EMPLOYMENT TRIBUNALS

Claimant: Mr D Bentham

Respondent: Timpson Limited

Heard at: Manchester (remotely, by CVP) **On:** 20, 21, 22 and 23 September 2022
26 September 2022
(in Chambers)

Before: Employment Judge K M Ross
Mr D Lancaster
Ms A Ashworth

REPRESENTATION:

Claimant: Ms Bates (Claimant's partner)
Respondent: Ms A Niaz-Dickinson (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unfair dismissal (redundancy) pursuant to section 95 and section 98 Employment Rights Act 1996 is not well-founded and fails.

2. The claimant's claim that he was discriminated against by the respondent pursuant to section 15 Equality Act 2010 when the respondent (1) dismissed him, and (2) denied him a lunch break, is not well-founded and fails.

3. The claimant's claim that the respondent failed to make reasonable adjustments for him pursuant to sections 20-21 Equality Act 2010 is not well-founded and fails.

4. The claimant’s claim that the respondent directly discriminated against him pursuant to section 13 Equality Act 2010 when it dismissed him is not well-founded and fails.

5. The claimant's claim for harassment pursuant to section 26 Equality Act 2010, that the respondent discriminated against him by (1) withholding £900 from his salary on 18 December 2017, (2) placing a covert camera in the shop on 1 May 2019, and (3) in April 2019 sending him a letter of concern, is not well-founded and fails.

REASONS

Introduction

1. The claimant was employed by the respondent from 1988 until he was dismissed for redundancy on 13 July 2020. The claimant appealed against his redundancy but was unsuccessful and brought a claim to this Tribunal.

2. There is no dispute that the claimant suffers from ulcerative colitis, a condition which causes him to be a disabled person within the meaning of section 6 Equality Act 2010. The respondent agrees the claimant was a disabled person at the relevant time and also admits knowledge of disability.

The Hearing

3. This hearing was originally listed to be heard" in person". However the case was converted to a remote video link hearing by Cloud Video Platform ("CVP") for the first day because the Judge was unable to attend in person and because counsel for the respondent had tested positive for COVID-19 and although she was well enough to represent, it was not appropriate for her to attend the Tribunal building.

4. The claimant made an application to convert the remainder of the hearing into an "in person" hearing. The claimant explained there were distractions at home caused by neighbours and pets and he and his partner had concerns about using technology.

5. Given that counsel continued to test positive for COVID-19 and given that the Tribunal could not hear a fully "in person" hearing until late 2023, the Tribunal refused the application. However the Tribunal made arrangements for the claimant and his partner to attend "in person" at Manchester Employment Tribunal via videolink, with the Panel and respondent attending remotely from elsewhere. A clerk was made available to assist the claimant with technology. (This arrangement was to remove any problems with difficulties attending remotely from home for him.)

6. In fact the claimant and his partner chose to continue to attend remotely at home by CVP. Thus the Tribunal proceeded by way of CVP for the full hearing.

7. When conducting the Hearing, the Tribunal took into account that the claimant, given his condition of ulcerative colitis, required regular toilet breaks.

8. The claimant was ably represented throughout by his partner, Ms Bates, and the respondent had the expert assistance of counsel, Ms Niaz-Dickinson.

The Issues

9. The case had originally been case managed by Employment Judge Robinson in 2021. It was further case managed by Employment Judge Ainscough and her List of Issues is to be found at pages 435-439 of the joint file of documents. The parties agreed these were the relevant issues for the hearing.

10. Accordingly, the claimant brought a claim for unfair dismissal (redundancy); discrimination arising from disability (section 15 Equality Act 2010) in relation to his dismissal and denying him a lunch break; and a claim for a failure to make reasonable adjustments, where the PCP was that the shop must be kept open during operating hours and the alleged adjustments contended for were allowing him to take breaks and allowing him to take a lunch break. The claimant also brought a claim for direct disability discrimination (section 13 Equality Act 2010) in relation to his dismissal and a claim for harassment related to disability in relation to:

(1) On 18 December 2017 the respondent withheld £900m from his salary;

(2) On 1 May 2019 the claimant placed a covert camera in the shop; and

(3) In April 2019 the respondent sent a letter of concern to the claimant.

