EMPLOYMENT TRIBUNALS

Claimant: Mr J Moffitt

Respondent: Virgin Media Ltd

HELD AT: Manchester **ON:** 30 October - 1 November 2018

BEFORE: Employment Judge Slater
Mr R W Harrison
Mr W Haydock

REPRESENTATION:

Claimant: Mr Moose, Union Representative
Respondent: Mr MacCabe, Counsel

JUDGMENT

1. The unanimous judgment of the Tribunal is that the complaint of failure to make reasonable adjustments is well founded.

2. There will be a remedy hearing on 11 February 2019.

REASONS

Claims and Issues

1. The only complaint to be determined by the Employment Tribunal was one of failure to make reasonable adjustments. Complaints of direct disability discrimination and discrimination arising from disability had been dismissed on withdrawal prior to the final hearing.

2. The issues in relation to the failure to make reasonable adjustments claim had been identified at a preliminary hearing on 3 April 2018 as follows. The claimant's case was that the respondent applied a provision, criterion or practice (PCP) requiring only blended roles in terms of physical access roles and the Service

Technician role (a diagnostic role) as opposed to service and physical access roles being separate. The claimant alleged that that PCP put him at a substantial disadvantage on the basis that, not being able to perform the physical aspects of that blended role, he could not perform any role. The claimant alleged that the respondent was under a duty to make reasonable adjustments and as such, should have

(a) "job cleaved" to provide a service only role for the claimant; and/or

(b) Removed aspects of the job the claimant was unable to do

3. The issues for the Tribunal to decide were agreed to be as follows: -

(a) Did the respondent apply the PCP alleged?

(b) If so, did that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

(c) If so, did the respondent know or ought it reasonably to have known that it did so?

(d) If so, did the respondent take such steps as it was reasonable to have to take to avoid the disadvantage caused by that requirement? This involved considering the following questions: -

(i) Would the adjustment claimed by the claimant have avoided the disadvantange?

(ii) If so, was it reasonable for the employer to have to take that step?

4. The Tribunal had understood from the notes of the Preliminary Hearing held on 3 April 2018 that the relevant period for considering whether there was a failure to make reasonable adjustments began on 11 October 2017. Following the issuing of the proceedings, the claimant successfully returned to work, with adjustments having been made, on 30 April 2018. The Tribunal, therefore, understood that it was to consider whether there was a failure to make reasonable adjustments in the period 11 October 2017 to 30 April 2018.

5. In closing submissions, the claimant's representative sought to extend the period to be considered, extending it back to August 2017. The Tribunal proposed to consider this as an application to amend the claim. However, the claimant decided to withdraw the application to amend. The relevant period for the Tribunal to consider, therefore, remained 11 October 2017 to 30 April 2018. Matters prior to 11 October 2017 could, of course, still be considered as background material relevant to the claim.

Facts

6. The claimant began employment with Telewest in 1999. His employment later transferred to the respondent. The last written contract which either party has

been able to provide is a contract dated 10 April 2008 describing the claimant as a Customer Service Technician. Until August 2008, the claimant worked as a Service Technician. In August 2008, the service and installation departments merged. All Service Technicians, including the claimant, changed to being Area Field Technicians (AFTs) doing both service and installation work. The respondent wanted AFTs to do both installation and service work because they considered this to be more productive for the company and beneficial to customers and employees. The respondent considers they can adapt more easily to customer demands if AFTs do both types of work.

7. In June 2010, the claimant had an accident at work, causing an injury to his knee. The claimant was in and out of work for the next four years, undergoing knee surgery and physiotherapy. His last return to work, prior to the lengthy period of absence ending in October 2017, was in May 2014. We accept the claimant's evidence that, in the period May 2014 until 16 February 2015, when he began his lengthy period of sickness absence, he struggled with the installation side of the role. In a meeting with his manager at the time, Mark King, the claimant asked if he could abstain from installation work for an agreed period of time. Mark King, after consulting with another manager, told him that this would not be an option.

8. The claimant began a lengthy period of sickness absence on 16 February 2015. From November that year, he began to receive payments under a permanent health insurance policy.

