# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr M Jankowski**

**Respondent:** **GKN Aerospace Limited**

**Heard at:** **Bristol** **On:** **15 August 2018**

**Before:** **Employment Judge Livesey**
**Ms M Pendle**
**Mrs M Moore**

**Representation**
**Claimant:** Ms Short, friend
**Respondent:** Mr Steer, Counsel

**JUDGMENT** having been sent to the parties on 23 August 2018 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## 1. The claim

1.1 By a claim form dated 28 October 2017, the Claimant brought complaints of discrimination on the grounds of disability.

## 2. The evidence

2.1 The Claimant gave oral evidence and, on behalf of the Respondent, we heard from the following witnesses;
- Mrs Richards, the Respondent's HR Manager;
- Mr Rooke, Head of Operations at the Respondent's Western Approach site;
- Mr Martin, the Claimant's Team Leader;
- Mr Endicott, Operational Group Leader at the Western Approach site;
- Miss Chapman, HR Manager with Morson International.

2.2 The following documents were produced;
- R1; a hearing bundle;

- R2; the Respondent's counsel's chronology.

## 3. The issues

3.1 The issues had been discussed and recorded by the Employment Judge at a telephone Case Management Preliminary Hearing which had taken place on 15 March 2018. There had been a previous hearing on 30 January 2018, but the issues were more clearly set out in the subsequent March Case Management Summary.

3.2 In essence, there were two complaints one under s. 15 of the Equality Act and another under ss. 20 and 21, which were covered in paragraphs 6 and 7 of the Case Management Summary respectively. We have returned to those paragraphs later in these Reasons.

3.3 The hearing was limited to a determination of the issues relating to liability only.

3.4 The Claimant pursued the Respondent as a principal under s. 41 of the Equality Act, which had been conceded.

3.5 The Respondent had also conceded that the Claimant was disabled at all material times by virtue of osteoarthritis.

3.6 The Respondent had initially also conceded that it had had knowledge of the disability under both s. 15 and Schedule 8 of the Act, as reflected in paragraph 6.4 and 7.4 of the Case Management Summary of the 15 March 2018. At the start of the hearing, however, it wanted to qualify its position by asserting that it only conceded knowledge from 25 August 2017. Having considered that change of stance with the Claimant and having clarified that he was not prejudiced by the alteration in the Respondent's case in that respect, we acknowledged the change and proceeded.

## 4. The hearing

4.1 At the start of the hearing, the Respondent wanted to introduce further documents into the bundle, pages 140a – 140f, which had been provided to the Claimant that morning. The Claimant initially objected to the contents of pages 140b – 140f because Ms Short did not understand what the information was relied upon for. She did accept and agree the information that was set out on page 140a however.

4.2 We considered the matter further with the Respondent and were told that the pages at 140b – 140f were simply the source material from which page 140a had been put together. On that basis, all of the documents were admitted into evidence.

## 5. The facts

5.1 We reached factual findings on the balance of probabilities on matters which were relevant to a determination of the issues. Any page numbers referred to within these Reasons are references to pages within the hearing bundle R1 and have been cited in square brackets.

5.2 The Respondent is a well known aerospace manufacturer. The Claimant was an agency worker employed by Morson to work at the Respondent's Western Approach site at Seven Beach near Bristol where the Respondent manufactures wing spars for Airbus aircraft.

5.3 The Respondent now employs approximately 260 production staff at the site, 215 of those are permanent employees and 46 are from an agency. In 2017 the numbers were different. There were significantly more who were then employed at the site; approximately 343, 101 of whom were agency staff and 242 were employed directly.

5.4 The Claimant commenced at the site on 13 February 2017. As a qualified aerospace engineer, he was familiar with the work. He started on what were called double day shifts; from 6.00am – 2.00pm for five days in one week and then from 2.00pm – 10.00pm for five days the following week. His Team Leader was Mr Lee and Mr Lee's Manager and Supervisor was Mr Martin.

