EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102354/2020 (V)

Heard in Glasgow on the 10, 11 and 12 February and 12 and 13 May 2021

Employment Judge L Wiseman
Tribunal Member R Martin
Tribunal Member J Torbet

Mr Stephen Smith	**Claimant** **Represented by:** **Mr C Edward, Counsel** **Instructed by:** **Ms K Bolt, Solicitor**
Asda Stores Ltd	**Respondent** **Represented by:** **Mr J Wallace, Counsel** **Instructed by:** **Mr A Singh, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 30 April 2020 alleging he had been discriminated against because of disability. The claimant asserted he was a disabled person because he had Parkinson's Disease, depression, cellulitis, sleep apnoea and low mood. The claimant, in particular, complained of discrimination arising from disability and a

failure to make reasonable adjustments in connection with being subjected to disciplinary proceedings and a final written warning.

2. The respondent entered a response in which they admitted the claimant was a disabled person at the relevant time because he had the physical and mental impairments of Parkinson's disease, Depression and Cellulitis. The respondent did not concede the conditions of sleep apnoea and low mood were a disability in terms of section 6 of the Equality Act. The respondent denied the allegations of discrimination.

3. We heard evidence from the claimant and his wife, and from Mr Joseph McGrath, who took the decision to issue a final written warning and Mr Stephen Gallagher, who heard the appeal.

4. We were also referred to a number of jointly produced documents. We, on the basis of the evidence before us, made the following material findings of fact.

5. The representatives, at the commencement of the hearing, confirmed (i) that the respondent had conceded the claimant was a disabled person, at the relevant time, in respect of Parkinson's disease, cellulitis and depression and (ii) the claimant no longer pursued sleep apnoea and low mood as being a disability.

Findings of fact

6. The claimant commenced employment with the respondent on the 1 May 1998. He was, at the time of these events, employed as a Section Manager for Administration at the Glenrothes store.

7. The claimant was diagnosed with Parkinson's disease in October 2015. This is a disease condition in which parts of the brain become progressively damaged over many years. The three main symptoms of Parkinson's disease are involuntary shaking of particular parts of the body (tremor), slow movement, stiff and inflexible muscles. A person with Parkinson's disease can also experience a wide range of other physical and psychological symptoms including depression and anxiety, balance problems, loss of sense of smell, problems sleeping or memory problems

(quoted from the occupational health report dated 20 January 2020 at page 496).

8. The claimant was diagnosed with cellulitis in both legs in 2016. This condition can lead to being hospitalised and the claimant was hospitalised twice with it.

9. The claimant also had moderate to severe anxiety and depression.

10. The claimant was prescribed medication for the above conditions: he was prescribed Roprinoral for the Parkinson's disease. This was initially a low dosage in 2015, but it increased gradually until 2019, when the claimant was taken off this medication and changed to another one. The claimant was also prescribed Naproxin, a painkiller; Thyroxine, for an underactive thyroid; Antihistamine, to prevent skin aggravation (cellulitis); Fluoxetine, for anxiety and Propranodol, a painkiller.

11. The claimant was taken off Roprinoral in 2019 because it had a side-effect of causing compulsive behaviour. The claimant compulsively bought and sold items on ebay, purchased lottery tickets, purchased three games consoles for his son's birthday and purchased four phone covers. The claimant became reclusive, did not converse with his wife or family and completely lost confidence. The claimant, when confronted by his wife about how much money he had spent, was distraught about it: he had been unaware of the extent of what he had been doing.

12. The claimant was taken off Roprinoral in early 2019 and the compulsive behaviour disappeared.

13. The claimant had various periods of absence from work for ill health reasons. In February 2019 the claimant was referred to occupational health for a report following a period of hospitalisation because of cellulitis. Further occupational health reports were prepared in March and April because of severe anxiety. The respondent made various adjustments to accommodate a return to work and to facilitate the claimant being at work.

14. The claimant returned to work in July 2019. The claimant met with Sarah Wilson, his manager, on the 8 July, following his first few shifts. A note of the meeting was produced at page 350. The purpose of the meeting was

to explore how the claimant was feeling and whether there was anything more the respondent could do to help. Ms Wilson noted the claimant was due to go on holiday and informed the claimant that upon his return, an investigation was to be carried out because of accident packs going missing.

15. The claimant attended an investigation meeting with Mr Andrew Crombie on the 10 August 2019. The claimant was represented at that meeting. The notes of the meeting were produced at page 356. The claimant was advised the investigation was “quite serious” and if it went forward to a disciplinary it may be considered gross misconduct. The matters under investigation related to (i) the non-completion of 12 accident forms (found in the claimant’s desk); (ii) an enforcement officer letter (found in the claimant’s desk drawer) which had not been reported to City and which related to a visit which had taken place on the 17 January 2019; (iii) the accident causation tracker had not been completed; (iv) some accident forms had been signed off by the claimant as complete when in fact they were not complete; (v) a legal letter relating to an accident which had occurred on the 13 December 2018 had not been notified to the respondent’s solicitors. The respondent had subsequently received a letter from solicitors regarding the accident, and seeking information, and they had known nothing about it; and (vi) breaches of GDPR.

16. The claimant confirmed he was aware of the correct process to be followed following an enforcement officer visit, and he was aware of the process for the completion of the accident packs, and the completion of the causation tracker. The claimant could not offer any explanation why these matters had been left incomplete (although he suggested the causation tracker on the computer may have been up-to-date, however the information produced by Mr Crombie did not support this) or why they were in his desk. The claimant assumed he had signed off the accident packs as complete because he had intended to go back and complete them.

17. The claimant went off on sickness absence on the 12 August 2019. A fit note was produced at page 375 confirming the reason for the absence was “Parkinson’s disease aggravated by anxiety”.

18. The claimant was referred to occupational health and a report was produced on the 22 August 2019 (page 382). The report noted the claimant had reported an increase in the symptoms of Parkinson's due to anxiety, and that he was worried about his job. The claimant further reported feeling emotional, lacking motivation and feeling like he had taken a step backwards due to the current work situation.

19. The report confirmed the advice was that the claimant was not fit for his substantive role, but should be fit to return to work in 2 – 4 weeks' time. The report further confirmed the assessment indicated the claimant had the ability to understand the allegations, distinguish right from wrong and that he had a reasonable understanding of the proceedings.

20. The claimant met with Mr Crombie again on the 10 September for a second investigation meeting, the notes of which were produced at page 399. Mr Crombie, as part of the investigation, asked the claimant if he thought his illness contributed to the accident pack and causation tracker not being completed to the required standard. The claimant responded that his illness had not really contributed, but it was more to do with his state of mind, that he had been in hospital over the last two Christmases and felt pressured to be at work.