9. In January 2016, Andrew Todd became responsible for the North-West region which became part of a new north super region headed by Andrew Todd.

10. On 8 September 2016, the claimant emailed Andrew Todd asking questions including whether there were going to be any jobs available for someone like him who could not do the job he had been doing due to a work accident which left his knee and leg unsafe for him to kneel or work on ladders safely. He also asked whether there was likely to be any voluntary redundancy for Service Technicians. Andrew Todd passed this email to Kieran Tulley to deal with. We have seen some email correspondence which followed between the claimant and Kieran Tulley. On 9 January 2017, Mr Tulley informed the claimant that there would be no offer of voluntary redundancy and assured the claimant that he would continue to send him up to date jobs board details.

11. Sometime in 2016, Andrew Todd noted that there appeared to be a problem with sickness levels in the North West and a number of AFTs had a limited range of tasks due to historic and/or current injuries, illness or alleged disabilities, some of which cases had not been reviewed with occupational health for many years. Part of the review process which followed included arranging for Dr Mark Simpson, an Occupational Health Physician, to spend a day with a Field Technician in November 2016. In a letter dated 7 February 2017, regarding another employee but on which the respondent came to rely in the claimant's case, Dr Simpson wrote the following:

> "Having spent a day with one of your Field Technicians, I am aware of the range of tasks they perform in both service and installation capacity. It is

> clear that there really is little in the way of practical difference between these roles, in terms of the physical demands".

12. He wrote that he would not make a practical distinction between the two different aspects of the role and the same considerations with regard to workplace adjustments and restrictions would apply to both.

13. On 7 August 2017, the claimant had a meeting with Peter Wick. We note that, in the grievance investigation, Peter Wick, who did not give evidence to this Tribunal, disputed that he said at this meeting that the claimant could return to work on a service only basis. However, based on the emails the claimant sent following this meeting, we find that Mr Wick gave the claimant the impression in this meeting that it would not be an issue for the claimant to return to work on a service only role, given there were already people doing this. Whilst we consider it unlikely that any binding agreement was reached at this meeting, we find that it is more likely than not that the emails correctly reflect the claimant's understanding following this discussion. The claimant expected to return to work on a service only basis with effect from 29 August 2017.

14. The claimant asked Peter Wick for a copy of his notes from the meeting. We find that Peter Wick originally agreed to do this and then failed to supply any notes and stopped corresponding with the claimant. Mr Wick informed the grievance investigation that he had made notes on a scrap of paper but no longer had these notes.

15. Having failed to hear anything further after the meeting with Peter Wick, the claimant emailed Kieran Tulley on 15 August. It appears from the emails that they then spoke and Kieran Tulley confirmed by email of 16 August that Area Field Manager Adrian Priestley would contact the claimant on his return from annual leave in the week commencing 21 August. Mr Tulley told the claimant that he was not to return to work on 29 August doing just service and that Adrian Priestley would need to evaluate the situation fully prior to any return to work being agreed.

16. The respondent sought an occupational health report relating to the claimant which was produced by Dr Coker an Occupational Physician, dated 15 September 2017. It is apparent from the letter that Dr Coker had seen the claimant in clinic and had assessed his movement. He wrote:-

> "In my view, Mr Moffitt is fit to undertake a role which does not involve climbing ladders. He can kneel, but should wear knee protection at all times. He will be unable to repeatedly squat and rise. He is able to drive. In my opinion, he would be better in a service rather than an installation role. These restrictions are likely to be applicable into the longer term.
>
> The disability provisions of the Equality Act are likely to be applicable.
>
> There is a realistic prospect that he will be able to render reliable service and attendance into the future within a suitable role".

17. Dr Coker advised that the claimant was fit to resume working in a service role with the adjustments described above. He invited the respondent to contact him if they required any further clarification. It appears that further clarification was sought by Adrian Priestley. The clarification he sought, in an email dated 26 September 2017, was for the doctor to explain the difference between service and install activities and why he felt the claimant would not be able to carry this key part of the role. The doctor's response came in an email dated 28 September 2017. It appears, therefore, that the questions suggested in Rae Ibbotson's email of 2 October 2017, which came after Dr Coker's response, did not form part of the request for clarification of Dr Coker.