5.5 We were referred to a number of the Respondent's policies during the course of evidence including the Managing Diversity Policy [49 – 54] and the Flexible Working Policy [55 – 64] albeit that the latter applied to the Respondent's employees only, not agency staff.

The Claimant's disability

5.6 The Claimant was diagnosed with osteoarthritis in 2002 when he was 41 years of age. His condition was managed conservatively with physiotherapy and pain relief. In 2016 he suffered a fall at work and twisted his spine. He was then working in France. X-rays confirmed the presence of advanced spinal osteoarthritis [152 – 153]. His condition slowly deteriorated and he continued to receive pain relief and physiotherapy treatment.

5.7 As a result of his condition, it was the Claimant's case that he could not work more hours than were required by his shifts. He therefore worked no overtime in the seven months that he was with the Respondent, despite it having been available to him had he wanted to do so.

5.8 It was worthy of note that, both at the start of the Claimant's employment with Morson and at the start of his placement with the Respondent, he was not required to fill in any form of health screening questionnaire or undergo a health test by Occupational Health or anyone else. Such steps may have revealed the presence of a disability. We found it particularly surprising that that had been the case in respect of the employer, Morson. It did not appear to have undertaken any form of equal opportunities monitoring amongst its staff.

Quality Cards

5.9 Every shop floor worker has a Quality Card. After induction it bears a 'Q' stamp. Workers cannot move from one process to another freely. They have to demonstrate competence in an area before they move. A worker's work is therefore checked by a more experienced person who holds a 'B' stamp. If a worker holds an 'A' stamp on their Quality Card, they are able to

check and sign of their own work and they are paid at a slightly higher rate, approximately £1 more per hour.

5.10 In order to gain an A stamp, a worker must, first, compile a dossier of twelve weeks' work which has been verified by a more experienced worker. Then, he must attend two, two-day training courses, on composite awareness and composite assembly. The courses take place regularly (approximately every month) at the Respondent's Filton site. They are then required to submit all of their records, their training certification and curriculum vitae to the Quality Department with their manager's approval and sign off. The Quality Department then obtains an eye test for the applicant from its Occupational Health provider and it then runs its own tests before the worker can be A stamped.

5.11 The certification process was set out in the Respondent's procedure NB04, an extract of which was in R1 [65 – 73]. The Claimant had a reasonably good idea of the process from his colleagues, but he also received a copy of NB04 in June 2017.

5.12 The Claimant had previously worked at the Respondent's Filton site and had obtained an A stamp during that earlier period, but it had lapsed.

The Claimant's progress towards his A stamp

5.13 The Claimant maintained a twelve week record of his work from February to June 2017 [83 – 91]. He alleged that he had been led to believe that the training courses for A stamp qualifications were only accessible to workers as overtime or on their days off. He said that he told Mr Martin in approximately April 2017 that he needed time to rest between his shifts because of his disability and therefore could not attend training courses as overtime or on days of leave. He asserted that Mr Martin said that he would "*see what could be done*". In other words, he did not tell him that he could not do the course on a normal working day.

5.14 The Respondent's case on that issue was rather different. It asserted that the Western Approach site had no control over when Filton ran the courses. Nevertheless, the records of other staff showed that they had frequently attended courses on their normal working days [141 – 146]. Mr Martin denied that the Respondent operated any policy or practice of *requiring* staff to attend only on their days off or as overtime. It was simply not in the Respondent's interests to have done so, he said, because it needed as many people A stamped as possible so as to reduce the requirement for B stamped staff to check and supervise those who were still Q stamped. Mr Martin alleged that the Claimant had never told him that there had been any difficulty attending a course or that he had even enquired about an application form for an A stamp qualification.

