EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr James Dunn	**v**	Boots Opticians Professional Services Limited

Heard at: Cambridge (by CVP)

On: 23 – 26 September 2024

Chambers Discussion: 1 November 2024

Before: Employment Judge Tynan

Members: Ms C Lloyd-Jennings and Ms C Smith

Appearances
For the Claimant: Mr R Winspear, Counsel
For the Respondent: Mr B Frew, Counsel

RESERVED JUDGMENT

1. The Claimant's claim that the Respondent discriminated against him, by failing to comply with its s.20 Equality Act 2010 duty to make reasonable adjustments, succeeds in so far as the Respondent failed at Stage Four of its absence review process to make the Claimant a formal offer in writing to be redeployed from his substantive post as a Student Dispensing Optician into the post of Optical Consultant.

2. The Claimant's claim that the Respondent discriminated against him contrary to s.15 of the Equality Act 2010 succeeds.

3. The Claimant's claim that the Respondent discriminated against him contrary to s.13 of the Equality Act 2010 is dismissed on the basis that it is withdrawn by him.

4. The Claimant's claim that the Respondent indirectly discriminated against him contrary to s.19 of the Equality Act 2010 is not well-founded and is dismissed.

5. The Claimant's complaint of unfair dismissal is well-founded. The Claimant was unfairly dismissed.

6. The Claimant would have left the Respondent's employment in any event by 31 December 2022.

REASONS

Introduction

7. The Claimant claims that the Respondent discriminated against him as a person with a disability and that it unfairly dismissed him. He was employed by the Respondent for nearly eight years, latterly as a Student Dispensing Optician ("SDO"). Save, as we shall come back to, that he struggled to complete his SDO course to qualify as a Dispensing Optician, it is not suggested that he was other than a competent and committed employee. Kamil Strychalski, the Store Manager of the Petty Cury Store in Cambridge where the Claimant worked, said at Tribunal that the Claimant was well liked by his colleagues. The Claimant was dismissed from the Respondent's employment on 1 July 2022 on grounds of capability, specifically by reason of his sickness absence levels and inability to attend work regularly. The questions for this Tribunal are whether the Respondent discriminated against him or acted unreasonably by dismissing him in the application of its Absence Policy.

8. The Claimant was diagnosed with Crohn's disease in October 2015. The Respondent concedes that at all material times the Claimant was disabled for the purposes of the Equality Act 2010 by reason of that condition. The Claimant additionally claimed to be disabled by reason of stress, anxiety and depression, but Mr Winspear confirmed in opening that this was no longer pursued and also that the Claimant's complaint of direct disability discrimination was withdrawn.

9. The Claimant presented his claim to the Employment Tribunals on 20 September 2022 following ACAS Early Conciliation between 18 June and 28 July 2022. His discrimination complaints are brought pursuant to §.15, 19 and 20 / 21 of the Equality Act 2010 and are closely related in that they all concern his dismissal. The same PCP is relied upon for the s.19 and §.20 / 21 complaints.

The hearing

10. The Claimant gave evidence to the Tribunal. On behalf of the Respondent we heard evidence from:-

    10.1. Ms Emily Richardson, formerly an Assistant Manager at the Petty Cury Store. Ms Richardson managed a number of the informal and formal review meetings that ultimately led to the Claimant being dismissed at the fourth stage of the Respondent's absence review process contained within its Absence Policy.

    10.2. Mr Kamil Strychalski.

10.3. Ms Lina Varsan, Practice Manager at the Respondent's Bury St Edmunds store. It was Ms Varsan's decision that the Claimant should be dismissed.

10.4. Mr Mark Rigden, Head of Centres of Expertise. Mr Rigden heard the Claimant's appeal against his dismissal.

11. There was an agreed single Hearing Bundle that extended to 710 numbered pages. Any page references in this judgment correspond to the Hearing Bundle. The Hearing Bundle was supplemented in the course of the hearing at our request by the notes of a return to work interview on 21 December 2020, at which the Claimant was progressed to Stage One of the review process (see below).

12. The Claimant adopted his disability impact statement as part of his evidence to the Tribunal. Presumably on the basis that disability had been conceded by reason of Crohn's disease and that stress, anxiety and depression were no longer pursued as disabling conditions, the Claimant was not questioned by Mr Frew about any matters in his disability Impact statement. In the statement, the Claimant sets out in some detail the extent to which his life is impacted by his condition. Crohn's disease is a lifelong condition which we accept is debilitating for the Claimant on a daily basis and that this was the case throughout his employment with the Respondent. As well as the immediate painful symptoms associated with flare-ups, namely abdominal pain, diarrhoea and nausea, the Claimant experiences significant persistent fatigue, something that impacts him even when the condition is in remission. That fatigue has a knock on effect in terms of the Claimant's energy and focus, as well as his motivation and ability to maintain the recommended lifestyle that best supports the effective management of his condition. We accept the Claimant's evidence that this in turn can lead to a cycle of self-blame and negative thoughts notwithstanding, as the Respondent's Occupational Health Advisor, Christine Bridgett noted in October 2021, he manages his condition to the best of his ability (page 144). In a further report in February 2022, Ms Bridgett also seemingly acknowledged that work-related and personal stressors could be aggravating factors in terms of the Claimant's condition and its effective management (page 195).

<u>The management of the Claimant's absences pursuant to the Respondent's Absence Policy</u>

13. Throughout his employment with the Respondent, the Claimant had an above average level of sickness absence. Given the nature of his condition, that is unsurprising. We do not have a complete record of the Claimant's absences, but he told Ms Varsan that he was typically absent between eight and ten days per year. His absence history as at 11 April 2022 (pages 238 – 239) evidences twenty absences totalling 28 days over a rolling period of 24 months. Whilst that suggests an average of 14 days' absence per annum, we understand the Claimant to have been furloughed twice during that period, as he was required to shield during the Coronavirus pandemic because he was clinically extremely vulnerable as

a result of being immunosuppressed due to the medication he took to manage his condition. His documented absences were therefore effectively over a shorter period of perhaps 17 months, which suggests to us that he was absent at least once a month on average and that in the two years prior to dismissal he was absent on average slightly over 1.5 days per month or nearly 20 days in total on an annualised basis. The categorisation of the Claimant's absences in the Respondent's records suggests that a significant majority of his absences were related to his Crohn's disease, including, we accept, cold and flu related absences because of his greater susceptibility to infection as a result of being immunosuppressed.

