



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr P Matei**

**v**

**Young and Co.'s Brewery PLC**

**Heard at:** London Central

**On:** 26 – 28 September 2020

**Before:** EJ G Hodgson  
Mr D Schofield  
Ms K Harr

**Representation**

**For the Claimant:** Ms I Bayliss, counsel  
**For the Respondent:** Mr R Hignett, counsel

## JUDGMENT

- 1. The claim of discrimination arising from disability fails and is dismissed.**
- 2. The claim of wrongful dismissal fails and is dismissed.**

## REASONS

### Introduction

- 1.1** On 22 February 2021, the claimant brought claims of discrimination arising from disability and wrongful dismissal.

### The Issues

- 2.1** At the start of the case we considered and agreed the issues.

- 2.2 There is a claim of discrimination arising from disability (section 15 Equality Act 2010).
- 2.3 The unfavourable treatment is said to be dismissing the claimant.
- 2.4 The claimant's primary case is that the matter arising in consequence of disability was sickness absence. The claimant's alternative case, as advanced at the hearing, was his failure to comply with the respondent sickness reporting procedure was due to embarrassment, which itself was in consequence of disability.
- 2.5 The claimant abandoned any argument that the disability itself caused an inability to comply with the respondent's sickness reporting procedure.
- 2.6 The respondent stated the reason for dismissal was the claimant's failure to comply with the respondent's sickness reporting procedure. The respondent denied that the reason for non-compliance was something that arose in consequence of disability.
- 2.7 The respondent denied that the claimant was dismissed because of absenteeism.
- 2.8 The respondent did not accept any absence was disability related.
- 2.9 The respondent accepted the claimant was disabled because he is HIV positive.
- 2.10 The respondent advanced a Section 15(2) Equality Act 2010 defence stating it did not know and could not be reasonably expected to know the claimant had a disability.
- 2.11 The respondent advanced a justification argument in the alternative, should it be found that treatment was because of something arising in consequence disability.
- 2.12 The legitimate aim was said to be seeking to manage the impact of the sickness absence through sickness absence reporting procedure. The means was said to be requirement to comply with the sickness absence reporting procedure, and in the event of failure to comply with it, dismissal.
- 2.13 The claimant alleged that any misconduct was not a repudiatory breach and that dismissal without notice was wrongful.

### **Evidence**

- 3.1 The claimant gave evidence.

- 3.2 The respondent relied on three witnesses. Two witnesses, Mr Sam Wilkinson and Ms Penny Spence, gave oral evidence. Ms Sara Kerton, who dismissed the claimant, did not give oral evidence. She did produce a statement. We accept that she intended to give evidence but was unable to do so. She currently resides in New Zealand. She is employed there and cannot take time off work. It was impracticable for her to fly back to England. It had been assumed she would give evidence by CVP. The respondent was late in applying for permission. The respondent did seek adjournment to ensure that her evidence could be given. The adjournment was refused prior to this hearing. We are satisfied that Ms Kerton wished to give evidence, but was prevented from doing so for reasons beyond her control.
- 3.3 We received an agreed bundle of documents.
- 3.4 Both parties gave written submissions.

### **Concessions/Applications**

- 4.1 We considered whether the claimant needed an interpreter. Ms Bayliss initially expressed reservations, but did not apply for an interpreter. The tribunal discussed the matter with the claimant. The claimant confirmed he did not believe he needed an interpreter. There was some suggestion during the hearing, from Ms Bayliss, the claimant may have been confused by questions. That was not reflected in any representation made by the claimant himself.
- 4.2 The tribunal considered carefully whether the claimant could answer questions or appeared to have any difficulty understanding the language. We were satisfied that the claimant had no difficulty understanding the language. We are satisfied the claimant understood all questions. To the extent that Ms Bayliss suggested the claimant may have been confused in his evidence, we find that this occurred when his evidence was challenged and his response reflected his desire to maintain his evidence in the face of cross-examination. It did not reflect a lack of understanding
- 4.3 We have considered the weight to be given to the evidence of Ms Kerton who did not attend. We have noted that her evidence is corroborated by a discussion with Ms Spence, from whom we have heard.
- 4.4 In **Efobi v Royal Mail Group Ltd [2021] UKSC 33**, Lord Leggatt said:

