EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FRANCES SPENCER**

MEMBERS **MS C OLDFIELD**
MS A SADLER

BETWEEN: **MR R AMIN** **CLAIMANT**

AND

HOME OFFICE **RESPONDENT**

ON: **6-10TH February 2017**

Appearances

For the Claimant: Ms P Kuranchie, lay representative
For the Respondent: Ms A Cohen, counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the Claimant's claims of disability discrimination and victimisation are not well founded and are dismissed.

REASONS

1. The Claimant was employed as a security officer for the Respondent from April 2000 until he was dismissed, with pay in lieu of notice, in May 2014. He brings complaints of failure to make reasonable adjustments (sections 20 and 21 of the Equality Act 2010), discrimination arising from disability (section 15 of that Act) and a complaint of victimisation contrary to section 27. His complaint of unfair dismissal had been dismissed at an earlier hearing as being out of time.

2. The Respondent accepted that at the material time the Claimant was a disabled person by reason of impairment to his knee. The parties had agreed that the issues to be determined were:

Failure to make reasonable adjustments

2.1 Did the Respondent apply one or more provision, criterion or practice (PCP) that placed the Claimant at a substantial disadvantage compared to non disabled persons? The PCPs relied on by the Claimant are: (i) a requirement of lone working (ii) a requirement to remain within the confines of the workstation during working time; (iii) a requirement to deal with members of the public, including escorting, lifting items belonging to the public in the course of conducting security searches.

2.2 If the Claimant was placed at a substantial disadvantage by the application of the above PCPs, did the Respondent comply with its duty to make reasonable adjustments to avoid that disadvantage?

2.3 Would it have been a reasonable adjustment for the Respondent to:

2.3.1 give the Claimant breaks when required;

2.3.2 assign the Claimant shifts which did not require lone working or the need to escort service users;

2.3.3 transfer the Claimant to fill in existing vacancy; and/or

2.3.4 provide the Claimant with suitable equipment such as an appropriate table to conduct searches on or a suitable chair at reception after a workstation assessment, as advised by the OHS.

Discrimination arising from disability

2.4 Did the Respondent treat the Claimant unfavourably because of something arising in consequence of his disability? The something arising is said to be (i) earlier warnings as to conduct which had been given to Claimant because of issues relating to disability in particular the need to take additional/longer breaks and (ii) the fact that the Claimant left his workplace in response to his knee "locking". The unfavourable treatment is the Claimant's dismissal.

2.5 If unfavourable treatment is found, was that treatment a proportionate means of achieving a legitimate aim?

Victimisation

2.6 Did the Respondent subject the Claimant to a detriment because of a protected act? The protected act is said to be verbal complaints by the Claimant to Derek Ashby and Christine Neophytou about not being able to take sufficient breaks and the detriment relied upon is the issuing of a first written warning on 21 March 2013.

2.7 Was this a continuing act which can be linked to the final detriment suffered by the Claimant on 28th May 2014 when he was dismissed?

2.8 If the Claimant is successful what remedy is he entitled to receive and has the Claimant mitigated any losses he has established he has suffered?

Evidence

3 The Tribunal had a bundle of documents. We heard evidence from the Claimant and, on his behalf, from Mr David Bailey, the Claimant's trade union representative, and from Mr A Thomas, who was formerly a colleague of the Claimant. For the Respondent we heard evidence from Mr Avery, Head of Physical Security, who took the decision to dismiss the Claimant, and from Mr C Heard, the appeal manager. We were asked to take into account a statement of Ms Neophytou, the Claimant's line manager from December 2013 who was unable to attend having had a baby prematurely a few days before the hearing.

4 Ms Kuranchie for the Claimant was of the view that the Claimant had been disadvantaged by the non-attendance of Ms Neophytou as she had been unable to cross examine her. We have some sympathy for that position. We do not accept, however, her submission that the Respondent had chosen not to call Ms Neophytou for tactical reasons. The Tribunal had granted an earlier postponement request made by the Respondent on the grounds of Ms Neophytou's ill-health, but had been warned by the tribunal that it was very unlikely that the Respondent would be granted another postponement. The Claimant was put on notice that Ms Neophytou had a very difficult pregnancy and would be unable to attend for health-related issues at some point before the hearing – although we do not have a copy of that correspondence. Given the above we can draw no conclusions from the Respondent's failure to seek a further postponement and the decision to go ahead in Ms Neophytou's absence. In any event, most of the tribunal's findings have been drawn from contemporaneous documentation which was contained in the bundle.

