Case Number: 3201098/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Maguire**

Respondent: **Department for Work and Pensions**

Heard at: **East London Hearing Centre**

On: **16-18 May 2018**

Before: **Employment Judge Ferguson**

Members: **Ms K Freeman**
Mr M Rowe

Representation

Claimant: In person

Respondent: Ms H Masood (Counsel)

RESERVED JUDGMENT

It is the judgment of the Tribunal that:-

1. **The Claimant's complaint of unfair dismissal is dismissed.**

2. **The Claimant's complaints of disability discrimination and failure to make reasonable adjustments are dismissed.**

REASONS

INTRODUCTION

1. The Claimant was employed by the Respondent from 5 November 2001 until his dismissal with effect from 8 May 2017. By an ET1 presented on 31 August 2017, following a period of early conciliation from 3 July 2017 to 2 August 2017, the Claimant brought complaints of unfair dismissal and disability discrimination. The agreed issues to be determined are:

Direct Disability Discrimination (s13 Equality Act 2010 ("EqA"))

1.1 It is not in dispute that the Claimant was at all material times a disabled person as a result of a physical impairment, namely Ankylosing Spondylitis ("AS").

1.2 Did the Respondent treat the Claimant less favourably than Ms X, another disabled employee, because of his disability by failing to pay for taxis to and from work after his car was taken away by Motability?

1.3 Did the Claimant's dismissal amount to less favourable treatment than a hypothetical comparator because of his disability?

Failure to make reasonable adjustments (ss.19-20 EqA)

1.4 The Claimant claims that the Respondent failed to make the following reasonable adjustments:

1.4.1 Paying for taxis to take the Claimant to and from work after his car was taken away by Motability.

1.4.2 Reducing the Claimant's workload by 25%.

1.4.3 Providing the Claimant with a buddy to help him exit the building in the event of an emergency.

1.4.4 Not locating the Claimant in the Basildon Jobcentre on his own and afterwards in the annex of Great Oaks House on his own so as to be segregated from the rest of his team for the period 21 September 2015 until the middle of January 2016.

1.4.5 Providing him more quickly with a printer in his office when he was transferred to the annex of Great Oaks House in December 2015.

Jurisdiction

1.5 Does the Tribunal have jurisdiction to hear the Claimant's claims of disability discrimination?

Unfair Dismissal

1.6 Was the reason for the Claimant's dismissal related to his conduct or was it for some other reason?

1.7 If the reason is found to be misconduct, in the circumstances (including the size and administrative resources of the Respondent's undertaking) did the Respondent act reasonably or unreasonably in treating that conduct as a sufficient reason for dismissing the Claimant, in accordance with equity and the substantial merits of the case? In particular,

1.7.1 Did the Respondent believe that the Claimant was guilty of misconduct?

1.7.2 Were the grounds for that belief reasonable?

1.7.3 Was a reasonable investigation undertaken and procedure followed?

2. The Claimant gave evidence and on behalf of the Respondent we heard evidence from Cheryl Barrett, Lisa Mahoney, Julie Hampson and Carol Adams.

FACTS

3. The Respondent leads the government's welfare and pensions policies and is responsible for managing and administering benefits and entitlements to jobseekers, pensioners, disabled people, parents and carers.

4. The Claimant commenced employment with the Respondent on 5 November 2001. At the time of his dismissal he was employed as an Executive Officer advisor in the Access to Work team at Basildon Job Centre Plus.

5. The Claimant was diagnosed with AS in or around 1993. This is a condition that affects joints, including the neck, shoulders, arms, hands, back, hips and knees. There is no cure for AS. The Respondent has known of the Claimant's disability since the start of his employment.

6. In 1999 the Claimant was awarded Disability Living Allowance ("DLA"). DLA is divided into a mobility component and a care component. The Claimant was awarded the lowest rate of the care component until 2002, when he was awarded the higher rate of the mobility component and the middle rate of the care component. In February 2008 he completed a self-assessment renewal claim form, in which he described his mobility and care needs. The DWP also obtained a report from the Claimant's consultant rheumatologist. The Claimant's DLA was renewed at the same rates.

7. In July 2016 the DWP conducted an investigation into the Claimant, following an anonymous allegation suggesting that he was in receipt of DLA to which he was not entitled. The Fraud and Error Service ("FES") conducted covert surveillance of the Claimant on 12 occasions between 12 July and 9 August 2016. The Claimant was subsequently interviewed under caution, accompanied by a solicitor, on 17 August 2016.

8. In the interview the Claimant was asked about the account of his mobility and care needs he had given in February 2008. It was pointed out to him that the award of DLA had been made on the basis that he was "unable or virtually unable to walk". The Claimant said he believed he had explained it was incredibly painful to walk, and that he has to "push through" the pain to prevent his condition getting worse. He said he uses crutches every time he goes out, but not both crutches because that damages his shoulders. He said he now has osteoarthritis in his shoulders and neck. He said he uses a wheelchair every few months, mainly at work, and that he does not have the strength in his shoulders and hands to push himself. He and his wife moved to their current three-storey townhouse because they needed more space, but in hindsight it was a bad idea because of the stairs. He has to go up the stairs on all fours.

9. The Claimant was asked whether anything had changed since 2008. He said he now had osteoarthritis, but had not contacted the DWP about it because it thought it was unlikely to change the award. As to his mobility he said that it certainly had not got better, but he had possibly got more used to it. He maintained that he cannot walk without severe discomfort.

10. The surveillance footage was shown to the Claimant during the interview. It was put to him that he was seen walking around near his house without any crutches, crossing the road and back again. On another occasion he was seen walking around town, constantly looking at his mobile phone. The Claimant explained that he plays the "Pokemon" game on his phone, which involves walking to particular locations. The interviewers said that they had measured the distance the Claimant walked and it was 940 metres. It was also put to him that even with occasional stops he was averaging over 60 metres a minutes. The Claimant expressed surprise at both assertions.