21. The claimant attended a final investigation meeting with Mr Crombie on the 26 September 2019, the notes of which were produced at page 417. Mr Crombie explained to the claimant that he had adjourned the previous investigation meeting in order to allow time for the claimant's mitigation (feeling the store had not put in enough support to allow him to achieve the tasks) to be explored. Mr Crombie confirmed there had been frequent referrals to, and reports from, occupational health from 2018 to the present time. There had also been face-to-face meetings, communication with the claimant and a great deal of care, support and adjustments provided.

22. The claimant was invited by letter of the 7 November 2019 (page 443) to attend a disciplinary hearing, to answer allegations that he falsified company documents by signing off trading law paperwork as complete in August 2019 as well as an accident pack in February 2019 when neither of these documents were complete. Further, it was alleged the claimant

had failed to follow process regarding the storage, filing and reporting of accidents and also failed to notify City of an enforcement officer visit in March 2019. He had also failed to follow GDPR with regards to having legal documentation relating to a customer accident on the 13 December 2018 which he had in his drawer, and to which others had access. The letter warned the claimant that falsifying company documents, failing to report accidents and breaches of GDPR were all deemed to be gross misconduct offences and if proven may lead to summary dismissal.

23. Mr McGrath, prior to the disciplinary hearing, had regard to the Health and Wellbeing Policy; the Mental Health policy; the Reasonable Adjustments policy and the Disciplinary and Appeals policy. Mr McGrath also referred to the respondent's Ethics policy which makes clear that documents are not to be signed off as complete, if they are not in fact complete.

24. The disciplinary hearing was re-arranged and took place on the 12 December 2019. A note of the hearing was produced at page 449. Mr McGrath gave the claimant an opportunity to provide information regarding his medical conditions. The claimant took the opportunity to provide a full account to Mr McGrath of the compulsive behaviour he had experienced and that this had improved once his medication had been altered. Mr McGrath also enquired how his conditions had affected work. The claimant referred to having been hospitalised twice because of cellulitis, and to the Parkinson's tremor getting worse. The claimant stated that he did not think his conditions had been affecting him at work, but he was unable to say whether he had done, or not done, things. The claimant was devastated when he read back the notes of some of the things he was alleged to have done or not done. The claimant did know he had a backlog of accident forms in his desk drawer. The real issue for the claimant was that he had not been aware of the extent of the impact his condition was having on his mental health.

25. The claimant's trade union representative informed Mr McGrath that he considered the claimant was being discriminated against because of something arising in consequence of his disability.

26. Mr McGrath asked the claimant about the enforcement letter not being reported to City: the letter had been in the claimant's desk drawer for over two months. The claimant told Mr McGrath that he had no recollection of the letter, but if he had seen it he would have acted on it, because he knew the process to be followed. The claimant suggested the letter had perhaps been put in his drawer.

27. The claimant accepted there had been some accident packs in his desk drawer. The claimant was questioned about the 12 accident packs that had not been completed, and the incomplete causation tracker (used to track accidents). The claimant suggested he had not been trained on completing the tracker, but accepted it was easy to complete, and his notes had been on the tracker. The claimant also suggested that his physical health may have been a factor, and that he probably should not have been in work. He had also been changing medication. The claimant also suggested that as far as he was concerned the causation tracker on the computer was up to date, and no-one had told him differently.

28. The claimant, with regard to the accident packs, suggested the packs had been put to one side, perhaps because they were missing signatures or photographs, but he was not sure. The claimant did not know there were 12 in his desk, although he did know there were a few.

29. The claimant accepted he had signed off an accident pack as complete, when it was not complete, and that he should not have done this. The claimant's representative intervened to say that the claimant did not know why he had done what he had, and that it was because of his mental health issues.

30. Mr McGrath adjourned the hearing to consider all of the information before him, which included the occupational health reports, psychological reports, the investigation notes, the claimant's appraisals and his personal file. Mr McGrath did not understand, from the reports, that Parkinson's caused memory loss.

31. Mr McGrath met with the claimant again on the 18 December to inform him of his decision. Mr McGrath confirmed he had reviewed all of the information and had formed the reasonable belief that the claimant did

commit a breach by failing to follow the process of filing, recording and reporting of accidents, failing to notify City of an enforcement officer visit, failing to notify head office claims team of a customer accident and signing off accident packs as complete that were not. Mr McGrath confirmed the acts were acts of gross misconduct, which was a dismissable offence, however he had taken into consideration the points of mitigation regarding the claimant's health and had decided to "pull back" from dismissal and instead to issue a final written warning which would remain on file for twelve months.

32. The decision made by Mr McGrath was confirmed in writing by letter of 28 December 2019 (page 486). The letter set out the allegations, the claimant's response and the reason for Mr McGrath's decision.

33. The claimant appealed against Mr McGrath's decision (page 490). The claimant, in the letter of appeal, confirmed he felt certain facts had been ignored, that he had been diagnosed with serious health issues and that his union representative had made the case of discrimination due to lack of support from the store management. The claimant also referred to the fact he had not been dismissed because his health issues had been taken into account. He argued this meant health had played a factor regarding these issues.

34. The claimant did not return to work following being given a final written warning. The claimant was anxious that one more instance of lateness, absence or misconduct would lead to his dismissal.

35. Mr Stephen Gallagher, General Store Manager in Kirkcaldy, heard the claimant's appeal. Mr Gallagher was provided with an appeal pack of documents prior to the hearing, which included the notes of the investigatory meetings with the claimant, Ms Sarah Wilson, his manager and Kirsty Lawson; the invite to the disciplinary hearing; the notes of the disciplinary hearing; the letter of outcome of the disciplinary hearing and the respondent's Disciplinary Policy; Health and Wellbeing Policy and Reasonable Adjustments Policy.

36. The appeal hearing took place on the 26 February 2020 and the notes of the hearing were produced at page 525. The focus of the appeal hearing

was that the trade union representative, who spoke for the claimant, argued the matters should have been dealt with as a capability issue and not a disciplinary issue because of the claimant's health issues. The decision made by Mr McGrath demonstrated the claimant's health had been a factor.

37. The claimant, through his trade union representative, provided further information regarding the grounds of appeal, in a letter dated 1 May 2020 (page 569).

38. Mr Gallagher informed the claimant of his decision at a reconvened appeal hearing on the 8th July (page 584). He also confirmed his decision by letter of the 9th July (page 606). Mr Gallagher noted the points of appeal which had been made: (i) certain facts have been ignored; (ii) you have been diagnosed with serious health issues and feel you have been discriminated against because of a lack of support from store management; (iii) you have not had clear answers regarding these issues; (iv) the disciplinary sanction acknowledges health was a factor, yet the claimant had still been sanctioned and (v) the issues could have been dealt with under the capability process, and this would have been a reasonable adjustment.

39. Mr Gallagher confirmed in response to point (i) that he had reviewed the investigation notes, and interviewed Mr McGrath and he was satisfied Mr McGrath had taken all of the occupational health reports, return to work interviews, step care referrals, file notes, phased returns to work and workplace adjustments into consideration when making his decision.

40. Mr Gallagher concluded, in response to point (ii), that he had reviewed all of the information regarding the claimant's health and was satisfied that support (and reasonable adjustments) had been given to the claimant by the store management throughout his illness.

