EMPLOYMENT TRIBUNALS

Claimant: **Mr. S Sims**
Respondent: **Pektron Group Limited**

Heard at: **Nottingham**

On: **5th & 6th December 2022**
8th December 2022 – Judgment handed down electronically

Before: **Employment Judge Heap**
Members: **Mr. K Rose**
Ms. K McLeod

Representation
For the Claimant: **In person**
For the Respondent: **Mr. H Farmer - Counsel**

JUDGMENT

1. The complaint of unfair dismissal fails and is dismissed.

2. The complaint of discrimination arising from disability fails and is dismissed.

3. The Respondent did not fail to make reasonable adjustments for the Claimant and those complaints also fail and are dismissed.

REASONS

BACKGROUND &THE ISSUES

1. This is a claim brought by Mr. Steven Sims ("The Claimant") against his now former employer, Pektron Group Limited ("The Respondent"). The claim was discussed at a Preliminary hearing which took place on 29th June 2021. At that Preliminary hearing it was identified that the Claimant was advancing the following complaints:

   a. Unfair dismissal;
   b. Discrimination arising from disability; and
   c. A failure to make reasonable adjustments.

2. The Claimant relied on osteoarthritis as being a disability for the purposes of the discrimination complaints. The issue of disability was conceded by the Respondent in their ET3 Response and so that was not a live issue before us. The remaining issues in the claim were resisted by the Respondent.

3. It was identified at the Preliminary hearing that the issues in the claim appeared to be as follows:

    a. In respect of the unfair dismissal claim no issue was taken that the reason for the Claimant's dismissal was capability[1]. That was the potentially fair reason for dismissal relied on by the Respondent. However, he contends that the Respondent did not act fairly or reasonably in dismissing him for that reason. His position in that regard is threefold. Firstly, it was said that there were a number of sedentary posts that the Claimant could have been offered and which would not have proved problematic to him because of his osteoarthritis as his own role did. The Claimant identified at the hearing before us that the role that he was talking about in that regard was a production operative position, although he was not aware if there were any vacancies for such roles at the time of his dismissal.

       The second assertion was that it would have been reasonable for the Respondent to have waited for a further period of time so that he could have an operation which would have eased his condition. The Claimant told us at the hearing that he had that operation in November 2021.

       The third issue was that the recommendations of an occupational health report were not put into place in a timely fashion by the Respondent and instead he was asked for solutions as to what they could do to accommodate his condition. The Claimant was not able to say at the Preliminary hearing what recommendations were not put into place, but he confirmed at the hearing before us that it was all of the recommendations that the report contained.

    b. In respect of the discrimination arising from disability complaints it was identified that the act of unfavourable treatment was the Claimant's dismissal. The something arising from his disability was his continued ill health absence and the inability to undertake the full range of his duties as a cleaner. It is not in dispute that the Claimant was dismissed and that that was as a result of his inability to undertake his role as a cleaner. The Respondent relied, however, on a number of what they contended to be legitimate aims which were set out in their ET3 Response at paragraph 20 and which we deal with in our conclusions below.

[1] Although part of the case advanced by the Claimant at the hearing before us was that at least part of the reason for his dismissal was a refusal to change his hours of work.

c. Insofar as the complaint of a failure to make reasonable adjustments was concerned, they largely mirrored the three strands upon which the Claimant relied for the purposes of the unfair dismissal claim.

   The first complaint was identified as being in respect the provision of an alternative role. The PCP was identified as the requirement to attend work and undertake the full range of duties of a cleaner. It was said that that placed the Claimant at a substantial disadvantage because his osteoarthritis gave him mobility difficulties which meant that he could not undertake his role as a cleaner. The reasonable adjustment that the Claimant said should have been made is to allocate him a sedentary post.

   The second complaint is in respect of the additional time that the Claimant said the Respondent should have waited before dismissing him to allow him to have surgery. The exact PCP could not be identified because there was no copy of the Respondent's Managing Attendance Policy. As we shall come to, there is in fact not a proper policy in existence in that regard. It was said that that process placed the Claimant at a substantial disadvantage because his disability resulted in him having to take time off work and so placed him at risk of dismissal. The reasonable adjustment that the Claimant said should have been made was to delay progression of the attendance management process until he had had the opportunity to have and recover from surgery so that he could undertake his cleaning role.

   The third complaint related to the implementation of the occupational health recommendations. It was identified that the PCP again appeared to be the requirement to attend work and undertake the full range of duties of a cleaner. That again was said to have placed the Claimant at a substantial disadvantage because his osteoarthritis gave him mobility difficulties which meant that he could not do his job as a cleaner. The reasonable adjustment that the Claimant said should have been made is to implement the occupational health recommendations.

4. The Claimant was directed to set out if any part of the Orders did not correctly set out the complaints that he was advancing. Although he did not comply with that Order, the Claimant did not and has not suggested that any part of those recorded matters did not represent his claim.

<u>THE HEARING</u>

5. The claim was allocated 3 days of hearing time. We concluded the evidence and submission late morning on the second day of hearing time and conducted our deliberations thereafter. With the agreement of the parties we determined that rather than delivering a lengthy oral Judgment which might be difficult for the Claimant as a litigant in person to follow and fully digest why we had reached the decision that we had – particularly when he would be under pressure and stress of an unfamiliar process – that we would hand down our Judgment with full written reasons as they were likely to be required anyway. In view of that we confirmed that we would hand down the Judgment by email instead which would save both

parties the time and cost of attending the hearing. Both parties were in agreement with that proposal and we proceeded accordingly.