5 Unfortunately however it appeared to us that the Respondent had not adequately prepared the case for hearing. Many documents which should have been in the bundle were not in the bundle and the witness statements were insufficiently detailed and did not provide us clear chronological evidence of the events narrated below. It fell to the members of the Tribunal to trawl through the bundle in order to reach a coherent, chronological narrative. This is no criticism of Ms Cohen who presented the case carefully and skillfully for the Respondent, but the Respondent is a large employer with the resources to provide a clear chronology and who will be aware of its duty of disclosure. We did not, for example, have a copy of the Claimant's grievance form, copies of the appeal hearing notes or notes of the earlier disciplinary hearings relied on by the Claimant.

Relevant law

6 Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than non-disabled persons in recognition of their special needs.

7 In *Environment Agency v Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4* the EAT gave general guidance on the approach to be taken in the reasonable adjustment claims. A tribunal must identify:

- the PCP applied by or on behalf of the employer, or the physical feature of premises occupied by the employer;
- the identity of non-disabled comparators (where appropriate); and
- the nature and extent of the substantial disadvantage suffered by the Claimant.

8 Once these matters were identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as a matter of fact, not whether it did or did not consider them. As Langstaff J put it in Ashton (paragraph 24): “The focus is upon the practical result of the measures which can be taken. It is not - and it is an error - for the focus to be upon the process of reasoning by which a possible adjustment was considered.”

9 The Code of Practice on Employment 2011 (chapter 6) gives guidance in determining whether it is reasonable for employers to have to take a particular step to comply with a duty to make adjustments. What is a reasonable step for an employer to take will depend on the circumstances of the particular case. It also sets out some of the factors which might be taken into account in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer’s financial and other resources.

10 The test of reasonableness imports an objective standard. The Tribunal must examine the issue not just from the perspective of the Claimant but

also take into account wider implications including the operational objectives of the employer.

11 Section 15 of the Equality Act 2010 provides that

> "(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."

In *Basildon and Thurrock NHS Foundation Trust v Weerasinghe* 2016 ICR 305 the EAT (Langstaff J) explained

"The current statute requires two steps. There are two links in the chain, which are causal, though the causative relationship is differently expressed in respect of them. The tribunal has first to focus on the words "because of something", therefore have to identify something – and second upon the fact that something must be open to something arising in consequence of B's disability, which constitutes the second causative open consequential link."

12 The focus of sections 15 and 20 are different. Section 15 is focused upon making allowances for disability: unfavourable treatment because of something arising in consequence of disability. Sections 20-21 are focused upon affirmative action: If it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage.

13 As to victimisation section 27 of the Equality Act provides that

> "A person (A) victimises another person (B) if A subjects B to a detriment because–
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act–
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act."

14 The burden of proof, is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. Once

the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise.

Findings of relevant fact

15 The Claimant was employed by the Respondent as a security guard from 17th April 2000 to 28th May 2014. He was at all material times disabled by virtue of osteoarthritis in his left knee.

16 During his time with the Respondent he was referred to Occupational Health a number of times, both by reference to his knee problems and by reference to subsequent problems with stress. The first OHS referral to which the Tribunal was taken was in March 2009. So far as relevant the OHS said that the Claimant would "*generally benefit from being allowed to vary his roles as much as possible so that he has periods when he can sit, periods when he can stand and periods when he walks. Ideally he should change his role at least every 1 to 1 ½ hours during the working day. He remains fit to escort people from the building at present but obviously should avoid any possible violent confrontation. He should also avoid kneeling and repetitive bending. He should not lift any heavy weight over 20 kg.*"

17 The Claimant was referred again in April 2011. The following adjustments were suggested

17.1 If operationally practicable I suggest that lone working is avoided until after Mr Amin has had knee surgery as it is possible that his knee may give way on occasions during the working day.