11. One of the interviewers put to the Claimant that he goes on holiday to Florida regularly, to "Disney", and that it is "a very unusual holiday to choose for somebody with your, a severe disability as what you're portraying". The Claimant explained that on their last visit they used mobility scooters and that they upgraded to premium economy on the flights. He said that the support for disability in Florida is "absolutely amazing". The Claimant was also asked about a massage course he undertook in 2007. He maintained that it was not incompatible with the symptoms he had reported in 2008. One of the interviewers suggested that the Claimant had attended the interview with two walking sticks "probably for the effect".

12. The Claimant maintained that he was eligible for the higher rate mobility component because of the pain he experiences when walking. He said he felt like he was being penalised for following his doctor's advice to stay mobile. He said that perhaps he was walking a bit faster than he used to, but that was because it allows him to rest for longer when he gets to his destination. He said, "I know the DVD sort of looks bad", but that he had been lucky not have had a really bad day for quite a while. He said the department where he works have been "very, very supportive".

13. The Claimant provided a letter from his consultant rheumatologist dated 2 September 2015 which confirmed the Claimant's diagnosis, that he takes prescribed medication and that he must keep moving.

14. The FES also obtained statements from the investigators who had conducted the surveillance and from the Claimant's line manager at the time, Cheryl Barrett. Mr Barrett's statement wrongly gives her job title as "DWP Surveillance Officer". It appears that a number of other statements were also obtained, but none of these was before the Tribunal.

15. On 11 January 2017 a decision was issued by Mr D R Doyle, Decision Maker in the Case Review Team. Mr Doyle concluded that the Claimant had failed to report a change in circumstances, namely an improvement in his mobility, and that he was not entitled to any rate of either component of DLA for any period from 12 July 2016. The reasons for the decision may be summarised as follows:

15.1 Relevant changes of circumstance have occurred since the decision to renew the Claimant's DLA in April 2008. These changes are that the Claimant's walking ability has improved and his needs for help with personal care have diminished.

15.2 Mr Doyle summarised the Claimant's renewal claim form, submitted in February 2008, as follows:

"Mr Maguire listed the disabling conditions which gave rise to walking difficulties and needs for help as ankylosing spondylitis of 11 years' duration and asthma which has been a concern for 20 years, and for both of which he was taking prescribed medication. He also listed crutches and a wheelchair as aids which he relied on to ease his mobility but added that they caused him pain in his shoulders and back. He added that he had a car by virtue of the motability scheme which had special rear view mirrors to compensate for his inability to turn and look behind. He also explained that he had a special chair at work which helped with his pain but which he had difficulty getting into and out of and a special desk and telephone which allowed him to work full time.

Mr Maguire indicated within the form that he had physical problems which restricted his walking ability. He assessed that he was normally unable to walk any distance at all, and for no time at all, on level ground outdoors, before the onset of severe discomfort. He described his speed of walking as dependent on the day but as, at best, slow and with extreme pain. He explained that he was always in extreme pain when moving but had to do so to prevent fusion of his bones. He added that his pain was so troublesome at times that he was unable to walk at all and he had to rely on his wheelchair. He described his manner of walking as poor but variable due to the nature of his condition and because of which he used his wheelchair and crutches to get about. He added that although it could change from day to day he was always in pain, walking with a limping gait and had problems with his balance. He indicated that he fell and stumbled outdoors which he attributed to severe pain, spasms in his legs and back and his unreliable balance. He assessed that he had these walking difficulties every day."

15.3 The Claimant also described his care needs, saying that he had difficulties using the toilet and getting in and out of the bath. He related always needing the support of his crutches when walking indoors and help when using stairs. The Claimant said that his symptoms were variable. He described a good day as one where he was able to move around and do daily activities but only in extreme pain and at a slow pace. He described a bad day as one where he would try to get out of bed and collapse in a heap on the floor or be unable to move without unbearable pain. He described his normal state as being between a good day and a bad day.

15.4 A medical report from the Claimant's consultant rheumatologist, provided in March 2008 at the request of the DWP, confirmed a diagnosis of moderate to severe AS with associated low back pain, neck pain and stiffness especially in the morning. He described the Claimant's condition as prone to flare-ups when the symptoms were more troublesome. He said that the Claimant needed help with footwear when dressing and undressing and had difficulty negotiating steps and stairs. He added that the Claimant found it impossible to stand unsupported for 10 minutes without discomfort.

15.5 On 8 April 2008 the Decision Maker awarded the higher rate of the mobility component and the middle rate of the care component. The former award recognised that, for most of the time, the Claimant's walking ability was so significantly impaired that he was virtually unable to walk. The decision was

notified to the Claimant in writing and the letter advised the Claimant that it was his responsibility to disclose changes of circumstance such as improvements in his walking ability and changes in the amount of help he needed with tasks of personal care.

15.6 Mr Doyle summarised Ms Barrett's witness statement as follows:

"In a witness statement dated 10/10/16 Cheryl Barrett, presently a DWP Surveillance Officer, attests to having joined the National Access to Work team as acting manager in April 2016 where Mr Maguire was already working. She also states that she has known him since about 2006 when they worked together at Basildon Job Centre. She explains that she had only ever known him to use a single crutch and never a wheelchair but adds that, since 18/08/16, he has been using two walking sticks. She adds that he works in an annexe for safety reasons and has an L-shaped rather than traditional desk, and a special chair and mouse. She explains that he has someone assigned to help him in the event of evacuation, in line with DWP policy, but added that he has not asked for any other help at work in connection with personal care.

