeting begin at page 253. Relevant points raised in this meeting to which we were taken include the following:-

100.1. Mr Ziga is quoted as saying,

> "AB asked me why I don't do 12 hours. She asked me what my medical conditions are. Because of complexity of my conditions plus she's not a dr which could understand and I am not comfortable speaking to anyone about my problems and they are personal things. So, I told her I wasn't comfortable, she tries to make pressure and ask me twice which I find her harassing. Harassment if someone asking you very personal things."

100.2. Mr Ziga is recorded as acknowledging that by asking him to work 12 hours, Miss Bulto-Dowd was asking him to fulfil his contract.

100.3. Mr Jackson is noted as asking Mr Ziga to calm down.

100.4. Mr Ziga referred to his exchange of correspondence with Miss Parker.

100.5. Mr Jackson asked Mr Ziga what he meant when he referred to two failed attempts to arrange an occupational health appointment with Dr Betts.

100.6. Mr Ziga referred to two separate sets of meetings as a result of which he had thought that a further referral to Occupational Health was going to be made, but none ever was.

100.7. Mr Ziga is recorded as saying,

> "In meetings she told me lie. Company not accepting fit notes and all such thing. I found out later from union I learnt that this

> couldn't happen because they never speak to union about that.
> …
>
> Another thing. I spoke with Lawyer and she told me that if I have a disability which dr says I have if company disagree that's discrimination."

100.8. Mr Clare and Mr Ziga asserted that the Respondents had only picked on two people about working short hours, Miss Parker responded that everybody was reviewed.

100.9. The minutes record Mr Ziga apparently suggesting that those responsible for disability discrimination should be the subject of a fine and a criminal charge.

101. An Occupational Health Report was received dated 14 December 2020, (page 254). Exerts in this report include the following:-

> "Mr Ziga mentioned suffering with several physical long-term medical problems that affect his blood sugars, skin, joints and bowels, which are currently stable on medication.
>
> Mr Ziga also mentioned ongoing mental health problems that are stable on medication.
>
> …
>
> He has been performing reduced 10 hour night shifts and lighter duties … and is keen to continue this for the long term if possible and business circumstances permit, as he said longer hours and heavy work adversely affect his joints, mood and sleep.
>
> In my opinion work should be therapeutic (helpful) for his health provided he doesn't overdo it.
>
> …
>
> I will happily write to his GP for further information if required but in my opinion, it is unlikely to change the outcome as he has told me all I need to know.
>
> …
>
> It is a company decision whether the restrictions of long-term reduced hours on nights and lighter duties are possible. If the restrictions are not possible then he may need to consider re-deployment to a more suitable role with more appropriate duties and hours, or capability on medical grounds, if possible and business circumstances permit.

…

In my opinion the Equality Act 2010 does apply in this case with regard to the disability given their ongoing nature and impact on his life…"

102. By email dated 16 December 2020, Miss Parker warned Mr Ziga's Trade Union Representative that an outcome to the grievance was likely to be delayed due to Mr Jackson being absent on leave over Christmas, not returning until 13 January 2021.

103. On 8 January 2021, Mr Ziga wrote to Miss Parker, (page 350):-

"You had 5 working days for the outcome, which was not interrupted by Christmas. You breach grievance procedure, so for that reason we are at stage 3, if you fail arrange the meeting for stage 3 within five working days, I will be forced to take legal steps against company, and contact my lawyer."

104. On 14 January 2021, Mr Jackson obtained Mr Ziga's Time Cards from which he established that Mr Ziga has been working 10 hours of his 12 hour night shift on a regular basis.

105. On 18 January 2021, Mr Ziga commenced a period of absence due to ill health which lasted until May 2021. The certified condition was mixed anxiety and depressive disorder.

106. Mr Ziga was provided with an outcome to his grievance by a letter from Mr Jackson dated 26 January 2021, (page 268). In respect of Point 1 of Mr Ziga's Grievance, Mr Jackson concluded:-

"I fail to see how Alison has breached the Equality Act by asking you to work the contractual shift hours. The Report date 1 August 2019 does indeed request your hours are temporarily reduced based upon your perceived requirement, however, this is not supported with any medical evidence to confirm any disability that requires the need for reduced working hours. The Report states that a Review may be beneficial to ascertain if you feel you can return to 12 hour shifts or if the company could consider a flexible working arrangement, again, based upon your perceived requirement for shorter working hours. I understand that you do not wish to supply the supporting medical evidence for the business to review the medical need for reduced hours. As you will be aware if you are medically unfit to work the full 12 hour night shift, then my recommendation would be to request a FIT Note from your GP to this affect. Alison's request for you to work a full shift is based upon business need and I can see no evidence of her treating you unfairly based on any medical evidence that she has available to her."

107. In respect of the second point of Mr Ziga's grievance, relating to alleged harassment, Mr Jackson wrote:-

> "Having further discussed this meeting with you at the hearing I am under no doubt that the actions taken by Alison were not those of harassment. As acting Unit Manager, Alison was asking you for any reason why you were unable to complete the 12-hour shift required of you. Whilst I understand how you may have felt uncomfortable disclosing information about your medical conditions, I also remind you that without such evidence we are unable to review the work of hours that are required of you. … I fail to see how Alison's actions were that of harassment, however, I have recommended that when approaching these type of conversations some warning is given to the employee and might be of benefit".