**The question of whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *[Wisniewski]*<sup>1</sup> is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using**

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<sup>1</sup> *Wisniewski (a minor) v Central Manchester Health Authority* [1998] EWCA 596

their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules." (paragraph 41)

- 4.5 We have had regard to these principles when considering Ms Kerton's evidence. We are satisfied she would have given evidence by video, had she been permitted to do so.

### **The Facts**

- 5.1 From 2 January 2020, The respondent employed the claimant as a Chef de Partie . At the time of his dismissal, he worked at the Grange in Ealing. The staff are required to work on a rota system.
- 5.2 The claimant did not work the same shifts each week; a rota was produced each week to suit the requirements of the business. Staff are required to attend work. They are not permitted to cancel shifts. Any change in shifts must be authorised by the manager.
- 5.3 The claimant signed terms and conditions of employment on 20 January 2020. He signed an updated terms and conditions of employment on 28 September 2020. The terms and condition incorporate the respondent's "managed house staff handbook." The terms in the handbook are contractual, unless excluded. The disciplinary procedure is excluded and it is not contractual.
- 5.4 Section 34 of the handbook is entitled "HIV/AIDS policy." It confirms that employees who are HIV positive are not required to inform the employer, but are encouraged to tell a manager. It states, "Every reasonable step will be taken to ensure strict confidentiality." It states the employer "will not tolerate any discrimination against job applicants or employees on the basis of their actual or perceived HIV or AIDS status and any such behaviour may result in disciplinary action."
- 5.5 The handbook sets out the contractual procedure to be used when reporting sickness absence:

#### **12. Absence and Sickness**

**If you are absent for any reason other than by prior arrangement you must contact your House Manager as early as possible on the first day of absence to explain why you are absent and when you expect to return to work. If you are sick for longer than 7 calendar days you must submit a**

**doctor's certificate to the Company and arrange for the House Manager to be kept informed of your progress at the beginning of each week. ...**

- 5.6 Staff absence creates significant difficulty for the respondent's business. The pub may be left short staffed. The kitchen may be severely disrupted. It may be necessary to seek emergency cover, which may not be available. Repeated short-term unpredictable absence causes significant disruption and logistical difficulties. For that reason, if an individual is likely to be absent, that individual must, in accordance with the policy, contact the house manager as soon, as practicable, on the first day of absence giving the reason for absence and the expected duration. There is no provision for the individual to simply send a substitute, or swap shifts with a colleague.
- 5.7 The claimant was first absent from work for one day on 1 February 2020. Thereafter he was absent on 5 March 2020 and 31 July 2020. The claimant failed to contact his manager, Mr Wilkinson, to provide a reason for his absence on each occasion. Mr Wilkinson was not aware of the option to record the claimant absent without leave. He recorded the absences as sickness. He spoke to the claimant informally following these absences and confirmed they were unacceptable. He directed the claimant to ensure that he reported any absence in accordance with the sickness absence procedure.
- 5.8 On 6 September 2020, the claimant was due to work from midday until close. The claimant spoke to a colleague, who informed Mr Wilkinson of the absence.
- 5.9 On 7 September, Mr Wilkinson contacted the claimant, by WhatsApp, to ascertain whether he would work his shift on 8 September 2020. In the WhatsApp exchange, the claimant stated he had not been able to eat anything and had a "horrible sickly feeling." The claimant stated, "I also need to talk to you about these 'unpredictable' illnesses I've got through twice last two months." He added "Now it won't happen any more."
- 5.10 On 8 September 2020 at 06:32, the claimant sent a further WhatsApp message stating, "Unfortunately I got worse overnight. It's horrible the situation, I know but it's about my health and I need to pay attention to it. I'm very sorry and I hope you would understand."
- 5.11 The claimant did not work his shifts on 9 and 10 September. They were covered by the head chef. The claimant did not inform Mr Wilkinson of the reason for his absence, other than the initial explanation about feeling sick.
- 5.12 Mr Wilkinson was told by members of staff the claimant was not genuinely sick, but had chosen to spend time working on his house.
- 5.13 The claimant returned to work on 19 September, when Mr Wilkinson was on leave.

