EMPLOYMENT TRIBUNALS

Claimant: **Mr S Kirby**

Respondent: **Key Office Solutions Limited**

Heard at: **Bristol** **On:** **27 to 30 January 2020**

Before: **Employment Judge O'Rourke**
Members: Ms Ramsaran
Ms Howard

Representation:

Claimant: **Ms Clarke - Counsel**
Respondent: **Mr Wheaton - Counsel**

JUDGMENT

1. The Respondent discriminated against the Claimant, on the grounds of his disability, contrary to ss. 13, 15, 20-22 and 27 of the Equality Act 2010.

2. The Respondent is ordered to pay the Claimant the sum of £26,031.88, as set out in more detail in the Reasons below.

3. The Respondent is ordered to pay the Claimant's costs, in the sum of £7,260 (inclusive of VAT).

Wriitten reasons having been requested at the Hearing, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. The Claimant was employed by the Respondent, as a trainee service engineer, for approximately seventeen months, until the termination of his employment, with effect 19 December 2018, his dismissal having been notified on 9 November 2018 and which followed from the Claimant having taken sick leave, following him suffering a left ankle injury on 2 July 2018.

The Claimant brought claims of disability discrimination and unfair dismissal. He agreed subsequently, at a telephone case management hearing on 19 June 2019 that he did not have the requisite service to bring the latter claim and it was accordingly dismissed, on withdrawal. It is common ground that the Claimant is (and was at the relevant time) disabled, subject to s.6 of the Equality Act 2010 ('EqA'), by virtue of his condition of Ankylosing Spondylitis (AS).

2. The outcome of the preliminary hearing was set out in a detailed, comprehensive case management summary, which it is not our intention to rehearse here, but, in summary, the claims were:

   (1) Discrimination arising from disability (s.15 EqA). The Claimant alleged various acts of unfavourable treatment (which we will consider below), to include his dismissal and that they occurred because of something arising from his disability. The Respondent disputed both their state of knowledge of his disability and whether or not the alleged acts arose from it. They also rely on the statutory defence of proportionate means of achieving a legitimate aim.

   (2) Failure to make Reasonable Adjustments (ss.20-22). This claim related to a request by the Claimant to use an automatic car to call to clients' premises, in his role of photocopier repair and maintenance engineer. The Respondent denies that such an adjustment was reasonable.

   (3) Direct Discrimination – the Claimant asserted that by being dismissed, along with other detriments, he had been less favourably treated than a hypothetical comparator, namely an employee who had suffered a catastrophic ankle injury, but who did not suffer from AS.

3. Additional Claim. On the second day of the Hearing, following the evidence of the Respondent's managing director, Mr Gary Braniff, Ms Clarke applied for leave to amend the claim, to include a claim of victimisation, which was resisted by Mr Wheaton. Having considered it, we granted the application, for the following reasons:

   (1) The Tribunal has a wide discretion in such matters, with the Tribunal Rules not laying down any specific time limits for such applications, to include the possibility of applications during (or indeed, even after) the Hearing.

   (2) Clearly, however, applications that are made late in the day require greater scrutiny, in particular as to why they were not brought earlier. In this case, however, we find that in respect of this amended claim, the evidence to potentially support it was not apparent until Mr Braniff gave his evidence, namely that at least part of the Company's rationale for the Claimant's dismissal was their fear that he would take a claim against them. We note Mr Wheaton's suggestion that the Claimant will likely have known already of the possibility of such a claim from family contacts (his sister is married to Mr Griffiths, one of the directors), but that can only be speculation on his part and in any event, the evidence

indicates that family relations and contact have broken down since the dismissal, with very limited communication since.

(3) Indeed, if the Claimant had brought such a claim, speculatively, based on a suspicion of such motivation by the Respondent, he would have been subject to criticism by the Tribunal and no doubt the Respondent, for doing so. Thus, he limited his claims to those areas for which he felt he then had evidence to support.

(4) We can also take into account the likely merits of such a claim, with obviously unmeritorious or weak claims more subject to refusal. However, this is not such a claim.

(5) The amended claim is not based on entirely new, unrelated facts, but meshes with the existing claims.

(6) It is arguable whether or not the claim is brought out of time, as it is essentially a 're-labelling', based on existing facts, but if we are wrong in that, we have no difficulty in considering that it would be just and equitable to extend time for bringing of the claim, subject to s.123(1) EqA, as the evidence to support such a claim only became apparent at this Hearing.

(7) Finally, in considering the balance of hardship and injustice to the parties, by allowing the amendment, we consider that it falls in the Claimant's favour, for the following reasons:

a. He would be debarred from bringing a potentially successful claim.

b. While the Respondent now finds themselves facing a new claim, late in the day, it is quite a straightforward one, based on evidence they themselves adduced. They are already facing three discrimination claims and one more does not seem unduly harsh or unjust.

c. Little additional time will be needed to address the claim, as the case is listed for four days, with every possibility, regardless of this amendment that it would run into that fourth day.

The Law

4. We were referred to the relevant sections of the Equality Act 2010.

5. Both counsel referred us, in detailed written closing submissions, to various authorities, to which we shall refer below, as we consider relevant.

The Facts

6. We heard evidence from the Claimant and on behalf of the Respondent, from Mr Gary Braniff, the managing director and two other directors, Mr Stephen Griffiths and Mr Paul Viccars.

7. The Respondent is a small business, with three directors and one, or sometimes two employees. They supply and service office photocopiers.