Witnesses and Evidence

11. The Tribunal heard from the claimant. For the respondent the Tribunal heard from Mr Hamilton-Fisher, the respondent's Director of Colleagues and Support; Mr Tempest-Mitchell, the Area Manager and dismissing officer; Mr Kevin Dore, a Regional Director and the Appeals Officer; Mr Johnson, the Manager of Chorlton Branch; and Mr Shuttleworth, Head of Security.

12. The Tribunal had the benefit of an agreed bundle of 439 pages. In addition, on the first day of the hearing the claimant disclosed photographs of bonus points, a document from the Information Commissioner's Office, and a document entitled "Notes for Area Managers". The respondent on the second day disclosed a document in relation to Branch Manager vacancies.

The Facts

13. We found the following facts.

14. The claimant was employed by the respondent from October 1988 until he was dismissed by reason of redundancy on 13 July 2020. He was a long-serving and valued employee. There is no dispute that the claimant suffered from ulcerative colitis. His absence record (pages 161-164) shows he had significant periods of sickness. We heard from him that he was diagnosed with ulcerative colitis in 2017. The claimant also agreed he had a number of authorised absences to care for his partner, who suffered a significant injury after a fall.

15. We find the claimant was continuously absent from 15 July 2019 (page 214) and in fact never returned to work prior to his redundancy. We find that in February 2020 (page 229) , having been continuously absent on sick leave since 15 July 2019, the claimant was planning to return to work after the expiry of a fit note on 11

March 2020. The plan was that he would take his outstanding annual leave and return on 6 April 2020. However, events intervened. The COVID-19 pandemic hit, and the Government issued the national "stay at home" instruction on 23 March 2020. All the respondent's shops were closed.

16. We find the respondent is a leading shoe repair and lock provider within the UK with approximately 2,150 branches nationwide. We find that at the time of the claimant's redundancy the respondent had 5,400 employees. We find, relying on the respondent's evidence from Mr Hamilton-Fisher that the business now has approximately 4,800 colleagues and that approximately 1,000 colleagues were made redundant in 2020 as a result of the effect of the COVID-19 pandemic on the respondent's business.

17. We find that on 27 April 2020 the business was planning to reopen its outlets, although with social distancing in place (see page 230) as required by government regulation.

18. We find that the claimant was informed that his position in the Chorlton branch was at risk of redundancy. We accept the evidence of Mr Hamilton-Fisher that all the respondent's 2,150 branches were required to close during the Government national lockdown and the 5,500 colleagues were placed on the Government's Coronavirus Job Retention Scheme, also known as the "furlough scheme". We find that after eight weeks without any sales or any other means of generating sufficient revenue to cover their costs, the company was losing money and at serious risk. We accept the respondent's evidence that it was a business entirely dependent on footfall to their branches and it was a predominantly cash business. We accept the evidence of the respondent's witness that the fixed costs of the business were roughly £2.9million per week, although with the Coronavirus Job Retention Scheme grant their losses were projected to be about £1.5million per week.

19. We find that upon reopening in April 2020 the sales were worse than half that of the same period the previous year. We rely on Mr Hamilton-Fisher's evidence that, as stated in paragraph 5 of his witness statement, the company was facing projected losses of £48million. We rely on his evidence that the coronavirus situation had changed the way customers shopped. The strict requirements for social distancing placed heavy restrictions on the number of colleagues and customers the business could have working in their branches. The trading pattern was very uncertain and the business was facing significantly lower sales than it needed. In order to protect the survival of the business, measures were taken to control costs and expenditure and a freeze was placed on recruitment. All annual pay reviews and pay increases were frozen and other benefits were stopped.

20. We find the company embarked on a countrywide redundancy programme. We find there was an exercise to identifying branches which did not have sufficient sales to justify more than one position. We find Area Managers were tasked with identifying roles that were at risk of redundancy in their areas, managing consultation meetings and making decisions on termination. We find that Robert Tempest-Mitchell, the Area Manager for the shop where the claimant worked at Chorlton, looked at performance reports. He noted the Chorlton branch turnover (see pages 357 and 359). He identified the Chorlton branch (like some other branches) had

more than one member of staff. He also identified it had a turnover of less than £4,000 per week.

21. We find that the Chorlton branch had a manager, Rory Johnson, and the claimant working there. The claimant said he was also a Branch Manager, although in cross examination he described himself as a “floating manager”. He agreed that Rory Johnson was “the manager” of the Chorlton branch. We find no other employees worked in the Chorlton branch.