6. Given that the Claimant was acting as a litigant in person during the course of the hearing we adjourned at times when it was clear that he needed more time to properly consider the issues in the claim and to prepare cross examination questions and assisted him where appropriate in considering areas where he need to put questions to the Respondent's witnesses so as to ensure that all matters were covered. That included an adjournment in the mid-afternoon of the first day of the hearing to allow the Claimant time to prepare cross examination questions overnight for Angela Coupland who had taken the decision to dismiss him. The adjournment was helpfully not opposed by the Respondent.

7. Although we do not rehearse here all that we have seen and heard during the course of the hearing the parties can be assured that we have taken into account all that they have told us both in evidence and submissions before reaching a conclusion in respect of the claim before us.

WITNESSES

8. During the course of the hearing, we heard evidence from the Claimant on his own account.

9. On behalf of the Respondent, we heard from the following witnesses:

    a. Jane Keighron – the Human Resources ("HR") Manager with the Respondent who supported Ms. Coupland in her interactions with the Claimant and the decision to dismiss him; and

    b. Angela Coupland – a Production Manager for the Respondent who made the decision to dismiss the Claimant.

10. In addition to the witnesses from whom we have heard we have paid careful reference to the documentation within the hearing bundle before us and to the submissions received both from the Claimant and from Mr. Farmer on behalf of the Respondent. If we fail to mention something in this Judgment that does not mean that we have not considered it as the parties can be assured that we have taken into account everything that we have been told when reaching our decision.

THE LAW

11. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be.

Unfair dismissal

12. Section 94 Employment Rights Act 1996 ("ERA 1996") creates the right not to be unfairly dismissed.

13. Section 98 deals with the general provisions with regard to fairness and provides that one of the potentially fair reasons for dismissing an employee is on the grounds of that employee's capability to do the work for which they are employed.

14. If it is disputed then the burden is upon the employer to satisfy the Tribunal on that question and they must be satisfied that the reason advanced by the employer for dismissal is the reason asserted by them; that it is a potentially fair reason for dismissal falling under either Section 98(1) or 98(2) ERA 1996 and, further, that it was capable of justifying the dismissal of the employee. A reason for dismissal is to be viewed in the context of the set of facts known to the employer or the beliefs held by him, which cause him to dismiss the employee (see **Abernethy v Mott, Hay & Anderson 1974 ICR 323, CA**).

15. It is therefore for the employer to satisfy the Tribunal as to the reason for dismissal. If they are not able to do so, then a finding of unfair dismissal will follow.

16. If an Employment Tribunal is satisfied that there was a potentially fair reason for dismissal and that that is the reason advanced by the employer, then it will go on to consider whether the employer acted fairly and reasonably in treating that reason as a sufficient reason to dismiss.

17. The all-important question of fairness is contained with Section 98(4) ERA 1996 which provides as follows:

> *"(4) Where the employer has fulfilled the requirements of subsection (1),* (in this case that they have shown that the reason for dismissal was redundancy) *the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and 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."*

18. The burden is no longer upon the employer alone to establish that the requirements of Section 98(4) are fulfilled in respect of the dismissal. That is now a neutral burden.

19. In a dismissal for capability reasons arising from ill health a Tribunal will need to consider whether the employer:

    a. Consulted with the employee concerned about their health, absence and prognosis;

    b. Undertook a proper medical investigation so as to establish the nature of the illness and its prognosis;

c. Gave consideration to other options such as redeployment, adjustments to working arrangements or ill health retirement where the employee was incapable of continuing in their current position; and

d. Undertook a process that was procedurally fair. That will include considering any relevant policies – such as a Sickness Absence Management Policy - operated by the employer.

20. In cases where an employee contends that the employer should have delayed dismissing them the question for the tribunal to address is whether or not, in the circumstances of that particular case, a reasonable employer would have waited longer before dismissing the employee (see **McAdie v RBS [2007] EWCA Civ 806** and **BS v Dundee City Council [2014] IRLR 131**).

21. The issue of whether a dismissal is unfair or not is determined by reference to the question of whether that dismissal was within the range of reasonable responses open to a reasonable employer. The question is not whether every employer would have dismissed in the circumstances but whether no reasonable employer would have done as this employer did.

22. A Tribunal may disagree with a decision taken by an employer to dismiss an employee and have taken a different course if it had been in their shoes but that will not necessarily mean that the decision was unfair, and the Tribunal is not entitled to substitute its view for that of the employer. The dismissal will only be said to be unfair when it can properly be said that the decision to dismiss the particular employee in the particular circumstances of the case was one which was outside the range of reasonable responses.

Discrimination complaints

23. The complaints brought by the Claimant are of discrimination arising from disability and a failure to make reasonable adjustments. The relevant statutory provisions dealing with those complaints are contained within Sections 15, 20, 21 and 39 Equality Act 2010 (EqA 2010).

24. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

25. Section 39 EqA 2010 provides for protection from discrimination in the work arena and provides as follows:

(1) An employer (A) must not discriminate against a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(2)An employer (A) must not discriminate against an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(3)An employer (A) must not victimise a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(4)An employer (A) must not victimise an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(5)A duty to make reasonable adjustments applies to an employer.

(6)Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—

(a)unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or

(b)if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.

(7)In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a)by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b)by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8)Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.