18. In the email dated 28 September 2017, Dr Coker's response was conveyed as follows: -

> "the employee explained that install work often involved ladders and prolonged kneeling but service work was generally lighter. On that basis, service work would be less likely to exacerbate his symptoms. Obviously, the employee understands more about the nature of his work duties than I do, and may be able to provide you with further clarification if needed. I hope that this helps".

19. It does not appear that any other questions or further clarification requests were put to Dr Coker.

20. Adrian Priestley became the claimant's line manager with effect from 22 September 2017. The claimant's return to work was arranged for 6 October 2017, during a period of Mr Priestley's pre-arranged leave. Another manager, Paul McGrath, was asked to manage the claimant's return to work during Mr Priestley's absence on leave.

21. We have seen no evidence that there was any discussion with the claimant about adjustments he would need prior to his return to work on 6 October 2017.

22. On 6 October 2017, the claimant attended a return to work meeting with Mr McGrath and another manager, Paul Summers. Mr Summers attended the meeting, we were told by Mr McGrath, to ensure that Mr McGrath did not miss anything. The claimant was not accompanied by a trade union representative or anyone else. The return to work form was completed and an attendance support plan completed and signed by Mr McGrath and the claimant. Whilst we accept the claimant had concerns about the plan, he did not express disagreement with the plan in the meeting. He was told that his line manager would discuss the plan further with him when he returned from holiday.

23. The plan recorded the occupational health recommendations, which included: return to work in a role which does not involve climbing ladders; wearing knee protection at all times; being unable to repeatedly squat and rise; and an option to do service work rather than install work. We find that Mr McGrath was dismissive about Dr Coker's report, we find that, as the claimant explained in the grievance appeal meeting, Mr McGrath and Mr Summers said that Dr Coker did not know what the job

entailed. The claimant commented in the grievance appeal meeting "it was quite arrogant the way they were coming across about the doctor's report".

24. Mr McGrath made use of Dr Simpson's occupational health report from a different case, where Dr Simpson referred to the day which he had spent with Field Technicians and concluded that there was little in the way of practical difference between the service and installation roles in terms of the physical demands.

25. Mr McGrath was insistent that the claimant had to return to the role which included both service and installation. The plan included introducing the claimant to install work, starting with 25% and increasing to 50% after four weeks, if reviews were ok. The claimant is recorded as saying that he could complete service work but, on an install, he could not climb ladders and could not clip long lengths of cable because of constant crouching. He wrote that, on internal work, he could adjust his body on internal floors in order to take pressure of the knee but external re-wires on service would be an issue as with installs. Although the claimant's view remained that service work would be better for him than install work, as indicated in Dr Coker's report, the claimant was also flagging up that some adjustment would be needed to service work as well.

26. Mr McGrath recorded the adjustments. For action to be taken in relation to ladder work, he wrote: "No ladder work. This will be assessed by local H & S officer". He also wrote "process to be given around risk assessment issues if ladders required". There is no adjustment which is expressly stated to relate to the difficulty with kneeling and squatting. Mr McGrath, in evidence, said that the reduced workload was the adjustment because this would give the claimant more time. He gave oral evidence that he discussed this with the claimant. However, the plan indicates that the reduced workload was to be for a six week period, building up to 100% service at the end of six weeks. Other parts of the plan also stated an expectation that the claimant would get back to full quota. However, it was apparent from the occupational health advice, that the issue with kneeling and squatting was an ongoing issue. A phased return to full quota would not, therefore, address this issue on an ongoing basis. This appears more to be a phased return than an ongoing reasonable adjustment due to problems with kneeling and squatting.