41. Mr Gallagher concluded, in response to point (iv) that Mr McGrath did consider the mitigation put forward regarding the claimant's mental health. However, he also took into account the fact there were elements of the allegations that related to conduct because there had been previous training, briefings, coaching and support put in place. The conduct issues

relating to an accident report form being signed by the claimant as complete on the 27 February 2019, but not reported to the City Helpdesk until 6th March 2019; an accident form completed and signed by the claimant, but with no dates recorded and not reported to the City Helpdesk; the accident causation tracker being incomplete and the enforcement officer visit on the 17 January 2019 not being reported to the City Helpdesk all fell within the claimant's role and were issues for which he was accountable. Mr Gallagher considered it reasonable for Mr McGrath to have found these matters amounted to gross misconduct, for which the sanction was dismissal. However, Mr McGrath did not dismiss because he fully considered the mitigation of the claimant's health. Mr Gallagher was satisfied Mr McGrath had acted reasonably and appropriately by issuing a reduced sanction.

42. Mr Gallagher noted that during the investigation Mr Crombie found that 15 instances of support had been given to the claimant in terms of occupational health referrals, counselling referrals and coaching with Ms Wilson. Mr Crombie considered this support addressed the requested workplace adjustments. Mr Gallagher was satisfied it had been reasonable for Mr McGrath to continue with a disciplinary process in circumstances where there was ongoing support from Ms Wilson and this had provided the claimant with an opportunity to bring forward any concerns regarding his health.

43. Mr Gallagher decided to reject the claimant's appeal for these reasons.

44. The claimant took ill health retirement and left the employment of the respondent on the 26 March 2021.

Credibility and notes on the evidence

45. We found the respondent's witnesses to be both credible and reliable. They gave their evidence in a straightforward manner and fully explained their decision-making process.

46. We also found the claimant to be a credible witness, but his evidence lacked clarity and was at times confused and confusing. We acknowledged the diagnosis of Parkinson's and the subsequent

compulsive behaviour caused by the medication had been traumatic for the claimant, however the detail he provided regarding that episode far outweighed the detail he provided regarding his work situation. A great deal of the claimant's evidence was focussed on possible explanations for what might have happened: for example, someone might have put the document in his drawer, or he must have made notes so he could complete the causation tracker later. The claimant would respond to questions put in cross examination, but it became clear he was putting forward the answer as a possible explanation thought of after the event.

47. The claimant's case was that Parkinson's caused memory loss and this explained why he had acted, or failed to act, as alleged. The claimant was asked if the issue was a memory issue, but he would not accept that. He was clear that once he had been told he had done something, he could recollect it or trace back his actions. He said, for example, that once he had been told of the details regarding the accident packs, he agreed with some of them, disputed some of them and did not remember some.

48. A further example related to the claimant's position that although the respondent had provided a lot of support for the physical issues, it had not provided support for the mental health issues. The claimant, when asked about this, backed off from his assertion, stating maybe the mental health issues had not been a big issue at the time. Ultimately, when asked about what support he had wanted from the respondent with the mental health issues, he could not think of anything to reply.

49. The crucial issue with the claimant's evidence was the lack of clarity and certainty about what he was saying or alleging. He offered possible explanations, and this chimed with Mr Wallace's suggestion of "armchair analysis", whereby the explanation for what had happened took root and grew after the event.

50. Mrs Smith was a credible witness whose evidence focussed on the issue of compulsive behaviour caused by the medication. She was clear that once the claimant had been weaned off the medication and changed to another medication he was "back to his old self", although he still had stress and anxiety. Mrs Smith described the claimant as "managing fine"

in the disciplinary process, although he had been angry and upset about it all.

Claimant's submissions

51. Mr Edward took no issue with the legal propositions in the respondent's written submissions, but submitted that for the claim to be established under section 15 Equality Act, the something arising need not be the sole cause of the discrimination, it can be a significant cause (**Pnaiser v NHS England 2016 IRLR 170** at paragraph 31). In terms of the section 15 claim, the unfavourable treatment relied upon was being subjected to a disciplinary process and being given a final written warning. The "something arising in consequence of disability" was the failure to fulfil his duties. Mr Edward referred the tribunal to the letter of outcome from the disciplinary hearing where Mr McGrath accepted the claimant's condition warranted being taken into account.

52. Mr Edward also invited the tribunal to have regard to the evidence of Mrs Smith, when she spoke of the claimant suffering a loss of confidence, not interacting, being reclusive and repeating the same conversation. The Consultant had said these were symptoms of Parkinson's and of the medication. The claimant also spoke of being told by his GP that memory loss could be attributed to Parkinson's. The Parkinson's Nurse had also referred to this. Mr Edward submitted the symptoms arose because of Parkinson's and/or the medication he took for it. The unfavourable treatment arose because of this.

53. Mr Edward accepted it was a legitimate aim for a business to avoid future failures of this kind. However, to be proportionate, the means must be the least discriminatory way of doing so. A final written warning did achieve the legitimate aim, but it was not the least discriminatory way it could have been dealt with. The respondent could, for example, have followed a capability procedure, or dealt with it informally by disciplinary counselling. Mr McGrath had accepted that a written warning would have had the same effect, but would have caused less anxiety. This was particularly so against a background where Ms Wilson had put in place procedures to

avoid issues with the accident packs arising again, and Mr McGrath was aware of this.

54. Mr Edward referred to the **Seldon v Clarkson Wright & Jakes 2021 3 All ER 1301** case where it was held the policy must be objectively justified. However **Seldon** had been distinguished in the case of **Buchanan v Metropolitan Police 2017 ICR 184** where it was said that in a section 15 claim, the tribunal must look at the treatment of the claimant because that was what had to be justified.

55. The claimant, in relation to the claim brought under section 20 Equality Act, relied firstly on the provision, criterion or practice (PCP) of subjecting an employee whose performance was impacted to a disciplinary process. This disadvantaged the claimant because he was more likely to make these errors because of the nature of his disability. The reasonable adjustment to make would have been to have dealt with it in another way. The claimant's health worsened because he was subjected to the disciplinary process.

56. The second PCP was issuing a final written warning to an employee whose performance had fallen below the required standard (page 99 of the Disciplinary Policy). Mr McGrath said if there was no dismissal that a final written warning was appropriate because of the seriousness of the misconduct. This caused disadvantage to the claimant because of his disability and it would have been reasonable to adjust the final written warning to a written warning.

57. Mr Edward invited the tribunal to find for the claimant and to order compensation comprising wage loss caused by the respondent when the claimant was unable to attend work between September 2019 to March 2020 and from March 2020 to 26 March 2021 (52 weeks' loss). There should also be an award for injury to feelings of £20,000, plus interest. Mr Edward noted the claimant had been informed of the allegations on the 8 July 2019. His mental health took a big step backwards and he was signed off work. He returned in July 2019 but was absent from September onwards. The claimant went back into periods of isolation and any improvements to his mental health disappeared: he hit rock bottom.

