EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr Simon Laverack	v	**Foundation for Credit Counselling t/a Stepchange Debt Charity**

Heard at: **Leeds** **On:** **11 – 14 March 2019**
01 April 2019 in Chambers

Before: **Employment Judge T R Smith**

Members: **Ms J Lancaster,Mrs L Hill**

Representation:

Claimant: **In person**

Respondent: **Ms R Mellor, of Counsel**

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well founded and is dismissed.
2. The complaint of automatic unfair dismissal is not well founded and is dismissed.
3. The complaint of detriment contrary for section 44 of the Employment Rights Act 1996 is not well founded and is dismissed.
4. The complaint of wrongful dismissal is not well founded and is dismissed.

REASONS

Background.

1. The Tribunal heard oral evidence from the Claimant.
2. The Tribunal heard oral evidence from the following witnesses for the Respondent:

   Mr Kevin Boon, Team leader.

   Mr Kevin Piper, Head of Insolvency Services.

   Ms Kirsty Free, Team Leader, Correspondence.

   Mr Jamie Swales, Debt Advice Service Manager.

   Ms Samantha Hodgson, Facilities Manager.

   Ms Sarah Cheetham, Service Delivery Manager.

3. The Tribunal had before it two agreed bundles of documents. The bundles contained 412 paginated pages, although in practice there were far more pages due to sub pagination. The Tribunal also had, initially, three appendices to the bundles, the first marked "A", the second marked "B", (both setting out Health and Safety Executive guidance) and the third marked "C" showed plans and photographs of the floor on which the Claimant worked along with his work station.

4. Following the conclusion of the first day of the Tribunal hearing the Claimant's chiropractors report dated 25 July 2017 was submitted by the Claimant.

Issues

5. At a preliminary hearing held on 18 July 2018, Employment Judge. Keevash clarified and agreed the issues with the parties that required determination at the substantive hearing in the following terms.

"Unfair dismissal

What was the reason for the dismissal? The Respondent asserts that it was a reason relating to conduct which is a potentially fair reason under section 98 (2) of the 1996 Act. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal. The Claimant contends that the reason or the principal reason was related to health and safety.

Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds? Did it act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal having regard to the factors set out in section 98 (4) of the 1996 Act?

Was the decision to dismiss a fair sanction, that is, was it within a reasonable range of responses for a reasonable employer?

If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged?

Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?

Health and safety complaints

Was there a representative of employee safety or a safety committee?

If so, was it not reasonably practicable for the Claimant to raise the matter by those means?

Did the Claimant bring to the Respondent's attention circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety?

Were there circumstances of danger which the Claimant reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert?

Detriment complaints.

If the issues in [the first three issues in relation to the health and safety complaint] *inclusive and/or* [the fourth issue in the health and safety complaint]

are determined in the Claimant's favour, was the Claimant, on the ground of a health and safety reason, subject to detriment by the employer in that: -

The Respondent instigated disciplinary proceedings against him?

The Respondent made unauthorised deductions from his pay?

Unfair dismissal complaints.

Was a health and safety reason the principal reason for the dismissal?

Has the Claimant produced sufficient evidence to raise the question whether the reason for the dismissal was health and safety?

Has the Respondent proved its reason for the dismissal, namely conduct?

If not, does the Tribunal accept the reason put forward by the Claimant or does it decide there was a different reason for the dismissal?

Breach of contract

It is not in dispute that the Respondent dismissed the Claimant without notice.

Does the Respondent prove that it was entitled to dismiss the Claimant without notice because the Claimant had committed gross misconduct? This requires the Respondent prove, on the balance of probabilities, that the Claimant actually committed gross misconduct

To how much notice was the Claimant entitled?"

It was agreed at the start of the hearing that the Tribunal would determine liability which included to what extent, if at all, the Claimant caused or contributed to his dismissal and also to what extent, if at all, if the Respondent unfairly dismissed the Claimant what was the likelihood, if it had adopted a fair procedure, that the Claimant would have been fairly dismissed in any event.

The Law

6. Unfair dismissal.

The Tribunal applied section 98 (1), 98 (2) and 98 (4) of the Employment Rights Act 1996 ("ERA 96") which provides as follows: –

"98 (1) – in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that either it is a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee helped.

98 (2) – a reason falls within this subsection if it…….

(b) relates to the conduct of the employee.

98 (4) –….. Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

(a) depends on the whether in the circumstances (including the size and the administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

7. In **Abernethy – v – Mott, Hay and Anderson 1974 IRLR213** the Court of Appeal held that a reason for dismissal was a set of facts known to the employer or beliefs held by the employer which would cause the employer to dismiss the employee.

8. The Tribunal had regard to the guidance given in **British Home Stores Ltd -v- Burchall 1978 IRLR 379** having reminded itself that **Burchell** was decided before the alteration of the burden of proof effected by section 6 of the Employment Act 1980.

9. In that case the first question raised by Mr Justice Arnold: *"did the employer had a genuine belief in the misconduct alleged?"* goes to the reason for dismissal. The burden of showing a potentially fair reason rests with the Respondent. However, the second and third questions, the reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under section 98 (4) of the ERA 96 and there the burden is neutral.

10. The Tribunal had regard to the guidance given at paragraphs 13 to 15 in the case of **Sheffield Health and Social Care NHS Foundation Trust -v- Crabtree UKEAT 0331/09/ZT**.

11. The approach to fairness and procedure is the standard of a reasonable employer at all three of the **Burchall** stages: - **Sainsbury's Supermarket-v- Hitt 2002 EWCA CIV 1588**.

12. The Tribunal reminded itself that when considering the objective standard of a reasonable employer the test was the material which was available the Respondent at the time. However, the test goes further as it involves information which would have been available to the Respondent had a proper investigation being conducted and this point was emphasised by His Honour Judge Serota QC in the case of **London Waste Ltd -v-Scrivens UK EAT/0317/09**

13. Where, as here, any appeal proceeds by way of review and not a rehearing there is no rule that earlier unfairness can only be cured by means of a rehearing. The Tribunal must examine the fairness of the disciplinary procedure as a whole: - **Taylor -v- OCS group Ltd 2006 ICR 1602**

14. The Tribunal also applied the guidance given in the case of **Iceland Frozen Foods Ltd -v- James 1992 IRLR 439**: –

"The authorities establish that in law the correct approach for an employment Tribunal to adopt in answering the question posed by section 98 (4) is as follows……

(1) the starting point should always be the words of section 98 (4) themselves.

(2) in applying this section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair.

(3) in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take on you, another quite reasonably take another.

(5) the approach of the Employment Tribunal, as an industrial jury, is to determine whether the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses in which a reasonable employer might have adopted stop if a dismissal falls within the band the dismissal is fair….. If the dismissal falls outside the band it is unfair."

15. In summary the Tribunal decided it had to ask itself the following questions namely: –

15.1. Was there a genuine belief in the alleged misconduct?

15.2. Were there reasonable grounds to sustain that belief?

15.3. Was there a fair investigation and procedure?

15.4. Was dismissal a reasonable sanction open to a reasonable employer?

16. Automatic unfair dismissal.

As the Claimant has sufficient qualifying service to bring an ordinary unfair dismissal claim the burden of proof is on the Respondent to prove the reason or principle reason for the dismissal on the balance of probabilities. Once the Respondent has shown the reason or principle reason for the dismissal, there is an evidential burden on the Claimant to produce some evidence to show that there is a real issue as to whether or not the reason given is true. If this is done, the onus remains on the Respondent to prove the real reason for dismissal, see **Maund -v- Penwith District Council 1984 ICR 143.**

17. In seeking to establish the reason or principal reason for dismissal it is only necessary to ask why the Respondent acted as it did. A "but for" test is not appropriate: see **Balfour Kilpatrick Ltd -v- Acheson 2003 IRLR 683**.

Section 100(1) ERA 96 provides as follows: –

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that…..

(c) being an employee at a place where-

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means

He brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or propose to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or propose to take) appropriate steps to protect himself or other persons from the danger."