27. In relation to the ladders, Mr McGrath said he did not have any discussion with the claimant about what the difficulty was, although the claimant did record in the form that his knee could give way. Mr McGrath said in evidence that he wanted the local health and safety officer to have a discussion with the claimant but expected the health and safety officer to say that there should be no ladder work. Mr McGrath did not seek clarification from Dr Coker if he was doubtful as to whether it was correct that the claimant could not climb ladders. The respondent has suggested that the claimant was aware that he could call on an Area Field Coach for assistance if a job required ladder work. We find that the claimant was aware of the resource of Area Field Coaches, whether under that title or their predecessor title. There were four AFCs at the time for around twenty or twenty-five AFTs working on any one day. The claimant had done the predecessor role. He regarded this role as being largely to cover for sickness absence. Whilst the claimant was aware of this general resource, we find that he did not know, and he was not told by Mr McGrath, that he could call on the AFCs to do work which he was unable to do because of

disability. We do not consider that the suggestion the claimant made in the appeal hearing that, if he did attend a job requiring him to climb a ladder, maybe a coach could come out to check it, indicated that the claimant was fully aware that this resource was available as a reasonable adjustment at the time in the meeting on 6 October 2017.

28. It is common ground that the claimant was provided with knee pads as part of the standard equipment issued to AFTs.

29. Mr McGrath did not take any advice from case management in drawing up the attendance support plan in the page headed "back to work plan". Mr McGrath completed the answer "no" to the box "permanent change to role/tasks".

30. The claimant returned to work that day, 6 October 2017. He started with training and then shadowing another AFT for a few days. During this period of shadowing, the claimant was summoned to a meeting with Mr McGrath on 11 October. We accept that Mr McGrath had asked Paul Summers to ask the claimant to attend a meeting to discuss the possibility of the claimant going on a two-week installation course in Scotland at short notice. The claimant gave evidence that he received a telephone call, which we presume must have been from Mr Summers. We accept the claimant's evidence that he was asked how things were going. The claimant gave the example of the job he was working on, assisting another engineer, and stated that he would never be able to complete the type of install jobs of that magnitude without assistance due to excessive high and low-level work required. He was then asked to attend a meeting. We accept that Mr McGrath understood from what Mr Summers relayed to him that the claimant had said he was not going to do installation work. It may be that some of the detail of what the claimant said got lost in the process of relaying this information. On the basis of Mr McGrath's evidence, we find that the meeting, which was also attended by Mr Summers, started with Mr McGrath relaying to the claimant his understanding that the claimant had said he was insisting that he would only do service work.

31. We find that the rest of the conversation continued as recorded in the notes beginning at page 145 of the bundle. These notes were signed by both Mr McGrath and the claimant as a true and accurate record of the discussion. When asked the reasons for insisting that he should only do service work, the claimant explained that he had been advised by the CWU due to the fact that it would deteriorate even faster, for his own health. They said they thought it would deteriorate faster because it had done so last time. Mr McGrath asked, "so you are stating that you are unable to carry out the role of an Access Field Technician completing install and service work?" The claimant replied "Yes". Mr McGrath asked what he was looking for and the claimant said first to carry out service only and second, a health and safety role when it comes up. Mr McGrath informed him that service only was no longer an option and jobs for health and safety were not due until the earliest quarter one in 2018. He asked the claimant "so where do we go from here?" The claimant replied that he would have to go back on sick leave and wait for health and safety jobs to become available. Mr McGrath asked whether a mixture of service and install work would not be a better option as it would be less jobs than a full-service route. The claimant replied "install would be ideal if I didn't have to keep getting up and down all the time was out with tech this morning and viewed him and I cannot do that work."

Mr McGrath concluded the meeting saying, "pending further enquiries with case management and regional management you are currently by your admission still unfit to carry out the role of an Access Field Technician so will be sent home". Mr McGrath did not seek to explore further what adjustments might allow the claimant to carry out the combined role, either at this meeting or by arranging a further meeting.

32. Mr McGrath then passed the matter to HR and Mr Priestley but any further steps which might have been taken were then overtaken by the claimant presenting a grievance and the respondent addressing this. The claimant, by an email to Kieran Tulley of 11 October, wrote that, in response to the meeting on 11 October, he wished to raise a grievance on the grounds of discrimination as per the 2010 Equality Act. He wrote that it was unlawful to discriminate against employees including working because of a mental or physical disability. The claimant set out his grounds of grievance in more detail in an email sent on 21 October 2017. He gave a brief description of the meeting on 6 October, saying that he had pointed out the result of the occupational report and Mr McGrath replied, "doing install and service require you to do the same procedures and occupational don't know the job". He wrote that, in the further meeting, he explained that he had been out in the field with a tech who was doing an install and this had confirmed his earlier statement that he would struggle to fulfil the role of installs. The claimant set out a list of questions, including why the respondent chose to ignore the advice of an occupational health doctor and why he was not given the chance to return to work on service only when there were techs currently in the field given that opportunity.

