EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103161/2022

Final Hearing held at Dundee on 13 – 16 December 2022

Employment Judge A Kemp
Tribunal Member W Canning
Tribunal Member A Shanahan

Mr Albert Iannetta	**Claimant** **Represented by:** **Mr J Lawson,** **Solicitor**
ATMRC Ltd	**Respondent** **Represented by:** **Mr T Muirhead,** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The majority Judgment of the Tribunal is that the Claim does not succeed, and is dismissed.

REASONS

Introduction

1. This was the Final Hearing into claims of discrimination on the ground of disability under sections 15 and 20/21 of the Equality Act 2010 ("the 2010 Act"), and for unfair dismissal under section 94 of the Employment Rights Act 1996 ("the 1996 Act"). The claimant produced a Schedule of Loss, which sought an award of a little over £47,000.

2. The respondent accepted that it had dismissed the claimant, and contended that that was for reason of capacity, and was fair. It argued that there had been no unlawful discrimination.

3. There was a Preliminary Hearing in the case on 11 August 2022 which granted Orders in relation to the present hearing. After that details as to disability were provided, and disability status and knowledge was accepted by the respondent. The respondent also later sought permission to lead the evidence of one witness, Mr Cheah, remotely as he is in London and no longer an employee, which was granted without opposition from the claimant. The hearing was therefore largely in person but with Mr Cheah appearing remotely such that it was a hybrid hearing to that extent.

4. The claimant was represented by Mr Lawson and the respondent by Mr Muirhead. The Tribunal was grateful to both of them for the most helpful and professional manner in which they conducted the hearing. Their submissions were succinct, helpful and of conspicuous quality. It was also grateful to them for producing the documentation for the Tribunal, which included a List of Agreed Facts, a Chronology and a List of Issues.

5. During the course of evidence it emerged that Mr Ron Scrimgeour, a witness for the respondent, had held a role at Tayside Police. Ms Canning disclosed that she had worked for that organisation, but had not recalled ever meeting Mr Scrimgeour. Neither party had any difficulty with Ms Canning continuing to hear the case.

Issues

6. The following is the agreed List of Issues referred to, with some slight amendments made by the Judge, with parties' agreement, and further reflecting the parties' agreement that the dismissal was unfavourable treatment, and something that arose from the claimant's disability:

Discrimination arising from a disability

1. Can the respondent show that the dismissal of the claimant was a proportionate means of achieving a legitimate aim within the meaning of section 15(1)(b) of the 2010 Act?

Reasonable adjustments

2. Did the respondent operate a provision, criterion or practice ("PCP") which put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who do not have his disability? In this regard the claimant relies on the PCPs of the requirement to attend work and the requirement to be able to perform his role or otherwise face dismissal, and alleges that the substantial disadvantages were the dismissal, the likelihood of being dismissed and being subject to the absence management process.

3. If so, did the respondent know or could reasonably have been expected to know that the claimant was likely to be at a substantial disadvantage by that PCP when compared with persons who do not have his disability?

4. If so, did the respondents take such steps as it was reasonable to have taken to avoid the disadvantage, in accordance with section 20 of the 2010 Act? The claimant alleges that the following adjustments should have been made:
    a) Allowing the claimant to return to work in the role he had been carrying out prior to being placed on furlough.
    b) Having the claimant work with a colleague in assisting him to do the NCR job.
    c) Providing the claimant with a suitable alternative role on the same pay and conditions that he was receiving before he was furloughed.

5. Did the respondent fail to make the adjustments reasonably required?

6. If the respondent had implemented the adjustments that the claimant contends should have been made, would this have alleviated any disadvantage?

Unfair dismissal

7. Can the respondent show that the claimant was dismissed for a potentially fair reason for dismissal pursuant to section 98(1) or (2) of

the 1996 Act? The respondent says that the reason for dismissal was capability, or in the alternative some other substantial reason.

8. If so, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason for dismissing the claimant pursuant to section 98(4) of the 1996 Act? In that regard, did the respondent follow a fair procedure when dismissing the claimant?

Remedy

9. In the event that some or all the claimant's claims are successful to what remedy is the claimant entitled, and in that regard:
    a) What financial loss has the claimant suffered?
    b) What level of compensation should be awarded for Injury to Feelings?
    c) Should there be any reduction to the award of compensation for contribution or in respect of unfair dismissal whether there may have been a fair dismissal by a different procedure?
    d) What steps has the claimant taken to mitigate his loss?
    e) Has the respondent shown that those steps have not been reasonable?

Evidence

7. The parties had prepared a single Inventory of Documents extending to over 500 pages. Most but not all of the documents were spoken to in evidence.

8. Evidence was given orally by Ms Jen Robertson-Edgar, Mr Kim Cheah, Mr Stuart Robertson-Edgar, Mr Ron Scrimgeour, and Mr Andrew Edgar for the respondent, and the claimant gave evidence on his own behalf and called Mr Robert Donaldson.

Facts

9. The Tribunal had the benefit of facts agreed by the parties, and found further acts, relevant to the issues, to have been established from the evidence led before it:

Parties

10. The claimant is Albert Iannetta. His date of birth is 2 July 1961.

11. The respondent is ATMRC Limited.

Agreed Facts

The following is a list of the facts as agreed between the parties, with some minor modifications which do not change the meaning:

12. The claimant started employment with the respondent on 1 September 2014.

13. The claimant was employed as HGV Driver/Installer prior to his dismissal. He worked 35 hours per week, on four days per week being Monday to Thursday, and latterly was paid at the rate of £10.50 per hour. Other employees working in the respondent's factory were generally paid between £9.80 and £10.20 per hour.

14. In or around January 2019, the claimant was diagnosed with osteoarthritis in the right ankle. The claimant is a disabled person under section 6 of the Equality Act 2010. The claimant's disability is Osteoarthritis.

15. The respondent knew or ought reasonably to have known that the claimant was a disabled person.

16. On or around 23 March 2020, the claimant was furloughed.

17. On or around 17 June 2021, the claimant was asked to return from furlough and perform the role driving primarily for a client NCR

18. On or around 18 June 2021 the claimant was signed off work sick by his GP.

19. On 8 July 2021 the claimant attended a Welfare Meeting with Jen Robertson-Edgar (QMS & Customer Support Manager) and Kevin Keenan.

20. On 29 July 2021 the respondent wrote to the claimant's GP practice Hawkhill Medical Centre.

21. On 23 August 2021 the claimant's GP, Dr Emma J. Fardon, wrote to Jen Robertson-Edgar in response to the respondent's letter dated 29th July 2021.