5.15 Having heard all of the evidence on those issues, we concluded that the dates for courses which were organised by the Respondent's training department at its Filton site were given to supervisors like Mr Martin who then gave them to their team leaders, like Mr Lee. They were then supposed to have been notified to staff by the team leaders but, even if they were not notified verbally, the course dates were posted on a board which was accessible to those staff. It was true that some courses fell on days

when the Claimant would not have been at work, but some had fallen on days when he would have been at work, as he accepted in cross examination and as most clearly demonstrated by some of documents [140a]. Importantly, two courses had fallen on working days after the end of the completion of the Claimant's twelve week record in June.

5.16 Other staff went on courses on their normal working days (by way of example [144] and [146]) including some of those who had worked in the Claimant's section, for example Mr Simpson and Mr Harber ([141], [142] and [164]).

5.17 We were also satisfied that the Claimant probably had not complained that he had not gone on courses and/or that they were only held on specific days upon which he had not have been working. Having heard both the Claimant and Mr Martin on that issue, we broadly preferred Mr Martin's evidence. We were also satisfied that no member of staff was pushed or forced to gain an A stamp. It was up to each worker to decide what qualifications they sought. If they had wanted an A stamp, they were expected to find out from their leaders when the courses were held and to ask to go on one. The Respondent's evidence was that that was what the Claimant had pushed to do when he had previously worked at the Filton site.

5.18 The fact remained that the Claimant was not put on a course. He said that he was told that he would have been put on one by Mr Lee. The precise reason for his failure to have been put on one was unclear to us. Whether the onus had been assumed by Mr Lee or whether it had remained with the Claimant, we could not determine, but it was not central to our determination of the issues.

Shift change

5.19 In late April 2017, the Respondent changed the Claimant's shift pattern. It meant that he started to work a 7-day fortnight. In the first week of the cycle, he worked 12 hours each day on 5 days, two of which were a weekend. In the second week, he worked 12 hours per day on the remaining 2 days, Wednesday and Thursday. Another group of workers dovetailed in with those shifts. He therefore worked 60 hours in week 1 and 24 hours in week 2, with half an hour rest breaks on each day.

5.20 The Claimant alleged that he told Mr Martin that he could not manage the work in week 1 because of his osteoarthritis. He was nevertheless told to give it a try which he said he did. He took 3 days annual leave in the week commencing 16 June. He was then absent for a day in the week commencing 23 June and again for a day in the week commencing 14 July [149].

5.21 Mr Martin told us that the Claimant had not complained about the effects of the new shift pattern upon him and/or about any disability or physical condition and we concluded that Mr Martin had indeed remained ignorant of any adverse effects of the new pattern upon the Claimant and of his medical condition, at least at that time.

The Claimant's flexible working request

5.22 In August 2017, the Claimant asked to reduce his working hours. He asked that he should have been permitted to not work on Fridays, which was one day in every 2-week period [94]. He made the application to his employers, Morson, and he made it clear what the reasons for it were:

> "*I make this request after a recent escalation of my arthritis and visiting my doctor. Working 2 days and having 2 days off was not a problem, but working the 3rd 12-hour day has caused me increased pain from (as my doctor describes), my age related chronic condition.*
> *Reducing the number of days to 2 days but not working the Friday would assist me in this regard*".

5.23 The Respondent received the request from Miss Chapman on 25 August. Within her letter to Mr Martin and Ms McGregor, within the Respondent's HR department, she said [95]:

> "*I have received a request for flexible working from our employee Martin Jankowski, with regards to whether he can amend his hours with regards to not working a Friday when he works three consecutive shifts (Fri, Sat and Sun).*
> *He is working on the 7 day fortnight shift and the main concern is that when he works 3 days in a row, as he suffers from chronic arthritis, on the third day the pain even with pain killers is severe and intolerable. Martin has been to see his GP to seek advice and it was felt that this option would give him enough recovery time within the working week.*
> *Please could you consider whether you can accommodate this request? Martin is committed to the business and has tried after moving shifts to manage the pain, but this slightly altered the work pattern would greatly alleviate this*".

