



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4106301/2023**

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**Held in Glasgow on 20, 21 and 22 March 2024**

**Employment Judge L Doherty  
Members I Ashraf and P Finlay**

10 **Mr A Behan**

**Claimant  
Represented by:  
Mr N Paterson -  
Solicitor**

15 **Ethigen Limited**

**Respondent  
Represented by:  
Mr G Miller -  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the employment Tribunal is that:

- (1) the claim under Section 15 of the Equality Act 2010 (the Act) succeed;
- (2) the claim under Section 26 of the Act is dismissed; and
- (3) a Remedy hearing will now be fixed.

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### **REASONS**

1. The claimant brings claims under Section 15 and section 26 of the Act on the grounds of the protected characteristic of disability, which is chronic lymphocytic leukaemia (CLL). Disability status is accepted, but knowledge of disability is not.
- 30 2. The parties had agreed a list of issues which could be summarised as follows:

**Section 15 claim**

- (1) Did the respondent's know or ought reasonably to have known that at the relevant time the claimant was disabled in terms of the Act.
- (2) Was the claimant dismissed for a reason relating to his disability?
- 5 (3) If so, can the respondents show that dismissal was a proportionate means of achieving a legitimate aim?

**Section 26 claim**

- (4) Was the claim in respect of the allegation that in August 2022 Mr Starrs asked the claimant how his condition would affect his attendance at work, presented in time? If not was it was part of a continuing act? Should time be extended to allow the complaint?
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- (5) Did in the unwanted conduct alleged to have taken place in August 2022 occur?
- (6) Was that conduct related to the claimant's disability?
- 15 (7) Did that conduct have the proscribed purpose or effect under Section 26 (1)?
- (8) Did the unwanted conduct said to have taken place on 15 June 2023 occur?
- (9) If so. was that conduct related to the claimant's protected characteristic?
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- (10) If so, did it have the proscribed purpose or effect under Section 26(1)?

**The Hearing**

3. The claimant give evidence on his behalf. For the respondent's evidence was given by their Transport Manager, Hugh Starrs, and by their Logistics General Manager, Ian Crawford. The parties lodged a joint bundle of documents.
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**Findings in Fact**

4. The respondents are a wholesale pharmaceuticals distributor, engaged in the delivery of pharmaceuticals to pharmacies across the UK, including the central belt in Scotland. They have a number of depots across the UK,  
5 including one at East Kilbride, where the claimant worked. The East Kilbride depot employs about 30 drivers; there are approximately 300 employees in total. The respondents have HR support.
5. The respondents attach great importance to their deliveries being made on time, as they are delivering to dispensing pharmacies. The respondents rely  
10 on their delivery drivers to provide regular and effective service. Drivers are told about the importance of providing regular and effective service during their induction training.
6. If a driver does not attend work because of sickness absence, then the respondents have a system in place to deal with which involves relying on a  
15 standby driver from among a pool of their own drivers, or an agency driver. There is an inconvenience factor in this as a drivers absence usually has to be covered at the last minute. There is a cost to engaging an agency driver.
7. Drivers are familiar with their delivery routes, which are swapped about on a regular basis. They have the benefit of SatNav.
- 20 8. The respondents have a sickness absence policy which comprises of a number of stages and is triggered after 3 periods of absences in a 12 month period, after which attendance is monitored. Responses to absences range from a verbal warning, to written warning, to a final written warning, and to dismissal under the respondent's disciplinary procedure.
- 25 9. After any period of absence an employee attends a return to work (RTW) interview with a manger. A pre -printed RTW interview form which contains a number of questions about the absence is generated by the manager before the interview. Those questions include 'reason for absence' and 'is treatment/condition ongoing?'. It also contains a section under the heading

'Action Required' which includes whether a formal meeting in accordance with the sickness absences policy is required.