Ms Barrett also recalls that, on 20/05/16, Mr Maguire fell at work breaking his shoulder and that he was absent from work for six weeks. She was also able to confirm that he was absent from work on 01/09/16 and on 29/09/16 and 30/09/16 owing to illnesses related to his disabilities. She recalls conversations with Mr Maguire about his meeting friends at lunchtime at a local public house and his accounts of living in a four storey house and taking his dog for walks. She states that he had also told her about his holidays to Florida, going on the rides in Disneyland and meeting all the characters in the theme parks."

15.7 As to the surveillance of the Claimant, Mr Doyle summarised the evidence as follows:

"The observations log, FIs' witness statements and surveillance footage record Mr Maguire walking in the town centre and outside his home address over distances, two of which the FIs measured as being 150 and 940 metres. Whilst he can be seen using an elbow crutch, the FIs also observed him walking without any form of walking aid. His only slightly limping gait appears not significantly discernably different to others around him. His demeanour whilst walking displays no outward signs of the extreme pain which he had described as typical of a good day and his casual, relaxed manner betrays no signs of his struggling to keep moving whilst coping with pain. His speed of walking is moderate to brisk and not the slow pace he described as also being typical of a good day. His walking ability without walking aids appears competent and his balance steady and reliable whilst stepping backwards and turning briskly on his heels. He neither falls nor stumbles and nor does his manner of walking betray any signs of caution for fear of doing so. He walks whilst wholly concentrating on his mobile telephone and he appears to stop only to stare at it rather than to alleviate pain.

Mr Maguire's handling of his mobile telephone demonstrates competence and reliability of grip and betrays none of the pain, cramp and stiffness in his hands and shoulders which caused him difficulties with fastenings and footwear when dressing and undressing. The footage records him getting out of his car without the help which he had described needing when transferring to and from his wheelchair."

15.8 The interview under caution is summarised.

15.9 The Claimant had provided further information by email after the interview, explaining that his symptoms vary and that he tries to avoid using his crutches over short distances because of the problems he has had with his shoulders and his osteoarthritis.

15.10 Mr Doyle concludes as follows:

"Clearly, Mr Maguire is not unable to walk and I do not consider it reasonable to accept that his symptoms so significantly restrict his walking ability that he is virtually unable to walk. Pivotal to any determination about entitlement to DLA are the claimant's own assessments of walking ability and needs for help with personal care…

In Mr Maguire's case he presented, in his 2008 self-assessment renewal claim form, a portrayal of unremitting physical impairment as a consequence of varying levels of pain and stiffness. I have noted that he maintained that even good days were characterised by extreme pain and being able to move around and manage activities at only a slow pace and bad days by being unable to move without unbearable pain and the horrendous pain of body spasms… He has not offered any other assessment or reported any change for better or worse…

Given the nature of Mr Maguire's pain, as he has described it, it is reasonable to expect to see outward signs with movement. Certainly, it would be reasonable to expect to see Mr Maguire walking at only a slow pace on level ground outdoors on even his good days and with the support of his wheelchair or crutches to mitigate the poor balance. Given his assertion about falling, despite using walking aids, it may also be reasonable to expect to have seen him either fall or stumble. However, his achievable distances and his ability to walk without walking aids betrays more competent levels of walking ability than his assessments would have it. …

I am not satisfied that Mr Maguire is either unable or virtually unable to walk. He has offered nothing other than assessments of unremittingly impaired walking ability but which conflict quite significantly with the FIs' observations and the footage. I prefer the latter as the more reliable and objective evidence of Mr Maguire's true walking ability. As a consequence, I have revoked Mr Maguire's entitlement to the higher rate of the mobility component from and including 12/07/16 which is the earliest date of the observations."

15.11 The other matters referred to in the interview under caution, including the holidays abroad and lifestyle activities did not provide evidence of sufficient material weight to revoke from any earlier date.

15.12 It was also not accepted that the Claimant's pain significantly impacts on his ability to manage tasks associated with the preparation and cooking of a main meal and with personal care. His entitlement to the care component was also revoked from 12 July 2016.

15.13 As to the Claimant's responsibility to report changes of circumstance, Mr Doyle said:

> "During the IUC [interview under caution] Mr Maguie conceded that he knew that it was his responsibility to report changes of circumstance and I have sought to explain that such changes have occurred in his walking ability and his physical capabilities. Furthermore, I consider it reasonable to accept that these changes are significant and recognisable and thus it follows that Mr Maguire has failed to disclose changes which he knew to disclose and which would have a bearing on his entitlement to DLA.
>
> Regulations provide that any payment of benefit which is made, but which would not have been made, but for a failure to disclose a change of circumstance, is recoverable. This applies regardless of whether the failure to disclose was a fraudulent or wholly innocent act. I have determined that relevant changes of circumstance have occurred which Mr Maguire has failed to disclose which he could reasonably be expected to have known to disclose."

16. The Claimant applied for "mandatory reconsideration" of the decision. He claimed that Cheryl Barrett's statement was wrong and/or misleading in a number of respects. Contrary to her assertion that she joined Access to Work in April 2016 where the Claimant was already working, in fact the Claimant took up his role there in May 2015 and Ms Barrett was already working in the team as deputy to the Claimant's manager. Although he had known her since 2006, he moved to a different office in 2007 and had no contact with her until May 2015. During his time at Access to Work the Claimant has met up with friends and family for lunch only 5 or 6 times. He has been to the pub on one occasion with work. He has never said he lives in a four-storey house; it is a three-storey house. The comments about holidays in Florida are irrelevant and discriminatory. As for the surveillance, the Claimant said he hides his pain to preserve his dignity. He noted that DWP guidance states that if a claimant suffers from a physical disablement which affects the physical act of walking and which causes severe discomfort even when not walking, "any walking accomplished despite the severe discomfort must be disregarded". He objected to many of the comments in Mr Doyle's decision and maintained that on a proper application of the criteria he was entitled to receipt of DLA at the levels he had been receiving it since 2002.