22. We rely on Mr Tempest Mitchell that there was only a need for one manager at Chorlton branch and no additional employees.

23. The Tribunal finds that the claimant was working as an Assistant Manager, although the respondent had not provided him with updated terms and conditions to reflect that.

24. Given the claimant was the only Assistant Manager in the branch, there was no-one else to pool him with and he was identified as being at risk for redundancy. We find there was a first consultation with the claimant on 23 June 2020 and a letter sent after that meeting to advise him that he was at risk (page 238). A second redundancy consultation meeting took place between the claimant and his Area Manager on 30 June 2020 (page 240) and a third consultation meeting took place on 3 July 2020 (pages 255-260). A final meeting took place on 8 July 2020 (pages 265-272). The claimant was dismissed by letter with effect from 15 July 2020 (see page 280). He appealed on 18 July 2020 (pages 290-299). A meeting was held on 27 July 2020 (page 308). The claimant's appeal was unsuccessful, and he was notified in a detailed letter of outcome (pages 319-324).

<u>Unfair dismissal pursuant to section 95 and section 98 Employment Rights Act 1996</u>

25. We turn to the first issue, as set out at page 435 of the Complaints and List of Issues document: what was the reason, or principal reason, for dismissal? The respondent says the reason was redundancy; the claimant alleges it was because of his disability.

26. We rely on the evidence of Mr Hamilton-Fisher to find that at the time of the COVID-19 pandemic in 2020 the company was required to close all 2,150 branches due to the Government national lockdown. We find there were eight weeks where the company was unable to generate any sales at all and was losing money at a substantial rate. The claimant did not dispute that the effects of the COVID-19 pandemic upon the respondent’s business were extremely serious. The claimant did not dispute that sales upon reopening in April 2020 were less than half for the same period of the previous year. The claimant did not dispute that a genuine redundancy situation existed at that time in the sense that the need for workers had ceased or diminished or was likely to cease or diminish.

27. The Tribunal turns to consider the particular circumstances at the Chorlton branch.

28. The Tribunal finds that the claimant had worked as a Branch Manager in the Stretford shop until 2015. We find he was the only employee working at the

respondent's Stretford branch in 2015. We find his job there disappeared when that branch was closed due to the rent rise in rent and takings for that outlet not making the shop viable.

29. The claimant agreed that when he was told the Stretford branch would be closed, he accepted that he would move to the Chorlton branch. Mr Tempest-Mitchell was the claimant's Area Manager at that time. Both he and the claimant agreed they had a meeting about the position at Stretford. Unfortunately, after this length of time the minutes do not survive. We find that the claimant agreed to move to Chorlton on the same terms and conditions. It was not disputed that he continued to be paid at a Branch Manager's rate of pay, and to be entitled to the Branch Manager's level of sick pay. We find the claimant had a contract of employment for his role as Branch Manager at Stretford (pages 80-92) which clearly states on page 80 that his place of work is "0432 Stretford".

30. We find that the claimant's Area Manager completed the appropriate notification of change form (page 98). (A further notification of change form at page 113 shows an increase in rate of pay from August 2015.)

31. We rely on the evidence of Mr Hamilton-Fisher that when the claimant suggested the notice of change form at p98 was manipulated, he investigated this and found the metadata at page 112 which showed the document had been created on 31 July 2015, which was the date the change took effect (see page 98). We find the notice of change at p98 document is genuine.

32. The Tribunal finds that the respondent's HR department failed to send the claimant an updated contract of employment. However, we find the claimant's contract of employment which he retained was no longer reflective of his circumstances because he was no longer employed at Stretford.

33. In cross examination the claimant entirely agreed that Rory Johnson was "the manager" at Chorlton branch. The Tribunal finds only the claimant and Mr Johnson were employed at that branch. The Tribunal accepts the evidence of the respondent that they did not employ two managers at one branch. The Tribunal finds that although the claimant had the benefit of his existing terms and conditions as a manager when he moved from Stretford to Chorlton, he worked in reality as an assistant manager, not as the manager. We find that the shop was open Monday to Saturday inclusive. We find the claimant's regular day off was Monday. We find Mr Johnson's regular day off was Wednesday. We find therefore there was only one day when the claimant was alone in the shop. We find on those days the claimant did complete the administrative and other paperwork. However the Tribunal are satisfied that on the days when both men were in the shop, Mr Johnson completed the paperwork and took the role as manager.

