RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Sharp**

Respondents: **(1) Carrier Refrigeration UK Limited**
(2) Pieter Aucamp

Heard at: **East London Hearing Centre**

On: **28, 29, 30 and 31 March 2017**

Before: **Employment Judge Brown**

Members: **Ms J Houzer**
Ms V Stansfield

Representation

Claimant: Mr M Lafferty (Solicitor)
Mr S McHugh (Counsel)

Respondent: Mr C Harries (Counsel)

JUDGMENT

The judgment of the Tribunal is that:-

1. The Respondents subjected the Claimant to disability discrimination when they failed to make reasonable adjustments between 9 March 2016 and 8 July 2016, when they:

1.1 Failed to adjust the Claimant's duties so that he did not work for more than 12 hours a day and did not carry out more than 1:6 weekends on call; and

1.2 Failed to redeploy the Claimant.

2. The First Respondent subjected the Claimant to discrimination arising from disability when it dismissed him.

3. The First Respondent subjected the Claimant to detriments on the grounds that he had made protected disclosures, by repeatedly refusing to carry out risk assessments.

4. The Respondents did not subject the Claimant to direct disability discrimination.

5. The Respondents did not victimise the Claimant.

6. The Respondents did not subject the Claimant to other discrimination.

7. The First Respondent did not automatically unfairly dismiss the Claimant, nor subject him to unlawful deductions from wages.

8. The Respondents shall pay the Claimant a total £25,335.67 in compensation for disability discrimination and protected disclosure detriment, comprised as follows:

8.1. £10,000 compensation for injury to feelings;

8.2. £800 interest on injury to feelings compensation;

8.3. £12,785.23 compensation for past loss of earnings and life insurance to the date of the Employment Tribunal hearing;

8.4. £372.70 interest on past economic loss;

8.5. £1,197.69 future loss of earnings (13 weeks from date of ET hearing);

8.6. £108.05 future loss of life insurance (13 weeks from date of ET hearing).

9. The ET makes no ACAS Code of Practice adjustment to the award.

REASONS

Preliminary

1 The Claimant brought complaints of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, victimisation, protected disclosure detriment and automatically unfair dismissal under *s103A Employment Rights Act 1996* against the First Respondent, his former employer, and the Second Respondent, his former line manager. The issues to be decided had been agreed between the parties.

Disability Discrimination

2 **Direct Discrimination**

1. For the purposes of the Claimant's claim of direct disability discrimination who are the correct comparators?

2. Are there facts from which the Employment Tribunal could conclude, in the absence of other explanation that the treatment meted out to the Claimant

by the First and/or Second Respondent amounted to direct disability discrimination contrary to Sections 13 and 39 of the Equality Act 2010 insofar as he was treated less favourably than his non-disabled colleagues?

3. As part of 4, above, there are facts from which the Employment Tribunal could conclude, in the absence of any other explanation that, that the First and/or Second Respondent's actions in not implementing the adjustments to the Claimant's role recommended by the various medical professionals, failing to properly consider redeployment of the Claimant within the First Respondent's organisation, and culminating with the termination of the Claimants employment on 8 July 2016 amounted to less favourable treatment because of his disability? In particular, did the following acts amount to unlawful acts of direct discrimination?:

   (a) The First and/or Second Respondent's refusal to implement the adjustments to the Claimant's role recommended by the various medical professionals:

   (b) The First and/or Second Respondent's failure to properly consider redeployment of the Claimant within the First Respondent's organisation; and

   (c) The First and/or Second Respondent's decision to terminate the Claimant's employment.

4. If so, have the Respondents shown that the Claimant's treatment was, in no sense whatsoever, on the grounds of his disability?

Discrimination arising from disability

5. Are these facts from which the Employment Tribunal could conclude, in the absence of other explanation, that the treatment meted out to the Claimant by the First and/or Second Respondent amounted to discrimination arising from disability contrary to Sections 15 and 39 of the EqA 2010?

6. .. Are there facts from which the Employment Tribunal could conclude, in the absence of other explanation, that the treatment meted out to the Claimant by the First and/or Second Respondent in not implementing the reasonable adjustments to the Claimant's role recommended by the various medical professionals, failing to properly consider redeployment of the Claimant within the First Respondent's organisation, and culminating with the termination of the Claimant's employment on 8 July 2016 amounted to detriment for reasons arising from his disability? In particular, did the following acts amount to acts of unlawful discrimination arising from disability?

   (a) The First and/or Second Respondent's refusal to implement the adjustments to the Claimant's role recommended by the various medical professionals;

(b) The First and/or Second Respondent's failure to properly consider redeployment of the Claimant within the First Respondent's organisation; and

(c) The First and/or Second Respondent's decision to terminate the Claimant's employment.

7. If so, have the Respondents shown that the Claimant's treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

10. Did the First and/or Second Respondent fail to make reasonable adjustments as required by Section 20 of the EqA 2010 and contrary to Section 21 of the EqA 2010?

11. As part of 10, above, did the First and/or Second Respondent's require the Claimant to:

(a) work in excess of 12 hours per day? and/or

(b) work on "standby" more than one weekend in every six?

And did this constitute a provision, criterion, or practice which put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?

12. As part of 10, above, was the Claimant put at a substantial disadvantage in comparison with persons who are not disabled insofar as the PCPs:

(a) Would have prevented him from properly using the continuous positive airway pressure ("CPAP") machine as advised by medical professionals?

(b) Would have prevented him from properly using the CPAP machine and hence seriously exacerbated his health condition?

(c) Would have resulted in the Claimant's health condition being seriously exacerbated and hence seriously affected his ability to carry out normal day-to-day activities?

(d) Would have resulted in the Claimant being unable to comply with the conditions imposed on him by the DVLA (i.e. continued use of the CPAP machine) and hence resulted in the loss of his driving licence and/or consequent loss of employment?

13. As part of 10, above, did the First and/or Second Respondent:

(a) Ensure that the Claimant was not required to work in excess of 12 hours per day?

(b) Ensure that the Claimant was not required to work on "standby" more than one weekend in every six?

(c) Consider redeployment on the Claimant in the First Respondent's organisation?

14. As part of 10, above did the First and/or Second Respondent fail to comply with the duty to consider and to make reasonable adjustments at 12, above?

Victimisation

15. Did the treatment meted out to the Claimant by the First and/or Second Respondent, including but not limited to his dismissal, amount to a detriment because he had raised a "protected act" contrary to Section 27 of the EqA 2010?

16. As part of 15, above, did the Claimant's actions in repeatedly requesting that the First and/or Second Respondent implement the reasonable adjustments recommended by the various medical professionals and/or in sending the email of 7 July 2016 complaining of disability discrimination amount to "protected acts" within the meaning of Section 27(2) of the EqA 2010?

17. As part of 15, above, did the First and/or Second Respondent's treatment of the Claimant, in not implementing the reasonable adjustments recommended by the various medical professionals refusing to consider redeployment of the Claimant in the First Respondent's organisation, and the decision to dismiss the Claimant, amount to detriments because he had performed "protected acts"? In particular, did the following acts amount to unlawful acts of victimisation?

(a) The First and/or Second Respondent's refusal to implement the adjustments to the Claimant's role recommended by the various medical professionals;

(b) The First and/or Second Respondent's failure to properly consider redeployment of the Claimant within the First Respondent's organisation; and

(c) The First and/or Second Respondent's decision to terminate the Claimant's employment.

Whistleblowing

18. Did the First and/or Second Respondent subject the Claimant to a detriment and/or dismiss the Claimant because he had made protected

disclosures within the meaning of Section 43B(1) of the Employment Rights Act 1996 ("ERtsA 1996"), contrary to Sections 47B(1) and 103A of the Act?

19. As part of 18, above, did the Claimant's requests that the First and/or Second Respondent carry out a Health and Safety risk assessment in relation to his role, workplace, and system of work, in light of his Health Condition, and complaints at their failure to do so and/or in raising concerns regarding the First and/or Second Respondent's failure to implement the reasonable adjustments recommended by the various medical professionals amount to qualifying disclosures within the meaning of Section 43B(1), ERtsA 1996?

20. In particular, as part of 18 above, did the Claimant hold a reasonable belief that the information disclosed tended to show:

    (a) that a person had failed and/or was likely to comply with any legal obligation to which he is subject (as per Section 43B(1)(b), ERtsA 1996)?

    (b) that the health or safety of any individual had been, was being or was likely to be endangered (as per Section 43B(1)(d), ERtsA 1996)?

21. As part of 18, above, did the First and/or Second Respondent subject the Claimant to a detriment as a result of his having made protected disclosures? In particular, did the treatment meted out to the Claimant by the First and/or Second Respondent between March 2016 and July 2016 and the First and/or Second Respondent's failure to either carry out a Health and Safety risk assessment and/or implement the reasonable adjustments recommended and/or failure to properly consider redeployment of the Claimant within the First Respondent's organisation amount to a detriment as a result of his having made "protected disclosures"? In particular, did the following acts amount to detriments?