14. The Respondent's Absence Policy (pages 82 – 88) covers both short term (that is to say absences lasting between one and fourteen calendar days) and long term absences. The Claimant's absences were all of a short term nature. They were unpredictable. The process for managing short term absence is at page 85 of the Hearing Bundle and comprises five stages as follows: Stage One: First absence review: Stage Two: Second absence review; Stage Three: Formal absence review: Stage Four: Capability review meeting; Stage Five: Appeal. The normal trigger for a First absence review is three short absences within a 12 month rolling period. Thereafter, managers at the Respondent have a discretion to consider moving staff to each of the next stages after one or two short absences of one to two days' duration or following a single instance of absence lasting three days or more. Under the terms of the Absence Policy, it would theoretically be possible for an employee at the Respondent to be dismissed after just six days' absence. Stage One was commenced in relation to the Claimant following sickness absence on 17 December 2020. The available history of absences in the documents produced during the hearing indicates that it was his eighth absence during the preceding 12 month rolling period (during which he had been shielding for perhaps four months) and that he took a total of twelve days' sickness absence during that period. We take judicial notice of the fact that according to the Office for National Statistics, sickness absence levels in 2020, 2021 and 2022 for all people in employment was 1.8%, 2.2% and 2.6% respectively. That equates to between 4.68 and 6.76 days' absence on average for a person working five days per week. Although the Claimant's 12 days' absence in 2020 was not necessarily a high level of sickness absence in absolute terms, nevertheless it was more than double the national average for that year and also comfortably above the level identified within the Respondent's Absence Policy as being that which would normally trigger a review.

15. The Claimant's sickness absence records, including detailed return to work interview records, were examined in some detail in the course of the hearing: we have reviewed them again in the course of our discussions and in coming to this judgment. The Claimant progressed to Stage Two of the absence review process on or around 9 June 2021 following four further absences, each of one day's duration. He had been shielding until April 2021. The Claimant's absences at this time were managed by

another Assistant Store Manager, Claire Wilson. Following the fourth absence she sought HR advice through the Respondent's People Point resource. The relevant record at page 311 of the Hearing Bundle evidences that Ms Wilson was advised to make an adjustment in terms of the trigger for escalation under the Absence Policy referred to in paragraph 8 above. Ms Wilson was advised that three to four short absences might be permitted. It seems that she failed to share this advice with Ms Richardson when Ms Richardson subsequently joined the Petty Cury Store in July 2021 and in September 2021 became involved in managing his ongoing absences.

16. In August 2021 the Claimant informed Mr Strychalski that his treatment / medication regime was changing. Mr Strychalski noted in the record of their discussion on that occasion that in terms of internal support, the Claimant would benefit from a less stressful work environment. It was specifically identified that this might include help and support with his SDO course. Ms Richardson's first involvement on 9 September 2021 was following a Crohn's flare up. No further action was taken under the Absence Policy. At that point the Claimant had had four absences since being progressed to Stage Two. Following a further absence on 6 and 7 October 2021, the decision was taken to refer the Claimant for an occupational health assessment. Ms Richardson had a detailed discussion with the Claimant regarding his health, diet and lifestyle and noted his explanation that stress and diet were principal triggers for flare ups. She noted,

> "Want to see great improvement with diet / lifestyle". (page 136)

17. As with Ms Wilson, we find that Ms Richardson failed to appreciate the extent to which the Claimant is impacted by fatigue. Indeed, certain of the documented comments in the return to work records come across as almost censorious or judgmental. We find that neither individual fully recognised that the Claimant's fatigue impacted his ability to always maintain an optimal diet and lifestyle, and that their notes on the subject likely influenced aspects of Ms Varsan's thinking in the matter.

18. On 8 October 2021, Ms Richardson did nevertheless put forward a useful practical suggestion for the Claimant to trial two thirty-minute breaks rather than taking a single one-hour lunch break, to see whether this might support the Claimant in managing his condition more effectively, for example by reducing his stress levels and fatigue at work. She also referred the Claimant to Colleague Health, for an occupational health assessment, something Ms Wilson had seemingly not thought to do. The resulting report is at pages 143 – 144 of the Hearing Bundle. As we have noted already, Ms Bridgett expressed the view that the Claimant was managing his condition to the best of his ability. She wrote,

> "Tolerance of sickness absence is a management decision and therefore when considering possible workplace adjustments, you may wish to consider any flexibility to adjust absence triggers to support his

> condition with its higher probability of periodic exacerbation. I recommend you explore what is operationally feasible with HR."

Regrettably, Ms Richardson failed to follow up that recommendation with HR / People Point.

19. The question of what is or was operationally feasible in terms of tolerating the Claimant's sickness absences was addressed in a particularly unsatisfactory way in the course of these proceedings. The Respondent's witnesses barely touch upon the issue in their respective witness statements. When we highlighted this omission at the outset of the hearing, Mr Frew confirmed that he proposed to address the matter by way of examination in chief of the Respondent's witnesses, thereby putting the Claimant and Mr Winspear at an obvious disadvantage since the Claimant would become liable to cross examination on a critical issue without any, or any meaningful, prior notice of the Respondent's case or what the Respondent's witnesses might say. With some reservations in the matter, we came to the view that it would be in accordance with the overriding objective to permit further evidence in chief from the Respondent's witnesses, though we insisted that Mr Frew provide Mr Winspear with a summary of the Respondent's case, including any additional evidence he anticipated would be given by the Respondent's witnesses so that Mr Winspear would have some basic opportunity to consider the matter before he was required to cross examine the Respondent's witnesses. On this basis, and as we shall return to, the Respondent was able to adduce additional evidence as to the purported impact of the Claimant's absences upon its business, specifically how they are said to have affected his colleagues and the Respondent's customers.