34. The Tribunal also relies on the respondent's document at page 106 which contains various information about the claimant from the Payroll Department which shows (five lines up from the bottom of the page) on 25 July 2015 "BM" (Branch Manager) described as "old value" and the "new value" of "Ass Mngr" which we accept means Assistant Manager. We also rely on the claimant's evidence in cross examination where he described himself as a "floating" manager. We rely on the evidence of an incident on Saturday 30 March 2019 when Mr Johnson became

frustrated that the claimant went on his break. Mr Johnson had asked him not to go at that busy time, but the claimant went anyway. Mr Johnson felt the claimant was showing him “no respect” by doing that. We find this evidence suggests that Mr Johnson was indeed the manager of that branch.

35. The claimant sought to show that he was entitled to the same bonus points and was therefore still a manager. The evidence produced by the claimant did not show that he was entitled to the same bonus points as Mr Johnson.We find that Mr Johnson was entitled to additional points as the manager.

36. Accordingly, the Tribunal find that the reality was the claimant was working as an Assistant Manager in the Chorlton branch on the same rate of pay as he had held in the Stretford branch

37. Having found that there was a genuine redundancy situation and that the claimant was working in the Chorlton branch as an Assistant Branch Manager at the time of the redundancy situation, the Tribunal turn to 1.1.2 of the Issues: “Did the respondent adequately warn and consult the claimant?”. We find that they did. There were four consultation meetings with the claimant.

38. We turn to the next issue: did the respondent adopt a reasonable selection decision, including its approach to a selection pool? The claimant alleges he should have been pooled with the Branch Manager. In determining this issue, the Tribunal must consider the claimant's role.

39. The Tribunal has found that Rory Johnson was the Branch Manager and the claimant was the Assistant Branch Manager. The Tribunal reminds itself that it is not for the Tribunal to substitute its view for that of the employer. Rather, the test is whether a reasonable employer could have selected such a pool for redundancy. Counsel referred us to **British Aerospace PLC v Green and others [1995] ICR 1006** and **Nicholls v Rockwell Automation Limited [2012] UKEAT 0540**.

40. We rely on the evidence of the claimant's Area Manager that he looked at the position in his area shop by shop. He identified shops where the turnover was less than £4,000 and where more than one person was working.This included the Chorlton shop.

41. We find that in the Chorlton branch there were two people working:the claimant and Mr Johnson. The claimant and Mr Johnson did not carry out the same roles. Mr Johnson was the Manager. The claimant was an Assistant Manager. The respondent decided in these circumstances it would keep the manager of the shop and pool any remaining employees of that shop together. The respondent was entitled to determine the pool in this way. Having pooled the claimant (an Assistant Manager) separately, there was no requirement to score him because he was in a pool of one.

42. The Tribunal turn to the next issue: did the respondent take reasonable steps to find the claimant suitable alternative employment? We find that there was a discussion of alternative work in the warehouse but at that time during the pandemic, warehouse staff were also being made redundant and there were no vacancies.

43. The claimant relied on the fact that there was a document in the bundle showing a tweet from a new Branch Manager in April 2021 to suggest there were other positions available.

44. The Tribunal relies on the evidence of the respondent that the position in April 2021 was different to the situation in July 2020 when the claimant was made redundant. The Tribunal finds that a role which became available in April 2021 was not a suitable alternative for the claimant in July 2020.

45. Therefore the Tribunal finds the respondent took reasonable steps to consider alternative employment.

46. The Tribunal turn to consider the last issue: was dismissal within the range of reasonable responses of a reasonable employer? Having regard to the devastating impact of the COVID-19 pandemic on the respondent's business at the relevant time, the Tribunal find that dismissal was within the range of reasonable responses of a reasonable employer. Accordingly, the claimant was fairly dismissed for redundancy. His claim for unfair dismissal therefore fails.

Discrimination arising from disability – section 15 Equality Act 2010

Relevant Law

47. The Tribunal reminds itself of the burden of proof provisions at section 136 Equality Act 2010. We reminded ourselves the established authorities demonstrate there is a two stage process. We must consider whether the claimant can adduce facts which could suggest that the reason for the treatment is discriminatory. If so, the burden shifts to the respondent to show there is a non-discriminatory reason for the treatment. These well-known authorities include **Igen Ltd v Wong [2005] 3 ICR 931**; **Madarassy v Nomura International PLC [2007] IRLR 246**; and **Efobi v Royal Mail Group Limited [2019] 2 All ER 917**. The Tribunal reminded itself that a difference in treatment and a difference in protected characteristic is not sufficient to shift the burden of proof. There must be "something more" (see Mummery LJ in **Madarassy v Nomura International PLC**). We reminded ourselves that it is necessary to explore the alleged discriminator's mental processes. We took into account Lord Nicholls' guidance that that bias may be unconscious (see **Nagarajan v London Regional Transport [1999] ICR 877**).

