EMPLOYMENT TRIBUNALS

Claimant: Mr J Kirk

Respondent: Network Rail Infrastructure Limited

Heard at: Liverpool **On:** 8-11 May 2018
25 May 2018
31 May 2018
(in Chambers)

Before: Employment Judge T Vincent Ryan
Mrs J L Pennie
Mr W K Partington

REPRESENTATION:

Claimant: Mr D Campion, Counsel
Respondent: Mr T Cordrey, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's following claims are not well-founded, fail and are dismissed, namely:

1. That the respondent treated him unfavourably because of something arising in consequence of his disability, in circumstances where the respondent could not show that such treatment was a proportionate means of achieving a legitimate aim (section 15 Equality Act 2010);

2. That the respondent failed to comply with any requirement of the duty to make reasonable adjustments to remove any substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in respect of any provision, criterion or practice of the respondent (sections 20-22 Equality Act 2010);

3. That the respondent dismissed the claimant unfairly. The respondent dismissed the claimant fairly for a reason related to capability by reference to health on 15 June 2017;

4. That the respondent breached the claimant's contract of employment.

REASONS

1. The Issues

In a situation where the claimant, a disabled person, requested adjustments to his role and was absent from work for some two years while adjustments and alternative roles were considered ("stood off" as explained below) before he was dismissed for reasons related to capability, the parties agreed a joint List of Issues for the tribunal to determine. I set out verbatim the agreed list below, save for my explanations and abbreviations in italics in parenthesis, and that issue numbered 6A below was added orally during the course of submissions and the version of it below is not verbatim:

Disability Discrimination

(1) Did the respondent subject the claimant to unfavourable treatment because of something arising in consequence of his disability, contrary to section 15 of the Equality Act 2010 (EA)? If so, can the respondent show that such treatment was a proportionate means of achieving a legitimate aim?

(2) The unfavourable treatment relied upon by the claimant is –

  (a) Refusing to provide the claimant with an alternative role;

  (b) Dismissing him.

(3) The "something arising in consequence of his disability" relied on by the claimant is:

  (a) The impact of the claimant's impairments (HAVS and stress and anxiety) upon the claimant and associated restrictions on his work (real or perceived). (The respondent does not accept a perceived restriction can be "something arising in consequence of his disability");

  (b) The claimant's need for adjustments to be made to some of the alternative roles for which he applied;

  (c) The respondent's position that the claimant could not benefit from his disability.

(4) In relation to 2(a) and 2(b) above:

  (a) The legitimate aim relied on by the respondent as set out in its closing submission *[extract from respondent's written submission paragraph 58: "The legitimate aim the respondent relies upon is its need to protect and maintain the highest standards of health and safety and the need to ensure that it has in post people who are qualified and able to carry out the requirements of those posts"].*

(b) The respondent asserts treatment of the claimant was proportionate in achieving that aim for the reasons set out in its closing submissions. *[Mr Cordrey produced written submissions running to 61 paragraphs and dated 24 May 2018 together with a table referring to certain job applications made by the claimant].*

(c) Was the treatment of the claimant a proportionate means of achieving a legitimate aim?

(5) Did the respondent know or could the respondent reasonably have been expected to know that the claimant was a disabled person at the relevant time?

(6) Did the respondent fail to comply with its obligations, if any, to make reasonable adjustments contrary to sections 20-21 EA?

(a) The PCPs *[provisions, criteria or practices]* the claimant relies upon are –

(i) The requirements of his role of team leader (welding);

(ii) The requirements of the roles for which he applied; and/or

(iii) The requirement to return to work.

(b) Was the claimant placed at a substantial disadvantage by such PCPs when compared with non-disabled comparators?

(c) If so, did the respondent know or could the respondent reasonably have been expected to know that the claimant was likely to be so affected?

(d) If so were the following adjustments reasonable:

(i) Adjusting the claimant's substantive role as welder;

(ii) Re-deploying the claimant into an alternative role, with adjustments if required including training and adjusting pay?

(e) If so, did the respondent fail to make that/those adjustments?

6A <u>The respondent contends that claims under sections 15 and 20 EA in respect of three of the claimant's four job applications upon which he relies in respect of those claims were presented to the Tribunal out of time in circumstances when it would not be just and equitable to extend the time to the date of presentation of the claimant's claim</u>.

<u>Unfair Dismissal</u>

(7) Was the claimant dismissed for a potentially fair reason pursuant to section 98(2) (a) of the Employment Rights Act 1996 *[ERA]*, namely capability?

(8) Did the respondent act reasonably in treating the claimant's capability as a sufficient reason for dismissing the claimant?

(9) Was the dismissal of the claimant fair in all the circumstances? In particular, was the dismissal within the band of reasonable responses available to the respondent? The claimant relies on the following alleged unfairness:

(a) The commencement of the ill health procedure being in breach of his terms and conditions of employment/the stood off arrangements;

(b) The respondent's failure to consider alternatives to dismissal;

(c) The respondent's failure to reasonably consider the claimant for redeployment opportunities;

(d) The dismissal constituting an act of unfavourable treatment because of something arising in consequence of disability (section 15EA);

(e) The dismissal arising from a failure to make reasonable adjustments which could have avoided the dismissal (sections 20-21 EA) bearing in mind the size and resources of the respondent; and

(f) The respondent's failure to follow a fair procedure or fully investigate the medical position as at the date of termination.

Breach of Contract

(10) Did the respondent breach the claimant's contract of employment? The claimant relies on a breach of the stood off arrangement and contends that the ill health procedure should not have been commenced until 20 May 2017 at the earliest. But for the breach the claimant contends that he would have received an additional four months' pay.

(11) Following from the above, did the claimant suffer an unlawful deduction of four months' pay from his wages?

2. **The Facts**

2.1 The Respondent –

2.1.1 The respondent is a well-known large employer. The respondent operates many employee relations policies and procedures which have been agreed with recognised trade unions. Owing to the nature of the engineering work by some of its employees, its working practices are regulated, monitored and subject to rules governing health and safety at work and specifically, in the case of the claimant, with regard to the use of vibrating tools. The respondent relies on the services of Occupational Health advice and assistance through the good offices of BUPA. In respect of such health and safety and Occupational Health matters, the respondent's management holds regular review meetings with employees who are affected by ill health or are on restricted

duties, particularly when the debilitating condition in question is work related. The respondent aims to provide a safe and efficient service to railway companies and insofar as the employment of its workforce is concerned the Tribunal finds that the respondent's legitimate aim, which its witnesses explained was treated with the utmost seriousness, was "to protect and maintain the highest standards of health and safety and the need to ensure that it has in post people who are qualified and able to carry out the requirements of their respective posts".

2.1.2 The respondent operates at numerous stations and innumerable on-track sites and depots. Its established working areas are referred to as "delivery units". The claimant was employed at the delivery unit at Edge Hill, Liverpool. He was employed as a Team Leader (Welding). The Welding and Grinding Section Manager at Edge Hill at all material times was Mick Cripps. The Rail Management Engineer at the relevant time who was responsible for that delivery unit was Mr Atif Hamid (AH) who gave evidence to the Tribunal. The Tribunal found AH's evidence to be clear, cogent, credible and reliable by reference to the documentation presented to the Tribunal in two ring binders, pages numbered 1-604 (to which all page references refer unless otherwise stated). In so far as there was any evidential dispute between him and the claimant we generally preferred AH's evidence as being more credible and reliable. AH was Mr Cripps' line manager responsible to deal with grievances such as those against Mr Cripps and also to deal with capability and disciplinary matters at the delivery units, including Edge Hill, that fell within his jurisdiction. Throughout most of the time covered by the chronology of the events comprising the claimant's claims AH was his direct manager in preference to management by Mr Cripps; this was an adjustment to the line management structure made by the respondent because of the claimant's grievances against Mr Cripps, which he said caused him stress and anxiety; by so re-arranging the chain of command the respondent was able to remove any disadvantage (substantial or otherwise) encountered by the claimant in being managed by Mr Cripps.