8. Credibility. As much of what we need to decide depends on oral evidence, relating to conflicting accounts of events and with either gaps in, or lack of documentation, we consider that we need, at the outset, to come to a view as to the credibility of the witnesses. The Claimant's evidence was subdued and unexpansive, but he answered questions put to him in a straightforward manner and we did not perceive any attempt by him to mislead or be evasive. On the other hand, particularly in relation to Mr Braniff, we had concerns as to his credibility. His evidence was often inconsistent, both in relation to his witness statement and even in respect of his own oral evidence. For example, he and the other Respondent witnesses, both in the response and in their statements, complained of the '*significant expense*' of arranging outsourced cover with the Toshiba company, for the Claimant's absence from work, but in oral evidence, for the first time, said that it was in fact '*the better model',* stating that some more favourable change in the contract had been arranged in December 2018, but they had, for some reason, failed to say this in their response or statements, many months later. Mr Braniff also, in either his statement or the Response, made no mention of his fear that the Claimant would bring a claim against the Company, as forming part of the rationale for dismissal, relying only on redundancy. Instead, he raised this issue for the first time in cross-examination, which meant that the redundancy assertion was clearly not therefore true. He also over-relied, we consider, on apparent lapses in memory to excuse inability to answer questions, particularly when, on his and the other directors' evidence, he and his colleagues had talked of little else since. Finally, he was warned on several occasions that his answers were sometimes evasive, but he persisted in such practice, nonetheless. The other directors were more peripheral to the issues, and we consider, under the sway of Mr Braniff, to some extent. Therefore, where there is a conflict in evidence between the parties, we prefer the evidence of the Claimant.

9. Events.

   (1) There was a conflict of evidence as to whether or not the Claimant was asked about any medical condition when first interviewed and then appointed by Mr Braniff. Mr Braniff said he had asked such a question and the Claimant had not disclosed his AS, whereas the Claimant said he was not asked any questions of that nature. We note, in this respect, our views as to Mr Braniff's credibility, but, in any event, it was agreed that Mr Griffiths knew of the Claimant's conditions at all times (his wife also suffering from it) and therefore the Respondent can be taken to have been on notice, regardless.

   (2) The first fifteen months of the Claimant's employment were uneventful. The impression we had was that he was an entirely reliable employee. He took no sick leave during that period.

   (3) On 2 July 2018 (all dates hereafter 2018, unless otherwise stated), he suffered an injury to his ankle, either alighting from the Company van, or on the stairs at home, but which is not particularly relevant. He

attended A&E and went on sick leave, certified from 12 July, initially to 30 July [sick note 50], recording an ankle sprain. From the 30th July to 10 August he was on annual leave.

(4) Following a visit from Mr Griffiths to the Claimant at home, on 2 August, it was arranged that Mr Griffiths, or Mr Viccars, who live close-by, would pick him up for work. The Claimant said that the arrangement constituted a reasonable adjustment, to include potentially driving him to clients' premises, or, as he had suggested, the hire of an automatic vehicle, at his own expense, which he felt he could drive, right-footed, even with his injury. An email of 9 August refers simply to Mr Viccars '*picking him up*' [53]. In evidence, the Respondent witnesses argued that in fact the only arrangement that had been made had been to pick up the Claimant and take him to the office, but that on reflection, there was no point in doing so, as there was no work for him to do there. Nor was it accepted that he had mentioned the automatic car, at that point at least, but did so later, by email of 28 August [64] (the Claimant normally used the Respondent's manual-control van). We consider that what happened in this incident is that initially, Messrs Griffiths and Viccars were more sympathetic and supportive of the Claimant's wish to return to work, to include possibly taking him to clients, but were persuaded by Mr Braniff, the older and more experienced man, who, it was clear to us, had a more inflexible attitude to this situation, to reverse that decision. Mr Braniff phoned the Claimant the same day, to inform him that the arrangement would not proceed and he should stay at home. The Claimant said that in that conversation, Mr Braniff said that he '*could let him go'*. Mr Griffiths said, in his statement that he overhead the call and that Mr Braniff said '*it had been extremely busy and his absence for such a long period has caused massive disruption, additional costs and we would probably need to make alternative arrangements and let him go, if we didn't have a clear idea of when he would be fit to return to work.'* The Claimant subsequently sent a text, on the same day, referring to this conversation [52e] and which was not contradicted. Mr Braniff, in his statement, does not refer to the '*let him go*' comment, but clearly, based on both the Claimant's and Mr Griffiths' evidence and the lack of challenge to it at the time, he did say it. Therefore, within the first month of the Claimant's sick leave, Mr Braniff was considering his dismissal and threatening accordingly.

(5) At or around the same time, perhaps 10 August, the Claimant sent two letters from his rheumatology practitioner, dated 19 July and 8 August [51&52]. While there was some initial dispute as to whether both letters had been sent, Mr Braniff did eventually accept that he had seen them, at around that time. The second letter specifically refers to the Claimant's disability and links it to his ankle injury. While Mr Braniff now says that he '*didn't make the connection*' at the time, we doubt that to be the case, as the letters are quite clear. Therefore, from that point at least, the Respondent and in particular Mr Braniff, were on notice of both the Claimant's disability and the link to his injury.

(6) On 23 August, Mr Braniff wrote to the Claimant suggesting an OH report [61] and asking for his authority to do so, which was granted. On 28

August, the Claimant wrote again, stressing his desire to return to work and mentioned the possibility of an automatic car and/or attending a course and/or providing telephone support to customers, as interim alternatives to returning to his old role [64].