- 5.14 On 21 September 2020, Mr Wilkinson met with the claimant in the morning to discuss the absences. The discussion took place in the bar area around 10:00. We accept Mr Wilkinson's evidence that no one else was present and it was a private discussion. Mr Wilkinson wished to ask about the rumours and to clarify what was meant by "unpredictable illness."
- 5.15 The claimant stated that on 9 and 10 September he had not attended work as he was tired because he had been working on his house. Mr Wilkinson asked if the claimant had any underlying health conditions that he should be aware of, but the claimant denied any underlying health issues, and repeated that working on his house had tired him.
- 5.16 Mr Wilkinson confirmed that it was not acceptable to simply not attend, as it caused inconvenience. Mr Wilkinson warned the claimant that it must not happen again. It is accepted this was a formal conversation and Mr Wilkinson reiterated the claimant must, if he proposed to be absent, speak to either Mr Wilkinson or in his absence, his duty manager or the head chef.
- 5.17 We accept the claimant understood the importance of following the procedure.
- 5.18 On 21 September, the claimant asked to reduce his hours to 35 a week. Mr Wilkinson confirmed that it would be possible to adjust his hours when the business would allow. It was necessary for Mr Wilkinson to consider overall staffing and the rota; the request could not be accommodated immediately. At no time did the claimant suggest disability caused him any difficulty.
- 5.19 On 1 October 2020, the claimant was due to start his shift at 16:00. The claimant failed to attend. Contrary to his terms and conditions of employment, and the specific instruction from Mr Wilkinson, the claimant contacted a colleague at 15:16 and stated

**Hi lovely. Could I ask you, please, if you don't mind to do my shift this evening.**

**I got really drunk last night, till 5 AM at my son's. I feel awful...**

- 5.20 It is clear the colleagues spoke to Mr Wilkinson sent the following message at 15:20.

**Sam says that it's not good enough, he is expected you to be at work otherwise it's an unauthorised absence.**

- 5.21 The claimant replied at 15:23:

**I promise this is the last time! I don't drink any more!!!**

And at 15:36:

**Is it alright?**

5.22 The colleague refused, as she had already worked all day.

5.23 The claimant did not contact Mr Wilkinson.

5.24 At 16:01, and the claimant did not attend, Mr Wilkinson sent a message which stated:

**Can you please let me know if you will be working your shift this evening?"**

5.25 The claimant replied that he was waiting for his colleague to "text me back."

5.26 Mr Wilkinson confirmed that shifts could not be swapped without approval; he stated:

**Shifts do not get swapped without my approval. You have not informed me that you would not be working. I take it that this you saying you will not be in?**

5.27 The claimant failed to engage directly. Instead, he stated he did not know that his colleague was working a double shift. He stated:

**I would have let you know about the shifts changes.**

5.28 He went on to say

**I know I have done this three times but I'm working on this so it should not happen again.**

5.29 Mr Wilkinson replied:

**This is not acceptable I will be writing to you formally in due course."**

5.30 The claimant responded:

**I know and I feel awful for being very unprofessional about my work.**

5.31 Mr Wilkinson resolved to instigate disciplinary action. He wrote a summary explanation, confirming the events in September and October, which was provided to the decision-maker, Ms Kerton.

5.32 The respondent sent an invitation to the claimant on 2 October 2020, which invited the claimant to attend on 6 October. It confirmed the purpose was disciplinary action because the claimant allegedly "failed to follow the absence reporting procedure and therefore had unauthorised absence." The letter enclosed copies of relevant documents to be used at the hearing and invited the claimant to provide information and documentation. It confirmed that summary dismissal was a possibility. It

invited the claimant to bring a work colleague or trade union representative.