20. Following their meeting in October 2021, the Claimant raised various matters with Ms Bridgett which she addressed in a follow up report. Amongst other things, she explained the origins of a suggested '3P's' strategy for managing fatigue, namely that it was a tool devised during the Coronavirus pandemic for people who were then experiencing fatigue.

21. When the Claimant had a further one-day absence on 13 November 2021, following an episode of food poisoning, apparently unrelated to his condition (though which the Claimant said at Tribunal had resulted from efforts by him to cook a nutritious meal), Ms Richardson took the decision to escalate the matter to Stage Three of the absence review process, namely to its more formal stages. In her notes of their meeting on or around 17 November 2021, Ms Richardson documented that the Claimant had found the split lunch breaks to be stressful and that he could not identify any further support that could be offered by the Respondent. He disclosed during their meeting that he had recently been prescribed Citalopram, an anti-depressant medication.

22. The Stage Three: Formal absence review meeting was held on 24 November 2021. The invitation to that meeting is at pages 158 to 160 of the Hearing Bundle. The Claimant was provided with copies of his return

to work interview records dating back to May 2021. That suggests that his absences in May and June 2021 were under consideration even though they had previously been taken into account in the decision to escalate the matter to Stage Two. If one discounts those absences, since Stage Two had been invoked the Claimant had had a further five absences involving six days' absence in total.

23. At the meeting on 24 November 2021, the Claimant and Ms Richardson essentially discussed the same issues that had previously been explored on 9 September and 17 November 2021. The outcome was that the Claimant was issued with a formal absence warning which was to remain live for 12 months. He was warned that further absence could lead to further action, including dismissal. He was advised of his right of appeal, something he did not exercise.

24. Thereafter, the Claimant had further absences as follows:

    24.1. On 17 – 18 December 2021, as a result of a Crohn's flare up.

    24.2. On 4 – 6 January 2022, due to cold / flu like symptoms – during his return to work interview the Claimant highlighted that his medication to treat his Crohn's disease acted as an immunosuppressant.

    24.3. On 10 February 2022, as a result of a further Crohn's flare up. The Claimant reported being stressed and worried, including as a result of parallel discussions regarding his SDO course and because of issues in his personal life. When asked, he said once more that there was nothing more the Respondent could do to support him. The return to work interview notes document that by then his hours had been adjusted to facilitate a later start time, we believe because of the impact of his fatigue. There was noted to have been a pronounced improvement in time keeping as a result of that adjustment.

    24.4. On 15 – 16 March 2022, due to a cold / flu symptoms.

    24.5. On 11 April 2022, as a result of a Crohn's flare up, reported to be linked to stress in his personal life connected to a housing issue.

25. Following the fifth absence, Ms Richardson confirmed to the Claimant that he would be invited to attend a Stage Four: Capability review meeting. The invitation in that regard was issued on 12 April 2022 (pages 210 – 211). The Claimant was informed that the meeting would be conducted by Ms Varsan. He was reminded of his right to be accompanied and also warned that a potential outcome was that he could be dismissed with notice on the grounds of capability. He was also reminded of the availability of LifeWorks, the Respondent's Employee Assistance Programme, and provided with copies of return to work interview records for the five absences that had triggered consideration being given to dismissal.

26. The meeting with Ms Varsan took place on 22 April 2022. The Claimant was unaccompanied at the meeting. He told Ms Varsan that he was unwell and in greater pain than usual. In the course of the meeting, he referred to forcing himself to go to work because he could not afford to be absent. The detailed meeting notes, which run to some 21 pages and were kept by a note-taker, do not evidence any discussion of the likely or potential impacts of the Claimant's absences upon the Respondent's business. Notwithstanding Ms Varsan's evidence at Tribunal that she discussed with the Claimant the impact which his absences was having, we find that she is mistaken in her recollection in that regard. Instead, as with Ms Wilson and Ms Richardson, the focus of their discussions was on how the Claimant managed his condition, particularly in the context that he had identified diet and stress as likely significant triggers for flare-ups. Work related stressors as well as issues impacting the Claimant in his personal life were discussed. When the occupational health assessments and advice were discussed, the Claimant could not readily describe the 3P's strategy for managing his fatigue. Ms Varsan was clearly frustrated by this: it lent an impression that the Claimant was not doing all he could to help himself. The Claimant told Ms Varsan that he felt well supported by the Respondent and when the conversation moved on to the SDO course, he referred to having had good support in that regard (he was being mentored and supported by Mr Strychalski and another colleague). As the meeting progressed the Claimant continued to be asked and continued to confirm that there was no further support that the Respondent could offer.

27. The meeting adjourned after two hours as Ms Varsan wished to make further enquiries. The Claimant agreed to provide her with an article regarding Crohn's disease. The notes of the meeting evidence to us that Ms Varsan came to the meeting with an open and enquiring mind, and that she wanted to hear what the Claimant had to say and to secure as much relevant information from him as possible to enable her to come to an informed decision in the matter. The meeting was due to resume on 27 April 2022 but was delayed as a result of Ms Varsan's unavailability. It was rescheduled to 4 May 2022 with a further reminder to the Claimant both of his right to be accompanied and of the potential risk of dismissal. In the event, Ms Varsan was then unwell and the meeting was further delayed until 13 May 2022.

28. The Claimant submitted a short letter from an IBD Nurse Specialist ahead of, or at the meeting on 13 May 2022 (page 245). The letter noted that he was experiencing pain all of the time and that he and his partner were facing eviction from their home (we should add, not due to any fault of theirs). As discussed, he also provided Ms Varsan with further information about Crohn's disease. At the resumed meeting with Ms Varsan, the Claimant referred to having undertaken CBT to manage his stress. The discussion focused on his SDO course and associated stress, before Ms Varsan then introduced the potential for a change of role. We think it is worthwhile setting out their exchange on the subject in full.