10. The intention of the RTW interview is that this form is gone through and completed by the manager; the employee can also input into it if he wishes, and the form is then signed by both parties.
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11. The Claimant, whose date of birth is 8 February 1964, commenced employment with the respondents as a delivery driver on 1 August 2022. On that date he signed a Confidential Medical questionnaire in which he did not disclose any ill health or symptoms of ill health. The claimant's line manager was Mr Starrs.
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12. On 2 August 2022, further to a referral from his GP the claimant received a letter from Monklands Hospital asking him to attend for a Haematology Clinic on 9 August 2022 at 14.00.
13. The respondent's procedure is that where an employee has a medical appointment during working hours, the employee shows the appointment letter to their line manager; it is scanned and then authority to attend can be given. The claimant showed the letter of 2 August 2022 to Mr Starrs at some point before 9 August 2022, and told him he had a hospital appointment. The claimant had a half day off work to attend the appointment.
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14. At that appointment the claimant was diagnosed with CLL. He was told that his condition did not require treatment but that it would worsen, and that that it would require treatment at some point in the future. He was told and that he was on 'watch and wait'.
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15. The claimant's symptoms in August 2022 were stomach problems with stomach pains and sickness, and some fatigue.
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16. The claimant returned to work on 10 August 2022. On either the 10 or 11 of August the claimant spoke to Mr Starrs and told him that at his hospital visit his had been diagnosed with chronic lymphocytic leukaemia. The claimant suggested to Mr Starrs that if he wanted to know about the condition he could he google it. Mr Starrs asked the claimant how his condition would affect his
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work going forward. The claimant responded that he did not know and that he was on 'watch and wait'. The claimant also said that Mr Starrs would probably need to inform 'people upstairs' but that he would be grateful if he could keep it quiet as he did not want the whole world knowing.

- 5 17. On 2 February 2023, the claimant signed an annual driver's medical questionnaire, which required him to make a declaration to the effect that there had been no change to his health which could affect his driving. The questionnaire set out a list of conditions which could affect driving. CLL was not one of them, and the claimant did not consider that it affected his ability to drive. He did not make any mention of his condition when he signed the declaration.
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18. The claimant was absent for 4 days from 4 to 9 January 2023, following a planned 2 day holiday. The reason for his absences was flu. He attended a RTW interview with Mr Starrs on 10 January 2023.
- 15 19. Mr Starrs had pre-printed the RTW interview form with information about the period of absence and the reason given for it. The RTW interview was short and there was no detailed discussion of the reason for the claimant's absence. No detail of his illness/ treatment or condition were contained in the form apart from flu which was noted as the reason for his absence.
- 20 20. The claimant was absent for a period of 6 days from 24 to 30 January as a result of stomach pains and sickness which he suffered as a result of his CLL. He attended a RTW interview with Mr Starrs on 31 January 2023. This was again a short meeting. It was noted that the claimant had attended his doctor and that reason for his absence was stomach pains and sickness. Mr Starrs asked the claimant if he had fully recovered, to which he replied no. Mr Starrs therefore noted against *treatment/condition* 'ongoing'. The claimants earlier absence was also noted on the form.
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21. The claimant had a telephone appointment with the Haematology clinic on 23 January 2023 during this period of absence.

22. The claimant was absent for a period of 5 days from 21 to 27 March 2023 on the back of planned annual leave. He attended a RTW interview with Mr Starrs on the 20/3/23. The meeting was short. In It was noted that he had attended hospital and that reason for his absence was rib injury. Mr Starrs asked the claimant if he had fully recovered, to which he replied no. Mr Starrs therefore noted against *treatment/condition*- 'ongoing'. The claimants earlier absences were noted on the form.
23. The claimant had a telephone appointment with the Haematology clinic on 24 April 2023.
24. The claimant had a hospital appointment on 8 May 2023 at the Haematology clinic. He felt that he was having too much time off work so he took annual leave in order to attend the appointment.
25. The claimant was absent for a period of 2 days from 6 to 8 June 2023 on the back of planned annual leave because of stomach issues which he suffered as a result of his CLL. He attended a short RTW interview with Mr Starrs on 9 June 2023. Mr Starrs noted that he had had not attended for medical treatment and that reason for his absence was stomach issues. Mr Starrs asked the claimant if he had fully recovered, to which he replied no. Mr Starrs therefore noted against *treatment/condition* 'ongoing'. The claimant's earlier absences were noted on the form and Mr Starrs indicated to him that his absence meant that a formal meeting in accordance with the sickness policy would be required.
26. Mr Starrs knew that the claimant had attended for hospital appointments and that he had had blood tests.
27. Mr Starrs passed this RWT form onto HR. This was referred to Mr Crawford on 9 June when Mr Starrs emailed him details of the claimant's attendance stating he had been absent for 16.5 days. He has in fact been absent for 15.5 days. Mr Crawford checked the claimant's length of service with HR who confirmed that the claimant had less than 2 years' service.