18. The case of **Balfour Kilpatrick Ltd** set out three requirements that need to be satisfied claim the section 100 (1) (c) namely: -

    18.1. One, was it not reasonably practicable for the employee to raise the health and safety matters through the safety representatives or safety committee?

    18.2. Two, the employee must have brought to the employer's attention by reasonable means the circumstances that he or she reasonably believed were harmful or potentially harmful to health and safety

    18.3. Three, the reason or principal reason, for the dismissal, must be the fact that the employee was exercising his or her rights.

    There is a distinction between section 100(1)(c), which relates to the raising of the safety issue and section 100(1)(d) and (e) which relates to the safety of the employee.

    What amounts to *"reasonable belief"* involves looking at whether the Claimant's belief was genuine and based on reasonable grounds although the reasonable belief provisions of section 100(c) should not be interpreted as imposing too onerous a duty, given the aim of the legislation is to protect those employees who raise health and safety matters.

    Under section 100(d) ERA96 what amounts to a serious and imminent danger is a question of fact: see **Harvest Press Ltd -v- Mc Caffrey 1999 IRLR 778**.

19. Detriment.

    Section 44 of the ERA 96 deals with the issue of detriment.

    It provides ": –

    "(1) An employee has the right not be subjected to a detriment by any act, or any deliberate failure to act, by his employer done on the ground that…..

    (c) being an employee at a place where-

    (i) there was no such representative or safety committee, or

    (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means

    He brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

    (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or propose to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

    (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or propose to take) appropriate steps to protect himself or other persons from the danger."

Submissions.

20. Ms Mellor made oral submissions by reference to a pre-prepared skeleton running to some 12 pages. She spoke to the skeleton. We mean no disrespect to her but as her submissions are set out in that document, available on the Tribunal file, we do not intend to repeat them

21. The Claimant made oral submissions as to the facts. Again, we mean no disrespect to him but have not repeated those submissions. We assure both parties that we had full regard to their submissions in reaching our conclusions and where necessary we have dealt with disputed matters and given reasons for our determination in this judgement.

Findings of Fact

22. The findings of fact set out below are not intended to cover each and every factual dispute that existed between the parties. The Tribunal has only adjudicated upon those facts necessary to determine the agreed issues.

23. The Claimant commenced employment with the Respondent on 02 September 2013.

24. The Respondent is a large charity employing approximately 1800 staff. It has its own HR department.

25. The Claimant was employed by the Respondent, until the termination of his employment on 13 March 2018, as a debt adviser.

26. The Claimant's line manager at the relevant time was Mr Kevin Boon ("Mr Boon")

27. Under the terms of the Claimant's contract of employment, on termination other than for gross misconduct, the Claimant was entitled to 4 weeks' notice.

28. As at the termination of his employment both the dismissing officer and the appeal officer believed the Claimant had a clean disciplinary record.

29. The Respondent had no health and safety committee and further had no appointed health and safety representatives.

30. In September 2016, as part of a general reorganisation in the office at which the Claimant worked, he was allocated a new desk, as were many of his colleagues.

31. Relevant for the purposes of these proceedings is there were two sorts of desks used at the Claimant's place of work, a curved desk and a straight desk. Three sorts of chairs were used, a blue chair, a purple chair and, obtainable from facilities, a black chair. The Tribunal finds the latter had greater height adjustment than the blue or purple chair.

32. In September 2016 the Claimant occupied a curved desk. He used a blue standard chair. He used a fixed foot rest which the Claimant accepted were readily available from the store cupboard.

33. The Tribunal is satisfied that prior to September 2016 the Claimant did not articulate any concerns as to his work station or its effect on his health.

34. On 13 September 2016 the Claimant moved to a straight desk and was allocated a standard purple chair.

35. The Tribunal found on the floor on which the Claimant worked there were unoccupied desks of both the straight and curved variety and also both blue and purple chairs.

36. In February 2017 the Respondent invited its employees to complete a workstation review.

37. We interject here that the Health and Safety (Display Screen Equipment) Regulations 1992 as amended by the Health and Safety (Miscellaneous Amendments) Regulations 2002 requires employers to carry out assessments as

regard to display screen equipment. Despite the title of the legislation, the obligation upon the employer goes further than just display screens and also includes the work station itself.

38. Throughout the evidence the parties referred to these assessments as DSE assessments and we will use the same abbreviation.

39. On 23 February 2017 the Claimant completed a self-assessment form (pages 109 to 114). In summary the Claimant asserted he was unable to adjust his chair to a comfortable position and it was too low to allow him to use the foot rest correctly. He also made reference to difficulties typing with regard to the computer mouse.

40. On reviewing the self-assessment, Mr Boon arranged, on or about 27 February 2017, for a DSE assessment to be undertaken. The Claimant in an email of the same date (103) stated that he believed he needed a higher chair and, ideally, a keyboard with a trackpad.

41. Mr Boon was not a qualified DSE assessor. He was not in a position to judge the reasonableness or otherwise of the Claimant's request.

42. The Respondent employed a number of individuals who are trained and designated DSE assessors and thus he made a referral for expert advice.

43. One such qualified DSE assessor employed by the Respondent was Mr Luke Turner ("Mr Turner").

44. On 10 March 2017 Mr Turner carried out a DSE assessment, (**the "First Assessment")** with the Claimant present.

45. The First Assessment was recorded in writing (115 to 118) and Mr Turner recommended an adjustable foot rest be provided to the Claimant, a lumbar support and a trackpad instead of a computer mouse. Mr Turner noted the current footrest was not adjustable and the chair could not be adjusted high enough for proper use.

46. The lumbar support was supplied that day. The Claimant used it briefly but discarded it.

47. The trackpad was not supplied to the Claimant until July 2017 (although nothing turns upon this piece of equipment and it does not form part of the Claimant's later complaints as to equipment, he considered he required.).

48. Similarly, the adjustable foot rest had to be ordered and was probably overlooked; it was not supplied until early July 2017.

49. The Claimant contended that Mr Turner had also agreed the Claimant needed a new chair.

50. We reject this for three reasons.

    50.1. Firstly, we find it improbable that a trained assessor would not have recorded such a significant adjustment, given the other adjustments that were recorded.

    50.2. Secondly in the subsequent grievance appeal, and before any Tribunal proceedings had been issued, Mr Swales interviewed Mr Turner and put the Claimant's contention to him and he denied it.

50.3. Thirdly there was no benefit to Mr Turner to lie to Mr Swales and no reason was put forward by the Claimant as to why Mr Turner would not have recorded the need for a new chair if that was genuinely his conclusion.

51. On 10 May 2017 the Claimant complained, justifiably, that the footrest has not been supplied. We find that it was the Claimant who was proactively pursuing this matter rather than the Respondent, on who the responsibility lay.

52. Between the 6 to 9 June 2017 the Claimant was absent from work with a stomach upset. He returned to work on Monday, 11 June but was unwell and was then absent again from 13 to 16 June inclusive.

53. Mr Boon was unable to undertake the Claimant's return to work interview and therefore it was undertaken by a Ms Julie Turfrey ("Ms Turfrey"). Again, the Claimant complained, justifiably, about the lack of a footrest and she promised to speak to Mr Turner to obtain an update.

54. By 19 June 2017 the Claimant indicated that he was no longer using the lumbar support as he found it gave him no benefit, as is evidenced by an internal email of that date (119 B). We find he had ceased to use it long before this date.

55. On or about 29 June 2017 Mr Turner revisited his initial assessment **(the Second Assessment)** and found the Claimant was still claiming that he was suffering from back pain and discomfort.

56. A slight adjustment was made to his chair. He was recommended to obtain medical evidence as regards his alleged neck and back pain.

57. It was recommended that the Claimant was given time to walk round the office if required away from his work station (118). It was not disputed that this adjustment was accommodated.

