EMPLOYMENT TRIBUNALS

Claimant: Mr C Reay

Respondent: Nissan Motor Manufacturing (UK) Limited

Heard at: North Shields **On:** 6, 7, 8 and 9 November, 2017

Before: Employment Judge Nicol **Members:** Mr M Brain
Mrs L Jackson

Representation

Claimant: Mr R Owen, CAB
Respondent: Ms K Jeram, Counsel

REASONS

1 At the end of the hearing, the Tribunal gave its Judgment and Reasons for the Judgment. The claimant requested that the Tribunal should set out its Reasons in writing. Accordingly, these Reasons set out the Tribunal's findings in support of its Judgment. Whilst the wording and order may differ from the announced version, this is with the benefit of more preparation time and is not the result of further deliberations by the Tribunal.

2 These are complaints by Colin Reay, the claimant, against Nissan Motor Manufacturing (UK) Limited, the respondent, arising from his employment with the respondent as manufacturing staff in the respondent's paint shop at its site at Washington, Tyne and Wear. The claimant's employment with the respondent commenced on 19 October, 2009, and the effective date of termination was 20 June, 2016, when the claimant had been in continuous employment for six complete years.

3 The Claimant alleges that he is a disabled person for the purposes of the Equality Act, 2010 ('EA') and that he suffers from an injury to his knee. For the purposes of these proceedings, at an earlier hearing on 11 July, 2017, before Employment Judge Hargrove, a Tribunal found that 'the decision of the Tribunal is that the claimant satisfied the test of disability under Section 6 in Schedule 1 to the Equality Act, 2010, as from a date in mid-October, 2016'. The claimant was described as having sustained an injury to his right knee.

4 The claimant alleges that he suffered discrimination arising from his disability, the respondent failed to make reasonable adjustments, he was unfairly dismissed and that he suffered detriments in consequence of protected disclosures that he had made. The issues for the Tribunal to decide were set out in an agreed list of issues provided by the parties and which was adopted by this Tribunal and the Tribunal's deliberations were limited to those issues.

5 The Tribunal heard evidence from the claimant and from William Reay, his father, on his behalf and from Jane Devanney, senior controller, employee relations, and Neil William Milburn, supervisor, on behalf of the respondent. The witnesses gave their evidence in chief by submitting written statements that were read by the Tribunal at the start of the hearing and confirmed on oath and, as permitted by the Tribunal, answering supplemental questions. All witnesses, apart from William Reay, were cross-examined. William Reay did seek to add to his statement but the Tribunal did not hear further evidence as the claimant's representative did not wish to pursue the matter. The claimant applied to give further evidence after the closing of his case. Although the respondent objected to this, the Tribunal allowed the application as it had been made aware that the claimant wished to change oral evidence that he had given to the Tribunal. Before hearing the application, the Tribunal warned the claimant that, depending on the change of evidence, it might affect his credibility to change his evidence at this stage of the proceedings.

6 The Tribunal had before it an agreed bundle of documents, marked 'Exhibit R1', to which additional documents were added during the hearing with the agreement of the respondent and the leave of the Tribunal. Both parties made oral closing submissions, the respondent by reference to a skeleton argument. From the evidence that we heard and the documents that we have seen, the Tribunal finds the following facts.

7 There was not any evidence before the Tribunal to suggest that the claimant was not a good employee of the respondent or that he had been involved in any disciplinary or capability proceedings prior to the events described below.

8 The claimant alleges that in May, 2015, he suffered an injury to his knee whilst working on the respondent's production line. The Tribunal understands that this is or may be the subject of litigation and therefore did not investigate the circumstances of the alleged injury. However, this appears to have been the start of the claimant's problems that led to his eventual dismissal.

9 A statement of fitness for work from the claimant's GP states that the claimant 'may be fit for work taking account of the following advice', although it is not clear what that advice was. The statement covered the period 28 May, 2015, to 4 June, 2015. Two fitness for work assessment forms dated 28 and 29 May, 2015, issued by Optima Health, on behalf of the respondent, set out the limited nature of the work on which the claimant might be engaged.

10 The claimant was examined by a consultant, Mr Tumia on 1 June, 2015, and referred to a further consultant, Mr Banaskiewicz to consider soft tissue injuries.

11 The claimant's GP issued a further statement stating that the claimant was not fit for work for the period 2 June, 2015, to 16 June, 2015. A subsequent statement extended this period to 29 June, 2015.

12 The claimant saw Mr Banaskiewicz on 1 June, 2015. His report sets out his findings on examining the claimant and notes that he has asked for a MRI scan.

