



# EMPLOYMENT TRIBUNALS

**Claimant:** Bryan Goodes

**Respondent:** Numatic International Ltd

**Heard at:** Exeter                      **On:** 10-13 August 2020

**Before:** Employment Judge Housego  
Ms R Hewitt-Gray  
Ms E Smillie

## Representation

Claimant: In person

Respondent: Stephen Ellerby, solicitor, Made UK Ltd

## JUDGMENT

The unanimous decision of the Tribunal is that the claims are dismissed.

## REASONS

1. Mr Goodes worked for Numatic International Ltd (“Numatic”) from 2005 until dismissed for excessive absence on 14 December 2018. He claims this was unfair, and was disability discrimination, and that there were other ways he was treated before that which were also disability discrimination. Numatic says that it treated Mr Goodes fairly throughout.

### Law

2. Mr Goodes claims unfair dismissal contrary to S94 of the Employment Rights Act 1996. The reason given was capability, and Mr Goodes does not suggest otherwise. There is reference to “*some other substantial reason*” in the papers, but this is plainly a capability case. That is a potentially fair reason for dismissal, and so the Tribunal applies S98(4) of the ERA (for which there is no burden or standard of proof):

*“Where the employer has fulfilled the requirements of subsection (1), 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 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."*

3. Mr Goodes' claim of disability discrimination relies on S15 of the Equality Act 2010, for which no comparator is needed:

*"15 Discrimination arising from disability*

*(1) 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.*

*(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

4. He also says that Numatic did not make reasonable adjustments:

*"20 Duty to make adjustments*

*(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*

*(2) The duty comprises the following three requirements.*

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

*(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

*(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in*

*relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*

*(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.*

*(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.*

*(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.*

*(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—*

*(a) removing the physical feature in question,*

*(b) altering it, or*

*(c) providing a reasonable means of avoiding it.*

*(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—*

*(a) a feature arising from the design or construction of a building,*

*(b) a feature of an approach to, exit from or access to a building,*

*(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or*

*(d) any other physical element or quality.*

*(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.*

*(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.*

*(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.*

## *21. Failure to comply with duty*

*(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*

*(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*

*(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.”*

5. The Claimant must provide evidence from which this Tribunal might find disability discrimination. If he does so, it is for the Respondent to show that the reason was not, even in part, to do with disability. The question of whether an adjustment is or is not reasonable is a value judgment for which there is no burden or standard of proof, as is the case in deciding whether a there anything that is a substantial disadvantage to a disabled person by reason of a provision criterion or practice is a proportionate means of achieving a legitimate aim.

### **Disability**

6. In a previous hearing it was decided that the Claimant is disabled within the meaning of the Equality Act by reason of pain in his left knee. The Respondent takes no point about knowledge at all material times. The Claimant also has recurrent back pain, but that is not a disability. His view is that there is a connection, as he believes that because he has a bad left knee, he shifts weight to his right leg which he believes is causative of his back pain.

### **The Setting**

7. The Respondent makes vacuum cleaners with the Henry brand. It employs a substantial workforce (about 950) and has an hr adviser in house. It is a factory setting.

### **The Issues**

8. The specific issues identified at a previous case management hearing are:

S15:

- Being removed from the company sick pay scheme
- Being put on to performance monitoring following sickness absence
- Having a written warning and final written warning imposed on him
- Being dismissed.

S20/21:

Was there a provision criterion or practice (“pcp”)

- allocating the Claimant work on any of the Respondent’s production lines
- the Respondent’s sickness management policy
- the Respondent’s sick pay policy

Did the application of any such pcp put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

- the Claimant could not stand in one position for any length of time
- the Claimant suffered pain if required to stand for any length of time
- the Claimant needed to be able to move regularly
- the Claimant needed to sit down from time to time
- the Claimant had taken sick leave in order to manage his condition

Did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant identified the following as the adjustments he says it would have been reasonable for the Respondent to make:

- allocation to a production line where he could either move regularly or be seated
- provision of longer time for the Claimant to see the company doctor when he was off sick and unable to travel to Yeovil
- finding him alternative work rather than dismissing him.