- 5.33 On 3 October 2020, the claimant sent to Mr Wilkinson an extract of a message which the claimant was writing to his own doctor. The message referred to the claimant being HIV positive. The message stated the claimant did not believe he could return to the pub.
- 5.34 Mr Wilkinson returned the claimant's message confirming that he should raise the matter with Ms Kerton. Mr Wilkinson did not forward the specific message to Ms Kerton, but he did have a conversation to explain the claimant had stated he was HIV positive. There was no reason why the claimant should not have sent to Ms Kerton the message, or any other document on which he intended to rely.
- 5.35 The claimant had not told Mr Wilkinson, previously, of his HIV status or state that any illness was connected to any medication he was taking for HIV.
- 5.36 Ms Kerton undertook the disciplinary hearing. She was a general manager. She was aware of the respondent's policy regarding HIV. Mr Wilkinson provided her with relevant documentation including the following: the disciplinary invitation letter; his note of the recent events; a screenshot of messages between the claimant and his colleague from 1 October 2020; screenshot messages between Mr Wilkinson and the claimant of 1 October 2020. Mr Wilkinson told her, in a telephone call, the claimant had stated he was HIV positive. She was aware the claimant was seeking medical evidence.
- 5.37 The hearing went ahead on 6 October 2020. The claimant did not provide medical evidence. The claimant explained he had not attended work because he felt ill and he was on strong medication which made him feel sick. She did not seek details of the medication because she doubted he was telling the truth, given the claimant's previous explanations, which had not mentioned medication. The claimant stated his partner had advised him not to discuss his medical condition. The claimant alleged he told his colleague that he had got drunk to avoid explaining his medical condition. Ms Kerton considered the explanation odd, as the claimant could have given any reason for sickness. She asked the claimant whether he had contacted Mr Wilkinson and whether he had complied with the procedure. The claimant failed to say that he complied with the sickness absence procedure. The claimant stated he had called in sick twice before and was embarrassed to do so again.
- 5.38 Ms Kerton asked the claimant whether it would have been a good idea to discuss his HIV status with his manager, Mr Wilkinson. The claimant reiterated he had been advised by his partner not to. He was worried that people would be judgemental.



- 5.39 Ms Kerton was concerned that dismissal for failing to report his absence in accordance with the procedure could give rise to a claim of discrimination. She had no medical evidence, but formed the view it was possible the claimant was being truthful about the effect of his medication, albeit it was possible that he was using his condition as "leverage to avoid a disciplinary sanction." Ms Kerton discussed her concerns with the previous operations manager, Ms Spence (from whom we have heard).
- 5.40 Ms Kerton came to several conclusions. Clause 12 of the handbook provided a clear direction to report absence to the manager. The claimant had received the handbook. The claimant had previously contacted Mr Wilkinson to report his absences and he was aware of the procedure. The claimant had been previously absent without authorisation on 9 and 10 September. Mr Wilkinson had confirmed the correct procedure for reporting absence from work in future. There had been a specific discussion on the 21 September. She noted the claimant's reason for absence for 9 and 10 September 2022, as given at the time, was that he had become tired having worked on his properties. She considered this was consistent with a pattern of short-term persistent absence. The claimant alleged that his failure to follow procedure on this occasion was embarrassment at being sick. The claimant did not allege it was his HIV status that prevented him from contacting Mr Wilkinson. She accepted that the claimant may have been reluctant to disclose his HIV status to Mr Wilkinson, but he could have contacted Mr Wilkinson and given a reason for sickness absence. Instead, he reported to his colleague that he was absent because he was ill having drunk excessively the night before. She noted the very clear language used to the colleague, and that he had said he promised it was the last time and he would not drink any more. Ms Kerton believed that he was telling the truth when he said that he had drunk excessively. He believed the colleague would keep his message confidential. Ms Kerton decided to dismiss the claimant.
- 5.41 In her dismissal letter she gave her reason as follows:
- During the meeting you stated you were sorry for not attending work and had tried to cover your shift with another staff member. You also stated you had not checked the rota to see if [ ], Sous Chef Grange, was available to cover your shift nor had you had not made any attempt to inform Sam Wilkinson, Manager Grange, of your intended absence. I accept that you may not have been comfortable telling Sam about your health issues however from your previous absences you have shown you were aware of the reporting procedure.**
- After investigation and consideration of the facts, including any mitigating factors you put forward, this incident is considered to be gross misconduct. In accordance with the Company's Disciplinary Procedure, your employment is terminated with immediate effect.**
- 5.42 The dismissal letter confirmed the right of appeal, which was also confirmed by Mr Wilkinson. The claimant did not appeal.

