EMPLOYMENT TRIBUNALS

Claimant: **Mr P Bellingham**

Respondent: **Bill Cleyndert & Company Ltd**

HEARD AT: **Bury St Edmunds** **ON:** **20th February 2017**
20th March 2017
21st March 2017

BEFORE: **Employment Judge Laidler**

MEMBERS: **Ms L Daniels**
Mr V Brazkiewicz

REPRESENTATION

For the Claimant: **Mr S Nicholls, Counsel**

For the Respondent: **Mr G Sims, Counsel**

JUDGMENT

1. **The Claimant was unfairly dismissed.**

2. **The Claimant was treated unfavourably because of something arising in consequence of his disability by his dismissal and the Respondent has not shown that was a proportionate means of achieving a legitimate aim.**

3. **The Respondent failed to comply with its duty to make reasonable adjustments**

4. **There was no breach of contract in relation to the payment of the Claimant's bonus and that claim is dismissed.**

REASONS

1. The ET1 in this matter was issued on the 7th July 2016 in which the Claimant claimed unfair dismissal, disability discrimination and a failure to pay a contractual bonus. The claim for the bonus was for the period 1st January to 24th March during which time the Claimant says he was only paid for the hours that he worked and not his contractual hours.

2. In its ET3 the Respondent admitted the Claimant was a disabled person but made no admissions as to the date on which it became known and the extent of the impairment.

3. The Tribunal heard from the Claimant and from;

   Bill Cleyndert, Managing Director
   Mandi Cleyndert, Director
   Steven Harris, Foreman for the Respondent

The issues

4. There was a preliminary hearing before Employment Judge Postle on the 1st September 2016 when the issues were clarified as follows: -

   4.1 The Claimant's disability is osteoporosis consisting of a fracture of the upper vertebrae, impacted lower vertebrae and curvature of the spine.

   4.2 The Respondents have today helpfully indicated they accept the Claimant has a disability at the material time.

   Section 15: Discrimination arising from disability

   4.3 This arises out of the Claimant's dismissal.

   Section 20: Failure to make reasonable adjustments

   4.4 The PCP relied upon is the requirement to work full time.

   4.5 The Respondents will say it was not viable to do the Claimant's job on a part time basis and there were no alternatives.

   4.6 Therefore the Claimant was dismissed because of his absence and the inability to perform his job role.

   Ordinary unfair dismissal, Employment Rights Act

   4.7 The reason advanced for the dismissal is capability.

4.8 The Claimant asserts that the dismissal is procedurally unfair; it was in effect a sham. By this, the Claimant asserts that the letter of 17 February to the Claimant from the Respondents inviting him to a meeting to discuss his absence made it clear in that letter that the only way forward was for the Claimant to work full time.

4.9 The Claimant also asserts that the sanction of dismissal, was too harsh and thus unfair.

Breach of Contract claim

4.10 The Claimant asserts that he is entitled to a bonus, his bonus was only paid on the basis of the time he worked rather than for the period the bonus should have been payable for.

5. The Claimant commenced employment on the 10th September 2012 until his dismissal on 25th March 2016.

6. The Claimant's contract of employment is in the bundle at page 28. The relevant paragraphs of the contract were as follows: -

8.1 "The employee will be expected to perform his duties as required. The normal hours will be 40 hours per week from 8am until 4.30pm Monday to Friday. The employee shall be entitled to take 1 half hour lunch break each day at a time to be agreed with the employer and a further 15-minute tea break at 10am".

Clause 23 Profit Share

6.1 Paragraph 23.1 *"The employee will be entitled to participate in the employer's profit share scheme. At the date of this agreement, the scheme allows for distribution of 20% of the employer's net profit equally as between its employees on a quarterly basis. Entitlement is based on the number of days worked by the employee in the quarter to which the profit applies".*

History of the business

7. The Respondent produces bespoke furniture and is a specialist joiner working with architects, interior designers and private clients on residential, royal, marine and aviation projects. The work is generated through recommendations, referrals and through samples of finishes they can produce. A sample can be any size and might be a big panel or long strip showing the finish or a section replicating the detail of a piece of furniture. These samples are the tools by which the company gains new business. They demonstrate the skill and ability of the team and differentiate them from their competitors. As they do not have showrooms and their work is

installed in private residences they are unable to show potential clients their work other than through these samples.