2.1.3 Amongst the many policies and procedures applicable to the workforce and with specific reference to health and safety and to the health of employees there are arrangements concerning staff that are reduced in grade owing to eyesight failure, ill health or accident. These are set out in what is referred to as the Blue Book an extract of which appears at pages 77A to 78A. The claimant qualified for consideration of pay and job protection under a procedure referred to as "Stood Off". The "stood off" provisions are set out at page 78. Under this procedure employees with ten or more years' employment for whom no suitable alternative work can be found owing to restrictions placed upon them because of ill health will be regarded as remaining in employment (by which it means they will not be regarded as absent from duty "sick" or

"stood off" (sic)) and will continue to be paid at the basic rate of pay for their substantive grade for "a maximum period of two years". At the end of the period of full basic pay (which will not exceed two years) if it has not been possible to suitably accommodate an employee they will be dealt with in accordance with the ill health severance procedures. Any such employee's situation is to be kept under constant review and the respondent is required to offer suitable employment if it arises, that is suitable to the restrictions placed upon the employee owing to their health. The procedure envisages two circumstances in which the period of pay and job protection may be reduced to less than two years, and that is where the employee in question refuses to accept an offer of reasonable alternative work or expresses a desire to be dealt with under the ill health severance arrangements. In either of those circumstances the protection will come to an end and severance procedures become effective. The "stood off" provisions are contractual.

2.1.4 Prior to the "stood off" period employees working on restricted duties on a temporary basis or with regard, for example, to a phased return to work, are entitled to pay protection. Whilst working in a reduced capacity or a reduced level of seniority they retain their substantive basic pay and are entitled to benefit from any increases in pay at the rate applicable to the substantive post. If any such employee obtains better paid alternative employment then they are entitled to be paid at that rate rather than their substantive pay rate.

2.1.5 At the material time AH and his management colleagues were unfamiliar with the "stood off" provisions. The claimant's trade union representative alerted management to them, indicating that the claimant ought to be allowed to stay away from work for up to two years subject to review and appropriate job offers from the respondent and subject further to the claimant being seen to make suitable job applications to assist a return, or phased return, to work. Management's view was that employees should not be permitted to sit at home for up to two years on full basic pay doing nothing practical at work. AH and certain of his colleagues took a dim view of the claimant when they perceived that he was making suboptimal effort to return to work or to retrain whilst staying away from the work environment yet drawing full basic pay. AH felt this was an abuse of the system. He sought advice from the HR Department. The HR Department advised AH that he could send the claimant home during the "stood off" period, and eventually (see below) he did so reluctantly. AH's preference would have been for the claimant to accept any work, to stay in view of management, acquiring skills, retraining and making himself available so that the respondent would get some value from paying the claimant being paid full salary; the claimant would have the benefit of acquiring and honing skills and keeping in touch.

2.2 The Claimant –

2.2.1 The claimant was employed by the respondent as Team Leader (Welding) from 24 June 2006 until his dismissal for a reason related to capability by reference to health on 15 June 2017. When he was appointed by the respondent the claimant was already a qualified and experienced welder. The respondent's Welders work in teams with employees who are Grinders. Welders lay the weld on tracks and then the excess weld is removed and the surface of the track smoothened by the use of vibrating tools. The latter process is referred to as grinding. Some operatives only did grinding. Welders would weld and grind as appropriate.

2.2.2 Over the course of the claimant's career, and probably in consequence of the use of vibrating tools, he developed Hand and Arm Vibration Syndrome (HAVS). The claimant experienced HAVS type symptoms from 2013 onwards. The respondent accepts that the claimant is a disabled person within the definition contained in section 6 EA; the Tribunal finds the claimant to be disabled to the extent and as he explained in his evidence (see below 2.2.4)

2.2.3 In March 2014 the claimant experienced symptoms of anxiety and depression. According to his evidence to the tribunal he was "fed up with management and politics" at work. The claimant had had a specific issue with Mr Cripps in March and April 2009 when the claimant was refused annual leave at a time that his grandson was in hospital. This was particularly upsetting to the claimant in 2009 because his grandson sadly died. In the period from 2009 to 2014, however, there was no personal or professional problem between the claimant and Mr Cripps, although the claimant alleges that Mr Cripps was generally a bully.

2.2.4 In response to a Case Management Order the claimant produced a "Disability/section 6 Equality Act 2010 statement" dated 19 December 2017 (pages 42-48). The respondent confirmed that the description of his symptoms and their disabling effects set out in that statement were true not only as at 19 December 2017 when he signed it but throughout the period from 2014 to 2017 and with symptoms continuing, save that the HAVS symptoms have dissipated with the non-use of vibrating tools, and since his dismissal he has suffered less stress and anxiety. In all other respects he confirmed that throughout the period from 2014 to 19 December 2017 (some six months post dismissal) he had a significantly reduced grip such that he cannot dress and use buttons, he cannot iron clothing or clean (presumably his home), he cannot drink from a mug, or brush his teeth without a large handle toothbrush, he cannot tie laces, open food packaging or do

any kind of DIY. He cannot write because he cannot hold a pen, pencil or biro. He cannot hold a bottle. His impairment has had a significant impact on his physical coordination such that he is clumsy in everyday tasks, experiencing consistent pins and needles in his hands and loss of sensitivity. He cannot lift, carry or move basic items such as shopping bags and mugs unless they have a large handle, or any items around the kitchen such as a kettle or an iron. The claimant's concentration, learning and understanding is significantly impaired, preventing him from performing any tasks requiring him to concentrate for more than 30 minutes. He becomes agitated if he tries to read or watch television and finds that he has to move around or go out for a walk leaving what he was doing to get away from whatever task has agitated him. He can no longer complete a crossword puzzle and this is a combined effect of not being able to hold a pen and because of the effect that stress and anxiety has on his ability to concentrate. He became extremely hesitant to perform tasks requiring dexterity and coordination for fear of hurting himself, and he is therefore wary of lifting kettles, using irons, carrying mugs of hot drinks, using scissors or holding sharp knives, not least because he has cut himself on numerous occasions owing to the effects of his disabilities. In a typical day he relies upon his partner to do “most things” as he cannot do them without her assistance, such as preparing his breakfast and leaving him a hot flask of coffee for him to drink while she is out of the house. He is unable to enjoy a lot of activities previously enjoyed by him and he cannot now play golf, go to the gym, cook, play pool, do general housework, go shopping, complete crosswords. He cannot socialise; he does not want to go out and meet people, even his friends, because of his disabling mental condition. The respondent did not contest the claimant's sworn evidence, and the claimant confirmed in cross-examination the consistency of those disabling symptoms over the last four years up to, including and subsequent to the date of dismissal. The Tribunal noted that the claimant's mental health has improved since but not before 15 June 2017 when the claimant was dismissed; bearing in mind the date of the claimant's impact statement it would appear that the improvement did not become significant for some six months post termination of employment.

2.3 In line with the respondent’s stated legitimate aim as found above, it operates a strict system of health monitoring. During the claimant's employment, and since his disabling symptoms were first reported, the respondent has monitored the claimant on a consistent basis, obtaining regular and frequent Occupational Health reports. The claimant has also produced a report from a consultant of his own nomination, Mr Marcuson, who was instructed by the claimant's solicitors to prepare a report for use in personal injury litigation. The Occupational Health and medical reports have informed the respondent’s decision making throughout and they have acted appropriately in both referring the claimant for advice and in

response to the recommendations made by the healthcare professionals. Details of some of the significant reports are set out below:

2.3.1 2 August 2013 – Dr Hadley (pages 79-80). The claimant was fit to work and to use vibrating tools provided measures were taken to control exposure and there was regular health surveillance.

2.3.2 17 January 2014 – Mr R W Marcuson (pages 105-110). The claimant presented giving the impression he had HAVS and it was recommended that he should not be employed in his current role but should be removed from exposure to vibrating tools.

2.3.3 4 February 2014 – Dr Giridhar (pages 115-116). Dr Giridhar queried whether the claimant ought to be redeployed because of his stress symptoms and in relation to the claimant's report that he had worsening HAVS symptoms he should only have restricted use of vibrating tools pending further assessment.

2.3.4 18 March 2014 – Dr Giridhar (pages 117-118). The claimant was fit for normal duties from a medical point of view provided the use of vibratory tools was kept to a minimum time and the suggestion was made of temporary redeployment to another role because of anxiety and depression.

2.3.5 27 May 2014 – Dr Giridhar (pages 121-122). Dr Giridhar was uncertain as to whether the claimant's symptoms were due to HAVS and considered that his diagnosis was only provisional such that he could continue with the use of vibrating tools provided the exposure was kept to a minimum. That said Dr Giridhar felt that owing to the claimant's stress and anxiety it was difficult to foresee him returning to work without successful resolution of work issues. The Tribunal understands that this repeated reference to stress at work and work issues, or the resolving of such issues, was in relation to his line management by Mr Cripps.