13 Mr Banaskiewicz saw the claimant again on 16 June, 2015, and reported on the apparent extent of the injury and commented that 'the knee is getting better and overall things are improving' but 'it is a bit too soon to go back to work and he should rest the knee more fully and let it recover before going back to work'. The claimant passed a copy of the consultant's report to the respondent.

14 The claimant was referred to the respondent's medical adviser and the physiotherapist. The claimant was assessed as being fit for limited light duties.

15 The claimant returned to work on light duties around the end of June, 2015. He was unable to return to his normal work but some work was available, such as checking fault sheets for vehicles on the production line, which did not involve working on the production line. The amount of this work was limited and the claimant returned to sickness absence until fit for normal duties.

16 Mr Banaskiewicz again saw the claimant on 30 June, 2015, and reported that the claimant's right knee continued to improve. However, 'we have not yet come to a diagnosis…' He was happy for the claimant to commence physiotherapy. A copy of the consultant's report was provided to the respondent.

17 On 14 July, 2015, Bernadette Oliva, a physiotherapist with the respondent, reported that after a week on light duties and taking pain relief, the claimant's knee did not show any sign of improvement.

18 The report by the Mr Banaskiewicz following an examination on 31 July, 2015, demonstrates the complexity of the claimant's injury and the difficulty in giving a diagnosis and a prognosis.

19 In accordance with the respondent's normal practice, a medical counselling meeting took place on 11 August, 2015, attended by the claimant with Alan Griffiths, the claimant's trade union representative, Mr Milburn and Amalia Pilar, HR controller. Following each meeting of this type, detailed confirmation of the matters discussed were sent to the claimant and the Tribunal found these to be useful records of what had taken place.

20 The claimant's medical progress was discussed. Both the claimant and Mr Milburn wanted the claimant to be able to return to his previous work but it was recognised that this was not possible at that time. Mr Milburn was unable to provide further light duties and the claimant was returned to sickness absence. The Tribunal was satisfied that the meeting was conducted appropriately and the claimant was not being put under any pressure to undertake work for which he was not sufficiently fit.

21 On 2 September, 2015, the claimant was seen by another consultant, Mr Elson. The claimant was given a steroid injection, which seemed to have little effect, and

advised to build up the strength in his leg by undertaking exercise, such as cycling. Mr Elsdon considered that the claimant would need to make more progress before returning to his former duties. A copy of the report was passed to the respondent.

22 Ms Oliva, one of the respondent's physiotherapists, confirmed the lack of progress in a report on 2 September, 2015. She stated that she would be assessing all of the jobs available to the claimant in order to assess his suitability and to give recommendations for a phased return to work.

23 A further medical counselling meeting took place on 10 September, 2015, attended by the claimant with Mr Griffiths, Mr Milburn and Katie Bell, HR controller, at which the situation was reviewed. The same people attended all subsequent medical counselling meetings. At this point, progress had not been made on a rehabilitation programme, although more than a week had passed since Ms Oliva's report. The claimant stated that his pain levels varied with the amount of stress placed on his knee. It was anticipated that Glen Robertson, head of physiotherapy, would assess the claimant and his possible options for a return to work. The Tribunal was again satisfied that nothing occurred that could be construed as placing undue pressure on the claimant to return to work.

24 The claimant attended a hospital physiotherapy session on 18 September when he had been given a varied diagnosis and different treatment.

25 From a letter dated 21 September, 2015, it is clear that Mr Robertson was aware of the claimant's medical history, although there had not been any direct contact between the respondent's medical advisers and the claimant's medical advisers.

26 The claimant commenced a grievance on 21 September, 2015, alleging that the company had failed to rotate his work to avoid the type of injury that he had suffered. The grievance was not upheld and an appeal was rejected. The letter contains the first of the agreed protected disclosures. There was not any evidence before the Tribunal to suggest that there was any link between this letter and the claimant's subsequent treatment by the respondent.

27 On 22 September, 2015, the claimant's GP issued a further statement stating the claimant was unfit to work for the period up to 20 October, 2015.

28 A further medical counselling meeting took place on 24 September, 2015, with the same people attending as at the last one. A rehabilitation plan was explained to the claimant. Under this, he was to return to full time work but would only be required to actually work for 30 minutes, before he had a one hour break. Mr Griffiths asked several question about the working conditions that the claimant would face.

29 The claimant asked for it to be recorded that he was still certified as being unfit for work. The claimant asked that the wording of the original letter sent to him concerning this meeting be amended to show that the claimant was referring to the advice of his GP and his consultant. This was the only real challenge that the claimant made to the reports of meetings prepared by the respondent and shows that the respondent was open to making corrections if required.