17. In March 2017 the FES referred the Claimant's case to the Access to Work department for consideration to be given to disciplinary action. Julie Hampson, Senior Operations Manager in Halifax Jobcentre, was appointed as the decision maker for the purposes of the disciplinary procedure. There was no evidence before the Tribunal as to the policy or procedure that applied where an FES investigation is conducted into a DWP

employee. The Respondents' witnesses did not know how the FES would ascertain that the person under investigation was a DWP employee or whether referral to the employee's manager was automatic. Clearly in this case the FES was aware that the Claimant was a DWP employee because the surveillance took place around his workplace and they obtained a statement from his line manager. Further, the Claimant has not complained about the fact that the FES investigation triggered a disciplinary investigation and indeed he notified Ms Barrett that he was under investigation as soon as he became aware of it.

18. FES produced a report of its investigation and provided this to Ms Hampson. The report explains that a criminal investigation into suspected DLA fraud had been undertaken. The investigation concluded that the Claimant had been overpaid for the period 13 July to 16 August 2016, amounting to £562.75, due to his failure to disclose the material fact that his capabilities had improved. It was noted that the Claimant maintained he did not believe he should have reported any change in circumstances. The FES had not yet decided whether to refer the case to the CPS for consideration of prosecution. The Claimant had a disciplinary case to answer in respect of two potential breaches of the Summary of Expectations in the DWP Standards of Behaviour policy, namely:

> "Employees and customers receive only benefits and funds to which they are entitled."
>
> and
>
> "Conduct both inside and outside the workplace does not bring the DWP, its ministers or the government into disrepute."

19. Ms Hampson was also provided with a copy of the FES interview transcript and Mr Doyle's decision. She was not given the witness statements or surveillance footage.

20. Ms Hampson sought advice from Civil Service HR Casework as to whether it was necessary to conduct a disciplinary investigation, or whether she could proceed directly to a "Decision Maker's Meeting". In accordance with their advice she decided to hold an investigatory meeting because although the FES investigation concluded that the benefit had been claimed incorrectly, she still had to investigate whether this amounted to a breach of the Civil Service Code or DWP Standards of Behaviour policy.

21. On 29 March 2017 the Claimant was invited to an investigation meeting to discuss possible breaches of the two DWP Standards of Behaviour referred to in the FES investigation report. The meeting took place on 7 April 2017, attended by Ms Hampson, the Claimant and the Claimant's union representative. Another member of staff attended as a note-taker. The Claimant raised the points he had raised in his application for reconsideration of Mr Doyle's decision and said that he was expecting a decision in around four weeks' time. After the meeting he provided a copy of his reconsideration application to Ms Hampson.

22. Ms Hampson wrote to the Claimant on 7 April 2017 stating that because the reconsideration decision was imminent and would impact on her decision, she would await the outcome before holding a further meeting.

23. By letter dated 20 April 2017 from Mr Doyle the Claimant was informed that his case had been reconsidered but the decision had not been changed. Mr Doyle noted the Claimant's concerns about Ms Barrett's statement, but noted that she had provided it on the basis that if she wilfully stated anything which she knew to be false she would be liable to prosecution. He did not agree that she had implied the Claimant was not allowed to enjoy a holiday and in any event the original decision had not challenged the Claimant's assertions about disability assistance at the resort. As for the surveillance footage, Mr Doyle did not dispute that the Claimant endures pain whilst walking, but said, "it does not appear to be a significantly limiting factor on his ability to walk". The letter continues:

> "I understand that Mr Maguire maintains a stoic approach to his pain and the sensations he feels when he walks but this does not alter that he is able to walk. His explanation that he endures severe discomfort when walking does not appear to match his manner of walking during the surveillance exercise which betrays no signs of such distress. Given Mr Maguire's description of how severe and all encompassing his pain is whilst he walks it would not be unreasonable to expect to see outward signs in his demeanour. That he has, by his own admission, learnt to with his pain enables him to walk at a significantly more competent manner than his assessments of alternating poor mobility with poor manner, falls and reliance on walking aids every day. That he has to push himself to walk is commendable but it does demonstrate that he is able to walk.
>
> …
>
> I applaud Mr Maguire's attempts to maintain his positivity and every semblance of dignity but I have to take into account what he is able to do as much as the efforts he makes to do it…
>
> I accept that ankylosing spondylitis is a genuine medical condition with its own associated symptoms and difficulties. I also accept that walking is a recommended exercise for mitigating the progress of the condition. Paradoxically, however, walking ability is a primary element for consideration of entitlement to DLA. Where a person is able to walk and over distances and at speeds and in a manner not significantly restricted by severe discomfort then entitlement to the mobility component is brought into question…
>
> I have noted Mr Maguire's comprehensive descriptions of his conditions and their associated symptoms and I accept that they cause him some distress. However, I must reiterate that entitlement to DLA depends entirely on the walking difficulties and needs for help with personal care which arise from a condition and not the condition itself or the symptoms it presents. I understand his concern about the revocation of his entitlement to DLA but this is an unavoidable consequence in the absence of genuine and persistent walking difficulties and needs for help."

24. Mr Doyle confirmed that he had considered various items of medical evidence submitted by the Claimant. He concluded that these did not affect the decision.

25. On 25 April 2017 Ms Hampson wrote to the Claimant to invite him to a "Discipline decision meeting" to consider the two alleged breaches of the DWP Standards of Behaviour. The meeting took place on 4 May 2017, with the same attendees as the investigatory meeting. Ms Hampson said that she was "not looking at the DLA decision", but that this was an opportunity for the Claimant to provide any new or different evidence. The Claimant said that he was intending to appeal the DLA decision. He maintained that he had never intended to defraud the DWP and had not knowingly given any incorrect information. He believed he was entitled to the benefit. He said that in 15 years no-one had ever questioned his disability and honesty, and he had always kept his managers informed about his health. Ms Hampson said she would deliver a decision within 5 working days.