    (a) The treatment meted out to the Claimant by the First and/or Second Respondent between March 2016 and July 2016. In particular, in:

        (i) refusing to adequately respond to the Claimant's request during the meeting of 14 April 2016 that a health and safety risk assessment be carried out;

        (ii) refusing to adequately respond to the Claimant's request to the Second Respondent and Tim Evans, Health and Safety Officer at the First Respondent, on 27 April that a health and safety risk assessment be carried out;

        (iii) refusing to adequately respond to the Claimant's request to Mr Evans via telephone call on 16 May 2016 that a health and safety risk assessment be carried out;

(iv) refusing to adequately respond to the Claimant's request to Mr Evans via telephone call on 17 May 2016 that a health and safety risk assessment be carried out;

(v) the Second Respondent, Pieter Aucamp, informing other employees that the Claimant would cover their on-call duties in exchange for them having covered the Claimant's on-call duties whilst he was absent from work due to ill health resulting in the Claimant being contacted directly by colleagues, such as Tim Farrel on 25 May 2016, whilst absent from work;

(vi) refusing to adequately respond to the Claimant's request to Kerry Haydon of the First Respondent's HR department on 13 June 2016 that a health and safety risk assessment be carried out;

(vii) being contacted by the Second Respondent on 15 June 2016 to ask whether the Claimant had arranged for a colleague to cover his on-call duties on that date; and

(viii) being contacted by a Service Controller at the First Respondent at around 5.00pm on 30 June 2016 and being told that he was on-call, in response to which the Claimant indicated that he was unable to carry out his on-call duties on that date, following which the telephone call was abruptly terminated by the other party;

(b) the First and/or Second Respondent's failure to implement the Safety risk assessment;

(c) the First and/or Second Respondent's failure to implement the reasonable adjustments recommended;

(d) the First and/or Second Respondent's failure to properly consider redeployment of the Claimant within the First Respondent's organisation.

22. As part of 18, above was the decision to dismiss the Claimant motivated by the fact that he had made protected disclosures and thus automatically unfair, as per Section 103A, ERtsA 1996?

<u>Unauthorised deduction from wages/breach of contract/breach of the Working Time Regulations 1998</u>

23. As a peripatetic employee, did time spent by the Claimant travelling to and from assignments on behalf of the First Respondent amount to working time?

24. Did the First Respondent fail to pay the Claimant in respect of time spent travelling in excess of two hours per day?

25. Did the First Respondent's failure to pay the Claimant in respect of time spent travelling in excess of two hours per day result in a miscalculation of his working hours for the purposes of calculating overtime pay?

26. Did the First Respondent's failure to pay the Claimant in respect of time spent travelling in excess of two hours per day result in miscalculation of his working hours for the purposes of calculating overtime pay result in an ongoing underpayment of his salary?

27. Did the First Respondent's failure to pay the Claimant in respect of time spent travelling in excess of two hours per day in a miscalculation of his working hours for the purposes of calculating overtime pay in an ongoing miscalculation of his holiday pay for the purposes of the Working Time Directive 2003/88/EC as implemented by Regulation 13 of the Working Time Regulations 1998?

28. Did the First Respondent's actions as outlined at 26 and 27 above amount to:

    (a) an unauthorised deduction from wages, contrary to Section 13 ERtsA 1996? And/or

    (b) a breach of contract? and/or

    (c) A breach of Regulation 13 of the Working Time Regulations 1998?

3 The Tribunal heard evidence from the Claimant. It heard evidence from the Second Respondent, Pieter Aucamp, the Claimant's Line Manager. It heard evidence from Adrian Amies, the dismissing manager and Zoe Brown, HR Business Partner. There was a bundle of documents. Both parties made submissions. The Claimant relies on his sleep apnoea condition in contending that he is a disabled person.

4 On 24 January 2017 the Respondents wrote to the Employment Tribunal, saying that they were confirming that the Respondent did not intend to dispute that the Claimant is disabled for the purpose of the *Equality Act 2010*.

5 The Respondents' representative told the Employment Tribunal that he considered that the burden was still on the Claimant to show that he was disabled within the meaning of *s6 Equality Act 2010*. The Respondents did not raise any issue about knowledge of disability.

Findings of Fact

6 The Claimant was employed by the First Respondent as a refrigeration service technician between 22 October 2014 and 8 July 2016. Service technicians were also known as service engineers and the terms "service technician" and "engineer" are used interchangeably in these Reasons. The Claimant's role involved travelling to the First Respondent's clients' premises, to maintain and repair commercial refrigeration units in South East England.

7 The First Respondent provides refrigeration products and service and repair support for refrigeration plant in major food retailers such as Aldi and Lidl. The First Respondent employs about 40 employees. It is subsidiary of a larger group of companies, United Technologies. It has access to the shared HR functions of this larger group, as well as having it own smaller dedicated HR function, with an HR director and HR business partner.

8 The Claimant lives in Clacton, Essex. The geographical area he was required to cover as a service technician included Dorset, Hampshire, Sussex, Berkshire and Buckinghamshire. The Claimant's contract of employment provided that his hours of work were Monday – Friday 8.30am to 5.30pm. The contract said, "This is a 40 hour week". The Claimant had signed a *Working Time Regulations* waiver.

9 The Claimant's contract also provided:

> "Carrier operates a 24 hour Call Out facility … you will be included within the call out rota. Standby rota/duties are subject to change to ensure industry and business requirements are met. A standby allowance is payable when on call rota and in addition an overtime payment if called out."

10 The Claimant was entitled to overtime pay at 1.5 times his normal rate for hours worked in excess of 10 hours a day on weekdays and before 12.00pm on Saturdays. He was entitled to double pay after 12.00pm on Saturdays and all day on Sunday.

11 The Claimant began to feel unwell and unusually tired in mid 2015 and sought medical advice. He underwent a sleep study in September 2016. On 28 January 2016 Mr Tim Howes, Consultant Respiratory Physician, wrote to the Claimant's GP saying:

> "Sleep study shows a borderline degree of sleep apnoea … Today he actually scores only 8 out of 24 on the Epworth sleepiness scale but his fatigue sleepiness score was 55.5 which is very elevated and probably in this context an indicator of a significant problem… He will also need to tell the DVLA about the diagnosis of sleep apnoea. He will be initiated on CPAP therapy today." Page 140

12 The Claimant did inform the DVLA of his diagnosis of sleep apnoea. On 25 January 2016 the DVLA wrote to the Claimant saying that it would make confidential enquiries about the Claimant's fitness to drive. The DVLA subsequently wrote to Dr Howes, page 141 and 145.

13 At the same time the Claimant told Neal Reed, who had health and safety responsibilities at the First Respondent, about his diagnosis. Mr Reed passed the information onto Mr Aucamp, the Second Respondent and Claimant's line manager. Mr Aucamp asked the First Respondent's Human Resources Director, Ruth Buckland, to arrange a referral to Occupational Health, as Mr Aucamp was concerned that the Claimant's sleep apnoea could affect the Claimant's driving.

14 The Claimant told the Tribunal, and the Tribunal accepted, that conditions were later placed on his ability to drive by the DVLA, due to his sleep apnoea. The DVLA conditions were that the Claimant received ongoing treatment using continuous positive

airway pressure, "CPAP", and that he undergo annual health checks. He told the Tribunal that his treating doctors told him that he was required to use a CPAP machine for a minimum of 7.5 to 8 hours a night. The CPCP machine prevents the Claimant's airways becoming blocked at night, so that he can rest properly while sleeping. The Tribunal accepted this evidence; it was unchallenged by the Respondent.

15 On 1 March 2016 Kerry Haden, United Technologies HR Adviser, referred the Claimant to an Occupational Health specialist, saying that there was a "..need to assess if Paul is fit to work and not at any risk completing service engineer tasks." Page 147.

16 On 3 March 2016 the Claimant attended a tool box talk meeting at the Respondent's Oxford office. At 11.00am he was told to undertake a job in Kensington in London. He had left home at 5.30am that day. The Claimant considered that it would take him a further 8 hours to carry out the job and return home. He refused to undertake the job that day, but said he would attend the client the following day.

17 On 4 March 2016 Mr Aucamp called the Claimant to an investigation meeting. The Claimant told Mr Aucamp and Zoe Brown that he considered the request the previous day to have been dangerous and unfair. The Claimant said he would have been unable to stay overnight on the job, when this was suggested by Mr Aucamp, because the Claimant needed to use his CPAP machine at night for 8 hours. He said that he was not fit to drive 11 hours in one day. Mr Aucamp told the Claimant that he considered that the job was a reasonable request. Mr Aucamp also mentioned that a Welsh engineer had completed a job on his way home from the tool box meeting, page 149 – 151.

18 On 9 March 2016 Mr Aucamp asked the Claimant by email to give him, HR and Neal Reed a copy of the doctor's note for the Claimant's condition. The Claimant replied, saying that, having taken legal advice, he would not, page 152.

19 Also on 9 March 2016 Clare Haddow, Occupational Nurse Specialist, sent a report on the Claimant's obstructive sleep apnoea to Kerry Hayden. Ms Haddow said:

> "In my opinion obstructive sleep apnoea is quite a serious condition… to have a maximum benefit from the CPAP treatment (the Claimant) has been told that he needs to continuously wear the mask for at least 7.5 – 8 hours … realistically if he was able to do slightly shorter days i.e. no more than 10 – 12 hours a day this would allow him to have good sleep wearing the mask. I have some concerns … with Paul doing standbys on the weekends (Friday, Saturday and Sunday) as his sleep will be disrupted and it is likely to have an effect on his wellbeing for the following week. He needs regular, good and uninterrupted sleeps. My understanding is that when he is on call he is telephoned often every two hours which means that he has broken sleep and he is not able to continuously use his CPAP machine. Paul should be able to undertake 1:6 weekends on call although 1:2 weekends in my opinion is <u>not</u> within his individual capabilities at this time." Page 153 – 154.