48. So far as harassment claims are concerned, we reminded ourselves of the principle in **Richmond Pharmacology v Dhaliwal [2009] IRLR 936**.

49. The Tribunal also had regard to the case of **Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305** in relation to the two separate causative steps required for a section 15 claim.

50. We had further regard to **Pnaiser v NHS England [2016] IRLR 170**, when Mrs Justice Simler considered the authorities and summarised the proper approach to establishing causation under section 15. First, the Tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment, focussing 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. The Tribunal must then determine whether the reason was "something" arising in consequence of the claimant's disability which could be described as a range of causal links.

51. The Tribunal turned to the claimant's claim of discrimination arising from disability (section 15 Equality Act 2010). The claimant relied on the following unfavourable treatment:

(1) Dismissing him;

(2) Denying him a lunch break.

52. The Tribunal turned to the first factual issue. There is no dispute that the claimant was dismissed. We then turned to consider whether the unfavourable treatment was because of either of the "somethings" relied upon by the claimant, namely:

(1) The claimant's sickness absence since 2017; and

(2) The need for the claimant to take breaks.

53. The Tribunal refers to its findings of fact in the claim for "ordinary" unfair dismissal. The Tribunal finds that the reason for dismissal was redundancy. The claimant was in a pool of one. We find his dismissal was caused by the effects of the global pandemic upon the respondent's business and the need for it to reduce headcount.

54. We considered the claimant's allegation that he was unfavourably treated (dismissed) because of "something"(the claimant's sickness absence since 2017) which arose in consequence of disability.

55. We are not satisfied the claimant has adduced any evidence that Mr Tempest Mitchell dismissed him because of his sickness absence since 2017. The Tribunal finds Mr Tempest Mitchell acted sympathetically towards the claimant. The claimant suggested that given his levels of sickness absence Mr Tempest Mitchell could have issued a letter of concern to the claimant before Jan 2019 . We find he did not do so.

56. We find he acted sympathetically in extending the claimant's company sick pay on occasion or arranging an advance of his wages on occasion.

57. The Tribunal is not satisfied the claimant has adduced any evidence which suggested that the real reason the claimant was dismissed for redundancy was the claimant's sickness absence, other than the fact he was a disabled person who had had time off on sick leave. That is not sufficient to shift the burden of proof.Even if we are wrong about and the burden has shifted to the respondent, we are satisfied the real reason the claimant was dismissed by Mr Tempest Mitchell was because he was the assistant branch manager whose role was at redundant because of the dire effects of the Covid 19 pandemic on the respondent's business at his workplace at that time.

58. We then considered the claimant's allegation that he was unfavourably treated (dismissed) because of "something" (the need to take breaks) which arose in consequence of disability.

59. We rely on our findings of fact above that the reason for dismissal was the reduction in need for employees in the respondent's Chorlton shop due to the effects of the Covid 19 pandemic on the respondent's business. We rely on the findings of fact below that the claimant was permitted to take breaks. We rely on the evidence of Mr Tempest Mitchell in a contemporaneous email at p387 that the claimant was permitted to take breaks.

60. The claimant sought to suggest that Mr Tempest Mitchell wanted to get rid of him because of his disability. We are not satisfied the claimant adduced any evidence to show that. The Tribunal finds the area manager was supportive of the claimant, responding to concerns raised by email and exercising his discretion in favour of the claimant-eg granting him additional company sick pay outside his entitlement.

61. We rely on our findings of fact below that the claimant was permitted to use a closed sign if he needed to close the shop when he was lone working, which was normally only on a Wednesday as on the other days Mr Johnson worked along side him. The claimant did not adduce any evidence of any occasion where he was not permitted to take a break. The only occasion he relied upon in terms of problems taking a break was in relation to a lunch break on 30 March 2019 when Mr Johnson asked him not to go at that time because the shop was busy. However the claimant went anyway so he did have a break. There were no disciplinary or other consequences.