22. On 4 October 2021 Jen Robertson-Edgar wrote to the claimant inviting him to attend a welfare meeting.

23. On 7 December 2021 the claimant attended a welfare meeting with Jen Robertson Edgar and Kevin Keenan both present. The claimant was offered an alternative role at £9.00 per hour.

24. On 8 December 2021 the claimant emailed Jen Robertson-Edgar to raise a grievance.

25. On 10 December 2021, the claimant received a letter from Kevin Keenan confirming receipt of the claimant's grievance and scheduling a grievance meeting on14 December 2021.

26. On 14 December 2021 the claimant attended a grievance meeting. He was accompanied by Neil Birmingham, a colleague. The meeting was chaired by Ron Scrimgeour and Lisa Heenan was present as note taker.

27. On or around 22 December 2021 the claimant received the outcome letter to his grievance. The claimant's grievance was not upheld.

28. On 5 January 2022 the claimant appealed the decision to not uphold his grievance. This was appealed via email to Andrew Edgar and Jen Robertson-Edgar.

29. On 6 January 2022 the claimant was invited to a grievance appeal meeting.

30. On 17 January 2022 the claimant attended his grievance appeal meeting. The claimant attended with James Aberdein. The meeting was chaired by Andy Edgar and Rebecca Seery was present as note taker.

31. On 28 January 2022 the claimant was informed that his grievance appeal was not upheld.

32. On 3 February 2022 the claimant was invited to attend an absence review meeting. This was to discuss the claimant's continued absence because of ill-health and the content of a medical report dated 23 August 2021.

33. On 8 February 2022 the claimant attended the absence review meeting. The claimant was accompanied by James Aberdein. The meeting was chaired by Jen Roberson-Edgar and Kevin Keenan was also present.

34. On 22 February 2022, the claimant received a letter from Jen Robertson-Edgar. The letter informed the Claimant that his employment was being terminated with his last date of employment being 23 February 2022.

35. The claimant was paid 7 weeks' notice.

36. On 2 March 2022 the claimant appealed the decision to dismiss him.

37. On the 8 March 2022 the claimant received a letter acknowledging the appeal.

38. On 16 March 2022 the claimant attended the appeal meeting. The claimant was accompanied by James Aberdein. The meeting was chaired by Kim Cheah (Sales Manager) and Karen Dunn (Finance Manager) was present as note taker.

39. On 22 March 2022 the claimant was informed by letter that his appeal was not upheld and the decision to dismiss remained. This was the end of the internal process.

40. The claimant's gross (weekly) wage was £345.28. The claimant's net (weekly) wage was £294.10.

41. The claimant was a member of the respondent's pension scheme. The respondent contributed an average of £6.81 per week to the claimant's pension.

Further facts found by the Tribunal

Background

42. There was a contract of employment between the parties dated 21 August 2014 which stated the claimant's job title as "Storeman/Driver". The job

title was in effect amended to that of HGV Driver/Installer thereafter on a date not given in evidence. The contract also made reference to a Company Handbook, which included a Grievance Procedure.

43. The claimant and other employees at the respondent worked generally a 40 hour week. In September 2018 the claimant accepted an opportunity to reduce his hours of work to 35 per week, as did some other employees. The claimant carried out the 35 hours of work in the period Mondays to Thursdays each week. Employees including the claimant were paid for the standard 35 or 40 hours per week.

44. The claimant had a period of absence due to ankle pain in the period 19 June to 1 July 2018, and that was recorded by the respondent in its records. He also had a period of absence in 2019 because of ankle pain the detail of which was not before the Tribunal.

Claimant's role

45. Prior to being placed on furlough the claimant's primary role was as a driver. He held an HGV Licence, and was the only full-time driver of the respondent. About five other employees also held an HGV Licence and could drive HGVs if required.

46. When performing the role prior to being placed on furlough the claimant's role included doing installations works, as part of a team of two or three normally which included driving, but also some other driving and other roles. The other roles included working on "picks" being part of the ATM in a module which weighed about 8kg. The claimant's driving work included driving to and from a client, NCR, based in Dundee, to deliver or uplift Automatic Telling Machines (ATMs) or parts for those machines, on occasion. In the period 1 January 2020 to 23 March 2020 he did so on six occasions.

47. Different vehicles were used for the NCR run. One was an 18 tonne truck. There were two 7.5 tonne trucks also used on the run. One of those 7.5 tonne trucks did not have a tail lift.

48. ATMs were stored at the respondent's facility in Arbroath in their warehouse. They were taken from their location by forklift truck, or a pallet

truck. The pallet truck was moved manually, with hydraulic gears to move the pallet up or down. It required a degree of strength to manoeuvre into position and use. A degree of strength was required when unloading a pallet with ATMS, or a single ATM, at the customer premises. An ATM weighed about 800 kg.

49. The claimant also undertook deliveries of ATMs to other customers, notably Note Machine. The role was very similar as between NCR and Note Machine.

50. The claimant and others at the respondent were placed on “furlough” on or around 23 March 2020 when the Covid-19 pandemic led to that.

Contact about return to work

51. Ms Robertson-Edgar telephoned the claimant on 17 June 2021 to inform him that work was available for him primarily as a driver on the NCR run. He indicated that he was not able to carry out that work in light of the condition of his ankle, and she informed him that if he was unfit he would require a fit note from his GP. She had a further telephone call with him on 21 June 2021. He asked for a period of time off work on annual leave from 28 June to 1 July 2021 which she granted.

52. Ms Robertson-Edgar wrote to the claimant on 23 June 2021 to confim their discussions, which stated that he had said that he was “now unwell”. The claimant sent her an email on 25 June 2021 raising his disability, stating that she had been aware of it, that he was awaiting an operation, referred to reasonable adjustments that could be made, and said that he would be happy to consider redundancy. He also separately provided a fit note from his GP. Ms Roberston-Edgar responded by letter on 30 June 2021 to invite him to a meeting.

53. That meeting took place on 8 July 2021 and the note of the same is a reasonably accurate record of it. It was undertaken between the claimant, Ms Robertson-Edgar, and Mr Kevin Keenan of the respondent. The notes were sent to the claimant on 15 July 2021. The claimant also provided consent to a report from his GP. He wrote to the respondent on 15 July 2021 to indicate that he would be happy to work three days per week.