108. Mr Jackson did not uphold Mr Ziga's grievance.

109. Mr Ziga appealed the outcome of the grievance. We do not think we were taken to his appeal document, which we believe was dated 28 January 2021.

110. Ms Sheila Nelis was appointed to hear the Grievance Appeal. She was the Unit Manager of Unit 1. The notes of the appeal hearing begin at page 318. Mr Jackson informed Ms Nelis that the outcome he hoped for was that Miss Bulto-Dowd, Mr Cook, Mr Jackson and Miss Parker should be dismissed and that Miss Bulto-Dowd and Mr Cook should be charged with a criminal offence and sentenced to six months imprisonment. That this is what was said is corroborated in the contemporaneous note at page 320. We accept her evidence that is what Mr Ziga said.

111. The first of these proceedings were issued on 23 February 2021.

112. Mr Ziga was provided with an outcome to his appeal against the grievance outcome by letter dated 24 February 2021, (page 363). The grounds of appeal were that there was a breach of the Grievance Procedure by his not having received an outcome within five days and that there had been a failure to investigate and respond to the allegations of harassment. The outcome of the appeal was that the five day period within which the policy provided an outcome should be provided was an, "ideal time" but not a binding limitation. Ms Nelis further recorded that she did not see any evidence of discrimination or harassment. She wrote,

> "A Line Manager or the Unit Manager asking questions around someone's health status is normal within the Manager's remit for safety, welfare and business requirements. You were also advised that in order to support you in your role we wished for you to visit your GP with regards to your medical circumstances, however you declined

> this. Therefore a decision could only be made on the information that was available to us."

113. A further Occupational Health Report was obtained dated 15 April 2021, (page 384). The practitioner Dr Betts referred to Mr Ziga as having attended with a letter from a Joint Specialist (Rheumatologist) agreeing that he should not work very long shifts as this could exacerbate joint pain. Dr Betts states,

> "In my opinion the longer hours and heavy work can adversely affect his joints, mood and sleep… He feels unable to do the 12 hour night shift as he stated (and in my opinion) it could have a detrimental impact on his chronic mental and physical health problems (as in my opinion are likely to be covered under the Equality Act 2010). Therefore, it is a company decision whether the restrictions of long term reduced hours on nights and lighter duties are possible. …"

114. On 13 May 2021, Ms Crane of the Respondent's Human Resources Department wrote to Mr Ziga in respect of that Occupational Health Report. She noted that his latest Fit Note expired on 17 May 2021 and looked forward to his return to work, which was to be on reduced hours of 10 hours per night. A further Fit Note was produced dated 9 June 2021, referring to the condition of Anxiety and Depression and stating that he may be fit to work on a phased return to work and altered hours of five hours per day.

115. Mr Ziga returned to work and UNITY carried out a Workplace Assessment with him on 10 June 2021. They recommended Mr Ziga work only on the Bead Saw role as that was the lightest role in the factory. The assessment recommended a phased return to work, beginning on five hours per shift, increasing by an hour a week until a maximum of ten hours per night was reached.

116. A further Fit Note was produced dated 6 July 2021, (page 399) the condition was Anxiety and Depression and he was certified as fit to work a maximum of eight hours per day.

117. Mr Ziga subsequently increased his hours to nine per night and then to ten hours per night.

118. On 28 April 2022, an incident occurred between Mr Ziga and his Line Manager, Mr Shaun Ream.

119. Mr Ream's account of what occurred is at page 417, the note which he made on the date of the incident and signed by him at 2:20, the incident having occurred at 1:35. Mr Ream says that he had seen Mr Ziga away from his machine talking to a colleague called Ewa. He approached him and told him he could not stand there talking to Ewa. Mr Ziga responded

by shouting at him, asking if he thought he was somebody special. Mr Ream says that he told Mr Ziga that he was his manager and that he needed to get back to work. He says Mr Ziga shouted and argued with him, he then shouted to Mr Ziga that he should go into his office, Mr Ziga accused him of being aggressive and he told Mr Ziga that he, (Mr Ziga) was being aggressive. Mr Ziga asked for his Trade Union Representative Mr Thompson to attend, so Mr Ream called for Mr Thompson. He says that Mr Ziga accused him of being aggressive and of making a forceful movement towards him and said that if Mr Ream had done that to somebody on the street he would,

> "Get a smack in the mouth".

120. Mr Ream says that he told Mr Ziga that it was he, (Mr Ziga) who had started the aggressive behaviour by shouting in his face. He says he did not make any movement towards Mr Ziga. He reports Mr Ziga as calling him a,

> "Fucking liar".

121. Mr Ream says that Mr Ziga started making threats, saying what he would do to him if he saw him outside. Mr Ream says that Mr Thompson tried to calm things down, but that Mr Ziga continued ranting, accusing Mr Ream of being aggressive. Mr Ream says that he told Mr Ziga to return to work.