17.2 If operationally practicable I suggest that Mr Amin refrains from working late shifts from prolonged periods, i.e. more than 3 consecutive days.

17.3 I recommend that Mr Amin refrains from handling any heavy items. If he is required to do so, I suggest a buddy is allocated to assist.

17.4 I recommend Mr Amin refrains from any activity that might require him to kneel on the floor on the left knee. He is able to kneel on the right knee however.

17.5 I recommend that Mr Amin refrains from any activity that might require him to walk for more than 30 minutes at a time.

17.6 You might wish to consider liaising with access to work to obtain a suitable piece of equipment to enable Mr Amin to elevate his leg for short periods when sitting at reception.

17.7 I recommend that the local fire warden is advised of Mr Amin's mobility issues in order that safe egress might be planned for in the event of an evacuation procedure.

17.8 I suggest that Mr Amin is enabled to work flexibly to attend any medical appointments that might fall within his normal working hours.

17.9 Finally, I suggest that Mr Amin has regular micro breaks to vary tasks as able and to change position."

18 Prior to November 2011 the Claimant was working at the staff reception at Metro point. This role involved late shifts and lone working. In November 2011, as a result of the OH advice the Claimant was moved to work in the 2nd search area on the 3rd floor in Lunar House. In this position the Claimant worked with 2 other guards.

19 Asylum seekers and other service users would enter the building through the main public access on the ground floor where they would go through a deep security check and where large bags would be left in a locker. A small proportion of those visitors would then be required to be interviewed in a separate interview room on the 3rd floor. Generally, the interviewing officer would escort the applicant up to the 3rd floor where they would be subjected to a 2nd search by the security guards working in the second search area. This involved the applicant moving through a scanner. If the light went red one of the guards would pass the wand over them and in addition the applicants would have their (smaller) bags searched. Occasionally the security guards would be asked to collect the service user from the first floor and bring them up in the lift to the 2nd search area. In late October 2012 the 2nd search was moved to the 4th floor.

20 When working in the second search area in Lunar House the Claimant was working with 2 colleagues Mr Kumar and Mr Davda (Cws p 52). The job involved a mixture of standing, sitting and walking. When there were no applicants at the search area the guards were able to be seated. On the 4th floor the Claimant and the other guards were also required to patrol the corridor from time to time. We do not however accept that the Claimant was required to continuously patrol for 2 ½ hours at a time as submitted by his representative. Nor do we wholly accept the Claimant's evidence that he would be "standing up patrolling locations in Lunar House standing up for long periods and carrying asylum seekers heavy bags". Heavy bags were left on the ground floor and there was no requirement for the Claimant to carry bags for asylum seekers. We are also satisfied that the requirement for patrolling was limited to walking up and down the 4th floor corridor and alternating with the other 2 guards.

21 From late October 2012 the Claimant worked a shift pattern commencing at 7:30 a.m., 8 a.m. or 10 a.m. At first the guards were entitled to half an hour's break in the morning, half an hour's break in the afternoon and one hour for lunch. However, shortly thereafter the morning and afternoon break times were reduced to 15 minutes.

22 In May 2012 the Claimant was referred to occupational health. OH advised that the Claimant's osteoarthritis impacted on his mobility and that his walking was limited to short periods of about 10 minutes. *"As with all people with his underlying condition he does find that being in a prolonged*

static posture does make his symptoms worse and his current job would be ideal with him moving from sitting to standing" OH advised that the Claimant could do sedentary or semi-sedentary duties and was not fit for patrolling or duties that involved walking or prolonged standing.

23 In March 2013 the Claimant was issued with a first written warning by Ms Neophytou for refusing to follow reasonable management instructions. More specifically that

23.1 On 23 November 2012 when advised that he had to go for his breaks at the times specified on the break sheet he was rude to his manager and then refused to go with his manager to a private area to discuss it.

23.2 That he had, on the same day, taken a 30 minute break in the morning (at 10 a.m.) and a 24 minute break in the afternoon at 15.26 when the break sheets required him to have 15 minute breaks at 10.30 and 15.00 respectively.