54. On 15 July 2021 the claimant's GP issued a fit note stating "Longstanding severe arthritis affecting right ankle. Awaiting CT results and Orthopaedics opinion re surgical options. Only able to undertake administrative work and light duties. Heavy lifting (even with another person) should be avoided". Similar fit notes were issued in the period to 14 February 2022.

55. Ms Robertson-Edgar wrote to the claimant's GP, Dr Emma Fardon, on 29 July 2021 setting out details of the role the claimant performed, and asking a series of questions. The claimant did not see a copy of that letter at that time. The list of duties included "driving all over Scotland – up to 18 tonne lorry, loading and unloading lorry, moving of ATM machines up to 800 kilos, and on site ATM installations". Dr Fardon replied on 23 August 2021, and in summary stated that the claimant had osteoarthritis in his right ankle for which he was awaiting surgical intervention, he was unable to use his right ankle safely, was not likely to be able to return to work in the foreseeable future, and was able to undertake an administrative role or very light duties only. She stated "Given that his right ankle is affected by severe osteoarthritis causing stiffness and pain I cannot envisage how any of the listed duties would be appropriate for him". She indicated that the position may not be permanent dependent on surgery, and that he was unable to drive heavy vehicles or undertake any heavy lifting.

56. On 4 October 2021 the respondent sent that report to the claimant and invited him to attend a further meeting on 12 October 2021.

57. A further meeting with the claimant, Ms Robertson-Edgar, Mr Keenan and the claimant took place on 12 October 2021. The note of the same is a reasonably accurate record of it. The claimant said that he would consider working 2/3 days per week, and that he had been holding out for redundancy. The minute was amended to a small extent at the claimant's request.

Offer of alternative role

58. On 15 November 2021 the respondent wrote to the claimant to invite him to attend a further meeting. It took place on 30 November 2021 by conference call. The same attendees were present. A note of the meeting is a reasonably accurate record of it. The respondent offered the claimant

a role that they considered suitable for him given the terms of the medical report, which was for small module tear down, cutting cables or harnessing. The claimant was asked if he would consider that, and said that he would subject to revised hours and a new contract. He said that three or four days per week were best, and two days was not likely to be suitable. The claimant mentioned driving roles, but the respondent did not consider that he could do so safely given the terms of the medical report.

59. A contract of employment was then offered to the claimant as a Recycling Material Operative, working 16 hours per week, four hours per day for four days per week, at £9 per hour. The role was created for the claimant by the respondent. These duties had been performed by other employees when there was no other work for them to do. Those doing so were paid between £9.80 and £10.20 per hour when performing that role, but it was not their main role with the company. The rate of £9 per hour was suggested by Ms Robertson-Edgar and Mr Keenan, being slightly above the then national living wage of £8.91 per hour, because the role was not skilled to any extent, because it would not generate profit for the respondent, and because they were seeking to control all of their costs given their financial position. The proposed rate was decided by Mr Robertson-Edgar and Mr Keenan, and then, approved by Mr Andrew Edgar the Managing Director. It was also offered with a view to the claimant returning to HGV driving and other roles after surgery, assuming that that was successful.

60. The offer of an alternative role was discussed at a meeting on 7 December 2021 with the same attendees, at the respondent's boardroom. The claimant indicated his unhappiness with the rate offered, which he said was "silly money" to push him out. Mr Keenan said that the wage had been set based on the new role created. The claimant indicated that he would be happy with £10 per hour and 20 hours per week. Mr Keenan stated that the company could not negotiate over those terms. Ms Robertson-Edgar referred to the company having reviewed all potential reasonable adjustments taking into account the medical report. Latterly the claimant indicated that he would accept 16 hours per week at £10 per hour. Mr Keenan said that that would be considered, but may be refused.

Grievance

61. On 8 December 2021 the claimant intimated a grievance to the respondent stating that he felt discriminated against because of his disability, the lack of reasonable adjustments, and that he should have full non-HGV driver pay.

62. The grievance was acknowledged by letter dated 10 December 2021, which indicated that it would be conducted by an impartial person from outwith the company, without stating who that was to be.

63. The grievance meeting took place on 13 December 2021 with the claimant attending with a colleague, Neil Birmingham, and before Mr Ron Scrimgeour, with Lisa Butcher of the respondent taking notes. The note provided is a reasonably accurate summary of it. After the meeting Mr Scrimgeour was provided with a file of papers from the respondent.

64. Mr Scrimgeour prepared a report dated 16 December 2021 which he sent to the respondent, but not the claimant. He then produced a letter of decision dated 22 December 2021 which was sent, with the report, to the claimant on 23 December 2021.

65. On 5 January 2022 the claimant wrote to the respondent by email to intimate an appeal against the grievance decision. The appeal hearing was conducted before Mr Andrew Edgar, the respondent's managing director, on 17 January 2022. The claimant and Mr Edgar were present, with Mr Jim Aberdein accompanying the claimant and Ms Rebecca Seery of the respondent taking notes. The note of the meeting is a reasonably accurate record of it.

66. Mr Edgar sent a letter of decision, with a copy of the notes, to the claimant on 28 January 2022. He refused the appeal. That was sent to the claimant by email on 31 January 2022.

Dismissal process

67. On 3 February 2022 the respondent wrote to the claimant to invite him to a further meeting to discuss his future employment, and to state that a

possible outcome of the meeting was that his employment may be terminated.

68. The meeting took place on 8 February 2022. The claimant was present, with Mr Aberdein accompanying him, and Ms Robertson-Edgar and Mr Keenan present. A note of the meeting is a reasonably accurate record of it. The claimant did not know when the surgery he required was to take place. The claimant stated, inter alia, that he "had not done the NCR run for 2 years". He thought that he should have been returned to installation work in June 2021. He set out what he thought that he could do at present, which included some driving work and other roles. The claimant referred to the alternative role offered, and asked if it could be done over two days. Ms Robertson-Edgar said that she would look into this but that the rate of pay was to remain the same. The claimant indicated that that rate was not acceptable to him. The minutes were sent to the claimant by email on 14 February 2022.

69. On 14 February 2022 the claimant received a further fit note from his GP. It stated inter alia "Ankle now giving way on standing; requires stronger pain relief. Meaningful work unlikely at present."

70. On 22 February 2022 the respondent wrote to the claimant to terminate his employment with effect from 23 February 2022. He was paid seven weeks' notice. He was paid for accrued untaken holidays. He was told of the right of appeal.