122. Mr Ziga's account is at pages 425 – 428, taken at a fact finding meeting with the investigating Area Manager, Mr Mark Cook on 13 May 2022. Mr Ziga explained that he had gone to the toilet because his machine had broken down and on the way, he stopped to speak to Ewa. He said that Mr Ream came to him and told him he should not be disturbing Ewa. Mr Ziga says he responded that he was not disturbing Ewa, she was still working and explained that his machine was under repair. Mr Ziga says that Mr Ream at this point told him he should not be talking to other people and says that he, (Mr Ziga) replied,

> "Why, because I seen [sic] you talking to other people about football for long period of time".

123. He said that Mr Ream asked him to go and work on another machine. Mr Ziga said,

> "When I asked him if he believes that he is something more than me, I believe that this question upset him and he walking to the office. I was following him."

124. He described Mr Ream as upset, but not angry and he said that at that point, he, (Mr Ream) had not raised his voice. Mr Ziga denied raising his voice. He said that when he entered the office, Mr Ream starting pushing chairs and telling him to,

> "Get in there".

125. He says that on seeing Mr Ream acting aggressively, he said he wanted Mr Thompson with him and that he, (Mr Ziga) went to get Mr Thompson. He says that Mr Ream followed him and approached him in an aggressive manner that made him think that Mr Ream was going to punch him. He said that Mr Ream stood ten or less inches from his face aggressively accusing him (Mr Ziga), of shouting at him (Mr Ream). When asked whether he had threatened Mr Ream, Mr Ziga replied,

> "I told him that if this would be outside work and he would be invading my space I would punch him, I was explaining that this would happen."

126. He denied shouting at Mr Ream in an aggressive way or acting aggressively. He said he may have been a little loud because of the noise in the factory.

127. Mr Cook interviewed Mr Ream and the note of that interview is at page 415. In this account, Mr Ream spoke of Mr Ziga stepping towards him, raising his voice, shouting,

> "Who do you thing [sic] you are."

128. He described his manner as aggressive and confirmed that Mr Thompson was called and that he had tried to calm things down. He says that he explained to Mr Thompson the way in which Mr Ziga had behaved towards him and reacted. He said Mr Ziga subsequently left the premises at 1:30am. Asked whether Mr Ziga had been aggressive and whether he felt any physical threat, Mr Ream responded,

> "No I don't think so, it was just verbal aggressive in your face type. I can see that we could work together again, I would need to be more cautious around him."

129. Mr Thompson's account of the meeting, taken by Mr Cook, signed by Mr Thompson on 9 June 2022, (pages 470 – 471) made it clear that he had not seen the incident. He explained that Mr Ziga had been upset in the meeting because he felt he had been disrespected by the way that Mr Ream had spoken to him. Mr Thompson described Mr Ream's manner as fine at all times and that Mr Ziga was upset. Asked whether he had seen any aggressive intimidating behaviour from Mr Ream towards Mr Ziga he replied,

> "No, that was Andrej actions that caused the initial argument."

130. Ewa was interviewed by Mr Cook, his note of what she said, signed by her on 9 June 2022, is at page 467. Describing the exchange between Mr Ream and Mr Ziga, the note originally read,

> "Later Shaun came and said to Andrej can you please come back to your workplace, Andrej shouted at Shaun saying, *"are you stopping me talk to her."*

131. The words, "shouted at" in typeface have been deleted in manuscript and replaced with, "was loud" in an amendment apparently initialled by Ewa. The note records her as having said that Mr Ream was speaking in a normal way. She stated she did not believe that Mr Ream had been aggressive or had shouted. She said he had been polite all the time and that he was a quiet person. On the other hand, she also said that everybody had heard both of them shouting.

132. Somebody else called MF gave a statement to Mr Cook, page 468. He described Mr Ziga as shouting on the shop floor at Mr Ream. He said that it was Mr Ziga shouting, he did not hear Mr Ream shouting. He said with regard to Mr Ziga,

> "It was right in front of me, Andrej manner was aggressive, he was gesticulating his hands, before they went to the office."

133. He described Mr Ream's manner as calm and Mr Ziga as sounding aggressive, angry and loud.

134. Somebody else called MH also gave a statement, (page 469). He told Mr Cook that Mr Ream had asked Mr Ziga politely to go back to his workplace. He said that Mr Ream had not been aggressive towards Mr Ziga. He confirmed that he had later heard raised voices from the office. He confirmed that he had seen and heard Mr Ream ask Mr Ziga to go back to work and Mr Ziga challenging him.

135. We heard evidence from Mr Ream and from Mr Ziga about this incident. Our findings are that Mr Ream's account of what happened is to be preferred. It is corroborated by statements taken from others. The behaviour of Mr Ziga is consistent with the way he behaved on other occasions. Mr Ream was candid enough to acknowledge that he had raised his voice to Mr Ziga, (in response to Mr Ziga's aggression) notwithstanding that witnesses had said that the had not, probably because they saw Mr Ziga as the aggressor.

136. After the incident with Mr Ream, Mr Ziga went home. He says that he went home with the permission of Mr Cook. Mr Cook says Mr Ziga went to him and said that he was going home, he did not authorise him to go home. Mr Cook says that he told Mr Ziga that if he chose to leave work without permission, that would be his decision but he would appreciate it if he stayed on at work as if he were to leave, that would impact on staffing levels. Mr Ziga chose to leave. Mr Cook's evidence in cross examination was ambiguous on whether he gave permission to Mr Ziga to leave. He

expressed surprised that Mr Ziga had been charged with leaving without permission. Mr Cook probably did give Mr Ziga permission to leave.