58. Mr Turner also recommended that the Claimant diarise his pain and where it was located, how long it lasted and what made it better or worse so the DSE team could build up a better picture. The Claimant did not follow this advice so throughout the assessments such information was not available, to better inform the assessors.

59. At this stage the Claimant's case was that he believed his chair was too low relative to his desk, see his email to Mr Boon on 05 July 2017 (148).

60. The Respondent was keen to better understand the Claimant's medical condition particularly given the Claimant stated when he first was absent through ill-health that he was suffering from stomach pains. He was only later to associate those pains with his seating position. The Claimant was asked for any medical evidence

61. Whilst the Tribunal does not say in every case medical evidence must be obtained by the employee, it was not in the Tribunal's judgement unreasonable, in these particular circumstances, to ask whether the Claimant was prepared to disclose medical evidence to better assist the Respondent in undertaking assessments to address the Claimant's concerns.

62. The Claimant was then absent from work from 11 July until 13 October 2017. His sick note disclosed what may best be described as muscular skeletal difficulties.

63. In none of the six fit notes did the Claimant's GP recommend any adjustment to the Claimants working environment.

64. In the interim the Claimant was referred to Occupational Health. We find it is likely that the principal reason the Claimant was referred to Occupational Health because he reached a trigger point under the Respondents sickness absence procedure, rather than at the specific request of the Claimant.

65. An Occupational Health assessment was undertaken on 24 July 2017 (152 to 154)

66. Occupational Health noted the Claimant had an excellent health record. The Claimant explained to Occupational Health that he had been suffering from abdominal pain but tests proved negative for any underlying condition. He claimed he was experiencing muscular skeletal difficulties. Occupational Health advice was that the Claimant could return to work, but given a possible work-related cause it recommended a work station assessment be completed as soon as possible.

67. A further assessment was undertaken on 27 July 2017 **(the Third Assessment)** by a qualified DSE assessor.

68. The Claimant was present during the assessment

69. The assessor this time was Ms Samantha Hodgson ("Ms Hodgson"), the Respondents Facilities Manager, who prior to commencing employment with the Respondent in May 2017 had 15 years health and safety experience and has completed IOSH and NEBOSH training. The latter qualification requires approximately eight hours study per week over an 18-month period.

70. We are satisfied that Ms Hodgson could be described as an expert due to her qualifications, experience in DSE assessments and the fact she could describe to us the principles set out in the HSE documentation, for example the desirability of a straight line from a person's ear, to hip to knee as evidence of a good seating posture.

71. Ms Hodgson adjusted the footrest during the third assessment.

72. The Tribunal accepted Ms Hodgson's evidence that the Claimant failed to relax his shoulders and was very rigid in his posture and therefore when he moved his arms, he also moved his shoulders. She recommended that a wrist rest might assist in relation to posture. This was in the Tribunal's judgement a sensible suggestion and was consistent with her written recommendation made at the time.

73. The Tribunal was satisfied that the Claimant did have posture problems as evidenced by Mr Boon's unchallenged evidence.

74. The Claimant accepted in cross examination at times he slouched and sat with one leg under his bottom.

75. Ms Hodgson based her opinion on what she called "walk by" assessments prior to the third assessment. She said, in her experience when an assessment was undertaken, staff frequently sat up which did not give a true reflection as to how they normally sat when working. We found this evidence credible.

76. She indicated reassessment would depend upon when the Claimant returned to work.

77. In an email from Ms Hodgson dated 27 July 2017 (157a) she concluded that the Claimant could sit properly at his workstation but the principal problem was the Claimant preferred to slouch, which appeared to be his natural sitting position,

hence why she recommended a wrist rest to assist, in the hope it would make the Claimant rest his shoulders. Ms Hodgson gave the Claimant a copy of the guidelines used when making DSE assessments and a copy of her assessment so the Claimant could discuss matters with his chiropractor to see whether the chiropractor wished to make any further recommendations which the Respondent would then consider. No recommendations were ever made by the chiropractor. At no stage did the chiropractor supply any evidence to the Respondent challenging the various DSE assessments

78. Although a footrest was supplied along with a wrist rest, we accept the evidence of Mr Boon that the Claimant only briefly used the equipment but then declined to do so.

79. Whilst the Claimant disagreed with Ms Hodgson's report the Claimant was later to move to a different desk and chair (i.e. a move from a curved to a straight desk) and he accepted in cross examination that it was unfair to compare adjustments to one workstation with a differently constituted work station. The Claimant was never required to work at this desk when he returned to work after illness. Thus, whatever the flaws the Claimant perceived in this work station set up and the adjustments made in the Third Assessment it cannot have been relevant to the Claimant's subsequent decision not to return to work.

80. On 10 August 2017 Mr Boon held an informal welfare meeting with the Claimant, accompanied by Theresa Cleavin, HR adviser, the purpose of which was to assist the Claimant returning to work. He informed the Claimant that all the equipment that had been requested by Ms Hodgson had arrived. The Claimant contended that his workstation was not suitable. We find Mr Boon did not ignore that evidence the Claimant produced but reasonably concluded he was not in a position to make an assessment of such guidance and it was appropriate that any adjustments to the Claimant's workstation were dealt with by the Respondent's authorised and trained DSE staff. We accept Mr Boon reasonably considered that he was entitled to rely upon the advice he been given by the Respondent's DSE staff.

81. The Claimant confirmed he had not discussed the Third Assessment with his chiropractor.

82. It was stressed to the Claimant that the Respondent would consider any recommendations from the chiropractor. No report was produced though we find the Claimant did tell Mr Boon and Ms Cleavin, he had been diagnosed as having no core strength and it was considered his spine was out of alignment. He had been given exercises to undertake.

83. The Claimant was also signposted to Access to Work and the assessments it could offer, if he thought that would assist.

84. The Tribunal finds as a fact that under Access to Work the Respondent could not make a direct referral. The application had to be made by the Claimant. He made no such application.

85. It was further explained that the Claimant might well be able to reclaim his chiropractor fees from a health insurance scheme the Respondent operated.

86. On 30 August 2017 Mr Boon discussed with the Claimant his health. The Claimant was shown the wrist support and claimed it was ineffective. He tried it for approximately 10 seconds. He considered the DSE assessments were wrong

and said he hadn't spoken to Access to Work as he considered it a waste of time(177a).

87. On 13 September 2017 the Claimant attended a formal long-term ill-health meeting with Mr Boon. The meeting was documented (181a to 181d). The Claimant was advised of his absence record and told without a sustained improvement, dismissal was one potential option.

88. In October 2017 the Claimant's desk was changed. He went back from a straight desk to a curved desk.

89. On 16 October 2017 the Claimant returned to work on a phased basis working 3.5 hours per day. During his absence the Claimant received contractual sick pay.

90. A further DSE assessment (**the Fourth Assessment)** was undertaken that same day by Ms Hodgson (181e to 181 h) in the Claimant's presence. The assessment related to the new curved desk. He was provided with a purple chair. The curved desk was of the same design of desk that the Claimant had used up to September 2016. The Tribunal finds that it is likely on the balance of probabilities that it was identical to that used by the Claimant prior to September 2016.

91. Ms Hodgson concluded that: -

- The curved desk needed to be raised. The Tribunal was satisfied with the justification given for this by Ms Hodgson. She recommended a rocking foot rest so the Claimant's knees were at a 90° angle and, given the height of the rocking foot rest, the desk needed to be slightly higher. We accepted Ms Hodgson's evidence that the Claimant had complained of cramp and she considered that better circulation would assist and, in an attempt, to produce a 90-degree angle, a rocking foot rest was the most appropriate adjustment.
- A higher chair was needed. By this Ms Hodgson meant both a higher back to the chair to offer more support and more adjustment on its physical height. Ms Hodgson had observed the Claimant at his desk slouching and in our judgement reasonably considered further back support could alleviate this problem. She noted the chair was height adjustable but not high enough.
- The tower holder, holding part of the computer hardware under the desk, was to be removed.
- The desk pedestal was to be moved.
- The telephone was to be moved to the right-hand side of the desk.
- A new chair, black, with a higher back and height adjustment was obtained from stock for the Claimant to try.