71. At the time of the decision to dismiss the claimant the respondent intended to replace him. They did not do so as relatively shortly after the dismissal they lost their contract with NCR (the precise date was not given in evidence).

Appeal

72. The claimant appealed by email dated 2 March 2022. He claimed that he had been discriminated against.

73. The appeal was heard by Mr Kim Cheah of the respondent. He was a Sales Manager, at the same level of management as Ms Robertson-

Edgar, and had authority to change the decision had he felt it appropriate to do so.

74. The appeal was acknowledged by letter dated 8 March 2022, and an appeal hearing took place on 16 March 2022 with Mr Cheah appearing remotely, the claimant attending with Mr Aberdein, and Ms Karen Dunn of the respondent taking notes. The note of the meeting is a reasonably accurate record of it.

75. Mr Cheah rejected the appeal by letter dated 22 March 2022.

Other matters

76. In the respondent's financial year to 31 August 2019 it made a small profit. In the following two financial years, affected by the Covid 19 pandemic, it made losses of £146,650 and £339,380 respectively. Turnover reduced from a little over £3 million in the financial year to 31 August 2019, to a little over £2 million in the following financial year, and a little under £1.9 million in the financial year following that.

77. The volume of deliveries required dropped from an average of 35 – 40 per month before the pandemic to single figures per month during and after it.

78. From on or around 7 January 2022 onwards the claimant received Employment Support Allowance.

79. The claimant made some attempts to secure alternative employment in the period following his dismissal, but without success. He made about six applications for employment in the six month period after dismissal. During that same period his wife suffered injury in a road traffic accident, and his father-in-law fell ill, was admitted to a care home, and died in October 2021. The claimant remains unemployed. He has not yet had any surgery, but the expectation is that that may occur in the relatively near future, and then be followed by a period of recuperation.

80. The claimant commenced Early Conciliation on 10 May 2022.

81. The Certificate for Early Conciliation was dated 10 May 2022.

82. The Claim Form was presented on 8 June 2022.

Respondents' submission

83. The following is a basic summary of the submissions made. The reason for dismissal was capability which was potentially fair. There had been numerous meetings, the warning of the potential for dismissal before the meeting that ended with that, and a right of appeal. An offer of alternative employment had been made, created especially for the claimant. The claimant could not drive or use his right ankle safely. The dismissal followed a fair procedure and was within the band of reasonable responses.

84. It was accepted that the dismissal was something arising from disability, but the respondent had established the objective justification defence under section 15(2). In relation to the claims under sections 20 and 21 it was contended that the respondent had done all reasonably required of it. The respondent's evidence should be preferred to that of the claimant. The real issue in contention was the pay for the role that was offered. It was not a reasonable adjustment to require the higher pay the claimant sought. The cases of ***O'Hanlon v HMRC [2007] IRLR 404*** and ***Meikle v Nottingham County Council [2004] IRLR 703*** established the principle that it was rare and exceptional to extend sick pay, and that applied to the argument made here. ***Cordell v FCO [2012] 1CR 18*** established the principle that the cost of an adjustment goes to its reasonableness. Reference was also made to ***G4S Cash Solutions UK Ltd v Powell [2006] IRLR 820,*** and the case distinguished on the basis that it was decided as the claimant had been led to believe that pay would continue at a higher rate, such that reducing it was not reasonable.

Claimant's submission

85. The following is again a basic summary of the submissions made. The claimant founded strongly on ***Powell.*** It established that it can be a reasonable adjustment to preserve pay. The facts in that case were similar to those in this. All those who had given evidence had done so with the intention to aid the Tribunal. There had been inconsistencies in the claimant's evidence, but also with that of the respondent. That included the issue of who had decided the level of pay offered. Mr Edgar had a completely outdated understanding of the 2010 Act. Mr Scrimgeour's

understanding of the Act was seriously lacking. It was clear that the claimant was disabled and the lack of understanding of that was the backdrop for what the claimant was up against.

86. There had been a breach of sections 20 and 21. The PCPs relied on were to attend work and be fit for the role, which were not challenged. That created a substantial disadvantage for the claimant. The reasonableness of the adjustment sought of £10 per hour as pay for the alternative role was objectively assessed. It was suitable as it was the same pay as others. The respondent sought to place the cost of the adjustment on the claimant in breach of section 20(7). The difference between the parties was £16 per week. The claimant was not replaced. The respondent had a cost saving. If there had been an offer of £10 per hour the claimant would have accepted it and remained employed. That he was not offered that led to dismissal.

87. In relation to the section 15 claim the defence had not been made out. Reference was made to ***Chief Constable of West Yorkshire v Homer [2012] ICR 704.*** Dismissal was the most severe outcome, and could have been avoided by the pay the claimant sought.

88. It was accepted that the reason for dismissal was capability but it was argued that it was unfair. That included as the dismissal was discriminatory. The grievance had been dealt with abysmally. Mr Scrimgeour came to an unreasonable and unfounded conclusion. The appeal against the decision by Mr Edgar meant that it was not properly considered. The claimant had no hope of a fair process. There had not been much investigation into the dismissal, particularly the pay issue, and Mr Cheah had been vague in his evidence. The claimant had been reasonable in rejecting the offer made to him. Further submissions were made on remedy and related matters. The claimant referred, in addition to the authorities referred to above, to ***Nelson v NNC (No. 2) [1980] ICR 110***, and ***Slaughter v C Brewer and Sons [1990] IRLR 820.***

Law

(i) Disability Discrimination

(i) Statute

89. Section 4 of the Equality Act 2010 ("the Act") provides that disability is a protected characteristic. The Act re-enacts large parts of the predecessor statute, the Disability Discrimination Act 1995, but there are some changes.

90. Section 15 of the Act provides as follows:

> "**15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

91. Section 20 of the Act provides as follows:

> **"20 Duty to make adjustments**
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
> (2) The duty comprises the following three requirements.
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage……
> (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
>
> | Part of this Act | Applicable Schedule |
> |---|---|
> | ……Part 5 (work) | Schedule 8" |
>
> [Part 5 includes sections 39, 53 and 54]

92. Section 21 of the Act provides:

> **"21 Failure to comply with duty**
>
> (1) 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…."

93. Section 39 of the Act provides:

> "**39 Employees and applicants**
>
> …….
>
> (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.
>
> ……."

94. Section 136 of the Act provides:

> "**136 Burden of proof**
>
> If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

95. Section 212 of the Act states:

> "**212 General Interpretation**
>
> In this Act - …….
>
> 'substantial' means more than minor or trivial".