137. Mr Cook went to speak to Mr Ream to find out what had happened and that conversation led Mr Cook to conduct an investigation, which led to the above mentioned statements.

138. Mr Ziga was then certified as unfit to work.

139. Mr Ziga submitted a grievance, (page 406A):

> "I would like to make complain about the Manager Shaun, unit 13 nightshift. On the 28th. April, he was very aggressive in my confrontation and act very inappropriately, shout at me etc. There are cameras on the shop floor, so could find evidence about his inappropriate actions. I am happy to discuss about the matter on a meeting with you."

140. Mr Ziga met with Occupational Health on 1 May 2022, (see below).

141. The Respondent subsequently received a letter of complaint about Mr Ziga from the Operations Manager at UNITY, dated 8 June 2022, (page 499). The Senior Occupational Health Nurse Advisor, (who we will identify as JL) who had seen Mr Ziga, reported that he had become very agitated and angry with her when he realised she was a nurse and not a doctor. JL reported that Mr Ziga had told her that she was only a nurse and could not possibly understand the complexities of his health needs. Whilst JL tried to reassure him, Mr Ziga is reported to have said, "are you a doctor? No! Then you do not understand, you are only a nurse". Mr Ziga was said to have exhibited aggressive behaviour throughout the consultation.

142. Mr Ziga's Grievance in relation to the incident with Mr Ream was allocated to Area Manager Mr Huckle to investigate. Mr Ziga met with Mr Huckle accompanied by a trade union representative Mr Clare, on 27 June 2022, (page 436). He gave an account of the incident with Mr Ream broadly in line with what we have seen already.

143. By letter dated 27 June 2022, Mr Ziga was invited to attend a disciplinary hearing scheduled for 30 June 2022. He was provided with an Investigation Report and Appendices prepared by Mr Cook. The allegations against him to answer were as follows:-

> "1. 28 April 2022 serious act of inappropriate behaviour by way of inappropriate language used towards Area Manager by allegedly using threatening language, shouting and gesticulating hands which can be construed as bullying by Andrej Ziga.

2. 28 April 2022 Andrej Ziga not following reasonable Management request by refusing to go back to his work station.

3. 28 April 2022 unauthorised absence from work by leaving site before the shift ended without Manager's approval."

144. By email dated 29 June 2022, Mr Ziga requested a postponement because he needed more time for preparation and also because he would be off work due to mental issues.

145. The scheduled hearing was postponed and Mr Ziga was sent a revised invitation to attend a disciplinary hearing on 7 July 2022, (page 439).

146. On 29 June 2022, Mr Ziga and Mr Thompson approached Ewa, Mr Thompson asked Ewa to change her statement which she did in manuscript as noted above, (page 476/7).

147. On 30 June 2022, Mr Ziga wrote by reference to the proposed disciplinary hearing,

> "I am not sure if I'll be back next week."

148. He then wrote on 4 July 2022,

> "Apologies, but I probably not be available for this hearing, due to my mental issues. I am really sorry, but I can't get back together. The one of reasons is that I don't have enough of the time to prepare for this hearing due to Steve Clare, Union convener, not working on Tuesdays and Wednesdays, so this put enormous pressure on me. I am going to see my GP tomorrow and let you know the result."

149. A Fit Note dated 6 July 2022 stated that Mr Ziga was not fit for a month due to mental health issues, (page 450).

150. Mr Ziga filed a second claim in these proceedings on 26 August 2022.

151. On or about 11 October 2022, Mr Huckle prepared a draft outcome to the grievance, (page 451). The outcome would have been that the grievance was not upheld. However, the letter was never sent to Mr Ziga. It was overlooked in the midst of dealing with the disciplinary aspect to the events of 28 April and Mr Ziga's interaction with Occupational Health.

152. The Respondent obtained an Occupational Health Report for Mr Ziga from Dr Betts dated 12 December 2022. He is described him as suffering several physical long term medical problems affecting his blood sugars, skin, joints and bowels. It had also referred to ongoing mental health problems and with flare ups of mental health and joints, coinciding with perceived work related stress. These statements were made by Dr Betts,

by reference to what Mr Ziga had told him. As for adjustments, Dr Betts wrote:

> "Andrej said that he finds prolonged standing in a static position during his current role problematic at work and feels pressurised. So, in my opinion, he is unlikely to return to his reduced hours, light duty role for the foreseeable future and possibly long term."

He recommended a supportive meeting with HR and Line Manager to discuss available options. He repeated his view that the Equality Act applied in light of the ongoing nature and impact on Mr Ziga's life of his conditions, (mental and physical).