2.3.6 22 July 2014 – Dr Giridhar (pages 127-128). Dr Giridhar's view changed slightly in that Dr Giridhar now reported that on the balance of probabilities the claimant's symptoms could be attributed to HAVS although in his opinion the claimant was fit to return to work with temporary restrictions on using handheld vibratory tools. He recommended a tier 5 assessment in this connection, and until then suggested that the claimant could undertake work that did not involve the use of handheld vibratory tools. Dr Giridhar recommended counselling in respect of the claimant's anxiety and commented again that it was essential line management had an open discussion with the claimant to address his anxiety and the concerns that he had.

2.3.7 15 September 2014 – Tier 5 assessment by Dr Poole (pages 131-145). Dr Poole thought that the HAVS diagnosis was unsafe

because whilst the claimant's exposure to the use of vibrating tools was consistent with it causing HAVS, his symptoms were inconsistent with HAVS; in fact Dr Poole thought some of the reported symptoms were not credible. He also concluded the claimant was not depressed.

2.3.8 24 September 2014 – Dr N Hadley (pages 146=148). Dr Hadley commented on what he felt was a combination of factors concerning the claimant's employment and work environment that had contributed to his psychological ill health. He commented that it is often not realistic for an employee to return to the same job and run the risk of recurrence of illness, suggesting that it would be preferable to explore redeployment in an alternative post. As one of Dr Hadley's colleagues had previously commented, he felt it would be better for management to sit down with the claimant to discuss the circumstances, specific tasks or events that seem to have precipitated his mental ill health and any absence. Arrangements were made for a follow up.

2.3.9 14 October 2014 – BUPA (only page 1 of two was disclosed) (page 151). The claimant was said to be not fit for work because of stress and anxiety and the possibility of redeployment was again mentioned with emphasis on attempts to resolve the workplace issue. The use of vibrating tools was raised as a possibility provided it was monitored.

2.3.10 24 March 2015 – Dr Giridhar (pages 226-228). Dr Giridhar reported that:

"As his long-term concentration is limited he should be accompanied while working on the track/trackside:

- He is fit to undertake non safety critical work on his own.
- He is not fit to undertake any handheld vibratory tasks considering the anxiety symptoms that he has been experiencing."

Dr Giridhar suggested that the respondent "may wish to restrict him from undertaking handheld vibratory tasks" and said that the claimant was restricted from working on his own. His overall opinion was that the claimant was not permanently unfit for any type of work but should be able to undertake an operative's role without undertaking handheld vibratory tasks. Dr Giridhar suggested a three month review with a possibility that the restrictions referred to above could be lifted, except in respect of the use of vibratory tools.

2.3.11 12 April 2016 – Ms L Antony (pages 292-293). Ms Antony reported that the claimant was unfit for work because of stress, perceived work related stress. The claimant displayed stress

and anxiety related symptoms despite treatment, although a full and complete recovery was expected, the timing of which was dependent upon the resolution of "the perceived triggers". The Tribunal believes this to be a reference to the state of the relationship between the claimant and Mr Cripps, nominally but no longer actually his line manager.

2.3.12 5 May 2016 – Dr E Liu (pages 300-301). Dr Liu confirmed the diagnosis of HAVS and felt that the claimant's symptoms were consistent with that diagnosis. He recommended permanent restrictions on the use of vibration tools.

2.3.13 29 July 2016 – Dr Jackson-Brown (pages 307-308). Whilst saying he felt that it was unlikely the claimant would return to work, Dr Jackson-Brown's opinion was that the claimant was fit for adjusted work not involving the use of vibrating tools. He was therefore unfit for his normal duties for completing the full role of welder (being welding and grinding) for the foreseeable future, meaning until intended normal retirement age.

2.3.14 The tribunal's summary – HAVS: The above reports show some hesitancy on the part of medical professionals to confirm a diagnosis of HAVS because of doubts over credibility and consistency of reporting by the claimant, but over time that evolved to a situation where there was a provisional diagnosis but with recommendation for permitted light use of vibrating tools; that then then evolved into a definite diagnosis of HAVS with a recommendation that to retirement age the claimant should be restricted from all use of vibrating tools.

2.3.15 The tribunal's summary – stress/anxiety: There is a consistent picture of reports of the claimant saying that he has work related stress and perceiving that his symptoms were related to the working environment. There are mostly vague references to issues at work and the only specific causative factor is said to be concern over the use of vibrating tools. Mr Cripps is not mentioned. The consistent theme is that the respondent may wish to consider redeployment to another working environment, but in any event ought to discuss issues with the claimant and seek resolution directly with the claimant.

2.3.16 In consequence of the above the Tribunal finds that it was evident to the respondent for some time that it ought to at least restrict and then prohibit the use of vibrating tools, as far as the claimant was concerned, and it ought to attempt to resolve work related issues that the claimant reported at Edge Hill, whether they related either to Mr Cripps or his anxiety over the continued use of vibrating tools. The Tribunal is satisfied that the respondent understood the above and what was required of it. For the reasons below the Tribunal finds that the respondent acted accordingly by restricting and then prohibiting the use of

hand held vibrating tools, by appointing AH as his line manager instead of Mr Cripps during the limited period when the claimant worked after the end of 2013 until his dismissal, and by offering bespoke and generic roles and placements for varying lengths of time that neither involved the use of such tools or management by Mr Cripps.

2.4 The respondent's actions in response to the claimant's complaints and the available medical evidence: AH, in his capacity as Rail Management Engineer responsible for the delivery unit at Edge Hill, and therefore the claimant's line manager's line manager, offered the following to the claimant to ensure that he stayed at work or to facilitate a return to work following any absence –

2.4.1 The claimant could be absolved from any grinding work involving the use of vibrating tools, but that he would restrict himself to welding only. Welding did not involve the use of vibrating tools and was not a trigger for the onset of HAVS related symptoms.

2.4.2 To line manage the claimant directly. In fact from 2013/14 up to and including the claimant's eventual dismissal he was line managed by AH and not by Mr Cripps. That arrangement was intended to be a temporary arrangement pending resolution of workplace issues, but because the claimant was "stood off" for a period of two years prior to his dismissal the situation never arose where the respondent had to put into effect a permanent management structure that was any different. To all intents and purposes the respondent ensured that line management by Mr Cripps was bypassed and AH was the claimant's line manager. The claimant has never reported having issues with AH (other than in respect of this litigation) and there was no medical evidence before the respondent that AH was the cause of or exacerbated the claimant's symptoms of stress and anxiety. The Tribunal finds that line management by AH was a positive resolution of the line management issue.

2.4.3 To mediate between the claimant and Mr Cripps. The respondent set up mediation and a mediation meeting was held on 26 March 2015. The respondent attempted to resolve the claimant's workplace issues that caused anxiety by removing the requirement to use handheld vibrating tools (which Occupational Health reported had caused him anxiety), by removing Mr Cripps as line manager, and by attempting to mediate between the claimant and Mr Cripps over any issues there were between them. The Tribunal can only find on the evidence of the claimant that the "issues" with Mr Cripps related back to April/May 2009 and his subsequently being "fed up with management and politics", and his assertion that Mr Cripps bullied not only him but others. We heard no evidence from Mr Cripps and no specific details of any other issues or of those issues.

2.4.4 Other roles, such as coaching and mentoring in welding. AH went out of his way to accommodate the claimant and the Tribunal accepts his evidence that he called in favours from colleagues to try to create roles that would best suit the claimant and his situation so as to effect his safe return to work. These roles were not always "templated" in that they did not show on a vacancy list. AH was prepared to customise a role that would suit the claimant and to get the best from him safely, bearing in mind his experience, qualifications and the quality of his welding work which was appreciated by the respondent. One such example of an offer made by AH was that the claimant's duties would be limited to welding without grinding, without any loss of pay or status.

2.4.5 A secondment. The claimant was offered roles on a temporary basis, other than at Edge Hill, as befitted his situation and the restrictions recommended by Occupational Health. Being secondments, they were not permanent placements, and any permanency would obviously depend on the success in the claimant sustaining attendance at work in accordance with the respondent's legitimate aims as previously found.

2.4.6 A phased return to work at Chester station working on "lubrication". This was a phased return to work period of several weeks and showed the respondent's willingness to redeploy the claimant appropriately.