26. On 5 May 2017 Ms Hampson wrote to the Claimant to inform him of her decision that he was guilty of gross misconduct and would be dismissed. She noted that the Claimant was intending to appeal the DLA decision, but concluded that he did not have new or substantial evidence that would change the decision at appeal. The letter continued:

> "I asked if you had mitigation that showed you had not brought the DWP into disrepute. You told me you still believe you are entitled to DLA and the decision to withdraw this benefit is incorrect. You asked for the following points to be taken into mitigation;
>
> - You believed you were entitled to DLA
> - You are the sole breadwinner for your family
> - You have never been charged or convicted of benefit fraud previously
> - You have never had Formal Action taken against you whilst working for DWP
> - You believe yourself to be an honest person
> - You understand how serious false claims to benefit are because you are a Civil Servant working in DWP
>
> I understand you disagree with the DLA decision, but I am satisfied that the Reconsideration process has explored whether this decision is correct.
> I understand that the further points were made to demonstrate why you would not claim benefit to which you were not entitled. The DLA decision was that despite these reasons, you did claim benefit to which you were not entitled so cannot be classed as mitigation.
>
> I find that the evidence shows you received benefit to which you were not entitled. I find that your current employment in DWP would have made you aware of the serious nature of benefit fraud, especially by civil servants who have to abide by the Civil Service Code of Conduct. I find that these actions have brought the DWP into disrepute. I do not find that you have offered reasonable mitigation."

27. Ms Hampson's oral evidence was that she considered the Claimant's conduct had brought the DWP into disrepute, whether or not it was dishonest. She believed that the Claimant's failure to report a change in circumstances was dishonest, but not to the point of fraud.

28. The Claimant appealed against his dismissal and the appeal was referred to Carol Adams, then Cluster Manager Southern England. In a lengthy appeal letter the Claimant reiterated the points he had made in his reconsideration application and during the disciplinary process. He also argued it was unfair for the reconsideration to have been conducted by Mr Doyle, the original decision maker. He cited various extracts from case law to support his contention that Mr Doyle had applied the criteria incorrectly. These included a case in which it was held that a claimant's assertion that walking caused pain had wrongly been dismissed on the grounds that the claimant had shown no sign of it. The Commissioner in that case had held that it was "not the sign but the fact [of the pain] that is crucial". He also argued that the Respondent should have written to his consultant for up to date medical evidence. The Claimant also referred to an article stating that the DWP had set a target of upholding 80% of the benefit decisions they are asked to reassess. The Claimant considered that the Respondent's investigations had not been thorough enough and he had been unfairly dismissed. He set out 22 reasons, summarising the arguments in his appeal letter.

29. Following an appeal hearing on 12 June 2017, Ms Adams wrote to the Claimant on 30 June 2017 to inform him that his appeal was not upheld. She noted that the Claimant had raised a number of discrepancies in the transcript of the Interview Under Caution. She accepted that there was some misinterpretation of some responses, but considered that none of them had any bearing on the outcome of the investigation or the decision to dismiss. As for Cheryl Barrett's statement, her view was that the actual date that the Claimant worked for Ms Barrett was not relevant to the decision.

30. It should be noted at this point that Ms Hampson's and Ms Adams's witness statements each contained an identical passage of three paragraphs outlining the reasons for the Claimant's dismissal and justifying the decision. The passage includes statements such as "I had reasonable grounds to believe that the Claimant was guilty of gross misconduct and therefore in my view the working relationship had been destroyed and dismissal was the correct sanction." The passage also contained a typographical error ("if" instead of "of") which further suggested that it had been copied and pasted from one statement to the other. When this was pointed out to Ms Adams by the Tribunal she said that the draft statement had been prepared by the solicitors and sent to her to check for accuracy. The passage in question was not based on any specific instructions from her.

31. At the stage of the hearing that this issue was raised, the end of the second day, the Respondent was represented by counsel alone. We suggested that counsel ask her instructing solicitors for an explanation and indicated that we were minded to disregard entirely those passages of the witness statements. On the third day counsel said that although she had spoken to her instructing solicitor, he said that the statements had been drafted by a colleague and he had been unable to make any further enquiries. We were therefore left without any explanation for the fact that these parts of the witness statements, and possibly others, appeared to have been drafted without instructions. We acknowledge that both witnesses confirmed the truth of their witness statements and we accept that they agree with the statements in the repeated passages, but the fact remains that they were not their words. Further, much of the repeated passages amounts to argument, rather than evidence. We therefore disregard those parts of the statements and we register our concern that the evidence was prepared in this way.

32. It is convenient to set out the facts in relation to each of the discrimination complaints separately below.

Taxis to take the Claimant to and from work

33. The following facts are not in dispute. In or around January 2017 the Claimant asked Lisa Mahoney, his then line manager, if the Respondent could pay for taxis to take him to and from work. By this stage his motability vehicle had been taken away because of the removal of his DLA and his wife was giving him lifts to and from work, which he claims was not a suitable arrangement because she has a low car that is difficult for him to get in and out of. Ms Mahoney agreed to look into the matter, but said he would need to provide three taxi quotes and a letter from his GP stating why his medical conditions required use of a taxi. The Claimant provided the taxi quotes and asked Ms Mahoney in what format he should provide the medical evidence. It was at this point that the evidence diverged. The Claimant says that Ms Mahoney never got back to him about the format of the medical evidence. Ms Mahoney says that she told him it could be provided on the same form that DWP customers use and that the Claimant never provided it. We prefer Ms Mahoney's evidence on this issue. The Claimant had not remembered any discussions about the medical evidence at all until after reading Ms Mahoney's witness statement, which casts doubt on the reliability of his recollection. Further, if the Claimant had been significantly affected by the failure to provide taxis, one would expect him to have provided the evidence in some form rather than waiting for more precise instructions. We consider it likely that the Claimant had become used to the arrangement with his wife taking him to and from work and the request to provide taxis had ceased to be a priority for him so he did not get round to providing the medical evidence.