Discrimination arising from Disability

26. Section 15 EqA deals with the question of discrimination arising from disability and provides as follows:

> *"(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."*

27. There is no requirement in a Section 15 complaint for there to be identification of a comparator. All that is required is that the Claimant is able to show unfavourable treatment, in that regard some detriment, and further that there are facts from which it can be established that that unfavourable treatment was in consequence of something arising from disability. The Code assists in the interpretation of the term "unfavourable" treatment and provides that it requires the employee to have been "put at a disadvantage" (paragraph 5.7 of The Code).

28. It is not sufficient, however, to simply show that a person is disabled and receives unfavourable treatment, that unfavourable treatment must be in consequence of something arising from the disability.

29. Equally, the unfavourable treatment in question is not the disability itself but must arise in consequence of the employee's disability – such as disability related sickness absence. This means that there must be a connection between whatever led to the unfavourable treatment and the disability (paragraph 5.8 of The Code) and which can be referred to as the "causation" question.

30. The Employment Appeal Tribunal provided a useful analysis with regard to the causation question in the context of a Section 15 EqA 2010 claim in **Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305**. **Weerasinghe** sets out a two-stage approach and that, firstly, there must be something arising in consequence of the disability and secondly, the unfavourable treatment must be "because of" that "something".

31. The test to be applied is not the same as for an unfair dismissal claim and with regard to a complaint relating to Section 15 EqA a Tribunal is required to carry out an objective assessment and reach its own conclusion, having undertaken a critical evaluation, through which it must balance the discriminatory effect of the act complained of with the organisational needs and requirements of the employer.

Failure to make reasonable adjustments

32. Section 20 EqA 2010 provides that:

> *"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.*
>
> *(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.*
>
> *(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.*
>
> *(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.*
>
> *(9)In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—*
>
> *(a)removing the physical feature in question,*

(b)altering it, or

(c)providing a reasonable means of avoiding it.

(10)A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a)a feature arising from the design or construction of a building,

(b)a feature of an approach to, exit from or access to a building,

(c)a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d)any other physical element or quality.

(11)A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12)A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13)The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

33. Section 21 provides that:

"A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

34. It will therefore amount to discrimination for an employer to fail to comply with a duty to make reasonable adjustments imposed upon them in relation to that disabled person (paragraph 6.4 of The Code).

35. However, the duty to make reasonable adjustments will only arise where a disabled person is placed at a substantial disadvantage by:

    - An employee's provision, criterion or practice ("PCP").
    - A physical feature of the employer's premises.
    - An employer's failure to provide an auxiliary aid.

36. Where the claim relates to a PCP, this "should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions" imposed by the employer (paragraph 6.10 of The Code).

37. Matters resulting from ineptitude or oversight on the part of the employer will not, however, amount to a PCP (see ***Newcastle Upon Tyne Hospitals NHS Foundation Trust v Bagley UK EAT 0417/11***).

38. The duty to make reasonable adjustments only arises insofar as an employer is required to take such steps *as it is reasonable to take* (our emphasis) in order to avoid the substantial disadvantage to the disabled person. A Tribunal is required to take into account matters such as whether the adjustment would have ameliorated the disabled person's disadvantage, the cost of the adjustment in the light of the employer's financial resources, and the disruption that the adjustment would have had on the employer's activities.

FINDINGS OF FACT

39. We ask the parties to note that we have only made findings of fact where those are required for the proper determination of the issues in this claim. We have therefore invariably not made findings in respect of each and every area where the parties are in dispute with each other on the evidence.

The Claimant's employment with the Respondent

40. The Respondent is an electronics manufacturer employing approximately 350 people and is based in Derby. We understand that the premises are made up of five sites or units with employees either being based in production (including operatives and management), HR or the cleaning of the commercial premises.

41. The Claimant was employed by the Respondent as a cleaner having commenced employment on 22nd January 2007. He was dismissed by the Respondent, in circumstances which we shall come to below, with effect from 12th March 2021. As at the date of termination of employment he therefore had just over 14 years service with the Respondent.

42. The shifts that the Claimant normally undertook were of a four-hour duration between 2.25 p.m. and 4.45 p.m. each day over a five day working week. The Claimant does not drive and was reliant on public transport to get to work.

43. The normal duties that cleaners with the Respondent were required to undertake cover multiple floors in different buildings within the site and were as follows:

    a. Cleaning the offices and production areas, toilets, canteens, corridors and general areas;
    b. Hoovering;
    c. Using a buffer on the floors;
    d. Emptying the waste and recycling bins and taking them to the compactor; and
    e. Sweeping and mopping the floors.

Ill health absence

44. It is common ground that the Claimant suffers from osteoarthritis and that that has caused him to take time off sick from his employment with the Respondent. As we understand it, the Claimant did not have much time off sick during the first ten years of his employment with the Respondent and the real issue was within the final four years and the latter stages particularly.

45. The Claimant was absent on sick leave because of osteoarthritis between 8th May 2018 and 26th July 2018. He was then again absent from 3rd September to 30th November 2018 (see page 66 of the hearing bundle) and again from 9th September to 6th November 2019. On 25th April 2020 he was placed along with the other cleaners on furlough as a result of the Covid-19 pandemic. The Claimant's period of furlough ended on 19th September 2020 and thereafter he again commenced a period of sickness absence. He returned to work on or around 26th October 2020 but had a further period of absence of two weeks as a result of having to self-isolate.