96. The provisions of the Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC***. Its terms include Article 5

as to the taking of "appropriate measures, where needed in a particular case", for a disabled person, "unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

97. The Directives referred to are retained law under the European Union Withdrawal Act 2018.

(ii) Case law

(i) Discrimination arising from disability - Justification

98. There is a potential defence of objective justification under section 15(1)(b) of the Act. In ***Hardys & Hansons plc v Lax [2005] IRLR 726***, heard in the Court of Appeal, it was held that the test of justification, essentially the same for the section 19 claim, under the statutory provisions then in force requires the employer to show that a provision, criterion or practice is justified objectively notwithstanding its discriminatory effect. The EAT in ***Hensman v Ministry of Defence UKEAT/0067/14*** applied the test set out in that case to a claim of discrimination under section 15 of the 2010 Act. It held that when assessing proportionality, while an employment tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

99. The Supreme Court summarised the law in relation to justification in ***Bank Mellat v HM Treasury (No. 2) [2015] AC 700***, and set four matters to consider – (i) whether the objective of the measure is sufficiently important to justify the limitation of a protected right (ii) whether the measure is rationally connected to the objective, (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

100. As stated expressly in the EAT judgment in ***City of York Council v Grosset UKEAT/0015/16*** the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the tribunal was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the tribunal. The Court of Appeal in ***Grosset [2018] IRLR 746*** upheld this reasoning.

101. In ***Buchanan v Commissioner of Police of the Metropolis [2016] IRLR 918*** the claimant was dismissed for unsatisfactory performance after eight months of absence. He had been in a serious motorcycle accident whilst responding to an emergency call, and developed post-traumatic stress disorder which had prevented a return to work. The respondent accepted that the officer had been treated unfavourably because of something arising from his disability – namely his absence – but relied on the application of the Police Performance Regulations by way of justification. The EAT held that the Tribunal had erred in accepting justification on the basis that the police force's general procedure had been justified. The EAT drew a distinction between cases where A's treatment of B is the direct result of applying a general rule or policy, to cases where a policy permits a number of responses to an individual's circumstances. In the former the issue will be whether the general rule or policy is justified. In the latter, it is the particular treatment which must be examined to consider whether it is a proportionate means of achieving a legitimate aim.

102. In the case of ***Browne v Commissioner of Police of the Metropolis UKEAT/0278/17*** the EAT held, in brief summary, that the employment tribunal were entitled to find that the individual treatment of the claimant was justified because the employer had given the claimant an opportunity to make representations asking for an extension of sick pay but had not accepted them.

(ii) Reasonable adjustments

103. Guidance on a claim as to reasonable adjustments was provided by the EAT in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, and in

Newham Sixth Form College v Saunders [2014] EWCA Civ 734, and ***Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220*** both at the Court of Appeal. The reasonableness of a step for these purposes is assessed objectively, as confirmed in ***Smith v Churchill***. The need to focus on the practical result of the step proposed was referred to in ***Ashton***. These cases were in relation to the predecessor provision in the Disability Act 1995. Their application to the 2010 Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14.***

104. The Court in ***Saunders*** stated that:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

105. The duty to make reasonable adjustments does not extend to a duty to carry out any kind of assessment of what adjustments ought reasonably to be made. A failure to carry out such an assessment may nevertheless be of evidential significance. In ***Project Management Institute v Latif [2007] IRLR 579*** the EAT stated that

> "… a failure to carry out a proper assessment, although it is not a breach of the duty of reasonable adjustment in its own right, may well result in a respondent failing to make adjustments which he ought reasonably to make. A respondent, be it an employer or qualifying body, cannot rely on that omission as a shield to justify a failure to make a reasonable adjustment which a proper assessment would have identified."

106. The duty may involve treating disabled persons more favourably than those who are not – ***Redcar v Lonsdale UKEAT/0090/12.***

107. The extent to which the duty extends to the issue of pay has been considered in a number of authorities. In ***O'Hanlon v Revenue and Customs Comissioners [2007] IRLR 404*** the EAT finding that the Act

was "designed to recognise the dignity of the disabled and to require modifications which will require them to play a full part in the world of work…….It is not to treat them as objects of charity….." was considered by the Court of Appeal and said to have "much force". That case concerned an argument for extending sick pay beyond a contractual period.

108. In ***G4 Cash Solutions (UK) Ltd v Powell [2016] IRLR 820,*** a disabled person was put on to lighter work but retained on the former pay rate. At a later date the employer sought to reduce the level of pay to that appropriate to the work being performed. Doing so was, in the circumstances of the case, held to be disability discrimination, as the employee had been led to believe that the pay would be maintained for the lighter work. The EAT held that what was a reasonable adjustment was a question of fact for the tribunal, with claims turning on their own facts and financial considerations being weighed in the balance. The EAT also stated that

> "I do not expect that it will be an everyday event for an Employment Tribunal to conclude that an employer is required to make up an employee's pay long-term to any significant extent – but I can envisage cases where this may be a reasonable adjustment for an employer to have to make as part of a package of reasonable adjustments to get an employee back to work or keep an employee in work. "

109. In ***Aleem v E-Act Academy Trust Ltd UKEAT/0099/20*** the EAT held that there was no obligation to continue the previous wage level (after a probationary period in the new lesser work and time for a grievance to be dealt with). ***O'Hanlon*** was considered as the leading case and **Powell** was distinguished on the basis that in that case the employee had been led to believe that the pay would continue at that same rate.

(iii) Burden of proof

110. There is a two-stage process in applying the burden of proof provisions in discrimination cases, arising in relation to whether the decisions challenged were "because of" the disability, but which may be relevant to

the issue of whether the respondent applied a PCP to the claimant for the reasonable adjustments claim, as explained in the authorities of ***Igen v Wong [2005] IRLR*** 258, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

111. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court approved the guidance from those authorities. The law on the shifting burden of proof was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal, which said the following (in a case which concerned direct discrimination on the protected characteristic of disability):

> "In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason".

112. The application of the burden of proof is not as clear in a reasonable adjustments' claim as in a claim of direct discrimination. In ***Project Management Institute v Latif [2007] IRLR 579***, Mr Justice Elias, as he then was, gave guidance of the specification required of the steps relied upon.

113. ***Jennings v Barts and the London NHS Trust UKEAT/0056/12*** held that ***Latif*** did not require the application of the concept of shifting burdens of proof, which 'in this context' added 'unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided' as

to whether the adjustment contended for would have been a reasonable one.