153. On 14 March 2023, (page 504) the Respondent wrote once again to invite Mr Ziga to attend a disciplinary hearing, this time proposed for 20 March 2023. In this revised invitation, four additional charges appear to the three mentioned above. They are:-

> "4. Serious act of insubordination and inappropriate behaviour on 12 May 2022 in the form of being verbally threatening and abusive along with making derogatory remarks towards JL, Senior Occupational Health Nurse Advisor, a third-party service provider.
>
> 5. Inappropriate, verbally threatening abusive behaviour towards JL, Senior Occupational Health Nurse Advisor bringing the company into disrepute.
>
> 6. Aiding or procuring an act of misconduct by James Thompson by asking Ewa… to change her witness statement relating to the incident of 28 April 2022.
>
> 7. Termination of employment due to fundamental break down of trust and confidence of Mr Ziga to carry out his role and duties and conduct himself appropriately in the workplace."

154. With this letter, Mr Ziga was provided with a revised hearing pack that contained the new documents relating to the new allegations.

155. By letter dated 15 March 2023, Mr Ziga was invited to attend a Capability Review Meeting to take place on 23 March 2023. This was to consider whether his employment should be terminated on the grounds of ill health.

156. On 15 March 2023, Mr Ziga emailed the Respondent to say,

> "I can't attend the disciplinary hearing on 20 March 2023 nor capability meeting on 23 March 2023 due to my illness and due to I have been falsely accused, when from witness I have been accused of

> wrongdoing which cause me even more distress. For these reasons I have great concerns about disciplinary processes that Anglian Windows together with HR implement against me." (page 521)

157. On 22 March 2023, the Respondent wrote and invited Mr Ziga to attend a rearranged Disciplinary Hearing on 29 March 2023, (page 523). In this letter Ms Duzinskiene wrote:

> "Your concerns regarding the company acting in bad faith are adamantly denied. It is evident however that the situation has become circumstantial and until these matters are dealt with your health issue will not be resolved.
>
> There is an overwhelming case to proceed with dealing with these matters and the only way to resolve them is to progress with the hearings. The outcome of which may be that you remain with the business and trust and confidence is reaffirmed, or it may result in your leaving the business.
>
> If it would be easier for you to attend the hearing, we would be prepared to consider holding the hearings off site and away from the factory or via video conference call which could be arranged as an alternative to a face to face meeting should you wish. Alternatively, you may wish to submit written representations for us to consider at a hearing in your absence."

158. In an email on 23 March 2023, Mr Ziga replied:

> "Unfortunately on 29 March 2023 I will still be off the work. As soon as my mental illness will improve, and I will be back to the work, I will let you know."

159. Mr Ziga provided a further Fit Note on 31 March 2023 certifying him as not fit for work for a further month to 29 April 2023, by reason of depression, back pain and work related stress.

160. A further invitation to attend a Disciplinary Hearing on 3 April 2023 was sent to Mr Ziga dated 29 March 2023. On this occasion the letter of invitation included the following:

> "Failure to attend the hearing may result in the hearing taking place in your absence. In this event a decision will be made in your absence based solely on the facts and evidence available at the time."

161. The Disciplinary Hearing proceeded on 3 April 2023 in the absence of Mr Ziga. The notes of that hearing begin at page 536. The Chair was Mr Paul Kellett, Head of Quality and Technical. On the basis of the evidence available to him, he concluded that the allegations against Mr Ziga were

well founded and that Mr Ziga should be dismissed. Mr Kellett set out his conclusions and reasoning in a letter dated 20 April 2023, running to seven pages, (pages 539 – 546).:

161.1. On the topic of dealing with the matter in Mr Ziga's absence he wrote,

> "There was a fairly overwhelming justification and necessity to proceed with dealing with these matters in order to resolve an impasse. We have endeavoured to engage with you and to accommodate you where possible, and within reason in order for you to attend the disciplinary hearings that had been planned and notified to you in advance. As previously advised, with this being the third request for you to attend the disciplinary hearing and with your choosing not to attend, it was likely that the disciplinary hearing would go ahead in your absence and it did so."

161.2. He concluded the allegation of insubordination towards Mr Ream was proven, which he found amounted to gross misconduct. He wrote that having regard to Mr Ziga's length of service and employment record, he concluded the appropriate sanction would be a Final Written Warning.

161.3. He found the allegation of verbal and physical threatening behaviour towards Mr Ream to be proven, which he found to be gross misconduct. He referred to a lack of any semblance of regret or remorse and concluded that the appropriate sanction would be summary dismissal.

161.4. He upheld the allegation Mr Ziga had absented himself from the business without authorisation. He acknowledged that he had notified Mr Cook that he was leaving, nevertheless he left without authorisation. Mr Kellet concluded the appropriate sanction would be a verbal warning.

161.5. With regards to the allegation Mr Ziga had made derogatory remarks to JL, Mr Kellet said that the evidence showed Mr Ziga had been verbally aggressive towards her, had been rude to her and that this conduct had led to a formal complaint to the company from the OH provider. He said there was no reason to doubt the veracity of the report from the OH provider and that the conduct alleged was strikingly consistent with the type of behaviour of which Mr Ziga had been accused in relation to Mr Ream. He found this to amount to gross misconduct for which the appropriate sanction would be summary dismissal.

161.6. He found the allegation that Mr Ziga had used inappropriate, verbally threatening and abusive behaviour towards JL proven and once again concluded that the appropriate sanction was summary dismissal.