46. Unfortunately, after his return to work from self-isolation, the Claimant again had to take a period of sick leave on account of osteoarthritis from 30th November 2020. He returned to work on 1st March 2021. It does not appear to be disputed by the Claimant that in the last two years of his employment with the Respondent he had five periods of absence on account of his osteoarthritis totalling some 129 days. That was in addition to the period that he spent on furlough.

47. We accept that at the times that the Claimant was at work he was asked what he was able to undertake, and the Respondent let him take the lead on that at all times. Particularly, following discussion with Ms. Coupland his work was limited at his request to the ground floor of one of the sites which he felt would be more suitable for him and which avoided him having to use the stairs.

Capability policy

48. We raised at the outset with Mr. Farmer why we did not appear to have a copy of the Respondent's managing attendance or capability policy. We were told that this was part of the staff handbook and it appeared at pages 63 and 64. The relevant part of the handbook took up approximately half a page of text. It is surprising that it appears geared only towards what is termed performance, incompetence or unsuitability. It says nothing as to capability or how attendance issues – whether short or long term – should be dealt with.

49. We find that somewhat astonishing for a Respondent employing over 350 people and with a dedicated HR function. It leaves those managers such as Ms. Coupland who have to deal with absence issues short on guidance as to how to proceed and runs the real risk of things not being dealt with as they should be and, as we say, for a relatively large employer it is difficult to understand why they have not turned their mind to the need for such a process to deal with such matters previously.

Meeting with the Claimant – November 2018

50. On 30th October 2018 Ms. Coupland wrote to the Claimant inviting him to a meeting to discuss his absence and explore ways in which he could be supported in a return to work. Ms. Coupland attended at the Claimant's home for that meeting on 3rd November 2018. She had recently taken over responsibility for production and the cleaning team and therefore took the opportunity to meet with the Claimant to introduce herself and understand the reasons for his absence and anything that he needed from the Respondent.

51. We accept that the notes of the meeting which appears at pages 42 and 43 of the hearing bundle are an accurate record of what was said. During the meeting Ms. Coupland asked the Claimant more than once what the Respondent could do to assist him in a return to work. Whilst the Claimant is critical that the emphasis was put on him to suggest what could be done in that regard, we accept that Ms. Coupland was simply giving the Claimant what she termed as a blank cavass to say what it was that he needed because he knew his condition, the work that he was required to perform and what he could manage and was therefore best placed to say what was required. The Claimant accepted in his evidence that he did indeed know his condition and working environment the best.

52. On both occasions when the Claimant was asked if there was anything that the Respondent could do to assist in a return to work, he said that he did not think that there was anything that could be done. He also commented that simply getting to work would be a challenge.

53. A further meeting was arranged during an additional spell of ill health absence and that took place between the Claimant and Ms. Coupland on 23rd September 2019 although for reasons which are unexplained, we do not have any notes of that particular meeting. However, following that meeting Ms. Coupland wrote to the Claimant seeking permission to obtain a report from his General Practitioner ("GP") (see pages 45 and 46 of the hearing bundle).

General practitioners report and referral to Occupational Health

54. As set out above the Respondent had requested a report from the Claimant's GP regarding his condition. The Claimant consented to that report being provided and it was sent to the Respondent shortly after the request was made. That report was dated 21st October 2019. It set out that the Claimant was not fit for work at that time because of osteoarthritis and that he was not fit to return to his role as a cleaner. The Claimant's GP indicated that it was hoped that his symptoms would improve with steroid injections, but this was not guaranteed. In fact, the steroid injections ceased

to have any positive effects only a few months later. The report suggested a referral to an occupational health provider for further detail.

55. The Respondent did not arrange a referral to occupational health until November 2020. Whilst the Claimant contends, not unreasonably, that this should have been arranged much earlier nothing ultimately turns on this because the Claimant was not at work at all during the period between receipt of the GP report and his return to work on 26th October, shortly before the referral to occupational health nor can it reasonably be suggested that he would have been able to return to work sooner had the referral been arranged more expediently and nor does that form part of his pleaded case.

56. The Claimant was in fact only at work for one week on that occasion before he was then absent for a further two weeks as a result of having to self-isolate.

57. The Claimant objected to the content of the occupational health referral and he emailed Ms. Keighron about that. He contends that the fact that it was amended in accordance with his wishes evidences that the Respondent had not amended the duties that he was required to perform. However, again nothing ultimately turns on that because it does not form part of the Claimant's pleaded case as to a failure to make reasonable adjustments and the amended referral which he agreed still set out that he had been moved to work on aground floor level only within a specific part of the site.

58. The Claimant attended an occupational health assessment on 15th December 2020 and a report was subsequently sent to the Respondent. The report made a number of recommendations, many of which were directed to the Claimant himself to undertake outside of work and to allow him to seek to manage his condition and make progress towards recovery.

59. However, the report made some additional recommendations to the Respondent regarding managing the Claimant in a return to work once he was able to do so. At that stage the Claimant was still off sick. The report set out the following in regard to the Respondent:

    a. That the Claimant may benefit from a 6 to 8 week phased return to work of either phased hours combined with modified or lighter duties if available and for those to be reviewed depending upon how he fared with his symptoms;

    b. That if his symptoms persisted then he may benefit from an on-site workplace assessment; and

    c. If following the advice given and any orthopaedic intervention failed then he may require a further assessment to consider whether he could continue in his role.

60. The report set out that any improvement to the Claimant's condition would take months rather than weeks to achieve anything of significance and that whilst there may be some improvement if he was to follow the advice given then there might be some improvement but that could not be guaranteed. The report also set out that the

Claimant was under the treatment of an orthopaedic consultant but that as a result of the Covid-19 pandemic that may take time to access. Indeed, as we have already set out above the Claimant was unable to have the operation that was required until November 2021.