28. Mr Crawford decided to dismiss the claimant because of his poor attendance. He prepared a letter of termination of employment dated 16 June, giving the claimant 1 weeks' pay in lieu of notice.
29. On 15 June 2023, the claimant was asked to attend a meeting with Mr Crawford in his office. Mr Crawford told the claimant that he was being dismissed because of his poor attendance. He give him the pre -prepared letter of termination which gave him one weeks' notice, which he was not required to work.
30. The claimant asked about his right to appeal. Mr Crawford told him that he did not have a right of appeal, but brought Ms McLean of HR into the meeting to confirm that was the case. The claimant said that he would have the last laugh. Mr Crawford did not pursue this with him as he did not want to be confrontational.
31. Mr Crawford asked the claimant about how he was going to get home and offered to arrange a lift for him or call a taxi. The claimant said he preferred a taxi and Mr Crawford organised that. He told the claimant he could wait in the reception area. The claimant decided to waited outside the office building. Mr Crawford got £10 cash for the taxi and brought it out to the claimant outside the office.
32. In accordance with the respondent's standard procedure, when an employee is dismissed or suspended, the claimant was asked to return the vehicle keys and other company property, and Mr Starrs collected the claimant's personal belongings from his vehicle and gave brought to the claimant who was waiting outside the main office building.

25 **Note on Evidence**

33. While not concluding that there was any deliberate intention to mislead, the Tribunal found in the evidence of both the claimant and Mr Starrs to be unconvincing on certain points.

34. Whether the claimant told Mr Starrs about his diagnosis of CLL is one of the conflicts in the evidence which the Tribunal had to resolve. The claimant's evidence on the position is set out in the findings of fact.
35. The respondents position in the ET3 was that no such conversation ever took place. When it was first put to Mr Starrs in evidence in chief that it might be suggested to him that the claimant spoke to him about his diagnosis of 9 August 2022, his response was: *"I don't remember that being brought to my attention."*
36. Mr Miller brought to Mr Starrs' attention the distinction between not remembering something, and giving evidence to the effect that something did not happen, and asked him to clarify his answer.
37. Mr Starrs hesitated before answering this question, and then said: *"it was not said to me."*
38. Mr Starrs was asked in cross examination if he had a discussion with the claimant around 9 August 2022, to which he responded again to the effect that he did not remember any discussion.
39. Mr Starrs was asked in evidence in chief about whether he had seen the claimant's appointment letter, to which he said: *"I don't remember seeing that."* The distinction between not remembering and denying something was again brought to his attention. His response again was that he did not remember seeing the document.
40. Mr Starrs was asked in chief whether he had asked the claimant about whether his condition would impact his attendance level, to which he responded: *"I don't remember asking that."* He was then asked whether he was told by the claimant that he was on *watch and wait*? He replied: *"no"*.
41. While the Tribunal did not form the impression that Mr Starrs set out to deliberately mislead, it was satisfied that on balance, the claimant's evidence as to his interaction with Mr Starrs about attendance at hospital and his diagnosis on 9 August was to be preferred. In reaching this conclusion, it takes into account that the claimant gave reasonably straightforward evidence



about this. His memory of events was impacted to the extent he could not remember exactly when he had spoken to Mr Starrs after his appointment, saying it was the Wednesday or Thursday, or a few days later, but this was in the Tribunal's view commensurate with the passage of time, and did not affect his reliability.