5.24 At or around the same time, Mr Martin had spoken to the Claimant. The Claimant had told him about the difficulty that he was experiencing with the prolonged periods of standing which were necessary on his shift and Mr Martin said that that was the first that he had known of the Claimant's back condition.

5.25 Miss Chapman chased her request with the Respondent [98 & 101]. The issue was then discussed by Mr Martin with HR at one of their regular management meetings on 30 August. Mr Martin expressed the view that the change that had been sought could not have been sustained, but he did not feel that he had the authority to determine the request himself and the matter was left with Ms McGregor.

5.26 It was Ms McGregor who then, on 1 September, rejected the request in a very short email to Miss Chapman [102]. A more detailed explanation was not provided until 7 September from Morson to the Claimant [108 –109];

> "*GKN have advised Morson that they are not able to accommodate this request due to business constraints. The revised working hours would mean a creation of a new shift pattern that would be inconsistent and not be in line with other workers on site. The request to change your working hours would also mean that you would not be working the full hours on the shift pattern and therefore*

*this would potentially have a detrimental effect on the site being able to meet their customer demands through reduced manning levels*".

5.27 Mr Martin explained the rationale in greater detail in his evidence. He stated that production workers generally worked in pairs and that, if the Claimant was not working a shift, someone would have been needed to replace him. Any replacement could not have been a temporary member of staff because they would not have been qualified to have undertaken the highly skilled work. It could have been another employee or agency worker who already had a Quality Card but *only* on the basis that he or she worked overtime. Because of pressures which then existed in relation to overtime, he considered that that was impossible.

The Respondent's headcount review and overtime cap

5.28 Meanwhile, since June 2017, there had been an increased focus upon expenditure against budget at the Respondent's Western Approach site. The numbers engaged at the site and the overtime levels that were being worked were examined. By late summer, plans were drawn up to reduce the total workforce from 343 to 298. An overtime cap of no more than 10% was also imposed (see the Vice President's email to managers on 29 August specifically related to overtime [97], the Action Sheet in more general terms [99] and the Vice President's further email of 14 September which focussed upon headcount [115]).

5.29 It was important to note the chronology of that issue against the timeline of the Claimant's flexible working request. He asserted that the headcount reduction came after the loss of his placement on 7 September. He relied upon the email of 14 September [115]. Nevertheless, we gained the clear impression that the process had started before that and was largely precipitated by a visit from the CEO to the site on 23 June. Western Approach had become regarded as something of a failing site which was why the CEO had visited in order to shake it up. The rationalisations which he initiated then caused him to return in July and August.

The end of the Claimant's placement

5.30 As part of the rationalisation in September 2017, 23 workers were released or dismissed, 15 of whom were agency workers. On 7 September, Miss Chapman was informed that the Claimant and three others were to have been included. Another agency worker resigned and one more was moved [107]. She telephoned the Claimant with the news which was confirmed in a letter [110]. The three others included one who was Q stamped and two who were A stamped but were considered weak, either because of their poor timekeeping and/or relatively poor skills.

5.31 The Claimant had been the only worker in his section and on his shift who had not held an A stamp [164]. The other workers who worked on the other day shift who had Q stamps also eventually lost their placements or were dismissed or moved in the reduced headcount. Mr Endicott and Mr Martin both said that the reason why the Claimant was chosen was because he was Q stamped. It was Mr Endicott who had picked him. We considered that to have been clear and compelling evidence.

5.32 On 10 September, the Claimant visited the site to collect his personal effects. He said that he saw Mr Martin who was alleged to have said that he was sorry to lose him, but that his flexible working request 'had not done him any good'. Those comments were denied by Mr Martin and, having considered and accepted the evidence of Mr Endicott and Mr Martin as to the motive for the termination of the Claimant's placement, it seemed to us an inherently implausible comment to have been made and we rejected it.