61. The report also indicated that the Claimant intended to return to work on 4th January 2021 carrying out his normal duties although, as we shall come to below, he did not in fact return until 4th March 2021 and only at that time on very much lighter duties to those which a cleaner normally performed.

Formal meeting with the Claimant – February 2021

62. In the meantime, Ms. Coupland had arranged for a further meeting with the Claimant to discuss his by then long-term sickness absence. She wrote to the Claimant in that regard on 2nd February 2021 following receipt of a further Fit Note signing him off as being unfit for work until 26th February 2021.

63. The letter set out that the purpose of the meeting was to discuss whether there had been any change to his condition, the recommendations set out in the occupational health report and other options that may be available such as redeployment (see page 49 of the hearing bundle). A copy of the occupational health report was enclosed along with the Claimant's absence record and a copy of the Company Handbook which enclosed what has been referred to as the Respondent's capability policy to which we have already referred above.

64. The letter also set out that one outcome of the meeting might be to issue a final written warning or dismissal (see page 50 of the hearing bundle).

65. The meeting took place on 10th February 2021. We accept that the notes of the meeting which appear in the hearing bundle at pages 51 to 53 are an accurate record of what was said. Ms. Coupland asked the Claimant if there had been any improvement in his condition and he said that there had not and that nothing had changed. He referred to his operation having been cancelled as a result of the pandemic. That was a matter which was already known to the Respondent prior to the meeting being arranged because the Claimant had emailed Ms. Keighron of HR about it.

66. Ms. Coupland discussed with the Claimant the recommendations in the occupational health report and whether changing his hours to start work later would assist him. The Claimant said that he was unable to do that because he was reliant on getting the bus to work and that later buses ran less frequently.

67. Again, Ms. Coupland gave the Claimant a blank cavass as to what he needed to be able to return to work and asked him a number of questions as to what he thought would enable him to manage. The Claimant requested to just undertake cleaning on a particular site, site C, on the ground floor which was agreed to by Ms. Coupland.

68. Lighter duties were discussed and it was agreed that the Claimant would only undertake a light range of duties which were dusting, emptying the bins and taking the recycling to the compactor. The Claimant indicated that he could manage the latter

task although, as we shall come to below, that was removed from him by his supervisor shortly after his return to work because he was not able to undertake it without being in pain.

69. Ms. Coupland indicated that she would have regular meetings with the Claimant but that he must inform her if he started to struggle with the work that he was undertaking. It was agreed that the Claimant would return to work on a phased return in accordance with the recommendations of the occupational health report. The Claimant was to return on a four day week rather than his usual five day week. He did not want to reduce his hours or working week any further because it was not financially viable for him.

70. We do not accept that the Claimant was pushed to change his hours to later hours which some of the other cleaners undertook. Whilst we accept that later hours fitted in more with the Respondent's requirements it is clear that Ms. Coupland was enquiring whether a change of hours might better suit the Claimant because of his condition. We are satisfied that the Claimant's hours of work had nothing at all to do with the decision to dismiss him as he contends and he remained working the shift pattern that he had always worked.

71. The Claimant indicated that he would return to work when his then current Fit Note ran out at the beginning of March 2021 and he referred to taking redundancy if that was on offer. As we shall come to below, that was raised again by the Claimant at a later stage.

72. Matters were left that Ms. Coupland would see how the Claimant got on and that she must be told if he was struggling.

73. Although the discussion of alternative employment was not discussed at the meeting, we accept the evidence of Ms. Coupland that it had been discussed with the Claimant on other occasions. We also accept that the Claimant had never expressed any interest in any other roles and, particularly, that he had not made any references to redeployment to a production operative role.

74. We are also satisfied that Ms. Coupland did turn her mind to whether the Claimant could undertake any other roles before she made a later decision to terminate his employment. However, she determined that a role as a production operative would not be suitable as an alternative. We accept the evidence of the Respondent that whilst some of the work of a production operative could be undertaken whilst seated that could not be guaranteed. If the production demanded it, the operatives could have had to undertake work standing for their entire shift which was twice as long as the one that the Claimant had previously been undertaking and it also involved walking around which aggravated his condition. There was no guarantee that on any given day or days there would be work available on the production line which would allow the Claimant to remain seated at all times or even for any time at all. We accept that if the Claimant could not do the cleaning role on reduced days and light duties then he would not have coped with the demands of the production operative role and particularly not working full time hours.

75. The Claimant is critical of the fact that there was a delay before the occupational health report was discussed with him. Whilst factually that is accurate we are satisfied that the reason for that was that the Claimant was not fit for work and remained absent throughout the relevant period. It was not a case that there were adjustments that needed to be put in place before the Claimant was able to return to work, such as the provision of equipment or other facilities, and there is nothing at all to suggest that he would have been in a position to return sooner had there been an earlier meeting. Indeed, as we shall come to below even when the Claimant did return to work he was unable to sustain his attendance for more than two days.

Return to work in March 2021

76. The Claimant returned to work on 1st March 2021. At that time as agreed with Ms. Coupland at the February meeting he was only undertaking light duties namely dusting, emptying the bins and taking the recycling to the compactor. However, that latter task was removed from the Claimant's duties by his supervisor because the Claimant was struggling to undertake it and was in pain due to the distance that he had to walk to the compactor.