The Claimant's position

8. The Claimant was interviewed for the role by Bill Cleyndert, Managing Director. He confirmed in evidence that during the interview the Claimant told him that he had a back condition. His recollection was that the Claimant told him it would not cause any problem with performing his role. The tribunal has to accept the submissions made on behalf of the Claimant that it was instructive in considering how the Respondent viewed those with disabilities when Mr Cleyndert stated in evidence that he would have not employed the Claimant if he had said his back condition would have affected his work and he would not have asked 'at that point' what reasonable adjustments were needed.

9. When the Claimant first joined, he was a furniture finisher. The role involved polishing and flatting (sanding). He had come to the Respondent with many years' experience in vehicle body repair work. That is not unusual as the Respondent rarely finds applicants who have worked in furniture. The Respondent therefore looks at applicants who have technical skills who can be trained to work with furniture to the high standards required and that is what they did with the Claimant.

10. Approximately a year after the Claimant joined he was promoted to Samples Finisher. In an email to the office on 12th September 2013, Mandi Cleyndert advised that Mr Bellingham would be 'trialing' as being responsible for sampling with the aim to "free up production, streamline the process and allow time for innovation".

11. In a role description signed by the Claimant on the 1st September 2014, the job purpose was described as "to support the business in creating samples, managing the sampling process from start to finish, developing new and unique finishes which can then be rolled out in the finishing department". The key accountabilities were listed as: -

    11.1 Speculative samples requested by clients.
    11.2 Job samples.
    11.3 Stock samples.
    11.4 Experimental finishes.

12. The samples are a very important marketing tool to win new business. They are in the evidence of Mandi Cleyndert, which was not disputed, a pivotal part of the business. Finishes will often be the determining factor as to whether the Respondent wins a project. Samples are sent to clients, presented at meetings, attached to mood boards and presented to end clients. They are created for a variety of different purposes in the business. Some are very artistic and technical. These are used to attract new clients and to win business (called speculative samples). Some are made to demonstrate finishes which will be produced on an actual piece of furniture

(job samples). Other samples are less technical and based on proven formulas and techniques and are produced for stock in the Respondent's samples library and to send to clients. If, for example, the Respondent is approached by a new interior designer, then Mandi Cleyndert would prepare a sample box based on what she thought their aesthetic would be and this would be left in the Respondent's samples library.

13. When the Claimant commenced employment with the Respondent he had advised them of a back condition. Both the roles of finisher and sampler involve standing at a bench due to the nature of the work which is quite physical. The Claimant was adamant and the Tribunal accepts that the cushioned mat which he stood on was something he purchased and the stool was a bar stool from his own kitchen. These were not items provided by the Respondent.

14. The Claimant was signed off as unfit to work from the 5th November 2015 for 2 weeks. He was then signed off again for a further 2 weeks until the 3rd December 2015.

15. By a fit note dated 3rd December 2015, the Claimant's doctor certified him as fit to return to work on a phased return to work on altered hours. The period at the bottom of the fit note was for 3 weeks to the 24th December 2015. The Claimant agreed with Mandi Cleyndert that his adjusted hours during this period would be 8am until 12 noon.

16. On the 17th December, the doctor signed a further fit note again stating a phased return to work on altered hours, this time for 4 weeks to the 14th January 2016. Further certificates stating altered hours were issued on the 13th January 2016 to the 10th February and then on the 10th February to 9th March 2016 and again on the 9th March 2016 for 4 weeks to the 8th April 2016.

17. When the Claimant returned to work part-time on the 4th December 2015, Mandi Cleyndert advised the office by email to bear this in mind when making sample requests. She also made it clear in that email that Steve (Harris) would be assisting to progress samples in addition to the Claimant for the time being. This is borne out by Mr Harris' evidence heard by this Tribunal. He made it clear that the more complex samples were taken off the Claimant and he was given the ones he could get done in 4 hours. Either Mr Harris or Mr Hargreaves would do the more complex ones. He made it clear in paragraph 7 of his witness statement that the Claimant's workload had been reduced. There were samples that the Claimant was not asked to do.

18. The Claimant stated in paragraph 8 of his witness statement that at the end of his shift he would hand over work still to be done by Mr Harris "but he would say he was too busy to do them". Having heard the evidence of Mr Harris the Claimant's evidence on this point is not accepted. The Tribunal accepts Mr Harris' evidence that that is not something that he would say. The Tribunal accepts his evidence particularly paragraph 4 of his witness statement that he had no reason not to pick up a sample, that they all work

as a team and he had to ensure that production went through on time. By not picking up any samples that needed to be worked on, that would mean the work was not getting done and cause delays which would have a knock-on effect on production. The Tribunal accepts it was in his interest to get the sample done as soon as possible. If the sample is not completed by the deadline requested by the customer, it becomes critical and at that point Mr Harris would invariably have to deal with it. The sooner they complete the samples the sooner they get to the customer.