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42. In contrast, Mr Starrs not appear to have a clear recollection of all matters; he was unable to categorically say that he had not seen the appointment letter or that he had not had any interaction with the claimant about CLL. For example, after the distinction between nor recalling something and denying something had been brought to his attention on three occasions, he said he could not recall asking the claimant what impact his condition would have all his attendance levels, as opposed to be denying that that such a conversation ever took place, which is position set out in the ET3. While Mr Starrs denied in answer to questions from the Tribunal that he had spoken to the claimant about his health at any point prior to the RTW interviews, that was not his clear evidence in answer to questions in evidence in chief. His initial response were that he could not recall seeing the appointment letter or the having a discussion with the claimant about CLL, and it was only after some hesitation that he denied that such a discussion took place. Such a denial is also inconsistent with his evidence in cross examination and his being unable to recall if he asked the question attributed to him about the potential impact of the claimant's condition upon his attendance. Further, Mr Starrs accepted that he was aware that the claimant had hospital appointments and that he had had blood tests. The fact that this is the case suggests that he had had a discussion with the claimant about his condition and had an awareness that the claimant had attended hospital.

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43. While the Tribunal accepted the claimant's evidence about his conversation with Mr Starrs in August, it did not accept that he told Mr Starrs at the RTW interviews on three occasions that his absences were linked to his condition. It was the claimant's evidence that at his RTW interview on 10 January 2023 after an absence for flu, he told Mr Starrs that because of his condition he did not know if he was going to be more prone to that kind of thing. He said that

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told Mr Starrs at the RTW interviews after his two absences for stomach problems that he felt these were related to his CLL.

44. Mr Starrs has no hesitation in denying that the claimant had mentioned his condition at the RTW interviews, and on balance the Tribunal accepted this. In reaching this conclusion the Tribunal took into account that Mr Starrs evidence to the effect that there were no such discussions was given with more certainty that his denial about having had a conversation with the claimant in August 2022. Further, the Tribunal formed the impression from both witnesses that the RTW interviews were very summary affairs, akin to a tick box exercise. It was the evidence of both witnesses that the meetings were very short and the lack of information in the forms as to what was discussed tends to suggest that there was no significant discussion about the reason for absence. The Tribunal accepted Mr Starrs evidence that the note 'ongoing' against the question 'is the treatment/ condition ongoing,' was indicative of the fact the claimant indicated he had not fully recovered, as opposed to indicating, as the claimant said, that he told Mr Starrs about the link between his illnesses and his CLL. In reaching that conclusion takes into account that *ongoing* is noted in respect of the claimant's rib injury, but not flu, which tends to support Mr Starr's version of events. The Tribunal formed the view that the claimant put a considerable gloss on the information which he imparted at these interviews, and that Mr Starrs evidence as to what was discussed was to be preferred.

45. While it may be a great deal did not turn on this, there was an issue as to what Mr Starrs told the claimant at the final RTW interview about potential disciplinary action. Mr Crawford seemed to be under the impression that the claimant had be given a warning about his absence, however it did not appear to the Tribunal that that was the case, and rather based on the content of the RTW form it was satisfied that he had only been told that a formal meeting in accordance with the sickness policy was going to be required.

46. The Tribunal formed the impression that Mr Crawford was generally reliable as to the conduct of the meeting on 15 August 2023. There was a dispute about whether he gave the claimant the letter before he told him he was

dismissed, or just after it. However, nothing turned on that as the Tribunal was satisfied that regardless of when exactly the letter was passed over, Mr Crawford had made up his mind to dismiss the claimant. That was apparent from the terms of the letter and indeed what was said at the meeting.

5 47. There was a dispute as to whether the claimant had told Mr Crawford that he has a disability at the meeting. It was the claimant's evidence that when he was told he had no right of appeal, he told Mr Crawford and Ms McLean HR that thought they were wrong as he had a disability. Mr Crawford asked him when he became disabled to which the claimant responded he should speak  
10 to Mr Starrs.