34. It is not in dispute that the Respondent paid for, or contributed towards, taxis for Ms X, a disabled colleague of the Claimant's. It is also not in dispute that she is significantly more physically disabled than the Claimant and uses a wheelchair daily.

Reducing the Claimant's workload

35. On 21 February 2017 an Occupational Health ("OH") report on the Claimant noted that he was struggling in work at times due to his fluctuating pain and reduced mobility. The Claimant had said that the pace of work could be problematic at times and this may cause additional anxieties. OH advised that the Claimant's workload should be reduced by 25%. Ms Mahoney's evidence was that the following week she reduced the Claimant's workload from 4-5 cases a day to three cases a day. The Claimant's evidence was that he had only recently finished the training for case work and that his workload had never been higher than 3 cases per day. He did not dispute that the normal workload for case workers was 4-5 cases per day. It was also not in dispute that Ms Mahoney had provided the Claimant with some one to one assistance to help him with time management issues and had paused his allocations for one week. A further OH report dated 5 April 2017 again suggested a reduction of workload by 25%, subject to review. This recommendation appears to have been made on the basis that the earlier recommendation had not yet been put into effect. Ms Mahoney's evidence was that after this she reduced the Claimant's workload to 1-2 cases per day. The Claimant did not dispute that but said he did not remember this happening.

36. Given the lack of any direct challenge, we accept Ms Mahoney's evidence that the Claimant's workload was limited to three cases per day from the end of February 2017 and limited to two cases per day from April 2017. In light of our conclusions below it is

unnecessary to resolve the dispute about whether the Claimant's workload had ever been higher than three cases per day before the first OH report.

Personal evacuation plan

37. The Claimant complains of the Respondent's delay in putting in place a personal evacuation plan ("PEP") for him after he transferred to Great Oaks House, which resulted in him having to take special leave for the period while there was no PEP in place. The Claimant accepts that a PEP was put in place in February 2016. This provided for a "buddy" to help him to evacuate and two were assigned. The Claimant accepted that this was adequate in theory, but complains that there is no evidence that the buddies were trained and says that there were insufficient buddies in practice because the same two people were assigned as buddies to Ms X and she required two: one to push her wheelchair and one to open doors. He did not consider it adequate that the same person would assist him and open doors for Ms X. Ms Barrett's evidence was that the buddies were trained and we accept that. The Claimant had never raised any concerns about training before the Tribunal proceedings.

Claimant being alone in the office

38. This complaint relates to the period up to January 2016. It is therefore substantially out of time and we have no jurisdiction to hear it. We make no factual findings about it.

Printer

39. The Claimant complains about not being provided with a printer more quickly after it was recommended in an OH report in or around January 2016. He accepts that a printer was provided in September 2016. Again, this complaint is substantially out of time and we have no jurisdiction to hear it.

THE LAW

Direct disability discrimination

40. Pursuant to sections 13 and 39 EqA it is unlawful for an employer to dismiss an employee or subject him or her to a detriment, where doing so amounts to less favourable treatment because of the employee's disability. The appropriate comparator for this purpose is an actual or hypothetical employee with the same characteristics and in the same circumstances as the claimant but who does not have the claimant's disability. If the employee proves facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against him or her, the burden shifts to the employer to show that the treatment was in no sense whatsoever because of disability.

Duty to make reasonable adjustments

41. Pursuant to s.20 EqA, where an employer has a provision, criterion or practice ("PCP") that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not apply if the employer does not know, and could not reasonably be expected to know that the

disabled person has a disability and is likely to be placed at the disadvantage referred to (paragraph 20 of Schedule 8 EqA).

42. S.21 provides that an employer discriminates against a disabled person if it fails to comply with a s.20 duty in relation to that person.

43. As to the "reasonableness" of a particular adjustment, this is a question of fact for the Tribunal to be determined on objective grounds (see, e.g., Smith v Churchills Stairlifts [2006] ICR 524, paragraph 45 per Maurice Kay LJ). The EHRC Statutory Code of Practice provides guidance on the type of factors to be considered. The factors listed (at paragraph 6.28) are:

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

43.2 The practicability of the step;

43.3 The financial and other costs of making the adjustment and the extent of any disruption caused;

43.4 The extent of the employer's financial or other resources;

43.5 The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

43.6 The type and size of the employer.

Unfair dismissal

44. Pursuant to section 98 of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is a potentially fair reason. A reason relating to the conduct of an employee is a fair reason within section 98(2) of the Act. According to section 98(4) the determination of the question whether the dismissal is fair or unfair "depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee" and "shall be determined in accordance with equity and the substantial merits of the case."

45. In misconduct cases the Tribunal should apply a three stage test first set out in *British Home Stores Ltd v Burchell* [1980] ICR 303 to the question of reasonableness. An employer will have acted reasonably in this context if:-

45.1 It had a genuine belief in the employee's guilt;

45.2 based on reasonable grounds

45.3 and following a reasonable investigation.

The Tribunal must then consider whether it was reasonable for the employer to treat the misconduct as a sufficient reason for dismissal in respect of each aspect of the employer's conduct the Tribunal must not substitute its view for that of the employer but must instead

ask itself whether the employer's actions fell within a range of reasonable responses (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).

CONCLUSIONS

Direct disability discrimination

46. There are two complaints under this head, one relating to the provision of taxis and the other relating to the Claimant's dismissal. As to the former, the Claimant has named Ms X as a comparator but he also accepts that she is considerably more physically disabled than him. She is therefore not an appropriate comparator. In any event, we have accepted Ms Mahoney's evidence that the Claimant was asked to provide medical evidence and failed to do so. We do not therefore accept that he was subjected to any detriment and this complaint must be dismissed.