19. The Tribunal accepts the evidence of the Respondent supported also by Steven Harris that there were weekly Monday meetings at which the samples and sample levels were discussed. However, at no time was the Claimant individually taken to one side and advised either formally or informally that the Respondent considered that it was his performance and/or part-time hours that were causing quality issues with samples and a reduction in the number of samples held by the Respondent. He was only working his reduced hours and would not have necessarily been able to see the "bigger picture" that the stock samples were being reduced. He was not explicitly told by Mandi Cleyndert or anyone else, for example his foreman, that the Respondent considered that difficulties with samples and their quality were down to his part time working.

20. By letter of 17th February 2016 the Claimant was invited to a meeting on the 24th February to "discuss your ongoing health issues, your part-time working and the effect this is having on the business". The Claimant in his witness statement explained that he was told a few days before this, by Mandi Cleyndert, of the need to have a meeting. In the letter, she stated that she wanted to discuss when the Claimant was likely to be able to return to full-time working. She appreciated the current fit note indicated ideally he should continue on reduced hours to 9th March but "unfortunately it is having a seriously detrimental impact on the business and the other employees. It will be impossible for us to continue with these reduced hours on an ongoing basis". She hoped they would be able to agree a timetable for the return to work in a full-time capacity. She went on "if you seriously believe that will not be possible in view of your medical condition I fear that one option open to me is to dismiss you for capability". She hoped that it would not come to that but had to warn him of the possibility.

21. Only after she had written that invite did Mandi Cleyndert email two of her staff, Ash Price and James Whittaker to remind them that she had emailed them the week before to ask whether they had experienced issues in samples received in the last couple of months. This email was dated 29th February 2016 but the Tribunal did not see the earlier email.

22. The only response that the Tribunal saw which was not produced to the Claimant was from James Whittaker on the 1st March 2016 in which he said "obviously, Paul being part-time does lead to issues with him not being here to discuss things with us as the situations arise". He mentioned a sample recently where an issue had arisen in the afternoon and he had to get others to undertake the work. There was also a "large Mahogany reviving" left on the Claimant's desk with a note to revive by 12 noon the following

day. The Claimant had not turned up the following day so Mr Harris had to deal with it. There was also a project that had taken 10 months and was still not right. At the end of the email Mr Whittaker stated: -

> *"in addition, for whatever reason, Paul appears to be unable to get to grips with the intent in many cases and when re-presenting samples to match existing – which are obviously incorrect in terms of match or finish he states - "well I used exactly the same mix as last time". This is a particular concern with the recent Faberge egg samples".*

This letter was received after the invite to the Claimant and the detail in it was not brought to his attention.

Meeting 1st March 2016

23. The disciplinary hearing was rescheduled to the 1st March 2016 when the Claimant attended with Allyson Crawford taking notes on his behalf and Mandi Cleyndert with Charis Grapes taking notes. The Tribunal saw both the notes that Charis Grapes took and the notes that Allyson Crawford took. The Claimant does not accept that the notes Allyson Crawford took are accurate and indeed advised the Respondent of that by email of the 3rd March 2016 when he took issue with them having been forwarded by Allyson Crawford to Mandi Cleyndert. He suggested they were not a true representation of the meeting and were no way impartial.

24. The notes that were taken on behalf of the Respondent state that the Claimant confirmed his condition was only going to get worse. He confirmed that he had been advised by his doctor that 'due to the fact that his condition was degenerative he would not be able to return to work in the long term.' Although the Claimant disputes Allyson Crawford's notes, they also confirm the doctor had explained it was a long term and degenerative condition and that Paul did not envisage being able to return full-time. That is exactly the same phraseology that is used in the Claimant's own claim form at paragraph 7. The Tribunal accepts that that was the indication given to the Respondents at that meeting.

25. Mandi Cleyndert outlined how the part-time working was having a detrimental impact to the business confirming that having a full-time samples position was fundamental to provide the service required to the Respondent's clients. It was, in her words, the "life blood of the business to be able to provide samples to clients on a timely basis". Having only part-time hours available had resulted in a backlog of samples being produced and the core sample stock required by the business had been depleted below the required levels.