2.5 The claimant's reaction and actions –

2.5.1 The claimant refused to accept the role envisaged by AH whereby he would weld but never grind. He refused this, he said, on the basis that the respondent would not necessarily know who was responsible for the weld if the job was shown to have been completed by a named grinder, or alternatively that he would be held responsible for defective grinding work when his weld was satisfactory. Furthermore he said that he felt that this arrangement would put an unfair burden on the grinder who would have to grind more, and more often, to cover for him. AH made it clear to the claimant in a genuine offer that the respondent would be able to record appropriately who was responsible for the weld and who was responsible for the grind so that there would be no issue as to accountability and liability for any defect; that was a matter for the respondent to manage and AH was prepared to do so. Furthermore, AH attempted to reassure the claimant that it would always monitor the colleague doing the grinding work and ensure that as with all use of vibrating tools they were only used within safe limits; this was a matter for the respondent to manage, and it was a matter that was regularly and consistently managed by the respondent in any event and was not a new point for consideration. Notwithstanding that this proposal would enable the claimant to

work as a welder and team leader in his substantive role, excused from the use of vibration tools and under the direct line management of AH, at least for the foreseeable future, the claimant rejected the offer. The offer as put by AH would have removed the substantial disadvantages to the claimant in his use of vibrating tools and in his being line managed by Mr Cripps. They were the operative disadvantages triggering the statutory duty on the respondent to make adjustments.

2.5.2 The claimant categorically and as a point of principle refused to accept any offer of a role that was not a templated role. He refused the coaching and mentoring role. He felt that a non-templated role lacked sufficient job security and he did not consider he was suitably trained to be a coach and mentor. The respondent made the offer of non-templated roles, including coaching and mentoring, to remove the substantial disadvantages to the claimant of his being a welder who also did grinding work and did so under the management of Mr Cripps. The Tribunal is satisfied that the respondent saw the coaching and mentoring role as a potentially effective adjustment, and as such it was a relatively secure role, but in any event it was an acknowledgement by the respondent of its duty such that if there was any insecurity or the role became time limited the Tribunal is satisfied that AH would have then created a further bespoke role or found an alternative suitable role akin to the claimant's substantive role but without the substantial disadvantages of which he complained. The claimant would have been provided with sufficient training by the respondent. The claimant claims in this context that he was not sufficiently trained, but in respect of job applications that he made at a later stage he argues that training ought to have been provided to him. Training, insofar as it was needed, would have been provided to him in the coaching and mentoring role but it is not envisaged that much training would have been required because welding was the claimant's forte. These findings are made in the light of AH's convincing evidence that he was doing his best to assist the claimant whilst acknowledging the respondent's stated legitimate aim as above (paras 1 (4) and 2.1.1).

2.5.3 The claimant attended a mediation meeting with Mr Cripps on 26 March 2015 but walked out of it and refused to discuss resolution of any alleged issues with Mr Cripps then and thereafter. The claimant refused to engage in the respondent's attempts to resolve issues insofar as they were related to Mr Cripps, his management or management style. In any event, as already found, line management was effectively taken over by AH.

2.5.4 The claimant and his trade union representative submitted to the respondent that the claimant was entitled to remain off site and at home during a two year stand off period. AH resisted this

stance until advice received from an HR Business Partner to the effect that the claimant could be sent home. AH did so reluctantly and would not have done so if he had not understood that the claimant was insistent. The impression that the Tribunal received from the claimant, and in this it finds that AH's perception was reasonable, was that the claimant believed he could stay at home, applying for jobs, and that this was sufficient to entitle him to two years' full basic pay without his having to work.

2.6 The claimant was "stood off" from 20 May 2015 until his dismissal with effect from 15 June 2017. Being put on "stood off" was confirmed in AH's letter to the claimant of 10 June 2015 (pages 234-235). AH confirmed the application of the "stood off" provisions. As indicated above, the provision was for continued employment with pay protection for a maximum two year period. AH referred to "a period of up to two years". Conditions for eligibility were that BUPA continued to advise that the claimant was fit to work with restrictions which the respondent would be unable to accommodate in an alternative role. Should BUPA advise at any time that the claimant was fit to return to work in a substantive role without the need for restrictions then the claimant would be required to do so. Furthermore, during the period in question the respondent would continue to look for work for the claimant and he was required to actively seek alternative employment in line with medical restrictions. AH repeated the provisions found above that being "stood off" would come to an end if the claimant refused to accept a reasonable alternative offer of work or expressed a desire to leave the company through the ill health severance procedure. In his letter AH then referred to the "end of the two year period" and what might occur. The Tribunal finds that AH's intention was to confirm the "stood off" arrangements as they appear at page 78. There was no intention to create a two year fixed period. A two year fixed period is inconsistent with AH's wording that the period was "up to two years" and was inconsistent with the eligibility requirements specified. It was inconsistent with the contract. Having heard evidence from AH the Tribunal finds that AH had no intention of varying the contract, and the use of the expression "at the end of the two year period" was a patent error insofar as it was taken as creating a two year fixed period. It was not within AH's authority to unilaterally vary the contract of employment contrary to the Blue Book which had been agreed with the claimant's trade union. The claimant did not at that time convey that he believed in or agreed to any variation of the Blue Book provisions.

2.7 AH believed the claimant did not want to be a welder and that he did not wish to return to work at Edge Hill. Having heard the claimant and having considered the documentation produced and the evidence of the respondent's witnesses, the Tribunal concludes that throughout the period from 2014 to 2017 the claimant no longer wished to fulfil his substantive role as Team Leader (Welding) or to work at his principal place of work, namely Edge Hill. There is reference in the Occupational Health reports to the claimant suffering anxiety at the thought of returning to work. The Tribunal is not convinced by the claimant that he wanted to return to work

for the respondent in any capacity, but at the very least he did not wish to return to his substantive role.

2.8 During the “stood off” period AH ensured that the claimant received, on a regular weekly basis, a full vacancy list. AH took less notice as to the contents of that list as time went by and did not vet it for suitable roles but allowed the claimant free rein to look at the full vacancy list. AH did, however, approach managers to discuss the possibility of the claimant's redeployment, of the creation of non-templated roles and the suitability of the claimant for templated roles that appeared on the vacancy list as and when the claimant notified him of the applications. AH did his best to facilitate the claimant's return to work. The claimant, however, did not tell AH of all the job applications that he made; he made some 25. He did not tell AH of some of the applications before he made them, thus not allowing AH an opportunity to make representations on his behalf, and/or after them such that AH could make subsequent submissions and representations on his behalf or discuss with recruiting managers the possibility of making reasonable adjustments to any role.

2.9 Of the 25 applications that the claimant made, and which were rejected, he relies on only four as evidence to support his claims of disability discrimination. The Tribunal accepts the evidence of Anthony Jones, the respondent’s Infrastructure Maintenance Engineer, as to the unsuitability of the claimant for the 23 jobs that the respondent has a record of the claimant's applications. The claimant does not have a record of any other applications and has not retained records of the rejections in respect of some of them, although he has accepted that most of the rejections were by way of a generic letter. The Tribunal finds that the claimant applied for many and varied roles in which he had no experience or qualification and no realistic prospect of making a successful application, and he was aware of it. He must have been aware of it in view of the nature of his disabilities and the restrictions which he accepts were placed upon him, and in circumstances where he could not suggest reasonable adjustments that would have removed the substantial disadvantages he would necessarily have faced. Initially the claimant based his claims on all of the rejected applications and over a period of time, including during the hearing, he abandoned some of those claims thus indicating that he accepted that some job applications were inappropriate and speculative. That said, of course, the claimant did not put AH in a position whereby he could practically consider many of the applications made. The Tribunal was not satisfied with or impressed by the claimant's evidence that his attempts to secure employment were genuine. His evidence was in part the assertion of a right and a dependence on his belief that provided he made some applications he would be entitled to two years’ pay protection without having to attend work. The Tribunal has taken that into account with its finding that the claimant may not have wanted to return to work at all but certainly did not wish to return to his substantive role, notwithstanding the efforts made by AH to facilitate it. The claimant did not cooperate with AH in respect of any adjustment to his substantive role or in respect of redeployment, save that he agreed he would undergo some computer training which the respondent then failed to arrange.