This warning followed informal counselling which had been given on 15 November 2012 for failing to follow a reasonable management instruction as to the taking of breaks.

24 The Claimant's defence to those allegations was that he needed additional breaks because of his medical conditions including depression, high blood pressure and his knee. (The Claimant also said that he had refused to go with his manager because his manager had been rude to him.) Those explanations were rejected by Ms Neophytou. Her outcome letter records that OH had not recommended that the Claimant be given additional or longer breaks and he had not given any satisfactory explanation for not having obtained authorisation for taking breaks at times other than scheduled. She did not accept that his manager had been rude to the Claimant.

25 The Claimant appealed the warning. In relation to his break times the grounds of the Claimant's appeal was that a manager, Mr Jayakumar, had told him that he could take extended breaks. In May 2013 he was advised that his appeal was unsuccessful and that Mr Jayakumar had said that he had told the Claimant of the break requirements. (80)

26 In the meantime, the Claimant had had another occupational health report in December 2012 (62). That report advised that he was capable of undertaking security officer activities "*provided that these can be adjusted so that he has a mix of standing, sitting and walking. He can sit for about 15 minutes and then he needs to move and change position. He is able to walk about 5 minutes before he needs to sit and then move on. Prolonged stair use would not be advisable".* In relation to lifting OH advised that the Claimant's lifting capability was for about 5 kg in weight. In January 2013 OH further advised that the Claimant was not fit for "handcuff" confrontational situations but should be fit to use verbal calming.

27 This advice was discussed with the Claimant on 14th February 2013. (65A) As a result of this advice the Respondent concluded that the Claimant should not work at a staff reception. Those posts required him to be seated most of the time and would not he would not be able to get up and move around. The Claimant was offered a post in Electric House in the 2nd search area working from 9 to 5. The Claimant was told that as part of this job he would be required to escort approximately 12 to 15 people a day to the ARC area and asked if he was able to do this. The Claimant said he was willing to work in Electric House and that he would be able to do the escorting duties as it was what he had done before. In relation to the lifting restriction Mr Ashby said to the Claimant that most heavy bags were left on the ground floor and that the Claimant should ask a colleague or the customer to assist him with lifting handheld luggage onto the table to be searched. The Claimant said that he would ask for assistance when needed.

28 On the 22nd February 2013 the Claimant's then line manager Mr Ashby undertook a stress risk assessment with the Claimant. The Claimant said that working on the 4th floor ASU area in Lunar House had caused him stress as it was very busy and the facilities were very cramped. Sometimes he had to take abuse and deal with aggressive people. However things were much better now he was working in Electric House and he was no longer taking antidepressant tablets (69). The Claimant complained that 15 minutes breaks in the morning and the afternoon were insufficient. He said "my knee locks/gives way without warning and management knows this and is bullying me because of my disability". Mr Ashby rejected that complaint saying that his breaks had been reduced because he was now working basic hours and had nothing to do with his disability.

29 Following this meeting Mr Ashby prepared, and the Claimant signed, the "UKBA reasonable adjustment agreement form" (73). Inter alia the form notes that the Claimant was working in Electric House in a post which enabled him to alternate between seated, standing, and walking tasks throughout the day.

30 Unfortunately further misconduct allegations were made against the Claimant. These were that (i) in December 2012 the Claimant had been rude to a Royal Mail delivery driver in the Lunar House car park and (ii) on 13th February 2013 the Claimant had refused to attend an informal meeting with his line manager Mr Smart. A second disciplinary hearing was convened for the Claimant in June 2013.

31 As to the first allegation a Royal Mail delivery van was blocking access to the Claimant's preferred parking space. It was alleged that the Claimant shouted from his vehicle and then got out of his vehicle to confront the driver, who then complained. At the disciplinary hearing the Claimant said that he was not rude and did not shout. The outcome letter records (83) that the Claimant told Ms Neophytou that he did not think of parking in the back section of the car park because his car had been damaged there on a couple of occasions in the past so that he wanted to park at the front.