48. Mr Crawford denied that such a conversation took place, saying instead that the claimant said words to the effect that he would have the last laugh. Mr Crawford did not want to be confrontational and did not respond to this.

15 49. While a great deal may not turn on this as the respondents had already dismissed the claimant before he said he highlighted that he had a disability, on balance the Tribunal preferred the evidence of Mr Crawford as to the interaction. He was very clear that the claimant had made no such statement, and the Tribunal considered that if the claimant had disclosed that he had a disability it was likely that Mr Crawford would have reacted to it. Mr Crawford  
20 had been careful to check the claimant's length of service before dismissing him, which tended to support this conclusion.

### **Submissions**

25 50. Both parties helpfully produced written submissions which they supplemented with oral submissions. The Tribunal took into account all of the submissions made, but in the interest of brevity these are not set out here, but are dealt with below where relevant.

### **Consideration**

#### ***Section 15 claim***

51. Section 15 of the Act states:

- (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.*
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- (2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

52. Section 136 of the Act deal with the burden of proof. The claimant has the  
10 initial burden of proof but once there are facts from which the Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to the respondent to prove a non-discriminatory explanation for the treatment complained about.

53. Mr Miller referred the Tribunal to the two distinct steps under Section 15(1)  
15 which are:

- (1) *Did the claimants disability cause, have the consequence, or result in 'something'?*
- (2) *Did the employer treat the claimant unfavourably because of the 'something?'*

20 54. Mr Miller also referred to the case of *Pnaiser v NHS England and anor* 2016 IRLR 170, EAT, and the judgment of Mrs Justice Simler which set out the approach to the question of causation in section 15 claims. That should be that firstly the Tribunal must identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that  
25 treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.

55. There was no dispute that the claimant was dismissed and that dismissal amounted to unfavourable treatment. Mr Miller submitted that the main reason for dismissal was the claimant's poor attendance . He submitted that the reason for the claimants dismissal had nothing to do with his disability. Mr  
5 Crawford gave unchallenged evidence to the effect that he did not know the claimant had a disability.

56. However, the Tribunal was satisfied that the claimant had been absent on two occasions because of stomach problems. His stomach problems were a consequence of his disability; his absence from work because of these  
10 stomach problems was therefore 'in consequence of his disability. The Tribunal was satisfied that Mr Crawford did not know that the claimant was disabled at the point when he dismissed him, but he dismissed him because of his poor absences record. The periods of absence which Mr Crawford took into account in deciding to dismiss the claimant, included two periods of  
15 absence because of stomach problems. The claimant's absence record, which included these absences, was more than a trivial part in the mind of Mr Crawford when he dismissed the claimant. The claimant was therefore treated unfavourably (dismissed) because of the 'something'.

### *Knowledge*

20 57. The claimant then went on to consider the question of knowledge under Section 15 (2).

58. The Equality and Human Rights Commission's Code of Practice on Employment (2011) (the Code') which gives guidance on the matter provides  
25 that an employer must do all it can reasonably be expected to do to find out whether a person has a disability. Paragraph 5.14 of the Code suggests that "*employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'*".

30 59. The Code states at 5.15 that: "*An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable*

*will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.”*

60. The Code at paragraph 5.17 provides:

5 *“If an employer’s agent or employee (such as an occupational health adviser or a HR officer) knows, in that capacity, of a worker’s or applicant’s or potential applicant’s disability, the employer will not usually be able to claim that they do not know of the disability, and that they cannot therefore have subjected a disabled person to discrimination arising from disability.”*