"L: If we offer to you, you the possibilities to work as an Optical Consultant, do you think it will be a reasonable adjustment?

J: It would depend on the pay, and if I have to repay the SDO Course.

L: Do you think that offering you a role as an Optical Consultant, without the stress and responsibilities of the SDO Course your attendances will improve?

J: Maybe, I don't know.

L: According to what we discussed, the SDO Course is a cause of stress for you, and worsening your condition, so why you are not sure if [??] it will improve your attendances.

J: I don't want to say yes and the is not.

L: So you are not sure.

J: Yes.

L: If we remove the SDO Course as a reasonable adjustment will it be something you will accept it?

J: I need to think about, I thought about it in the past.

L: What stopped you to do it?

J: Salary mostly.

Further information needed.

L: If I am able to tell you the salary would you accept?

J: I should check with my partner as well, also if is in the same store.

L: If is in the same store would you accept it?

J: I would seriously consider it." (Pages 257 – 258)

29. The discussion then moved on to other matters before adjourning at 12:48 to enable Ms Varsan to discuss the matter with People Point. The notes of Ms Varsan's interaction with People Point at page 315 of the Hearing Bundle evidence that there was some discussion of the impact of the Claimant's absences on the business, but the nature and extent of any impacts are not documented. The final decision would seem to have been left to Ms Varsan with no obvious guidance from People Point. Instead, Ms Varsan's call with People Point is documented as having concluded on the following basis:

> "Options are either no action (there have now been six absence since the FAW) or terminate employment due to the frequent short absence
>
> He will have [right of appeal]"

The reference to there having been six absences was because the Claimant had had a further absence since the meeting on 22 April 2022.

30. Although we are unable to identify from the meeting notes when this was discussed, the Claimant seemingly does not dispute that as well as the Optical Consultant role Ms Varsan had also raised with the Claimant the possibility of him being redeployed into a customer consultant position within Boots the Chemist. Ms Varsan clarified at Tribunal that had the Claimant expressed an interest in such a role she would have needed to have made further enquiries since she was not aware as to what, if any, vacancies there were in the Cambridge area.

31. When their meeting resumed at 4:30pm Ms Varsan started by asking the Claimant whether he had any questions or anything to add. He replied,

> "I was thinking about the Optical Consultant, if in case I need to repay for the course".

It is clear to us and we find would have been clear to Ms Varsan that he was continuing to give serious consideration to the suggestion of a potential move into an Optical Consultant role, but that he wished to understand whether in that event he would be required to repay his SDO course fees. Ms Varsan responded,

> "Don't know about it. But I have already made a decision about this case. The decision is dismissal with notice."

32. Mr Varsan proceeded to explain the reasons for her decision. Amongst other things, she said,

> "I asked you about changing your role for Boots UK and you rejected and today I spoke to you about dropping the SDO course but you weren't sure if this could change your attendance. That's why I don't think it's the right thing to do."

She concluded,

> "The business is unable to sustain this."

No further details were provided in that regard.

33. The decision to terminate the Claimant's employment was confirmed in a letter given to the Claimant the same day. It too referred to the business being unable to sustain his absence levels, but again no further details were provided in that regard.

34. The Claimant was advised of his right of appeal which he duly exercised. We deal with the appeal in a little more detail below. For the time being we simply note that the appeal hearing took place on 24 May 2022 and that Mr Rigden issued his decision on 27 May 2022. The appeal did not proceed by way of a re-hearing, rather Mr Rigden considered the Claimant's two documented grounds for appeal set out in his letter of appeal dated 18 May 2022 (pages 280 to 281). He addressed each ground in his outcome letter (pages 302 and 303).

The PCP relied upon by the Claimant

35. In determining the Claimant's Equality Act 2010 claims, the first issue that arises is whether the claimed PCP was applied by the Respondent. The PCP relied upon by the Claimant is recorded within the List of Issues as follows:

> 'implementing the respondent's absence policy without any flexibility / allowances being made'

It seems to us that this formulation of the PCP incorporates the Claimant's complaint that adjustments were not made in terms of how the Respondent's Absence Policy was applied to him and that the application of the Policy to both himself and others with his disability was not proportionate to the aims it was intended to secure.

36. We do not think that we are not required to construe the PCP in an overly mechanistic, literal or limiting way, particularly if this would fly in the face of what was clearly intended by the Claimant and reasonably understood by the Respondent. The Claimant's fundamental complaint throughout has been that he was dismissed because his sickness absences exceeded the relevant triggers identified within the Respondent's Absence Policy. His complaints relate to the application of the provisions of that Policy to him and we proceed on that basis. In our judgment, the words 'without any flexibility / allowances being made' are otiose. Throughout the period with which we are concerned, namely from December 2020, when Stage One of the absence review process was triggered, until 27 May 2022 when Mr Rigden determined the Claimant's appeal against his dismissal, the Respondent was applying its Absence Policy. In the circumstances the PCP is established, namely applying the provisions of the Respondent's Absence Policy to him.

LAW, FURTHER FINDINGS AND OUR CONCLUSIONS

Indirect Discrimination

37. Section 19 of EqA 2010 provides that,

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> > (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> > (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> > (c) it puts, or would put, B at that disadvantage, and
> > (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

38. In Shamoon v Chief Constable of the Royal Ulster Constabularly [2003] UKHL 11, the House of Lords held that the test of 'disadvantage' in s.19(2) is whether "a reasonable worker would or might take the view that he had been … disadvantaged in the circumstances in which he thereafter had to work". As the EHRC Employment Code confirms (section 4.9) an unjustified sense of grievance will not qualify.