30 The actual work would involve checking paint work on vehicles on the production line. The claimant and Mr Milburn disagreed about what was precisely involved but the Tribunal preferred Mr Milburn's description that the work involved checking a specific area of each vehicle as it passed on the production line and that this would not involve bending or stretching or much movement of the claimant's knees. It did not accept that the claimant would be moving at a similar pace to the vehicle as he would have been unable to check it along its length.

31 The claimant is quoted as saying that 'all you could do was to try the rehab plan that had been set out'. Ms Bell confirmed that that was all that he was being asked to do. Whilst the claimant had concerns about a return to work, the Tribunal was satisfied that he was being involved in the plan to return him to work and there is no evidence to suggest that he refused to try the plan at that stage or that undue pressure was placed upon him.

32 The claimant was expected to return to work on 28 September, 2015. On that day, at 10.40, according to Mr Elsdon, he spoke to Mr Elson and obtained a letter from him stating that he was not ready to return to work. The letter is relatively brief and does not make any reference to the rehabilitation programme. The claimant attended work and handed in his consultant's letter and then left work. He was informed that he was now on unauthorised absence and so was not entitled to company sickness benefit. He commenced a second grievance about this which was rejected but, on appeal, the rejection of the grievance was upheld but he was granted retrospective company sickness benefit. Apparently, at this time, the claimant had been informed that the respondent was disputing liability for his knee injury.

33 The claimant wrote to the respondent on 29 September, 2015, confirming that he would not be returning to work on the advice of his consultant and his union representative.

34 On 30 September, 2015, the claimant's then legal adviser wrote to the respondent and this letter contains the other admitted protective disclosure. Again, there was not any evidence before the Tribunal linking this letter to the subsequent treatment of the claimant.

35 Mr Robertson saw the claimant on 5 October, 2015, reviewed the proposed work and advised the claimant about his return to work.

36 An email from the claimant to Mr Elson dated 13 October, 2015, gives details of the physiotherapy treatment and exercises used by the claimant. These included cycling and one leg squats.

37 Around this time, the claimant was receiving medical advice concerning the state of his mental health and there are further references to this later in the bundle.

38 On 15 October, 2015, the claimant wrote to the respondent setting out his formal grievance concerning being recorded as being on unauthorised absence and having his company sickness benefit stopped.

39 On the same day, Mr Elsdon wrote to the claimant in response to the earlier email. He suggested a reduction of the exercise regime and a period of prescribed rest.

It was hoped that without strenuous activity there was a chance of the claimant's knee condition improving.

40 On 5 November, 2015, the claimant, with Mr Griffiths, was interviewed by Cheryl Francis, personnel controller, and Michael Taylor, supervisor, in connection with his grievance over been classed as being on unauthorised absence. The claimant made it clear that his grievance arose between what he saw as the conflict between his own medical advisers and the respondent's physiotherapist. The claimant stated that Mr Elson had made his recommendation after asking 'its still production? Still 1 car a minute?'. The claimant did not say that he informed Mr Elson precisely what was intended and the limitations on his working.

41 The same day a further medical counselling meeting took place. This was conducted separately to the grievance procedure. The need for clarification of the medical evidence was discussed. The claimant signed a consent form for Mr Robertson to contact Mr Elson. Whilst it is clear that the respondent was seeking to effect a return to work for the claimant, the Tribunal was satisfied that undue pressure was not put on the claimant and certainly not before the medical evidence was clarified.

42 Mr Robertson was interviewed in connection with the grievance on 19 November, 2015. He had received virtually all of the reports that had been written by the claimant's consultants and took the contents into account so that he did not need to contact them personally. He thought that the claimant had been keen to return to work. Mr Robertson considered that his proposals would be less painful for the claimant than the proposed cycling.

43 Mr Milburn was interviewed in connection with the grievance on 11 November, 2015. He said that, in respect of the rehabilitation plan, the claimant stated 'OK I will give it a go' but then refused to do so when he was due to start work again.

44 The claimant was interviewed again in connection with the grievance on 12 November, 2015. Various conflicts in the information that had already been obtained were discussed. It was put to the claimant that he had agreed to the return to work but thirty minutes later telephoned Ms Bell to say that he could not return on medical advice. The claimant said that he had put the situation to his GP who told him to contact Mr Elsdon. He accepted that his GP had not told him to stay off work. The claimant said that he rang Mr Elsdon on 24 September and Mr Elsdon rang him back on 28 September to say stay off work. At several points, the claimant said that he could not recall what had been said in conversations he had had. The claimant said that he had told Mr Elson about working thirty minutes and then resting for an hour. He did not mention Mr Elsdon saying 'one car a minute' as he had previously stated. The claimant was also asked if he had told Mr Robertson that he did not have Mr Elsdon's email address. At first, the claimant said that this had not happened but later said 'haven't a clue'.

45 A further statement from the claimant's GP indicated that he would not be fit for work until at least 15 December, 2015.