33. The claimant attended a grievance hearing with Gary Daffern on 25 October 2017. The meeting included Mr Daffern asking the claimant to explain what he could and could not do on the roles of service and install. The claimant explained that he could not use ladders because his knee was likely to give way. He explained that external work was more of a problem that inside work, as inside he could lay on the side of his leg and there were more obstacles outsides than there were inside.

34. Mr Daffern followed up the meeting by speaking to Peter Wicks, who said there was no document that agreed the claimant could return on service only and he had not said this. Mr Daffern did not speak to Mr McGrath. Mr Daffern's understanding about the adjustments which had been made was taken from the attendance support plan and a conversation with HR. Mr Daffern said in evidence that he assumed Mr McGrath had discussed with the claimant the support available from AFCs. However, he makes no reference to this conclusion in his grievance outcome.

35. By letter dated 23 November 2017, Mr Daffern provided the outcome to the grievance. He did not uphold the claimant's grievance. In his letter, he confirmed that there were some technicians working on service only as part of historical agreements but wrote that this was under review and subject to change. He referred to Dr Simpson's finding that installation and service jobs in their physical requirements are like for like and they do not differ in physical requirement. He wrote "I appreciate that you do have concerns regarding squatting and using ladders etc however both these activities are present whether you are installing services or you are required to fix the customer's services. Separation of the two elements of the role would not alleviate these requirements". Mr Daffern wrote that if the

claimant was routed to service only jobs, he would be given up to 14 service calls within the day. He wrote that longer time was given to installation, reducing the number of visits. He wrote "based upon the medical opinion and my observations, I do not believe that splitting the Access Field Technician role would be beneficial to you. I do believe that having the two aspects in the Access Field Technician's role could be beneficial to you given your health concerns, in removing the installation element of the role I believe you could potentially do more jobs per day which could potentially increase the need for you to squat and climb ladders which is an area of concern raised by yourself and occupational health".

36. In writing that the two roles would be beneficial to the claimant, Mr Daffern was expressing his own view, which was not based on either the opinion of Dr Coker, which had been to the contrary, or the opinion of Dr Simpson, which had not expressed any view as to whether doing the combined role would be better than doing the service role only. Mr Daffern wrote that the respondent was committed to making reasonable adjustments to enable the claimant to return to the work place. He wrote "I am aware that your line manager has already arranged for you to have a six-week phased return to work on reduced quota, with regular catch ups each week to check how you are doing. Your line manager has already committed to supporting you and this includes making reasonable adjustments to the role. One area your manager has highlighted is the use of ladders and I am aware he has spoken to you to ensure that you have access to support should a job require the use of high ladders, this may include swapping the job with colleagues or seeking assistance. I would therefore encourage you to continue these conversations".

37. We previously noted that the conclusion that Mr McGrath had spoken to the claimant about access to support should a job require the use of high ladders was based on an assumption that Mr McGrath had discussed this, rather than on anything recorded in the plan. Mr Daffern did not know what was said by Mr McGrath since Mr Daffern did not speak to Mr McGrath about this. Mr Daffern did not write anything about what adjustments, if any, were being made to deal with the problem of repeated squatting and kneeling. Although Mr Daffern said, in evidence, that this was dealt with by the reduced work load, this does not appear in his outcome letter or his witness statement. It seems likely to us that this is a later thought, developed with the benefit of hindsight, rather than something he thought about at the time. Had he thought about it at the time, we consider it likely he would have addressed it in his outcome letter. We would have expected him to explain how this was an adjustment when the plan provided for the claimant to be back to full quota at the end of six weeks.