20 Mr Aucamp received the report shortly after the Occupational Health adviser sent it.

21 During 2015 the First Respondent had had a team of 7 engineers covering its clients in the South East area. In late 2015, or early 2016, two of these service technicians/engineers left the First Respondent company. Five service technicians/engineers remained to cover the South East area. The First Respondent's witnesses told the Tribunal that its larger parent group instigated a recruitment freeze around this time. Mr Aucamp told the Tribunal that he had asked the parent group for permission to recruit and had sent a written request for justification. This written request was not shown to the Tribunal and there was no documentary evidence of it, or of any response to it, or of any chasing of it.

22 Mr Amies told the Tribunal that the First Respondent used subcontractors daily for specialist work and for refrigeration. He told the Tribunal that subcontractors helped to reduce the First Respondent's costs, because of their lower hourly rate, and because there were fewer overheads associated with them.

23 The Claimant told the Tribunal that, at the time of the events in question, he was the second longest service member of the team of 5, even though he had been employed for less than two years. This was not challenged by the Respondents in evidence.

24 Mr Amies and Mr Aucamp told the Tribunal that their clients like to see a Carrier engineer, rather than a subcontractor. Given the very high turnover of engineers in the First Respondent's business, the Employment Tribunal considered that it was unlikely that any engineer built up any significant relationship with the First Respondent's clients.

25 The Claimant was scheduled by the First Respondent to work on call on the weekend of Friday 25 March. This was the second weekend in 4 on which the Claimant had been rostered to be on call. On 21 March Mr Aucamp told the Claimant that, once the Occupational Health report had been reviewed, the First Respondent would discuss the recommendations with the Claimant. The Claimant responded by email, saying that he needed to know before the 25 March. Mr Aucamp said that the discussion and review would not take place before then. The Claimant replied once more, saying that a decision needed to be made, because it was due to be the second weekend in 4 on call and the Occupational Health letter had clearly stated that the Claimant should not be doing that, page 158.

26 On 22 March Mr Aucamp reiterated to the Claimant, by email, that the recommendations would be reviewed as a business and discussed in due course. Later the same day Mr Aucamp said that the recommendations from Occupational Health were not a legal document and that the Claimant would have to bear with the First Respondent until any changes could be discussed and implemented, as the First Respondent had limited labour resources, page 157. Also that day the Claimant asked Mr Aucamp to state clearly that the Claimant was required to do stand by, as the rota stated, 2 weekends in 4, as the Claimant wished to be cleared of blame if an accident occurred, page 157. Mr Aucamp replied, saying the Claimant would carry on with his duties until the First Respondent had reviewed the recommendations of the business, page 156.

27 In addition, on 22 March 2016, Clare Haddow, Occupational Health nurse, emailed Zoe Brown, the First Respondent's HR business partner. Ms Haddow reiterated her advice that the Claimant would be able to undertake 1 in 6 weekends on call and that 1 in 2 weekends were not within the Claimant's capabilities. She said,

> "It is very important that he has good uninterrupted sleeps at night so that he can use … his CPAP machine. Being on frequent standby does not allow him to have the full benefit of his treatment. I recommend he does stand by 1:6."

28 Ms Haddow reiterated her advice that the Claimant worked shorter days; no more than 10 to 12 hours a day, page 162.

29 The Claimant contended that Mr Aucamp had been rude and abrupt to Ms Haddow and that Ms Haddow had told the Claimant about this and had said that she was concerned about Mr Aucamp's attitude to the Claimant's reasonable adjustments. Mr Aucamp told the Tribunal that he had never spoken directly to Ms Haddow. Zoe Brown confirmed that it had been she who had sought further clarification from Ms Haddow, not Mr Aucamp. The Tribunal accepted the Respondents' evidence; their witnesses corroborated each other. The Tribunal found that Ms Haddow did not say that Mr Aucamp was rude and/or that Mr Aucamp was treating the Claimant's reasonable adjustment request inappropriately.

30 On 11 April 2016 the Claimant's GP wrote a letter saying that the Claimant was required to use a CPAP machine 8 hours every 24 hours. She said that, due to the Claimant's sleep apnoea, he was unable to work more than 1 weekend in 6 and could only work up to 12 hours a day, page 164.

31 The Claimant was signed off work, sick, by his GP, due to anxiety from 8 – 13 April 2016, page 166, and again for anxiety from 14 April to 19 April, page 167. His GP signed him off work due to anxiety from 9 – 16 May 2016, page 168. The GP signed the Claimant off work with anxiety due to work related stress from 20 May 2016 to 24 May 2016, page 169. The Claimant was signed off again with stress and anxiety due to workload from 27 May 2016 to 30 May 2016, page 171.

32 On 13 April 2016, while the Claimant was signed off work sick, Mr Aucamp emailed the Claimant, asking him whether he had made arrangements to have his standby covered, page 172.

33 On 14 April 2016 the Claimant attended a meeting with Mr Aucamp and Ms Brown, HR Business Partner, to review the Occupational Health report, page 173. At the start of the meeting Mr Aucamp said that the Occupational Health recommendations had no legal force. He said that he wanted to find a middle ground and work together. The Claimant said he was currently working 12 – 14 hours a day, including travel. The Claimant said that there were not enough engineers and that, when he had started in the job, he had only had to work 1 weekend in 7 on standby. The Claimant said that the First Respondent was not providing enough cover and that the situation was illegal. Mr Aucamp said that it was not down to him to employ more people.

34 Mr Aucamp and the Claimant had a lengthy discussion about the amount of standby the Claimant had actually been doing. The Claimant and Mr Aucamp also discussed how much standby the Claimant was doing at weekends and how many hours he was working. The Claimant contended that he was working 12 – 14 hours a day and that he was working 1 in 2 weekends when he was at work. Mr Aucamp contended that, on average, the Claimant was working about 8 hours a day and was working far fewer weekends on standby.

35 The Claimant complained that Mr Aucamp was including periods when the Claimant had been sick and on holiday when he calculated the standby frequency; he said that, when he was at work, he was actually doing 1 in 2 weekends on standby. Mr Aucamp and the Claimant did not agree about these things.

36 The Claimant said that he had been anxious and off sick and felt that things were not right. Mr Aucamp said that, if the Claimant was concerned about a particular job, then Mr Aucamp would make the decision. Mr Aucamp said that the Claimant should carry on as usual until the Respondents received the GP recommendations. The Claimant said that he agreed that, if the job was dangerous, he would not do it. Mr Aucamp said that, if the Claimant refused a job, then Mr Aucamp would decide whether to deal with it under the company disciplinary policy.

37 On 22 April 2016 Mr Aucamp wrote to the Claimant, page 180. He said that travelling was part of the Claimant's role and that the Respondents were unable to change the area which the Claimant covered due to the First Respondent's current labour situation and business requirements. He said, "We do however try our best to allocate jobs to the closest engineer and take into consideration how long the travelling and job will take." He said, "Part of your role … is to be included in the call out rota and even when it was suggested to you that even after speaking with Occupational Health they recommended to go to 1 in 4, if 1 in 6 six was not suitable, you still wanted exactly what the Occupational Health report recommended."

38 Mr Aucamp told the Claimant that the First Respondent would seek a GP report and a second report from an independent Occupational Health specialist. He said, "Once we have further medical advice I will be back in contact to review your capability in the role".

39 In his letter Mr Aucamp also stated that, as discussed in the meeting on 14 April, the Claimant had recently refused to take on a job. Mr Aucamp said that, if there were issues with travel time, Mr Aucamp expected the Claimant to contact Mr Aucamp about it. He said, "We agreed that if you felt there was an issue in the future with a job you were allocated, then you should contact me directly by telephone and we can discuss the situation further." Page 180 – 182.

40 The Respondents contended that Ms Haddow, OH Adviser, had told Zoe Brown in a telephone call that the Claimant was able to work 1 in 4 weekends on standby. The Tribunal did not accept that evidence. Ms Haddow never stated this in writing. In her clarificatory email of 22 March 2016, she was emphatic that her recommendation was that the Claimant could work 1 in 6 weekends on call. If an Occupational Health adviser had considered that the Claimant was capable of working 1 weekend in 4, the Tribunal would have expected her to have confirmed this in writing, both to the First Respondent and to the Claimant.

41 On 26 April 2016 the DVLA wrote to the Claimant, saying that he was able to keep his driving licence. The DVLA stated that an enclosed letter informed the Claimant's doctor of the need for regular review of the Claimant's condition and that, if the Claimant's condition got worse, or the Claimant's doctor told him not to drive, the Claimant was required to let the DVLA know. The letter concluded by saying, "I must respectfully remind you that you could be committing a road traffic offence if you cannot safely control the

vehicle that you drive at all times."

42 On 27 April 2016 the Claimant contacted Tim Evans, a Director of the Respondent with responsibility for health and safety. The Claimant said that the First Respondent was not abiding by Occupational Health recommendations and was placing him on standby with higher frequency than medical advice allowed. Mr Evans emailed Mr Aucamp, Neal Reed and another Director, Michael Mulhern, saying, "I am not sure who will be handling this. However, if he does have an accident at work or in his vehicle we may have some liability. Can we call Paul back today." Page 184. On the evidence, no one called the Claimant back to follow up on his complaint to Mr Evans.

43 On 18 May 2016 the Claimant spoke to Ceri Prichard, HR Assistant, by telephone. The Claimant said that he was being bullied into doing shifts and that he had been advised by doctors to work 1 in 6 weekends, but had been asked to work 5 nights and 5 days in a row that week, which was giving him anxiety attacks. The Claimant said he had asked Tim Evans to do a Risk Assessment on him and was waiting for a call from Tim Evans as soon as possible, page 186.