10 61. For the reasons given above the Tribunal was satisfied that the claimant had told Mr Starrs, his line manager, about his diagnosis of chronic lymphocytic leukaemia. If that of itself is insufficient to impute knowledge of the claimant’s disability, then the Tribunal was satisfied that applying an objective test the respondents could reasonably have been expected to know that the claimant  
15 had a disability. At the point when Mr Crawford dismissed the claimant, he had had 4 periods of absence in the period from January to June 2022. On the face of it 2 of these was unconnected, but 2 related to stomach problems and therefore were on the face it connected. The claimant’s line manager knew that the claimant had attended hospital for blood tests and that he had  
20 been diagnosed as having CLL. Mr Miller submitted that information given to Mr Starrs by the claimant could not be attributed to Mr Crawford, as the claimant had told Mr Starrs to keep things quiet. That submission however is not in line with the guidance given in the Code, and in any event the claimant’s evidence was to the effect that he said to Mr Starrs that he knew that at some  
25 point he would have to speak to the ‘people upstairs’ but would appreciate it if he did not tell the whole world. That it seemed to the Tribunal reflected nothing more than an understandable desire for privacy about his medical condition on the part of the claimant, coupled with a realistic acknowledgment that management would have to be informed. It did not support that contention  
30 that Mr Starrs was bound by claimant to keep his discourse about CLL a secret.

62. Applying an objective test, had the respondents made reasonable enquiries, it was reasonably likely that they would have discovered that the claimant's stomach problems were a consequence of the claimant's CLL, and that these had occasioned at least two of the periods of absence which were taken into account in deciding to dismiss him. That is so even although the claimant did not discuss his condition at the RTW interviews. These were short meetings, and although it would have been better if the claimant had made clear the link between the reason for his absence and his condition, his failure to do so was an insufficient basis on which to conclude that reasonable enquiry would not have led to the discovery of the link between the claimant's condition and his absences.
63. Nor in the Tribunal's view did anything turn on the claimant's failure to disclose his CLL on the medical declaration he signed certifying his fitness to drive. CLL was not one of the conditions listed on the declaration and it did not affect his ability to drive.
64. The Tribunal therefore did not conclude that the respondents did not know or could not reasonably have been expected to know about the claimant's disability.

*Objective justification*

65. The Tribunal went on then to consider the respondent's defence under section 15 (1) b). There is no issue that the respondent's aim of providing regular and effective service is a legitimate aim for the purposes of section 15 (1) (b).
66. The issue is whether dismissing the claim was a proportionate means of achieving that aim.
67. Mr Miller reminded the Tribunal that to be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so (*Homer v Chief Constable of West Yorkshire [2012] UKSC 15*). He submitted that the Tribunal has to balance the reasonable needs of the business against the discriminatory effect of the employer's actions on the employee (*Land Registry v Houghton*

5 *and others UKEAT/0149/14*). The Tribunal, he submitted must undertake a fair and detailed assessment of the employer's business needs and working practices (*Hensman v Ministry of Defence UKEAT/0067/14*). In the case of a dismissal, although it may be unfair, this does not necessarily mean that it will also be disproportionate under section 15(1)(b). A Tribunal should evaluate objectively the proportionality of the dismissal, given any legitimate aims it accepts were being pursued by the employer.

10 68. Mr Miler submitted that the respondents provide essential and necessary medication to pharmacies and chemists across the UK. It is essential that these deliveries are made. It is essential that the drivers provide regular and effective service. Having 4 periods of absence totalling 16.5 days from 4 January to 9 June 2023 placed a considerable burden on the respondent. The unchallenged evidence was that they would have to source at very short notice a relief or agency driver, at an additional cost to the respondent. 15 Equally, these drivers did not know the routes and whilst it was accepted that they could use SatNav, the reality is that for many shops, it might be that access is to the rear of the shop, or that there is no parking or drop off outside the shop. Having the local knowledge is very helpful to the delivery process. the Tribunal needed to judge this situation and determine whether or not the 20 reasonable needs of the business justify dismissing someone with under a year's service with the claimant's attendance record.

25 69. Mr Miller also submitted that when determining whether or not a measure is proportionate it is relevant for the Tribunal to consider whether or not a lesser measure could have achieved the employer's legitimate aim (*Naeem v Secretary of State for Justice [2017] UKSC 27*). The Tribunal should consider whether the measure taken was proportionate at the time the unfavourable treatment was applied. He submitted that if the respondents felt the claimant was unable to provide regular and effective service as a driver, giving him a final written warning would not meet that aim of regular and effective service.