58. The claimant told the tribunal he had been afraid to return to work following the final written warning because of the threat of dismissal attached to the warning for one further instance of misconduct in circumstances where the claimant's absence and timekeeping were affected by his disability.

59. Mr Edward, in response to the respondent's submissions, noted it was perverse to suggest the claimant had been given an advantage by being given a final written warning. He further noted the non-completion of the training log paperwork was not listed as a finding or outcome of the disciplinary hearing and therefore it could not be justification for the final written warning.

60. There was no evidence that the legitimate aim was to discourage the misconduct of others.

61. Mr Edward considered the issue of whether the claimant would have been furloughed would have been within the knowledge of the respondent.

Respondent's submissions

62. Mr Wallace submitted the foundations of the claim were not stable and the claim had been undermined by this. Mr Wallace, in support of this submission, relied on four points:

- the phrasing of the claimant's case was vague. The causal link between the claimant's disability and the unfavourable treatment or substantial disadvantage was framed in vague terms and the evidence was equally vague on the connection. Further, in the section 20 claim the PCP was wholly artificial because there was no PCP as framed regarding the final written warning.

- In the section 15 case, either the claimant had limited the scope of the claim to incomplete accident packs (the claimant would not accept he had done the other allegations and therefore if he had not done them, they could not be said to arise from disability), or the claimant did do all which was alleged, in which case he had undermined his claim. If the claimant's case was limited to the accident packs, it was a very small part of the allegations of misconduct and would not have amounted to gross misconduct.

- Mr McGrath found the claimant responsible for the failures regarding the trading law paperwork (even though this had been omitted from the outcome letter). The claimant provided no evidence regarding this matter and therefore, it was submitted, it must be the case that this was excluded from the claim.

- The claimant admitted that at least one of the acts was gross misconduct (that is, leaving the letter regarding the accident in his drawer). All of the evidence pointed to dismissal for gross misconduct. The respondent was benevolent in pulling back from dismissal to a final written warning. The claimant had, in fact, received a benefit.

63. Mr Wallace set out the applicable law and referred to the cases of ***T-Systems Ltd v Lewis EAT; Williams v Trustees of Swansea University Pension and Assurance Scheme 2015 IRLR 885; Basildon & Thurrock HNS Foundation Trust v Weerasinghe 2016 ICR 305; Harrod v Chief Constable of West Midlands Police 2017 EWCA Civ 191; Prospere v Secretary of State for Justice 2014 EqLR 633; Newcastle upon Tyne NHS Foundation Trust v Bagley 2021 EqLR 634*** and ***North Lancashire Teaching Primary Care NHS Trust v Howorth EAT 0294/13***.

64. Mr Wallace submitted there had been no unfavourable treatment. A disciplinary process could not be described as unfavourable treatment because it was a neutral act which allowed the respondent to investigate a potential act of misconduct. A final written warning was an advantageous outcome to allegations of gross misconduct.

65. Mr Wallace submitted, in respect of the section 15 claim, that the "something" identified by the claimant in the list of issues was, to a significant degree, in fact not alleged by the claimant at all. This was because the claimant had, in evidence, only admitted to keeping incomplete accident reports in his drawer at work. He did not accept that he was responsible for leaving the legal accident letter in his drawer, or for failing to notify City about the legal enforcement officer visit, or for failing to keep the accident tracker up to date. The consequence of this

was that the claimant must accept his claim was based only on the accident reports: the other allegations which led to the disciplinary action and the final written warning cannot be part of the pleaded "something arising" case. Any alternative suggestion by the claimant must bring his credibility into extreme doubt.

66. Mr Wallace submitted there must be some link (in a section 15 claim) between the disability and the something arising. This was said to be the errors made by the claimant. The claimant, however, failed to evidence the link. He refused to describe his mental health problems as causing memory loss and accepted no such diagnosis had ever been made. He did not explain how his disability led to him not reporting, or not completing the accident forms, or signing incomplete forms. The strongest suggestion made by the claimant was that he was forgetful. The problem with that, however, was that the claimant was asked if this was a memory issue and refused to accept it. He agreed it was a recollection issue. There was no diagnosis of memory loss and no medical evidence to support it.

67. The claimant had given evidence of compulsive behaviour although he refused to accept it was compulsive. Mr Wallace suggested it was not a memory issue, but a restraint issue, and no link could be drawn between compulsive behaviour and the errors.

68. Mr Wallace submitted the claimant explained the link between his disability and the errors by way of "armchair analysis". Mr Wallace referred to the note of the second investigation where the claimant started to talk of ill health as a possible explanation, stating this "could" have been a contributory factor. By the time of the third investigation, and with support from the trade union, the claimant made a more positive assertion regarding disability and his conduct. There was no suggestion of a memory issue. It was not until the disciplinary hearing that the claimant brought up his gambling.

69. The claimant and his wife gave different evidence regarding where the idea of memory loss had come from: the claimant referred to the GP and his wife referred to the Parkinson's Nurse. Both agreed it was something said in passing.

70. Mr Wallace submitted that the fact the claimant, in his own case, did not set out the link undermined his case. He could not put his finger on memory loss because it was speculative.

71. Mr Wallace submitted the legitimate aim of the business was to avoid future failures, and in particular the future failures of the claimant. Mr McGrath described the misconduct as serious, and requiring some sanction. The purpose of the sanction was to discourage failure again, both of the claimant and the workforce.

72. Mr Wallace submitted the defence of the respondent required an objective analysis regarding the aim and the proportionality: it was not simply about what Mr McGrath said. It was not right for the respondent to allow serious acts to go unpunished and the respondent in this case had struck the balance perfectly.

73. Mr Wallace, with regard to the section 20 claim, referred to the **Prospere** case. The respondent accepted there was a PCP of subjecting someone to a disciplinary process where there had been alleged misconduct. However, the way in which the second PCP had been framed was artificial. There was no evidence to suggest the respondent gave final written warnings whenever misconduct occurred. Mr Wallace noted in relation to the second PCP that the claimant's representative had referred to page 99 (the disciplinary policy) but that referred to serious misconduct, whereas the claimant was alleged to have committed gross misconduct. If the claimant maintained it was serious, the claim must fail.

74. Mr Wallace noted that one of the adjustments suggested by the claimant was dealing with the matter under the capability procedure. No such procedure had been produced and there was no evidence regarding what it might entail. Mr Wallace questioned how the tribunal could judge what would have happened. Mr Wallace invited the tribunal to have regard to the claimant's evidence that a capability procedure carried a stigma. He suggested it was not the process, but the outcome, which obviated the disadvantage and the tribunal had no way of knowing what the outcome of a capability procedure may have been.

75. The claimant also suggested the final written warning should have been adjusted to a written warning which would have relieved the stress. Mr Wallace submitted the claimant would still have felt some stress and anxiety at being given a written warning and so the proposed adjustment would not have removed the disadvantage.