(7) On 5 September [68], the Claimant wrote again, providing more detail as to his injury, referring for the need for an operation and asking again about return to work. Mr Braniff replied five days later, reiterating the possibility of arranging an OH report. He subsequently made that referral on 18 September. While there was some dispute about whether or not the Claimant was given sufficient notice of the consultation with OH and was or wasn't able to provide his medical notes, the report itself, of 23 October, is quite clear [91]. It said that following surgery, he would be likely to have '*residual incapacity during the rehabilitation stage. The timescale is uncertain, but likely to be approximately six weeks'* and that it was '*highly likely that Shane would be able to return to office-based sedentary work, without the requirement for significant walking/repetitively climbing stairs or manual handling and subsequently should be able to return to his usual work'* (specifically referring to the possibility of driving). The Claimant's initial operation had been cancelled and it had been re-arranged for 2 November. The Respondent argued that as the majority of the Claimant's work was out of the office, there was little or no work for him to do in the office, but, firstly, the Claimant said that the proportion of his work was about 60/40% out and in the office, respectively and secondly, the OH advice was that he could return in due course to his usual work. The Claimant said that he in fact spent quite a bit of time in the office, answering phones, working on photocopiers and on occasion standing in for the directors, if they were out, or wished to leave work early. While this was contradicted by the Respondent witnesses, we note, firstly, our views on the credibility of their evidence and the lack of any corroborative documentary analysis (say from the Claimant's work sheets/diary) as to the split in work. In short, therefore, we don't necessarily accept that there was 'no work' for him to do in the office, at least temporarily, until he could return to his usual work. Nor was there was any evidence provided that the Claimant was actually still unfit for work on 19 December, or thereafter, apart from him undergoing a further operation, the following year, in May 2019. The Consultant's comments, made on 10 July 2019, are that the Claimant's condition '*would have made it virtually impossible for him to carry out his work, in particular drive or undertake any significant lifting or carrying, in particular going up stairs …'* and goes on to refer to him currently still recovering from surgery. It is unclear to us as to what period of time the Consultant is referring to in these comments – is it after the first operation, in November 2018, or leading up to the second one, in May 2019? She refers immediately beforehand to '*his rehabilitation from this surgery'* i.e. the operation of May 2019 and could, therefore, be referring to either event. We consider it more likely that she is referring to the latter operation, but, of course, it was open to the Respondent to seek clarification from her on this point, if they wished, but they did not. In any event, none of this evidence was before the Respondent, when they made their decision in

November 2018 and while it may or may not be relevant to remedy, it has no bearing on liability.

(8) On 16 August, Mr Viccars went to the Claimant's home and collected his work laptop. The Claimant had previously asked that the link from the company diary to his phone be disabled, as it was upsetting for him to constantly see himself as recorded on sick leave. It seems likely that as a consequence, he changed the record to remove those references. It seems, from the Respondent's oral evidence only that they apparently feared, as a consequence of this action that the Claimant would in some way further interfere with the Company's data, to their disadvantage, hence the decision to remove his laptop and disable his email access, all without telling him the reason for doing so.

(9) The operation went ahead on 2 November and on 9 November, at 09:36, the Claimant wrote to all the directors [94], saying that he estimated that he would be able to return to work on 19 December, to which he was looking forward. Approximately an hour later, following discussion between the directors, Mr Viccars phoned the Claimant and told him he was being dismissed on grounds of redundancy. This was confirmed by email that day [95]. He was given a month's notice, on full pay. Mr Braniff said in his statement that the decision was made because the Claimant's work was now outsourced to Toshiba and therefore there was no work for him to do. Strangely, Mr Viccars makes no reference in his statement to this call, or the rationale for the decision and Mr Griffiths only passing reference. They both indicated in oral evidence that they may have chosen to do things differently than Mr Braniff. He said in oral evidence that they had '*no option but to farm out the work to Toshiba, because the Claimant was off sick and Toshiba then changed to a better model. We thought he was a danger and would take us to court. He was sacked because there was no job anymore but there were other things going on that made us think that we would be prosecuted'*. He referred to a '*vendetta*' and felt that the Claimant wished to '*entrap'* them and that *'that was what the case was all about'*. '*We knew from the conversation in August that he would sue us'*. In this respect, much play was made of the Respondent's knowledge of the circumstances of the Claimant's departure from his previous employment with the Royal Mail, with the assumption that he was, because of that event, an experienced vexatious litigant, with similar intent against the Respondent. However, the uncontested evidence from the Claimant was that he had left Royal Mail on medical retirement, very much to both Royal Mail's and his satisfaction and to their mutual benefit, as he received a lump sum and they were downsizing at the time. There were no court or tribunal proceedings and the arrangement was entirely amicable. Further, if the Claimant was the vexatious litigant he was now being painted as, why would he have given fifteen months' good service, with no sick leave, before embarking on this '*vendetta*', but instead, simply waited a few months and then sought to '*entrap*' the Respondent. Further, his injury was clearly entirely genuine and very painful and debilitating. The idea that he would construct such a scenario purely for the purpose of suing the Respondent is nonsense. Following that disclosure in cross-

examination by Mr Braniff as to this supposed vendetta and when it was put to him that therefore the dismissal decision must have had nothing to do with Toshiba, he said '*yes*'. He accepted that the Respondent wasn't tied to using Toshiba, '*but it worked well and we didn't want to end the arrangement' 'We learnt that he was not fit to return in December – this was not the reason for dismissal, but it did force the issue. I learnt from Stephen, sometime in November that the Claimant would need another operation in the future'*. In respect of the Respondent's state of knowledge on 9 November, as to the Claimant's medical condition, the most recent medical evidence they had was the OH report, which said that the Claimant could return to work six weeks after his operation, initially in the office and thereafter to his normal job, which is what the Claimant himself wanted. In contradiction to that, Mr Braniff said that reliant on '*family conversations*, *the operation had not been a success and we were aware he was awaiting a second operation'*. We find that at this point, it is utterly implausible that the Respondent could have had this knowledge. The operation had only happened a week before and we suspect that not even the Claimant's consultant would have been so certain on this issue. We suspect that the Respondent is conflating later information they became aware of, as to an operation which the Claimant did have in May 2019, with the actual information available to them at the time. Further, in any event, they never discussed any of these conclusions with the Claimant, nor sought further medical advice, choosing instead to ignore the existing OH report and instead substitute their own personal views on the matter. That was an entirely unsatisfactory basis upon which to form a decision to dismiss.

10. Discrimination Arising from Disability. The Claimant said that he had suffered the following acts of unfavourable treatment:

    (1) A lack of support in returning to work – it is clear from the Claimant's evidence and his contemporaneous emails that he very much wanted to to return to work. It is a statement of obvious fact that he wasn't supported to return, but the Respondent would argue that they had good cause not to permit such return.