62. Therefore we are not satisfied the claimant was dismissed because he took breaks. We find he was dismissed for redundancy. He was not selected because he took breaks. He was selected because he was the assistant manager in a pool of one.

63. We turn to the other allegation of unfavourable treatment which is that the respondent denied the claimant a lunch break. We find that this is factually incorrect. We find, relying on the evidence of Mr Tempest-Mitchell and Mr Johnson, that the respondent preferred their employees to take their lunch break outside the busiest time of day, which tended to be around 1-2pm. We accept the respondent's evidence that there was a "closed" sign where, if an employee was working alone, he could close the shop to take a break. We find that normally the claimant was working alongside Mr Rory Johnson and it was only on a Wednesday when he worked alone.

64. We find there was only one occasion where there was a problem with the claimant taking a break. We find that was for lunch on 30 March 2019. We rely on the evidence of both the claimant and Mr Johnson that both men were working that day and the shop was busy when the claimant took a half hour lunch break from 13:43 to 14:15. There was a disagreement between the two men that day:Mr Johnson asked the claimant not to go on his break at that time because the shop was busy with customers. The claimant went on his break anyway. Mr Johnson said

felt the claimant had not respected him as the manager when he asked him not to go at that point and the claimant went anyway. The incident is recorded at p 389.

65. The claimant did not suggest in evidence that he was unable to use the closed sign if he was lone working. His evidence was that he felt taking a lunch break was “frowned upon”. The only clear evidence adduced of the problem of taking breaks was in relation to taking a lunch break when Mr Johnson was also in the shop. There was no evidence the claimant did not take his breaks- even on the day of the dispute the claimant still went on his lunch break.

66. The Tribunal is not satisfied that the claimant was denied breaks. The Tribunal relies on a contemporaneous email from his Area Manager, Mr Tempest-Mitchell, “We are flexible with toilet breaks, Dave, and there is no set time you must take them, I would expect you to take your breaks whenever you need to and if you choose to take the hour all in one go that is fine” (page 387).

67. The Tribunal notes there were no further consequences for the claimant when he went for a lunch break on 30 March 2019 after Mr Johnson had asked him not go at that time. The fact that the claimant went for his break on that day shows that the claimant was not denied a lunch break.

68. Having found that it is factually incorrect to suggest that the claimant was denied breaks, the claim fails at that point.

<u>Reasonable Adjustments – sections 20 and 21 Equality Act 2010</u>

69. The first issue is: did the respondent know, or could it reasonably have been expected to know, that the claimant had a disability? There is no dispute that the respondent knew that the claimant had a disability. We find that was from when he was diagnosed in 2017.

70. We turn to the next issue: did the respondent have a provision, criterion or practice (“PCP”) that the shop must be kept open during operating hours?

71. We find that the respondent did not have a provision, criterion or practice (“PCP”) that the shop must be kept open during operating hours. We find that the shop had a “closed” sign and if either Mr Johnson or the claimant was working alone, they could use the “closed” sign to take a break.

72. The claimant did not say in evidence that the shop must be kept open during operating hours. Rather, he suggested that closing the shop would be “frowned upon”. The claimant was normally only alone in the shop on a Wednesday, and he did not complain that he was unable to take his breaks on those days. Rather, he appeared to complain that his breaks were being monitored when Mr Johnson was present in the shop (paragraph 23 claimant's witness statement).

73. The Tribunal finds that the respondent did not operate a PCP that the shop must be kept open during operating hours, and accordingly the claim for reasonable adjustments fails at this point.

Direct disability discrimination – section 13 Equality Act 2010

74. We turn to the first issue: did the respondent dismiss the claimant on 13 July 2020? There is no dispute that they did.

75. Was that less favourable treatment? The claimant says the comparator is Rory Johnson and he was treated worse because he was dismissed and Rory Johnson was not.

76. The Tribunal reminds itself that a comparator must be a person in the same material circumstances as the claimant. The Tribunal is not satisfied that Rory Johnson was a suitable comparator because he was the Manager of Chorlton branch whereas we have found the claimant was an Assistant Branch Manager of that branch.