The Respondent accepted that it knew of the Claimant’s problems with his left knee at all material times.

### Reason for dismissal and statistics

9. The reason given for dismissal was excessive sickness absence, and Mr Goodes does not say this was other than a genuine reason. Mr Goodes was absent from 2014 to 2018 for the following number of days, and following number of absences. He was dismissed on 14 December 2018, so the 2018 figure is effectively a whole year, and the absences include periods of phased return to work after longer absences, where the first weeks are part time, and full pay is paid, the rest being sick pay. The first figure is the number of days, and the second the number of absences. There was an issue with attendance before 2014, but Numatics records are not as full as they are from 2014:

- 2014: 65, 8
- 2015: 13, 4
- 2016: 90, 4
- 2017: 95, 6
- 2018: 77, 7.

10. Mr Goodes’ disability is his left knee. He had absences that were not related to his left knee as follows:

- 2014: 0 days
- 2015: 5 days 3 absences
- 2016: 2 days, 1 absence
- 2017: 27 days, 4 absences

- 2018: 11 days, 3 absences.
11. Mr Goodes has received sick pay in all his sickness absences, apparently of full pay, save for two weeks when it was suspended because Mr Goodes did not attend an OH appointment.
  12. Mr Goodes accepts that Numatic has a capability policy and followed its procedure correctly. Under it Numatic took the following steps:
    - 12 February 2013: informal counselling
    - 19 April 2013: first formal caution
    - June 2017: informal counselling
    - 20 October 2017: verbal warning
    - 27 February 2018: first written warning
    - 05 June 2018: no warning given after 5 day absence for preplanned surgery for removal of teeth
    - 24 August 2018: restarted first written warning after absence for knee pain 28 June 2018 – 17 August 2018
    - 18 October 2018: final written warning after 08-12 October stomach absence
    - 14 December 2018: dismissal following absence 31 October 2018 – 07 December 2018
  13. The dismissal was at the end of a period of sick leave from 31 October 2018 to 07 December 2018, absence that was related to his knee.
  14. Numatic retain an occupational health doctor. He prepared reports about Mr Goodes, and after each there was a review meeting. The dates of the occupational health reports are:
    - 14 November 2012
    - 27 February 2013
    - 06 September 2013
    - 23 September 2013
    - 15 February 2016
    - 07 July 2017
    - 23 July 2018
    - 10 December 2018
  15. Numatic obtained a report from Mr Goodes' GP dated 20 September 2018.

## **Evidence**

16. The Tribunal had an agreed bundle of documents of nearly 500 pages, and heard oral evidence from Mr Goodes, and for Numatic from Ray Poole (project manager), Stuart Cochrane (head of operations), Kevin Phillips (shift leader), Mark Trump (Vac B manager (the department where Mr Goodes worked)), and from Abi Dare (human resources). The Tribunal found all the witnesses reliable, and there was no substantial dispute of fact, save as to mobility in the assembly lines.

## Policy

17. Numatic has an absence management policy, agreed with the union. It has triggers. Mr Goodes accepts that all the actions of Numatic under the policy were after his absences met these trigger points:
- 2 absences in a rolling 6 months has a possible outcome of informal counselling.
  - 3 absences in a rolling 6 months has a possible outcome of a verbal warning.
  - Up to 2 absences in any rolling 6 month period during the life of a verbal warning has a possible outcome of a first written warning.
  - up to 2 absences in any 6 month rolling period during the life of a first written warning has a possible outcome of a final written warning, and
  - up to 2 absences in any 6 month rolling period during the life of a final written warning has a possible outcome of dismissal.