77. Despite the fact that the Claimant was then only undertaking dusting and emptying the bins he was unable to cope because of his osteoarthritis and he informed his supervisor of the difficulties that he was having. That came only two days after the Claimant had returned to work.

78. The Claimant and his supervisor went to see Ms. Coupland on 3rd March 2021. The Claimant told her that he was in agony and that his condition was not going to get better any time soon. It was discussed that his operation had again been cancelled because of the pandemic and that as a result he was not sure when he would be able to have that surgery.

79. We accept that at this meeting the Claimant asked if he could be made redundant. Ms. Coupland indicated that that was not a possibility and said that the Claimant did not have to struggle on and could hand in his notice. We accept that that was said out of concern for the Claimant and that he was not told or pressed to resign. We also accept that the Claimant said that he could not afford to resign because of his benefits and it was agreed that there would be a further discussion with Ms. Keighron of HR who had been assisting Ms. Coupland with the process.

80. The Claimant and Ms. Coupland then met with Ms. Keighron the same day.

81. We accept that at that meeting the Claimant indicated that he wanted to leave employment with the Respondent and suggested that they "finish" him. He also agreed that there was nothing more that was able to be done to allow him to remain in employment. That also included a discussion about there not being any alternative roles which would suit him and the Claimant made no reference to production operative positions at that or any other time. Whilst the Claimant denies that he said that he wanted to leave and that that was inconsistent with him later producing a Fit Note, we prefer the evidence of the Respondent on this point. The Claimant indicating a wish to leave is consistent with the fact that he requested that the Respondent make

him redundant both at the meeting with Ms. Coupland and during a later conversation with Ms. Keighron.

82. In this regard the Claimant telephoned Ms. Keighron the day after the meeting and asked if he could be made redundant. It was explained to him that that was not a possibility because there was a lot of work for cleaners to do, indeed we understand that the Respondent was in fact recruiting cleaners at that time. As such, there was no redundancy situation. The Claimant also asked if he could be furloughed again because the scheme had at that time been extended to September 2021. That too was refused.

83. On the same day Ms. Coupland wrote to the Claimant terminating his employment. The letter recorded that the Claimant had been struggling to undertake his role after only two days of his return to work, that it had been agreed that all recommendation and adjustments had been put into place, that he was not physically able to carry out his duties either now or in the foreseeable future and that any possible improvement was likely to take many months because of the delay in his operation and the pandemic. Ms. Coupland also noted that as had previously been advised one outcome could be the termination of his employment and the return to work had failed after only two days. She therefore advised the Claimant of her decision to terminate his employment on notice. The Claimant was not required to work his notice period but was given a payment in lieu of notice.

84. The Claimant was advised of his right of appeal and how to exercise that. It is common ground that the Claimant did not appeal against his dismissal. We consider it more likely than not that he would have done so or written to Ms. Coupland or Ms. Keighron to address any inaccuracies with what was recorded in the letter (as he had done with the occupational health referral previously) or to raise the possibility of a production operative role if that had not been discussed previously and he considered that it was a viable option.

85. Whilst we are satisfied that it did not affect the fairness of the dismissal because of what had been said at the final meeting by the Claimant as to "being finished" and the Respondent seeking to do what they considered was best for him in that regard, we are of the very strong view as a Tribunal that it would have been much better practice to have had a final meeting with the Claimant to tie everything off. That was particularly the case given that the Respondent had left matters that they would consider "letting him go" and there was no certainty on that, the Claimant appeared to think that redundancy was an option and had confused that with termination where he could not do his job anymore and he had by that stage submitted a further Fit Note and was therefore no doubt expecting to take a further period of sickness absence. Simply sending the Claimant a letter terminating his employment was a significant mistake in our view and particularly given his length of service it would have been much better practice to have arranged a final meeting to confirm that as the Claimant could not undertake his existing role and there were no other viable options dismissal was the only way forward. Had that taken place, perhaps these proceedings could have been avoided because we accept that the Claimant was not expecting the dismissal letter and it would have come as a shock to him.

86. The Claimant later entered into early conciliation via ACAS and issued the proceedings which are now before us for determination.

CONCLUSIONS

87. Insofar as we have not already done so, we now turn to our conclusions in respect of the complaints that we are required to decide.

88. We begin with the complaint of unfair dismissal. Given that the Claimant now says that, at least in part, the reason for his dismissal was a refusal to change his hours we need to deal with the question of whether there was a potentially fair reason for dismissal and if so, what that reason was. We are entirely satisfied that the Claimant was not, for the reasons that we have given above, pressed to change his hours and that the hours that he worked had nothing at all to do with the termination of his employment. It is clear and the Respondent has satisfied us on the point that the reason operating in the mind of Ms. Coupland was the Claimant's capability to undertake his role because of his ill health. There was therefore a potentially fair reason for the Claimant's dismissal on account of capability.

89. We turn then to the question of whether the Respondent acted fairly and reasonably in treating capability as a sufficient reason to dismiss. The Claimant identified three issues at the Preliminary hearing as to why he says that his dismissal was unfair. The first of those is not being offered a sedentary post. He identified those posts at the hearing before us as being a post of a production operative.

90. We find it surprising that we had no vacancy list in the documentation before us and expressed that at the outset of the hearing. Nothing could apparently now be provided from the time that the Claimant's employment terminated and Ms. Coupland was unable to recall if there were any production operative posts available during the relevant period. That is an important issue before of course the Respondent would not be obliged to create a position that did not exist for the Claimant and they were alive to the sedentary post point from the early Preliminary hearing. However, we have proceeded on the assumption that there was such a post or posts available.