77. However, even if the Tribunal considers a hypothetical comparator instead, namely a person working as an Assistant Branch Manager but who was not disabled, the Tribunal is satisfied that such an individual would also have been dismissed by the respondent. All the factual circumstances relied upon by the respondent, namely the disastrous effects of the COVID-19 pandemic on its business, the fact that there were two employees at Chorlton, the fact that one was a Branch Manager and one was Assistant Branch Manager, and the fact that the turnover was less than £4,000, would still have meant that the hypothetical comparator as the Assistant Branch Manager would have been the person dismissed. Accordingly, we are not satisfied that the claimant was treated less favourably than a real or hypothetical comparator because of disability and that claim also fails.

Harassment related to disability

78. The claimant relies on the following allegations of harassment:

(1) On 18 December 2017 the respondent withheld £900 from the claimant's salary.

(2) On 1 May 2019 the respondent placed a covert camera in the shop.

(3) In April 2019 the respondent sent a letter of concern to the claimant.

79. We turn to the first allegation: did the respondent on 18 December 2017 withhold £900 from the claimant's salary?

80. The Tribunal finds that this is a misunderstanding. The Tribunal notes that the claimant said in his statement that “my wages had been inaccurate to the amount of over £900 in my favour”. However, when cross examined he said that was a mistake and it should have said that it was inaccurate and £900 in arrears.

81. Mr Tempest-Mitchell and Mr Hamilton-Fisher explained that in December 2017 the claimant was absent on long-term sick leave and receiving statutory sick pay. We find, relying on their evidence, that given the claimant's sickness absence, his financial situation and Christmas approaching, Mr Tempest-Mitchell organised for the claimant to benefit from an additional three weeks’ company sick pay over and

above his entitlement to company sick pay("CSP"). We find that amount gross was £913.25.

82. We find that the Area Manager's instruction to Payroll was not received until after 13 December, the date of the payroll cut-off for December's pay. We find that the CSP authorised by the Area Manager was paid as an advance to the claimant in December and accounted for in the January 2018 payslip. We find some confusion arose because the gross figure was £913.25 and the net figure was £630.

83. We turn to the next issue: was that unwanted conduct? We find that it was because the claimant was confused by the situation and raised the issue in his emails to the respondent in March and April 2018 (see page 189).

84. We turn to the next issue: did it relate to disability? The answer to that question is yes. The disputed payment related to company sick pay.

85. We then turn to the next issue: did the conduct have the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? We find there was no evidence whatsoever that Mr Tempest-Mitchell, or any of the respondent's witnesses, had such a purpose. We find that Mr Tempest-Mitchell acted sympathetically towards the claimant, exercising his discretion to award him additional company sick pay and arranging an advance of this sum before Christmas.

86. We turn to the next issue: did it have the *effect* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? We reminded ourselves that although we must take into account the claimant's perception, we must also have regard to the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

87. We find that the underlying issue in relation to the £900 was actually a positive act on the part of the respondent to grant the claimant an additional three weeks' company sick pay to which he was not legally entitled under the terms of his contract. Furthermore, having erroneously missed the payroll date the respondent took action so that the claimant received the net sum before Christmas. In these circumstances we are not satisfied that it was reasonable for the conduct to have the disadvantageous effect and the claim for disability related harassment fails.

88. We turn to the second allegation: on 1 May 2019 the respondent placed a covert camera in the shop. We find this is factually correct. We find, relying on the evidence of Head of Security (Mr Shuttleworth) that the camera was placed there on 14 April 2019. It was removed after the claimant discovered it, on 2 May 2019.

89. We entirely accept the evidence of Mr Shuttleworth and Mr Hamilton-Fisher in relation to the security camera. Mr Hamilton-Fisher told us that the respondent is a business which is predominantly cash based. He said that sadly the company dismisses two employees a week for theft. In these circumstances, to safeguard the company's assets and to protect the business, they operate a policy of covert surveillance in particular circumstances. It is a theft prevention strategy.

90. We entirely accept Mr Shuttleworth's evidence that the authority to operate covert surveillance comes from Mr Hamilton-Fisher in his role as Director, but that the system for implementing it is organised by Mr Shuttleworth.

91. The claimant brought to our attention to the Information Commissioner's Guidelines. These guidelines are not directly relevant to the case. However, the Tribunal finds the respondent submits that they are entitled to put their workforce under surveillance on a random basis because of the excessive amount lost to theft from their business, i.e. one or two individuals per week amounting to over 100 people per year are found to be stealing from the business.

92. The Tribunal also finds the workforce was alerted to the fact they were at risk of being placed under covertly surveillance because it was referred to in the regular newsletter.