5.33 In September 2017, the loss of the 23 production workers was reflected in the Respondent's documentation [138], but the headcount dropped further [147]; there had been 515 people at the site in August 2017, but the number was reduced to 450 by March of 2018 (we were told that the reference in the table to 'direct' and 'indirect' workers referred to those who were on the production line and those who fulfilled a supporting role respectively).

5.34 Overtime also dropped. Nevertheless, the figures showed that the Claimant's section continued to record very poor overtime statistics when compared to the site overall [139]. For example, in July 2017, the section was operating at an overtime rate of 55% against the site level of 9%. It did manage to reduce that by over half such that it was operating at 25.5% by February 2018 but that was then compared to the overall site figure of 3.73%. The hours of overtime were 846 hours in July 2017 and 364 hours in February 2018.

## 6. Conclusions

Knowledge of disability

6.1 We first addressed the issue of the Respondent's knowledge of the Claimant's disability, since it contended that it did not have the requisite knowledge within the meaning of s. 15 (2) and/or Schedule 8 of the Equality Act until 25 August 2017.

6.2 Ignorance itself was not a defence under the provisions. We had to ask whether the Respondent knew or reasonably ought to have known that the Claimant was disabled earlier. In relation to the second part of that test, we had to consider whether, in light of cases such as *Gallop-v-Newport City Council* [2014] IRLR 211 and *Donelien-v-Liberata UK Ltd* [2018] IRLR 235, the employer could reasonably have been expected to have known of the disability and whether it ought reasonably to have asked more questions on the basis of what it already knew.

6.3 In this case, we had to consider what evidence the Respondent had prior to 25 August. We were satisfied that it had been aware that the Claimant had attended two GP appointments in March 2017 (evident from [149], [150] and [151]), but there was no other evidence around them which might have put the Respondent on notice that any significant medical issue existed.

6.4 We were also told by the Claimant that he had told Mr Martin that courses held on his normal working days and the three consecutive days of work under the new shift pattern had caused him difficulty, but we were not satisfied that such comments had in fact been made.

6.5 In her closing submissions, Ms Short attempted to argue that the Claimant had also told Mr Lee about his difficulties, but no evidence to that effect had been given. The assertion was not in the Claimant's witness statement or any other document, nor was it part of his oral evidence. It was not put the Respondent's witnesses either.

6.6 We concluded that there had been nothing which had, or which reasonably ought to have put the Respondent on notice of the Claimant's actual or potential disability prior to 25 August 2017. Neither at the start of the his placement with the Respondent nor when he joined Morson, was the Claimant ever screened or even asked about his physical health.

Discrimination arising from disability; legal principles

6.7 The claims brought under s. 15 of the Equality Act were set out in paragraphs 6.1.1, 6.1.2 and 6.1.3 of the Case Management Summary of the 15 March 2018.

6.8 We had to consider whether the Claimant was treated unfavourably because of something which had arisen in consequence of his disability. There needed to have been, first, something which arose in consequence of the disability and, secondly, unfavourable treatment which was suffered because of that something. There only needed to have been a loose causal connection between the disability and the unfavourable treatment; it need not have been the only reason for the treatment, but it needed to have been a significant cause. In *IPC-v-Millar* [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator; whether conscious or unconscious, the motive for the unfavourable treatment claimed needed to have been something arising in consequence of the disability.

6.9 No comparator was needed under s. 15.

6.10 Unfavourable treatment did not equate to less favourable treatment or detriment. It had to be measured objectively and it required us to consider whether the Claimant had been subjected to something that was adverse rather than something that was beneficial.

6.11 If an act of discrimination occurred under s. 15 (1)(a), a respondent had a defence under sub-section (1)(b) if it could demonstrate that the treatment had been a proportionate means of achieving a legitimate aim. Proportionality in that context meant reasonably necessary and appropriate and the issue required us to objectively balance the measure that was taken against the needs of the Respondent based upon an analysis of its working practices and wider the business considerations (*Hensman-v-MoD* UKEAT/0067/14/DM at paragraphs 42-3). It did not necessarily render it impossible to justify the step that was taken just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, but it was a factor which ought to have been considered (*Homer-v-West Yorkshire Police* [2012] IRLR 601 at paragraph 25 and *Kapenova-v-Department of Health* [2014] ICR 884, EAT).