2.10 With regard to the four job applications that the claimant ultimately relies upon in support of his disability discrimination claims, being applications that were made but rejected:

2.10.1 The claimant applied for approximately 25 jobs during the period when he was unfit to work in his substantive role and his applications will have been considered by up to 25 different recruiting managers. The respondent submits that it was not possible to collate evidence from each of the 25 recruiting officers in time because of the manner in which the claimant presented his claim, and specifically that the details of the jobs in question were provided to the respondent's legal representatives late in the day in terms of this hearing. Be that as it may, and coupled with the fact that the claimant edited his jobs list during the course of the hearing such that only four substantive job applications are relied upon in support of the claimant's claims, the Tribunal was satisfied that the respondent did the best it could in calling Mr Anthony Jones (the respondent's Infrastructure Maintenance Manager) to give evidence as to the claimant's suitability measured against the written criteria and specifications for each of those jobs. The claimant had set up a moving target in respect of these job applications which made preparation to rebut the claims difficult. Mr Jones, however, was not the person who made the decision in respect of each of those applications, and his evidence as to why the claimant was not appointed to any of the jobs for which he applied is therefore an educated guess. The respondent's case, however, was assisted by the claimant's answers to questions under cross examination. Taking into account all of that evidence, the documents before us and drawing reasonable inferences from what we have heard and read we find that the claimant was not a suitable candidate for the jobs for which he applied. We found in respect of each of the four substantive job applications where the claimant was unsuccessful and says that the respondent thereby discriminated against him because of disability, as follows:

2.10.1.1 Customer Services Assistant at Liverpool Lime Street Station: – the claimant made an application for this job on 14 December 2015 and was rejected for it on 21 December 2015. He provided AH with details subsequently (8 January 2016). The claimant had no prior experience of customer services, and such experience was a prerequisite for consideration. The essential job skills, experience and qualifications listed in the job description included "experience of working in a customer facing environment". The claimant had not done that. The key accountabilities included responding to emergencies and incidents involving the general public and "industry partners" as required…actively

assist and provide information to customers travelling through the station…implement plans to prevent and manage criminal activity on the station, including discouraging and preventing unauthorised persons from entering or remaining on the station…provide a proactive role in dealing with hazards or unsafe conditions, checking that all such occurrences are reported correctly…fulfil allocated duties as described within emergency plans. In the light of the Tribunal findings regarding the extent of the claimant's disabling stress and anxiety it concluded that it was unlikely the claimant would be able to match the key accountabilities for this role even with reasonable adjustments; it would not have been possible to adjust the job to facilitate the claimant short of appointing a second, additional, person, which would not have been reasonable. The job description is at pages 536-537.

2.10.1.2 Driver (ECR): – the claimant applied for this role on 8 November 2016 without prior or subsequent reference to AH. He was unsuccessful. The driving job was based in Crewe. The claimant had said to the respondent's management "I don't drive". The claimant accepted at the final hearing that he may have given the impression that he was unable to drive. He conceded that he should have made it clearer that when he said "I don't drive" it was because he did not have a car. He is able to drive but he did not make this clear. The role involved a significant amount of working alone and could involve elements of manual handling in respect of plant and equipment. The Tribunal concluded that in the light of the claimant's assertion that he did not drive, his disabling conditions and their effects, and the Occupational Health evidence available, that the driver role would not have appeared to any reasonable recruiting officer as suitable employment, with or without adjustments.

2.10.1.3 CAD Technician – this role was located at Wigan and the claimant applied for it on 19 February 2017 without notifying AH before or after it (save in a subsequent grievance). The job description is at pages 552-553 where the key accountabilities include managing existing and incoming CAD data files, preparing diagrams, providing professional advice and assisting CAD manager. The essential job skills, experience and qualifications include "good CAD skills and engineering knowledge, relevant successful experience using microStation

and auto CAD" and it was desirable to have knowledge of OS digital mapping formats (as well as railway experience and good desktop software skills, which the claimant may well have had). The claimant had a CAD qualification from 1994 on systems and using methods not currently operated by the company, and he had not kept his CAD skills up-to-date. He did not have essential job skills, experience and qualifications and in the light of his disabilities and the Occupational Health reports available the Tribunal inferred that a reasonable recruiting manager would have considered the claimant was not a suitable candidate even with adjustments and that training would have taken a relatively long time and beyond the claimant's stood off period of job and pay protection.

2.10.1.4 Station Control Assistant at Liverpool Lime Street – The claimant applied for this job on 18 April 2017 and did not notify AH before or after it, save to refer to it in a subsequent grievance. For all the reasons previously stated in respect of the Customer Services Assistant role above. The Tribunal concluded that a recruiting officer could reasonably conclude that the claimant would not be a suitable candidate even with adjustments.

2.10.2 The claimant had indicated to AH that he would not be interested in a role that paid less than his substantive job. Bearing in mind that he had pay protection the Tribunal understood this to be a reference to status. That said, however, the claimant clearly had the benefit of pay protection and the Tribunal concludes that he may have been prepared to consider some less well paid job at no financial loss on an interim basis. Mr Jones gave evidence to the effect that there was in play a 10% pay differential ceiling in respect of applications for posts paid higher than the claimant's substantive role. No documentary or other corroborative evidence was adduced of this 10% ceiling. The Tribunal understood the logic of not advancing the claimant beyond his basic rate of pay to a higher band by way of an adjustment; however that is not consistent with a reasonable reading of the Blue Book which did permit for promotion with pay increase and protection at a higher rate than the substantive role. That said, the Tribunal considered that the claimant applied for jobs such as engineering jobs and his line manager's line manager's job, which he had no realistic prospect of securing for any number of reasons related to job skills, experience, qualifications and his unsuitability for the key accountabilities in the light of his disabling condition, even with adjustments. Such was the claimant's position in respect of most of his job applications that even he could not come up with

reasonable adjustments other than extensive prolonged training. In the given circumstances the tribunal finds that the provision of the training required would not have been a reasonable requirement; it would have taken a long time with little if any realistic chance of enabling the claimant to perform the duties of the jobs.

2.10.3 In the light of the Blue Book provisions regarding "stood off" and a period of grace of up to two years, the Tribunal considered that the claimant's many and varied job applications and their rejection were part of a series of acts within the "stood off" period. The claimant's claims in respect of any of those roles for which he applied after 20 May 2015 and before 15 June 2017 form part of that continuous series of acts, and his claims in respect of the respondent's rejections of his applications are not out of time. Our primary finding of fact in this regard is that there was a continuous course of conduct with regard to job search which involved both the claimant and the respondent as both had contractual obligations in that regard.

2.11 The dismissal –

2.11.1 The claimant was "stood off" on 10 June 2015 because he and his union representative submitted that he was entitled to the application of the "stood off" provisions and HR so advised AH. The claimant had work related stress and work related HAVS such that he fell within the contractual protection provided in respect of staff reduced in grade owing to eyesight failure, ill health or accident. By that date the claimant had more than ten years' employment, no suitable alternative work had been found for him in that he had refused to accept the offer of adjustments to his substantive role (welding without grinding and under the line management of AH). AH believed that the claimant had refused to accept an offer of reasonable alternative work as so described, but on advice from HR still considered that the claimant was entitled to be "stood off". The claimant did not return to work prior to his dismissal, throughout which time his health situation and ability to work was as set out in the various Occupational Health reports summarised above.

2.11.2 Throughout the claimant's period of absence (and indeed before it) the respondent investigated the claimant's health and capability to work by reference to his health. The situation was kept under review and monitored. The claimant was appropriately referred to Occupational Health advisers whose reports were considered and whose recommendations effected insofar as the respondent was able to do so, as has been described above. Furthermore the respondent regularly and frequently consulted the claimant concerning his state of health, alternatives to his substantive role and his return to work, including when he had trade union representation.

2.11.3 The stood off provisions allowed for pay and employment protection for a maximum period of two years. During that two year period the claimant refused to accept the offer of reasonable alternative work made by AH in respect of the modified welding team leader role under different line management, and also to accept any non-templated roles or secondments. On 15 July 2016 the claimant made a formal request for ill health severance (page 303). This was consistent with some representations made by the claimant to AH or at least the impression he gave that he did not wish to return to work, something that was also commented upon by Occupational Health advisers in a report. In response to that formal request the respondent met with the claimant on 24 August 2016 (pages 312-313) and far from withdrawing the request or reconsidering his stance the claimant merely queried the projected figures that were produced for him to show what ill health severance would mean in financial terms. There then followed a further meeting on 24 February 2017 under the same procedure and as a result of the claimant's formal request, which is confirmed in a letter dated 10 March 2017 at pages 338-339. It was explained to the claimant that the next step regarding employment would be a further meeting, the possible outcome of which would be termination of employment on the grounds of capability. That meeting was schedule for 22 March 2017 by which date the claimant had both refused to accept an offer of reasonable alternative employment and expressed a desire to be dealt with under the ill health severance arrangements, both of which are the provisions which allow for termination of the stood off protection within the maximum period allowed of two years.