76. Mr Wallace invited the tribunal to have regard to the adjustments which had been made for the claimant, and to all of the support put in place. He suggested the support had helped the claimant physically and mentally. He submitted it could not be the case that whenever the claimant faced disciplinary proceedings they had to be converted to capability proceedings. The allegations against the claimant had been serious and it had been reasonable for the respondent to pursue disciplinary proceedings.

77. Mr Wallace invited the tribunal to dismiss the claim in its entirety. If however the tribunal were not minded to do so, he submitted the case was not a mid-band Vento case because the claimant had not lost his job.

78. The claimant would have been dismissed in any event for the error not included in this claim.

79. The claimant decided not to return to work. This was a tactical decision in case he made another mistake and did not arise in consequence of the discrimination.

80. Mr Wallace noted that on the 20 March 2020 shielding letters had been issued. The claimant was not able to go out or go to work. The claimant would have received 12 weeks' wages and then SSP: he was not able to recover full wages. There was no evidence or assertion that the claimant would have been furloughed, and therefore the tribunal could not make any finding regarding this matter (although Mr Wallace acknowledged there had been Government guidance on the 6 April 2020 that shielding employees could be furloughed). The claimant however was not at work because of ill health.

Discussion and Decision

Discrimination arising from disability

81. We firstly had regard to the relevant statutory provisions in section 15 of the Equality Act, which provide that a person discriminates against a disabled person if he treats the disabled person unfavourably because of something arising in consequence of the disabled person's disability and he cannot show that the treatment is a proportionate means of achieving a legitimate aim.

82. The EAT in ***Secretary of State for Justice v Dunn EAT 0234/***16 identified the following four elements that must be made out if a claimant is to succeed in a section 15 claim:

- there must be unfavourable treatment;
- there must be something that arises in consequence of the disability;
- the unfavourable treatment must be because of (that is, caused by) the something that arises in consequence of the disability and
- the respondent cannot show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

Unfavourable treatment

83. The unfavourable treatment relied on in this case was (i) being subjected to the disciplinary process and (ii) being subject to a final written warning. Mr Wallace suggested being subjected to a disciplinary process could not be a disadvantage because it is a neutral act insofar as the investigation and disciplinary hearing require to take place in order to decide whether disciplinary action is required.

84. We had regard to the case of ***T-Systems Ltd v Lewis*** (above) where it was stated that "*unfavourable treatment is that which the putative discriminator does or says or omits to do or say which places the disabled person at a disadvantage".* In ***Williams v Trustees of Swansea***

University Pension and Assurance Scheme (above) it was stated "*unfavourable treatment requires to be measured against an objective sense of that which is adverse compared with that which is beneficial".* Further, unfavourable treatment does not equate to either the concept of detriment or that of less favourable treatment.

85. We asked ourselves whether being subjected to a disciplinary process was unfavourable treatment (which should be construed synonymously with disadvantage). We noted the claimant had not provided any evidence to inform the tribunal why he considered this to be unfavourable treatment. We accepted an investigation and disciplinary hearing will take place in order to determine the facts and whether disciplinary action should be taken. An employer cannot determine how best to deal with a matter unless an investigation is carried out to determine the facts.

86. We, on the one hand, accepted the submission that the disciplinary process could be described as neutral. We balanced this, on the other hand, with the fact that being subjected to that process must have an impact on the employee concerned in terms of anxiety regarding the process and the possible outcome. We concluded, on a very fine balance, that being subjected to a disciplinary process was unfavourable treatment because we considered that it fell within the general concept of being a disadvantage.

87. We accepted Mr Wallace's submission that being subject to a final written warning was not unfavourable treatment in circumstances where the alleged gross misconduct merited dismissal. In the ***Williams*** case (above) it was said that "treatment that was advantageous cannot be said to be unfavourable because it was insufficiently advantageous". The allegations against the claimant were of gross misconduct, which Mr McGrath upheld. The sanction for gross misconduct is summary dismissal. The claimant was given a final written warning. This was an advantageous outcome in circumstances where the claimant could have been summarily dismissed. We decided that in the circumstances of this case being subjected to a final written warning was not unfavourable treatment.

Something arising in consequence of the disability

88. We next asked what was the something that arose in consequence of the disability. The claimant's disability was Parkinson's, Depression and Cellulitis. Mr Edward identified the something arising in consequence of the claimant's disability as being the failure to fulfil his duties.

89. Mr Wallace submitted the "something arising in consequence of the claimant's disability" had been undermined by the claimant's oral evidence, because although the claimant had admitted to keeping incomplete accident reports in his desk at work, he had denied leaving the legal letter regarding the accident at work in his drawer; failing to notify City about the enforcement officer visit; falsifying the trading law paperwork by signing it as complete when it was not and failing to keep the accident tracker up to date. Mr Wallace invited the tribunal to accept the claimant, having denied what was alleged, could not then argue these matters were "something arising in consequence of his disability".

90. We accepted the above matters were referred to in the claimant's written case, but in his oral evidence, the claimant was less than clear about his position. The claimant would not accept that (for example) the letter regarding the enforcement officer visit had lain unactioned in his desk drawer. The claimant denied it had been found in his desk drawer and stated "*there is no reason why, if I had it, I did not process it".* The claimant confirmed he knew the procedure to follow and had done it before. He suggested that someone may have put it there without his knowledge. The same explanation was given in respect of the legal letter regarding the accident. The claimant maintained that if he had been given it, he would have actioned it.

91. We acknowledged the submission made by Mr Wallace that there was a difference between the claimant's written case and his oral evidence. We decided however that rather than limit the claimant's case to the accident forms being incomplete, the difference undermined the claimant's case.

Was the unfavourable treatment caused by the something arising in consequence of disability

92. The claimant must show the unfavourable treatment was because of, or caused by, the something that arises in consequence of the disability. We were referred to the case of ***Pnaiser v 2016 IRLR 170*** where the EAT set out the proper approach to establishing causation in a section 15 Equality Act claim. It was said that first, the tribunal has to identify whether the claimant was treated unfavourably and by whom. It has then to determine what caused that treatment – focusing on the reason in the mind of the alleged discriminator. Then the tribunal must determine whether the reason was something arising in consequence of the claimant's disability, which could describe a range of causal links. This stage involves an objective question and not the thought processes of the alleged discriminator.

93. In ***T-Systems Ltd v Lewis EAT 0042/18*** it was said that the key question is whether the something arising in consequence of disability operated on the mind of the alleged discriminator consciously or unconsciously to a significant extent.

94. We accepted Mr Edward's submission that the something arising in consequence of disability need not be the sole cause of the unfavourable treatment, but it must have at least a significant (or more than trivial) influence on the unfavourable treatment and so amount to an effective reason for or cause of it.