114. The EAT emphasised the importance of Tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them in ***Newcastle City Council v Spires UKEAT/0034/10.*** The adjustment proposed can nevertheless be one contended for, for the first time, before the ET, as was the case in ***The Home Office (UK Visas and Immigration) v Kuranchie UKEAT/0202/16.*** Information of which the employer was unaware at the time of a decision might be taken into account by a tribunal, even if it emerges for the first time at a hearing – ***HM Land Registry v Wakefield [2009] All ER (D) 205.***

(iv) The EHRC Code

115. The Tribunal also considered the terms of the Equality and Human Rights Commission Code of Practice on Employment, the following provisions in particular, but not exhaustively:

> "6.2
> The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled.
>
> 6.3
> The duty to make reasonable adjustments applies to employers of all sizes, but the question of what is reasonable may vary according to the circumstances of the employer……..
>
> **Reasonable steps**
>
> 6.28

The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

a. whether taking any particular steps would be effective in preventing the substantial disadvantage;
b. the practicability of the step;
c. the financial and other costs of making the adjustment and the extent of any disruption caused;
d. the extent of the employer's financial or other resources;
e. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
f. the type and size of the employer.

6.29

Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case……

6.33

[Provides a list of examples of steps it might be reasonable for an employer to take, including in relation to Disability Leave and Profit-Related Pay]"

(ii) Unfair dismissal

116. Section 98 of the Employment Rights Act 1996 provides, so far as material for this case, as follows:

"98 General

(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 it is either 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 held.

(2) A reason falls within this subsection if it–

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do….

(3) In subsection 2(a)-

(a) "capability" in relation to an employee means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, …..

(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 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."……..

117. The burden of proof as to the reason for dismissal is on the first respondent. It argues capability which failing some other substantial reason. If the reason, or principal reason, for the dismissal is a potentially fair reason under section 98(2) whether or not it was fair under section 98(4) of the Employment Rights Act 1996 falls to be considered. No burden of proof applies to that stage. The issue is assessed against the band of reasonable responses, not what the Tribunal itself would have done.

118. In the former regard of capability a basic summary of the test to apply in a case related to absences from work under section 98(4) of the 1996 Act, as it is now, is set out in the EAT decision in ***Spencer v Paragon Wallpapers Ltd [1976] IRLR 373*** as follows:

"Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the

circumstances, the employer can be expected to wait any longer and, if so, how much longer?"

119. The tribunal added that the relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'.

120. In ***Lynock v Cereal Packaging Ltd [1988] IRLR 510***, the EAT described the appropriate response of an employer faced with what was in that case a series of intermittent absences as follows:

> "The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment—sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following—the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding'.'

121. There is a conflict between the needs of the business and those of the employee, and the tribunal must consider whether or not the employer has sought to resolve that conflict in a manner which a reasonable employer

might have adopted. That includes considering whether the respondent carried out an investigation which meant that it was sufficiently informed of the medical position.

122. In the latter regard of some other substantial reason, provided the reason is not whimsical or capricious (***Harper v National Coal Board [1980] IRLR 260***), it is capable of being substantial and, if, on the face of it, the reason could justify the dismissal then it will pass as a substantial reason (***Kent County Council v Gilham [1985] IRLR 18***).

Observations on the evidence

123. The Tribunal considered that all of the witnesses were seeking to give honest evidence. They stated the position as they understood it to be. The issues between them focused on matters of reliability.

124. There were a number of matters factually in dispute. The claimant alleged that Mr Robertson-Edgar had agreed to give him reasonable adjustments in about January 2019 after he had been diagnosed with osteoarthritis, being taken off the NCR run, but we concluded that there had not been such an agreement. That is because the claimant's position changed from the pleadings, and in evidence. He accepted that no one had specifically told him that he was to be taken off the NCR run. He said that Ms Robertson-Edgar had been present when the matter had been discussed, but that had not been put to her, or to Mr Robertson-Edgar. In meetings with the respondent he had claimed that he had not carried out NCR runs at all for two years, but accepted that he had done some when that was put to him. When there was a discussion with Ms Robertson-Edgar on 17 June 2021 he did not allege any prior agreement not to do the NCR run, and her letter recording the conversation and a late one referred to "now" disclosing his condition. He did not challenge that in his reply, nor in his reply (or the welfare meetings that followed), and not even in his grievance did he allege such an agreement. Mr Robertson-Edgar denied any such agreement. We concluded that, although in fact Mr Donaldson did the majority of the NRC runs from around January 2019, the claimant did on occasion do them and there had not been the agreement he contended for. We considered however that he performed the majority of his role as

an installer in the period from then until 23 March 2020 when “lockdown” took place.

125. That was not, as it turned out, a matter material to our decision. Although the claimant wished to return to work in his former position, and he thought that he could do more than the doctor said in her report, he accepted that he would have to be guided by her, and that the respondent would be reasonable in acting on that report. The report indicated that he could not perform the role of installer of ATMs. He could not drive heavy vehicles, which we consider must be both the 18 tonne and 7.5 tonne vehicles.

126. Another matter of dispute was whether the claimant sought redundancy or not. It is clear to us that he did. That is mentioned in a number of meetings which he signed the minutes for. His evidence that he had not is not, we consider, reliable. But we accept that he was also genuine in his desire to return to work, and that had an offer of 16 hours per week at £10 per hour been made to him, he would have accepted that.

127. Another matter in dispute was the grievance process. We have to say that we do not consider that it was well handled. Mr Scrimgeour accepted that the terms that he had used in his letter of outcome were not well chosen. He was wrong to say that the respondent had made it clear that they did not regard the claimant as a disabled person. Whilst they did not state that they thought that he was, they had commissioned a medical report which indicated clearly to us that the claimant was disabled, a point the respondent has quite properly conceded.

128. Mr Scrimgeour still believed however that the claimant was not a disabled person, and Mr Edgar who heard the appeal had the belief that to be a disabled person one had to have a blue badge and be in a wheelchair. That is of course entirely wrong. That evidence was of concern to us, as it indicated that the respondent did not have an adequate understanding of the duties that fell to it in relation to the claimant as a disabled person under the 2010 Act.

129. That having been said, we concluded that the respondent had made a genuine offer of alternative employment to the claimant. It was not, as he suggested, simply an attempt to get him out, or not to pay redundancy.

The respondent did not seek to remove him, rather they created a role for him which involved him doing work that others would do if there was no other work for them. To that extent it was a role that led to increased cost for the respondent, and it was arranged around what the respondent thought was safe for him given the terms of the medical report.