39. As regards s.19(2)(d), the EHRC Employment Code reminds us that in order for an employer to justify a PCP, the stated aim being pursued by the application of the PCP must represent a real, objective consideration. In accordance with the principles laid down by the Supreme Court in Akerman-Livingstone v Aster Communities Ltd [2015] AC 1399, any aims relied upon should be of substantial importance and there should be a connection between them and the disadvantage suffered. In Health and Safety Executive v Cadman 2005 ICR 1546, the Court of Appeal confirmed that there is no rule of law that prevents an employer from relying on considerations that were not in its mind at the time a PCP was implemented or applied. However, if that is the case, it may be important to scrutinise the Respondent's stated aims in order to be satisfied that they are legitimate. Cost considerations may constitute a legitimate aim in combination with other factors. In Cadman, Maurice Kay LJ said:

> "The test does not require the employer to establish that the measure complained of was "necessary" in the sense of being the only course open to him. … The difference between "necessary" and "reasonably necessary" is a significant one …"

40. As to whether any PCP represents a proportionate means of achieving a legitimate aim, the Respondent has the burden of proof in the matter. Consideration of whether an employer acted proportionately in the matter requires an objective balance to be struck between its reasonable needs and the discriminatory impact of the PCP in question.

41. Putting aside the appropriate pool for comparison purposes, which has not been clearly identified in this case, the Claimant's s.19 Equality Act 2010 complaint does not succeed because he has failed to show the requisite adverse disparate impact as required by s.19(2). He has the primary burden in that regard. The burden is often discharged, by statistical or expert evidence, though may equally be established by witness evidence,

including that of a claimant. In appropriate cases, Tribunals may take judicial notice of matters that are well known, the most often cited being the adverse impact upon women of employers not permitting flexible or agile working. Otherwise, however, Tribunals should avoid reaching conclusions intuitively or on the strength of their gut feeling in the matter. There must be a proper evidential basis for concluding that the relevant PCP has given rise, or would give rise, to the relevant group and individual disadvantage. Whilst we are in no doubt that the PCP put the Claimant at a disadvantage in that a reasonable worker in his situation would take the view that they were disadvantaged in the circumstances in which they had to work by reason that they were more likely to find themselves being managed under the Absence Policy because of their sickness absence levels and thereby at increased risk of receiving formal warnings and being dismissal, Mr Winspear did not take us to any evidence from which the relevant group disadvantage might be inferred.

S.15 and s. 20 / 21 of the Equality Act 2010

42. Section 15 of EqA 2010 provides,

> 15 Discrimination arising from disability
>
> (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.

43. Section 20 of EqA 2010 defines the duty to make adjustments as follows,

> Duty to make adjustments
>
> (1) …
> (2) …
> (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.
> (4) …

44. It is not necessary in this case for the Tribunal to have regard to the second or third statutory requirements.

45. For convenience we shall deal with the s.20 / 21 complaint prior to the s.15 complaint. For the reasons set out above, we are satisfied that the provisions of the Absence Policy placed the Claimant at a substantial disadvantage in comparison with persons who are not disabled. His

disability meant that he experienced regular, unpredictable, short-term sickness absences and that these were at a level above those identified within the Respondent's Absence Policy as being tolerated by the Respondent, with the result that he was more likely than his non-disabled colleagues to be subject to management under the Absence Policy, up to and including dismissal for incapability. In which case, the first requirement above was triggered. The Respondent's duty was to take such steps as it was reasonable to have to take to avoid the disadvantage.

46. It was not suggested that the Respondent is other than a profitable and reasonably resourced organisation, though as with all retailers it may be assumed that the Respondent operates in a competitive trading environment with a tight focus on cost. It is for the Tribunal to judge, objectively, what steps might reasonably have been taken. As Employment Judge Wyeth did at the Preliminary Hearing on 2 February 2023, we note that the duty of adjustment is a duty imposed on employers, who should pro-actively identify how their disabled workers are disadvantaged by their ways of working and implement adjustments to remove or ameliorate those disadvantages.

47. As Mr Winspear did, we have approached the matter by first asking ourselves what, if any, adjustments the Respondent should reasonably have made in terms of the absence triggers that operated under the Absence Policy. We have referred already to the unsatisfactory way in which evidence emerged at Tribunal regarding the alleged impact of the Claimant's absences upon the Respondent's business. It is trite, as Mr Frew observed, that staff absence will impact an employer's business, otherwise staff would be at liberty to come and go as they see fit. But that does not of itself answer the question we are required to grapple with as part of an objective assessment as to what adjustments might reasonably have been made by this employer, namely what impact the Claimant's absences had on the Petty Cury Store or on the Respondent's business more generally. In the course of her evidence at Tribunal Ms Richardson described the operating model within the Respondent's business, namely that SDOs are paired to clinics (with between two and three clinics operating in-store per day) and in particular that they take responsibility for customers at the point they emerge from clinic when they may be choosing frames and significantly, may have a lens or other prescriptions that need to be processed. She explained that the Respondent does not use locum staff at the Claimant's level for reasons of cost but also because of the need for staff to be trained in and familiar with the Respondent's systems and processes. She suggested that on those occasions when the Claimant was absent there might have been at most five other members of staff potentially available to cover his duties, so that if he and they were fully utilised (as the Claimant himself suggests was the case), and the work was spread evenly amongst them, they might experience a 20% increase in their workload. The impact would be less pronounced if instead customer appointments were cancelled, though in that event it seems to us the Petty Cury store might not then have achieved its sales targets, or at least the same levels of sales it might

otherwise have done, and there would also have been the potential risk of customers going elsewhere and their business being lost not just on that day but on a repeat basis.

48. Ms Richardson's evidence was that the Respondent might be impacted commercially and that staff bonuses might be affected, but she did not elaborate further. She referred to other staff becoming stressed and that it could lead to them becoming sick. However, when this was later explored with her, she said,

> "It is speculation really. I imagine that it causes others stress."

Ms Richardson became tearful in the course of her evidence. We were left with the impression that she had personally found the Claimant's absences stressful to manage. It was only in re-examination that she elaborated that she was taken away from her management tasks onto the shop floor as a result of the Claimant's absences. But she did not elaborate as to what that might have meant for the business, rather she spoke of the potential impact in terms of her own finish times and potentially missed or impacted lunch breaks.