2.11.4 On 13 March 2017 in anticipation of potential termination of employment at the meeting the following week, the claimant asked for details to support an application for benefits (page 339). On 13 March 2017 in anticipation of the said meeting the claimant requested a letter stating that he was being dismissed and wanted written evidence from the respondent that he had HAVS (or vibration white finger – page 339).

2.11.5 On 22 March 2017 the claimant attended a meeting with AH accompanied by his union representative. There was also a representative from the HR Department who took notes. Those notes appear at pages 340-341 and there is a summarised timeline (page 342). AH explained that in view of the length of time that the claimant had been “stood off” they would be giving notice to expire at the end of a two year period that commenced on 20 May 2015. The respondent explained that it had nominated the claimant for another competency specific medical examination and personal track safety accreditation “as something else may crop up in the next 12 weeks”, which was a reference to the 12 week notice period. AH summarised what he

considered to be the respondent's position, namely that they had attempted to place the claimant in a number of roles not least at the very outset when the claimant refused the welding role without grinding duties, and how that could have been managed by the respondent. At that meeting there was a discussion about other applications for work that the claimant had made, some of which were unsuccessful, and offers made by the respondent which the claimant had refused. AH also emphasised attempts at making reasonable adjustments and how the claimant had refused roles that were not permanent opportunities. AH Informed the claimant that the effective date of termination would be 15 June 2017, and expressed the hope that some other realistic job opportunity would present itself within the 12 week notice period.

2.11.6 Whilst there had been a decision to progress with further medical telephone consultation followed by PTS (Personal Track Safety) training, in the event in view of notice of termination being given to the claimant it was deemed that these steps were impractical and the arrangements were cancelled.

2.11.7 HR prepared a letter for AH to send to the claimant dated 27 April 2017 which appears at pages 368-370. That letter confirmed the outcome of the 22 March 2017 meeting and provided details of the lump sum payment that would be made to the claimant under the ill health severance procedure, £21,373.80. The letter confirmed that 12 weeks' notice was being given and the effective date of termination was confirmed as being 15 June 2017. The claimant was informed of his right to appeal.

2.11.8 On 15 May 2017 the claimant raised a formal grievance over the respondent's alleged failure to make reasonable adjustments to accommodate the claimant's disability, and that appears at pages 376-377. The claimant represented that he had applied for a large number of vacancies as was expected of him under the "stood off" arrangements but that he was unsuccessful, and that he had applied for renewal of his personal track safety accreditation and "look out tickets" as they had expired, but arrangements had not been put in hand. He also grieved that he had submitted a "clause 9 application" for a store's controller position at Liverpool Central Depot and that this was rejected by the committee that considered it. A "clause 9 application" provides that during a stood off period an employee can apply to be fast-tracked for a vacancy avoiding due process. The claimant considered it was feasible for his disability to be accommodated. The respondent required that the claimant follow due process in respect of his job applications save that it also expected that he would liaise with AH in advance of any application (or at very least immediately upon any rejection of his applications) so that AH could seek to persuade the

recruiting manager that adjustments could be made to facilitate the claimant's appointment in terms of the respondent's legitimate aim as above.

2.11.9 The grievance hearing was chaired by Brian Baker on 7 June 2017 and the claimant was accompanied by his trade union representative. The minutes are at pages 387-388.

2.11.10 The claimant also appealed against his dismissal and Mr Baker chaired that appeal also on 7 June 2017, and the minute of that meeting is at page 389, when the claimant was again accompanied by his union official.

2.11.11 Mr Baker knew that he could uphold or vary or overturn the original decision on the respondent's notice to terminate the claimant's employment, and he could either uphold or reject the grievance in whole or in part. He understood his role was to consider the assessments made by management and that in respect of the dismissal appeal it was not his role to re-hear the original case.

2.11.12 Mr Baker considered the claimant's grievances about the way he believed the respondent failed to make reasonable adjustments and accommodate his disability, and he understood that the appeal against dismissal was solely on the ground of what he considered to be the respondent's misinterpretation of the stood off provisions which he asserted should have allowed two full years' pay and job protection and that only at the end of a full two years, whatever other circumstances pertained, could the respondent proceed under the capability or ill health severance procedures. Mr Baker considered all relevant documentation and heard submissions from all relevant parties. He heard representations from the claimant and his union representative, and took advice from an industrial relations specialist before reaching his conclusions.

2.11.13 Mr Baker reached a genuine conclusion that in his view notice of termination of employment could be served on an employee during the stood off period. He believed, decided and confirmed to the claimant that the situation had been made clear to him and that the respondent's approach was in accordance with the Blue Book. With regard to the claimant's grievance, Mr Baker concluded that the respondent, and specifically by AH, had done all within its reasonable power to effect the claimant's return to work in a role consistent with Occupational Health recommendations and avoiding the difficulties he would face using vibrating hand tools, and could face otherwise at Edge Hill. Mr Baker concluded that AH had "gone out of his way to seek out positions which were potentially suitable for the claimant, taking into consideration all of the above restrictions". The Tribunal found Mr Baker's evidence to be clear, cogent,

credible and reliable in that it was consistent with the documentary evidence produced. The Tribunal considered that Mr Baker had acted fairly, reasonably and appropriately in his handling of both the appeal against ill health severance notice and the claimant's grievance. He rejected both. Mr Baker's conclusion in respect of the claimant's grievance is at pages 421-423; his outcome is dated 6 July 2017. Mr Baker wrote to the claimant with his decision on the claimant's appeal against dismissal on 5 July 2017 at pages 405-406. The Tribunal considered that both of those letters are a true reflection of the thought process and rationale of Mr Baker in reaching his decision, which the Tribunal finds was a conscientious decision made in good faith on due consideration of the relevant information before him and the claimant's submissions and representations on his behalf.

2.11.14 The claimant appealed against the grievance finding and an appeal hearing was held on 2 August 2017, minutes of which appear at pages 444-448. The outcome is at page 449. Mr Jones conducted this appeal and wrote that letter. We have already commented on Mr Jones' credibility as a witness. Once again the Tribunal considered that Mr Jones had read the relevant documentation, considered oral submissions and representations made to him and came to a conscientious decision accurately reflected in his outcome letter, albeit brief, and his evidence before the Tribunal contained in his written statement and answers to questions under cross examination. Mr Jones rejected the claimant's appeal against the rejection of his grievance regarding an alleged failure of the respondent to make reasonable adjustments to accommodate his disability.

The Law

3.1 Disability Discrimination

3.1.1 Discrimination arising from disability –

3.1.1.1 Section 15 EA provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. This does not apply if A shows that A did not know and could not reasonably have been expected to know that B had the disability.

3.1.1.2 The Tribunal must determine the "something" that arose in consequence of disability, and separately what was the unfavourable treatment. Having ascertained those two elements the Tribunal must determine whether any unfavourable treatment found was because of the "something" that arose from disability.

3.1.1.3 A respondent may attempt to justify its actions by showing that the treatment is a proportionate means of achieving a legitimate aim, but only where the aim is legal and not in itself discriminatory; it must be a real and objective consideration. It is for the employer to produce evidence to support its assertion that there is justification without insufficient generalisation. In particular where health and safety is relied upon an employer should not base its attempted justification on generalisations and the stereotyping of disabled people. The treatment must be proportionate to the health and safety risk in question. To be proportionate a measure has to be an appropriate means of achieving of legitimate aim and reasonably necessary in order to do so. There must be a real need and the means used must be appropriate with a view to achieving the objective being necessary to that end. An employer ought to seek a way of achieving its aim without any potentially discriminatory features.

3.1.2 Sections 20 and 21 EA provide that where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled then A has a statutory duty to take such steps to take such steps as it is reasonable to have to take to avoid the disadvantage (the duty to make reasonable adjustments).

3.1.2.1 It must be established that there was a provision, criterion or practice ("PCP") and also that it created a substantial disadvantage for a disabled person over a non-disabled person.

3.1.2.2 It is not enough that there is a disadvantage but any disadvantage must be substantial.

3.1.2.3 Any adjustment must have the intention of removing the substantial disadvantage, and this is with a view to facilitating the claimant's continued work or return to work. An adjustment must have a prospect of succeeding in that aim; success does not have to be guaranteed or to be likely.