92. On 19 October 2017 the Claimant was told by Ms Turfrey that the outstanding adjustments would be undertaken by 23 October 2017 and the Tribunal is satisfied that Ms Hodgson's recommendations were completed by that date.

93. Despite the Fourth Assessment recommendations the Claimant felt the desk was too high and wanted its height reduced. The Claimant only sat at the raised desk for approximately two hours.

94. We accepted the evidence of Ms Hodgson that normally a two weeks trial of adjustments would be reasonable, followed by a re-inspection. The Respondent was never able to do this given the Claimant was never at work for a period of two or more weeks from the Fourth Assessment.

95. On 24 October 2017 the Claimant complained he could not reach his telephone. Mr Boon addressed this matter that day by releasing part of the cable so it was in a comfortable position for the Claimant.

96. The Claimant's desk was also reduced in height as the Claimant had requested.

97. Between the Claimant's return to work and 24 October the Claimant was working reduced hours of 3.5 per day and spent the majority of his time away from his desk. He listened in to other calls, undertook training and attended meetings.

98. On 25 October 2017 the Claimant said he was not attending work due to knee pain.

99. The Claimant was then absent from work from 25 October 2017 to 16 November 2017, when he briefly returned. During this period the Claimant was paid his contractual sick pay.

100. The Claimant's sick note, covering the above period, simply referred to a *"knee injury/anxiety".* At no stage did the Claimant suggest he had banged his knee on his work station or in any other way injured his knee at the work station. In the subsequent grievance proceedings, the Claimant mentioned he may have exacerbated an old snowboarding injury.

101. On 15 November 2017 the Claimant indicated his joint pain had settled but his desk was still a problem and he wanted it lowered. Mr Boon's position was the legs been taken off the desk and so it could not be lowered any further and wanted to discuss the issue with the Claimant face-to-face.

102. On 16 November 2017 the Claimant attended work and also submitted a grievance (192 to 204).

103. In the grievance the Claimant complained of a failure to provide him with a safe work station, delay in obtaining equipment, a failure at the informal welfare meeting to consider his concerns as regards the previous DSE assessments, and a failure to regard the Claimants complaints as grievances. He accepted Mr Boon had been supportive throughout the process. The Claimant indicated that his absence from work was due to the failure of the Respondent to address his workstation which in turn was impacting upon his health. The Claimant stated in his grievance that he had *"lost all confidence"* in the Respondent.

104. The Claimant worked at his workstation for only an hour to 1 ½ hours before he considered he was in pain and left work, despite having agreed earlier that day at the return to work meeting(191c) that he would trial the desk for *"at least a week"* to see if this was an improvement.

105. The Claimant was advised on 16 November 2017 that an independent DSE inspection would be carried out on 22 November 2017 by Back Care Solutions ("BCS").

106. BCS were independent of the Respondent. The Tribunal concluded that the Respondent took this step because they had not simply dismissed out of hand the Claimant's representations and wanted assurance that his workstation was safe and complied with the statutory regulations.

107. On 20 November 2017 the Claimant indicated he was fit for work but unable to sit at his workstation which he said was unsafe

108. On the same day the Claimant was advised by HR as to his options if he did not attend work. He was advised that he could take holiday, if he was sick and unfit to work, submit a fit note, or alternatively agree an arrangement for unpaid leave. The Claimant did not accept any of these options.

109. On 21 November 2017 the Claimant consulted solicitors.

110. On 22 November 2017 BCS carried out an assessment (**the Fifth Assessment**) with the Claimant present. The assessor concluded that the desk was too low and the chair needed armrests. The Tribunal noted that the assessor had no concerns as regards the adjustability of the chair provided, although the seat needed to be extended out further. The Respondent had previously raised the desk but lowered it following the complaint of the Claimant on 23 October 2017. Armrests previously had been provided with the chair but rejected by the Claimant.

111. BCS did not recommend a foot rest but we accept that unless the Claimant had mentioned cramp it may not have been considered relevant. We also note that the Claimant told BCS that he could comfortably place both feet on the ground. This is a further factor that would lead to a foot rest not being recommended.

112. We do not find any significant differences between the external report from BCS and those conducted by the Respondent. To the extent there were differences we find this was predicated, in a significant measure, as to what the Claimant complained of to each assessor and the fact the Claimant was being now assessed at a curved desk whereas previously it had been at a straight desk and there was a slight height difference between the two.

113. BCS stressed the need for the Claimant to adopt good posture and to follow behavioural advice and this was a relevant factor in ensuring the workstation was safe, as well as ensuring appropriate equipment was provided. The subsequent report disclosed to the Claimant explained the behavioural advice. The Claimant accepted in cross examination that if he slouched his arms dropped irrespective of what equipment was supplied and even the best equipment could not address this point.

114. The Respondent followed the recommendations of BCS and once again raised the desk and supplied armrests to the chair.

115. The Claimant contended that he was told by the representative from BCS that his workstation represented a risk to his health. We are prepared to accept that was what he was told because that was consistent with the findings in the report. However, the desk was low because the Claimant had insisted the previous measures to raise the desk be removed and also wanted the armrests on his chair, previously supplied, also removed.

116. The Claimant was later to criticise the report from BCS and pointed out the report did not note the use of headphones and that he spent more time away from his desk than recorded. The Tribunal is satisfied that this criticism was examined by the Respondent and its conclusion that the fundamentals of the report was not undermined was reasonable because the fact the Claimant had headphones reduced risk as did the fact the Claimant spent more time away from his desk

than had been anticipated by the author of the report. In reaching this conclusion the Respondent took specific advice from Ms Hodgson.

117. We find that workplace equipment will only address the health and safety issues that arise from the statutory regulations if used correctly. The Tribunal was satisfied that on occasions the Claimant slouched and also tucked one leg under his bottom. There are two elements to health and safety in relation to workstations. The first is proper equipment and the second is adopting a good posture. If an employee fails to adopt a good posture there is still a risk of muscular skeletal pain even with the provision of adequate equipment. Indeed, the Health and Safety Executive documentation makes this very point.

118. The Tribunal is satisfied that although the Claimant criticised some of the fundamental recommendations made by BCS such as the provision of armrests, he provided insufficient evidence to the Respondent to justify why they should depart from independent expert's report.

119. The Claimant did not trial the desk modified in accordance with the recommendations made by BCS.

120. During the evidence before the Tribunal it became clear that Ms Hodgson considered that the Claimant was exaggerating his symptoms. The Tribunal gave very careful consideration as to whether this may either consciously or subconsciously have tainted her findings. After appropriate reflection the Tribunal concluded it had not. The Tribunal reached this conclusion because her recommendations, for example that the desk needed raising and that armrests were needed for the chair the Claimant used, were echoed by the independent assessor from BCS.

121. The Claimant failed to attend work on the 23 and 24 November and did not give a reason for his absence. Although the Claimant was specifically advised that he was regarded as being on unauthorised absence in an email dated 24 November 2017 (227) he was never to return to work, other than for the purposes of attending meetings. He continued to maintain that his workstation was not safe and raised with the Respondents in his email of the same date that he regarded such action as being in breach of section 44 ERA 96.

122. On 27 November 2017 the Claimant raised a concern termed as a *"whistleblowing: health and safety risk"* complaint (228). The matter was investigated by Ms Debbie Gandy who in a letter of 06 December 2017 concluded that the Respondent did comply with its health and safety obligations. Given the issue of a protected disclosure was not pursued it is inappropriate for the Tribunal to make any further comment on this element of the chronology.

123. On the same day the Claimant wrote to the Respondent (233) that: - *"I cannot now reasonably conceive any scenario in which I could possibly return to work"*.

124. On 27 November 2018 an equipment order was placed on the basis of the recommendations from BCS to raise the desk and provide armrests. (The appropriate adjustments arrived on 29 November 2017.)