161.7. He did not uphold the allegation that Mr Ziga had asked Ewa to change her Witness Statement.

161.8. He concluded there had been a fundamental breakdown of trust and confidence. He referred to Mr Ziga as clearly having a problem with authority and taking exception to managers asking simple and unobtrusive questions or making reasonable requests. He referred to Mr Ziga responding pre-emptively, aggressively and excessively without any regard to the consequences of those around him. He concluded that the appropriate sanction in regard to the breakdown of trust and confidence would be dismissal.

162. Mr Ziga appealed against his dismissal in an email dated 21 April 2023, (page 547). He appealed on multiple grounds, that the procedure was wrong and unfair and that he had no possibility of defending himself.

163. Mr Ziga provided a further Fit Note certifying him as unfit for work due to depression, work related stress and back pain dated 2 May 2023, he was certified unfit until 28 May 2023, (page 554).

164. On 2 May 2023, Mr Ziga wrote by email to protest that five days had passed since he had submitted his Appeal and he had not yet received an outcome. Later that day, Ms Duzinskiene wrote to him with a letter inviting him to attend an appeal hearing on 11 May 2023. The following day, Mr Ziga replied to say that he would be unable to attend the meeting on 11 May 2023, (page 555).

165. By letter dated 4 May 2023, the Respondent invited Mr Ziga to attend an appeal meeting on 15 May 2023. By an email of 4 May 2023 he replied to say he would not be able to attend the meeting on 15 May 2023 and stated,

> "As soon as my mental issue will permit, and I will be able to attend the meeting I will let you know."

166. On 10 May 2023, Mr Ziga was invited to attend an appeal hearing on 18 May 2023. On 11 May he replied by email in the same terms as the previous email, stating he would not be able to attend on 18 May 2023.

167. On 18 May 2023, the chairperson appointed to hear the appeal, Mr Wayne Nicholls, Group Manufacturing and EHS Director, proceeded in Mr Ziga's absence. Mr Nicholls raised some questions in writing by email, which Ms Duzinskiene answered for him, (page 567 (b) - (d)). This included

clarification of why, when the Respondent had received the complaint from their Occupational Health Advisor about Mr Ziga's behaviour towards its nurse, on 8 June 2022, they had not originally raised this directly with Mr Ziga. The reply he received was:

> "When it was received we were still working on his previous incident which took place on 28/4/2022, he went off sick after receiving the invite to disciplinary hearing letter issued to him 27/5/2022 and 30/5/2022. He didn't come back to work and went off sick hence why we didn't had [sic] a chance to speak with him about this."

168. By letter dated 24 May 2023, Mr Nicholls provided Mr Ziga with a ten page detailed outcome to his appeal, which was not upheld.

Conclusions

Disability

169. The Respondent concedes that Mr Ziga was a disabled person at the material time by reason of musculoskeletal pain and stiffness secondary to psoriatic arthritis and by reason of psoriasis.

170. The Respondent accepts that Mr Ziga has from time to time suffered from stress, depression and anxiety, but does not accept that those conditions alone amounted to causing him to meet the definition of a disabled person contained in the Equality Act 2010. In his opening note, Mr Ashley describes this as academic, accepting that stress is a relevant aggravating factor to both the accepted physical conditions. Nevertheless, we are left having to decide the point as an issue.

171. Mr Ziga's fit notes covering the period 3 April 2019 to 14 September 2019 are for, "mixed anxiety and depressive disorder". See the main bundle variously between pages 143 to 177. His absence in January to May 2021 was also because of mixed anxiety and depressive disorder. The Occupational Health report of 14 December 2020 refers to ongoing mental health issues that are stable on medication. The fit note of 6 July 2021, (page 399) recommending reduced hours on his return to work, continues to refer to anxiety and depression. His absence from June 2022 to the end of his employment was because of, "a flare up of his mental health and joints", (page 517).

172. An assessment by NHS Norfolk & Waveney Wellbeing on 9 April 2019, shows Mr Ziga scores on PHQ9 of 19, which is borderline moderately severe and severe depression and on GAD7 a score of 16, which is a score suggesting severe anxiety. See the Medical bundle page 713. Those scores in 2021 were 25/27 and 20/21 – severe depression and anxiety, (Medical bundle page 622). The last fit note we were referred to was dated 2 May 2023, (page 554) which referred to depression, work related stress and back pain.

173. There do not appear to be any earlier references to mental health issues in Mr Ziga's GP notes, (Medical bundle pages 504 to 576). He was first prescribed Citalopram in April 2019 and continued to take it throughout the relevant period.

174. In his various reports Dr Betts expressed his view that the Equality Act applies, (i.e. that Mr Ziga met the definition of a disabled person) because of the ongoing effect of his physical and mental health issues and the impact on his life**.**

175. At paragraph 5 of one of his 23 February 2023 witness statements, Mr Ziga wrote that his mental health issues meant that he had trouble sleeping, that he avoids socialising and has trouble with concentration. He was not challenged about that. What he says is corroborated by what occupational health had reported him as saying at the time and by the fact that his GP prescribed Citalopram, without which the effect on his ability to carry out day to day activities would have been worse. We accept what he said in that regard. Those are day to day activities and we accept that such activities were impacted substantially by Mr Ziga's mental as well as his physical impairments.