38. By an email dated 26 November 2017, the claimant appealed against the grievance outcome. Amongst other things, the claimant took issue with the suggestion that the service only roles would require him to constantly squat or work up ladders.

39. The appeal was heard by Alan McEwan on 13 December 2017. The claimant was accompanied at the meeting by a trade union representative. The claimant explained, amongst other things, to Mr McEwan that, while he could get down internally, he could not do so outside. He confirmed that he believed that a service only capacity would minimise the need for him to squat and rise and do ladder work,

because it was highly unlikely he was going to be inside on a ladder tackling cables. Mr McEwan put to the claimant that, if he were to return on service only, further reasonable adjustments would still be required. The claimant said that he was aware that he could not climb ladders but it would not be as much. He said he would then have to speak to a manager and explain that, if he did attend a job requiring him to climb a ladder, could a coach maybe come out to check it. He said that on installs he was tacking cables on 90% of the jobs, either low level or high level, and in all the years he had done it, he had only had one or two jobs on service where he had to go on ladders to replace a cable. He said his required outcome to the grievance was to be able to return to work on service with ongoing support.

40. Mr McEwan did not speak to Mr McGrath before providing his appeal outcome.

41. On 13 December 2017, the claimant contacted ACAS under the early conciliation procedure. We did not hear any evidence from the respondent as to when, or if, ACAS contacted them.

42. By letter dated 2 January 2018, Mr McEwan provided his appeal outcome. The appeal was not allowed other than in one aspect, where Mr McEwan considered that Mr Daffern could have been clearer in his reference to driving in his outcome letter. However, the appeal outcome letter referred to the need for a thorough examination to be undertaken of which physical tasks could and could not be done by the claimant in order to produce a tailored set of reasonable adjustments which would allow the claimant to return to work in a safe and sustained manner. Mr McEwan wrote that this might result in specific tasks being identified as unrealistic and/or unsafe for the claimant to undertake. Mr McEwan wrote "Virgin Media realise that some potentially significant adjustments to the role of Access Field Technician will need to be made to ensure the objective of a safe and sustainable return to work for you is achieved. Virgin Media are willing to make these adjustments once a full review of your physical capability to undertake a range of work tasks has been conducted during a comprehensive return to work programme. An inability to repeatedly squat and rise and an inability to climb ladders have both been confirmed as physical capability issues for you therefore adjustments to overcome or aid these work tasks will need to be incorporated into any solution. The fact remains, these adjustments will need to be implemented across all work types as squatting and rising and climbing ladders is a required work task across all work types. This significantly reduces the effectiveness of any service task only adjustment that Virgin Media could offer to you".

43. Mr McEwan wrote that key decisions were still to be made in ensuring the claimant's successful return to work. He ended by writing "Virgin Media are willing to explore and implement the required adjustments to the Access Field Technician role and support your return to work as soon as reasonably possible. With that in mind, I will ask the Area Field Manager for your area, Adrian Priestley, to contact you on Friday 5 January at 1pm to discuss the next steps in your return to work programme". It appears implicit in what Mr McEwan wrote about there needing to be a full review of the claimant's capabilities and key decisions still to be made, that he did not consider it apparent from the plan produced by Mr McGrath that such a process had already been completed.

44. The ACAS Early Conciliation Certificate was issued on 9 January 2018.

45. On 23 January 2018, Adrian Priestley informed the claimant that they would be getting an up to date occupational health report and then would have a wellbeing meeting to discuss reasonable adjustments or alternative roles. He wrote "as previously discussed our Technician roles consist of a combination of both service and install work, which would be the requirement should you return to the role; however, we will discuss what reasonable adjustments would need to be made in order to ensure you would be able to do this without impacting your condition".

46. The claimant presented his claim to the Employment Tribunal on 26 January 2018.

47. The respondent made a referral to occupational health and Dr Coker produced a further report on 9 February 2018. Dr Coker wrote "regarding restrictions, these are likely to be long term. He can only kneel for brief periods and should use good knee protection. He cannot undertake significant squatting. He cannot use ladders safely. He would be unable to undertake any significant manual digging". He wrote that the claimant was not fit for the full duties including installation and wrote "I do not believe that he can undertake installation duties for the reasons stated above. A phased return or adjustments would not be relevant to installation duties. If installation duties are considered to be an integral part of his role, then you may wish to consider whether he could be re-deployed to a less physically demanding role".