125. Also, on 27 November 2018 the Claimant attended a grievance investigatory meeting.

126. On 05 December 2018 the Claimant was informed his absence was unauthorised and therefore unpaid. On the same day Mr Boon contacted the Claimant by email to meet to discuss the BCS report. The Claimant did not agree to a meeting and

thus the BCS report was never discussed between Mr Boon and the Claimant despite the best efforts of the Respondent

127. On 13 December 2017 the Claimant wrote to the Respondents stating (237aa) his trust and confidence was shattered and he would *"struggle to envisage any scenario in which this* [trust and confidence] *could be restored sufficiently for me to return to work."*

128. On 14 December 2017 the Respondent's premises were visited by the Health and Safety Executive following a complaint by the Claimant.

129. In a subsequent letter dated 08 January 2018 from the Health and Safety Executive its inspector found that there were suitable systems in place to ensure workplace assessments were undertaken, that measures required following such the assessments were provided, and reviews undertaken. A walk round of part of the office noted that specialist chairs have been supplied to some employees and that workstations appeared suitable.

130. No action was taken by the Health and Safety Executive who accepted that the Respondent appeared to have in place the appropriate policies and procedures. No assessment was made of the particulars of the Claimant's complaint.

131. At no stage up to and including the Claimant's appeal did the Claimant produce any documentation from either his chiropractor, a doctor, or a health and safety assessor to challenge the internal and external assessments made of his workstation. He did, however, make reference to various government publications. The Tribunal notes that these publications are general guidance, and whilst they contain important principles, are no substitute for a detailed personalised assessment.

132. On 20 December 2017 the Claimant was advised by Ms Cheetham, Service Delivery Manager of the outcome of the Claimants grievance.

133. She found there should have been a DSE assessment when the Claimant moved desk in September 2016 and there were unacceptable delays between the Claimant completing a self-assessment on 23 February 2017 and appropriate equipment arriving. Whilst Ms Cheetham noted references to the Health and Safety literature, she found the Respondent had carried out appropriate DSE assessments. She further accepted that an email from the Claimant dated 05 July 2017 raising concerns, whilst not raised under the Respondents grievance policy, should have been treated as a grievance by the Respondent. The Claimant had contended he was not allowed to talk about his desktop assessment in his welfare meeting on 10 August 2017.Ms Cheetham reached the conclusion that as Mr Boon and Ms Cleavin were not DSE trained they could not reasonably comment upon the assessments that had been made. She did not uphold the Claimant's grievance that he moved on to no pay because he had failed to attend work without good reason. She noted the Claimant had been given three options, return to work, take annual leave, or provide a fit note. He agreed to none of these options and would not return to work. Finally, she noted the Claimant's complaint of delay in the grievance but concluded the timescales were not unreasonable in all the circumstances. She noted the concerns raised by the Claimant as to the competency of Ms Hodgson but did not support those concerns. The Tribunal is satisfied that Ms Cheetham made reasonable enquiries and undertook reasonable investigations before reaching her conclusion. The Tribunal is further satisfied that Ms Cheetham did look at the Health and Safety

Executive documents supplied to her. The Tribunal noted it was generic guidance. In the absence of any expert evidence from the Claimant the Tribunal is satisfied that she was entitled to conclude that the recommendations made by Ms Hodgson, given her expertise in health and safety, and the independent report from BCS were to be preferred. Ms Cheetham had invited the Claimant to submit any medical evidence before she concluded her investigation. The Claimant chose not to do so. In the circumstances the Tribunal cannot say that preferring the evidence of Ms Hodgson and BCS was an unreasonable conclusion.

134. On 08 January 2018 Mr Boon contacted the Claimant by email and reminded him that his absence was considered as unauthorised and could lead to disciplinary action. He recommended that if the Claimant was unfit for work, he should follow the absence reporting procedure. He also again invited Claimant to discuss with him the report from BCS. The Claimant did not avail himself of that offer.

135. On 16 January 2018 the Claimant lodged notice of appeal against the grievance outcome provided by Ms Cheetham.

136. A grievance appeal hearing was held by Mr Jamie Swales, Debt Advice Service Manager ("Mr Swales"), on 17 January 2018 with an outcome being provided in writing on 09 February 2018. During the discussion between Mr Swales and the Claimant he sought to understand what the Claimant wanted to achieve. The Tribunal is satisfied that Mr Swales genuinely was looking for a solution to try and help the Claimant to return to work. Mr Swales put it directly to the Claimant if he directed a further DSE assessment would the Claimant then return to work? The Claimant gave no such assurance. The Claimant wanted an acknowledgement that what happened to him was wrong and indicated that his solicitor would contact the Respondent to negotiate an exit and if not, Employment Tribunal proceedings would be issued. The Claimant said that the most likely scenario was for all parties to agree some form of settlement.

137. Mr Swale's appeal outcome letter was detailed, running to 9 closely typed pages (325 to 333).

138. In essence Mr Swales concluded the workstation provided to the Claimant was suitable and was safe. He found that had been a failure to carry out a DSE assessment in September 2016 and delays in delivering equipment following the assessment in March 2017. Steps had been taken to reduce any risk to the Claimant from his workplace and he had been given advice on how to reduce his risk of injury by using his workstation. He found there were some errors in the handling of the grievance. He was satisfied that having regard to the independent advice from BCS that the Claimant should have returned to work following the assessment and the reason the Claimant was not being paid was due to the fact he was failing to attend work. The Tribunal is satisfied that Mr Swales made reasonable enquiries and was entitled to come to the conclusion he did on the evidence before him.

139. On 13 February 2018 Mr Boon informed the Claimant that if he did not return to work, as his absence was unauthorised, he might be liable for disciplinary proceedings. The Claimant responded indicating he would not return because he regarded his workstation as being a serious and imminent risk to his health.

140. On 21 February 2018 the Claimant attended a disciplinary investigation meeting chaired by Ms Kirsty Free ("Ms Free") which was short (338 to 339). The

Claimant's position was he would not return to work until his workstation was modified to his satisfaction. The Claimant contended there was some form of cover up. (389).

141. The Respondent's disciplinary policy was in the bundle (pages 51 to 61). The Claimant's challenge to the application of the policy was that timeframes were not adhered to. The Tribunal concluded having regard to the timeline and having noted that the policy provided, at best, indicative time limits and not absolute limits and also having regard to the fact that if there was delay, it was minimal, the Tribunal concluded that any departure from the Respondent's policy in dealing with the disciplinary process did not render the process unfair.

142. The Tribunal also had to consider to challenges of substance to the investigative process.

143. Firstly, during the course of evidence it came to the Tribunal's attention that the investigating officer, Ms Free had not been given the details of the three allegations that was subsequently to appear in the disciplinary invitation letter of 28 February 2018. She simply investigated why the Claimant had not return to work. The Tribunal did not find this to be a substantial procedural error as in essence she investigated what was at the core of the matter that formed the basis of the subsequent disciplinary proceedings, why he would not come to work, and took into account the Claimant's contention that he did not regard the instruction to return to work as being reasonable because he regarded his work station as being unsafe.

144. Secondly Ms Free accepted that she had not investigated the initial appeal outcome or the subsequent grievance. The Claimant contended this was essential to understand why he was refusing to attend work. The Tribunal was satisfied as to the explanation given. The Claimant had fully exhausted the Respondent's grievance procedure. It was not for Ms Free to act as a further level of appeal. She was entitled to note that the substance of the Claimants grievance, namely that his work station was unsafe, that his contentions had been rejected. She was entitled to conclude that there was a prima facie case to be considered by a determining officer utilising the Respondents disciplinary procedure. Even if the Tribunal is wrong the Tribunal and Ms Free should have reopened the grievance process is satisfied that the dismissing officer revisited the issue of the Claimant's workstation.