130. That the respondent did not have a full understanding of the law is not, we consider, determinative. If they offered an appropriate role for him, which we address more fully below, that they did so because he was a long-standing employee, as Mr Edgar stated, rather than in compliance of a legal duty, is not the point. It would put form over substance.

131. In the parties' discussions the claimant eventually agreed to work the role performed, for 16 hours per week, and the point of difference related to the rate of pay. The difference was £1 per hour. Much of the other evidence we heard was at best background to what became that central issue. The question we focused on was whether it was a reasonable adjustment to offer the alternative role at the same rate of pay as other employees, as the claimant argued, or whether doing so at the level offered, just above the minimum wage as it was not a skilled job, was all that was required.

Discussion

132. No issue of jurisdiction was raised, and the Tribunal was satisfied that it had jurisdiction to consider the claims made before it. The Tribunal found the issues finely balanced, with strong arguments for both of the parties especially on the claim as to reasonable adjustments. It reached a unanimous decision on the claim of unfair dismissal and discrimination arising out of disability but a majority decision on the issues of reasonable adjustments. It addresses each of the issues as follows:

Discrimination arising from a disability

Can the respondent show that the dismissal of the claimant was a proportionate means of achieving a legitimate aim within the meaning of section 15(1)(b) of the 2010 Act?

133. The unanimous decision was that the respondent had established objective justification so as to make out the defence under section 15(2). There were two aims contended for, firstly having the claimant perform his role, and secondly to avoid the cost of extended absence and holiday entitlement. It was accepted that they were legitimate aims.

134. The Tribunal also unanimously considered that dismissal was a proportionate means to achieve those aims. The issue focused on the level of pay offered for the alternative role, which is addressed more fully in the context of reasonable adjustments below. The Tribunal considered that the level of pay was reasonable. It was for an unskilled role. Paying slightly above the national living wage, but less than for other employees, was proportionate given all the circumstances including the business needs of the respondent which at that time was losing substantial sums. The other employees were performing other duties as well as those that the claimant was offered to do, such that their primary role was different, and not unskilled. That level of additional skill warranted higher pay of the order of £10 or £10.20 per hour. It was the comparison with those employees that the claimant had difficulty with, rather than the amount of the pay for the role per se. He did not regard the pay offered as fair in that comparative sense. Whilst his view is perfectly understandable, it is not determinative. The Tribunal also took account of the uncontested evidence of the respondent having made material losses in the two most recent financial years. Nor was it contested that they were seeking to control cost as much as possible, which is understandable when losses are being made. The claimant was offered the role that there was and that still gave him a choice of whether to accept the role or not. If he had, he would not have been dismissed. It was his decision not to do so, and that decision was made on the basis of the comparative pay concern that he had.

135. Addressing the matters raised in ***Bank Mellat***, (i) the objective of the measure was sufficiently important to justify the limitation of a protected right (ii) the measure was rationally connected to the objective, (iii) a less intrusive measure could not have been used without unacceptably compromising the achievement of the objective, and (iv) balancing the severity of the measure's effects on the rights of the claimant against the

importance of the objective, to the extent that the measure will contribute to its achievement, the former is outweighed by the latter.

136. The Tribunal considered that the defence under section 15(2) had been established. It therefore dismissed the claim under the section.

Reasonable adjustments

Did the respondent operate a provision, criterion or practice ("PCP") which put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who do not have his disability? In this regard the claimant relies on the PCPs of the requirement to attend work and the requirement to be able to perform his role or otherwise face dismissal, and alleges that the substantial disadvantages were the dismissal, the likelihood of being dismissed and being subject to the absence management process.

137. There was no serious dispute that there had been PCPs applied in this regard, and that they caused the claimant substantial disadvantage, which was his dismissal. It was confirmed in discussions at the commencement of the claim that the claim itself related to the dismissal. The Tribunal considered that this had been established.

If so, did the respondent know or could reasonably have been expected to know that the claimant was likely to be at a substantial disadvantage by that PCP when compared with persons who are do not have his disability?

138. This issue was not addressed in evidence or submission, and not seriously disputed. The Tribunal considered that this had been established.

If so, did the respondents take such steps as it was reasonable to have taken to avoid the disadvantage, in accordance with section 20 of the 2010 Act? The claimant alleges that the following adjustments should have been made:

a) Allowing the claimant to return to work in the role he had been carrying out prior to being placed on furlough.

b) Having the claimant work with a colleague in assisting him to do the NCR job.

c) Providing the claimant with a suitable alternative role on the same pay and conditions that he was receiving before he was furloughed.

139. In this regard (a) and (b) were not maintained, but (c) was, including as an alternative to the same rate of pay, the rate at which the claimant offered to carry out the role of £10 per hour. In this regard the majority view was that the respondent had met the obligation to make reasonable adjustments. Their view was as follows

(i) The duty is in the context of section 20, which is to avoid substantial disadvantage suffered by disabled persons. Whilst the respondent's knowledge of the law of disability discrimination was inadequate, even for a reasonably small employer, they did offer the claimant an alternative role, which was both suitable for him given medical evidence and one which was created for him. It was not a vacancy otherwise being advertised. The only dispute about it that latterly remained was the rate of pay. The rate offered was an appropriate rate for the job itself, which was unskilled and did not generate profit for them. It was very slightly above the level of the national living wage. The respondent was making substantial losses and seeking to control costs because of that. They believed that they could not afford the rate he sought, which was an additional £1 per hour.

(ii) The section 20(7) provision is in relation to the cost of making adjustments, such as providing new equipment, or modifying the workplace or the like. The Tribunal did not regard that provision as extending to pay. That was not what had been argued for, or considered, in the authorities referred to above on pay for reasonable adjustments purposes. If the argument made by the claimant was correct the implication is that the respondent would have required to maintain the claimant on pay at the rate of £10.50 per hour for 35 hours per week, that being the rate and hours prior to disability. That was not argued for, and not consistent with the case law.

(iii) The case law indicated that paying a disabled person a sum above the appropriate rate for the work carried out was a possible requirement of the Act, but as an exception. It depended on all the circumstances, and there were some circumstances such that it could be required to do, such as in ***Powell***. But that was not the line

taken in ***Aleem***, where the facts were different and the same grounds for distinguishing the former case appear in the present case. The respondent made clear throughout that they would not be able to increase the offer of £9 per hour, in their view.