26. The Claimant stated, as far as he was concerned, he was up to date with the samples required but Mandi confirmed that was not the case and that he should be aware of the sample schedule which is reviewed with him at least

biweekly. He was only being given restricted amounts of samples to match the hours available which was not ideal.

27. There was discussion on the working space available. Although there was a long-term plan to increase the spray booths to accommodate a designated samples area that was some way off. In the meantime, the booths would continue to be shared and that highlighted the problems of limited working hours as the booths were not always available at the right time in line with the Claimant's working hours.

28. Mandi highlighted how uncompleted jobs had been handed over to other members of the finishing department. That disrupted production time as staff had to be reassigned to samples. The Claimant agreed that even when full-time he would more often than not be working at full capacity.

29. Mandi gave an example of samples not being produced on time and gave the "Lacewood" job as an example. She suggested a lack of communication from the Claimant had resulted in the samples being late and produced with the wrong finish. The Claimant said he had delivered the samples to James on time as required but Mandi said that was not the case as the original deadline had passed. It had taken some 10 months to produce at which point the client commented that was incredulous. The Claimant suggested they should not be doing those type of samples.

30. The Claimant asked if he could train up another part-time person in the department and Mandi said that would not be possible as the business needed continuity of service.

31. The Claimant then asked if he could move to the polishing department on a part-time basis but again it was considered that would not be sustainable as the company was not able to have 50% bench non-production time in a department that was already working in a limited area and at full capacity. Mandi confirmed she would take a few days to consider the matter and then revert back to Paul.

32. In considering the notes prepared by Allyson Crawford it appears the Iron ore sample was something separate to the Lacewood sample as her notes specifically refer to the Iron ore sample still not completed when it had been requested at the end of October. The Claimant had said she noted that he had offered several different experimental options to the project manager but none had been acceptable. Having discussed the problem with Steve Harris Paul had been advised by Steve to put this sample "to one side for the time being" as he himself had no alternative ideas of how to achieve the finish required. As has already been referred to Mr Harris accepted he had told the Claimant to put it to one side so that he could finish other urgent work but not to leave it completely. It was Mr Harris that then concluded that finish.

33. At the end of the minutes prepared on behalf of the company not only did it say that Mandi would confirm the outcome within a few days but that 'she would need to talk to Bill (her father) as well first so could not confirm that

any further decision would be made this week.' In her witness statement at paragraph 48 she gave evidence that she did indeed speak to Mr Cleyndert after the meeting and summarised what had been discussed and the options put forward and the decision she had come to. She wanted to "check with him whether he agreed with my review of the situation, alternatives and final decision as he is my father and owner of the business." The Tribunal is satisfied having heard the evidence of both Mandi and Bill Cleyndert that she went to her father with her decision to ensure that he was content with the decision she had reached. It is of note that it was made clear to the Claimant at the meeting that she was going to discuss the matter with her father.

34. The Claimant did not exercise his right to appeal. He stated in oral evidence that he saw no point as it was a family business and the appeal would be to Mandy's father. There was not an impartial person to hear the appeal. He accepted however the proposition put to him that that did not stop him setting out how her decision was in his view wrong.

35. It was put to the Claimant and the tribunal accepts that there was little if no detail in the ET1 drafted by solicitors and the Claimant's witness statement as to his positive case of what the Respondent's should have done rather than dismiss him. There was one suggestion in cross examination that he train someone up from outside but no suggestion from him as to what would then have happened with his employment. When then pressed the Claimant stated to the Judge that he hoped to continue working part time as he was indefinitely and until retirement. This seemed to the tribunal to be a most unrealistic suggestion.

Contract claim

36. It was the Claimant's evidence that ever since he commenced work with the Respondent he had received a bonus on a quarterly basis. He asserts it was always paid on the basis of contractual hours and for days worked whether they were full or part days. He claims for the bonus in March 2016 which he says underpaid him by only paying for hours worked and not the number of days. When cross examined the Claimant stated that if the employee was in and working they should be credited with having attended for one day for the purposes of calculating the bonus. However he accepted that if he had become permanently part time then he would have accepted that the bonus would have been pro-rated. The distinction he made was that he was on a phased return to work. When the Judge questioned what the distinction was between a phased return and staying on part time the Claimant responded that he presumed there wasn't one.

Relevant Law

Claims under the Equality Act 2010

37. The Claimant brings claims under the following provisions: -

Section 15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(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.