44 On 23 May 2016 the Claimant's GP, Dr Parsons, wrote to Zoe Brown. Dr Parsons reported that the Claimant had sleep apnoea, that he was using a CPAP machine as treatment for it and that this treatment would be life long. Dr Parsons advised that the Claimant should be given 1 in 6 standby call out duty and that his working hours should be reduced to 12 hours a day, including travel. Dr Parsons said that the Claimant's line manager was sending the Claimant emails when the Claimant was unwell and that this made the Claimant very stressed and anxious. She also said that the Claimant's line manager was pressuring the Claimant to do more than 1 in 6 weekends on standby and to work more than 12 hours a day; and that this was causing the Claimant increased anxiety and was not helping him to return to work, page 189 – 190.

45 On 25 May 2016 an engineer from the Claimant's team called the Claimant and asked the Claimant to do his standby that evening. The Claimant said that he was not able to do this. The engineer responded by saying that the Claimant should not be working at the First Respondent company and that everyone was getting fed up with him. The engineer put the phone down on the Claimant. The Claimant emailed Ms Brown and told her what had happened. He said that Mr Aucamp needed to tell engineers not to pressurise the Claimant into working standbys and that the Claimant would not be able to cover the other engineers' standby if they did the Claimant's. The Claimant said that Mr Aucamp was fully aware that the Claimant was not able to do this, page 193.

46 On 27 May 2016 Ms Brown replied, saying that the engineers were following process, whereby if an engineer was going to be absent when they were rostered for a shift, the engineer would arrange with others that the other engineers would cover the shift between them. She said that, in order for the Claimant to be on call 1 weekend in 6, he would have to be scheduled on call in the week. She said that this would mean the Claimant working 8 to 10 shifts call out per month. Ms Brown said, "This will total to the same amount of shift that you are on call out as the rest of the team per month." Page 191 – 192. Ms Brown said that the matter was an operational one. She told the Claimant that the Respondent was obtaining a GP report and an independent Occupational Health report and would arrange a formal capability meeting to discuss the contents of both reports with the Claimant.

47 The Claimant contended that Mr Aucamp was encouraging other engineers to call the Claimant to work standby and to resent the Claimant when the Claimant was not able to carry out standby work at the weekends. The Tribunal did not accept that Mr Aucamp was deliberately encouraging employees to pressurise the Claimant into carrying out standby work, or to be resentful towards the Claimant if he did not. Nevertheless, the Tribunal concluded that Mr Aucamp did nothing to stop the other engineers expecting the Claimant to work the same standby as them and asking the Claimant to cover their shifts. He did nothing to change the process whereby engineers contacted each other to arrange standby, so they all carried out standby equally. Mr Aucamp also called and contacted the Claimant, himself, about work matters while the Claimant was ill and did nothing to stop other engineers during this. In addition, Zoe Brown failed to stop process of fellow engineers contacting the Claimant to work their shifts and share out shifts amongst them, even though the Claimant told her that this was happening.

48 On 9 June 2016 Mr Cheng, Consultant in Occupational Medicine, provided a report to the Respondents on the Claimant. Mr Cheng said that the Claimant had been advised to use CPAP 8 hours a night. Mr Cheng said that, if he complied with this advice, the Claimant could drive his van. Mr Cheng recommended that the Claimant could work up to a maximum of 12 hours a day during the week, ideally including travel, and 1 weekend in 6, on call for a maximum of 12 hours a day, to allow uninterrupted sleep, which was a prerequisite for safe driving by the DVLA, page 196. Mr Cheng also said, of the Claimant, "He manages day-to-day activities independently therefore he should not qualify under the Equality Act although the ultimate arbiter is the Employment Tribunal."

49 On 29 June 2016 Mr Aucamp produced an investigation report. He recounted the history of the Occupational Health and GP reports in relation to the Claimant. Mr Aucamp said that, on average, the Claimant had worked 8 hours a day between January and April 2016 and had worked on call 7 weekends between January and April. He said that, therefore, the Claimant was working fewer than 1 in 6 weekends. Mr Aucamp recorded that he had told the Claimant that there was a need to work more frequent weekends, to spread the rota fairly between the current team. Mr Aucamp said, "At the meeting a compromise was discussed in working 1 in 4 weekends being on call out which was mentioned would be a possibility on the Occupational Health advice and Paul refused this as an option."

50 Mr Aucamp said that all the current service technicians worked 56 hours a week, including overtime, and 1 in 3 weekends on call out. He said that the Respondent did not currently have any technicians on a part-time basis "due to the business demand". Mr Aucamp said that the First Respondent had looked at reasonable adjustments. He said arranging subcontractors to cover what would be an additional 2 hours a day, dependent on the job being completed, would be costly and there would be no guarantee that a subcontractor could work 2 hours. He said that, for a subcontractor to cover weekends, the cost would be £6,080 a month. Mr Aucamp said that other service technicians would have to work 1 in 2 or 3 weekends if the Claimant worked one in 6. He stated that he could see the effect that this would have on morale. Mr Aucamp said that, without service technician cover at weekends, the Respondent could lose contracts. Mr Aucamp stated that the Claimant had only refrigeration service technician skills and, therefore, moving him to another role would not be possible as a reasonable adjustment. Mr Aucamp said that, in two of its agreements, the Respondent was liable for stock loss if SLAs were not adhered to. He said that it was not possible to allocate jobs to service technicians close to

their home base and that traffic conditions could not be predicted.

51 The Tribunal observed that Mr Aucamp did not exhibit any quotes, or rates, from independent contractors which he had used in compiling the figures in his report. These were not provided to the Tribunal either.

52 Mr Aucamp's assertion that the Claimant worked 7 weekends from January to April and that this amounted to him working 1 in 6 weekends was clearly incorrect. If there were about 17 weekends between January and April and the Claimant worked 7 of these, he was working 1 in 2, or 1 in 3, weekends. Indeed, in the Tribunal, both the Claimant and Respondents said that the Claimant was, in fact, working 1 in 3 weekends during that period.

53 The Claimant also told the Tribunal he actually does have air conditioning service skills, as well as refrigeration service skills. The Respondents did not discuss the Claimant's skills with him at any time during the process. Zoe Brown told the Tribunal that she had not consulted the Claimant's personnel file, or his CV, when considering what skill set he had.

54 On 4 July 2016 Mr Amies invited the Claimant to a capability hearing, to be held on 8 July 2016. He sent all the medical reports to the Claimant, along with the outcome letter from the Occupational Health review meeting and the notes of the meeting on 14 April 2016. He also sent Mr Aucamp's investigation report, a record of the hours actually worked by Southern technicians from January 2016 to June 2016 and average weekly working hours January 2016 to May 2016, amongst other things.

55 On 7 July 2016 the Claimant emailed Mr Amies, saying that the Claimant was raising a formal grievance on the basis that the Respondents treatment of him and Mr Aucamp's treatment of him amounted to discrimination because of his health condition. The Claimant said that he believed that the First Respondent had failed to make reasonable adjustments and that the First Respondent's actions and Mr Aucamp's actions were contrary to the Equality Act 2010, page 203.

56 The Claimant attended the capability hearing on 8 July 2016. Mr Amies chaired the hearing; Zoe Brown attended. At the start of the meeting Mr Amies asked the Claimant to give the details of his grievance. The Claimant said he needed to speak to his solicitor before giving the details and could not do this until after the meeting.

57 The Claimant said, on a number of occasions in the meeting, that Occupational Health advice had been that the Claimant should not work for more than 12 hours a day, or more than 1 in 6 weekends. Mr Amies said that 1 in 4 weekends had been offered. Mr Amies said that the Occupational Health recommendations would put more pressure on business colleagues to do standby and would involve costs to the business. The Claimant agreed and said unfortunately, yes, although it was not his fault that he was ill. He said that he needed to work 10 – 12 hours a day to use his CPAP machine for 8 hours. He said that his hands were tied due to the DVLA. The Claimant said that Occupational Health had asked for adjustments, but that Mr Aucamp had told the Claimant to carry on as usual, until further medical evidence was available, to just get the job done. The Claimant said that this had caused him to be ill with anxiety. He said that he had done as much as he could to help out the other engineers. Mr Amies said that he would consider

the points. He said the Claimant was a trained service technician and that nothing else was available in roles with similar capabilities. Mr Amies said that he would consider dismissing the Claimant and would adjourn to make a decision. The Claimant responded that he liked the job and felt that he did more than any other engineer.

58 Mr Amies adjourned and later reconvened the meeting. After the meeting had restarted Mr Amies said that the Claimant had not produced evidence from the DVLA. He said that the Claimant's work performance was not in question but that he had to consider the business impact and costs and other team members. Mr Amies said that he had decided to dismiss the Claimant as he was not able to carry out standby. The Claimant asked Mr Amies whether the company used subcontractors and whether the company used subcontractors on standby. Mr Amies said the company did. The Claimant said that he had spoken to subcontractors and that they said that they had not worked standby in the South East. Mr Amies said that the decision had been made based on "business impact and team moral", page 210.

59 Mr Amies and Zoe Brown told the Tribunal that they had looked at the Group Companies' weekly vacancy list during the 45 minute adjournment in this meeting. They said that they had concluded that there were no suitable vacancies for the Claimant in that list, page 228. They agreed that they did not show the list to the Claimant, or give him the opportunity to consider the vacancies.