145. On 28 February 2018 the Claimant was invited to a disciplinary meeting. The alleged misconduct was: –

"Failing to follow a reasonable management request, more specifically the request sent on 13 February 2018 by Kev Boon requested Simon Lavarack to attend work

Failure to return to work after a grievance appeal outcome had been provided, and expectations were set at the end of this process with regards to a return to work

Breach of terms and conditions of your contract of employment. More specifically failing to attend work Monday to Thursday 10 am-6am and Friday 9am -5pm since 23 November 2017 and since the email request to attend work dated 13 February 2018"

146. The Tribunal observes that there is significant "overcharging". In essence the Respondent's case was that the Claimant was not attending work without a good reason when being directed to do so.

147. On 06 March 2018 the Claimant attended a disciplinary hearing chaired by Ms Lisa Avins, Management Development Manager. ("Ms Avins").

148. Ms Avins was not called to give evidence and neither was the HR support. The Claimant did not call his own representative who was also present at the hearing. The Tribunal was therefore left to determine what occurred at that meeting on the basis of the notes, outcome letter and evidence from the Claimant.

149. The Claimant's case, in summary, was that he needed a higher chair synchronised with a foot rest and would not return to work until this was provided. He regarded the DSE reports as inaccurate and that from BCS as inconsistent with what he been told orally by the expert assessor. It was specifically put to the Claimant whether he had attended work since 22 November to see the adjustments that had been undertaken following the report from BCS to his workstation and he replied in the negative.

150. At the conclusion of the meeting on 06 March 2018 Ms Avins requested the Claimant attend a further DSE assessment on 08 March 2018.

151. On 08 March 2018 an assessment was conducted by a new health and safety officer, Mr Finch. The Tribunal is satisfied that Mr Finch did not carry out a formal DSE assessment but simply discussed matters with the Claimant and tried a number of different combinations of desks and chair. Mr Finch did not make a formal professional recommendation but did agree that steps should be taken to see whether the suggested solution from the Claimant, namely using a foot rest and lowering a desk in height and the removal of armrests from a standard chair worked. An agreement was reached that the Claimant would use a curved desk along with a blue chair and a rocking foot rest. This was the same configuration of the work station as the Claimant had used without incident since the commencement of his employment until September 2016 other than the Claimant preferred a rocking foot rest to the less flexible foot rest he had previously used.

152. The disciplinary hearing was reconvened and Ms Avins sought clarification from the Claimant if he would now return to work given, she was prepared to see whether the solution the Claimant had proposed to Mr Finch would produce satisfactory attendance. The Claimant was not prepared to return to work and was seeking a financial settlement. The Tribunal had particular regard to the recorded note of the exchange between the Claimant and the HR adviser Ms Cook which was not challenged. The exchange reads as follows: – *"so agreed today desk potentially fit for purpose, you saying it ready for Monday desk and chair potentially sorted are still not going to come back"*. The Claimant responded *"as far as I am concerned, I am waiting to hear back charity saying still refuses to pay me"*. The Claimant was not clear what financial settlement he was looking for and needed to speak to his legal advisers.

153. The Tribunal found that Ms Avins was left in the genuine belief that the Claimant would not return to work.

154. Ms Avins did not make a hasty decision. She waited to Monday to see whether the Claimant would attend work or provide a justifiable explanation for non-attendance. He did not. She then waited until Tuesday morning to see again

whether the Claimant would attend or provide a justifiable explanation for non-attendance. He did not.

155. On the afternoon of the 13 March 2018 the Claimant received a letter sent by email from Ms Avins dismissing him for alleged gross misconduct namely be a failed failure to comply a lawful instruction (365 to 368.). The Tribunal concluded that the letter was only sent when it was clear the Claimant not attend work on 13 March 2018.

156. The Tribunal is satisfied from the documentary evidence that Ms Avins carefully considered the evidence. She noted, in the Tribunal's view significantly, following the adjustments to the Claimant's workstation made by the independent assessors BCS the Claimant has not trialled his workstation despite the fact that he was fit to attend work. The Tribunal noted that although the Claimant had criticised the BCS report those concerns had been fully addressed in the internal grievance process. In any event Ms Avins concluded that the refusal to attend work started at the earliest from 13 February 2018, after the conclusion of the grievance appeal conducted by Mr Swailes.

157. The Tribunal is satisfied that Ms Avins did give consideration to the representations made by the Claimant hence why she required Mr Finch to carry out a further review. This was not a determining officer with a closed mind. The Tribunal is satisfied that the Respondent did carry out a reasonable investigation and treated seriously the Claimant's concerns hence why Ms Avins adjourned the disciplinary hearing for a meeting with Mr Finch.

158. Following the adjournment Ms Avins had further grounds to sustain her reasonable belief that he was failing to comply with a lawful instruction, based on the Claimant's own acceptance that the workstation was now in his opinion suitable, coupled with his representation that he would not attend work and wanted a financial settlement,

159. The Tribunal noted that Ms Avins made specific reference to mitigation in the termination letter and did consider penalties short of dismissal.

160. The Tribunal cannot say that dismissal for failure to comply with a lawful instruction, that is a requirement to attend work without good reason is outside the band of responses of a reasonable employer. The Tribunal noted the Claimant had been forewarned in emails that he either needed to attend work or provide good reason why he was failing to attend work. There was no realistic possibility the Claimant would attend work from the representations he made to Ms Avins and thus dismissal was within the band of responses of a reasonable employer.

161. The Claimant subsequently appealed in an undated document (369a). He contended that the Respondent could not conclude that his purported injuries were not caused by the workstation.

162. He did not accept that the Respondent had provided a credible argument that his workstation was safe.

163. The Claimant contended the assessment by Mr Finch on 08 March 2018 was not consistent with their discussion and the chair that was being suggested was too low. This is in direct contravention to what was recorded by Mr Finch and by the notetaker in the disciplinary hearing.

164. He indicated he wanted a negotiated settlement and if necessary, would pursue matters via an Employment Tribunal as he felt a fresh start elsewhere was a realistic and sensible solution. He made reference to sections 44 and 100 the Employment Rights Act 1996.

165. On 20 April 2018 the Claimants appeal against dismissal was heard by Mr Kevin Piper ("Mr Piper"). Notes were taken (371 to 374) The Tribunal was satisfied the notes were reasonably accurate.

166. Mr Piper occupied a more senior position to that of Ms Avins.

167. The Claimant contended there was inconsistency in the DSE assessments and he had become *"effectively paralysed".*

168. The appeal was not a rehearing but a review.

169. The Tribunal is satisfied that Mr Piper looked at all the appropriate documentation prior to the appeal that he needed to have an understanding of the situation, including the previous grievance proceedings. Mr Piper also spoke directly to Mr Finch to fully understand what had occurred on 08 March 2018. The Tribunal noted this was not done in the presence of the Claimant but concluded this did not result in any substantial unfairness.

170. On 27 April 2018 Mr Piper dismissed the Claimant's appeal in writing (375 to 377). Mr Piper concluded there were several occasions when the Claimant could have returned to work, firstly following the assessment by BCS, secondly at the conclusion of the grievance appeal and thirdly following the discussion with Mr Finch.

171. Mr Piper considered the issue of financial settlement was outside his remit as an appeal officer.

172. He dismissed the appeal.

173. At no stage had the Claimant produced any form of medical evidence, such as a GP report, his GP records, or a consultant report to point to the fact that his workstation was causing him injuries or indeed what injuries he apparently had sustained and when. The only evidence produced to the Tribunal was chiropractor report dated 25 July 2017 (Appendix D). This was available to the Claimant before the disciplinary and appeal proceedings but was never produced to the Respondents. Nothing in that report clearly indicated that the Claimant's workstation was the case of his reported difficulties. The furthest the report went was to record that the Claimant reported that he found sitting at his workstation *"uncomfortable".*

174. It is against the above factual background that the Tribunal reached its conclusions.

Discussion.

Unfair dismissal

The Tribunal is satisfied that both Ms Avins and Mr Piper had a genuine belief that the Claimant was guilty of misconduct hence why he was dismissed.