(iv) One of the situations in ***Powell*** was the expectation that the arrangement be temporary. That was also, to some extent, the situation here as the hope was that the claimant would have surgery which would succeed so as to be able to return to his former role, but (a) it was not known how long the period before the surgery would be, and (b) it was not known what the outcome of surgery, once it had taken place and after rehabilitation of around three months, would have been. It was therefore potentially to last a lengthy period, and indeed the surgery has not yet taken place, with at least some uncertainty of outcome thereafter.

(v) The employer in the present case was a small one, with around 30 employees, and also one which was losing significant sums of money. It was seeking to control all its costs. Whilst the claimant argued that as it paid others £10.20 per hour for the same work when they did it which meant that they could afford £10 per hour, that was not the whole picture. Those employees did such work when they did not have other work to do. They would be paid in any event for the 35 or 40 standard hours of work per week each of them had. It was a way of using what would otherwise be unproductive time productively for those employees. What this role created was a new situation where the claimant was paid for doing it as his sole job. It would increase the cost for the respondent against that background, as they would still be paying for the standard hours of 35 or 40 hours per week for the other employees. Whilst the claimant had earlier been paid at a higher rate of £10.50 per hour, when that was the case he was producing work which had a value for the respondent including his HGV driving but also as an installer. At the point of the discussions he was not doing either of those roles, nor was he being paid on that basis. He was only being paid SSP.

(vi) Prior to furlough the claimant and others had carried out the same kind of work in the alternative role offered, at different times, but those doing so had been paid different rates when undertaking that

work. That indicated to the majority that having differential rates even if some work carried out was the same was not an issue of itself prior to the present dispute.

(vii) The Code of Practice does not itself refer in terms to preserving pay for someone who becomes disabled. That absence is striking. The examples that are given are more particular ones, such as in relation to disability leave in the circumstances set out there (not argued for here) or Profit Related Pay.

(viii) The issue for the claimant was not one of the amount of the offer for the role itself, but how it compared to the rate paid to others. That comparison however does not feature in other cases, or the Code. The comments in ***O'Hanlon*** as to what the Act was or was not intended to do are relevant. It is to seek to retain disabled employees in work, not to increase their pay beyond what is otherwise an appropriate rate, because of comparison with fellow employees performing for their primary role a different task but who as a secondary role performed the same work as offered to the claimant. The issue is put into focus by the PCPs relied on, which relate to the work being carried out, rather than the pay for that work.

(ix) Taking all the circumstances into consideration, the majority concluded that, on a fine margin, the step proposed of paying more than £9 per hour was not within the terms of the statutory provision, and the claim in that regard therefore failed.

140. The view of the minority, being one of the lay members, was that the Code makes it clear that there may be a need to do for a disabled person more than for someone not disabled. It was reasonable for the respondent to pay what was a moderate increase in weekly amount to the claimant to retain him in employment. He had made his position clear, and it was both entirely understandable and from his own perspective reasonable. There had been limited evidence as to what the effect, if any, of the additional cost of a little over £800 per annum would have been for the respondent. Whilst its period was uncertain, the intention was for it to be a temporary situation until the surgery took place, after which it was hoped that he could return to his former role. Given the claimant's service and the circumstances overall the minority considered that it was a reasonable

adjustment to offer the claimant £10 per hour as he sought, that being in effect the "going rate" that the respondent applied more widely. By not paying that rate, the claimant felt he had to leave, and thus the intention of the Act of retaining his employment was not achieved.

Did the respondent fail to make the adjustments reasonably required?

141. The majority conclude that the respondent did not do so, the minority that it did, for the reasons above.

If the respondent had implemented the adjustments that the claimant contends should have been made, would this have alleviated any disadvantage?

142. This issue does not now arise, but lest it does the Tribunal unanimously considered that if the claimant had been offered £10 per hour for 16 hours per week he would have accepted that sum which he had himself suggested as fair, and remained in employment.

Unfair dismissal

Can the respondent show that the claimant was dismissed for a potentially fair reason for dismissal pursuant to section 98(1) or (2) of the 1996 Act? The respondent says that the reason for dismissal was capability, or in the alternative some other substantial reason.

143. It was not disputed that the reason for dismissal had been shown to be capability.

If so, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason for dismissing the claimant pursuant to section 98(4) of the 1996 Act? In that regard, did the respondent follow a fair procedure when dismissing the claimant?

144. The Tribunal unanimously considered that the respondent had followed a fair process, and acted within the band of reasonable responses. Whilst there were a number of criticisms of the grievance and appeal process validly made, they did not directly lead to dismissal. They were a by-product of the respondent not moving from its offer of £9 per hour, with the claimant not moving from his position that it was not sufficient or fair. Whilst

other employers might well have done more, including having more detailed discussions with the claimant over why they could not offer more than they did, what might happen in future if the work was there or similar points, that is not the issue before us. The test is the band of reasonable responses. We cannot substitute our view of what we would have done for that of the respondent as employer. Similarly although it might have been possible to ask more questions of the GP as to what the claimant could safely do, we concluded that it was within the band of reasonable responses to proceed on the basis of what was before the respondent. It included a fit note dated 14 February 2022 which did not indicate that continued employment would be easy. The claimant had rejected the offer that was made. His continued employment caused financial loss if only for annual leave. The respondent had been conducting the process from June 2021. There was no date set for the surgery, and none in sight. Given all the circumstances, we concluded unanimously that the dismissal was not unfair under section 98(4) of the 1996 Act.

145. In light of the findings made above, issues of remedy do not arise.

Conclusion

146. For the reasons given above, the Claim is dismissed.

147. The Tribunal wishes to state firstly that it found the issue of reasonable adjustments a difficult one. It has much sympathy for the claimant, who sought to work on through pain from his ankle, and whose position that he did not wish to work for less pay than others as a matter of pride was entirely understandable on a human level. It noted that there were reasonable prospects of his operation taking place in the not too distant future.

148. Secondly, it should not be thought from the decision of the majority that the respondent carried out all matters in accordance with good practice. Its knowledge of the law related to discrimination appears materially lacking. It may wish to consider, with those advising it, educating itself on that law as a matter of urgency.

149. In the Judgment the Tribunal has referred to some authorities not discussed in the submissions, and in the event that either party considers that it has suffered prejudice as a result an application for reconsideration may be made under Rule 71.

Employment Judge: **A Kemp**
Date of Judgment: **05 January 2023**
Date Sent to Parties: **05 January 2023**