Section 20 Duty to make reasonable adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

38. There are further provisions with regard to reasonable adjustments in Schedule 8, Part 3 of the Equality Act 2010, Clause 20 of which provides as follows: -

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know-

…

(b) …that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

39. The Code of Practice on Employment (2011), Chapter 6 assists with what is meant by 'reasonable steps' and provides as follows: -

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

6.25 Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.

40. At paragraph 6.32 the Code deals with Reasonable Adjustments in Practice providing:

> It is a good starting point for an employer to conduct a proper assessment, in consultation with the diabled person concerned, of what reasonable adjustments may be required. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment.

41. The following are some of the examples given of steps that might be reasonable for an employer to take:

> Allocating some of the disabled person's duties to another worker,
>
> Altering the disabled worker's hours of work or training
>
> Acquiring or modifying equipment
>
> Providing supervision or support

42. At paragraph 6.36 it makes clear that The Access to Work scheme may assist an employer to decide what steps to take.

43. The Code, Chapter 4 also assists with proportionality in indirect discrimination and provides at paragraph 4.30:

> 4.30 Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate, involves a balancing exercise. An Employment Tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reason for applying it, taking into account all the relevant factors.
>
> Paragraph 5.11 makes it clear that this is equally applicable in claims under section 15. It goes onto provide:
>
> 5.12 It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations.
> …
>
> *Relevance of Reasonable adjustments*
>
> 5.20 Employers may often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments.
>
> 5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.

Claim under the Employment Rights Act 1996

44. The Claimant also brings a complaint of ordinary unfair dismissal under the provisions of the Employment Rights Act 1996 (ERA). One of the potentially fair reasons for dismissal is capability which is defined in sub section 3 as meaning "his capability assessed by reference to skill, aptitude, health or any other physical or mental quality".

45. If the employer establishes a potentially fair reason the Tribunal must then consider whether within the meaning of Section 98(4) the dismissal is fair or unfair having regard to all of the circumstances of the case. It is not for the Tribunal to substitute it's view for that of the employer.

Submissions

46. Counsel handed up written submissions which it is not proposed to recite again here in these reasons

Conclusions

Unfair dismissal

47. The Respondent has established a potentially fair reason falling within s98 of the ERA namely capability by reason of ill health.

48. This was however not just a case of an ill health absence or the need to work part time. The Respondent also states that the Claimant's part time working had led to capability issues. These were connected with the hours being worked by the Claimant and the lack of consistency and difficulties experienced by the business as a result. The Respondent's evidence, which is accepted, was that it had till then been pleased with the standard of the Claimants work. The fact he was promoted a year after joining the Respondent speaks for itself.

49. The tribunal has concluded that the Respondent acted unfairly in treating the Claimants capability as a reason for dismissal.

50. The Respondent failed to obtain further information from the Claimant's GP with regard to the management of the phased return to work or consider obtaining an Occupational Health input either at the outset of the phased return or on the second certificate which still stated a phased return. The role was a physical role and the very fact that a GP was saying that there should be a phased return after an absence with a back condition should have alerted the reasonable employer to the need for further information on the medical position. Mandi Cleyndert at paragraph 15 of her witness statement stated that when she saw the fit note of 3 December and the need for a phased return 'the Claimant suggested that he work for four hours in the morning. I did not question this and agreed on the basis that he felt he had no option due to his health. I went on what the Claimant felt able to do as the Claimant and his Doctor were in a better position to know what was best for him.' All the fit notes stated was 'a phased return to work' and 'altered hours'. It did not provide any advice to the employer as to what that might entail and how best it should be structured.

51. Connected to the above point is the fact that the Respondent did not have in place any structure for managing and reviewing the phased return. This resulted in the Claimant not being aware of the issues the Respondent was experiencing with his part time working. It was not sufficient for the Respondent to assume these were known to the Claimant from weekly meetings. It is incumbent on the employer if a phased return is not in its view working satisfactorily to make this known to the employee at an early stage. This could again lead to the need for Occupational Health input. This is not to suggest that the employer necessarily had to embark on a

procedure of warnings and time to improve but to at least make it clear to the Claimant, way before it moved to considering dismissal, that the part time working was causing certain specified difficulties for the business. The Claimant was never given the opportunity to address those prior to being called to what turned out to be a dismissal meeting.

52. If the above steps had been considered this would also have ensured that criticisms of others e.g. Mr Whittaker were made known to the Claimant when they occurred.