91. We are satisfied that some discussion, albeit informally, was had about alternative employment and the Claimant did not raise at any stage that he considered redeployment to a production operative post was something that he would be interested in. In all events, even if the Claimant had been interested in such a post it is clear that given the nature of the work which involved significantly longer hours and could not be guaranteed at any stage to be a purely sedentary role, that he would not have been able to carry it out. It involved walking and standing for long periods, sometimes the entire length of the shift, and the Claimant would no more have been able to do that than he was to do the cleaning role. Indeed, it appears that it would have been a worse option. The Respondent considered it but dismissed it as being suitable and given the circumstances that was not outside the band of reasonable responses.

92. The second strand to the claim is that it is said that the Respondent should have delayed dismissing the Claimant until he had had his operation. We are satisfied that it did not fall outside the band of reasonable responses to have dismissed the Claimant

without waiting for the outcome of his operation and recovery time. The Claimant had no date for surgery to take place, it had already been cancelled once because of the effects of the pandemic and it was impossible to identify a timeframe when it might take place. That was not least because of the pressures on the NHS as a result of the Covid-19 pandemic and the routine cancellations of surgeries. The question is whether a reasonable employer would in these circumstances have delayed and for the reasons that we have given we do not conclude that it was unreasonable to have proceeded at this stage rather than await some unidentified point in the future which could – and indeed was as it transpired – many months on.

93. The final point made by the Claimant is that recommendations of an occupational health report were not put into place in a timely fashion by the Respondent and instead he was asked for solutions as to what they could do to accommodate his condition. We find it perfectly understandable why the Respondent let the Claimant take the lead as to what he needed to accommodate his disability because he was best placed to know what he needed and what limitations on the cleaning role resulted. He knew of course the cleaning role requirements in detail and was best placed to understand what he would and would not be able to do.

94. As to the occupational health recommendations, those had been as to a phased return to work and on reduced duties both of which were implemented by the Respondent when the Claimant indicated that he was able to return to work. Any other recommendations related only to review of the phased return and reduced duties but matters never got that far because only two days in the Claimant was unable to cope with the demands of the role, albeit through no fault of his own, even with significant adjustments.

95. Whilst the Claimant is critical that the occupational health report recommendations were not put in place sooner, that is answered quite easily by the fact that he was not at work and there was nothing that could be put in place until he had indicated that he was returning. The adjustments were implemented on the day of his return.

96. In addition to those matters which we have dealt with above which we identified by the Claimant at the Preliminary hearing he also now says that he should have been made redundant or placed on furlough as an alternative to dismissal by reason of capability. We can deal with those in short order given that there was no redundancy situation and so had the Respondent dismissed by reason of redundancy that clearly would have been unfair.

97. As to the issue of placing the Claimant on furlough, that would clearly have been inappropriate given that the purpose of the relevant scheme was to assist with employment costs so as to avoid redundancies during the pandemic. That was not an issue that affected the Claimant and so it would have been an unsuitable use of the scheme to have effectively topped up sick pay during a further period of ill health absence. We are unsurprised that the Respondent therefore rejected that proposal.

98. Whilst we are critical of the Respondent for not having a final meeting in order to tie everything off for the reasons that we have already given, we are satisfied that that did not affect the fairness of the dismissal. Given the circumstances that we have set out above and what was said at the meeting on 3rd March 2021, it was not outside the

band of reasonable responses for the Respondent not to have held that meeting although clearly it would have been much better practice to have done so and the Claimant was deserving of the courtesy of such a meeting given his lengthy service.

99. However, looking at the position as it was, we are satisfied that the Respondent consulted with the Claimant about his health, absence and prognosis. That included a number of informal meetings and discussions and the meetings of 10th February 2021 and 3rd March 2021. At the latter particularly the Claimant agreed that he was unable to undertake his cleaning role and nothing was able to be identified that would alter that position within a reasonable period of time nor was there anything else that could be adjusted or alternative employment offered that the Claimant would have been able to undertake.

100. We are also satisfied that the Respondent undertook a proper medical investigation so as to establish the nature of the illness and its prognosis. They obtained information from the Claimant's GP, obtained an occupational health report and equally importantly discussed the matter in detail with the Claimant himself.

101. We are also satisfied that the Respondent gave consideration to other options and that they discussed with the Claimant and thought through the possibility of redeployment but that there was nothing available that the Claimant would have been physically able to do and that they had made all reasonable adjustments that had been recommended and implemented everything that the Claimant had suggested might assist.

102. Finally, although Ms. Coupland was clearly not assisted by anything approaching a satisfactory managing attendance or capability policy we are nevertheless satisfied that the dismissal was procedurally fair. There were meetings and consultation with the Claimant, no key facts were in dispute and he was given an outcome letter and offered a right of appeal. Whilst we remain very critical of the decision not to call the Claimant to a final meeting before the dismissal letter was sent, for the reasons that we have already given we are satisfied that this did not render the dismissal unfair.

103. We should say that had we found the dismissal to have been unfair then we would have found that **Polkey** applied and that there was a 100% chance that the Claimant would have been fairly dismissed had a fair procedure been followed. That is because it is not disputed that the Claimant could not undertake his role as a cleaner, there were no further adjustments that could be made to allow him to do so and no other roles that could have been offered to him that he would have been able to undertake. His dismissal in that regard was therefore inevitable.