49. In re-examination Mr Strychalski said the Claimant's absences could not be sustained on a business level. His only other evidence in the matter is in paragraph 19 of his witness statement in which he refers to the Claimant's absences being,

> "very disruptive and made running the store very difficult."

However, he did not otherwise identify the respects in which the absences were disruptive or in what ways running the store was made more difficult.

50. Given that she was the dismissing officer, we have regard in particular to how Ms Varsan saw the matter. As we say, we conclude that she is mistaken in her recollection that she discussed with the Claimant the impact of his absences on his colleagues and customers. In any event she does not identify in her witness statement what those impacts might have been. Whilst the matter was not explored further with Ms Varsan in chief, in the course of cross examination she was asked about Ms Bridgett's recommendation that HR advice should be sought in terms of what was operationally feasible. Ms Varsan said that she had noted this as something she needed to explore with People Point, but it seems to us that she did not receive particularly clear guidance in the matter. Instead, the advice was seemingly that if the Claimant had been supported and the organisation had done all it could, then the process should be followed through to dismissal. She disagreed with Mr Winspear when he put it to her that there were in fact no significant operational difficulties, none allegedly having been evidenced. She said she knew the impact when a member of staff was absent. She described it as hugely stressful for a manager, ("one of the most stressful messages you receive") and the wider team, before going on to say that it created a risk at a clinical level because of the increased potential for over-burdened staff to make errors.

She said that at the point she was making her decision, what was playing in her mind was the support that was being given to the Claimant and the impact on the business. She sought to qualify Ms Richardson's evidence regarding there being five members of staff to cover any absences. She noted in particular that the Respondent struggles to retain experienced staff and that within any cohort who might be covering the Claimant's absence would be staff still in training who might be unable to pick up certain of the Claimant' responsibilities, placing the burden more heavily upon a smaller number of other colleagues. She referred to an increased risk of mistakes and 're-makes' before observing,

> "Clinical standards are not optional".

51. Mr Rigden did not supplement his evidence in chief. In his witness statement he says,

> "It was clear the Claimant's persistent absences (often at very late notice) had been creating significant operational difficulties for the store managers, after going in to working days short staffed and unable to find a last minute replacement."

It is unclear where that evidence derives from, since there is no record of it having been discussed in the extensively documented return to work interviews, or at the Stage Four meetings with Ms Varsan. Mr Rigden said he had not discussed this with the Claimant as he did not want to burden him with the Respondent's operational challenges given it was a stressful situation for the Claimant. We disagree, it was plainly a matter for discussion with the Claimant. Pressed further on the matter by Mr Winspear he said,

> "I am sure we could have presented (the information) but we don't readily have access to that information."

52. Whilst the impact of the Claimant's absences on other staff has not been quantified, we recognise that it is something that is incapable of precise measurement or quantification. Instead, we have regard to Ms Richardson and Ms Varsan's first-hand evidence as to the impact that unplanned absences have upon managers, both at a personal level but also because it can take them away from their management duties and divert them onto the shop floor to deal with day to day operational issues. Similarly, the potential impact upon customers of unplanned absences, including reduced service levels, cancelled appointments and lost business is essentially incapable of precise evaluation. However, we accept that these are genuine and material considerations for the Respondent, as they would be for any customer focused organisation. Whilst we do not attach weight to any alleged additional costs that might result from using locums or agency staff to cover absences, such costs having not been indicated, we accept as a matter of common sense that locums and agency staff, or indeed temporary cover from other stores, might be difficult to secure at short notice, and that the available pool of appropriate locums and agency

staff is further limited to those with some prior knowledge and experience of using the Respondent's systems and processes, thereby adding to the challenge of covering unplanned absences at short notice. On the Claimant's own evidence the Petty Cury store was a fast-paced working environment in which staff were often fully utilised, with limited capacity therefore to cover for staff who were absent. Notwithstanding the unsatisfactory way in which much of the evidence emerged at Tribunal, we are satisfied that the Claimant's absences had a real, immediate and material adverse impact upon the Claimant's colleagues, even if we do not consider that they became stressed and unwell or that their bonuses were affected as Ms Richardson suggested. Above all, we are particularly informed by Ms Varsan's evidence as to the potential clinical risks that result from unplanned staff absence, specifically if this leads to an increased risk of mistakes being made because already busy staff are under increased pressure because they are covering for an absent colleague. The management of such risks inevitably involves questions of judgement rather than necessarily being capable of precise evaluation. We take on board Ms Varsan's observation that clinical standards are not optional.

53. The arguments on each side regarding the adjustments that ought reasonably to have been made are finely balanced. Whilst there is certainly force in Mr Winspear's submission that it would have been reasonable for the Respondent to have disregarded the Claimant's Crohn's related absences altogether, ultimately we have concluded that the steps the Respondent ought reasonably to have taken in the first instance in relation to the Claimant were to double the relevant absence triggers under the Absence Policy in his case. In our judgement, had the Claimant's Crohn's related absences been disregarded altogether i.e, had he been absent on average once a month for between one and two days on an unplanned and unpredictable basis, this would have introduced an unacceptable level of clinical risk into the Respondent's operations because of the difficulty in ensuring that such absences were adequately covered. We have been troubled by what we perceive to have been the Respondent's disproportionate focus upon diet and lifestyle issues and by the Respondent's witnesses' failure to recognise, or at least to have due regard, to the fact that fatigue is a significant effect of Crohn's disease: it was highlighted by Ms Bridgett as being something that is sometimes unrecognised yet extremely debilitating. In our judgement, the Respondent's witnesses somewhat lost sight of the fact that Crohn's disease is managed rather than cured and that the Claimant was managing the condition to the best of his ability. Be that as it may, we also recognise that unpredictable absences are more difficult to manage than planned for absences, for example where a person with a disability has regular scheduled medical appointments. We are also mindful that in Burke v The College of Law and anor 2012 EWCA Civ 37, CA, the Court of Appeal made clear that a holistic approach should be adopted when considering the reasonableness of adjustments in circumstances where a number of adjustments, working in combination, may be required to ameliorate the substantial disadvantage suffered by a claimant. We have

weighed the need for greater allowance to be made in respect of absences in the overall balance with the other adjustments that were implemented in relation to the Claimant, namely:

- A later start time;
- The option of a split lunch break;
- The offer, early in the absence review process, for the Claimant to reduce his days of work;
- The availability of LifeWorks for support, advice and mentoring in terms of lifestyle issues and challenges; and
- Adjustments, support and mentoring around the SDO course in order to alleviate some of the work related stresses that may have been adding to the risk of flare-ups.