46 The outcome of the grievance was set out in a letter dated 1 December, 2015. The letter needs to be read for its full terms and effect. Briefly, the grievance was

rejected and discrepancies in the claimant's account of events were highlighted, including in respect to what he had told Dr Elsdon on 28 September, 2015. The claimant appealed against the rejection of his grievance in a letter dated 2 December, 2015. In this, he gives a further slightly varied account of what he said to Mr Elsdon.

47 On 20 November, 2015, Mr Robertson wrote to Mr Elson, outlining the rehabilitation scheme and asking whether Mr Elson was aware of it when he advised the claimant on 28 September, 2015. In a letter dated 4 December, 2015, Mr Elson responds. He states that he was not aware of the rehabilitation programme on 28 September, 2015. He goes on to state that it was in the claimant's overall interest to achieve a return to work and supported Mr Robertson's plan.

48 The claimant disputed whether Mr Elson was aware of the rehabilitation plan on 28 September, 2015, and contended that Mr Elson had not told the truth in his letter. However, the Tribunal did not accept that Mr Elson had been fully informed about the plan on 28 September in sufficient detail for him to usefully comment on it.

49 The next statement from the claimant's GP put him as being unfit to work until at least 15 January, 2016.

50 The next medical counselling meeting took place on 15 December, 2015. There are two versions of the letter issued following this meeting with slight variations. At that time, the claimant was not taking pain killers, preferring to rest when experiencing pain. The content of the letter from Mr Elsdon was discussed. It does not appear that the claimant challenged Mr Elsdon's statement that he was not aware of the rehabilitation plan when he advised the claimant. The claimant said that he was not fit to do a job for the respondent. The claimant's representative stated that the claimant was willing to return to work and to rely on Mr Robertson for advice. The claimant was told to contact Ms Bell if there were any problems.

51 The claimant did attend for work on 16 December but, by the next morning, he was experiencing too much pain to continue. This is confirmed in a letter from the claimant's GP dated 29 December in which she asks for the claimant to have a 'sitting down job'. It was subsequently proposed by the respondent that the rehabilitation plan be amended to require the claimant to work for 30 minutes during each of the three sessions into which each shift is divided.

52 Mr Robertson reviewed the claimant on 6 January, 2016. Mr Robertson's report again underlines the difficulty being experienced by the claimant's consultant in giving a diagnosis. The consultant had not given any additional advice on treatment and was intending to review the claimant after six months. The claimant reported that he was not happy with this and was seeking a second opinion.

53 The next day, in response to a report from the claimant that his knee was still causing considerable discomfort, Mr Robertson reduced the claimant's working time to thirty minutes every session.

54 A medical counselling meeting took place on 8 January, 2016. There was a discussion over whether the change to the claimant's working time had been discussed with him and he accepted that he was aware of it through an exchange of emails. It was hoped that the claimant would be able to resume the thirty minutes working and

one hour off regime in the near future. The claimant acknowledged that he understood the plan. It was recognised that the claimant was seeing a further consultant and that Mr Robertson was reviewing the claimant's case shortly after that. There was a discussion over whether Mr Milburn had spoken in an inappropriate manner to the claimant on the previous day and this was disputed by Mr Milburn. The Tribunal was satisfied that there was nothing to suggest that the claimant suffered any undue pressure to increase his working time or that he was treated in an inappropriate manner during the meeting.

55 On 12 January, 2016, the claimant's GP issued a further statement saying that the claimant could work but required a job working off the production line where he could rest the knee.

56 On 19 January, 2016, the claimant saw Dr Moothadeth, consultant occupational health physician, who had copies of all of the available medical reports. He advised that the claimant should be considered for permanent redeployment to a non-production role.

57 On the same day, the claimant saw Mr O'Brien, another consultant, who considered that the only untried option might be an operation but in due course this was discounted. Mr O'Brien requested an ultrasound scan.

58 The claimant's GP practitioner issued a statement saying that the claimant would be unfit for work for four weeks on 22 January, 2016, because the claimant had not been moved away from the production line.

59 Mr O'Brien suggested that a further MRI scan be conducted on 2 February, 2016, when he reviewed the claimant.

60 A further medical counselling meeting took place on 3 February but the lack of precision in the prognosis hampered taking the matter forward at that time. Redeployment could not be discussed at that time because of the uncertainty. As advised by his consultant, the claimant had been undertaking cycling despite the pain that this caused. The Tribunal was satisfied that the manner in which the claimant's situation was discussed was appropriate and that undue pressure was not put on the claimant to return to normal working.

61 Mr O'Brien saw the claimant on 16 February, 2016, after the MRI scan. He advised against operative management but suggested that an eccentric loading exercise programme should continue.