48. The respondent asked for a review of the case by Dr Simpson and Dr Simpson produced a report dated 28 March 2018 based on a paper review. He wrote "I have reviewed the required task list of both the service and install elements of the Area Field Technicians role. In addition, I have also reviewed this in the light of my own personal experience of accompanying an Area Field Technician on a ride out day to observe these requirements in practice. I would therefore not differentiate between the install and service elements as such but the following are the suggested restrictions that should apply to either element of the role." These included: -

(1) That the claimant should not undertake prolonged kneeling of greater than 30 minutes duration.

(2) He was not fit to undertake work requiring the use of ladders and he should not undertake prolonged squatting of 30 minutes duration or longer.

49. Along with this report, a wellbeing meeting was held with the claimant with Adrian Priestley and Catherine Wilkinson, Case Manager, People Team. On 25 April 2018, Mr Priestly wrote to the claimant, summarising the meeting and setting out the proposed adjustments. In relation to kneeling, he wrote "should not undertake prolonged kneeling, Jeff should make sure he takes regular breaks from kneeling down, extra time should be incorporated into jobs, company to provide knee pads". In relation to squatting he wrote "should not undertake prolonged squatting – Jeff should make sure he takes regular breaks from squatting. Extra time should be incorporated into jobs". In relation to ladder work, he wrote "not fit to undertake

work that requires the use of ladders. JM should contact line manager if and when the work allocated involves the use of ladders".

50. Mr Priestley wrote in the letter that they would assess these workplace adjustments on an ongoing/regular basis. He proposed a phased return for a period of four weeks, in accordance with the proposals set out in the letter, but wrote that this was not set in stone and could be amended. He wrote that the phased return would incorporate regular one to ones with his line manager.

51. The claimant returned to work on 30 April 2018.

52. Mr Priestley gave evidence that, because of the type of agreed adjustments, the majority of work by the claimant has been service work, although the claimant has done some installation work. We accept the claimant's evidence that, at the time of writing his witness statement, during five months, he had picked nine install jobs; two of these had been returned back to despatch because external ladder work was required and working in a confined space. He received assistance from another engineer to complete two of the install tasks and the other five tasks were pre-wired so there was no external work required.

53. The claimant and the respondent consider that the return to work has been successful. The claimant is working satisfactorily with the adjustments which have been made.

The parties' submissions

54. The parties' submissions were focused on the issue of whether the respondent had failed to make reasonable adjustments in the period 11 October 2017 to 30 April 2018. The respondent did not seek to persuade the Tribunal that the PCP was not applied or that the PCP did not put the claimant at a substantial disadvantage. The representatives made oral submissions and we do not to seek to record all their submissions but summarise the main points.

55. Mr MacCabe, for the respondent, submitted that the same adjustments would have to be made both for service and installation work. Providing a service only role for the claimant would not, therefore, assist the claimant. Mr MacCabe submitted that the attendance support plan stated no ladders; the statement that it would be assessed did not mean that ladders would be used by him. Mr MacCabe submitted that the claimant was aware that ASTs existed and that they were there to give assistance if needed. This was such common knowledge that it was not in the ASP. In relation to kneeling and squatting, Mr MacCabe submitted that the reduction in workload would give more time for installs and, therefore, be better for his knee. Adjustments had been agreed in October but were not implemented because the claimant was intransigent and insisted that he did service only, although he had previously agreed with the plan.

56. Mr Moosa, for the claimant, submitted there was a clear failure to make adjustments in the McGrath meeting. Mr McGrath identified the occupational health recommendations but did not carry these recommendations through into adjustments. At the second meeting with Mr McGrath, Mr McGrath was not

forthcoming in making adjustments. His approach was negative and, if he had applied his management skills, we would not be here today. Mr McGrath did nothing to defuse the situation and failed to take the opportunity to offer solutions or adjustments. The claimant reasonably formed the belief, on the basis of having done the roles, that the service role would be better for him and he could see other people doing a service only role. The meeting broke down because Mr McGrath failed to offer solutions.