95. The something arising in consequence of the claimant's disability was said to be the failure to fulfil his duties. It is not however sufficient to simply point to the fact of the claimant's disability and the fact of the failure to fulfil duties, and argue there has been discrimination. The something arising – in this case the failure to fulfil duties – must arise in consequence of the claimant's disability, and there was a complete lack of clarity surrounding this issue.

96. Mr Edward in his submission referred the tribunal to the evidence of Mrs Smith when she spoke of the claimant suffering a loss of confidence, not interacting, being reclusive and repeating the same conversation, all of

which she said were symptoms of Parkinson's and the medication. The claimant referred to being told by his GP that memory loss could be attributed to Parkinson's (although Mrs Smith suggested this information had come from the Parkinson's nurse).

97. The claimant did not suggest, in his evidence to this tribunal, that a loss of confidence, not interacting or being reclusive and repeating conversations had caused him to fail to fulfil his duties. The only suggestion he made was that memory loss could be an effect of Parkinson's. We noted the claimant, during the disciplinary hearing, made one reference to memory loss being an effect of Parkinson's: he did not go on to suggest that he had failed to take certain action because he had forgotten to do so. In fact it was not at all clear whether the claimant sought to argue that he failed to act because he had forgotten or that he could not give an explanation for his actions because he had forgotten what happened. The claimant, in any event, undermined his argument that the errors arose because of memory loss when he was asked in cross examination if it was a memory issue and refused to accept it.

98. We have referred above to the fact a large part of the claimant's evidence to Mr McGrath (and to this tribunal) concerned the compulsive behaviour caused by the medication. The claimant was asked in cross examination if his case was that the errors were caused by compulsive behaviour, and he denied this, saying it was an issue of restraint. The claimant did not however go on to clarify how an issue of restraint may have led him to act, or fail to act, as alleged.

99. We acknowledged the fact Parkinson's disease has various consequences (for example, those referred to at the start of this Judgment) but for the purposes of this claim, the claimant did not explain what it was about the condition which had had the consequence of making him fail to fulfil his duties. The EHRC Code of Practice gives an example of a section 15 claim as follows: a person with arthritis, employed as a typist, was put on a performance management plan because of typing too slowly. The person's typing was impacted by the fact arthritis causes pain and stiffness in the joints which caused the person to type more slowly. This example must be contrasted with the claimant's case where the links

between the disability and the failure to fulfil his duties were missing. The claimant was a person with Parkinson's disease, and he was subjected to a disciplinary procedure because of a failure to fulfil his duties: beyond this the claimant did not clarify or lead evidence to explain why/in what way his ability to fulfil his duties was impacted by having Parkinson's disease.

100. There was a suggestion that memory loss was an effect of Parkinson's which had impacted on the claimant's ability to fulfil his duties. The difficulty with that position was that it was not supported by the evidence of the claimant (either during the disciplinary process or at this hearing) or by the documents.

101. The claimant's position during the disciplinary process was equally confused and lacking in clarity. The claimant, during the investigation with Mr Crombie, was asked if he believed his illness had been a contributory factor. The claimant referred to his mental health and confirmed he thought it had contributed: he went on to refer to "many symptoms" and there being "a number of things that contribute, for example, sleep apnoea, anxiety etc".

102. Mr McGrath, at the start of the disciplinary hearing, noted the issue of the claimant's mental health had been raised and he asked the claimant to tell him how it affected him. The claimant referred to having gambled a lot of money due to the medication he was taking. He told Mr McGrath he had done things without knowing, for example, buying tickets for a concert. He had turned the playroom into a room for himself and bought lots of things with the holiday money. The claimant said there had been occasions when he had got up to get ready for work but had sat on the bed crying; he had become reclusive and did not wash. These incidents had all happened the previous year and prior to the claimant's medication being changed.

103. Mr McGrath investigated with the claimant how this had affected work. The claimant explained the physical effects in terms of being hospitalised twice for cellulitis, and having a tremor with Parkinson's. The claimant found being taken off the shop floor very difficult and he had, on several occasions, defied instructions not to go on to the shop floor. The claimant had thought he was doing "fine in the role"; he knew he had a backlog of

accident forms in his drawer that he had to work through, and "a few problems with facts and figures", but nothing else. The claimant told Mr McGrath he had not been aware of the extent to which Parkinson's affected him: he knew of the tremor, but not the full extent of the "depression, anxiety, hiding myself away, going quiet and not being as outgoing as I have been over the years".

104. The claimant's trade union representative told Mr McGrath the claimant had been supported by the respondent in relation to the physical effects, but not in relation to the mental health effects.

105. Mr McGrath had the claimant's occupational health reports before him at the disciplinary hearing. He took into account the fact the August 2019 report (page 382) confirmed the claimant had an ability to understand the allegations and could participate in the proceedings. Mr McGrath did not understand from that occupational health report that an effect of Parkinson's was memory loss.

106. Mr Gallagher, at the appeal hearing, was told by the claimant that the Parkinson's affected his memory. Mr Gallagher was keen to explore what mental health issues the claimant had been made aware of and whether he had made the respondent aware of specific mental health issues. The claimant referred to the occupational health reports and the information in those reports regarding depression and anxiety, and referred to the respondent being aware the claimant had attended for counselling. The claimant confirmed that everything had been in the occupational health reports.

107. The claimant, at the start of his evidence in chief, told the tribunal about Parkinson's, the effects it had on him and the medication he had been prescribed. The claimant did not refer to issues with memory loss. The claimant was asked some questions in cross examination regarding the issue of memory. The claimant was asked if it was a memory issue: he replied (referring to his compulsive behaviour) that he had "no recollection of what I was doing, and it was only when it was brought to my attention that I realised some of it." Mr Wallace suggested that if he could not remember, it must be a memory issue. The claimant insisted that once he

was told about it, he could "trace back what I had been doing. I do have issues with retention".

108. The claimant accepted the letter written by Dr Brown, Clinical Psychologist, to Dr Wheal, dated 3 January 2020 (page 444a) following an assessment regarding self-reported key difficulties, did not refer to memory loss.

109. The claimant was also asked if, at this time, he was still experiencing memory issues, and responded "I don't know, medication had been changed and there was no reason to think it was happening, but I wouldn't know". Mr Wallace suggested the claimant's case was that it was the drugs which caused him not to recall what he had done. The claimant replied that "the drugs caused me to do what I did, and the not remembering was part of the Parkinson's".

110. The claimant did, during the disciplinary hearing, focus on the effect the medication had had when causing the impulsive behaviour. The claimant's wife told the tribunal that the compulsiveness went once the medication was changed, and the claimant was "back to his old self" although he still had stress and anxiety. Mrs Smith also told the tribunal the claimant had "managed fine" at the disciplinary.

111. We concluded that the claimant's position during the disciplinary process did not shed any light on why he was saying the failure to fulfil his duties arose in consequence of his disability.