93. We accept Mr Shuttleworth's evidence that it is the branch that is targeted, not individuals. Although sometimes his department may receive information that a specific person may be stealing, that is the exception and was not the situation here.

94. We find normally the Security department operates on a basis of random surveillance of branches. We find that was the situation in relation to the Chorlton shop in April 2019. We accept Mr Shuttleworth's evidence that the Manchester area had not been placed under surveillance for some time and so the Chorlton shop and two other branches were selected at random. We accept his evidence that as usual the camera was placed so that it only viewed the till and the service areas. We accept his evidence that they never place a camera to view the rest areas or private areas of the shop. We entirely accept his evidence that the camera was removed once it was discovered because it was no longer covert. We also find that he had no knowledge of who the individuals working in the shop were, and no knowledge that the claimant was disabled.

95. We turn to the next issue: was the conduct unwanted? We entirely accept the claimant's evidence that being watched by a covert camera was conduct he found unwanted.

96. We turn to the next issue: did it relate to disability? The answer to that question is emphatically no. The respondent's evidence is convincing that the reason the camera was placed there was wholly unrelated to the claimant's disability. It was placed there as a random check on the Chorlton shop for theft.

97. The claim therefore fails at this stage.

98. We turn to the claimant's final claim for disability related harassment: In April 2019 the respondent sent a letter of concern to the claimant.

99. There is no dispute that the claimant was sent a letter of concern. The respondent's sickness policy entitles them to do so. The letter is at page 198 and is actually dated 30 January 2019. The claimant did not dispute that he had been absent from work for a lengthy period due to his ulcerative colitis at the time he received the letter.

100. The Tribunal notes that the claimant appeared unaware that even though he was a very long-serving, genuine, hardworking employee suffering from an unpleasant condition which the respondent accepted amounted to a disability, namely ulcerative colitis, the respondent is entitled to take action in relation to employees who are absent from work due to sickness in accordance with their sickness policy. Many employers have such policy. Genuine long- or short-term sickness due to disability can be a fair and legal reason for dismissal.

101. The Tribunal turns back to the letter of concern. We accept the claimant's evidence that he considered this amounted to unwanted conduct. He said he was worried that it would progress to disciplinary action.

102. We turn to the next question: did it relate to disability? The answer to that question is yes. The reason the claimant was sent his letter of concern was related to absences caused by his condition of ulcerative colitis.

103. We turn to the next question: did the conduct have the *purpose* of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? We are not satisfied that any of the respondent's witnesses had such a purpose. We find Mr Tempest Mitchell was sympathetic to the claimant. Although the claimant had (he admitted) extensive previous absences from work, he had never received a letter of concern before. Mr Tempest-Mitchell also acted sympathetically in granting the claimant an extension of company sick pay to which he was not contractually entitled.

104. The Tribunal turn to the last question: did the conduct have the *effect* of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

105. The Tribunal has to take into account, as well as the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect. We find it is not reasonable for a letter of concern, consistent with the respondent's sickness absence management policy when the claimant agrees he had had significant sickness absence sufficient to trigger such a letter, to amount to disability related harassment. It is not reasonable for the conduct to have that effect otherwise every employer in the country who sends an employee a letter of concern in accordance with their absence management policy would be guilty of disability related harassment.

106. TheTribunal finds the respondent is entitled to send the claimant a letter flagging their concern at the level of absence.

107. The Tribunal find that in fact in this case no further action was taken in any event.

108. It was therefore not reasonable for the conduct to have the disadvantageous effect. For all these reasons the claimant's final claim for disability related harassment also fails.

109. The last issue for the Tribunal was time limits. As the claimant has been unsuccessful it is not strictly necessary for us to deal with this issue. However, the

Tribunal find that the claimant's claims, other than his dismissal, were all brought before 14 May 2020 and were therefore presented out of time. We are not satisfied that the claimant has shown it was just and equitable to extend time.He did not explain any clear reason why he had not presented his claim earlier.

110. We are not satisfied the claimant brought any evidence to suggest that there was a course of conduct which linked the allegations so even if the claimant had succeeded in any of his claims, aside from his dismissal,(which was brought within the time limit) the Tribunal would have found that they were out of time in any event.

Employment Judge KM Ross

Date: 28 September 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

29 September 2022

FOR THE TRIBUNAL OFFICE

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