176. There is no evidence on which we could conclude that in April 2019 the impairment could, at that time, could be said to be expected to last more than 12 months.

177. Although the fit notes in 2019 ended after September, we know that the impairment continued, managed by medication. On the balance of probability, without the medication, the impairment would not have been managed, it would have had a substantial adverse impact on his day to day activities. We find that Mr Ziga was disabled by reason of depression and anxiety as of 3 April 2020, after it had lasted 12 months from its initial flare up.

Failure to Make Reasonable adjustments

178. The Respondent did have a PCP of requiring all employees to work 12 hour shifts.

179. That PCP would place Mr Ziga at a disadvantage, as explained by Dr Betts, the Respondent's OH advisor: longer hours would, "adversely affect his mood and sleep", (page 175) his, "joints, mood and sleep", (page 254). A joint specialist advised that he should not work long shifts, (page 385). In December 2021, OH advised, (reciting what they had been told by Mr Ziga) that prolonged standing was problematic. These are the nature of the disadvantage to which he would be placed by the requirement to work a 12 hour shift, which is a substantial disadvantage.

180. Based on the information provided by their own OH advisors, the Respondent knew and certainly ought to have known, that Mr Ziga was disabled, both by reason both of the physical and mental impairments.

181. The Respondent had put in place the reasonable adjustment of a reduced 10 hour shift from July 2019, (fit note at page 173).

182. In November 2020, the Respondent adopted a blanket approach, requiring everyone to get back to working 12 shifts, "the business will no longer be able to support FIT Notes…", (page 237). Miss Parker wrote that Mr Ziga needs to return to full hours, (page 233A). She said Mr Cook had all relevant information, but he did not have medical information. On 26 November 2020, the Respondent informed Mr Ziga that the adjustment was to be withdrawn with effect from 30 November 2020. He was told that if a fit note were to be produced that he was not fit to work a 12 hours shift, he was to stay at home until he was fit. It was also made clear that if he did not complete his 12 hour shift, he would be unpaid, would accrue absence points and potentially face disciplinary action. That remained the Respondent's position in the following heated telephone conversation between Mr Ziga and Miss Bulto-Dowd, as confirmed by her email to Miss Parker. The Respondent's position was that he must work a 12 hour shift and if he cannot do so, he must go to his GP for a fit note, in which case he would be treated as absent due to ill health. The statement dismissing the OH report of 19 August, on the basis that it had expired, is very surprising indeed. The stance of the Respondent at this point is remarkably ill judged. It would have been reasonable for the Respondent to have continued the adjustment in place until it had obtained up to date information from its OH provider.

183. By indicating a withdrawal of the reasonable adjustment that had been in place, ignoring its earlier OH advice, and failing to contemplate a further referral to OH, refusing to contemplate continuation of the adjustment even if a fit note as to its necessity were produced, the Respondent is indicating that it will not make a reasonable adjustment after 30 November 2020.

184. On 1 December 2020, Miss Parker told Mr Ziga that the status quo of a 10 hour shift would not continue investigation into his grievance, compounding their error.

185. Referring to the Kronos record at page 310, we can see that Mr Ziga worked 4 10 hour days 1 to 4 December 2020 during which, 2 additional hours were treated as unexcused absence. It is not clear why on 8 December 2020 the Respondent went back to treating those additional hours as excused absence, but they did. OH recommended the adjustment of 10 hour shifts on 14 December 2020. Mr Ziga was on holiday, furlough and sick leave, until he returned to work in May 2021. When he returned to work at that time, he was permitted to continue working 10 hour shifts only.

186. We therefore conclude that for a period of 4 days, 1 to 4 December 2020, there was a period of failure to make reasonable adjustments; the 12 hour PCP was being implemented and the disadvantage to Mr Ziga was, that whilst he continued to work 10 hours only, he understood that he would be accumulating absence points and potentially facing disciplinary action. That is particularly significant as he had depression and anxiety. It would have been reasonable for the Respondent to have continued the 10 hour shift adjustment.

187. To that extend, Mr Ziga's complaint of failure to make reasonable adjustments succeeds.

Discrimination arising from Disability

188. Asking someone to work their contracted hours is not unfavourable treatment.

189. Even if one were to take the view that asking a disabled person in Mr Ziga's circumstances to work contractual hours was unfavourable treatment, the reason for asking him to work his contracted hours is because that is his contractual obligation. That is not a reason which arises as a consequence of Mr Ziga's disability.

190. The complaint of disability related discrimination under section 15 of the Equality Act therefore fails.

Direct Disability Discrimination

191. Mr Ream did not behave as alleged. In any event, there are no facts from which we could properly conclude that Mr Ream's actions on 28 April 2022 were because of Mr Ziga's disability. The burden of proof does not shift. If it had done, we are satisfied on Mr Ream's evidence, that Mr Ziga's disability played no part, consciously or unconsciously, in his actions towards Mr Ziga that day.

192. The Respondent did not deal with Mr Ziga's grievance about the events on 28 April 2022 in accordance with its policy. However, there are no facts from which we could properly conclude that its failure to do so was because of Mr Ziga's disability. If there were, we accept Ms Duzinskiene's evidence that the reason for this is that it got overlooked as the Respondent pursued disciplinary action over the same, (and subsequent) events .