- 5.43 The tribunal has disagreed on one finding of fact. The claimant has alleged before the tribunal that his explanation for absence given to his colleague on 1 October, namely that he had been drinking the evening before until the early hours causing him to be too ill to undertake a shift at 16:00, was an untruthful explanation. Both non-legal members have accepted the claimant's evidence on this point, and accepted that the explanation offered to his colleague on 1 October 2022 was deliberately untrue. They rely on the medical evidence of Dr Cooper, the claimant's HIV specialist, in a letter dated 18 January 2022. This confirms the claimant changed his antiretroviral medication to a new formulation in approximately September 2020 which caused him to suffer from central nervous system adverse effects including "dizziness, poor concentration, panic attacks, vivid dreams and nightmares." They find this supports the claimant's accounts that he had an adverse reaction to medication around the relevant time. They accept that the claimant wished to conceal his HIV status, and hence gave what they found to be an untruthful explanation.
- 5.44 EJ Hodgson finds that the claimant gave a truthful account to his colleague when he said he had been drinking the night before and was too ill to work his shift. The explanation given to his colleague was voluntary and unguarded. He could have made any excuse. There was no need to go in detail either as to the condition, its causation, or any medication. Later in the conversation with the colleague, the claimant indicated that he would not continue to drink. He did not expect the message to be shown to the manager, hence why he used unguarded language. The claimant had intended to tell his manager of his HIV status, this is inconsistent with an assertion that he was too embarrassed to inform his manager. His later text message indicated he had a fear of losing his job, should he reveal his HIV status, as it had happened previously. Nevertheless, he had resolved to tell his manager. A wish to conceal his HIV positive status, may lead to a false explanation, but that is unlikely to extend to an elaborate lie about drinking, which could be an excuse not acceptable to the respondent.
- 5.45 It is theoretically possible that the claimant chose to give an elaborate lie about drinking to obscure his true symptoms. However, it is a surprising cover story. On the balance of probability, EJ Hodgson finds the claimant was truthful when he said he had been drinking the night before, and it had made him too ill to attend. The claimant may have had an adverse reaction to a change in medication. However, it cannot be assumed that any adverse reaction prevented him drinking. It is possible that the combined effect of the medication and drinking contributed to his ill-health on 1 October 2022.

### **The law**

- 6.1 Section 15 Equality Act 2010 (Discrimination arising from disability) provides:

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

- 6.2 In **Pnaiser v NHS England** [2016] IRLR 170, EAT, Simler P, at para. 31, gave guidance on the general approach to be taken by a tribunal under s 15. By way of summary, the approach should identify the following: was there unfavourable treatment and by whom; what caused the impugned treatment, or what was the reason for it (motive is irrelevant); was the cause/reason 'something' arising in consequence of the claimant's disability; the more links in the chain of causation, the harder it will be to establish the necessary connection; the causation test is objective; the knowledge requirement concerns the disability itself; it does not extend to the 'something' that led to unfavourable treatment.
- 6.3 The matter arising in consequence of disability does not need to be the main or sole cause of the unfavourable treatment; it may be enough if the disability was a significant influence on the treatment, or a cause which was not the main or sole cause, but which was an effective cause (see, e.g., **Hall v Chief Constable of West Yorkshire Police** [2015] IRLR 893, EAT).