Discrimination arising from disability; conclusions

6.12 The first allegation was that the Respondent had failed to arrange training days to enable the Claimant to gain his A stamp other than on non-working days or as overtime.

6.13 On that issue, we had found as a fact that that had simply not occurred, as revealed by the Respondent's supporting documents [140a] and the other matters to which we have previously referred.

6.14 Secondly, the Claimant complained about the rejection of his flexible working request on 6 September 2017. The Claimant's case was that working for three consecutive days caused him significant pain and discomfort [94]. The Respondent did not actually challenge that assertion and we accepted his evidence.

6.15 We did not consider, however, that the manner in which the claim had been formulated in paragraph 6.1.2 of the Case Management Summary actually worked as a claim under s. 15. The Claimant was really complaining about the effect of 3 consecutive 12-hour shifts. The flexible working application had been his attempt to adjust the shifts in order to have alleviated the disadvantage that he suffered as a result. We therefore considered that we ought to have viewed paragraph 6.1.2 in that different way (the treatment caused by the consecutive shifts themselves), not only because the Respondent had itself changed its stance in a material respect at the start of the hearing, but also because the Claimant's s. 15 claim, if seen in that way, did little more than mirror the claim which had already been put forward under ss. 20 and 21 and the Respondent consequently suffered no disadvantage. As a Tribunal, we were not required to adhere slavishly to the issues which had been drawn in the Case Management Summary where to do so would have prevented us from determining the case in accordance with the evidence which had been produced (*Royal Mail-v-Jhuti* UKEAT/0020/16 RN).

6.16 We concluded that the Claimant had suffered unfavourable treatment as a result of having been required to work three consecutive 12-hour shifts and that that had arisen from his disability. The focus therefore fell upon the Respondent; whether it was able to prove that the treatment had been justified under s. 15 (1)(b).

6.17 By requiring the Claimant to work the same shifts as the rest of the workforce, the Respondent's aim had been to cover its work in an organised manner. It was difficult to understand how the workload would have been completed had it not been so organised. It seemed to us that the real question here was whether the new shift pattern had been reasonably necessary.

6.18 In that respect, we noted that the system had replaced a 5-day pattern of 8 hours with one which involved 7-day work, each of 12 hours. The pattern obviously increased productivity. The Claimant was often required to work as part of a pair and the use of the shifts set out within paragraph 14 of his statement was not challenged by him as having been a suitable and reasonable manner for the Respondent to have organised its undertakings.

It was, in our view therefore, a proportionate manner of achieving the Respondent's legitimate aim.

6.19 The ability of the Claimant to have dropped *out* of his shift was another aspect of his case and one that we were required to consider within the context of the complaint which had been brought under s. 20 complaint.

6.20 The final allegation under s. 15 was the termination of the Claimant's assignment on 7 September which, he said, occurred because of his flexible working request. He said that he could not understand why his flexible working request had been rejected because the Respondent claimed to have needed its shifts to have been fully manned yet, at the same time, it was capable of losing his role altogether.

6.21 The Respondent's simple answer to that apparent inconsistency was that the Claimant's offer to give up a few hours through his flexible working request did not meet its need to reduce headcount at the site. In its choice of the Claimant as part of that reduction, it simply based its decision upon those who needed more supervision; those who had Q stamps or were weaker in other respects. Upon our analysis of the evidence, the Claimant was chosen for reasons other than the fact that he had made a flexible working request. Although we recognised that Mr Endicott, who made the decision, had been copied into the emails which had concerned the Claimant's request for flexible working, we accepted that he had not read or appreciated their contents. We concluded that he had made his decision for reasons which were not tainted by that request.