62 The next medical counselling meeting took place on 17 February, 2016. Again, the uncertainty about the prognosis hampered the discussion. The Tribunal was satisfied that the manner in which the claimant's situation was discussed was appropriate and that undue pressure was not put on the claimant to return to normal working.

63 On 22 February, 2016, Mrs Devanney wrote to Mr Elsdon about his knowledge of the rehabilitation plan when he advised the claimant that he was unfit to work on 28 September, 2015. A further letter from Mr Elson, dated 1 March, 2016, gives more details of his discussion with the claimant on 28 September and his lack of knowledge

of the rehabilitation plan and confirms his support of the rehabilitation plan. He had made a note of their conversation and could not recall the plan being discussed in specific detail. It was discussed by them on 4 December, 2015, and Mr Elsdon advised the claimant to negotiate a return to work. He stated that the plan would 'probably be an acceptable beginning for his re-entry to work'.

64 By a letter dated 9 March Ms Devanney notified the claimant of the outcome of his appeal in the grievance procedure. The letter needs to be read for its full terms and effect. Briefly, the grievance was not upheld but, as a gesture of goodwill, the respondent agreed to pay the claimant the difference between the statutory sickness pay and the sums payable under the company sickness benefit scheme.

65 The consultant's GP issued a further statement on 11 March, 2016, stating that the claimant would be fit to return to work for six months on the basis that he was to be redeployed.

66 In further reports from Dr Moothadeth dated 15 and 22 March, 2016, the latter following a case conference, he confirms his conclusion that the claimant should be redeployed.

67 At a medical counselling meeting on 29 March, 2016, it was accepted that redeployment was appropriate and the process and the parameters were explained to the claimant. The claimant was to submit his CV and then for three months he would be assessed against suitable vacancies as they arose. The possibility of the claimant's dismissal if redeployment could not be achieved was discussed. The Tribunal was satisfied that the manner in which the claimant's situation was discussed was appropriate and that undue pressure was not put on the claimant to return to normal working.

68 At a medical counselling meeting on 26 April the claimant was informed that three suitable vacancies had been identified for him but that two of them had been awarded to more suitable candidates. However, the third, administrative officer security, was on-going. A copy of the vacancy details was included in the bundle before the Tribunal. The post was administrative and desk based. It did not involve undertaking security duties. Ways of improving the claimant's prospects for redeployment were discussed. The Tribunal was satisfied that the manner in which the claimant's situation was discussed was appropriate and that undue pressure was not put on the claimant to return to normal working.

69 Subsequently, the claimant was offered an interview for the administrative officer security post but he declined, apparently after consulting his wife, on the grounds that the post did not suit him. The email inviting him to the interview was sent at 10.16 on 5 May, 2016, and the claimant responded at 10.27 on the same day, stating 'I have no interest in this role'.

70 Despite a conflict in the evidence, the Tribunal accepted that the claimant was given sufficient details of the post before he rejected it to enable him to understand what might be on offer. The claimant had responded to the invitation to an interview very quickly, which suggested that he had already given the matter consideration. If, as the claimant suggested, he was not aware of the details of the post, there was nothing to suggest that he had attempted to make enquiries.

71 At a medical counselling meeting on 6 June, 2016, the situation was considered. The claimant withdrawing from the interview and the possibility of training being offered to the claimant were discussed. The claimant explained that he had read the brief and discussed the job with his wife, who had said that it was a rubbish job. The claimant was invited to maintain an interest in the job but he refused. The claimant was again informed that his continuing employment with the respondent was a risk if he could not be redeployed in a reasonable time. The Tribunal was satisfied that the manner in which the claimant's situation was discussed was appropriate and that undue pressure was not put on the claimant to return to normal working.

72 Mr Elson wrote to the claimant's GP on 8 June, 2016, stating, among other things, 'it is difficult to know what to do in order to help Colin with his pain'. He referred the claimant to the pain clinic and said that he would review him a year later.

73 By a letter dated 15 June, 2016, the claimant was invited to a medical counselling meeting on 20 June, 2016, and informed that his employment might be terminated on the ground of medical incapacity. At the meeting, Mr Milburn and Ms Bell decided that at that time the claimant was not fit for his contracted duties and there was little prospect of finding alternative employment within a reasonable time. Although the respondent was prepared to offer a training opportunity to the claimant, this could not be undertaken for about a month and was not in anticipation of the acquired skills being used in an identified post. The post that the claimant had withdrawn from required skills of the type that the claimant would have acquired during the training so he had been considered for a post in advance of being trained for it.