    (2) Blocking access to his emails – again, this is a statement of fact. We consider that this could be considered as unfavourable treatment, unless otherwise explained to an employee. In the absence of an explanation, an employee may consider that he is being excluded, or even suspect in some way. It could be possible that a caring employer wished to alleviate any stress for a sick employee, by not requiring them to look at work emails, but no such explanation was given to the Claimant. In fact, as we now know, the real reason was that they considered that he may somehow sabotage their data, as part of his alleged vendetta.

    (3) Dismissal – again, this is a matter of fact. It is irrelevant that the Respondent considers that the reason for dismissal was redundancy. Dismissal is clearly unfavourable treatment and it essentially only has to be shown that it happened because of something arising from the Claimant's disability for the claim to succeed. As set out in **Pnaiser v**

NHS England [2016] UKEAT IRLR 170, '*just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it*.'

(4) Automatic car – at no point did the Respondent engage with this issue, seeming to dismiss it out of hand.

(5) Not permitting a colleague to transport him from job to job. As we have found, this was initially at least considered, but then withdrawn, without any further consideration.

11. No comparator is necessary for discrimination arising from disability.

12. Did these acts of unfavourable treatment occur because of something arising from his disability? As **Pnaiser** indicates, there can be more than one link in the chain of causation, so the injury can lead to the sick leave and the sick leave can lead to the Respondent's stance on the Claimant's return to work and/or dismissal. Also, the ankle injury, the main reason for the sick leave, is capable of being linked to the disability, as all the medical evidence indicates (and as was also confirmed by the Claimant's consultant in her letter of 31 July 2019 [103], in answer to specific directions from the Tribunal). All of the acts of unfavourable treatment directly flowed (even the alleged 'redundancy') from the Claimant being on sick leave, caused by his ankle injury, which, in the consultant's words '*arose as a direct consequence of the disability',* at a time when he, nonetheless, clearly wished to return to work. We therefore consider that these acts did happen because of something arising from the Claimant's disability.

13. As we have found, the Respondent was aware, at the very latest, both of the Claimant's disability and its link to his injury, by 10 August 2018. All of the acts of unfavourable treatment either occurred after this point, or before and after this point, or continued throughout.

14. Proportionate Means of Achieving a Legitimate Aim. This defence is pursued only in relation to the dismissal and the legitimate aim claimed is the efficient running of a small business, by continuing to outsource to Toshiba, while not permitting the Claimant to return to work until 100% fit, at which point, Toshiba would no longer be required. No argument was advanced as to such aim being achieved by proportionate means. In respect of the aim, no corroborative documentary evidence was advanced as to the contract with Toshiba, its cost, its terms and how and when it could be terminated. Indeed contradictory evidence was advanced, as set out above, as to it being both financially onerous, but also the '*better model'*, further muddied by belated assertions as to fear of a vendetta by the Claimant influencing the decision to dismiss. Based on our views on credibility, we are not inclined to accept the Respondent's oral evidence alone on this point. Even, however, were this a legitimate aim, there is no possibility of the Respondent trying to contend that they attempted to achieve it by proportionate means. In our

view, proportionate means would have at least included proper consultation with the Claimant, real consideration of available medical advice and if necessary, obtaining updated medical advice and potentially trialling the Claimant's return, none of which occurred.

15. Accordingly, therefore, we find that the Respondent discriminated against the Claimant subject to s.15.

16. Failure to Make Reasonable Adjustments. One adjustment is claimed, the use of an automatic vehicle, or, in the alternative, the Claimant being transported to jobs, to alleviate the detriment of being unable to return to work. The Respondent said that the latter was a 'non-starter' and we can see, with only three directors and many jobs being quite a distance away that this adjustment may not have been reasonable. It could be argued that such an adjustment did not need to be trialled, because the Respondent knew their limits and time constraints and that they couldn't sustain such an arrangement for any lengthy period of time. In respect of the automatic car, however, they clearly gave no consideration to this possibility and did not at any point discuss it with the Claimant. If it was a '*sham and a ploy'* by the Claimant to force the Respondent to facilitate his return, as asserted in closing submissions, then the easiest way of exposing such would have been to respond to him and to enquire into the feasibility of the arrangement. It *may* have been the case that had they done so, they would have discovered that it was not feasible, perhaps too expensive, or had insurance implications etc., but without any such consideration, they are not now entitled to say that such adjustment was not reasonable. We note also the case law indicating that adjustments do not necessarily need to be guaranteed of success, to be reasonable, but merely to have the prospect of removing the disadvantage (**Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075 UKEAT**) and we cannot say, in this case that no such prospect existed. Accordingly, therefore, the Respondent failed to make a reasonable adjustment to alleviate a substantial detriment to the Claimant.

17. Direct Discrimination. We have already found that the three acts of detriment complained of, lack of support to return to work, the blocking of emails and dismissal are acts of unfavourable treatment and they are therefore, by definition, also acts of detriment. The only question is whether those acts of detriment occurred because the Respondent treated the Claimant less favourably than they would have treated a non-disabled comparator, with a catastrophic ankle injury? We are conscious of the burden of proof being initially on the Claimant in this respect (s.136 EqA and **Efobi v Royal Mail Group Ltd [2019] IRLR 352 EWCA**), but consider that he has established facts (his dismissal and the possible link to his disability) which shift the burden to the Respondent to provide a non-discriminatory reason. We consider that the detriments of dismissal and the refusal to allow a return to work did constitute such less favourable treatment, because Mr Braniff, in particular, clearly had an adverse view of the employment of persons with the kind of disabilities that might have adverse consequences for his business. He said that the Claimant had '*lied to us from the very onset of his employment'* and that '*they were placed in a very awkward and impossible position through no fault of their own'*. The Respondent witnesses' combined evidence was that Mr Griffiths was criticised by Mr Braniff for even putting the