Looked at holistically and having regard in particular to the clinical risk, as well as the other factors identified above, we conclude that the Respondent ought reasonably to have doubled the relevant absence triggers in the Absence Policy in the Claimant's case. Looking at the way in which the Claimant's absences were managed, we are satisfied that the Respondent discharged its s.20 duty to the Claimant in this regard at each stage of the absence review process. Stage One was only triggered after eight rather than three absences, Stage Two after four rather than one to two absences, and Stages Three and Four after five rather than one to two absences. We reach the same conclusion under s.15 Equality Act 2010 as we are satisfied for all the same reasons set out above that the Respondent acted proportionately in applying the Absence Policy as it did rather than disregarding the Claimant's disability related absences in their entirety.

54. However, that is not the end of the matter. In our judgement, the Respondent's s.20 duty extended to offering the Claimant redeployment into an Optical Consultant role at the Petty Cury store at the point at which his continued employment as a SDO was at risk. In our further judgement, in order for the duty to be discharged, the Respondent ought reasonably to have communicated that offer to the Claimant in writing, including any material terms and conditions regarding his remuneration. It was not sufficient for Ms Varsan to explore the matter as she did with the Claimant on 13 May 2022, including closing the discussion down when the Claimant sought to explore with her what it might look like in practice, including whether he would then be responsible for repayment of his SDO course fees. In our experience, redeployment is a common adjustment for those who have essentially become incapable of performing their substantive role by reason of disability. It is incumbent upon an employer to effectively communicate any such proposed adjustment to its employee, otherwise the statutory duty would be diluted or undermined and potentially cast upon the employee. In any event, there was an obvious reason to do so in

this case: the Claimant experienced fatigue on an ongoing essentially daily basis and told Ms Varsan on 22 April 2022 that he was unwell and in greater pain than usual. Amongst other things, the Claimant's fatigue affects his focus. The Respondent ought reasonably to have to have confirmed the proposal in writing and allowed the Claimant a reasonable period of time in which to consider it.

55. In Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10, the EAT confirmed that there does not necessarily have to be a good or real prospect of an adjustment removing a disadvantage for that adjustment to be a reasonable one. Instead, it is sufficient for the tribunal to find that there would have been a prospect of the disadvantage being alleviated, a point also made in Noor v Foreign and Commonwealth Office 2011 ICR 695, EAT. These decisions were endorsed by Elias LJ in Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA, in which he observed:

> 'It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.'

The Claimant told Ms Varsan that he could not be certain that redeployment into the Optical Consultant role would lead to an improvement in his attendance, but in an organisation the size of the Respondent and with its resources, we consider that it was a step that ought reasonably to have been taken by the Respondent. The change to the Claimant's start time had brought about an immediate improvement in his punctuality. With a much clearer focus upon the real world consequences for the Respondent and the Claimant's colleagues of any ongoing absences in the new role, there was a reasonable opportunity for the Respondent to see whether the Claimant's pattern of absences improved without the stresses associated with the SDO role and coursework, or indeed the other recent stressors in his personal life which had seemingly then abated. In our judgement, the Respondent breached its s.20 / 21 duty in relation to the Claimant.

56. We arrive at effectively the same conclusion approaching the matter under the closely connected though distinct provisions of s.15 of the Equality Act 2010. The Claimant was progressed though the various stages of the absence review process and ultimately dismissed for disability related absences. At Stage Four, all five absences were disability related. They arose in consequence of his disability. He was plainly treated unfavourably by being dismissed because of those absences. Whilst it was legitimate for the Respondent to require reliable and regular attendance from its workforce, even putting aside that the Respondent has the burden of proof in the matter, in our judgement it did not act proportionately when it dismissed the Claimant. Tribunals are expected to critically evaluate the question of objective justification and to carry out their own assessment in the matter in the same way they are the ultimate arbiters of what adjustments ought reasonably to have been made. In

circumstances where a loyal, well-liked and reasonably long-serving employee with a debilitating life-long condition was facing the loss of secure employment, the Respondent's legitimate aims could have been met in a more proportionate way by redeploying the Claimant into the Optical Consultant role. In our judgement, that would have struck an objective balance between its reasonable needs and the discriminatory impact of the PCP in question, namely the loss of the Claimant's substantive position, including the opportunities for personal development and career progression that came with it. The Claimant's s.15 Equality Act 2010 complaint is equally well-founded in this regard.

Unfair Dismissal

57. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by his employer (section 94 of the Employment Rights Act 1996).

58. Section 98 of the 1996 Act provides,

> 98 General
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it-
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do
>
> …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

> (b) shall be determined in accordance with equity and the substantial merits of the case.

59. We consider that the Claimant was unfairly dismissed by the Respondent. Whilst we think this follows almost as a matter of course given our conclusions above that the Respondent failed to take such steps as it was reasonable for it to take to avoid the relevant disadvantage to which the PCP gave rise and, further, that it acted disproportionately in dismissing the Claimant, for the avoidance of doubt we consider that the Respondent acted unreasonably in relying upon the Claimant's incapability as sufficient reason for dismissing him. Specifically, the Respondent failed to address the Claimant's questions regarding the salary for the Optical Consultant role and what it would mean in terms of him having to repay any SDO course fees, failed to set out the potential option for re-deployment in writing, failed to allow the Claimant a reasonable opportunity to consider his position and ruled out redeployment without first seeking the Claimant's comments as to the impact which his absences were said to be having on the business and affording the Claimant the opportunity as a loyal, reasonably long-serving, disabled employee to transition back into a role that he had previously performed and in which it could continue to monitor his attendance and the impact of any sickness absences upon the business. Having taken her time on 27 April 2022, adjourning to make further enquiries and engaging in all other respects with the Claimant to understand his position, the Tribunal is left with the firm impression that Ms Varsan stopped engaging with the Claimant at the 'final hurdle' and became a little impatient to make a decision and bring the process to an end. She was not guided in the matter by People Point as she might have been but instead encouraged to make a decision on the strength of a somewhat nebulous or instinctive assessment of whether the Respondent had done all that it could rather than an HR driven evaluation of whether the Respondent had discharged its legal responsibilities to the Claimant as a person with a disability.