3.1.3 Section 94 Employment Rights Act 1996 (ERA) provides an employee with the right not to be unfairly dismissed by their employer. Section 98 ERA sets out potentially fair reasons for dismissal which include reasons related to capability by reference to a number of factors including health or any other physical or mental quality.

3.1.3.1 Subject to a respondent establishing that a dismissal was for a potentially fair reason it is for the Tribunal to determine, in accordance with section 98(4) ERA whether

the dismissal was fair or unfair having regard to the reason shown by a respondent, and the outcome of that determination is dependent upon whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the respondent acted reasonably or unreasonably in treating the actual reason as sufficient reason for dismissal. Such matters are to be determined in accordance with equity and the substantial merits of the case.

3.1.3.2 With ill health capability dismissals it is generally expected that a reasonable employer would consult with the employee, carry out a reasonable medical investigation, consider alternatives to dismissal including suitable alternative employment and will take into account the claimant's work record, mitigating circumstances and any representations made on their behalf, as well as the business needs of the respondent, before dismissing with due notice if all else reasonable fails.

3.2 Breach of Contract: – contractual claims are based on the interpretation of the wording of the contract and intentions of the parties to it at the time they enter into it rather than on principles of reasonableness (such as in the statutory construction of unfair dismissal). As regards a contractual claim what matters is whether there was an offer, acceptance and consideration to form a contract; the clear and apparent sense of a contract ought to be enforced without our substituting any preferred interpretation. If the contract is clear and unambiguous terms should not be implied and meanings inferred unless and only as absolutely necessary to make the contract effective. The Tribunal may be required to enforce what one party considers to be a "bad deal" if that is the deal that was agreed.

4. **Application of Law to Facts (by reference to the agreed List of Issues)**

Disability Discrimination

(1) Did the respondent subject the claimant to unfavourable treatment because of something arising in consequence of his disability, contrary to section 15 of the Equality Act 2010 (EA)? If so, can the respondent show that such treatment was a proportionate means of achieving a legitimate aim?

4.1 Whilst there was some unfavourable treatment as detailed below (namely dismissal) the respondent has shown that such treatment was a proportionate means of achieving a legitimate aim. The respondent's legitimate aim was the need to protect and maintain the highest standards of health and safety and the need to ensure that it has in post people who are qualified and able to carry out the requirements of those posts. By the date of dismissal, which is clearly unfavourable treatment, the respondent had done all that it reasonably could to protect and maintain high standards of health and safety in employing the claimant in a post for

which he was suited and qualified. It proved impossible to secure the claimant's return to work safely in a suitable role for a number of reasons not least the claimant's intransigent refusal of reasonable offers. It would have been disproportionate to require the claimant to work unsafely or in a role for which he was unsuited, or to maintain his employment without active service but on full basic pay indefinitely; the latter course would waste financial and other resources needed to fill the vacancy created by the claimant's dismissal; such recruitment would in turn allow for the respondent to meet its objective with another person and so to provide its services efficiently. The steps taken by the respondent up to and including dismissal were proportionate means of achieving the claimant's legitimate aim.

(2) The unfavourable treatment relied upon by the claimant is –

(a) Refusing to provide the claimant with an alternative role;

4.2 The respondent did not refuse to provide the claimant with an alternative role. The respondent offered various roles that were suitable for the claimant in that they posed no substantial disadvantage to him owing to his disabilities. The respondent offered the claimant an adjusted welding role at Edge Hill under AH's line management, secondments and non-templated roles which were suitable for the claimant taking into account his disabilities, adjustments to the PCPs that were effective, his qualifications, experience and the requirements of the job. Taking into account what arose in consequence of the claimant's disability as detailed below, the inability to place the claimant was down to his refusal to accept reasonable offers and not matters that arose in consequence of his disability.

(b) Dismissing him.

4.3 Dismissal is unfavourable. The claimant was dismissed after a protracted period of absence from work while he was "stood off" during which time he both refused reasonable offers of adjusted roles and intimated a wish to terminate his employment under the ill health severance scheme. In the light of the claimant's conduct (by which we do not refer to misconduct) and his incapacity as evidenced by all that he said and did and the medical evidence available, the respondent acted proportionately in dismissing the claimant. The respondent considered alternatives, making reasonable adjustments to the claimant's substantive role, and offering alternative adjusted roles. When all else failed the claimant made a formal request for ill health severance, and after such a lengthy period of incapacity from his substantive role dismissal was a proportionate response and one that was a proportionate means of achieving the legitimate aim as contended by the respondent and found by the Tribunal.

(3) The "something arising in consequence of his disability" relied on by the claimant is:

(a) The impact of the claimant's impairments (HAVS and stress and anxiety) upon the claimant and associated restrictions on his work

(real or perceived). (The respondent does not accept a perceived restriction can be "something arising in consequence of his disability");

4.4 The Tribunal has made findings of fact as to what arose in consequence of the claimant's HAVS, stress and anxiety. The Tribunal accepted the claimant's evidence contained in his section 6 EA impact statement. The respondent was prepared and able to work around those matters that arose in consequence of the claimant's disability by offering adjusted roles and even bespoke adjusted roles. The claimant refused to accept non-templated roles and secondments and did not cooperate with the respondent's best efforts. The respondent's actions with regard to the placement of the claimant in alternative roles and dismissing him were not in consequence of the claimant's impairments by way of HAVS, stress and anxiety but because of the claimant's intransigence and refusal to cooperate.

(b) The claimant's need for adjustments to be made to some of the alternative roles for which he applied;

4.5 As found above, the respondent had no difficulty in adjusting the claimant's substantive role by removing the requirement to use handheld vibrating tools which would have put him at a substantial disadvantage and it adjusted his line management to avoid stress and anxiety from having to be managed by Mr Cripps. The respondent did not refuse to provide the claimant with an alternative role or dismiss him because of the need to make adjustments.

(c) The respondent's position that the claimant could not benefit from his disability.

4.6 Mr Jones for the respondent referred to a salary cap indicating that an applicant for a job whilst "stood off" that would attract a salary of more than 10% above the pay for the substantive role could not be appointed. He did not know and had no evidence to suggest that that was determinative of any of the recruiting officer's decision to reject the claimant for any of the 25 jobs for which he applied. It was clear in the Tribunal's view that the claimant applied for jobs that were not suitable for him for all the reasons stated in our findings of fact. The Tribunal considers that Mr Jones was speculating and attempting to justify non-appointments with hindsight by making reference to a wage cap for which there was no credible evidence. The Tribunal fully understands Mr Jones' reasoning in feeling that it would be inappropriate to parachute a person into a better paid job, but the Tribunal is also satisfied that there were reasons other than that for the claimant's non-appointment to some of the roles for which he applied. The Tribunal finds that the respondent did not treat the claimant unfavourably by failing to appoint him to an alternative role or dismissing him to ensure that the claimant did not benefit from his disability as alleged.

(5) Did the respondent know or could the respondent reasonably have been expected to know that the claimant was a disabled person at the relevant time?

4.7 The respondent monitored and reviewed the claimant's health regularly and professionally as evidenced by a number of OH reports, the significant ones of which are summarised in our findings of fact. The reports, especially the early ones, gave a very mixed message about the effects of HAVS (and some doubted that the claimant's diagnosis was HAVS); there was some scepticism about the extent of reported symptoms. Whatever the diagnosis the reports up to July 2014 were indicating an ability to work. Even from then there were reports indicating that the claimant's abiding conditions required only that workplace issues be resolved and that the claimant either reduce vibrating hand held tool usage or completely stop it. From July 2014 there were reasons for the respondent to suspect that there may be a "disability" issue or claim but the available evidence and the claimant's assertions were not such that the respondent could be said to have known, or that it ought to reasonably have known, that the claimant satisfied the statutory definition. Notwithstanding this the respondent treated the claimant as if he was disabled in that it took seriously its consideration of reasonable adjustments to remove any real or perceived disadvantage the claimant felt he encountered at work and it sought to avoid the claimant being treated unfavourably because of anything arising from HAVS and anxiety/depression.

(6) Did the respondent fail to comply with its obligations, if any, to make reasonable adjustments contrary to sections 20-21 EA?

(a) The PCPs the claimant relies upon are –

(i) The requirements of his role of team leader (welding);

(ii) The requirements of the roles for which he applied; and/or

(iii) The requirement to return to work.