Claimant forward for interview, in the first place, bearing in mind his knowledge of the Claimant's disability. The only possible implication of such a statement, for us, is that if Mr Braniff had known of the disability from the outset, he would have not employed the Claimant, potentially of course an act of discrimination at that point, if it had occurred, but probably considerably harder for the Claimant to prove. Such a view clearly indicates a bias against disabled employees and that therefore, in the Claimant's circumstances, the Respondent (and in particular Mr Braniff) was distinguishing between a hypothetical employee with an ankle injury, who would recover in due course, return to work and probably not suffer a relapse, in contrast to a disabled employee, who had suffered an injury due to his disability and who may relapse in the future. The Respondent sought to avoid any such further recurrence by dismissing the Claimant. The alternative, potentially non-discriminatory reason advanced, of redundancy, was clearly a sham. Likewise, the refusal to support a return to work was similarly discriminatory, as the Respondent did not wish to trial the Claimant's return, as such a trial may have been successful, or partially so, rendering any subsequent dismissal more difficult. While, as we have found, the refusal to allow the Claimant to return to work and his dismissal were acts of direct discrimination, we do not do so in respect of the emails, as that, we find, was related to the Respondent's suspicions as to data interference and his supposed 'vendetta' against the Respondent, not his disability. Any non-disabled comparator who was considered by the Respondent to be behaving in a similar manner would no doubt also have suffered the same detriment.

18. Victimisation. Finally, we turn to the claim of victimisation. This, to our mind, is the most clear-cut of all the claims. On the Respondent's own evidence, in particular, but not exclusively that of Mr Braniff, they feared a 'claim' from him. There was never any implication of any potential personal injury claim and at no point had the Claimant blamed the Respondent for his injury, so the only possible claim, following Mr Braniff being alerted to the Claimant's disability, was a claim of discrimination on grounds of disability. Bizarrely, the Respondent's fear of such a claim ensured that it would come to pass. Mr Braniff, in very clear evidence in cross-examination, stated, without prompting that at least part of the rationale for dismissal was the directors' fear that the Claimant would bring such a claim. This does not have to be the sole reason, but simply be a significant influence on the decision to dismiss, which, it is clear from Mr Braniff's evidence, it was (**Nagarajan v Agnew [1994] IRLR 61 UKEAT**). Subject to s.27, therefore, the Respondent believed that the Claimant 'may do a protected act' and dismissed him as a consequence. That is a clear act of victimisation and which we find to be the case.

19. Subsequent Application by the Respondent. Just prior to the Tribunal giving Judgment, Mr Wheaton made an application for the consideration of new documentary evidence provided by the Claimant. The evening before, Ms Clarke had sent him a small bundle of additional documents, in preparation for a potential remedy hearing. They included an 'activity log' from the Claimant he had prepared that day (so, essentially, witness evidence on his part) and various items of correspondence with potential employers. Mr Wheaton considered that these documents also went to the question of liability, providing materially different evidence to that which the Claimant had

given in cross-examination, indicating effectively that the Claimant knew that he would not, in fact, be able to return to work on 19 December 2018 and was misleading the Respondent on this point, thus undermining both his evidence and credibility. He also pointed out that this disclosure was not in accordance with the Tribunal's Order on this matter, which directed that remedy-related disclosure be complete by 2 September 2019. Ms Clarke stated that the Claimant 'had nothing to hide' and that she struggled to see the relevance of these documents to the issue of liability, focussed as they were on remedy. She considered that rather than contradicting the Claimant's previous account, they corroborated it. She saw no need to recall the Claimant to give evidence, at this point.

20. Following a short adjournment, the Tribunal gave its conclusions on this new documentation, essentially deciding that it did not affect its previously-determined judgment, for the following reasons:

(1) While Mr Wheaton had raised concerns about the late disclosure of these documents, he did not object to them being adduced in evidence, as clearly he seeks to rely on them to support the Respondent's case. In the light of that and the fact that they are clearly potentially relevant (at very least to remedy), we permit their inclusion.

(2) We consider (to the extent that we consider it potentially relevant), this new evidence, as follows:

i. In his 'activity log' [1], which Ms Clarke said was created yesterday, the Claimant refers, in the period January to March 2019, to still being in crutches, rendering it extremely difficult to find a new job. Mr Wheaton considers that this implies therefore that the Claimant could not drive and that it impacts on his state of knowledge in early November 2018, as to his likely level of future fitness. Firstly, however, we don't see that the fact that the Claimant was on crutches would have prevented him from driving an automatic car. Many people with much more severe disabilities manage to do so. Secondly, there is no reason to assume that in early November, a week after his operation that because he in fact, subsequently, still needed crutches in January to March that he was misleading the Respondent in the preceding November. Many patients recovering from operations will hope to make full recoveries and the Claimant had the OH report to support him in that belief.

ii. In a text of 9 November [6] (the day of dismissal), the Claimant texted a contact at Toshiba, seeking employment and said '*I was sacked today for having an ankle injury which after my operation last week I will be back fully fit next month.*(sic)*'* That text, we consider, entirely supports the evidence given by the Claimant in this Hearing.

iii. Again, on the same day [8], he texted another contact at Toshiba, saying '*my ankle should be perfectly fine now'* and again, on 12 November, stating '*my ankle will be fully fit in January'*. Again,

this chimes with his evidence in this Hearing. We see no significance to his reference to 'January', as he is looking for new employment, which realistically he was unlikely to be offered to commence days before Christmas, bearing in mind the few work days remaining in December and a future employer's liability for payment for bank holidays and any privilege days over that period. Commencement of any new role was much more likely in the New Year.

iv. Again, on 9 November [9], he says (presumably to another potential employer) that '*I would have been back to work next month.'*

v. On 10 December [10], he texted another contact, stating '*hopefully, by the New Year, my ankle will be better'*. This matches what the OH report was saying, an initial return to limited work and then a full recovery. He was clearly, in view of subsequent events, over-optimistic in this respect, but he was consistent throughout in that belief and indeed it would have been very foolish of him, as Mr Wheaton implies, to deliberately mislead potential future employers on this point, had in fact anybody offered him a job commencing in January. We are confident, therefore that this was his genuine belief at the time.