74 It was decided that the claimant should be dismissed with immediate effect.

75 Mr Milburn informed the Tribunal that he was led by the respondent's policy that after attempting redeployment for three months without success an employee was liable to be dismissed. Because the respondent operates a very lean operation, when someone is absent from work other employees have to provide cover, which may mean, for example, rearranging annual leave. A replacement cannot be recruited until there is an actual vacancy. Absences, such as the claimant's, have a significant effect on the ability of the respondent to work adequately in the affected area of the plant.

76 However, he also stated that if he had been satisfied that there was a realistic chance of the claimant being redeployed within a reasonable time he would have sought permission to defer dismissal to see the outcome.

77 The claimant told the Tribunal that at the time of his dismissal he was not fit to undertake the work for which he was employed and that he was not aware of any suitable vacancy to which he might have been redeployed.

78 The claimant appealed against his dismissal by a letter dated 21 June, 2016. Briefly, the claimant complained about the respondent's policies and the manner in which they were implemented. He did not suggest that he was fit for work. The claimant subsequently withdrew his appeal before it could be heard. The claimant, through his union representative, was offered the opportunity to have his appeal reinstated but he declined the offer.

79 The contentions of the parties were set out in their closing submissions and the respondent's skeleton argument. Briefly, the claimant contends that the respondent unfairly and inappropriately applied pressure to him to undertake work that he was not fit to do and failed to have regard to medical reports concerning his disability. As part of this the respondent failed to implement reasonable adjustments that would have allowed him to work. Further, that he was prematurely dismissed and the dismissal was unfair in any event. The claimant attributes his treatment both to his disability and to the fact that he had made protected disclosures. The respondent denies all of this. The respondent contends that it did not put undue pressure on the claimant as alleged but did make reasonable adjustments. Further, that the dismissal was fair and for the reason of capability. It denies that the claimant suffered any detriment as a result of making protected disclosures.

80 Section 98(1) of the Employment Rights Act, 1996, as amended, ('the 1996 Act') states that:

> "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

Capability is a ground that may found a fair dismissal.

81 Where the reason for dismissal has been established, then the task for the Tribunal is set out at section 98(4) of the 1996 Act. That provides:

> "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)
>
> (a) depends on whether in the circumstances (including the size and the administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

82 In respect of an alleged unfair dismissal, it is well-established law that the Tribunal in a case of this sort is not entitled to ask itself what it would have done in the circumstances: we are only entitled to ask whether the employer acted reasonably or unreasonably.

83 Section 4 of the EA, provides that disability is a protected characteristic. Section 13(1) of the EA provides that

> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 15(1) of the EA provides that

> A person (A) discriminates against a disabled person (B) if
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Section 19(1) provides that

> A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a protected characteristic of B's.

Sections 20 and 21 of the EA deal with the duty to make reasonable adjustments.

84 Subsections (2) and (3) of Section 136 of the EA provide

> (2) If there are facts from which [the Tribunal] could decide in the absence of any other explanation that a person (A) contravened the provision concerned, [the Tribunal] must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

85 In reaching its decision, the Tribunal had regard to the relevant statutory provisions, the Code of Practice for the elimination of discrimination in the field of employment against disabled persons or persons who have had a disability and the guidance on matters to be taken into account in determining questions relating to the definition of disability.

86 The Tribunal also had regard to the following sections of the 1996 Act

> Section 43A – meaning of 'protected disclosure'
>
> Section 43B – disclosures qualifying for protection
>
> Section 43C – disclosure to employer or other responsible person, requirement for good faith
>
> Section 47B – protected disclosures

87 The Tribunal noted that the disclosure must identify a breach of obligation, must be made in good faith and must give rise to a detriment to be actionable.

88 In relation to all of the claimant's complaints, the Tribunal had regard to the various authorities referred to in the closing submissions.

89 Following the order in the list of issues, the Tribunal, first considered whether the claimant suffered discrimination arising from disability. As mentioned above, an earlier Tribunal had already found that the claimant was a disabled person from mid-October, 2015. The respondent accepts that it had constructive knowledge of the claimant's disability from about the same time.

90 The Tribunal considered whether the claimant suffered discrimination arising from disability and whether the circumstances set out in the list of issues at paragraph 5 (a), (b) and (c) did amount to unfavourable treatment. It was agreed that the 'something' is the claimant's inability to carry out his contracted work. The Tribunal unanimously finds that the claimant's inability to undertake his contracted work arose in consequence of his disability.