112. The claimant's evidence was, as stated above, confused and lacking in clarity. Mr Wallace used the term "armchair analysis" to describe a situation where the possible explanations, or what could have happened, have been constructed after the event. We think this accurately described what occurred in this case. We say that because of the confusion and looseness in the claimant's evidence: memory loss was an issue touched on in the disciplinary procedure, but it was not the focus of the claimant's position nor his explanation for what had occurred. The claimant, for example, did not adopt the position that he had forgotten to complete the accident forms. The claimant in fact accepted he had not completed some

of the forms: he knew they were in his desk and he knew they needed to be completed.

113. We next asked ourselves whether the unfavourable treatment alleged in this case arose as a consequence of the disability. We decided above that the claimant was treated unfavourably when he was subjected to a disciplinary process but not when he was given a final written warning. The decision to proceed to a disciplinary hearing was taken by Mr Crombie who carried out the investigation. Mr Crombie made that decision because he was satisfied the claimant knew what was expected with regard to accident form completion; he had had ample training, coaching and support to complete the forms and he had an opportunity to raise the accident form pack as an issue but did not do so.

114. The tribunal did not hear from Mr Crombie, and so had no evidence beyond what is set out above regarding why he decided to proceed to a disciplinary hearing. We must ask what caused Mr Crombie to make that decision. We were satisfied Mr Crombie made his decision because the alleged misconduct was serious; the claimant knew what was expected of him and had been trained and had support to complete the forms and, in response to Mr Crombie's questions, the claimant had not suggested the failure to complete forms occurred because of something arising in consequence of his disability.

115. The claimant did suggest the matter could have been dealt with using a capability procedure rather than a disciplinary procedure. A capability procedure was not produced for the tribunal and there was no evidence to inform the tribunal whether the respondent had such a policy, and if it did, the terms of any such policy. We accordingly had no evidence upon which to base any decision regarding the appropriateness or otherwise of using a capability procedure.

116. We decided above that the issuing of a final written warning was not unfavourable treatment. We decided – should we have erred in concluding the issuing of a final written warning was not unfavourable treatment – that we must determine what caused that treatment and, in answering that question, we must focus on the reason in the mind of the alleged

discriminator. The allegations against the claimant were that he had (a) falsified company documents by signing off trading law paperwork as complete in August 2019, as well as an accident pack in February 2019 when neither of these documents were complete; (b) failed to follow process regarding the storage, filing and reporting of accidents and failed to notify City of an enforcement officer visit in March 2019 and (c) failed to follow GDPR with regards to having legal documentation on a customer accident on 13/12/18 in his drawer to which others had access.

117. The allegations of falsifying company documents, failing to report accident and breaches of the GDPR were allegations of gross misconduct.

118. Mr McGrath, in reaching his decision to issue a final written warning, took into account the following points: (i) the claimant accepted he had signed the documents off as being complete when he should not have done so; (ii) the claimant knew 12 accident packs were not complete and he had put them to one side intending to go back to them; (iii) the claimant knew how to complete the causation tracker and had made notes to input to the tracker, but had not done so; (iv) the claimant stated he had known nothing of the enforcement officer letter. He was adamant that he knew how to action the letter and would have done so if he had known about it. The letter had been in his drawer for over two months. Mr McGrath concluded the claimant did know the letter was in his drawer and (v) the Store Manager had handed the claimant the legal letter regarding the customer accident, and he had placed it in the top drawer of his cabinet, but had not actioned it.

119. Mr McGrath also took into account whether the claimant's mental health had caused him to act, or fail to act, as alleged. Mr McGrath concluded, having had regard to his discussion with the claimant during the course of the disciplinary hearing, and to the occupational health records, that the failings had not been caused by the mental health issues. Mr McGrath in particular noted the occupational health advice that the claimant was fit to perform his role and that the claimant had been given support from the respondent.

120. Mr McGrath noted the allegations against the claimant were serious, and he believed the claimant had done what was alleged. Mr McGrath took into account the claimant's mitigation which related to his mental health and noted it was well documented that the claimant suffered from severe depression and anxiety while also having Parkinson's. Mr McGrath described that he took what he had been told about the impact on the claimant's home life and factored in that there must have also been some impact on his work life.

121. We considered this description by Mr McGrath of "factoring in" some impact on the claimant's work life disclosed the difficulty for the respondent in understanding from the claimant what it was about his mental health that had caused him to act, or fail to act, as he had. This was particularly so in circumstances where the claimant admitted some of the alleged misconduct. The claimant did not offer any explanation to Mr McGrath (or indeed to this tribunal) regarding how the effects of his disability led, or caused, him to sign paperwork off as being complete when it was not; or to not completing accident forms or to not processing the legal letter.

122. We concluded, having had regard to all of the above points, that the reason Mr McGrath made his decision to issue a final written warning was because the alleged misconduct was serious and he was satisfied the claimant had acted as alleged. Mr McGrath acknowledged the sanction for gross misconduct is summary dismissal and he confirmed he had "pulled back" from this sanction because of the mitigation offered by the claimant. We asked whether the fact Mr McGrath recognised the claimant's health had been a factor meant there was recognition that the allegations were something arising in consequence of disability. We answered that question in the negative. We considered that Mr McGrath factored in some impact generally on the claimant's work life, but beyond that could be no more specific. He was satisfied the claimant's health had not caused or been a factor in the allegations of misconduct. We concluded, based on this, that Mr McGrath's factoring in of the claimant's health had been on a much more general basis.

123. We concluded, having had regard to all of the above reasons, that the claimant had been unable to show the unfavourable treatment was caused by, or because of, the something arising in consequence of disability.

124. We did continue to determine whether (if we have erred above) the respondent's decision to subject the claimant to a disciplinary process and issue a final written warning was a proportionate means of achieving a legitimate aim. The claimant's representative accepted it is a legitimate aim for a business to wish to avoid failures of this kind. The question to be determined by this tribunal is whether the actions of the respondent were a proportionate means of achieving that aim.

125. Mr Edward sought to argue that issuing a final written warning was not proportionate because the respondent could have dealt with the matter in a different way, for example, by issuing a written warning, dealing with it under a capability procedure or disciplinary counselling.

126. In the case of ***Homer v Chief Constable of West Yorkshire Police 2021 UKSC 15*** Baroness Hale stressed that to be proportionate a measure must be both an appropriate means of achieving the legitimate aim and reasonable necessary in order to do so. The EHRC Employment Code states with regard to proportionality that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

127. There was no dispute regarding the fact the purpose of the final written warning was to ensure the allegations did not happen again. The final written warning reflected the seriousness of the misconduct not only to the claimant, but also to the workforce as a whole.

128. Mr McGrath was asked if a written warning would have been sufficient to prevent recurrence and he responded yes, but he had already pulled back from dismissal and he considered the seriousness of the allegations warranted a final written warning.

129. The claimant argued the allegations could have been dealt with under a capability procedure. We have already referred (above) to the fact no evidence was led regarding a capability procedure and the terms of any such procedure. We did not know if there was such a procedure, when it might be used or what difference it may have made for the claimant. In addition to this, the occupational health report noted the claimant was fit to perform his role. We concluded, on the basis there was no evidence regarding any capability procedure, that we could not make any findings or decisions regarding this matter.