60 Both Mr Amies and Ms Brown were cross examined in relation to a service technician job in air conditioning in the central region for Carrier Service Air Conditioning. They told the Tribunal that the job was based in their Central region which covers the area from Watford to Scotland. Ms Brown said that, from her knowledge, the role required call out and standby work. Neither Mr Amies nor Ms Brown the Tribunal how much standby or call out work would be involved; they had not made any enquiries about what the job actually would have involved. They both said that they considered the Claimant did not have air conditioning skills. Neither asked the Claimant about his skills and they did not look at his CV. Zoe Brown said that she had advised Mr Amies that the Respondent should consider reasonable adjustments. She said that she did not know about subcontractors and that that was an operational matter. Mr Amies said that subcontractors were cheaper for the business than employees, in his evidence to the Tribunal. There was no evidence that Ms Brown and Mr Amies discussed using subcontractors to cover some of the Claimant's shifts at the time.

61 On 2 July 2016 Mr Amies wrote to the Claimant, confirming the outcome of the meeting on 8 July. He said that the Claimant had been paid one month's pay in lieu of notice. His last date of employment would be 8 July 2016. He said that the Claimant had been dismissed for capability. Mr Amies said that he felt, from the documentation that there was evidence, that the Respondent had reviewed reasonable adjustments: a trial of 1 in 4 weekends was proposed, but the Claimant had declined that. Mr Amies said that the Claimant had been clear from the hearing that the Claimant could only work according to the recommendations in letters and reports from GP and two Occupational Health specialists. Mr Amies summarised what Mr Aucamp investigation report had said. He said that, from the documentation provided, for the business to accommodate 1 in 6 weekends and 12 hours maximum a day, additional costs would be necessitated, to pay for subcontractor cover. He said that the standby shifts would be an additional cost for the business to cover. He said that accommodating the Claimant's requirements would have

an effect on the team's morale, because being able to work regular standby shifts and overtime was a requirement of the service technician role. He said the Claimant's requirements could also affect certain of the Respondent's commercial contracts.

62 Mr Amies said that the Claimant had mentioned a document he had received from the DVLA, which Mr Amies had not seen. He said that, while the Claimant had mentioned the risk assessment in the meeting, Mr Amies considered that, even if there had been a risk assessment completed, the Respondent would still be in the same position. Mr Amies said that, at the capability hearing on 8 July, the Claimant had declined to give details of the grievance, page 211 – 212.

63 The Claimant did not appeal against his dismissal. He told the Employment Tribunal that, after the meeting with Mr Amies, Mr Amies had said to him, privately, that, while the Claimant could appeal, there would be no point in him doing so, as the outcome will be the same.

64 The 22 July dismissal letter told the Claimant in writing that he had the right of appeal against the decision. In evidence at the Tribunal, both Mr Amies and Ms Brown denied that Mr Amies had told the Claimant that an appeal would be pointless. The Tribunal noted that, in the Claimant's witness statement, he said that he did not appeal against the decision to dismiss him because he felt completely and utterly beaten and that there did not seem to be any point. The Tribunal does not find that Mr Amies told the Claimant specifically that there would not any point in appealing.

65 The Respondents produced tracker records for the Claimant in a supplementary bundle, pages 6 – 270. The Claimant disputed that these were accurate. Nevertheless, even on these records, it was clear that the Claimant did work more than 12 hours a day on some occasions between March and July 2016. For example, on 31 March 2016, the Claimant worked for 12 hours and 10 minutes. On 5 April 2016, he worked for 12 hours and 54 minutes. On 26 April, he worked for 12 hours and 59 minutes and, on 2 June 2016, he worked for 12 hours and 34 minutes.

66 The First Respondent's witnesses told the Tribunal that the Claimant had not indicated that there was a danger in any of the paper risk assessments which he carried on individual jobs. The Tribunal accepted the Claimant's evidence that the risk assessment forms he completed were carried out in relation to the individual pieces of machinery he was servicing: they were not risk assessment on the Claimant himself.

The Relevant Law

67 One of the protected characteristics under the Equality Act 2010 is disability, *s4 EqA 2010*.

68 By *s6 Equality Act 2010*, a person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

69 The burden of proof is on the Claimant to show that he or she satisfies this definition.

70 *Sch 1 para 12 EqA 2010* provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to be taken into account in this case is *Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011)*, brought into effect until 1 May 2011.

71 Whether there is an impairment which has a substantial effect on normal day to day activities is to be assessed at the date of the alleged discriminatory act, *Cruickshanks v VAW Motorcrest Limited* [2002] ICR 729, EAT.

72 *Goodwin v Post Office* [1999] ICR 302 established that the words of *s1 DDA 1995*, which reflect the words of *s6 EqA*, require the ET to look at the evidence regarding disability by reference to 4 different conditions:

72.1 Did the Claimant have a mental or physical impairment (the impairment condition)?

72.2 Did the impairment affect the Claimant's ability to carry out normal day to day activities? (the adverse effect condition)

72.3 Was the adverse effect substantial? (the substantial condition)

72.4 Was the adverse effect long term? (the long term condition).

73 *Paragraph 5, Sch 1 EqA 2010* provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to correct the effect and, but for the measures, the impairment would have a substantial adverse effect.

74 Section D of the *2011 Guidance* gives guidance on adverse effects on normal day to day activities.

75 D3 states that day-to-day activities are things people do on a regular basis, examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food.., travelling by various forms of transport.

76 Normal day to day activities encompass activities both at home and activities relevant to participation in work, *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706; *Paterson v Metropolitan Police Commissioner* [2007] IRLR 763.

77 D22 states that an impairment may not directly prevent someone from carrying out one or more normal day to day activities, but it may still have a substantial adverse long term effect on how he carries out those activities, for example because of the pain or fatigue suffered.

78 The Tribunal should focus on what an individual cannot do, or can only do with

difficulty, rather than on the things that he or she is able to do – Guidance para B9. In *Goodwin v Patent Office* [1999] ICR 302, EAT stated that, even though the Claimant may be able to perform many activities, the impairment may still have a substantial adverse effect on other activities, so that the Claimant is properly to be regarded as a disabled person.

79 If an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect - *para 5(1), Sch 1 EqA*. This is so even where the measures taken result in the effects of the impairment being completely under control or not at all apparent - para B13 Guidance.

Substantial

80 A substantial effect is one which is more than minor or trivial, *s 212(1) EqA 2010*.

Long Term

81 The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.

Discrimination

82 By *s39(2)(b)(c)&(d) EqA 2010*, an employer must not discriminate against an employee in the way the employer affords the employee access, or by not affording the employee access for receiving any benefit, facility or service, or by dismissing him or subjecting him to any other detriment.

83 The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

Direct Discrimination

84 Direct discrimination is defined in s13(1) EqA 2010: "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

85 In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010*.

86 Accordingly, for a Claimant to succeed in a direct disability discrimination complaint, it must be found that:

(a) The Respondent has treated the Claimant less favourably than a comparator in the same relevant circumstances;

(b) The less favourable treatment was because of disability - causation;

(c) The treatment in question constitutes an unlawful act such as dismissal or

detriment.

Victimisation

87 By *27 Eq A 2010*, " (1) 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 A

(*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."

88 There is no requirement for comparison in the same or nor materially different circumstances in the victimization provisions of the *EqA 2010*.

Direct Discrimination and Victimisation: Detriment & Causation

89 In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC* [2003] UKHL 11.

90 The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified. Para [77].

91 If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Discrimination Arising from Disability

92 *s 15 EqA 2010* provides, "

(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".

93 In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14, Langstaff P said that there were two issues regarding causation under s15:

93.1 What was the cause of the treatment complained of ("because of something" – what was the "something"?)

93.2 Did that something arise in consequence of the disability?

94 The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

Burden of Proof

95 *s136 EqA* provides for a shifting burden of proof in discrimination cases. In approaching the evidence in a discrimination case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

Reasonable Adjustments

96 By *s39(5) EqA 2010* a duty to make adjustments applies to an employer. *By s21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

97 *s20(3) EqA 2010* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer 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.

98 *Para 20, Sch 8 EqA 2010* provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage.

99 In *Griffiths v Secretary of State for work and Pensions* [2016] IRLR 216, the CA held that a requirement for an employee to maintain a certain level of attendance at work in order not to be subject to the risk of sanctions was a PCP. In so formulating the PCP, it was clear that a disabled employee whose disability increases the likelihood of absence from work is disadvantaged when compared to non disabled employees, as they are at greater risk of being absent on the grounds of ill health. It may then be reasonable to alter the trigger points at which disciplinary action will be considered.

100 The comparator for the purposes of s20 is identified by reference to the disadvantage caused by the relevant arrangements, *Smith v Churchills Stairlifts plc* [2005] EWCA Civ 1220, [2006] IRLR 41, ".. it is apparent from each of the speeches in Archibald that the proper comparator is readily identified by reference to the disadvantage caused by the arrangements, " per Maurice Kay LJ at para 41. In other words, the comparator is a person who was not placed at a substantial disadvantage by the arrangements.

Reasonableness of Adjustments

101 The test of 'reasonableness', imports an objective standard, Maurice Kay LJ in *Smith v Churchills Stairlifts plc* [2005] EWCA 1220, [2006] ICR 524, *Collins v Royal National Theatre Board Ltd* [2004] EWCA Civ 144, 2004 IRLR 395 per Sedley LJ para 20.