The Claimant did not suggest at that time that he was unable to park at the back because of his knee or that he was rude to the delivery driver because of pain in his knee.

32 The Claimant's defence to the second allegation was that he did not attend the meeting because he was not aware that the meeting was informal and he wanted to know if he needed his trade union representative.

33 The Claimant's explanations were rejected and he was given a final written warning. The Claimant's appeal was heard by Mr Heard on 23 August 2013 and was unsuccessful.

Events leading to dismissal

34 On 27 August 2013 the Respondent wrote to the Claimant advising him that Electric House would be closing in October and 90% of guarding duties would be in Lunar House. In the light of these changes they wished to refer him back to OH to obtain advice on whether the Claimant would be fit for the new roles.

35 In the event, the Claimant was then signed off work with work related stress (87). In his return to work interview on 23rd September the Claimant was asked if he wanted to be moved out of Electric House if this was causing him stress but the Claimant said he would manage until the reporting centre moved to Lunar House in October. It was explained that the guards working in the 2nd search area at Lunar house would be required to patrol the first and 2nd floors as well as responding to panic alarms and dealing with conflict and the Respondent was not sure whether the Claimant would be able to carry out this role given his knee problem. A referral would be made to OH.

36 On 24th September 2013 the Claimant was advised that there were 2 new misconduct allegations against him. These were (i) an allegation that he failed to respond to a management instruction and had also left his post unattended without permission on 17 July 2013 and (ii) an allegation that he had been rude to a service user on 5 August 2013. As to (i) the allegation was that the Claimant was asked over the radio to carry out an escorting duty and had responded "hold on a minute". When his supervisor escorted the applicant to the 2nd search area he saw the Claimant sitting on a wall outside the building and not carrying on any work related activity. CCTV footage had shown that the Claimant was sitting on a wall in the car park for 7 minutes.

37 On 7th October OH advice was obtained that the Claimant would not be fit for the revised security guard role in Lunar House as he was unable to stand for long periods of time and was unable to deal safely with confrontational situations as his knee could give way at any time. At a risk assessment interview on 16th October the Claimant reported that he felt that the 2nd search area of Electric House was very busy as he had to constantly walk applicants round to the reporting centre but this was in any event due to be closed on 18th October.

38 Notwithstanding the OH advice on 22nd October 2013 the Claimant was required to work on the public door in Lunar House following the closure of Electric House. While working on the public door he suffered a panic attack and was taken to hospital with high blood pressure. He remained off work until 24 November 2013.

39 At his return to work meeting on 28th November 2013 the Claimant was advised that, as a short-term adjustment, he would be moved to work on the first floor podium in Lunar House. The guards who normally worked there carried out patrols of the first and 2nd floors throughout the day and responded to any alarms. However the Claimant was advised that he would not be required to do these tasks but he would be required to conduct the 2nd search for those who were going for interviews on the first floor. The Claimant was asked if he could patrol on the first floor only and the Claimant confirmed that he could. The Claimant also asked if he could have a 30 minute tea break in the morning as opposed to 20 minutes so that he could take his medication plus 10 minutes in the afternoon. It was subsequently agreed that he could have a 25 minute tea break in the morning and 10 minutes in the afternoon.

40 The Claimant attended a stage 3 Disciplinary Hearing on 6 January 2014 accompanied by his trade union representative Mr Bailey. (It is not clear why the meeting was so delayed though the notes record that the Respondent had been trying to arrange the meeting since October.) The Claimant was aware that as he had a live final written warning the outcome might be dismissal. The meeting was chaired by Mr Avery who was supported by Ms Vogel, HR representative. At the start of the hearing the Claimant handed in a Grievance. Mr Bailey said that they could not proceed with the Disciplinary Hearing until the grievance was resolved.

41 Mr Avery adjourned for 30 minutes to look at the grievance and it was agreed that he would deal with the grievance during the course of the disciplinary hearing. The Claimant's complaints were discussed. (These related to racial discrimination, allowing the public to make racial comments, a security guard colluding with a Royal mail driver resulting in the Claimant been given a final written warning, a failure to make reasonable adjustments for the Claimant's medical condition and being bullied by line managers.)