91 With regard to the allegation that the respondent applied pressure to the claimant to return to work on a rehabilitation programme and that he should have been allowed to remain at home and rest and embark on redeployment sooner, the Tribunal noted the difficulty experienced by the medical practitioners in assessing the precise nature of the claimant's disability, its likely duration and the remedial treatment that was appropriate. It finds that it was appropriate for attempts to be made to see if the claimant was fit to return to work. Both the claimant's GP and his consultant had said, in effect, that the claimant was unfit to return to work on his previous hours and doing the same work. However, the consultant had indicated that physiotherapy and some physical exercise could help the claimant's recovery. Physiotherapy was provided by the respondent and Mr Robertson, the chief physiotherapist, devised a plan for the claimant to return to work with restricted working hours and limitations on the type of work that he could undertake. Mr Robertson was aware of most of the medical reports provided by the claimant's consultant, including the recommendations concerning exercise and physiotherapy. He believed that his rehabilitation plan was in accordance with the consultant's recommendations. The claimant's consultant was not consulted but in due course he confirmed that the rehabilitation plan was acceptable. Unfortunately, the claimant was unable to work to this plan without suffering considerable pain and discomfort and a revised plan was devised. The Tribunal unanimously finds that it was not unfavourable treatment for the claimant to be asked to and to actually try to put the rehabilitation plan into effect, either in the original or its modified form. The fact that this was unsuccessful could not have been known in advance with any degree of certainty because of, among other things, the difficulties over the diagnosis. The Tribunal also unanimously finds that, at the medical counselling meetings, the respondent did not apply undue pressure on the claimant to return to work and that it was reasonable for the matter to be raised with the claimant in the manner and on the occasions when it was. Further, that at none of the meetings referred to by the claimant in the list of issues did the conduct of the respondent amount to unfavourable treatment of the claimant. Delaying the consideration of redeployment until the rehabilitation plan was tried was appropriate given the uncertain state of the diagnosis of the claimant's disability. Again, this did not amount to unfavourable treatment. If the claimant had been left at home to rest, this would have

been with a view to seeing if he became fit to return to his contracted duties. It may have also been a reasonable adjustment but the obligation is on the respondent to apply a reasonable adjustment, which the Tribunal finds that the rehabilitation plan was. Whilst the Tribunal did not receive any evidence concerning this, had the rehabilitation plan not been available, the inability of the claimant to perform his duties could well have resulted in his dismissal taking place at an earlier date because of the need for his place to be filled on the production line.

92 The Tribunal accepted that the respondent did not inform the claimant of two of the potential redeployment opportunities before he was informed that he had been rejected for them. There was not any evidence before the Tribunal to suggest that the respondent had not followed its normal practices in relation to redeployment or that the claimant could have done anything to influence the outcomes if he had know of the vacancies at an earlier stage. There was not any evidence before the Tribunal to suggest that the claimant suffered unfavourable treatment in consequence of not being aware of the vacancies and being rejected for them. The vacancy that the claimant declined to be interviewed for demonstrates that the claimant was given a degree of latitude when being considered for vacancies. The Tribunal unanimously finds that failing to inform the claimant of the two vacancies did not amount to unfavourable treatment.

93 The Tribunal also accepted that the respondent dismissed the claimant before he had the opportunity to undertake training that was being offered by the respondent. The skills that the claimant might have acquired had he undergone the training were among the requirements of the post for which he was selected for interview but which he did not wish to be considered for. Accordingly, the lack of training did not prevent him being considered. There was not any evidence before the Tribunal to suggest that a suitable vacancy would arise within a reasonable time of the claimant completing the training. The respondent's period for considering redeployment expired before the training would have taken place. The Tribunal unanimously finds that dismissing the claimant before the training could take place did not amount to unfavourable treatment.

94 The Tribunal considered the evidence provided by the claimant but did not find that he established facts that supported his allegations in part or in their entirety. It follows from the above that there are not facts from which the Tribunal could decide in the absence of any other explanation that the respondent contravened the provision concerned so that the provisions of Section 136 of the EA do not apply. If this is not correct, which the Tribunal does not accept, the treatment of the claimant in each instance was a proportionate means of achieving a legitimate aim. Both parties wanted the claimant to be able to return to work but the uncertainty over the medical evidence made this difficult to achieve. The rehabilitation plans were proportionate to fulfil the legitimate aim of returning the claimant to work. The respondent's redeployment procedure was a proportionate means of achieving the legitimate aim of finding the claimant alternative employment and this procedure was followed. Finally, in the circumstances of this case and the state of the claimant's health in the context of the respondent needing to replace the claimant on its production line, the timing of the dismissal of the claimant was a proportionate means of achieving the legitimate aim of replacing the claimant on the production line.

95 It also follows from the above that as the claimant did not suffer unfavourable treatment as alleged or at all, his complaint that he suffered discrimination arising from his disability is not well founded and is dismissed.