102 The *Equality Act 2010* does not specify any particular factors which are to be taken into account in deciding whether an adjustment is reasonable. The Code of Practice on Employment 2011 provides examples of some of the factors which might be taken into account in determining whether a particular step is reasonable for an employer to have to take include;

102.1 Whether taking any particular steps would be effective in preventing the substantial disadvantage;

102.2 The practicability of the step;

102.3 The financial and other costs of the step and the extent of any disruption caused;

102.4 The extent of the employer's financial and other resources;

102.5 The availability to the employer of financial and other assistance;

102.6 The type and size of the employer.

Burden of Proof – Reasonable Adjustments

103 The Disability Rights Commission ("DRC")'s *Employment Code of Practice 2006* gave guidance on the application of the burden of proof in cases of failure to make reasonable adjustments. It provided, at paragraph 4.43, "To prove an allegation that there has been a failure to comply with a duty to make reasonable adjustments, an employee must prove facts from which it could be inferred in the absence of an adequate explanation that such a duty has arisen, and that it has been breached. If the employee does this, the claim will succeed unless the employer can show that it did not fail to comply with its duty in this regard."

104 In *Project Management Institute v Latif* [2007] IRLR 579, the EAT decided that, in applying the burden of proof, the Code of Practice was correct.

105 To shift the burden of proof to the Respondent, the Claimant must therefore show evidence from which it could be concluded that there was an arrangement causing a substantial disadvantage and that there was some apparently reasonable adjustment which could have been made. If the Claimant does this, the burden shifts.

106 Once the burden has shifted, the Claimant's claim will succeed unless the Respondent shows that it did not breach the duty.

Protected Disclosure

107 An employee who makes a "protected disclosure" is given protection against his employer subjecting him to a detriment, or dismissing him, by reason of having made such a protected disclosure.

108 The meaning of "protected disclosure" is defined in *s43A ERA 1996*:

"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

109 "Qualifying disclosures" are defined by *s43B*.

"43B Disclosures qualifying for protection
(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure [is made in the public interest and] tends to show one or more of the following—
….
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…

(d) that the health or safety of any individual has been, is being or is likely to be endangered. .. "

110 The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions/allegations), *Cavendish*

Munro Professional Risk Management v Geldud [2010] ICR [24] – [25]; *Kilraine v LB Wandsworth* [2016] IRLR 422. The disclosure must, considered in context, be sufficient to indicate the legal obligation in relation to which the Claimant believes that there has been or is likely to be non compliance, *Fincham v HM Prison Service* EAT 19 December 2002, unrep; *Western Union Payment Services UK Limited v Anastasiou* EAT 21 February 2014, unrep.

111 Protection from being subjected to a detriment is afforded by *s47B ERA 1996*, which provides:
"47B Protected disclosures
(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

112 A "whistleblower" who has been subjected to a detriment by reason of having made protected disclosures may apply for compensation to an Employment Tribunal under *s48 ERA 1996.* On such a complaint, it is for the employer to show the ground upon which any act, or any deliberate failure to act, was done.

Protected Disclosure Detriment – Causation

113 In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, “the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower." Per Elias J at para [45].

114 The making of a protected disclosure cannot shield an employee from disciplinary action, including dismissal, which is taken for reasons other than the fact that the employee has made a protected disclosure, *Bolton School v Evans* [2007] ICR 641.

Unfair Dismissal
115 By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

Automatically Unfair Dismissal

116 A whistleblower who has been dismissed by reason of making a protected disclosure is regarded as having been automatically unfairly dismissed (see section 103A):

"103A Protected disclosure
An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

Discussion and Decision

Disability

117 The Respondent did not dispute that the Claimant was disabled for the purposes of the *Equality Act 2010*.

118 In any event, from the medical evidence, the Claimant had a physical impairment, sleep apnoea. Further, on the GP and Occupational Health reports, the Claimant was required to use a CPAP machine while he slept and to have uninterrupted sleep, as a pre-requisite for safe driving by the DVLA. The Tribunal finds that sleeping and driving are both normal day-to-day activities. The Tribunal finds that the Claimant would have unable to sleep or gain rest from sleep, and would have been unable to drive, if he had not been using a CPAP machine to treat his sleep apnoea.

119 The adverse effects of the disability are to be judged by the effect of the disability if it is not subject to treatment. Without treatment, the Claimant's disability did not allow him to sleep and rest properly and would have prevented him from driving safely. The Tribunal finds that the untreated effect of sleep apnoea had a more than minor effect on the Claimant's ability to carry out the normal day-to-day activities of sleeping and driving.

120 The Claimant's sleep apnoea condition was said to be life-long in the medical reports. The Tribunal concluded that the Claimant was therefore a disabled person within the meaning of the *Equality Act 2010.*

The Respondent's Alleged Refusal to Implement Adjustments to the Claimant's Role

121 During 2016 the Claimant sought adjustments to his role, so that he did not work for more than 12 hours in any one day and he did not undertake more than 1 weekend in 6 on standby and call out. The Claimant contended that the Respondent's refusal to implement those adjustments amounted to direct disability discrimination, discrimination arising from disability, victimisation and a failure to make reasonable adjustments.

122 These adjustments were first suggested in the 9 March 2016 Occupational Health report. Between 9 March 2016 and 14 April 2016 Mr Aucamp did not even meet with the Claimant to discuss the suggested adjustments, even though he was aware, shortly after 9 March, that the adjustments had been proposed by the First Respondent's Occupational Health adviser. Mr Aucamp had known for at least a month before then that the Claimant had sleep apnoea. The Claimant chased Mr Aucamp to make a decision on the adjustments on 21 and 22 March 2016. Mr Aucamp said that the First Respondent would not make a decision at that time.

123 While Mr Aucamp delayed significantly in making a decision on the adjustments - and, the Tribunal considers, behaved unreasonably in doing so - the Tribunal considers that there was no evidence that Mr Aucamp would have convened a meeting to discuss the adjustments any more quickly in the case of a comparator who was equally unable to work more than 12 hours a day, or be on call more than one weekend in six, but was not disabled. The Tribunal concludes that there is not evidence from which the Tribunal could conclude that the Respondents directly discriminated against the Claimant by failing to make adjustments in that period.

124 When Mr Aucamp did later meet with the Claimant and discussed adjustments with him, Mr Aucamp gave the following reasons for not making the adjustments:

124.1 The impact on fellow employees;

124.2 The cost of employing subcontractors; and

124.3 The difficulty of planning to ensure that the Claimant did not work for more than 12 hours a day.

These were the same reasons given in the investigation report and in the letter of dismissal.

125 The Tribunal found that those were the Respondents' reasons for not implementing the reasonable adjustments: those reasons were repeated and recorded in writing on a number of occasions. The Tribunal concluded that those reasons did not amount to "something arising from the Claimant's disability": they were operational and practical reasons. The Tribunal also concluded that those reasons were nothing to do with the fact that the Claimant had done protected acts by seeking adjustments, or saying that the Respondent was discriminating against him by failing to make adjustments: they were operational reasons and did not amount to victimisation.

126 With regard to the reasonable adjustments complaint, however, the Tribunal finds that the Respondent did apply the following PCPs to the Claimant:

126.1 A requirement to work more than 1 in 6 weekends on call out; and

126.2 A requirement to work more than 12 hours a day when directed to by the Respondent.

127 From the Respondent's own evidence, the Claimant worked 7 weekends call out between January and April, which is clearly a more frequent call out rate than 1 in 6.

128 On the Respondent's time sheets, the Claimant was required to work for more than 12 hours a day, on occasion.

129 The Claimant was subject to a capability meeting because he said that he could not work more than 1 in 6 weekends on call out and more than 12 hours a day: clearly the Respondent was applying this PCP to the Claimant otherwise there would have been no issue about his capability. On the Respondent's evidence, there were no other issues about the Claimant skill and aptitude in doing the job.

130 The Tribunal finds that those PCPs put the Claimant at a substantial disadvantage in comparison with persons who were not disabled. Due to his disability, the Claimant had been told by his Medical Practitioners and by Occupational Health advisers that he was not allowed to work for more than 12 hours a day, or on more than 1 in 6 weekends, in order that his CPAP treatment could be effective. If he had not followed this advice he would not have been able to drive safely and would not have been able to breathe

effectively whilst sleeping. Five different medical reports said that the Claimant could not comply with the requirements of the PCPs. The DVLA had told the Claimant that he was required to follow the advice of his doctors and to inform the DVLA if the doctor's advice had changed. The relevant comparator in this case is someone who was not at the disadvantage.

131 The Claimant contended that reasonable adjustments would have been to allow the Claimant to work for fewer than 12 hours a day and to allow him to work no more than 1 weekend in 6. Those adjustments would have removed the disadvantages to the Claimant.

132 The Tribunal considered whether the Respondent had shown that it did not fail to make the reasonable adjustment. The Tribunal concluded that the Respondent had not discharge this burden of proof.

133 The Respondent advanced a number of reasons as to why the adjustments were not reasonable. For example, Mr Aucamp said, in his investigation report, that the costs of employment subcontractors would have been prohibitive. However, the Tribunal found that there was no good evidence from the Respondent about the cost of employing subcontractors, either during the day, or at the weekends. The Respondent's evidence was conflicting: Mr Aucamp said that it would be very expensive to engage contractors at weekends; but Mr Amies told the Tribunal that subcontractors were cheaper to engage and had lower hourly rate and overheads. In any event, on the evidence, the Respondent was saving money in 2016: it employed only five technicians in 2016 in the South East region, when the team establishment had been 7 technicians in 2015. Accordingly, the First Respondent was paying for 2 fewer employees in the South East area to work on relevant contracts. The Respondent must have been making substantial savings in not paying the salary of 2 employees.

134 The Respondent never produced costs schedules, or quotes, to show that it had investigated the cost of subcontractors.

135 The Tribunal did not accept the Respondent's evidence that it was important to the First Respondent's clients to have the First Respondent's employees attending their premises, rather than subcontractors. The Tribunal considered that it was unlikely that clients would have placed such a premium on the identity of the service technician, given the very high level of turnover of the staff at the First Respondent company and the different shops which were serviced over such a large area. It is highly unlikely that any of the First Respondent's technicians developed any particular relationship with any particular client in those circumstances.

136 The Respondents contended that there would have been a significant effect on team morale if the First Respondent had made the adjustments. The First Respondent, however, produced no note of any discussions with other members of the team, or any record of the Respondents ever having attempted to explain to members of the team that the Claimant was genuinely prevented from working. Such an explanation which may well have engendered a more sympathetic response.

137 The First Respondent also contended that it had a recruitment freeze at the time. This was advanced simply by way of a statement, rather than any justification being given

for it in terms of costs for the First Respondent company.

138 Mr Aucamp told the Employment Tribunal that he had asked for permission to employ more employees. The Tribunal did not accept his evidence: no documentary proof was produced of Mr Aucamp's request to recruit replacement employees, nor any response from the larger Group of companies, nor any chasing correspondence from Mr Aucamp. Indeed, the Tribunal notes that, in the meeting of 14 April, Mr Aucamp told the Claimant that it was not down to him to employ more people.

139 In sum, the Respondents have not proved that it was unreasonable to permit the Claimant to work 1 in 6 weekends. There was no reliable evidence that the First Respondent was unable to accommodate this, whether by employing subcontractors to cover additional shifts, or employing further technicians to replace the ones who had left, or by having a reasonable discussion with the Claimant's fellow employees and explaining that the Claimant was genuinely unable to cover more than 1 in 6 weekends due to disability.

140 With regard to the Claimant being allowed to work the maximum of 12 hours a day, the Tribunal finds that that, objectively, was a reasonably adjustment. In the meeting on 14 April 2016 Mr Aucamp seemed to suggest to the Claimant that, if there were any problems with the jobs he was allocated, the Claimant could telephone Mr Aucamp and the situation could be discussed and managed.

141 The Tribunal found that there was no evidence the Mr Aucamp ever discussed the matter with the controller who allocated the relevant jobs, or told the controller that the Claimant had a health condition, so that the controller could reorganise jobs to accommodate him. In any event, it appears from the Respondent's own records that working more than 12 hours a day happened very infrequently. Given that it would have been an infrequent requirement for an adjustment to be made, logically this would have reduced any burden on the First Respondent to reorganise activities, or to employ a subcontractor to provide cover on these rare occasions.

142 The Tribunal found that Mr Amies did not undertake his own enquiries into any of the matters. He did not seek any additional documents. He simply adopted Mr Aucamp's reasoning, which, on the Tribunal's findings was not properly justified.

143 The Tribunal concluded that the Respondents failed to make reasonable adjustments when they failed to allow the Claimant to work for a maximum of 12 hours a day and when they failed to allow him to work a maximum of 1 in 6 weekends, from 9 March 2016 until the date of the Claimant's dismissal on 8 July 2016.

144 The Claimant contended that the Respondents directly discriminated against him because of disability, subjected him to discrimination arising from disability, victimised him and failed to make reasonable adjustments when they did not redeploy him. It is correct that Mr Aucamp's investigation report said that the Claimant could not be redeployed. Mr Amies also decided that the Claimant could not be redeployed. The reason that Mr Aucamp gave was that the Claimant did not have skills, other than refrigeration servicing. Mr Aucamp and Ms Brown said that the Claimant did not have other skills and that other jobs would also have required on call working and working long hours. The Tribunal found that those were the reasons for the failure to redeploy: they were stated in writing at the

time. The Tribunal accepted the Respondents' witnesses' evidence this was why the Claimant was not redeployed.

145 Those reasons were not the Claimant's disability, nor were they the fact that the Claimant had submitted a grievance, or had asserted that he had a right to reasonable adjustments. The Respondents did not directly discriminate against the Claimant, or victimise him, by failing to redeploy him.

146 However, at least one of the reasons that the Claimant was not redeployed by Mr Amies was that Mr Amies and Ms Brown considered that alternative servicing roles also required call out duties and travelling, so that the Claimant would not be able to do those roles. That was "something arising in consequence of disability," in that the Claimant's disability that prevented him from working long hours and from doing call out more than 1 in 6 weekends.

147 With regard to the Claimant's reasonable adjustment complaint, the Respondent was considering dismissing the Claimant because of his inability to comply with PCPs of working more than 12 hours a day and participating in the call out rota more frequently than 1 weekend in 6. Redeploying the Claimant would have avoided the substantial disadvantage of being at risk of dismissal because he could not comply with those PCPs.

148 The Tribunal decided that the Respondents had not shown that their failure to redeploy the Claimant was a proportionate means of achieving a legitimate business aim. The legitimate business aim relied on by the Respondents was the First Respondent's business needs.

149 Furthermore, the Tribunal concluded that the Respondents had not shown that they did not fail to make the reasonable adjustment.

150 On the evidence, the First Respondent was part of a large Group of companies and was sent weekly job vacancies. Mr Amies and Zoe Brown only looked at one job vacancy list in one week. They did so during the Claimant's capability meeting on 8 July. They did not show the list to the Claimant. The Respondents never sent any of the vacancy lists to the Claimant. Neither Ms Brown nor Mr Amies made any enquiries about any of the roles in the list. In particular they were both cross-examined about an air conditioning service role in the First Respondent's Central region. They said that the Central region stretched from Watford to Scotland, that it was not suitable and that the Claimant would have been required to work long hours, travel long distances and participate in a call out rota. However, they did not contact the recruiting manager to establish what the call out requirements of that role, in fact, were. They did not contact the recruiting manager to establish within what geographical area the Claimant would have been required to work in the Central region. The Respondents failed to consult the Claimant or look at his CV to establish what skills he had. Ms Brown and Mr Amies simply assume that he had no other skills than refrigeration repair.

151 The Tribunal considered that the Respondents' efforts to redeploy the Claimant were wholly inadequate. They were cursory and minimal. It did not accept that the Central region conditioning repair job was unsuitable for the Claimant. The Respondents produced no adequate evidence to establish that.

152 The Claimant contended that the First Respondent directly discriminated against him, subjected him to discrimination arising from disability and victimised him when it dismissed him. However, the Tribunal concluded that the First Respondent would have dismissed another technician with the same restrictions on their work, but who was not disabled. Furthermore, the Tribunal considered that the First Respondent would likewise have dismissed a person with those restrictions, but who had not submitted a grievance, or asked for adjustments. The Tribunal concluded that the First Respondent did not directly discriminate against the Claimant and did not victimise him when it dismissed him.

153 However, the First Respondent clearly did dismiss the Claimant because of something arising in consequence of his disability. It dismissed the Claimant because of his inability to work for more than 12 hours a day, on occasion, and because of his inability to work on more than 1 weekend in 6 on call.

154 The Tribunal considered whether the First Respondent had shown that dismissal was a proportionate means of achieving a legitimate aim. The legitimate aim relied on was the needs of the business.

155 The Tribunal concluded that the First Respondent had failed to show that dismissing the Claimant was a proportionate means of achieving the First Respondent's business needs. The Respondents failed to make reasonable adjustments to allow the Claimant to continue to work. As stated above, there were a number of alternatives to dismissal which the First Respondent could have pursued; employing more technicians on the South Eastern contracts, employing subcontractors for the few occasions on which the Claimant was not able to work, properly explaining the situation to the other engineers.

156 The Tribunal found that offering the Claimant the ability to work on 1 in 4 weekends on call out was not a proportionate means of achieving the First Respondent's business needs. The Claimant was still unable to work 1 in 4 weekends; to do so would have been contrary to medical advice. None of the Occupational Health practitioners, nor the Claimant's doctor, ever suggested the Claimant was capable of working in 1 : 4 weekends. The Tribunal has rejected the Respondents' evidence in that regard.

Protected Disclosure Detriment

157 The Tribunal found that the Claimant made protected disclosures when he said that he was being required to work more frequently than 1 in 6 weekends and for more than 12 hours a day and that this represented a health and safety risk. He said these things in a meeting with Mr Aucamp on 14 April. On 27 April 2016 he told Mr Evans, who had health and safety responsibility at the First Respondent, that the First Respondent was requiring him to work contrary to Occupational Health advice. It is quite clear that Mr Evans knew that the Claimant was saying that the First Respondent was requiring him to work in a dangerous way. The Tribunal found that, in stating these things, the Claimant disclosed information to Mr Evans and Mr Aucamp, which, in the Claimant's reasonable belief, was in the public interest and tended to show that the First Respondent was failing to comply with legal obligations to which it was subject and that the health and safety of both the Claimant and the general public was likely to be endangered.

158 The Claimant contended that the First Respondent subjected him to detriments when it failed adequately to respond to his request that a risk assessment to carried out

on 14 April 2016. On the facts, the Claimant did not ask for a risk assessment to be carried out during that meeting.