6.22 Accordingly, the complaints under s. 15 failed and were dismissed.

Reasonable adjustments; legal principles

6.23 We bore in mind the guidance from the case of *The Environment Agency-v-Rowan* [2008] IRLR 20 in relation to the manner that we ought to have approached ss. 20 and 21.

6.24 In the context of this case, the focus fell upon the adjustments themselves. It was necessary for them to have been both reasonable and to have operated so as to have avoided the disadvantage. There did not need to have been a certainty that the disadvantage would have been removed or alleviated by the adjustment. A real prospect would have been sufficient. We also referred to the statutory Code of Practice and, specifically, paragraph 6 that dealt with the duties under the sections.

6.25 The first provision, criterion or practice ('PCP') contended for was the practice of holding training courses on non-working days or as overtime. We concluded, however, that no such PCP had existed for the reasons already given.

6.26 The second PCP was the requirement for the Claimant to have worked his specified shifts. The implementation of that shift pattern was a practice and, for the same unchallenged reasons, we concluded that they did cause the Claimant a substantial disadvantage when compared with those who were not disabled because of the difficulties caused by his osteoarthritis during the 3 consecutive days that he was required to work. The question then was

whether it was reasonable for the Respondent to have adjusted that shift pattern.

6.27 First, we considered the adjustment proposed by the Claimant; his desire to have avoided having to work on Fridays, as requested in his flexible working application [94]. We could not, however, see any other way of him achieving that goal other than by someone filling his role when he was not there. Given the need for skilled workers, we agreed with the Respondent that the only conceivable way in which he could have been replaced was by another worker having undertaken overtime.

6.28 A consideration of the reasonableness of the adjustment contended for involved, on the one hand, the balancing of the fact that overtime had become very sensitive and difficult to justify at the site as a result of a scrutiny that had fallen upon it by the CEO and the Vice President against, on the other, the fact that the Respondent was a large employer and that the requirement to make reasonable adjustments for a disabled member of the workforce sometimes did involve additional expense. We considered those to have been finely balanced considerations.

6.29 We considered the overtime figures at length [139]. It was clear that the area in which the Claimant worked was heavily dependent upon overtime and, even with the 10% cap which had been imposed, it was not achieving that figure by February 2018. Compared to the rest of the site, its dependence on overtime appeared excessive.

6.30 Despite lengthy deliberations, the Tribunal was unable to agree unanimously on the issue of the reasonableness of the adjustment contended for.

6.31 The majority concluded that the difficulty faced by management in September 2017 in justifying greater overtime against the targets which they had been given and against the excessive overtime figures that they already had to grapple with rendered the adjustment unreasonable. We noted that Miss Chapman knew of no other member of Morson's staff who did not work the Respondent's set shift pattern.

6.32 The minority, Mrs Moore, concluded that, given the size of the Respondent's undertaken, the likely cost of covering a 12-hour shift every fortnight, the likely increase to the overtime statistics (24 hours on top of the monthly totals in the left hand column [139]) and the fact that ss. 20 and 21 imposed positive duties upon employers and principals that sometimes resulted in additional cost, the adjustment was reasonable.

6.33 The other adjustment that we considered, which was not put forward by the Claimant himself, was whether it might have been possible to have looked for and/or found a worker on the alternative shift to his who might have been prepared to have swapped a day to have enabled the Claimant to have avoided 3 consecutive days of work. Such a swap would have had to have fallen on a Saturday and Mr Endicott said that staff would have been extremely reluctant to have lost a least one an entire weekend in their working pattern. We appreciated and accepted that point. Although the Claimant had not asked for it and the Respondent had not looked into it at

the time, we were told that no-one else had made a flexible working application and the evidence suggested that the chances of it actually happening were, in reality, somewhat fanciful.

6.34 Accordingly, on the basis of a majority decision in relation to the first adjustment and unanimously in relation to the second adjustment, the complaints under ss. 20 and 21 also failed.

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Employment Judge Livesey

Date 2 October 2018