42 In relation to the disciplinary allegations the first allegation was that when the Claimant was asked to escort a customer round to the ARC section he had responded via radio saying "hold on a few minutes" which indicated that he was busy. However CCTV footage had established that he was sitting on a wall in the Electric House car park area from 1155 till 1202. He had returned to his post only when he saw the security guard supervisor escorting the customer to the ARC.

43 The Claimant's explanation at the time was inconsistent. Initially he said that he said "Hang on a minute" because at the time he was searching members of the public and he was busy. When he finished searching he forgot that he had been asked to do an escort duty and then his knee had

locked and he went outside to sit down until his knee released (114). He said that he did not radio the manager to inform them he could not respond to the escorting request because he had forgotten as he was in a lot of pain. He also said that he had not left his post as, from his position in the car park, he had a clear view of what was going on. Later, in response to further questions the Claimant said that he had tried to call on the radio to say that he could not do the escorting duty and that he needed someone to assist because he was in pain and had received no answer. He also said that escorting to the ARC was not his job although he had done it many times in the past "as a favour". He was also asked why he was outside when there was a seating position inside to which there was no clear answer. Mr Bailey said on his behalf that he had stepped outside "for fresh air because he was breathless and to stretch his leg" and that the Respondent had failed to make adjustments. Mr Avery responded that the Claimant had been in that post at Electric House for 4 months and had not raised any concerns until after the incident occurred.

44 In Tribunal Ms Kuranchie was permitted to ask the Claimant further questions in chief about the need to go outside. In response the Claimant said that he could not sit in the chair provided as one of them was broken and/or not suitable because it was on wheels and unstable and the other was too small. He said that he had radioed for assistance 3 times but there was no answer. In his witness statement the Claimant also said that when he received the call over the radio to do the escorting duty he did not want to discuss his personal situation over the radio because all the other guards could hear.

45 The 2nd allegation was that the Claimant had been rude to a customer who was waiting to be escorted to the ARC section. The customer himself had not made any formal complaint but a member of staff (Mrs Stubbs) had overheard him telling another customer what had happened and had reported it to management. The Claimant denied he had been rude and said that the customer had called him a "Paki. Mr Avery concluded that Mrs Stubbs account was credible and that the Claiman's was not, noting that he had not filed an incident report in relation to the alleged abuse.

46 The hearing was then adjourned for Mr Avery to consider the grievance and Claimant's response to the disciplinary charges. It was intended that the hearing would reconvene in about 10 days' time.

47 However following an OH appointment on 9th January 2014 OH reported that the Claimant was not fit to attend a disciplinary hearing because of his symptoms of anxiety and depression. A further occupational health report on 4th April also advised that the Claimant was not fit to attend a disciplinary hearing and that consideration should be given to allowing his representative to attend the hearing on his behalf and to concluding the investigation.

48 The Claimant was off sick with work-related stress, osteoarthritis, and viral gastroenteritis from 7th February to 5 May 2014. He returned to work on 5th May but remained unfit to attend the reconvened disciplinary hearing. On

6th May, in line with OH advice, Mr Bailey attended the adjourned disciplinary hearing on his behalf. After further representations were made on his behalf the Claimant attended to be given the outcome. The Claimant was advised that he would be dismissed and paid 10 weeks in lieu of notice. The outcome letter was sent to him on 29th May 2014 (173).

49 The Claimant appealed. The grounds of his appeal were that: (i) he had to leave his post because his knee had locked and because he had been experiencing pains in his chest; and (ii) the Respondent failed to put in place adjustments.

50 His appeal was heard on 29th August 2014 and rejected. Mr Heard told the tribunal that it was not clear and remained unclear why the Claimant was not able to stretch his knee by his desk either by standing next to his post or sitting down using the chair provided.

Conclusions

Failure to make reasonable adjustments.

51 The Claimant claims that he was at a substantial disadvantage by the application of the following PCPs

51.1 a requirement of lone working;

51.2 a requirement to remain within the confines of the workstation during working time;

51.3 a requirement to deal with members of the public including escorting, lifting items belonging to the public in the course of conducting security searches.