175. Both relied upon the potentially fair reason of conduct namely his unauthorised absence.

176. That conduct was the principle reason for dismissal is wholly consistent with the contemporaneous documentation including the notes of the investigative

proceedings, the notes of the disciplinary hearing, the dismissal letter, the notes of the appeal hearing and the appeal outcome.

177. The Respondent has established on the balance of probabilities this was the reason or principal reason for dismissal and not any health and safety reason. The Tribunal have reached this conclusion because on the Claimant's own admission, prior to dismissal, a workstation had been set up which he regarded as being suitable but he then still refused to return to work. He was dismissed due to his failure to comply with a reasonable management instruction and not for health and safety issues.

178. Both Ms Avins and Mr Piper had reasonable grounds to sustain that belief as set out in the Tribunal's findings of fact.

179. The Tribunal then went on to consider whether the dismissal was both procedurally and substantively fair.

180. The Claimant contended his dismissal was procedurally unfair due to the failure of the Respondent to adhere strictly to the recommended time limits set out in its own policy. The Tribunal rejected that submission for the reasons already given. Time limits were indicative not mandatory. This was not a case that hinged on personal witness recollection that might fade. This was a case heavy on documentation and interpretation. There was no procedural unfairness and any delay was minimal.

181. Whilst Ms Free had not been given the details of the three allegations that was subsequently to appear in the disciplinary invitation letter of 28 February 2018. The Tribunal found she investigated what was at the core of the matter that formed the basis of the subsequent disciplinary proceedings and his explanation. There was no unfairness to the Claimant.

182. Whilst Ms Free had not investigated the initial appeal outcome or the subsequent grievance the Claimant had fully exhausted the Respondent's grievance procedure. It was not for Ms Free to act as a further level of appeal. Even if the Tribunal is wrong the Tribunal and Ms Free should have reopened the grievance process is satisfied that the dismissing officer revisited the issue of the Claimant's workstation.

183. The Claimant contended that his dismissal was substantially unfair because the management instruction to attend work was not reasonable. The Claimant maintained in his appeal documents that the DSE assessments were wrong.

184. The Tribunal is satisfied that both Ms Avins and Mr Piper gave adequate reasons as to why they rejected the Claimant's case. The Tribunal reminded itself that what was required of the Respondent was to reasonably investigate matters. It did not need to prove that the decision it made was right. There may be times when factually an employer makes a wrong decision but on a reasonable ground. That does not mean a subsequent dismissal is unfair. The Respondent had investigated the Claimant's concerns evidence by both the internal DSE assessments, the use of an external assessor BCS and also considering the representations from a Claimant is internal grievance procedure including the use of an appeal.

185. Mr Piper was satisfied that the Claimant's concerns being taken seriously as evidenced by the number of DSE assessments and the remedial action. He

noted that the internal DSE assessments had not all been undertaken by the same person.

186. The Tribunal was satisfied that the Claimant was not prepared to accept the specialist advice given and quickly concluded that adjustments were inappropriate as is evidenced by the rejection of the wrist rests, lumbar support and the armrests on his chair.

187. Mr Piper considered, and the Tribunal accepted his evidence, that the instruction given to the Claimant to return to work was reasonable in all the circumstances bearing in mind the content of the DSE assessments including that from BCS, who were wholly independent of the Respondent, and further the more recent conduct of the Claimant following the discussion with Mr Finch when even when Mr Finch indicated he was prepared to trial everything the Claimant believed would accommodate him, still refused to return to work.

188. Mr Piper was also entitled in the Tribunal's judgement to note that the Claimant had produced no medical or other expert evidence to support his position that all the DSE assessments were flawed and whilst the Health and Safety Executive literature was considered, it was generalised guidance.

189. Whilst the Claimant had what superficially appeared to be a good point, namely that the report from Mr Finch differed from the previous DSE assessments the Tribunal is satisfied that this does not assist the Claimant for two reasons.

190. Firstly, Mr Finch was not carrying out a DSE assessment but trying to discuss with the Claimant what he felt he would need in order to come back to work and ensure that what the Claimant perceived was required was available. He was not giving a professional opinion.

191. Secondly, and more significantly the disparity is irrelevant because the Claimant still would not attend work even after the Respondent indicated it was prepared to trial the equipment identified in discussions with Mr Finch on 08 March 2018.

192. The Tribunal concluded the Respondent acted reasonably in preferring the evidence of its own DSE assessors and BCS over the evidence of the Claimant.

193. The Tribunal found that procedurally and substantively the disciplinary procedure was fair and it mattered not that the appeal was by means of a review rather than a rehearing.

194. The Claimant contended that the penalty imposed was excessive and out with the Respondents disciplinary policy.

195. The Tribunal was satisfied that Mr Piper exercised his own independent judgement as to the issue of penalty. Whilst in the Respondent's disciplinary procedure *"unauthorised absence"* has an indicative classification of misconduct and not gross misconduct, Mr Piper explained that he felt this was the case of an employee who perhaps absented themselves for a short period of time and then returned to work. The situation involving the Claimant was more serious because he was refusing and continue to refuse to return to work for a number of months.

196. In the circumstances the Tribunal is satisfied that a reasonable employer could classify the Claimant's conduct as gross misconduct.

197. The Tribunal is also satisfied that Mr Piper had regard to the Claimant's length of service and previous record in reaching that conclusion.

198. The Tribunal exercising its own independent judgement cannot say that the penalty of gross misconduct was out with the band of responses of a reasonable employer.

Gross Misconduct

The Claimant himself admitted that he been absent from work and would not return to work.

199. Given the Tribunal are satisfied that the instruction given to the Claimant was a reasonable management instruction it is satisfied the Respondent has proven on the balance of probabilities a fundamental breach of contract by the Claimant.

Contribution/Polkey reduction.

200. As the Tribunal has not found that any of the complaints of the Claimant are established is unnecessary for it to examine to what extent, if at all, the Claimant caused or contributed to his dismissal or a Polkey reduction was applicable.

Automatically unfair dismissal

201. It was common ground that the Respondent had no health and safety representatives or a health and safety committee.

202. It is conceded that the Claimant brought his concerns to the Respondent's attention by reasonable means.

203. Given the Respondent has satisfied the Tribunal that the reason or principle reason for dismissal was one of conduct and not health and safety the Claimant has not evidential burden to produce some evidence to show that there is a real issue as to whether or not the reason given is true the complaint must fail.

204. The Tribunal will now explain, briefly, how it reached this conclusion.

205. Section 100(c) cannot apply as it is aimed at the situation where the employee remains in work but due to raising a health and safety issue is then dismissed.

206. The Tribunal concluded that this case did not fall within section 100 (c) as the Claimant was not dismissed for bringing to the employer's attention his concerns as regards his workstation.

207. By the time the Claimant was dismissed he had left his workplace and had refused to return to his place of work. Thus, the only appropriate complaint available to the Claimant is under section 100(1)(d)

208. The Tribunal did not find the Claimant reasonably believed he was in serious and imminent danger or that he could not have been reasonably expected to avert the risk.

209. The Tribunal therefore concluded that the Claimant's only potential ground of claim was under section 100 (d).

210. However, the Tribunal is not satisfied that ground is made out. The Tribunal reached this decision because it was not satisfied that the Claimant reasonably believed the danger to himself was serious and imminent.

211. The Claimant knew from the DSE assessments that his workplace had been adjusted.

212. He had no cogent evidence that those assessments were flawed.

213. The Claimant could not reasonably believe he was in serious and imminent danger and that was why he refused to return to his place of work. The Tribunal is satisfied that from 13 December 2017 the Claimant decided not to return and was seeking a financial settlement having instructed solicitors. He effectively repeated a similar request when interviewed by Mr Swales on 17 January 2018 when he was offered a further DSE assessment if it was likely that it would result in the Claimant returning to work and the Claimant indicated the most likely scenario was, he wanted a settlement.

214. Further his workstation was configured in a manner very similar to that pre-September 2016 when the Claimant himself accepted it had not caused him any concerns.

215. On 08 March 2018 at the resumed disciplinary, even though the Claimant accepted that a desk and chair been provided which he regards a satisfactory, the Claimant would give no guarantee that he would return on the following Monday.