130. The claimant told the tribunal that he deliberately decided not to return to work after being given a final written warning because he could not risk one further instance of misconduct leading to his dismissal. The claimant did not enter into any discussions with the respondent regarding his concerns. There was no discussion, whether, for example, one instance of lateness would be sufficient to lead to dismissal. We considered this to be an important point in circumstances where reasonable adjustments had been put in place by the respondent in relation to absence, and there was no suggestion other adjustments could not have been accommodated.

131. The claimant contrasted this with the situation if he had been given a written warning and told the tribunal that he could have returned to work in those circumstances. We doubted the claimant's evidence regarding returning to work. We say that because the claimant described himself as being "devastated" by the allegations of misconduct, and that he would take a warning "very seriously". Those two things would have applied equally to a written warning. The underlying issue for the claimant was that he felt angry and frustrated by the fact of disciplinary action having been taken against him, and these feelings would have been the same even if the respondent had put in place a written warning instead of a final written warning.

132. Mr McGrath did acknowledge a written warning would have carried less risk of dismissal and so would have caused the claimant less anxiety.

133. We concluded, having taken all of the above points into account, that issuing a written warning would not have achieved the same objective as a final written warning. We say that because we did not believe the claimant's evidence that if he had been given a written warning the impact on him would have been less and he would have been able to return to work. The claimant would have been equally as devastated by the allegations against him and would have been equally as angry and frustrated by the fact of disciplinary action having been taken against him even if a written warning had been issued.

134. We decided for these reasons that the respondent's actions were a proportionate means of achieving a legitimate aim.

135. We decided to dismiss the complaint of discrimination arising from disability.

Failure to make reasonable adjustments

136. We had regard to section 20 Equality Act which provides that where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the duty to take such steps as it is reasonable to have to take to avoid the disadvantage arises.

137. The claimant argued two PCPs had placed him at a substantial disadvantage: the first PCP was subjecting an employee whose performance is impacted to a disciplinary process; and the second PCP was issuing a final written warning to an employee whose performance had fallen below the required standard. The claimant referred to the respondent's Disciplinary Policy.

138. There was no dispute regarding the fact the respondent had a Disciplinary Policy which set out how cases of alleged misconduct should be dealt with. Misconduct was defined in point 3 of the Key Points as covering any behaviour that falls below what is expected.

139. The respondent did not have a policy of subjecting an employee whose performance was impacted to a disciplinary process. We say that because the Disciplinary Policy provided for certain circumstances to be dealt with

under other policies: for example, the disciplinary policy did not apply to cases of persistent absence, which should be dealt with under the Attendance policy. Further, the Disciplinary policy did not apply where an employee could not perform their duties to the required standard because of poor performance, lack of skills, knowledge or ability. Those cases should be dealt with under the Performance Improvement policy.

140. There was no evidence to suggest how the respondent had dealt with previous cases of impacted performance. We did not know, for example, how many such cases the respondent had had to deal with and whether they were dealt with under the Disciplinary policy or some other procedure.

141. We should state that if we had decided the respondent did have a PCP of subjecting an employee whose performance was impacted to a disciplinary process, we would have to have addressed the question of substantial disadvantage. The claimant argued the PCP subjected him to a substantial disadvantage because he was more likely to make these errors because of the nature of his disability. The claimant did not explain what he meant by “nature of his disability”: what was it about his disability that meant he was more likely to make these errors? What was it about his disability that made him sign off paperwork as complete when it was not, or not to complete accident packs or not process a legal letter regarding an accident? We, in asking these questions, rely on the points set out above where we have dealt with the lack of clarity and looseness regarding the claimant’s evidence.

142. The claimant submitted an adjustment should have been made to deal with his case in another way, for example under the capability procedure. The claimant offered no evidence regarding a capability procedure: we did not know if the respondent had such a procedure, when it was used or what its terms were. There was no evidence for the tribunal to consider when determining whether such an adjustment would have alleviated the disadvantage: we simply did not know.

143. We decided, with regard to the first PCP, that there was no such PCP; and, even if there was, it did not put the claimant at a substantial disadvantage and there was no evidence regarding the way in the

proposed adjustment would have alleviated the disadvantage. We decided to dismiss this part of the claim.

144. We next considered the second PCP (issuing a final written warning to an employee whose performance had fallen below the required standard). There was no dispute regarding the fact the respondent has a Disciplinary policy and that one of the disciplinary sanctions available to the employer under that policy is a final written warning. The policy makes clear, however, that "*The level of sanction will depend on all the circumstances of the case, including the seriousness of the misconduct and any relevant mitigation".*

145. There was no evidence to suggest the respondent had a policy of issuing a final written warning to an employee whose performance had fallen below the required standard. We say that for two reasons: firstly because apart from the fact the respondent had given the claimant a final written warning, there was no other evidence regarding the use or otherwise of final written warnings. Secondly, the policy makes clear that the level of sanction will depend on all the circumstances of the case. Accordingly, the level of performance in terms of how far it has fallen below the required standard would be a matter for consideration. It may well be that a range of sanctions could be considered up to and including dismissal.

146. We should say that even if we had been satisfied there was a PCP as suggested, we would not have been satisfied the claimant was subjected to a substantial disadvantage. The reason for this is set out above and not repeated.

147. The claimant submitted it would have been reasonable to adjust the PCP so that a written warning was given because this would have removed the threat of dismissal and the anxiety associated with it. The claimant did refer (above) to being able to return to work if a written warning had been given. We did not find this to be a credible aspect of the claimant's evidence, because his hurt and upset related to the allegations made against him, and this would have been the same in a written warning. Further, we noted above that the claimant was angry and frustrated that

any process had been taken against him and there was nothing to suggest this would have been any different if he had been given a written warning.

148. The claimant did suggest the final written warning increased his anxiety because of the fear of dismissal for one further instance of misconduct. The claimant spoke of his timekeeping and absence being vulnerable because of his disability. However, we noted the respondent had already made adjustments to remove disability-related absences from the triggers under the Absence Management policy (which would deal with such absences, rather than them being a misconduct issue) and there was nothing to suggest further instances would not be dealt with in the same way.

149. We also had regard to the fact the allegations against the claimant were of gross misconduct for which the disciplinary sanction is usually summary dismissal. Mr McGrath could, in terms of the Disciplinary policy, have decided to dismiss the claimant. He decided not to dismiss, and instead to adjust the sanction to a final written warning.

150. We decided the claimant had been unable to show there was a PCP as defined. And, even if the claimant had been able to show there was a PCP as defined, we would not have upheld the claim because we would not have been satisfied the PCP caused substantial disadvantage to the claimant, and/or that the adjustment proposed was reasonable.

151. We, in conclusion, decided to dismiss the claim in its entirety.

Employment Judge : L Wiseman
Date of Judgment : 26 July 2021
Date sent to parties : 27 July 2021