193. The Respondent did initiate disciplinary proceedings, for good reason, because of Mr Ziga's aggressive and inappropriate behaviour on 28 April 2022. There are no facts on which we could properly conclude that they did so because of his disability and we accept their explanation for doing so, that is, Mr Ziga's behaviour.

Victimisation

194. Protected Act One is the grievance of 28 November 2020. Mr Ziga clearly accused the Respondent of a breach of the Equality Act 2010; it was a Protected Act.

195. On the alleged detriment of delay in dealing with the grievance, 29 November 2020 to 26 January 2021 is not an inordinate delay, especially bearing in mind the time frame is over the Christmas and New Year period. The 5 day time frames for various steps mentioned in the policy were clearly aspirational. Failure to adhere to that time frame was not a breach of the policy. The time taken was not a detriment and even if it were, the reason for the delays was not that Mr Ziga had raised a grievance complaining of discrimination, but because of the practical difficulties in investigating, hearing and providing an outcome generally, an in particular, at that time of year.

196. As for the Respondent not upholding the grievance, that is more problematical. It seems to us obvious that for a brief moment, the Respondent had got it wrong in reversing the earlier OH advice without an up to date report. Particularly as by the time of the outcome, (26 January 2021) the Respondent had the benefit of Dr Betts' updated report of 14 December 2020. This could raise the inference that Mr Jackson did not uphold the grievance because it was a grievance that complained of discrimination. However, we are satisfied that Mr Jackson's decision was based on an ill-informed error of judgment on his part and those advising him. We are satisfied that Mr Jackson's conclusions were not, consciously or unconsciously, because Mr Ziga had raised a grievance complaining about discrimination and disability related harassment.

197. Protected Act Two is the issuing of Claim 1 on 23 February 2021, a complaint under the Equality Act and therefore, a Protected Act.

198. Mr Ream did not behave as alleged. In any event, there are no facts from which we could properly conclude that Mr Ream's actions on 28 April 2022 were because Mr Ziga issued Claim 1. The burden of proof does not shift. If it had done, we are satisfied on Mr Ream's evidence, that the issue of Claim 1 played no part, consciously or unconsciously, in his actions towards Mr Ziga that day.

199. As we have already said, the Respondent did not deal with Mr Ziga's grievance about the events on 28 April 2022 in accordance with its policy. However, there are no facts from which we could properly conclude that its failure to do so was because Mr Ziga issued Claim 1. If there were, as we have said, we accept Ms Duzinskiene's evidence that the reason for this is that it got overlooked as the Respondent pursued disciplinary action over the same, (and subsequent) events .

200. As we have said, the Respondent did initiate disciplinary proceedings and it did so for good reason, because of Mr Ziga's aggressive and inappropriate behaviour on 28 April 2022. There are no facts on which we could properly conclude that they did so because he had issued Claim 1 and we accept their explanation that Mr Ziga's behaviour was their reason for doing so.

Time

201. The one claim of discrimination that we have upheld is the failure to make reasonable adjustments. The first shift where the last 2 hours of a 12 hours shift are treated as unexcused absence is 2 December 2020. Time would expire on 1 March 2021, (ignoring early conciliation). Claim 1 was issued on 23 February 2021 and is therefore in time.

Unfair Dismissal

202. Reason for dismissal was the potentially fair reason of conduct. We find that the Respondent genuinely believed that Mr Ziga was guilty of the misconduct of which he was accused. We accept the evidence of Mr Kellett and Mr Nicholls.

203. There were reasonable grounds for that belief: the investigation statements and the complaint from UNITY.

204. A reasonable investigation was carried out. It was not perfect, but it was withing the range of reasonable responses. Ideally, the Respondent should have asked Mr Ziga about the UNITY complaint when it came, but we accept the explanation that at the time, Mr Ziga was absent from work with anxiety and depression and they wanted him to come back to work before they raised the issue with him. There comes a point as time passes, when it is no longer possible to delay things. The decision not to raise the UNITY complaint with Mr Ziga at the time is not outside the range of reasonable responses and does not render the procedure followed, unfair.

205. We accept that it was within the range of reasonable responses, for the Respondent ultimately to proceed with the disciplinary hearing in Mr Ziga's absence: 9 months had elapsed since he was first invited to attend a disciplinary hearing, 21 months since the events in question. The hearing proceeded on the 5th attempt, it had been postponed 4 times previously.

206. Decision to dismiss was within the ranged of reasonable responses. Mr Ziga's conduct, in the reasonable belief of Mr Kellett and Mr Nichols, was so serious that it undermined the Respondents' trust and confidence in him, such that it could no longer be expected to employ him. The conduct toward the OH nurse was particularly egregious.

207. The complaint of unfair dismissal fails.

_____

Employment Judge M Warren

Date: 29 July 2024

Sent to the parties on: 1 August 2024

For the Tribunal Office.

Public access to Employment Tribunal decisions

Judgments and Reasons for the Judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal Hearing has been recorded you may request a transcript of the recording, for which a charge is likely to be payable in most but not all circumstances. If a transcript is produced it will not include any oral Judgment or reasons given at the Hearing. The transcript will not be checked, approved or verified by a Judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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