(3) We do not consider, therefore that this new evidence is materially different than that the Claimant has previously given, or that it adversely affects his credibility, or the Respondent's liability for discrimination.

21. Conclusion. We conclude therefore that the Respondent discriminated against the Claimant on grounds of his disability, both directly, by way of victimisation, by failure to provide a reasonable adjustment and contrary to s.15, as to 'discrimination arising'.

REMEDY REASONS

1. We heard evidence from the Claimant, as follows:

(1) He agreed that the first operation had not been a success.

(2) He had used crutches, in the period January to March 2019, as needed, but not 24-hours a day, as he '*could shuffle about'* and use other support.

(3) He denied, however that he'd been unfit for work, until after the second operation in May 2019, stating that he would have been fit to work, with adjustments.

(4) He was referred to Dr Holden's report of July 2019 [104], in which she referred to him being in '*excruciating pain'* and it was suggested,

therefore that in the Spring of 2019, he was in such severe pain, the only option was a further operation to fuse the ankle. He agreed that his ankle could be painful if he took certain steps, when walking.

(5) It was suggested to him that Dr Holden's description of it being '*virtually impossible'* for him to work and drive was an accurate description, as by the mid-end of July 2019, he was still in a splint and just attempting weight-bearing and therefore was not fit for work until late July or August. He agreed that this was '*somewhat accurate'*, but pointed out that he didn't drive (getting about on the bus instead, to attend, for example, an IT course, '*for something to do and to improve my knowledge'*), as, being unemployed, he couldn't afford an automatic car, the family having one car already, which his wife used for work. He also said that the issue of an automatic car did not come up with Dr Holden, so she did not comment on that possibility.

(6) He had registered as disabled in September 2018, qualifying for a 'blue badge' for the family car sometime later. He was asked why he had not done so before then and said that he '*could have applied years ago, but now I had no income, so needed help. I was up against it.'*

(7) He disagreed that in January to May he was not fit to do any work similar to his old role, stating that he could, provided it was not heavy, or physical work. He reiterated that he could have done his previous role, with support.

(8) He agreed that from March-onwards his attempts at job-searching '*go quiet'* as, by then, his symptoms were worsening.

(9) He said that a couple of weeks after the second operation, he was weight-bearing and felt significantly better than after the first operation.

(10) He had made previous enquiries about becoming a driving instructor, but that role was unfeasible because too much money was needed, up-front, which he didn't have. He said that had he been able to follow that route, no driving would have been necessary initially, as there would have been a training period. At the end of August/early September, he applied to be a bus driver, shortly afterwards embarking successfully on a six-week training course. His losses ceased at that point.

(11) In respect of his psychological state, it was suggested to him that this was entirely down to his injury and its effects, with Dr Holden describing him as '*very down'*, for that reason, rather than perhaps any behaviour of the Respondent. He said that his low mood was '*for all matter of reasons, for losing my job, the impact on my family, the loss of income. I could talk for hours about this, it was a horrendous time. I had been doing well at work, passed all my courses and then it was all turned on its head, with Gary* (Mr Braniff) *turning from a nice guy, to the opposite. It was also the lack of support from my brother-in-law, not just the pain.'* He was asked if Dr Holden knew of this situation

and he said yes and was then asked, therefore, why she had not mentioned it and said that she was dealing with his injury.

(12) In respect of his family, he said that he was estranged from his sister, with the further factor of him no longer seeing his nephews and nieces (aged 18, 15 and 10) and his own children (aged 14 and 10) no longer seeing their cousins, when they had all been close before. When it was suggested that there could be other factors for this estrangement, he said that it was '*all linked – it all started with my dismissal'*. He said that he went from seeing his sister and her family frequently, with her (as a hairdresser) cutting his hair, to now not having seen them for over a year. He referred to seeing her in the street at some point and he holding out his hand to her, but she ignored him, as she blamed him for the events leading up to this Tribunal hearing.

2. Mr Wheaton made the following submissions:

(1) The Claimant was incapable of working, based on the evidence from Dr Holden, for the vast majority of the time after the termination of his employment. After his second operation, he did, to his credit, relatively quickly find employment, with only a minimal gap.

(2) He has not provided any fit notes for the period post-termination, when the onus is on him to show that he was fit for work.

(3) There should therefore be no, or minimal award for loss of earnings.

(4) It seems to be the case that the Claimant now seeks to amend his schedule of loss, to include a claim for loss of earnings, while still employed, but on Statutory Sick Pay (SSP), due to the Respondent's failure to implement his requested reasonable adjustment. Such an application should not be entertained, as clearly the possibility of such a claim could clearly have been in his contemplation all along and therefore should have been brought much earlier. If the Tribunal considers otherwise, such a claim would, in any event, be too remote.

(5) In respect of injury to feelings, the claimed £30,000 is excessive, with the period of discrimination ranging over a maximum of three or four months, so a relatively short period. While, in view of the several acts of discrimination, over that time frame, it must be accepted that an award would not fall in the lower **Vento** band, it is at the lower end of the middle band, say less than £10,000. Contributing factors to that submission are that Dr Holden did not, in her report, refer to any adverse psychological condition, but focussing on the pain of the injury. Further, the motivation of the Claimant's sister to behave in the way described was not challenged in evidence, with her husband, Mr Griffiths and is therefore simply an assumption on the Claimant's part. The Claimant's physical pain and discomfort is a significant contributor to his state of mind. The case is certainly not in the upper band. The Tribunal should not permit any sympathy for the Claimant to be used to seek to 'send a message' to the Respondent, or to 'punish' them,

when the only purpose of such an award is to compensate the Claimant.