60. This unfairness was not corrected on appeal as Mr Rigden failed to explore the redeployment issue with the Claimant. He failed to read the minutes of the Stage Four meetings before he met with the Claimant, in contravention of the Respondent's own documented guidance and his failure in that regard compounded his unreasonable assumption as to what the Claimant meant when he wrote in his appeal statement,

> "I was surprised at the mention of an alternative post in the Store as my condition does not make me unable to do my current job."

Had Mr Rigden read the minutes of the Stage Four meetings and explored this aspect further with Ms Varsan, he would have appreciated that two alternative roles had been mentioned by Ms Varsan: he ought reasonably to have clarified with the Claimant which role he was referring to. In any event, the Respondent unreasonably asserts that it was for the Claimant to raise the issue of redeployment on appeal. We agree with Mr Winspear that the documented appeal process gave no indication to the Claimant

that this was an option that was available to him on appeal. Moreover, the Claimant was not ruling out redeployment even if he still felt he was capable of performing his substantive role with adjustments. Given his documented unequivocal statement to Ms Varsan that he would seriously consider the Optical Consultant role and his attempt to follow the matter up with her immediately before being dismissed, Mr Rigden ought reasonably to have followed the matter up with him and sought any necessary clarification of the Claimant's position, either before they met to discuss the appeal or, at the very latest, before he issued his decision on the appeal. As Ms Varsan did, Mr Rigden unreasonably failed to explore with the Claimant the impact that his absences and unreasonably failed to afford the Claimant the opportunity to transition back into an Optical Consultant role. The complaint of unfair dismissal succeeds.

61. Pursuant to s.123(1) of the Employment Rights Act 1996, where a tribunal upholds a complaint of unfair dismissal, it may award such compensation as it considers just and equitable in the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal. In accordance with the well-established principles in Polkey v AE Dayton Services Limited [1988] A.C. 344, tribunals may make a just and equitable reduction in any compensatory award under s.123(1) to reflect the likelihood that the employee's employment would still have terminated in any event. The burden of proving that an employee would have resigned or been dismissed in any event rests with the employer. Nevertheless, Tribunals are required to actively consider whether a Polkey reduction is appropriate. O'Donoghue v Redcar and Cleveland Borough Council 2001 IRLR 615, CA and Abbey National plc and another v Chagger 2010 ICR 397, CA, confirm that the principles in Polkey are essentially applicable in discrimination cases, in that the chance of dismissal, apart from any discrimination, must be factored into any measure of loss.

62. In Software 2000 Limited and Andrews & Ors [2007] UKEAT 0533_06, the EAT reviewed the authorities at that time in relation to Polkey and confirmed that Tribunals must have regard to all relevant evidence, including any evidence from the employee and the fact that a degree of speculation is involved is not a reason not to have regard to the available evidence, unless the evidence is so inherently unreliable that no sensible prediction can be made. It is not an 'all or nothing' exercise but instead involves an assessment of matters of chance.

63. This case is a case in which it is not in our judgement too speculative an exercise to determine what would or could have happened in two important respects. We do so having careful regard to the entirety of the available documentation and evidence in the case, and mindful also that having discriminated against the Claimant and treated him unfairly, the Respondent now has a vested interest in asserting that it was inevitable he would have left its employment.

64. At our request, the Respondent has provided pay data from 2022 regarding various roles within the organisation, from which we note that

Student Dispensing Opticians were paid a salary of £22,211.64 as against £21,546.86 for an Optical Consultant. Given the relatively modest reduction in pay (which equated to about £55 gross per month), and given also that the Claimant confirmed on 13 May 2022 that he would seriously consider the position, that he had previously worked at that level (and indeed took a similar position after he was dismissed from the Respondent's employment), and that taking the Optical Consultant role would have enabled the Claimant to continue working in the store he was familiar with, with colleagues he knew and with a range of adjustments still in place, including some allowance for disability related sickness absence, we are certain that the Claimant would have taken the Optical Consultant role had it been formally offered to him by the Respondent at or following the meeting on 13 May 2024 as an alternative to being dismissed from the Respondent's employment.

65. However, we also have regard to what the Claimant says at paragraph 39 of his witness statement, namely, that after he took an Optical Consultant role in nearby Shelford, he "no longer had any prospects for advancement" and that this "created feelings of hopelessness, depression, and even thoughts of self-harm" with the result that he completely changed careers. The Schedule of Loss at pages 643 to 644 of the Hearing Bundle suggests that the Claimant left the position in Shelford after approximately seven months in the role. Whilst it was a much smaller practice and involved the Claimant in a longer commute to work, nevertheless given the complete change of career direction, we conclude that the Claimant would equally have left the Respondent's employment after a similar time for the same reasons. In our judgement, had the Claimant been redeployed to the Optical Consultant role by the end of May 2022 there is a 100% chance that he would have resigned his employment with the Respondent by 31 December 2022 in order to pursue an entirely new career. His claim to compensation for loss of income shall be limited accordingly.

66. We shall list this case for a one-day remedy hearing in 2025 and issue case management orders separately in that regard. If the parties are able to resolve the issue of remedy by agreement, the remedy hearing can be vacated.

_____
Employment Judge Tynan

Date: 6 November 2024

Sent to the parties on:
14 November 2024

For the Tribunal Office.

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