(b) Was the claimant placed at a substantial disadvantage by such PCPs when compared with no disabled comparators?

4.8 The claimant was placed at a substantial disadvantage for so long as he was required or expected to use a grinder and to do grinding as part of his substantive role. It exacerbated his HAVS-like symptoms and then symptoms that were attributed to HAVS; he could not safely use hand held vibrating tools. He would have been at a substantial disadvantage in any role that required the use of such tools. He asserted that he was at a substantial disadvantage while working under Mr Cripps' management but he did not satisfy the tribunal that this was the case. He had had an issue with Mr Cripps in 2009 but seemed to have come to terms with that for some years (obviously not with his grief or his frustration at not having time off when required in 2009, but with Mr Cripps professionally) prior to 2013. The tribunal did not find that the claimant was actually at a substantial disadvantage with regard to line management in 2014 when,

notwithstanding that, AH made changes. The claimant was at a disadvantage in applying for jobs for which he was totally unsuited but that was often and usually because he applied for jobs where he lacked the required skills and experience. Added to that his disabilities did present him with a situation whereby he would be at a substantial disadvantage such as where he would be required to lift, carry and to concentrate in stressful situation for more than 20 minutes at a time. The claimant was not at a substantial disadvantage in respect of the PCP of returning to work bearing in mind that the return envisaged by AH (and explained to the claimant) was to a job that did not entail either the use of vibrating tools or Mr Cripps' line management.

(c) If so, did the respondent know or could the respondent reasonably have been expected to know that the claimant was likely to be so affected?

4.9 The respondent had no reason to believe that the claimant would be at a disadvantage at all if he returned to a role welding or as a coach/mentor (without grinding) under AH's direct management. He would not have been. None of the roles offered by the respondent would have put the claimant at a disadvantage. The respondent did not require the claimant to use vibrating tools; the respondent effectively by-passed Mr Cripps' management.

(d) If so were the following adjustments reasonable:

(i) Adjusting the claimant's substantive role as welder.

4.10 The respondent removed the PCP of using vibrating tools; that was a reasonable adjustment. The respondent removed the claimant from Mr Cripps' line management even within the Welding and Grinding Team; that was a reasonable adjustment.

(ii) Re-deploying the claimant into an alternative role, with adjustments if required including training and adjusting pay?

4.11 AH made a number of offers of non-templated or seconded roles that removed the use of vibrating tools and Mr Cripp's line management; his offers of redeployment were offers of reasonable adjustments. The claimant's intransigent refusal of all offers was unreasonable and it was his attitude that prevented his return to work. The tribunal did not accept that the claimant had any good reason for his attitude save that he no longer wanted to work in his substantive role (even as adjusted) and at his usual place of work (even with the management issue resolved). The claimant did not want to return to his job.

(e) If so, did the respondent fail to make that/those adjustments?

4.12 No, for all the reasons stated above.

6A The respondent contends that claims under sections 15 and 20 EA in respect of three of the claimant's four job applications upon which he

relies in respect of those claims were presented to the Tribunal out of time in circumstances when it would not be just and equitable to extend the time to the date of presentation of the claimant's claim.

4.13 The claimant was entitled to pay and job protection in given circumstances and subject to conditions for up to two years while "stood off". There was duty on both parties to seek alternative or adjusted employment for the claimant. There was a continuing series of acts (job applications or offers and rejections) throughout the stood off period. The claimant's claims are in time. If the Tribunal was wrong about that it would have found in any event that it was just and equitable to extend time in respect of each of the claims relating to each of the job applications because of the period of grace of up to two years allowed for him to secure alternative employment. It would be unreasonable to have expected the claimant to present a claim in respect of each and every rejection in turn as it occurred over a period of two years against an employer with whom he may have wished to return to work and who was willing to employ him. Either because the claims are in time or by way of an extension of time the Tribunal was prepared to consider the claimant's claims.

Unfair Dismissal

(7) Was the claimant dismissed for a potentially fair reason pursuant to section 98(2) (a) of the Employment Rights Act 1996 (ERA), namely capability?

4.14 Yes. The claimant was not capable of fulfilling his full substantive role at Edge Hill under the management of Mr. Cripps. He was not prepared to work under the adjusted work and management regime proposed by the respondent; he remained absent from work for over two years in those circumstances.

(8) Did the respondent act reasonably in treating the claimant's capability as a sufficient reason for dismissing the claimant?

4.15 Yes. The respondent did all it reasonably could to facilitate the claimant's safe return to work in a suitable role. The fact that it failed was down to the claimant's intransigence and his inability to work to his original contract under the initial management structure. Faced with an impasse the respondent reasonably concluded that there was nothing left other than dismissal, and not least when the claimant indicated to OH that he wanted to leave his employment and that he requested ill health severance.

(9) Was the dismissal of the claimant fair in all the circumstances? In particular, was the dismissal within the band of reasonable responses available to the respondent? The claimant relies on the following alleged unfairness:

(a) The commencement of the ill health procedure being in breach of his terms and conditions of employment/the stood off arrangements;

4.16 The claimant was allowed stood off protection for up to two years; he refused reasonable offers that would have seen his return to work and he refused the offered adjustments to his substantive role. In those circumstances pay and job protection could be ended before the expiry of two years stood off. The respondent giving the claimant notice of termination following a fair procedure within two years of his being stood off was not unreasonable. In fact it was generous of the respondent to defer termination on that notice until after the expiry of two years which gave the claimant the benefit of any doubt and allowed more time for the claimant to save his employment should he wish to do so.

(b) The respondent's failure to consider alternatives to dismissal;

4.17 The respondent did not so fail. The respondent considered and offered several alternatives to dismissal all of which would have allowed the claimant return to work without any disability related disadvantage. He refused.

(c) The respondent's failure to reasonably consider the claimant for redeployment opportunities;

4.18 The tribunal's conclusion is as at (b) above.

(d) The dismissal constituting an act of unfavourable treatment because of something arising in consequence of disability (section 15EA);

4.19 The dismissal did not arise in consequence of the claimant's disabilities. What arose was the claimant's inability to use vibrating tools and his assertion that he could not be managed by Mr Cripps. The respondent was prepared to and did deal with those consequences while retaining the claimant in employment and would have continued to do so had the claimant not been intransigent and had he wanted to remain in employment.

(e) The dismissal arising from a failure to make reasonable adjustments which could have avoided the dismissal (sections 20-21 EA) bearing in mind the size and resources of the respondent;

4.20 The respondent did not fail to adjust the PCPs affecting the claimant's substantive role that put him at a substantial disadvantage (the use of vibrating tools). It did not fail to adjust the claimant's line management which he asserted, but did not prove, put him at a disadvantage. The dismissal arose from the claimant's intransigence and his own volition.

(f) The respondent's failure to follow a fair procedure or fully investigate the medical position as at the date of termination.

4.21 The respondent followed a prolonged and exhaustive procedure including thorough medical investigation, extensive consultation, and the genuine attempt to facilitate the claimant's safe return to work in a role to which he was suited. The claimant was represented by his union throughout. He was given every opportunity to make appropriate job applications and

representations. He was allowed to grieve and appeal and both procedures were fair and reasonable, as was the capability procedure.

Breach of Contract

(10) Did the respondent breach the claimant's contract of employment? The claimant relies on a breach of the stood off arrangement and contends that the ill health procedure should not have been commenced until 20 May 2017 at the earliest. But for the breach the claimant contends that he would have received an additional four months' pay.

4.22 The stood off provisions could apply for up to two years; it did not provide for a two year fixed period. Contractual pay and job protection could be ended upon an unreasonable refusal of work by the claimant or by his indicating that he wanted ill health severance. He did both. He did both within two years of the start of his stood off protection. The respondent was entitled to start capability procedures and to serve notice within two years of the claimant being stood off. Presumably out of abundance of caution and to give the claimant the maximum time to come to terms with returning to work in an adjusted capacity the respondent served notice such that termination would only occur after the expiry of the maximum stood off period. The respondent did not breach the claimant's contract.

(11) Following from the above, did the claimant suffer an unlawful deduction of four months' pay from his wages?

4.23 No. The claimant was paid in accordance with his contract; he received due notice, pay to termination and an ill health severance lump sum. There was no unlawful deduction form wages.

Employment Judge T Vincent Ryan

Date: 18.06.18

JUDGMENT SENT TO THE PARTIES ON
16 July 2018

FOR THE TRIBUNAL OFFICE