47. As to the dismissal, the Claimant did not put it to any of the Respondent's witnesses in cross-examination that his dismissal was motivated by his disability. The highest the case is put in his witness statement is that his appeal was not handled properly and that this "confirmed they wanted to get rid of me, and I believed it was because of my disabilities as I was not as productive as able bodied people and costed money for additional support". The reasonableness of Ms Hampson's decision to dismiss the Claimant is addressed below so we will return to this issue after setting out our conclusions on unfair dismissal. As for the appeal, we do not consider that there is anything in Ms Adams's handling of the appeal that would be sufficient to shift the burden to the Respondent. The Claimant accepts that although the appeal outcome letter was brief, an internal document shows that Ms Adams had in fact considered all of the points raised in his appeal and concluded that they were either irrelevant or raised points that had already been dealt with. We accept that it would have been courteous for Ms Adams to set this out briefly in the appeal outcome letter so that the Claimant knew the points had at least been considered, but there is nothing to indicate that her approach or decision on the appeal were influenced in any way by the Claimant's disability.

Reasonable adjustments

48. As noted above, the complaints about lone working and failure to provide a printer are significantly out of time. The Claimant did not expressly argue for an extension of time, but explained the failure to bring proceedings earlier on the fact that he did not want to "kick up a fuss" at the time. That does not amount to sufficient grounds to extend time and we do not consider it would be just and equitable to do so. The only reasonable adjustment complaints over which we have jurisdiction, therefore, are the complaints about provision of taxis, the PEP and the Claimant's workload.

49. As to the provision of taxis, we have already found that the Claimant did not pursue this after being required to produce medical evidence so he was not subjected to any detriment. We also do not accept that there was any PCP which placed the Claimant at a substantial disadvantage.

50. The PEP complaint is limited to the Claimant's concerns about the number of buddies available and their training. Any complaint about the delay in putting the PEP in place is out of time and we have no jurisdiction to hear it. We have accepted the Respondent's evidence that the two named buddies were appropriately trained. The only

potential issue, then, is whether the Respondent had a PCP of sharing buddies for disabled employees that placed the Claimant at a substantial disadvantage. We accept that there was a PCP of sharing buddies, to the extent that one of Ms X's two buddies would have needed to assist the Claimant as well, but we do not accept that that placed the Claimant at any disadvantage. He accepted that one buddy was sufficient for him and we see no difficulty with that person also opening doors for Ms X. The Claimant's office was on the ground floor so that he would not need to negotiate stairs in an evacuation. The help that he would need to get out of the building was therefore very limited.

51. As for the Claimant's workload, we have accepted the Respondent's evidence that his workload was capped at three cases a day from February 2017 and two cases from April 2017. There was some doubt as to whether the Claimant had previously been allocated more than three cases a day and therefore whether the limitation in February amounted to an actual reduction, but even if it did not, we do not consider that there was any failure by the Respondent to make a reasonable adjustment. It is not in dispute that Ms Mahoney put in place other measures to help the Claimant, namely the provision of one to one assistance and pausing his allocations for one week to allow him to catch up. In those circumstances, and given that a substantial reduction was made in April 2017, we do not consider that the Respondent had a duty to make any further adjustments, even if the Respondent had a PCP that put the Claimant at a substantial disadvantage.

52. All of the Claimant's complaints of failure to make reasonable adjustments are therefore dismissed.

Unfair dismissal

53. The Claimant's dismissal was expressed to be on the basis that his conduct brought the DWP into disrepute. The disciplinary process was clearly triggered by the FES investigation and we have seen no evidence of any other reason for the Claimant's dismissal. We accept that conduct was the reason for his dismissal.

54. The conduct in question was being in receipt of DLA to which the Claimant was not entitled, thereby bringing the DWP into disrepute. Ms Hampson did not expressly state in the dismissal letter that the Claimant had failed to report a change of circumstances, but she did say that the Claimant's employment with the DWP would have made him "aware of the serious nature of benefit fraud" and that the Claimant had not offered reasonable mitigation. She confirmed in her oral evidence that she concluded there was some dishonesty involved, although not to the point of fraud.

55. We must consider whether the Respondent had a genuine belief that the Claimant was guilty of that conduct, based on reasonable grounds and following a reasonable investigation.

56. The Claimant has made a number of criticisms of the investigation. He argues that it was unfair for the Respondent simply to rely on Mr Doyle's conclusions when the Claimant had raised numerous complaints about the FES process and Mr Doyle's reasoning. We do not accept that the Respondent acted unreasonably in this respect. First, Ms Hampson did not treat Mr Doyle's decision as unassailable fact. She approached the matter on the basis that Mr Doyle was an expert on DLA entitlement and it was not appropriate for her to investigate separately whether the Claimant was entitled to DLA. She did, however, consider the points raised by the Claimant and the implication from the

dismissal letter is that if the Claimant had shown that he had a good prospect of success on appeal, she would not have taken Mr Doyle's conclusions at face value. We consider that that was a reasonable approach. The finding of the FES investigation was not equivalent to a criminal conviction, but Ms Hampson was entitled to give it considerable weight and, in the absence of any clear mistake or unfairness, to accept it.