52 The reference to lone working was taken from the 2011 0H report (see para 17 above). The Claimant interprets this as working on his own—although Respondent's definition of "lone working" seems to be working where there were no other people around.

53 The Claimant was not working on his own when he worked in Lunar House. The post in the 2nd search area at Electric House (where he worked from February to October 2013) had originally been a 2 guard post but was subsequently reduced to one guard. At Electric House the Claimant was stationed on his own. The 2nd search area was however approximately 30 metres from the public entrance where the initial deep searches were undertaken and where there were about 6 guards on duty. For the most part when the Claimant was searching bags or doing security checks the interviewing officer would also be present but there would have been occasions (if the Claimant had been asked to escort a service user to the ARC area) when he might be required to do the security checks on his own.

54 We accept that the Claimant was required to work on his own for part of the time when he was stationed in Electric House. It is also accepted by the Respondent that the Claimant was required to remain within the

confines of his working area during working time and that he was required to deal with members of the public including escorting service users.

55 We do not accept that the Claimant was required to lift heavy items. The Respondent had been made aware of his lifting limitations and the Claimant had been told that he should ask the service user or the interviewing officer to lift any bags onto the table which needed to be searched.

56 We considered whether these requirements put the Claimant at a substantial disadvantage in comparison to others who were not disabled.

57 The OH recommendation that "lone working be avoided" had been made because of the risk that the Claimant might fall if his knee gave way. In Electric House the Claimant was working within 30 metres of a busy guarding post and within easy radio contact. Help was close by if his knee gave way. The Claimant did not explain why he considered that he was at a disadvantage in this post and there were no contemporaneous notes of meetings with the Respondent in which the Claimant had objected to the post in Electric House on that basis. The evidence did not suggest that he was at a substantial disadvantage because he was working in a one guard post in Electric House.

58 As for the requirement that the Claimant remain within the confines of his working area during working time, the Claimant's case was that he was put at a disadvantage because he might need to leave the working area in order to stretch/rest his leg and to have time to take his medication.

59 In all of the OH appointments attended by the Claimant no recommendations were ever made that (i) he should be able to leave his guarding post whenever he needed to stretch his leg or (ii) that he should have longer breaks away from his workstation. The focus of the OH recommendations was always that the Claimant should have a mix of sitting, standing and walking. The Respondent had arranged his guarding posts accordingly. He was also permitted to bring his own water with him so that he could take his medication while in post.

60 The Claimant and Ms Kuranchie have misconstrued the advice in the 2011 OH report which recommended that the Claimant "has regular micro breaks to vary tasks as able and to change position". We do not read this (and nor did the Respondent read this) as a recommendation that the Claimant should have longer breaks away from his workspace. This recommendation had been made at a time when the Claimant was working in a seated position at staff reception in Metro point and was a recommendation that he be given a chance to break up his tasks in order to change positions. The issue of longer breaks had been on the Claimant's wish list for some time, yet, despite numerous appointments, OH had never recommended that the Claimant be given longer breaks away from his work area. The Claimant had signed a work-related stress risk assessment and action plan form in February 2013 which identified that the Claimant was entitled to 15 minute tea breaks or one 30 minute

tea break in addition to his one-hour lunch break and that OH had not recommended longer breaks were needed because of his disability.

61 The adjustment recommended by OH was that he be able to vary tasks so that he could have a mix of standing, sitting and walking. All of those could be achieved within the confines of the working area. The Claimant was also able to stretch his leg without leaving the working area. We are not satisfied that the Claimant was substantially disadvantaged by a requirement to remain within the confines of his working area during working time.

62 Nor do we accept that the requirement to escort members of the public put the Claimant at a substantial disadvantage. This duty was discussed with him and OH on a number of occasions and no objection was taken. The OH recommendation was that the Claimant should be able to mix his tasks to include some walking.

63 In his posts at Lunar House and Electric House the Respondent had made all the adjustments recommended by OH. He was not at a disadvantage by reference to the pleaded PCPs.

Discrimination arising from disability.