53. The tribunal also has to accept the submissions made on behalf of the Claimant that there was no meaningful consideration of alternative roles for the Claimant. Although Mandi Cleyndert stated in evidence that part time working was not feasible there is little evidence that was actually considered at the time. Her evidence was that the Respondent has an almost constant advert for full time employees and that is difficult enough to fill. However there is no evidence she took any actual steps to find someone to job share with the Claimant. In cross examination, she confirmed she had not considered the Claimant remaining to train up his replacement. It was clear to the tribunal she had decided that as the Claimant could not work full time he had to be dismissed and did not thoroughly investigate other options.

54. It did not assist the Respondent to adopt a fair and reasonable procedure when it had no written disciplinary procedure or equal opportunities policy. Whilst accepting that the area where the Claimant was based was part of a relatively small team the Respondent is not a 'small' employer in the tribunal's experience. As such it should have written procedures that are followed which would not only have assisted the Respondent but made it clear to the Claimant what the process was. This may also have allayed any concerns the Claimant had about appealing.

55. For those reasons the tribunal has concluded that the Respondent did not act fairly in dismissing the Claimant when it did. It has not heard arguments on a *Polkey* reduction but must state that its provisional view is that had the return to work been more structured and/or medical evidence or OH input obtained then dismissal may still have occurred as it might have been the only option available but this may have taken longer to happen. Alternatively, it may have still occurred in March as medical evidence might already have been obtained. There was no dispute and indeed it was the Claimant who told the Respondent that the condition was degenerative and he could not return to full time working. That is also his pleaded case in the ET1. Where the tribunal has found the unreasonableness is in the Respondent not structuring the return to work in a way that would have ensured that both it and the Claimant were fully informed as to not only the hours to be worked and why but the effect they were having on both the Claimant and the business. The Respondent acted unfairly in proceeding with the return to work and the dismissal on the basis of only the limited information on the fit notes and the Claimants suggestion as to hours. Further submissions will need to be heard on any *Polkey* reduction.

Discrimination arising from disability – section 15

56. There is no dispute that the dismissal was unfavourable treatment 'because of something arising in consequence of' the Claimant's disability. This is acknowledged in paragraph 24 of the Respondent's submissions which accepts that the permanent lack of capability was related to his disability.'

57. The tribunal cannot find that dismissal was a 'proportionate means of achieving a legitimate aim' when it has found for all the reasons set out above that the Respondent acted unreasonably in treating the lack of capability related to the Claimant's disability as the reason for dismissal.

58. The tribunal cannot accept the Respondent's arguments as to why part time did not work when there has been a lack of evidence as to the steps taken to try a job share or at the least retain the Claimant to train his replacement.

59. Even if the tribunal were wrong in that conclusion and the Respondent had shown that part time working in the role was not feasible and it therefore had a 'legitimate aim' for the Claimant's dismissal, that is only one aspect of the justification defence. The Respondent must also show that the unfavourable treatment was a 'proportionate means of achieving' that aim and it has not done this by the manner in which it dealt with the Claimants return to work and subsequent dismissal. The tribunal must in particular take into account its findings below that the Respondent failed in its duty to make reasonable adjustments. It has not therefore been able to demonstrate that the dismissal of the Claimant was 'appropriate and necessary'

Reasonable adjustments

60. The PCP identified was the requirement to work full time. This clearly put a disabled person at a substantial disadvantage compared with those not disabled as they were more likely to be unable to comply with the requirement. The Claimant was put at such a disadvantage by virtue of his disability.

61. No real or proper consideration was given to reasonable adjustments. No medical evidence was sought (which went to the unfairness of the dismissal). There was no real consideration to training a replacement or job share**.**

62. In the absence of medical evidence or an OH report the Respondent was not sufficiently informed to determine what might amount to reasonable adjustments. It did not know whether the Claimants hours could have been adjusted in other ways. As the person taking the decision to dismiss

was completely untrained in disability issues no consideration was given to ways that adjustments could be made to retain the Claimant in employment.

Breach of contract

63. There was no breach of contract. The Claimant was paid correctly on a pro rata basis. The tribunal accepts the Respondents submissions. The Claimant was paid on the basis of the number of full working days he attended. The Claimant suggests that if he was contracted to attend for any length of time on a day that means he is entitled to that whole day for the purposes of the bonus calculation. That is a misreading of the contractual provision. The entitlement is to days worked not days at work. The Claimant accepted that part time staff were paid a lower bonus and was unable to explain any distinction between his status during his return to work on a part time basis and a permanent contract on part time hours. He was paid the correct bonus and this claim is dismissed.

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Employment Judge Laidler, Bury St Edmunds
Date: 22 August 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS