EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M Dodd	and	Hoyer Petrolog Limited

Hearing held at Reading on 17, 18 and 19 July 2017

Representation **Claimant:** Mr M Cole, counsel
Respondent: Mr C Bailey-Gibbs, solicitor

Employment Judge Mr SG Vowles **Members** Mrs M Moore
Mr P Miller

RESERVED UNANIMOUS JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties. From the evidence heard and read the Tribunal determined as follows.

Direct Disability Discrimination – section 13 Equality Act 2010

2. This complaint was withdrawn at the start of the hearing and it is dismissed.

Indirect Disability Discrimination – section 19 Equality Act 2010

3. This complaint was withdrawn at the start of the hearing and it is dismissed.

Discrimination Arising from Disability – section 15 Equality Act 2010

4. The Tribunal found that the Claimant was not subjected to discrimination arising from disability. This complaint fails.

Failure to Make Reasonable Adjustments – section 20 Equality Act 2010

5. The Tribunal found that the Respondent was not in breach of the duty to make reasonable adjustments. This complaint fails.

Failure to Provide Itemised Pay Statements – section 11 Employment Rights Act 1996

6. This complaint was withdrawn at the end of the hearing and it is dismissed.

Unauthorised Deductions From Wages – section 13 Employment Rights Act 1996

7. The Tribunal found that the Claimant had been paid all that was properly payable under his contract of employment. This complaint fails.

Reasons

8. This judgment was reserved and written reasons are attached.

REASONS

SUBMISSIONS

Claimant

1. On 26 September 2016 and 13 January 2017 the Claimant presented complaints of disability discrimination, unauthorised deductions from wages and failure to provide itemised pay statements to the Employment Tribunal.

2. The claims were clarified at preliminary hearings held on 5 January 2017 and 21 April 2017.

3. At the start of the hearing the Claimant withdrew the complaints of direct disability discrimination and indirect disability discrimination.

4. At the start of the hearing the Claimant made an application to amend the claims by adding 2 further claims of discrimination arising from disability and 1 further claim of failure to make reasonable adjustments. The Respondent objected to the application. The Tribunal refused the application and reasons for the decision were given.

5. At the end of the hearing the Claimant withdrew the complaint of failure to provide itemised pay statements.

Respondent

6. On 28 October 2016 and 14 February 2017 the Respondent presented responses and resisted all claims.

7. Before the start of the hearing the Respondent had conceded that the Claimant was a disabled person by reason of a back condition involving neuropathic pain.

EVIDENCE

8. The Tribunal heard evidence on oath from the Claimant Mr Mark Dodd (Driver Technician).

9. The Tribunal also heard evidence on oath on behalf of the Respondent from Mr Matthew Jones (Location Transport Manager) and Miss Jane Callander (Operations Manager).

10. The Tribunal also read documents in a bundle provided by the parties.

FINDINGS OF FACT

Background

11. The Respondent's business is to transport bulk liquids, fuels and other products under distribution contracts with customers. It employs 3,000 staff of whom 1,500 are drivers.

12. The Claimant commenced employment as a driver technician with the Respondent on 24 March 2003. His duties involved driving a 44 tonne tanker vehicle transporting liquid fuel products. He was responsible for loading the vehicle with the fuel products, driving to customer sites and off-loading the fuel product. There were three broad divisions of work:

    12.1 Retail work involved deliveries to petrol station forecourts used by the general public to refuel their vehicles.

    12.2 Industrial work involved making gas oil deliveries to industrial clients.

    12.3 Aviation work, which had the smallest volume of work, involved delivering aviation fuel to airports.

Back Surgery

13. In 2013 the Claimant had major back surgery. He was absent on sick leave for 3 months. On his return to work he was initially employed solely on Aviation work. This was because the physical demands of Aviation work were less than Retail and Industrial work. There was a dispute between the parties about the nature and extent of the physical demands of Aviation work as compared to Retail work. The Claimant claimed that Aviation work amounted to light duties. The Respondent accepted that the physical demands of Aviation work were less than Retail work but insisted that both types of work required heavy lifting and both were physically demanding.

14. After a while, the Claimant returned to full duties undertaking both Retail and Aviation work.

Implant of Spinal Stimulator

15. In September 2015 the Claimant began a period of sickness absence because his medication for pain relief prevented him from driving. In

February 2016 he underwent further surgery on his back involving the implanting of a spinal cord stimulator under his skin to provide pain relief.

Medical Examinations and Reports

16. On 4 April 2016 the Claimant attended a consultation with Mr Mattison, an occupational health specialist practitioner employed by "Clarity" who provided occupational health services to the Respondent. The Claimant explained to Mr Mattison that he considered himself fit to return to Aviation work but not Retail or Industrial work. He said that Mr Mattison said that he would recommend to the Respondent that the Claimant could return to Aviation work. After the consultation, however, Mr Jones met with Mr Mattison and explained the nature and demands of the Aviation contract. Mr Jones' evidence was that Mr Mattison had accepted at face value the Claimant's assertion that Aviation work involved light duties. He said that he properly set the record straight by informing Mr Mattison that Aviation work did not involve only light duties.

17. Mr Mattison's report dated 6 April 2016 included the following:

ACTION
I have advised Mark to discuss with his consultant and GP about his role and responsibilities as a driver technician particularly the manual handling tasks. I have advised Mark to obtain a report or statement (from both if possible) on his current range of movement and manual handling ability.

RECOMMENDATION
I would advise that Mark is reviewed after he has seen his consultant and GP and is in receipt of the suggested report/statement.

I have sent Mark a request for access to his medical records through his GP.

CONCLUSION
Mark is not currently fit for work.

I recommend that a further review be arranged when we are in receipt of information from his GP/Specialist.

18. The Claimant contended that Mr Mattison's report was altered following Mr Jones' intervention which resulted in the conclusion that the Claimant was not currently fit for work. Mr Jones rejected the suggestion that there was anything improper about his conversation with Mr Mattison. He said that it was usual practice for him to speak to the occupational health practitioner both before and after a consultation in order to ensure that an accurate description of the employee's duties had been provided. The Tribunal accepted that explanation and found nothing improper in Mr Jones' actions. Ultimately, it was a matter for the occupational health practitioner

to determine whether the employee was fit to return to work after hearing from both the employee and the employer.

19. On 11 April 2016 the Claimant's GP received a letter from Katie Markham (Deputy Clinical Nurse Specialist – Pain Management – St Thomas' Hospital) as follows:

Mr Dodd has a full implant of a spinal cord stimulator on the 5th February 2016 under the care of Dr Padfield, Consultant in Pain Management. This device was implanted to help manage his neuropathic leg pain following a spinal fusion he had performed in 2013.

We have discussed that with the implant now insitu there will be some restrictions around duties he can perform in his job as a heavy goods driver.

Abrupt movements which may cause shock/jolting, heavy lifting above shoulder height and exaggerated movements such as excessive stretching/twisting movements can cause the leads to move Electromagnetic interference should also be avoided.

This being said it is recommended that his role be adapted to undertake lighter duties to avoid movement of the leads, in particular to avoid heavy lifting.

20. On 20 May 2016 the Claimant's GP issued him with a Med 3 statement of fitness for work which included the following:

You may be fit for work taking account of the following advice:

Adv – lighter duties to avoid movement of the leads – particularly heavy lifting.

This will be the case for [Fit for work from 20/5/2016]

21. On 23 May 2016 the Claimant attended a consultation at St Thomas' Hospital with his pain management consultant Dr Padfield who produced a report dated 31 May 2016 as follows:

Re: Mr Mark Dodd …

It was nice to catch up with Mr Dodd. He had his full spinal cord stimulator implant in February and he tells me that the stimulation is covering the painful area. However, I sense that his expectations have not been fully met which, of course, happens sometimes but also particularly when patients have not attending the Pain Management Programme first.

I think this is actually what he needs to do to learn to deal with his pain now on a physical and emotional level more effectively as there really is

nothing else we can add to reduce the physical sensation of the pain. I am going to get him to see our clinical psychologist this morning who may advise further but it may well be that he ends up doing one of our Residential Pain Management Programmes. We will be in touch.

22. On 10 June 2016 the Claimant attended a meeting with Mr Jones to discuss the reports from Mr Mattison and Ms Markham. During the meeting he signed a consent form for occupational health to access his medical records.

Request for Medical Report

23. On 4 July 2016 Ms Wilson (Clarity Occupational Health Director) wrote to Dr Padfield requesting further information about the Claimant's condition. The letter included the following:

Clarity Healthcare Ltd provides Occupational Health advice and guidance to Hoyer Petrolog, who is your patient's employer. Our aim is to ensure that there are no health problems likely to affect Mr Dodd's suitability for his contractual role. Where appropriate we provide advice to the employer on making reasonable adjustments to cater for impaired health or disability.

In the absence of your advice, the quality and impact of our recommendations will be limited. I trust you will agree with this and a prompt response to this request will be in your patient's best interest.

In my capacity as an Occupational Health professional, I would be grateful if you could provide me with a report based on your medical records and your opinion of Mr Dodd's health, treatment and future prognosis. I would appreciate if you could provide specific detail on the range of movements and restrictions which Mr Dodd can and cannot complete.

We are also in receipt of correspondence dated 11th of April 2016 from Katie Markham, Clinical Nurse Specialist in Pain Management and she advises Mr Dodd's general practitioner that a "device was implanted to help manage his neuropathic leg pain following a spinal fusion". Please can you confirm if the device that has been installed is safe to use at petrol and fuel depots where Mr Dodd is required to work?

I enclose a signed Consent for Access to Medical Records for Mr Dodd who wishes to see this report prior to release.

24. There was no reply to Ms Wilson's letter and a follow up letter containing the same request was sent on 16 July 2016.

1st Grievance

25. On 29 July 2016 the Claimant presented a written grievance to the Respondent which included the following:

Re: Company Level Grievance

I wish to lodge a grievance about the company's refusal to allow me to return to work following sick leave. My grievance relates in particular to the conduct of Matthew Jones, Location Transport Manager – West London Terminal with whom I have had dealings over this matter.

Background

I have been employed by the company for 13 years as a Driver Technician. My role involves driving and heavy lifting.

I underwent back surgery in 2013 following which I returned to work initially on light duties for a period of approximately 3 months. Due to complications arising from my back surgery I suffered nerve pain in my leg. I was prescribed medication which prevented me from driving and I went on long term sick leave in September 2015.

On 5th February 2016, I underwent a further operation involving a full implant of a spinal cord stimulator to manage my leg pain. The operation has not been completely successful. I still suffer debilitating pain, have mobility problems and cannot undertake lifting. I believe that my condition fulfils the definition of a disability under the Equality Act 2010.

Complaint

"I believe the company has failed in its duty to deal with my situation and that Matthew Jones has deliberately created delays such as those outlined above to avoid doing so. The only adjustment that I require is that I do not have to undertake heavy lifting. I do not have a problem with driving and I am happy to take on any sort of driving work."

Outcome

All I have ever asked for is to be allowed to return to my job with an adjustment so that I do not have to undertake heavy lifting duties. I remain willing to return to work to a suitable role.

26. On 26 August 2016 the Claimant, accompanied by his trade union representative, attended a grievance investigation chaired by Mr David Sherwin (Location Transport Manager Esso Birmingham). Mr Jones was also interviewed separately as part of the grievance investigation process.

Further Request for Medical Report

27. Meanwhile, on 21 September 2016, Ms Wilson (Occupational Health Clinical Director) wrote to Mr Jones and the letter including the following:

As of writing this letter today, we have not yet had a response from Mr Dodd's specialist practitioner.

Mr Dodd did provide to Clarity Healthcare, a copy of a letter transcribed by his Pain Management Consultant Dr Padfield but this unfortunately did not provide enough information regarding Mr Dodd's ongoing care and prognosis. We have written to Dr Padfield to request further information on the long term prognosis and care for Mr Dodd and we await his response. In the absence of this information we have been unable to provide any guidance on when Mr Dodd can return to work nor can we provide any recommendations which would support a return to work. The clinical administrative team continues to request information from Dr Padfield on an ongoing basis. Mr Dodd did request that he receive the report before it was sent to Clarity Healthcare which can delay receipt of the report.

I have included with this letter details of the contact activity with the office of Dr Padfield. It may be useful for Mr Dodd to make enquiries with his doctor to request that he responds to our request for information.

28. On 26 September 2016 the Claimant submitted his first ET1 claim form to the Employment Tribunal.

29. On 28 September 2016 Mr Richardson (Clarity Occupational Health) wrote to Dr Padfield's secretary as follows:

Further to our phone discussion today 28th of September 2016. Thank you for confirming that Dr Padfield will be completing the report in the next few days. Our customer and Mr Dodd are very eager to resolve this matter and we appreciate any urgent assistance you can apply in this matter. I am on annual leave from the 30th September, returning on October 10th …

1st Grievance Outcome

30. On 7 October 2016 the Claimant attended a grievance hearing chaired by Mr Sherwin. On 21 October 2016 Mr Sherwin provided a written outcome to the grievance which included the following:

As a Location Transport Manager responsible for the care of drivers, I cannot, in clear conscience, agree that you were signed as fit to return to work. What is being highlighted to the Company is that there may be a possibility that you could be fit to return to work with adjustments. There is a clear difference. The Company was entirely justified in seeking Clarity's Occupational Health advice on whether you were fit to return. Their response was, and remains, clear in that they require a greater

understanding of your restrictions before they can properly advise what you can and cannot do, and what adjustments are to be considered. The presence of your Spinal Core Stimulator is a cause for proper caution and the need for information to avoid precisely what Ms Markham highlights as a risk for the leads moving.

Further, your grievance refers to Dr Padfield's report dated 31st May, electronically signed on 13th June 2016. However, despite the requests for further information by Clarity, there is nothing in Dr Padfield's correspondence to Dr Marshall which speaks to the limitations of your movements/abilities to help Clarity to reach a conclusion on your fitness to return to work, and in what capacity.

In respect of your assertion that you are fit for Aviation duties, because there is no requirement to lift heavy hoses, I do not agree with this statement. The Aviation contracts still require loading and discharge of product, through the use of hoses. That still requires lifting, twisting and turning. Any difference between Retail deliveries and Aviation does not remove those fundamental steps. Crucially, the Company is still without any medical advice as to whether or not you can carry out your duties, and if not fully, what you can do, and where required, what reasonable adjustments the Company should consider to assist you.

In conclusion, I do not find that you have been unfairly or unjustifiably refused a return to work, in the circumstances.

Further Medical Reports

31. On 24 October 2016 Katie Markham (Clinical Nurse Specialist) produced a further medical report, countersigned by Dr Padfield, following a consultation with the Claimant on 15 September 2016. The report contained the following:

Recommendations regarding his work:

Regarding his work, although Mr Dodd is managing a pain condition, now with the assistance of the neuromodulation device, this does not mean that he cannot work; indeed, as he has done for many years, many chronic pain sufferers manage to work.

There are some restrictions now that the device is in situ. He has been advised to avoid certain movements and positions as follows:

- *Abrupt movements – which may cause shock / jolting*
- *Heavy lifting above shoulder height and exaggerated movements such as excessive stretching / twisting – these may cause the leads to move*
- *Electromagnetic interference should also be avoided*

Our understanding is, therefore, that he should avoid heavy lifting, but he should be able to do tasks where lighter lifting is involved.

We understand that Mr Dodd works as a driver technician for Hoyer Petrolog UK Ltd. He reports that his work can be in the Retail and Aviation sectors. He reports that the Retail work can involve a lot of heavy lifting; however in the Aviation sector, the demand for lifting is much less. He has said that he found this work manageable after his first back surgery, and he is confident that he can manage this at his current level of functioning.

We would therefore encourage that Mr Dodd is enabled to remain at work and to do alternative duties where a lighter degree of lifting is involved.

32. On 1 December 2016 Ms Wilson (Clarity Clinical Director) wrote to Mr Jones as follows:

Following Mark's referral in April 2016 he was due to have a consultation with his consultant to discuss his general mobility, prognosis and movement and I understand this appointment has taken place.

It is important that we understand the outcome of this consultation to ensure that a return to work task assessment is not premature and we wish to avoid potentially causing further exacerbating his injuries.

At this point, it is also not clear if the duties that Mark is expected to undertake as a driver technician are conducive with the device he has had installed. We need to understand the pain management device he has had installed and what risks this may present which could potentially make it unsafe for Mark to return to return to his driver technician duties.

It is my recommendation that Mark be restricted from his role as a driver technician until we have been able to get further medical evidence for his condition, treatment and prognosis and that we fully understand the implications the use of his pain management device may have.

I regret to inform you that as of today's date and despite numerous requests, Mark's doctor has not yet responded to our request for information.

I last spoke with the office of Dr Padfield, Mark's consultant on the Tuesday the 29th of November and I have been advised that the request is with Dr Padfield and will be actioned as soon as reasonably possible.

33. On 6 January 2017 Mr Jones wrote to the Claimant as follows:

In summary, Clarity cannot confirm that you are fit to return to your role at this time. Nothing has changed since this report was issued, and Clarity are still waiting for the requested information from your consultant.

To assist with this process, can you please reach out to your consultant and ask them to provide Clarity with the required medical information so that they can make an assessment. Given the seriousness of your back injury and the risk of causing further injury Clarity cannot support your return to work until further and specific information is received from your consultant.

34. On 13 January 2017 the Claimant presented a second ETI claim form to the Employment Tribunal claiming that the Respondent's discriminatory conduct towards him was continuing.

Further Request for Medical Report

35. On 30 January 2017 Ms Wilson wrote again to Dr Padfield as follows:

Clarity Healthcare have made repeated efforts to contact your offices and although we have been advised by Katrin that you are in receipt of the request, we have to date received no response to our request for information. …

Please could I request that you provide confirmation of the following:

- *Is the device that has been installed is safe to use at petrol and fuel depots where Mr Dodd is required to work? Please could you also provide any specific operational information regarding the device.*
- *As you have noted in your correspondence dated the 24th of October 2016, Mr Dodd works as a Driver Technician for a large petroleum supplier, a role which does require not just heavy lifting but also requires frequent bending/twisting, climbing crouching. I would like to understand your opinion, if the required activity from the job is conducive with the use of the installed pain management device.*
- *Any other information that you would deem relevant to Mr Dodd's ongoing treatment and prognosis.*

36. On 2 March 2017 Mr Ian Brooks (Clarity Manager) made a file note as follows:

02.03.2017 – Spoke to new secretary who has taken over for Dr Padfield – He is no longer willing to provide medical reports – patient will have to go to GP for medical notes.

37. Clarity had by this time made numerous attempts, by letter and by telephone to obtain a medical report from Dr Padfield from 4 July 2016 until 2 March 2017. No such report was forthcoming from Dr Padfield and it was at this time that the solicitors for both the Claimant and the Respondent started to seek a suitable alternative back specialist who

could provide such a report. As at the date of this Tribunal hearing, however, this has not yet been done.

2nd Grievance

38. On 10 March 2017 the Claimant presented a written grievance regarding the termination of his sick pay.

2nd Grievance Outcome

39. On 13 April 2017 the Claimant's grievance regarding sick pay was refused by Mr Jones. The outcome included the following:

I confirmed that you are entitled to Company sick pay when absent from work. If, as in your case, you are absent for longer than Company sick pay provisions, then you must return to work and work in order to requalify for those benefits. As you are not fit for work, you are not entitled to any further sick pay at this time. In this regard, you are being treated in accordance with and no less favourably than others before you.

Further Medical Report

40. On 27 April 2017 the Claimant attended an occupational health consultation with Dr Edun Odufuwa (Clarity Occupational Health Adviser). (He had previously attended a consultation on 29 March 2017 but had refused to consent to the consultation because Dr Odufuwa did not have access to the report from his pain management team dated 24 October 2016). Dr Odufuwa reported:

From my understanding of the job role and from my discussions with Mr Dodd where he informed me that both roles (Aviation and Retail) would involve frequent bending, Aviation to a lesser degree, I thought it unwise and unsafe to carry out an assessment of his range of lumbar spinal movement as carrying out the assessment would involve asking him to carry out lumbar flexion i.e. bending forwards to touch the toes.

As explained earlier, we (Clarity) are yet to receive further clarification from Dr Padfield or Mr Dodd's GP as to whether it was safe for him to carry out bending, as such, asking him to carry our lumbar flexion could potentially result in injury to Mr Dodd or damage the device and/or the leads in his spine. Furthermore, an assessment of his spine would also involve carrying out rotation i.e. with Mr Dodd seated, asking him to twist round to each side. As you know, his pain management team in their letter dated 24th October 2016 have also recommended he avoids excessive stretching/twisting.

MEDICAL OPINION/RECOMMENDATIONS

Based on my understanding of his job role and given the restrictions recommended by his pain management team, it is my opinion that Mr Dodd is unfit to return to work undertaking full unrestricted duties. With regards his capability for amended duties, crouching and climbing in and out of the lorry, without further information from the pain management team as to whether carrying these activities would result in damage to the device and/or leads in his spine, I am afraid I cannot give an opinion as to his suitability for an amended role.

2nd Grievance Appeal Outcome

41. On 10 May 2017 the Claimant attended a grievance appeal meeting chaired by Ms Calendar at which the Claimant was accompanied by his trade union representative. In the outcome letter dated 26 May 2017 it was stated:

I confirmed that you had received the correct and full amount of sick pay and were not entitled to any further sick pay at this time. I added that you are being treated in accordance with and no less favourably than others before you.

DECISION

Jurisdiction – Time limits

42. Equality Act 2010

Section 123

(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of-

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment Tribunal thinks just and equitable. …

(3) For the purpose of this section -

(c) conduct extending over a period is to be treated as done at the end of the period;
(d) failure to do something is to be treated as occurring when the person in question decided on it.

43. The Respondent claimed that some of the discrimination complaints had been presented out of time and that the Tribunal had no jurisdiction to consider them.

44. The Tribunal considered that it was arguable that some of the events which fell outside the time limits were part of conduct extending over a period. Also, it was just and equitable to extend time because the material events were well documented and there was no prejudice to the Respondent if time was extended. The Tribunal considered that it had jurisdiction to consider all the complaints.

Burden of Proof – Equality Act 2010

45. For discrimination claims under the Equality Act 2010 the burden of proof is set out in section 136 of the Act. If there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provision concerned the Tribunal must hold that the contravention occurred. But that does not apply if the person shows that he or she did not contravene the provision.

46. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination, they are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.

47. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.

Discrimination Arising from Disability – section 15 Equality Act 2010

48. Equality Act 2010

Section 15

(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.

49. This complaint was set out in the claim forms as follows:

The Respondent has treated the Claimant unfavourably because of his inability to carry out the duties of the Retail contract ~~and/or because of his high level of sickness absence~~. The Claimant's inability to carry out the duties of the Retail contract ~~and/or his level of sickness absence~~ arise from his disability.

The Respondent has failed to provide the Claimant with full-time work including overtime, or in the alternative has failed to provide him with any work at all, because of his inability to carry out the duties of the Retail Contract ~~and/or because of his high level of sickness absence~~.

The Respondent has failed to pay the Claimant his full wages including overtime, or, in the alternative, any wages at all because of his inability to carry out the duties of the Retail contract ~~and/or because of his high level of sickness absence~~.

50. Those parts lined through were withdrawn by the Claimant during the course of the hearing.

Failure to provide the Claimant with work

51. The Tribunal found that the failure to provide the Claimant with work amounted to unfavourable treatment.

52. The Tribunal also found that the Claimant's inability to carry out the duties of the Retail contract (and indeed any duties as a driver technician) was something arising in consequence of his disability.

53. The Tribunal also found that the unfavourable treatment was because of the something arising in consequence of the disability.

54. The Tribunal then went on to consider the Respondent's defence of justification.

55. In Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority [2012] UKSC 15, it was said that to be a legitimate aim, the aim must correspond with a real need.

56. So far as proportionality is concerned in the case of Hardy & Hansons Plc v Lax [2005] EWCA Civ 846, it was said:

The principle of proportionality requires the Tribunal to take into account the reasonable needs of the business. But it has to make its own judgment upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary.

57. This required the Tribunal to balance the discriminatory effect of the unfavourable treatment against the Respondent's legitimate aims.

58. The EHRC Code of Practice on Employment (2001) paragraph 4.27 suggests that the question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages.

60.1 Is the aim of the PCP legal and non-discriminatory, and one that represents a real objective consideration?

60.2 If the aim is legitimate, is the means of achieving it proportionate - that is appropriate and necessary in all the circumstances?

59. The Claimant claimed that although the Respondent had pleaded justification in its responses, the defence of proportionate means and legitimate aim had not been sufficiently clarified. The Tribunal rejected that assertion. Justification had clearly been pleaded and it was implicit and obvious from the facts referred to above that the legitimate aim was to ensure the safety of the Claimant when performing his duties and the safety of others around him when involved in the delivery of highly flammable fuel products. There was a real need to take a strict approach to safety. That was a legitimate aim.

60. The Claimant's case involved the assertion that Aviation work did not involve heavy lifting which had been forbidden in reports from his pain specialist and his GP. However, during the course of the grievance investigation on 26 August 2016, he said the following:

DS (Mr Sherwin): Can you explain what you mean, you cannot do heavy lifting?
MD (Mr Dodd): I can do lifting, I can't do it all day. In case the leads in the stimulator move. I showed Clarity that I can lift, I just can't risk the leads moving. …

DS: I use to do Birmingham airport, I will be able to do it.
DS: But lifting and draining the hoses would be considered as heavy lifting.
MD: I can do heavy lifting, it says excessive heavy lifting. Excessing means a lot in my eyes, so I can't do heavy lifting all day.

DS: There is no part of the job that avoids heavy lifting, in Aviation and in general.
MD: No, I know. …

DS: Do you accept that there are heavy hoses to lift on Aviation?
MD: Yes, just not as heavy as Retail. You won't get a hose that kicks on Aviation. A hose filled with product. Aviation doesn't have that problem.

61. This was consistent with Mr Jones's evidence that although Aviation duties were lighter than Retail duties, they still involved manual handling and heavy lifting. The medical evidence provided to the Respondent was that the Claimant was not fit to return to any type of work until such time as the risks to his back condition and the implant were clarified. The consequences of further injury and/or damage to the implant were potentially serious.

62. It would have been foolhardy and contrary to the legitimate aim of safety, to allow an employee to be employed on the loading, transport and delivery of large quantities of highly flammable fuel when their medical advisers had stated that they could not be sure that he was fit to do so.

63. Additionally, up until April 2017, when further information became available, the Respondent was unsure as to whether the implant and/or the handheld recharging device constituted a risk in a fuel-rich environment.

64. Although the Claimant's pleaded case above refers only to the duties of the Retail contract, the medical advice was that he was not fit to return to work on any duties. The Tribunal accepted the Respondent's account that there were no roles other than driver/technician available for the Claimant. Despite his assertion that others had been employed on driver only duties, that was for a short period in exceptional circumstances.

65. The only proportionate means of achieving the legitimate aim of safety was to refuse to allow the Claimant to return to work. There was no other means, discriminatory or not, of achieving the legitimate aim in the above circumstances.

66. The Tribunal therefore found that the discriminatory treatment was justified.

<u>Failure to pay the Claimant his wages</u>

67. The Tribunal found that the failure to pay wages was unfavourable treatment.

68. This treatment was not, however, because of something arising in consequence of the Claimant's disability. It was because he was not

attending work. It is true that there was a causal link between the absence from work and the disability, but the direct reason for him not being paid wages was because the Claimant was not doing any work.

69. Even if the Tribunal had found that the failure to pay wages was because of something arising from his disability, it was justified. Under this claim, the Respondent had, as above, pleaded the defence of justification although it had not been clarified in the response form. Once again, however, the legitimate aim was obvious, that is to pay wages only for work done which is the basic pay/work bargain implicit in all contracts of employment. Not paying wages to an employee when he is not performing work is a proportionate means of achieving that aim.

70. It is not a reasonable adjustment to pay a disabled person more than a non-disabled person on account of his disability.

71. Absence from work can of course be remunerated in other ways, for example, by the payment of holiday pay, statutory sick pay or company sick pay. That will, however, be necessarily limited in the amount paid and the time over which payments will be made depending upon the statutory provisions and the contractual entitlement under the contract of employment. The Claimant having exhausted his sick pay entitlements, statutory and contractual, the Respondent was justified in not paying wages.

72. For the above reasons, this claim fails.

<u>Failure to Make Reasonable Adjustments - section 20 Equality Act 2010</u>

73. Equality Act 2010

Section 20

(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

74. This complaint was set out in the claim form as follows:

<u>Provision Criterion or Practice (PCP)</u> - The Respondent requires the Claimant to have the ability to fulfil duties which include the duties of the Retail Contract. The Respondent is therefore applying a PCP to the Claimant which since 2nd May 2016 has put him at a substantial disadvantage compared with non-disabled persons, as set out in paragraph 26 above. The Respondent is therefore under a duty to make reasonable adjustments pursuant to s20 Equality Act 2010. The

Respondent has failed to take any steps at all, including any reasonable steps, to avoid the disadvantage.

<u>Substantial Disadvantage</u> - The Claimant has thereby suffered, and is suffering, substantial disadvantage in that:

a) He is denied full-time work, or in the alternative any work at all.
b) He is denied his full wages including overtime, or in the alternative any wages at all.

<u>Reasonable Adjustment</u> - For example, the Respondent failed to rota the Claimant to work on the Aviation contract, which would have amounted to a reasonable adjustment and/or the Respondent has failed to provide the Claimant with appropriate alternative work such as driving work.

75. The Respondent submitted that the alleged PCP was not applied by the Respondent because, since May 2016, both the Claimant and the Respondent had been satisfied that he was unable to perform the Retail work and that a return to Aviation work was the only possibility, subject to medical clearance. The Tribunal gave a liberal interpretation to the stated PCP as being a requirement to fulfil the duties of a driver technician generally and of course those duties might include Retail work. The Tribunal was satisfied therefore that this was a PCP applied to the Claimant.

76. The Tribunal found that the PCP did put the Claimant at a substantial disadvantage in comparison with persons who were not disabled. The duty to make reasonable adjustments was therefore engaged.

77. There were however no reasonable steps which could have been taken to avoid the disadvantage. The medical evidence throughout the period April 2016 to the present date was that the Claimant was unfit to return to any duties. The last available medical report from Dr Odufuwa, quoted above, included:

"It is my opinion that Mr Dodd is unfit to return to work undertaking full unrestricted duties. … With regards his capability for amended duties… I am afraid I cannot give an opinion as to his suitability for an amended role."

78. That was because the Aviation work would also involve frequent bending, crouching and climbing in and out of the lorry.

79. Also, as mentioned above, there were no driver only jobs available. In summer 2016, two drivers were engaged on driver only work but it was in exceptional circumstances. Mr Jones confirmed that driver only operations would be impractical, inefficient, expensive and require double manning because another person would be required to load and unload the fuel products. The Tribunal did not consider that it would be a reasonable

adjustment for the Respondent to have created such a role for the Claimant. Additionally, the medical advice was that the Claimant was not fit to return to work to undertake any duties and that would, in the circumstances of this case, include driver only duties.

80. The Tribunal found that the Respondent was not in breach of its duty to make reasonable adjustments.

Unauthorised Deductions From Wages – section 13 Employment Rights Act 1996

81. Employment Rights Act 1996

Section 13

(1) An employer shall not make a deduction from wages of a worker employed by him unless -

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

82. This complaint was set out in the claim forms as follows:

Further, or in the alternative, the Respondent failed to pay the Claimant the full wages, including overtime, to which he was entitled between 2nd May 2016 and 31st August 2016. The Respondent paid the Claimant for 70 hours per month between 1st May 2016 and 30th June 2016. Thereafter the Respondent paid the Claimant no pay at all (save holiday pay). The Respondent has thereby made unauthorised deductions from the Claimant's wages."

83. The relevant provisions were as follows.

84. The Claimant's contract of employment

SICKNESS ABSENCE AND SICK PAY

7.5 Under the provisions of the Company's Sick Pay Scheme until you have been continuously employed for six months any payment of salary, premiums or allowances will only be made at the company's discretion and entirely without obligation. After you have been continuously employed for six months you will receive your basic salary (less any statutory sick pay under the provisions of the Social Security and Housing Benefits Act 1982) to a maximum of 6 months (in any 12-month period), based upon the following periods of continuous service:-

Service	*Sick pay payable (in a 12-month Rolling period)*

85. *6 to 12 months* — *1 month*
- *1 to 3 years* — *2 months*
- *3 to 5 years* — *3 months*
- *5 to 7 years* — *4 months*
- *7 to 9 years* — *5 months*
- *10 years plus* — *6 months*

86. Trade Union National Agreement

Mr A Devlin
Unite the Union

Dear Mr Devlin

Esso Fuels Distribution Contract Pay Offer: 1st January 2015 to 31st December 2015

The purpose of this letter is to confirm the Company's final offer following our negotiations of 3rd June 2015 regarding the 2015 wage round on the Esso Fuels Distribution Contract. Details are as follows: …

Payment during absence through sickness

An employee who is absent from work through sickness will be eligible for increased Company sick pay as follows:-

Service		*Maximum Benefit Payable*
• *Under 3 months' service*	-	*no payment*
• *3 months to 3 years*	-	*3 months at full sick pay and 2 months at half sick pay*
• *3-7 years*	-	*5 months at full sick pay and 2 months at half sick pay*
• *7 years+*	-	*6 months at full sick pay and 2 months at half sick pay*

It was clarified that Company sick pay is discretionary so that Hoyer reserves the right to withdraw sickness benefit from any individual who, in the Company's view, is or has been malingering or who fails to comply with the agreed sickness procedures.

87. The Claimant claimed that he was entitled to the benefits of both the provisions of his contract of employment at paragraph 7.5 and the provisions of the Trade Union National Agreement with effect from 5 June 2015. It was asserted that the "*12 month rolling period*" meant that where the Claimant was absent through sickness, he was entitled to 6 months at full sick pay and 2 months at half sick pay in every 12 month period and that there was no requirement for him to return to work to restart the rolling

period. It was accepted that he had received 6 months at full pay and 2 months at half pay. It was asserted that payment of sick pay was not discretionary in the Claimant's case because he had not been malingering or failed to comply with the agreed sickness procedures.

88. The Respondent claimed that the payment of company sick pay was discretionary and that the Claimant was only entitled to receive 6 months' full company sick pay and 2 months' half pay and that in order to requalify for company sick pay on any 12 month period, the Claimant would have to resume work at some point.

89. The Tribunal found that the Claimant was bound by the terms of the National Agreement set out above, which it was clear had replaced the provisions set out in the Claimant's contract of employment with effect from 5 June 2015. The Claimant was in fact paid 6 months at full pay and 2 months at half pay. There is no provision in the National Agreement provision for a rolling period. The National Agreement provision was both a replacement and an enhancement to the Claimant's company sick pay benefits.

90. The Tribunal accepted Mr Jones's evidence that no other employee had been paid the 6 months plus 2 months benefit on a 12 month rolling basis as claimed by the Claimant, nor had the Trade Union made submissions on behalf of the Claimant or on behalf of anyone else that that was the correct interpretation and implementation of what had been agreed by way of the National Agreement.

91. The Tribunal found that the Claimant had received all that he was entitled to receive under his contract of employment and that the claim for unauthorised deduction from wages was not well founded.

_____
Employment Judge Vowles

……29 August…….. 2017

Sent to the parties on: ..8/9/17.....

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For the Tribunal Office