64 It is the Claimant's case that he was unfavourably treated when he was dismissed. He says that this unfavourable treatment was because of something arising in consequence of his disability. The "something arising" is (i) the earlier warnings and (ii) the need to leave his workstation and go outside because his knee had locked.

65 The Claimant contends that he was disciplined for "trying to have breaks at times when I was seeking relief because I was in pain". Ms Kuranchie submits that the Claimant was given a first warning for taking breaks and that this related directly to his disability. OH had recommended that the Claimant be given breaks. Had he not had a first warning he would not have been dismissed.

66 We do not accept that the warning in 2012 arose in consequence of the Claimant's disability. In 2013 during the stress risk assessment the Claimant told managers that the 15 minute break didn't give him enough time to have a break "my knee locks/gives way without warning and management knows this" but that does not explain the link between the knee condition and the need for a longer break. The warning was given because the Claimant took longer breaks at unscheduled times without notifying his supervisor. That cannot be said to arise in consequence of his disability. The OH reports do not support his case that he was at a disadvantage by having standard breaks. The reference to micro breaks has been misconstrued.

67 Ms Kuranchie also submits that the Claimant was given a final written warning for something which arose in consequence of his disability namely his need to park close to the building. She submits that his altercation with the delivery driver was because the Claimant was disabled.

68 We do not accept that the final written warning given after the incident with the Royal Mail delivery driver was "something arising in consequence of his disability". The Claimant's case at the time of the disciplinary hearing was not that he was rude because he was in pain – his case was simply that he was not rude. In evidence before us he accepted that the incident with the Royal mail driver had nothing to do with his knee condition and that he was simply frustrated at where the driver had chosen to stop in a place which was against the Respondent's car parking regulations. Equally the reasons for the Claimant's failure to attend an informal meeting with his line manager and Mr Smart had nothing to do with his knee.

69 Since the warnings were not something arising in consequence of the Claimant's disability, it was reasonable for Mr Avery to take the warnings into account in deciding to dismiss the Claimant.

70 Ms Kuranchie also submits that the dismissal was "something arising in consequence of his disability" because the Claimant had to leave his post and go outside to sit on the wall because his knee had locked. He was dismissed because his knee had locked.

71 We reject that. The Claimant gave different and inconsistent accounts of the reasons why he needed to leave his workplace at the disciplinary hearing and before us. We do not accept he needed to go outside because of his knee condition. He did not explain to Mr Avery why he needed to sit down outside rather than in the chair provided. In the Tribunal the Claimant said that he could not sit down inside because the chair was on wheels/was broken/was too small. We did not find this account credible. First had he been unable to sit down in his workplace because there had been no viable chair it is unlikely that this would not have been reported. The Claimant had been working in Electric House for 5 months when the incident occurred. Secondly this was not an explanation that he gave to Mr Avery at the hearing in January. (That suggestion was made for the first time at the reconvened meeting in May when he said he could not sit at the chair provided as it had wheels and he might fall off).

72 The Claimant's explanations as to what he did or did not say on the radio were also inconsistent. Initially he had said that he told caller on the radio who had requested the escorting duty to "hang on a minute" because he was busy with 4 people waiting. Later he said that he asked the caller to "hang on" because he had not wished to say over the radio that he was in pain (as it was personal information that he did not want to be shared). We were unpersuaded that the Claimant needed to leave the workplace to sit on the wall outside in order to free up his leg when he could have sat down or otherwise freed up his leg inside.

Victimisation

73 Finally the Claimant contends that the first written warning given to him by Ms Neophytou was because the Claimant had complained both to her and to his line manager Mr Ashby about not being able to take sufficient breaks. The Claimant accepts that he took breaks at unauthorised times and without obtaining permission. He has provided no evidence which

would suggest or lead us to infer that Ms Neophytou's reasons for imposing the first written warning were not as set out in her decision letter but were to punish him for complaining. In the particular circumstances the warning came after the Claimant had been given "informal counselling" about the taking of breaks. The basis of this complaint is no more than a bare assertion. Further there is no link between this warning and the eventual dismissal which was for another breach of the rules and was imposed by a different manager.

74 Accordingly the complaints fail and are dismissed.

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Employment Judge Frances Spencer
6th March 2017