(6) (It was agreed by the parties that while there is mention in the schedule of loss as to possible uplift for breach of the ACAS Code, the Code did not apply in cases such as this.)

3. Ms Clarke made the following submissions:

(1) She did contend that the schedule of loss should be amended to allow for loss of earnings for the period August to September 2018, to reflect the failure to make the requested reasonable adjustment, with such loss calculated at £3550.

(2) If the Claimant had been allowed to return to work on 19 December, on full pay, how long would such return have lasted? It is submitted that the Claimant would had 'muddled through', with no reason why he could not have continued, particularly if using an automatic car, until the second operation in May. Potentially, at that point, the Respondent could have recommenced the outsourcing to Toshiba, with a potential continuance of sick leave by the Claimant thereafter, with continuing loss of SSP to October. (Ms Clarke accepted, however that the Claimant will have no suffered no loss in that period, as he was in receipt of Personal Income Payment, at SSP equivalent).

(3) In respect of injury to feelings, she submitted that the award should be at the top of the middle band, or the bottom of the upper band, because, for three months, there had been an ongoing and deliberate campaign of discrimination against the Claimant, despite two of the three directors being willing to facilitate his return to work. He was treated with suspicion by the Respondent. Further, all his claims have been upheld, showing the wide ambit of this discrimination. It is, in these circumstances, easy to see how the impact would be severe. The Claimant describes his upset, into which, entirely relevantly, the family issue plays in. In respect of Dr Holden's comments, she was dealing, as an orthopaedic consultant, with the Claimant's pain, which was within her professional ambit.

(4) She referred to some case examples of awards, but accepted that no two cases are the same.

(5) Interest in recoverable on the sum awarded, at 8%, for the entire period in respect of injury to feelings and from the midway point for loss of earnings.

4. Conclusions. We reached the following conclusions:

(1) In respect of loss of earnings, we consider that it could have been feasible for the Claimant to return to work on 19 December, but that it is likely that he would have gone on further sick leave by 28 February, based on both his own evidence as to his efforts at seeing employment '*going quiet'* from March-onwards, at which point and

thereafter his condition was probably too debilitating to continue working.

(2) We do not consider a claim for loss of earnings while still employed to be appropriate, as such a claim has not previously been pleaded, when all the relevant facts were known to the Claimant. In any event, we cannot conclude that if he had returned to work for a trial period, prior to his first operation, using an automatic car, he would have been able to continue doing so, bearing in mind that our finding in this respect was only that such a 'prospect' existed. We consider, therefore, any such loss to be too remote.

(3) On that basis, therefore, we considered that the Claimant's loss of earnings was limited to ten weeks, at £346 per week, total £3460. Added to that was interest at 8% for 270 days, of £204.76 – total £3664.76.

(4) In respect of injury to feelings, we concluded that clearly, as accepted by both parties, this is a middle band case, due to the length of time over which the discrimination took place and that it was not 'one-off'. We consider it at the higher end of that band, at £20,000, due to the following exacerbating factors:

i. The acts of discrimination extended over five months.

ii. The Respondent (in particular Mr Braniff) had a real animus against the Claimant, illustrated, firstly, by his threats of dismissal within a month of the Claimant injuring himself and repeated thereafter and secondly by his withdrawal of the Claimant's laptop and email access, without explanation. While he could not, until this Hearing, have been fully aware of Mr Braniff's unfounded suspicions towards him as to his suspected vendetta against the Company, the Claimant will no doubt have picked up on that atmosphere in their conversations at the time and evidenced by the unexplained withdrawal of his laptop and email access.

iii. At the time, the Claimant was vulnerable and in considerable pain and discomfort and clearly deserving of greater consideration than he was afforded, particularly as his previous service had been, on all accounts, good. He will have understandably been shocked and hurt by this sudden 180° turn in the Respondent's attitude towards him. We don't consider that Dr Holden's focus on his physical pain and discomfort contributing to his mental state to exclude other causes. As an orthopaedic consultant, she will naturally have focussed on her area of expertise and was not asked to comment on other, broader issues (even were she qualified to do so).

iv. The family rift is entirely relevant to this matter and was clearly related to these events. Indeed, Mr Griffiths, in his evidence, specifically linked them, recording the effect on both him and his

wife of the family split. He offered no other explanation for that state of affairs. The Claimant and his family, as a consequence, have not spoken to his sister and her family for over a year, when before they met and socialised regularly. The extent of this breakdown was well illustrated by the Claimant's description of his sister ignoring him in the street.

v. The discriminatory acts were deliberate and ranged over almost the full gamut of disability discrimination.

vi. Finally, the Respondent clearly acted in bad faith, as evidenced by its reliance on a sham redundancy dismissal, when clearly their motivation for dismissal lay elsewhere.

(5) Interest was added, at 8% for 540 days, of £2367.12 – total award £22,367.12.

(6) The grand total of both awards was therefore £26,031.88.

RESERVED JUDGMENT ON COSTS APPLICATION

1. Immediately following judgment, Ms Clarke applied for the Claimant's costs of these proceedings, limited to her fees for the hearing, in the amount of £7260 (inclusive of VAT).

2. She did so on two grounds: firstly that the response had no reasonable prospect of success and secondly, unreasonable conduct by the Respondent (Rule 76(1)(a) and (b) Employment Tribunal's Rules of Procedure Regulations 2013).

3. In respect of the former, she said that the Respondent had clearly carried out discriminatory conduct and that therefore their response was bound to fail, to include in respect of the claim for reasonable adjustments and their belated admission of the claim of victimisation.

4. In respect of unreasonable conduct, she cited the following:

(1) The Respondent's change in evidence as to the costs of the Toshiba contract.

(2) The allegation as to a 'vendetta' having never been previously raised.

(3) The Respondent refused an offer from the Claimant, via ACAS, to accept £12,000.