57. There are two aspects of the DLA decision that merit particular consideration. The first is that there was an element of unreality in treating the matter as a failure to report a change of circumstances. The Claimant suffers from a serious physical impairment, AS, for which there is no cure and which does not improve over time. It is very unlikely that there was, in fact, any significant improvement in his mobility between 2008 and 2016. The Claimant had been in receipt of DLA at the relevant rates since 2002 with no questions asked. He had been working for the DWP throughout that time and had always presented in the same way. There is no suggestion that he ever sought to conceal his abilities or exaggerate his symptoms. To that extent, the surveillance footage and FES investigation did not reveal anything that the Respondent, in its wider capacity as the Claimant's employer as well as the public authority with responsibility for administering DLA, did not already know. We acknowledge that the finding in 2016 that the Claimant was not in fact entitled to DLA would have come as a surprise to him and may have seemed unfair.

58. Having said that, the DWP must be entitled to review customers' entitlement to benefits and we note that there is a system for anonymous reporting which may trigger such a review. Once a report is received, it must be reasonable for the DWP to look into the matter. The issue the FES was really examining was whether there was a contradiction between the way the Claimant presented himself in his 2008 renewal application and his actual mobility in 2016. If there was a contradiction, that could be explained either by the fact that the Claimant exaggerated his symptoms in 2008 or by him having improved since then. Mr Doyle approached the Claimant's case on the basis that his description of his mobility in 2008 was correct, presumably because it was too late to call it into question. We do not consider that that undermines his conclusions to the extent that Ms Hampson was not entitled to rely on them. The essential point in Mr Doyle's decision was that the Claimant had allowed an inaccurate picture of his mobility to persist and he continued to receive DLA on that basis.

59. The second aspect of the DLA decision that merited careful consideration was Mr Doyle's reliance on the absence of any outward signs of pain. We are not an expert tribunal on the criteria for DLA entitlement, but we accept that that is a potentially unreliable basis on which to reach a conclusion on the actual level of pain experienced, especially in the absence of up to date medical evidence on the issue. Reading his decision as a whole, however, it is clear that it was not the only basis for his conclusion and we do not consider that his approach was so flawed that Ms Hampson was not entitled to rely on the outcome. The absence of any outward sign of the extreme pain that the Claimant had reported was one reason why Mr Doyle did not accept that the Claimant's mobility was as restricted as he had claimed. We note that the Claimant accepted in his Interview Under Caution that the surveillance "looked bad". The essence of Mr Doyle's decision was that there was an inconsistency between the Claimant's description of his mobility in 2008, where he said his speed of walking was dependent on the day but "at best, slow and with extreme pain" and that "he was always in pain, walking with a limping gait and had problems with his balance", and the confident, apparently normal way in which the Claimant walked nearly 1,000m during his lunch break. There is

nothing apparently unreasonable in Mr Doyle's conclusion that the Claimant did not satisfy the test of being "virtually unable to walk", whether actually or because of experiencing severe discomfort while doing so.

60. We do not consider that any of the other criticisms of Mr Doyle's decision raised by the Claimant were such as to make it unreasonable for Ms Hampson to rely on it. Despite the matters considered above, we conclude she was entitled to do so.

61. The Claimant complained that he had not been provided with all of the witness statements obtained by FES. We note that he said he had since obtained the statements and he did not produce them in the Tribunal proceedings. In those circumstances and given that they were not before Ms Hampson we do not consider that this gave rise to any unfairness in the disciplinary process.

62. The Claimant also argued that the Respondent should have re-interviewed Ms Barrett in light of the errors in her statement to the FES. We do not consider that the Respondent was obliged to do so. The central evidence relied upon by Mr Doyle was the surveillance footage. He did not appear to have placed much weight on Ms Barrett's statement. He expressly (and correctly, in our view) discounted the concerns raised about the Claimant's holidays in Florida.

63. In light of the above, we conclude that the Respondent had a genuine belief, on reasonable grounds and following a reasonable investigation, that the Claimant had been in receipt of benefit to which he was not entitled and that this brought the DWP into disrepute.

64. The final matter to consider is whether the sanction of dismissal fell within the range of reasonable responses. We have concluded that it did. There were a number of mitigating factors, most notably the point made above, that the decision to remove the Claimant's DLA came as a surprise to him. He had been in receipt of DLA for many years with no issues raised and his presentation of his mobility and abilities had not improved over that period. We have also said, however, that it must be open to the DWP to review entitlement to DLA on receipt of an anonymous report. Ms Hampson had to consider the level of culpability involved in the Claimant's conduct. Clearly not every instance of an employee receiving benefits to which he or she is not entitled would amount to conduct bringing the DWP into disrepute. There is a spectrum between administrative error, of which the employee is entirely innocent, on the one hand and fraud on the other. Ms Hampson concluded that the Claimant's conduct fell somewhere between the two. It was blameworthy, because he had allowed an inaccurate picture of his abilities to persist, but it was not benefit fraud as it is usually understood. We consider that Ms Hampson was entitled to take the view that anything other than innocent error brought the DWP into disrepute. It would clearly be embarrassing for the DWP if it were known that one of its employees had been in receipt of DLA in circumstances where his own description of his mobility was not consistent with his actual mobility.

65. The Respondent's disciplinary procedure includes, among the examples of gross misconduct:

> "Certain instances of bringing the department into disrepute, for example, posting defamatory comments or unauthorised information about the department, colleagues, customers, ministers on social media sites"

and

"Repeated or significant breach of the Civil Service Code or Standards of Behaviour policy"

66. Although we consider that this was a borderline case, we find that it was not unreasonable for Ms Hampson to conclude that the conduct fell into one or both of those categories and merited dismissal. The complaint of unfair dismissal therefore fails and is dismissed.

67. Returning to the issue of whether the Claimant's dismissal amounted to direct disability discrimination, we have accepted that the Claimant's conduct was the genuine reason for dismissal and that the Respondent had a genuine belief on reasonable grounds for its conclusion. There was nothing in the disciplinary process to suggest that the Claimant's disability was a factor so we find that the Claimant has not established facts from which we could conclude that his dismissal was because of his disability. This claim is also therefore dismissed.

Employment Judge Ferguson

20 June 2018