30 70. There was no suggestion by the claimant in his own evidence or challenge by the claimant of the respondent's witnesses that their objective justification defence was unreasonable. Mr Miller submitted that from the information



available to Iain Crawford it would be reasonable to conclude that the claimant was not providing regular and effective service.

71. In considering whether dismissing the claim was a proportionate means of achieving that aim the tribunal has to carry out a its own critical evaluation of the evidence weighing of the needs of the employer against the discriminatory impact on the employee, rather than simply asking what might fall within the band of reasonable responses of the reasonable employer (the test for unfair dismissal under section 98 (4) of the Employment Rights Act 1996.
72. The Tribunal was satisfied that given the nature of their business it was important to the respondents that deliveries were made to customers, and that it was therefore important that their drivers provided regular and effective service. The claimant had been absent for a period of 15.5 days in a period of just over 5 months. He had therefore been able to provide some service but this was which is a considerable absence record.
73. Tribunal was also satisfied that drivers absences, including the claimant's absence, resulted in the respondents having to put other measures in place to achieve deliveries, which caused them a degree of inconvenience dure to last minute nature of the arrangements required. There was insufficient evidence for the Tribunal to reach a conclusion as to extent of financial impact of the claimant's absence on the respondent's business as a result of these arrangements being implemented. Mr Starr evidence was that agency drivers were at a cost, but he did not know how much that was. Nor was there any evidence about the impact of the claimant's or driver absence generally on the efficiency of deliveries and whether they were achieved on time. Mr Starrs gave evidence to the effect that drivers were trained in their routes, but he did directly not answer the question in cross examination about the assistance new drivers might obtain from Sat Nav or give evidence about problems encountered with deliveries when agency or standby drivers were utilised. Mr Miller's submissions about knowledge of routes being important for access to shops was unsupported by evidence.

74. No consideration had been given to by the respondents to any alternative to dismissal. Mr Miller submitted that giving a final written warning would not meet the aim of providing regular and effective service. However, one of the alternatives which the respondents, as submitted by Mr Paterson, could have considered was discounting disability related absence from consideration under their absence management policy. This would have allowed them to continue to monitor absence in the interests of achieving effective service for non-disability related reasons, while mitigating the discriminatory impact on the claimant.

75. The discriminatory impact on the claimant of dismissal was very considerable.

76. Taking these factors into account and weighing the needs of the respondents business against the discriminatory impact on the claimant, the Tribunal was not satisfied that dismissal in these circumstances was a proportionate means of achieving a legitimate aim.

### ***Harassment Claim***

77. Section 26 of the Act provides:

(1) *A person (A) harasses another (B) if—*

(a) *A engages in unwanted conduct related to a relevant protected characteristic, and*

(b) *the conduct has the purpose or effect of—*

(i) *violating B's dignity, or*

(ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

(2) *A also harasses B if—*

(a) *A engages in unwanted conduct of a sexual nature, and*

- (b) *the conduct has the purpose or effect referred to in subsection (1)(b).*
- (3) *A also harasses B if—*
- (a) *A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*
- 5 (b) *the conduct has the purpose or effect referred to in subsection (1)(b), and*
- (c) *because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not*
- 10 *rejected or submitted to the conduct.*
- (4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
- (a) *the perception of B;*
- (b) *the other circumstances of the case;*
- 15 (c) *whether it is reasonable for the conduct to have that effect.*
78. There is an issue of time bar arising from the claim of harassment as a result of Mr Starrs' comment to the claimant in August 2022.
79. Section 123 of the Act provides:
- (1) *Subject to section 140B proceedings on a complaint within section 120*
- 20 *may not be brought after the end of—*
- (a) *the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) *such other period as the employment tribunal thinks just and equitable.*
- 25 (2) *Proceedings may not be brought in reliance on section 121(1) after the end of—*

(a) *the period of 6 months starting with the date of the act to which the proceedings relate, or*

(b) *such other period as the employment tribunal thinks just and equitable.*

5 (3) *For the purposes of this section—*

(a) *conduct extending over a period is to be treated as done at the end of the period;*

(b) *failure to do something is to be treated as occurring when the person in question decided on it.*

10 80. The Tribunal concluded that Mr Starrs had asked the claimant how his condition would affect his work going forward.