The Law

57. The provisions relating to the duty to make adjustments are included in Section 20 of the Equality Act 2010 and Schedule 8 to that Act. Schedule 8 imposes the duty on employers in relation to employees. Section 20(3) imposes a duty comprising:

> "a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage".

58. Paragraph 20 of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know, and could not reasonably be expected to know, that the employee had a disability and was likely to be placed at the relevant disadvantage.

Conclusions

59. The respondent did not argue that a PCP was not applied and we conclude that a PCP requiring only blended roles in terms of physical access roles and the Service Technician Role, (a diagnostic role), as opposed to service and physical access roles being separate, was applied by the respondent. It was a clear policy of the respondent that AFTs should have a dual role for business reasons, as Mr Todd explained.

60. The respondent did not argue that the claimant was not put at a substantial disadvantage by the application of this PCP and we conclude that the claimant was put at a substantial disadvantage by this PCP. The claimant could not do ladder work, which was more frequent in install work, and squatting and kneeling were more easily managed internally because he could adopt different positions and there were fewer obstacles than outside.

61. The respondent did not argue that they did not have knowledge of disability and that the claimant was likely to be placed at the relevant disadvantage. From the occupational health reports, it is clear that the respondent had the requisite knowledge of disability and disadvantage. We conclude that the respondent had the requisite knowledge of disability and that the claimant was likely to be placed at the relevant disadvantage by application of the PCP.

62. The issue for the Tribunal to determine is, therefore, whether, in the period 11 October 2017 to 30 April 2018, the respondent failed to make reasonable adjustments, the duty to make reasonable adjustments having arisen. The first adjustment contended for by the claimant was that the job should be "cleaved" to provide a service only role for the claimant. We conclude that this would not have been a reasonable adjustment since this would not have served to alleviate the disadvantage. Whilst it would have significantly reduced ladder work, in a service role, there was the potential for some limited ladder work and kneeling and squatting would still be required.

63. The second adjustment contended for by the claimant is that the respondent should have removed aspects of the job the claimant was unable to do. The respondent argues that they did make reasonable adjustments in a plan set out by Mr McGrath. We conclude that the proposals recorded in that plan do not constitute reasonable adjustments. Although the plan states "no ladders", this statement is then undermined in other places in the plan where Mr McGrath writes that this will be assessed by a local Health and Safety Officer, suggesting the possibility that, subject to this assessment, ladder work may be re-introduced. This would be contrary to the clear advice of Dr Coker. Mr McGrath also wrote "process to be given around risk assessment issues if ladders required". The meaning of this is not entirely clear but it suggests the possibility that, subject to risk assessment, the claimant may be required to climb ladders. There was clear occupational health advice that the claimant could not climb ladders. The respondent did not seek any further information about this point from the occupational health adviser. Mr McGrath appears to be undermining that advice and not making the full adjustment required, which would be an unequivocal assurance that the claimant would not be required to use ladders. The claimant was not told that he could, via his line manager, use the resources of an AFC for ladder work if this was required on a job. We do not consider that the general awareness of the resource of AFCs, available to everyone if they got into difficulty on jobs, was the same as a reasonable adjustment that the claimant could use this resource if ladder work was required.

64. In relation to kneeling and squatting, we are not satisfied that there was any adjustment for this in the plan. The plan does not expressly refer to any adjustment for this. We do not consider this was a mere defect in the clarity of the paperwork. We conclude that it is, rather, an indication that this was simply a temporary six week phased return, which might have been given to anyone on long term sickness absence. Such a phased increase, up to 100% of quota after six weeks, did not address a problem which it was clear, on the basis of medical advice, was a long term, ongoing problem.

65. We conclude, therefore, that the respondent failed to make reasonable adjustments in the period 11 October 2017 until 30 April 2018, when it is agreed that the claimant returned to work with suitable adjustments being in place.

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Employment Judge Slater

Date: 15 November 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

.20 November 2018

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FOR THE TRIBUNAL OFFICE