159 The Claimant also contended that the First Respondent subjected the Claimant to detriments when the First Respondent refused to respond to the Claimant's request for a risk assessment, made to Mr Evans on 27 April 2016, made again on 17 May 2016, and once more to Cerri Haden on 13 June 2016. He contended that he was subjected to detriments when the First Respondent failed to carry out a risk assessment at any time, including following the meeting with Mr Amies.

160 The Tribunal concluded that the First Respondent's failure to carry out a risk assessment was a detriment. A reasonable employee in the Claimant's circumstances would consider themselves to be disadvantaged by that failure: in the circumstances, the Claimant was being required to work in conditions contrary to medical advice, when he believed that his driving was potentially unsafe and was, therefore, a danger to himself and other people.

161 The Tribunal considered that the Claimant was an innocent whistleblower in this case. He acted conscientiously and diligently in drawing to his employer's attention to risks associated with driving contrary to medical advice. The First Respondent failed to give a reason, at any point, as to why a risk assessment would not be carried out. It behaved unreasonably in doing so.

162 The Tribunal found that the burden of proof shifted to the First Respondent under *s 48 Employment Rights Act 1996,* to show the reason why the risk assessments were not carried out. The First Respondent's witnesses told the Tribunal that the Claimant had not indicated that there was a danger in any of his own paper risk assessments which he carried on individual jobs. The Tribunal accepted the Claimant's evidence that the risk assessment forms he completed were carried out in relation to the individual pieces of machinery he was servicing: they were not risk assessments on the Claimant himself. In any event, it is quite clear that the Claimant asked, on numerous occasions, for a risk assessment to be carried out on him - and not on his individual jobs.

163 The Tribunal considers that the First Respondent did not discharge the burden of proof on it to show that the Claimant's protected disclosures were not the reason that the risk assessments were not carried out. It provided no good reason why the risk assessments were not carried out.

164 Accordingly, the Tribunal finds that the First Respondent subjected the Claimant to a detriment when it failed to carry out risk assessments over a number of months and failed to give him a reason for this.

165 The Claimant contended that the First Respondent subjected him to a detriment when:

165.1 Mr Aucamp informed his fellow employees that the Claimant would cover their on call duties, in exchange for them covering his; and

165.2 The Claimant was contacted by Mr Aucamp on 15 June 2016, to ask

whether the Claimant had arranged cover when he was ill; and

165.3 The Claimant was contacted on 30 June 2016 by a fellow engineer, who put the phone down on the Claimant when the Claimant could not cover his on call duties.

166 The Tribunal decided that Mr Aucamp simply followed the process which had always existed, which involved requiring service technicians to arrange cover for each other's on call rotas, when they were not available, whether or not the technician was sick. The Tribunal considered that that amounted to poor practice on the First Respondent's part; particularly its practice of requiring sick employees to remain responsible for their jobs and arrange cover. However, the First Respondent was simply continuing with this practice. The existing practice was the reason these acts occurred; and they were not caused in any way by the Claimant's protected disclosure.

167 The Claimant contended that the First Respondent's failure to implement reasonable adjustments and its failure to redeploy him were because of the Claimant protected disclosures. While the matters were both detriments, the Tribunal found the reasons the First Respondent acted in this way did not include the fact that the Claimant had made a protected disclosure.

Automatic Unfair Dismissal

168 The Claimant contended that his dismissal was automatically unfair because the reason, or principal reason, for it, was the fact that he had made a protected disclosure.

169 The Tribunal found that the reason or principal reason for the Claimant's dismissal was the Claimant's inability to carry out more than 1:6 weekends on call and to work for more than 12 hours a day, on occasion. This was not linked to the Claimant's protected disclosure.

Unlawful Deductions from Wages

170 The Claimant did not proceed with this claim.

Conclusions

171 Accordingly the Tribunal found that:

171.1 The Respondents failed to make reasonable adjustments between 9 March 2016 and 8 July 2016, when they failed to adjust the Claimant's duties so that he did not work for more than 12 hours a day and did not carry out more than 1:6 weekends on call and when they failed to redeploy the Claimant;

171.2 The First Respondent subjected the Claimant to discrimination arising from disability when it dismissed him.

171.3 The First Respondent subjected the Claimant to detriments by refusing to carry out risk assessments, on the grounds that he had made protected disclosures.

Remedy

172 The Claimant went off work, sick, with anxiety, which was work related, on a number of occasions in April and May 2016, when the Respondents failed to make adjustments, despite being repeatedly advised by separate medical experts to make these adjustments.

173 The Tribunal found that the Claimant was conscientious in seeking adjustments, and in pointing out the dangers to himself and others, if he continued to work in an unadjusted way. He was conscientious when he asked for risk assessments.

174 The Tribunal found that the Respondents' failure to respond to his reasonable requests caused the Claimant considerable stress and anxiety.

175 The Respondents constantly questioned the medical evidence. The First Respondent eventually dismissed the Claimant without ever properly considering the adjustments that he required. The Claimant was genuinely concerned about his safety on the road. The Respondents' actions did nothing to allay his concerns; quite the opposite.

176 The Tribunal accepted that the Claimant was anxious and distressed throughout the period when he was not being given answers, or adjustments, by the Respondents. We accepted that he was very distressed to be dismissed. While the Claimant did say that he wanted to leave the Respondent's employment in March 2016, he made clear that he would do so only when he had secured another job. When he was dismissed, however, he did not have another job to go to.

177 The Tribunal decided that the Claimant was not devastated by the loss of his job. It did not end his career. He was able to obtain alternative employment, albeit not until 31 December 2016.

178 The Tribunal decided that the injury to feelings award in this case properly fell within the lower end of the middle band of *Vento.* The discriminatory acts were not simply a one off act of discrimination. They extended over a five month, period during which the Claimant was so anxious and distressed that he had to be signed off work by his GP for some weeks.

179 The Tribunal awarded the Claimant £10,000 for injury to feelings, plus 8% interest on that figure for a year from March 2016 to March 2017. The interest calculation was therefore £10,000 x 0.08 x 365 ÷ 365 = £800. The Tribunal awarded the Claimant £10,800 for injury to feelings, including interest.

180 With regard to economic loss, the Claimant was unemployed until 31 October 2016. He then obtained a new job paying £522.26 a week.

181 On 30 January 2017 he moved employers and, from then on, he was earning

£502.40 net per week. The parties agreed that the Claimant had been earning £616.39 net per week when employed by the First Respondent and that this was the appropriate figure to use in calculating the Claimant's ongoing loss.

182 The Claimant told the Tribunal that he left his first new employer because the new employer did not win a contract within the Claimant's local area. However, there was no evidence that the Claimant would have had to work for more than 12 hours a day with that new employer thereafter. There was no evidence that he was going to be dismissed by that first employer.

183 The Tribunal decided that the Claimant did not mitigate his loss by getting a new job at a lower rate of pay. It concluded that the Claimant should be compensated, only, for the difference in pay between £616.30 net weekly pay at the First Respondent and £522.26 weekly pay at the first employer.

184 The Claimant contended that he lost the benefit of life insurance cover at the First Respondent, which was worth £13.85 weekly. There was no evidence that the Claimant had the benefit of life insurance in his new jobs. The Tribunal accepted the Claimant's evidence that he had lost the benefit of his life insurance and that it was worth £13.85 per week. The Respondents did not produce any evidence with regard to that claim.

185 The Tribunal awarded the Claimant compensation for discrimination which resulted in him losing his job. It awarded the Claimant his full loss of earnings for 16 weeks and 3 days until 31 October 2016: 16.6 weeks x £616.39 = £10,232.07. It awarded the Claimant compensation for ongoing loss of £92.13 weekly net from 31 October 2016 to 31 March 2017, 22 weeks. 22 x £92.13 = £2,026.86.

186 The Claimant contended that he should be awarded 26 weeks future loss.

187 The Tribunal considered, on the evidence that it had heard, that there is a buoyant job market for refrigeration technicians. The Claimant has been able to obtain two different jobs since his dismissal. The Tribunal considered that, within 3 months from the date of the Tribunal hearing, the Claimant ought to be able to obtain a job paying the same as he was paid by the First Respondent. It therefore awarded him 13 weeks future loss, or 13 x £92.13 = £1,197.69.

188 The Tribunal also awarded the Claimant compensation for loss of life insurance until that date. It awarded him a total of 51 weeks life insurance at £13.85. 51 x 13.85 = £706.35.

189 The Tribunal awarded the Claimant interest on his past loss. His total past loss is £10,232.07 + £2,026.86 + £526.30 (38 weeks' past life insurance) = £12,785.23. There are 266 days between the date of the Claimant's dismissal and 31 March 2017. 266 ÷ 365 x 0.08 x 0.5 x £12,785.23 = £372.70.

190 The Respondents are joint and severally liable for the award. It would be artificial to split up the award. The failure to make adjustments led inevitably to the Claimant's dismissal. The failure to carry out risk assessments were all of a piece with the failure to make reasonable adjustments.

191 The Tribunal did not award an Acas uplift, nor did it reduce the Claimant's award because of his failure to appeal. The Claimant did not appeal and he was legally advised at the time. However, the Respondent did not investigate the Claimant's grievance and did not offer him a grievance hearing with appropriate notice, but simply sprang a hearing on him on 8 July. It did not investigate the Claimant's grievance, at all, thereafter. Both parties were at fault for not following the Acas Code of Practice. It was therefore not appropriate to uplift or reduce the award.

Employment Judge Brown

26 May 2017