81. The claim was very considerably out of time. The Tribunal did not conclude that the complaint was part of a continuing act. It was a one off comment from Mr Starrs. Mr Crawford who dismissed the claimant did not know that the claimant was disabled, or that that comment had been made, and there was  
15 nothing to link the two complaints of disability discrimination.

82. There was no evidence to support the conclusion that it was just and equitable to extend the time limit under section 123 of the Act and the Tribunal was not satisfied that it should do so.

20 83. In any event the Tribunal did not consider this comment met the requisite test under Section 26 (1) (b). The claimants own evidence did not go beyond that he was a bit surprised at the comment

84. As a matter of fact, the Tribunal did not conclude that the claimant was 'ignominiously' escorted out of the office. It accepted that he was asked to  
25 leave after he was dismissed by Mr Crawford in accordance with respondents' usual practice, but that he was invited to wait in the reception area while Mr Crawford made and arrangements for his travel home. In reaching this conclusion the tribunal take into account that Claimant said in evidence in chief that after he was dismissed he was ' basically shown the

door' . He then went on to add that he was escorted off the premises, but did not explain how that occurred. In cross examination the claimant accepted that Mr Crawford enquired as to how he would get home and that he gave him money for a taxi. He said he could not recall Mr Crawford inviting him to wait  
5 in reception, rather than denying that this had taken place. Both these pieces of evidence are inconsistent with the notion that the claimant was ignominiously escorted off the premises, which is the allegation. There was no any credible evidence to support the conclusion that the claimant was told he had to wait outside the office building by Mr Crawford or anyone else  
10 and the Tribunal was satisfied that it was the claimant's own decision to do so.

85. It was unclear from the claimant's evidence to what if extent, if any, Security were involved in his exiting the building. When asked in cross examination who escorted him out he said the Security man; however he also accepted  
15 in cross that the first time Security was involved was after he left the building cross, which he found humiliating.

86. Even if Security were involved in the claimant exiting the building, and even if the claimant found that humiliating, then there was nothing to suggest that such actions were related to the claimant's disability. There was no evidence  
20 to support the conclusion that Security knew about the claimant's disability or that he had been dismissed.

87. For these reasons the claim under Section 26 fails.

### ***Further Procedure***

25 88. The claim will now be listed for a Remedy Hearing by Date Listing Stencil.

89. The claimant should provide the following information within **14 days** of the date of issue of this judgment;

(a) the sum sought as compensation for past loss of earnings and how that is calculated;

- (b) the sum sought as compensation of future loss of earnings and how that is calculated;
- (c) what steps has the claimant taken to mitigate his loss? Details with documentation in support of jobs which the claimant has applied for and any income which he has received should be provided;
- 5 (d) How much is sought by way of injury to feeling, and the basis of this assessment?
- (e) How much interest is sought on the award claimed and how is this calculated?
- 10 90. The respondents should respond within **14 days** of receiving that information. Their response should include the following;
- (a) Whether they agree with the sum claimed as past loss, and if not why not? What is their alternative calculation of that?
- (b) Whether they agree with the sum claimed as future, and if not why not? What is their alternative calculation of that?
- 15 (c) Do the respondents argue that the claimant has failed to mitigate his loss?
- (d) If so, they should set out the basis upon which this is argued.
- (e) Do the respondents accept the Claimants assessment of the injury to feelings award claimed? If not why not; what is their alternative assessment of this award?
- 20 (f) Do the respondents accept the interest calculations provided by the claimant? If not they should provide their alternative figures.

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**Laura Doherty**

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**Employment Judge****28/03/24**

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**Date****28/03/24**

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**Date sent to parties**