(4) The Respondent has had legal advice throughout.

5. Mr Wheaton resisted the application, citing the following:

(1) No costs notice had been served (although it was pointed out to him that none such is required in Tribunal proceedings).

(2) The offer was made at a point that the claim of unfair dismissal was still on the table and therefore the defence needed to be maintained.

(3) For much of these proceedings, the Respondent, as a relative amateur, has been operating on its own, albeit with some advice.

(4) They should not be punished for any candid admissions made by them in oral evidence.

(5) It has not been alleged that the response was a sham from the outset. If, however, the Claimant considered that the response met the high bar of having no reasonable prospect of success, then it was open to them to apply for strike out order, but they did not.

(6) The Claimant has not got over that high bar. The Respondent submitted a justification defence, limited only to the dismissal, which was not unreasonable, as further evidence was needed to determine it.

6. Conclusion. We find that a costs order is appropriate in this case, for the following reasons:

(1) No reasonable prospect of success. We consider that two elements of the Response, in particular, had no reasonable prospects of success, the s.15 claim in relation to the act of dismissal and the failure to make reasonable adjustments claim, for the following reasons:

i. Section 15. From the very outset, three elements of the s.15 claim were beyond dispute, namely that dismissal (for whatever reason) was a detriment; that the Respondent had knowledge of the Claimant's disability at the material time and that his ankle injury was linked to that disability. In respect of the latter two issues, despite the Respondent's prior denials as to receipt of the Rheumatology practitioner's letters in August 2018, it was clear that they (and Mr Braniff in particular) had seen them at the time and therefore should have been in no doubt on these matters, at the point of dismissal. Clearly, therefore, it was always going to be the case that the dismissal was because of 'something arising in consequence of the Claimant's disability'. If the Respondent was in any doubts on that matter, it was spelt out to them in detailed terms in the case management order.

ii. That left only the statutory defence of the Respondent showing that the treatment was a proportionate means of achieving a legitimate aim. As should be clear from our findings above, the Respondent made no real effort to advance this defence. They provided only belated and contradictory oral evidence as to the supposed legitimate aim of running its business efficiently, now stating that the outsourcing to Toshiba was '*the better model*'.

While Mr Wheaton asserts that further evidence was needed, before this issue could be determined, it was for the Respondent to provide such evidence and they failed to provide any corroborative evidence, to attempt to support their belated and contradictory oral evidence. The Respondent provided no effective argument on the 'proportionate means' point, because, we consider, there was none they could advance.

iii. This element of the Response was, therefore, doomed to fail and accordingly, had no reasonable prospect of success and should not have been pursued.

iv. Failure to Make Reasonable Adjustment. Again, several elements of this claim were indisputable, from the outset. It was not disputed that the Respondent applied the PCP of requiring the driving of a manual van. Secondly, as already stated, they knew of the Claimant's disability and its link to his ankle injury at all relevant times. On the final point, they advanced no evidence (because there was none) of any consideration by them of the Claimant's proposal that he hire an automatic vehicle and therefore effectively debarred themselves from any argument that such an adjustment would be unreasonable, or at very least had no prospect of alleviating the disadvantage. On that basis, therefore, the response to this claim had no reasonable prospect of success.

v. We note Mr Wheaton's assertion that if the Claimant considered that the Response had no reasonable prospects of success, then he could have applied to the Tribunal for a strike-out order. However, Tribunals are enjoined, at any preliminary hearing, to not strike out discrimination claims, except in the most exceptional cases, if there are facts in dispute (**Ezias v North Glamorgan NHS Trust [2007] ICR 1126 EWCA**). While it is possible for evidence to be heard at a preliminary hearing, to determine such facts, it would, we consider, have been necessary for such Tribunal to effectively have heard the bulk of the evidence we have heard, over the first two days of this Hearing, with a possible further day for deliberation, effectively therefore the equivalent of the substantive hearing this Tribunal has just concluded. There would, therefore, have been little or no merit, either in saving of costs, or the Tribunal's time (applying the 'Overriding Objective') in dealing with the claim in that manner.

(2) Unreasonable Conduct. We consider that there are elements of unreasonable conduct by the Respondent in this case, as follows:

i. The change in evidence, only in cross-examination, as to the merits or otherwise of the Toshiba contract. If true, this is a matter that should have been apparent to the Respondent over a year ago and therefore have been included in their response and witness statements. We consider that it was, instead, more likely

to be a belated and untrue attempt to justify the supposed redundancy.

ii. Similarly, the belated 'vendetta' allegations, setting out what was probably at least part of the true reason for dismissal, were made only in oral evidence, obliging the Claimant at that late stage, to protect his position by an application to amend his claim to include a claim of victimisation.

iii. The Respondent has had legal advice, at least at crucial moments in the progress of the case, to include the filing of the Response, attendance at the case management hearing and preparation for and conduct of this Hearing. They could also, presumably, if they wished, have sought 'ad hoc' advice, as and when the requirement arose. We do not therefore consider that this factor reduces the Respondent's liability for its conduct.

(3) While refusals of settlement offers are not necessarily, in their own right, sufficient to merit findings of unreasonable conduct, they can be a contributing factor, when considered cumulatively. However, in this case, the offer was made at a point when the Claimant was still pursuing a clearly unmeritorious unfair dismissal claim and provided no rationale as to its amount, or set out why the respondent's response may fail.

7. Amount of Costs Order. No submissions were made by the Respondent as to the amount sought and in our experience, counsel's fees of £6050 (plus VAT), for a four-day hearing, would be entirely reasonable. The Respondent (in the form of any of its directors) was not present at the costs hearing, although Mr Wheaton confirmed they could be contacted by phone, if necessary. No submissions, or evidence was therefore offered as to the Respondent's ability to pay such an order (Rule 84) and which we, therefore, accordingly, make.

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Employment Judge O'Rourke

Date: 4 February 2020