96 The Tribunal unanimously finds that the reason for the claimant's dismissal was capability. There was clear evidence to support this conclusion and there was not any evidence to suggest that this was not the true reason. On his own admission, the claimant was not fit to undertake work of the type for which he was employed. The respondent had considered redeployment but the claimant refused to be considered for the only vacancy that might have been suitable. Although, the policies of the respondent indicated that the point had been reached where dismissal was probable, Mr Milburn indicated that he would have sought permission to extend the claimant's employment if a suitable vacancy for redeployment was likely to be available in the near future but this was not the case. The respondent held a meeting with the claimant at which the claimant or his representative would have had the opportunity to put forward any matters that might have influenced consideration of the decision to dismiss him, especially as the claimant was on notice that his continuing employment might be at risk.

97 The Tribunal also unanimously finds that the procedure followed by the respondent was not unreasonable, provided that it was carried out properly. In this instance, the Tribunal was satisfied that the respondent had properly followed a proper process. It held a series of meetings with the claimant at which he was accompanied by his trade union representative. At those meetings, the claimant's medical situation was discussed, as was the attempts to get him to return to work using the rehabilitation plan. The Tribunal accepted Mr Milburn's evidence concerning the difficulties that the claimant's absence from the production line caused, especially as he could not be replaced whilst he remained in his substantive post.

98 Having regard to all of the circumstances, the Tribunal was satisfied that the dismissal of the claimant was within the band of reasonable responses open to the respondent.

99 The claimant appealed against his dismissal but withdrew his appeal before it was heard.

100 It follows from the above and having regard to equity and the substantial merits of the case that the claimant was not unfairly dismissed by the respondent and that his complaint that he was should be dismissed.

101 The purpose of a reasonable adjustment is to put a disabled person in a similar position to that which he/she would have been in but for the disability. It was agreed that the PCP is the requirement to be fit to do the contracted role and that the substantial disadvantage alleged is the increased risk of being dismissed or subjected to capability proceedings. The claimant contends that he should have been taken off the production line completely and/or redeployed to a more sedentary role.

102 The claimant failed to show that he had suffered undue pressure to return to work, that the rehabilitation plan was bound to fail or that the respondent failed to act appropriately when the rehabilitation plan failed to work. Redeployment was an option and this was considered when the medical evidence showed that this was the only

option. The claimant withdrew from being considered for a vacancy that was suitable for him and met the requirements of the reasonable adjustment of redeployment. There was not any evidence before the Tribunal to suggest that any other adjustments could have been considered and/or made.

103 The Tribunal unanimously finds that the creation of the rehabilitation plan and the amended rehabilitation plan were reasonable adjustments that were supported by the medical evidence available at the relevant time. When they were shown to be unsuitable, both by trying them and medical evidence that subsequently became available, the respondent did make a further reasonable adjustment by removing the claimant from the production line and attempted to redeploy him. The claimant refused to be considered for the only post available to him and for which he was considered suitable. In the circumstances of this case it was not unreasonable for the respondent to attempt to rehabilitate the claimant before turning to redeployment.

104 Taking the claimant off the production line could be a reasonable adjustment and was eventually employed by the respondent. However, the duty on the respondent is to apply a reasonable adjustment that need not be the one suggested by the claimant. The respondent did attempt to redeploy the claimant but, as is mentioned above, the claimant did not wish to pursue the one vacancy that was available to him.

105 The Tribunal unanimously finds that the respondent did make or attempt to make reasonable adjustments and these included those suggested by the claimant. During the delay in trying those suggested by the claimant, the respondent was trying another reasonable adjustment.

106 The Tribunal considered the evidence provided by the claimant but did not find that he established facts that supported his allegations in part or in their entirety. It follows that there are not facts from which the Tribunal could decide in the absence of any other explanation that the respondent contravened the provision concerned so that the provisions of Section 136 of the EA do not apply. However, if this is not correct, which is not accepted by the Tribunal, the Tribunal unanimously finds that the respondent complied with its obligations to make reasonable adjustments.

107 The complaint that the respondent failed to make reasonable adjustments is not well founded and is dismissed.

108 With regard to the protected disclosures, the respondent accepts that such disclosures were made by the claimant.

109 The claimant alleges that he suffered the same detriments as he listed as unfavourable treatment referred to above. For the same reasons as set out above the Tribunal unanimously finds that these were not detriments. Further, even if they were, which the Tribunal does not accept, there was not any evidence before the Tribunal to suggest that the respondent took any actions in relation to the alleged detriments as a result of the protective disclosures being made.

110 The claimant also alleges that he suffered a detriment as a result of the disclosures by being dismissed. There was not any evidence before the Tribunal to support this contention and the Tribunal was satisfied that the dismissal was for the

reason of capability having regard to the genuine requirements of the business and in accordance with the respondent's policies.

111 It follows from the above that these complaints are not well founded and should also be dismissed.

……
Employment Judge Nicol
21 November, 2017
Date……