## **Conclusions**

- 7.1 It is agreed the claimant is disabled as he is HIV positive. Having HIV infection is defined as a disability in Schedule 1 of the Equality Act 2010. The claimant has not sought to say that his day-to-day activity is adversely affected, save to the extent that he describes an adverse reaction to a change in medication. His evidence is that the effects were for a limited period.
- 7.2 The unfavourable treatment relied on is dismissal. It is clear that he was dismissed and thereby treated unfavourably.
- 7.3 At the hearing, we spent some time clarifying what was the something arising in consequence of disability. It had appeared the claimant initially put his case on the basis that the medication he was taking for his disability prevented him from complying with the respondent's procedure. To the extent that the argument has ever been advanced, it was abandoned.
- 7.4 The claimant alleged that his absence was disability related. For the reasons we will come to, we do not have to finally decide this point. We note that the claimant has not addressed the reason for each absence.

- 7.5 During the hearing, the claimant advanced, for the first time, an argument that the matter arising in consequence was the embarrassment which would have resulted from disclosure of his HIV status. We will consider this in due course.
- 7.6 In order to decide whether the claimant was treated unfavourably because of something arising in consequence disability, it is necessary to consider, on balance of probability, the respondent's reason for dismissal.
- 7.7 The respondent's position is that it dismissed because the claimant breached the contractual procedure for reporting absence. It is the claimant's case that the material reason for the dismissal was the absences and those absences were disability related.
- 7.8 The claimant was dismissed. He was HIV positive, and therefore disabled for the purposes of Equality Act 2010. There were absences. It is possible that some of those absences were, at least, in part related to this disability. It is possible, absent an explanation, that the absence was the reason for the dismissal. There is therefore an argument that the burden turns. It is necessary to examine the respondent's explanation.
- 7.9 The respondent's policy was clear. Absences must be reported to a manager, or a suitable deputy. There was a contractual term contained in the handbook. The claimant was aware of the policy. The policy had been brought to his attention, informally, on three previous occasions in February, March, and July 2022, when he had taken unauthorised absence. In September, the claimant failed to comply fully with the procedure and there were further recorded unauthorised absences on 9 and 10 September 2020. This resulted in the claimant having a discussion with Mr Wilkinson on 21 September 2020. Mr Wilkinson reiterated the policy and made it clear that unauthorised absence was unacceptable and that the claimant must comply with the procedure. The claimant accepted that he understood the policy and that the policy was explained to him carefully.
- 7.10 The claimant did not inform the respondent, prior to the material incident and 1 October, of his HIV status.
- 7.11 On 1 October 2022, the claimant once again breached the respondent's procedure. Rather than contact his manager to report the absence, he sought to change shifts with a colleague. In doing so, the claimant gave an explanation about having been drunk the night before. In the majority finding, it is clear the claimant lied to his colleague and thereby, ultimately, misled the respondent. On the judge's minority finding, the claimant was truthful to his colleague. We all agree the claimant breached procedure by failing to contact his manager. There were clear and appropriate grounds for taking disciplinary action. At the time Mr Wilkinson started the disciplinary action, he did not know of the claimant's HIV status.