216. The Tribunal finds at the very latest, 08 March 2018 the Claimant knew there was no serious and imminent danger but still refused to attend work.

217. Further the Tribunal finds even prior 08 March 2018 it was perfectly reasonable for the Claimant to avert any alleged serious and imminently dangerous situation by simply swopping desks and chairs as spares existed. The Tribunal observes that in its judgement the Claimant could have done this with agreement from the Respondent far earlier.

218. The Tribunal was satisfied that by the effective date of termination even though the dismissing officer was prepared to further adjust the Claimant's workstation in accordance with his representations to Mr Fitch he still refused to return to work.

219. Thus, even on the Claimant's own case, the health and safety concern which he perceived he had as regards his work place had been addressed. He did not wish to work as he wanted a financial settlement. His reason therefore for not returning was to seek to negotiate a financial advantage not because there was any form of serious and imminent danger.

Detriment

220. It is conceded by the Respondent that the Claimant, at the earliest, on 05 July 2017 the Claimant raised a concern namely he complained about his workstation and raised that complaint in writing with his line manager, Mr Boon.

221. The Tribunal will turn to reasonable belief in due course but at this stage it is instructive to examine the alleged causal connection between the Claimant raising the concern and the pleaded detriments namely the Claimant not being paid as from 24 November 2017 and the commencement of disciplinary proceedings, which the Tribunal finds started on 21 February 2018.

222. The Respondent does not challenge that the two acts were capable of amounting to detriments if it acted in the manner that it did because of the complaint made on 05 July 2017.

223. The question is why did the Respondent act as it did?

224. Both the pleaded detriments arose after the Claimant left his place of work. At no time was the Claimant subjected to any detriment prior to leaving work. It follows

therefore that the Claimant cannot take advantage of section 44(1)(c) and the Claimant must therefore rely upon Section 44(1)(d)

225. The Tribunal is not satisfied that the Claimant objectively genuinely believed there was a serious and imminent danger.

226. The Tribunal reached this conclusion because before the alleged detriments three separate qualified officers had carried out DSEs, Mr Turner, Ms Hodgson and also the external experts BCS. The Claimant had not accepted in full any of those assessments. The Claimant was unqualified and produced no expert evidence, medical or otherwise, to undermine the recommendations made.

227. The Tribunal was further satisfied that the justification for the recommendations made appeared sound. Whilst the Respondent did not ignore the fact the Claimant had referred to generic HSE advice it was satisfied from the oral evidence given by Ms Hodgson as to why personalised assessments were appropriate in every case. The Tribunal further noted that there are two elements to a successful assessment, one the provisions of equipment and secondly the adoption of proper posture by the employee. The Claimant did not cooperate in respect of the latter evidenced by his failure to diarise his concerns as requested by Mr Turner to assist any supplemental DSEs and the speedy rejection by the Claimant of modifications without a reasonable trial period. The Tribunal was impressed by the evidence of Ms Hodgson that initially a workplace adjustment might be like a new pair of shoes in that the body is put into a different position which may cause some uncomfortableness but as the body becomes used to the correct positioning that eases. The Tribunal concluded the Claimant did not give a reasonable trial of the recommendations made by the experts such as to reasonably conclude he was in serious and imminent danger

228. The Claimant contended that his difficulties started when he moved from a curved to a straight desk. Given the Claimant moved back to a curved desk in October 2017 he could not reasonably believe, certainly from that date, that he was a serious and imminent risk of injury given that the Claimant had occupied a similar desk since the commencement of employment up until September 2016 without complaint.

229. The Claimant further gave minimal time to trial the curved desk in October, given between 16 and 20 of October he was on reduced hours and spent a minimal amount of time at his desk.

230. On 24 October 2017 the Claimant made no further complaints of discomfort other than he mentioned an issue with his telephone which had been resolved.

231. He was then was absent due to *"knee injury/anxiety".* As the Tribunal found there was no suggestion of any incident with the Claimant's knee at his desk and the Tribunal found it more likely it was a flareup of the ligament difficulties he encountered from an old snowboarding accident.

232. In the period from 05 July 2017 until the Claimant absented himself from work the Respondent took a number of steps in order to address the Claimant's concerns.

233. In particular an occupational health assessment was undertaken on 24 July 2017. The third DBA assessment was undertaken on 27 July 2070 and adjustments made.

234. On 10 August 2017 a welfare meeting took place and the Claimant was invited to submit any evidence of his chiropractor and was also offered help with his chiropractor's fees.

235. The Claimant returned to work on 16 October 2017 on reduced hours and on the same day the fourth DBA assessment was undertaken with modifications actioned.

236. Whilst the Claimant was absent on 25 October until 16 November 2017, he received contractual sick pay.

237. On 22 November 2017 the external report by BCS was undertaken.

238. In the interim the Claimant's grievance was considered, in the Tribunal's judgement in a reasonable manner and part of it was upheld but those elements relating to his workstation were not. He was granted an appeal and again the Tribunal finds there was a thorough investigation.

239. This was not an employer which did not treat the Claimant's concerns seriously.

240. In the circumstances it was not objectively reasonable for the Claimant to believe that he was in serious and imminent danger given the actions taken by the Respondent to support and investigate the Claimant's concerns.

241. The Tribunal takes the view that the Claimant must have an objectively reasonable belief, a subjective reasonable belief does not suffice, hence the reference to "reasonable" in the legislation and adopts by analogy the fact that in public interest disclosure claims belief must be objectively reasonable to satisfy section 43B ERA 96, see **Korashi -v- Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4.**

242. In reaching this conclusion the Tribunal has reminded itself that just because the Respondent may not agree that there was a danger is irrelevant. The issue is whether the Claimant had a reasonable objective belief of serious and imminent danger and the Tribunal determined that he did not.

243. Putting aside the issue of serious and imminent danger the Tribunal is not satisfied that the Claimant could not have been expected to avert the situation he complained of.

244. At all times the Claimant was at liberty to alter his desk or get another chair from those that were vacant.

245. The Tribunal noted this was exactly what the Claimant did on 08 March 2018 when he spoke to Mr Finch. The Tribunal is satisfied there was no impediment to the Claimant doing that at an earlier stage if he believed the DSE assessments were wrong.

246. However, the Claimant did not have a reasonable belief that the danger was imminent given the adjustments that have been made to his work station. If the Claimant had used the aids provided and did not slouch his working environment was perfectly safe.

247. The Tribunal noted the Claimant did not challenge the evidence of Mr Boon as to the posture he adopted including at times sitting with one leg under his bottom rather than both legs under his desk. Neither did he challenge the evidence of Ms Hodgson who commented unfavourably on the Claimant's posture contending that he slouched. The Tribunal also noted that in the Claimants long-term ill-

health meeting on 13 September 2017 the Claimant accepted he had a hunched posture.

248. Further the Tribunal was persuaded by the evidence that when a workplace adjustment is undertaken it can take the employee a few weeks to see the benefit. The Respondent's policy was to reassess a workstation after 2 to 4 weeks and there was no cogent evidence before the Tribunal that that time period was anything other than reasonable. The difficulty in this case was that the Claimant rejected adjustments almost immediately and therefore the benefits or otherwise could not be fully assessed.

249. The Claimant did not leave his place of work because her believed he was in serious and imminent danger but because he wished to negotiate a financial settlement with the Respondent.

250. In the circumstances it follows that the Claimant's complaint under section 44(1)(d) must be dismissed.

Conclusion

251. For the above reason the complaints of the Claimant must be dismissed

Employment Judge T R Smith

Date: 5th April 2019

Stress that serious and imminent is conjunctive in reasons.

For both section 44 and 100 there are a number of common concepts namely those of reasonable belief, serious and imminent, and circumstances of danger reasonably to be serious and imminent which the employee could not have been expected to avert.

The Tribunal relied upon the following additional reasons, in addition to those reasons in relation to the section 44 complaint.

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