104. For all of those reasons the unfair dismissal claim fails and is dismissed.

105. We turn then to the complaint of discrimination arising from disability. There can be no reasonable suggestion that dismissing the Claimant was not an act of unfavourable treatment. It is also plain that the reason for the dismissal was something arising from the Claimant's disability because it stemmed from his long term sickness absence and inability to undertake his role as a cleaner. Both of those things were because of his disability.

106. The real question is whether the Respondent has satisfied us that the dismissal of the Claimant was a proportionate means of achieving a legitimate aim. The legitimate aims relied on by the Respondent are the need to perform the cleaning role and that that could not be absorbed by other members of the team. We are satisfied that the impact on the Respondent with regard to the need to perform the cleaning functions and the impact on the business and the other members of the team were legitimate aims. The question is then whether dismissing the Claimant was a proportionate way of achieving those aims. That involves considering if there was a less discriminatory way of dealing with those aims.

107. Ultimately, we are satisfied that dismissal was a proportionate way to proceed. There was no certainty that the Claimant would be able to return to his cleaning role and certainly not within a reasonable period of time. Indeed, the Claimant has not been able to work even with the benefit of having had surgery and is now no longer required to actively search for work. All other alternatives and adjustments had been explored and implemented but that had not resulted in the Claimant being able to render effective service. Indeed, he was only able to work for two days on very substantially reduced duties before his condition meant that he could not continue without significant discomfort.

108. For all of those reasons the dismissal of the Claimant was a proportionate means of achieving a legitimate aim and the claim of discrimination arising from disability fails and is dismissed.

109. We turn then to the complaint of a failure to make reasonable adjustments. The first complaint in this regard relates to the provision of an alternative role. The PCP was identified as the requirement to attend work and undertake the full range of duties of a cleaner. It was said that that placed the Claimant at a substantial disadvantage because his osteoarthritis gave him mobility difficulties which meant that he could not undertake his role as a cleaner. The reasonable adjustment that the Claimant said should have been made is to allocate him a sedentary post – i.e. a production operative role.

110. We are satisfied that the Respondent clearly applied that PCP to the Claimant and that it placed him at a substantial disadvantage because of his mobility difficulties and the pain that it caused him to undertake cleaning tasks. However, it would not have been a reasonable adjustment to allocate the Claimant a production operative role because that would not have alleviated the substantial disadvantage. That role could not be guaranteed to be wholly sedentary and would require standing and walking, both of which caused the Claimant difficulty and discomfort. There were no wholly sedentary roles which could have been offered to the Claimant and so the Respondent did not fail to make reasonable adjustments. Indeed, the Respondent took steps to make adjustments to the Claimant's existing role such as limiting the amount of tasks that he was required to do and his days of work. The Respondent was therefore not in breach of the duty to make reasonable adjustments in respect of this part of the claim and it accordingly fails and is dismissed.

111. The second complaint is in respect of the additional time that the Claimant contends that the Respondent should have waited before dismissing him to allow him to have surgery. We were unable to identify a PCP relating to a managing attendance policy

or capability policy because what was said to be that particular policy did not have anything to do with absence or capability to perform work because of ill health or disability. However, assuming that there was some identifiable PCP or applying the PCP of being required to undertake the full range of duties of a cleaner and attend work we have considered if delaying a decision as to whether to dismiss until the Claimant had had surgery would have amounted to a reasonable adjustment.

112. We are satisfied that it would not have been because it would not have had any prospect of ameliorating the substantial disadvantage identified. That is because even having had the surgery the Claimant has not been able to return to any form of work and there was no prospect of him being able to return to work as a cleaner. Moreover, the adjustment needs to be *reasonable* and it would not have been reasonable to delay a decision which was impacting the Respondent's cleaning operations during a pandemic and which could not be absorbed by other staff to an unspecified point in time to determine if the Claimant might then be able to return to his role. Again, the Respondent was therefore not in breach of the duty to make reasonable adjustments and this part of the claim also fails and is dismissed.

113. The final complaint of a failure to make reasonable adjustments is in respect of a failure to implement the recommendations which were made by occupational health following their assessment of the Claimant. The Claimant did not indicate that he is relying on any PCP other than that identified at the Preliminary hearing which is again the requirement to attend work and undertake the full range of duties of a cleaner. For the reasons that we have already given we accept that the Respondent applied that PCP and that it placed the Claimant at a substantial disadvantage.

114. Whilst the duty to make reasonable adjustments was therefore engaged, we are satisfied that it was not breached because the Respondent did in fact implement the recommendations made. In this regard the Respondent put in place a phased return to work for the Claimant and placed him on light duties. The remaining recommendations were either things that the Claimant needed to do himself outside of the workplace and which the Respondent was not and could not be responsible for or the monitoring of the phased return and modified duties. That was not able to be undertaken because within a very short period of time, just two days, the Claimant had made it plain that he still could not cope with his cleaning role even with adjustments in place and undertaking a very scaled back number of duties. We are therefore satisfied that the Respondent did not fail to implement the recommendations made in the occupational health report and was not in breach of the duty to make reasonable adjustments.

115. Insofar as the Claimant relies on any delay in implementing those recommendations, we have already dealt with that in the context of the unfair dismissal claim and we are satisfied for the same reasons that there has been no breach of the duty to make reasonable adjustments.

116. The claim therefore fails and is dismissed.

Employment Judge Heap
Date: 07 December 2022

FOR THE EMPLOYMENT TRIBUNAL OFFICE:
Yahya Merzougui

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