- 7.12 Prior to the disciplinary hearing on 6 October 2022, the claimant did inform the respondent of his HIV status. By that time the disciplinary process, limited to the breach of reporting procedure, was underway.
- 7.13 We note that Ms Kerton doubted the effect of the medication. We find that she accepted that the claimant was HIV positive. Ms Kerton did explore with the claimant whether the medication or its effects prevented the claimant from complying with the respondent's policy. Her focus remained entirely on the breach of procedure, being a breach which had been repeated. She found there was no reason why the claimant could not comply with the procedure. We find that the reason she dismissed was because of the breach of procedure on 1 October 2020, which she concluded was gross misconduct.
- 7.14 We note that at least some of the absences may or may not have been related to the disability. The position is unclear, and the evidence is unsatisfactory. However, we accept that, in no sense whatsoever, did the respondent dismiss because of repeated short-term absences; the absences, at this stage, were coincidental. They may tell us something about the claimant's reason for not attending; they tell us nothing about the reason for not reporting absence to his manager. The claimant was dismissed for breaching the procedure, in no sense whatsoever was the dismissal for any absences or the repeated absences.
- 7.15 We accept Mr Wilkinson's evidence that had he known that the absences may have been disability related, he would have entered into a conversation with the claimant. The reason why he referred the claimant for disciplinary action was because the claimant had breached procedure in failing to contact Mr Wilkinson about the absences.
- 7.16 It is necessary to consider whether there is a causal link between a matter arising in consequence of disability and the unfavourable treatment.
- 7.17 We have rejected the claimant's argument that the dismissal was because of disability related absences. He was not dismissed because of the absences whether singularly or cumulatively. He was dismissed because of the breach of procedure. It follows that we do not have to resolve whether the absences did arise in consequence of disability.
- 7.18 It is the claimant's case that the disability caused embarrassment, such that he did not wish to reveal his HIV status, and this in turn caused him to breach procedure.
- 7.19 The claimant was required to inform his manager of his absences, on the first day of absence, as soon as practicable. The claimant chose not to do that. He sought to persuade us that that his breach of procedure related to embarrassment, which arose in consequence of his disability. It was the revealing of his HIV status which he says was the potential embarrassment.

- 7.20 The claimant did report his absence to a colleague. The claimant gave reasons which related to excessive drinking. There is no reason why the claimant could not have contacted his manager and given him the same reason. The claimant could not, and did not, believe that stating to his manager that he was unable to attend because he had been drinking excessively would reveal his HIV status. It would not lead to any questions concerning his HIV status. Further, the claimant could have given any excuse for not attending. There were numerous excuses that could have been advanced which would not, in any sense whatsoever, revealed his HIV status. He had previously told his manager he had failed to attend in September because he had been working on his property and was tired. This did not lead to questions about the claimant's HIV status. We find the claimant did not believe that contacting his manager in accordance with the procedure would, inevitably, lead to questions which would reveal his HIV status. Put simply, there is no causative link between the claimant's fear of embarrassment and his inability to comply with the procedure.
- 7.21 In any event the claimant had resolved to tell his manager. Informing him was a matter of when and how. This undermines assertion that he was so fearful of disclosure that it affected his actions.
- 7.22 We do accept the claimant had concerns about disclosing his HIV status. It appears there may have been difficulties in his previous employment. It appears that previous colleagues may have reacted negatively, despite the claimant obtaining medical evidence as to the risk of transmission. However, whatever his concerns, he had resolved to tell his manager, whom it appears he trusted.
- 7.23 The claimant did refer to embarrassment in the disciplinary hearing. However, this appears to be in context of being embarrassed by repeated absences. That did not prevent the claimant from complying with procedure.
- 7.24 In the circumstances we find no causal link is not made out. If it can be said that a fear of embarrassment at revealing he was HIV positive is something arising in consequence of that medical condition, that fear of embarrassment did not cause the claimant to breach the respondent's procedure. Breach of that procedure was the reason for dismissal. It follows no causal link is not made out. The discrimination arising from disability claim fails.
- 7.25 We cannot consider justification. When considering justification, it is necessary to first identify the discriminatory behaviour. When considering proportionality, it is necessary to balance the discriminatory effect of the means adopted against the reasonable needs of the employer. In a situation where there is no discrimination, such analysis would be speculative.

- 7.26 We would not find the section 15(2) defence made out. Before dismissal, the claimant told the respondent that he was HIV positive. There is no requirement that he support this with medical evidence. There was no reason to disbelieve him.
- 7.27 The respondent referred us to **A Ltd v Z [2019] IRLR 952** where the EAT (Eady J) considered, in deciding if the when an employer had the requisite knowledge, what enquires may be appropriate. The facts of the cases are very different, and we do not find that case is of assistance. Being HIV positive is a deemed disability and this respondent was told expressly. Ms Kerton had knowledge. For there to be knowledge, pursuant to section 15(2), it was not necessary to consider impairment and effect on day-to-day activity. Being HIV positive is a deemed disability; asking if there is an impairment that has an effect on day to day activity is likely to lead the employer into error.
- 7.28 Finally, we consider the claim of wrongful dismissal.
- 7.29 The requirement to inform his manager of the absence was contractual. The claimant breached the procedure in February, March, and July 2022. There have been informal discussions. There were further breaches at the beginning of September. This led to a specific discussion on 21 September. Mr Wilkinson reiterated the importance of the procedure and gave clear instructions that the claimant should comply with it. The claimant was also told that further unauthorised absences would not be tolerated.
- 7.30 The claimant worked in a public house. We accept that staff absences cause specific difficulty. When an individual does not attend work, there can be extreme disruption. The kitchen may function poorly; that may lead to poor customer experience. We have no doubt the claimant understood how disruptive his absences could be. His WhatsApp messages demonstrate that he understood he was acting unprofessionally.
- 7.31 The respondent's policies are designed to avoid absences, and where that is not possible, to deal with them efficiently and as soon as practicable. The importance of the procedures is underlined by the fact it is contractual and contained in the handbook. The disciplinary procedure is not in itself contractual. However, it does demonstrate what matters will be seen as particularly important. It contains specific examples of incidents which may result in disciplinary action, including summary dismissal. A number of factors are identified; relevant factors include the following: repetition, where there has been a formal or informal warning; serious insubordination; and unauthorised absence from work.
- 7.32 If the employee is in repudiatory breach of contract, the employer may affirm the contract or the employer may accept the breach and treat the contract as terminated. In the latter case, the employee will be summarily dismissed. If the employee's breach is repudiatory, and it is accepted by

the respondent, the employee will have no right to payment for his or her notice period.

- 7.33 In order to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract **Laws v London Chronicle (Indicated Newspapers) Ltd 1959 1WLR 698, CA**. The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the tribunal to decide. In **Briscoe v Lubrizol Ltd 2002 IRLR 607** the Court of Appeal approved the test set out in **Neary and another v Dean of Westminster 1999 IRLR 288, ECJ** where the special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment." There are no hard and fast rules as to what can be taken into account. Many factors may be relevant. It may be appropriate to consider the nature of employment and the employee's past conduct. It may be relevant to consider the terms of the employee's contract and whether certain matters are set out as warranting summary dismissal. The general circumstances may be relevant. It may be appropriate to consider whether there has been a deliberate refusal to obey a lawful and reasonable instruction. The clarity of the instruction may be relevant. Dishonesty and wilful disobedience may justify summary dismissal. These are examples. Each case must be considered on its facts.
- 7.34 This is not a case which relies purely on a breach of the term of mutual trust and confidence. The requirement to contact the manager was an express contractual term, and the importance of it had been brought to the claimant's attention following his previous breaches.
- 7.35 We have regard to **Neary**. The conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment." It is a question of fact. The respondent relies on individuals attending work and, if unable to do so, contacting the manager as soon as practicable, so that arrangements can be made. The claimant had shown, by reference to his past conduct, a serious disregard for the respondent's procedures. Mr Wilkinson had discussed the matter with the claimant and made the respondent's position clear. The claimant accepts that he understood what was required of him, and he understood the importance of the procedure. Within a matter of a few weeks, the claimant completely ignored respondent's procedure. This undermined the trust and confidence inherent in this contract. Ms Kerton did consider whether the claimant's failure to comply with the policy could have been because of his disability. For appropriate and rational reasons, she decided it could not be. In those circumstances, given the serious disruption caused by the claimant, and given he was aware of the policy and the importance of the breaching it again, we accept that this employer should not have been required to maintain the claimant's employment. The breach was



repudiatory. The respondent was entitled to accept it. The claim for wrongful dismissal fails.

Employment Judge Hodgson

Dated: 11 October 2022

Sent to the parties on:

11/10/2022

For the Tribunal Office