## The hearing

18. Mr Goodes was offered breaks as he might find necessary by reason of his back or knees. Mr Goodes gave his evidence first. There were breaks about every hour to an hour and a quarter. At the end of day 1 the Tribunal established the witness order for the next day, so that Mr Goodes was able to prepare in the right order. The issues clearly set out in the case management order were explained to him. On the 3<sup>rd</sup> day evidence ended at 11:20. The solicitor for Numatic had prepared written submissions, which were handed to Mr Goodes and to the Tribunal, which then adjourned to 14:00 so that Mr Goodes had adequate time to prepare his submissions. In between each witness there was a short break (in part as the witness table had to be sanitised). The record of proceedings contains a full note of the submissions, which were about 15 minutes for each party (and those of Numatic are in writing), with further submissions dealing with some points from the evidence of the last 2 witnesses called by Numatic.

## Facts found

19. Mr Goodes worked at Numatic from 2005 to 2016 in the mould shop. In 2012 or 2013 he started having pains in his knees, primarily the left knee. The mould shop worked continental shifts, which means 12 hour shifts. Mr Goodes found this hard to cope with, by reason of pain in his knee. He had previously asked for a job swap with someone in the assembly section of the factory (Vac B), but this had been refused. After an OH report said that Mr Goodes should limit his working shifts to 9 hours, the problem was discussed, and it was agreed that Mr Goodes would be transferred to the Vac B assembly line area of the factory. He started work there on 14 March 2016. The assembly line works eight hour shifts, 06:00 to 14:00 and 14:00 to 22:00. Apart from being able to sit sometimes during his shift, that OH report made no other recommendations.
20. The assembly area of the factory is on several different lines, each for a different type of vacuum cleaner. There are a number of operatives on each line, typically 5 or 6. They rotate through a series of specific successive tasks in the assembly of a machine. In a shift there are hourly segments, each with

a production target, which varies with the machine being assembled. Each task has a time allocated to it, which is 15% more than the period that it ought to take to undertake each task, as no one can work flat out non-stop. The pause at the end of a task is called a “*microbreak*”. If all goes well, there are a few seconds at the end of every assembly task before the next one starts. At the end of every hour the team rotates tasks, so that everyone can do every job, and boredom (and risk of rsi) is reduced. This necessarily involves moving around. The team makes the target number of machines and then stops, so there may also be a break at the end of each hour segment of a shift.

21. There are two 15 minute breaks in the 8 hour shift, so about 2½ hours between breaks. Workers can go to the toilet whenever they wish, and can make tea or coffee at will. Because of the 15% margin this does not usually impact on the achievement of the target. If the target is not met it is usually because there has been some mechanical problem, or an absence of parts.
22. Parts are provided in containers called “*stillages*”. These come in from the mould shop or elsewhere. An extra person, the “*line filler*” makes sure that the stillages are full. If someone has gone to the toilet or to make a cup of tea the line filler will often lend a hand in assembling. No one is disciplined for failure to meet targets. If there is a real problem then Mr Phillips and others will carry out a “*root cause analysis*” to find out why and to solve it. The targets are set at a realistic level that is usually achieved if there is no issue.
23. Sometimes agency workers are employed. The tasks are not difficult, and new people tend to be 50-60% efficient in their first week, rising to over 90% by the fourth week.
24. While there is more room around some assembly lines than others, all the tasks involve moving about. Of the five or so tasks on the assembly lines, one or two are carried out seated. With microbreaks, toilet breaks, going to make tea or coffee, two mid shift breaks and changing task every hour, there is the opportunity to move around at will. Some of the tasks can be carried out seated or standing. Some require walking two or three paces to pick something out of a stillage.
25. Mr Phillips is shift manager for about 50 people in the assembly lines. He decides who works where on any given shift, and he sorts out any problems that arise. He also deals with any underperformance. If there is underperformance in a shift he will ask the tester of assembled machines what happened, and the tester is usually honest about who is failing, because the house rule is that if he is unable to say then the underperformance is attributed to him. Mr Goodes has no complaint about Mr Phillips (other than that he did not take him off the blue shift on 27 June 2018 when Mr Goodes asked him at 07:00 or so).
26. Various people in the factory use a perching stool to take the weight off their feet. Mr Goodes did not ask for one, and OH reports did not recommend the use of one. While Mr Goodes said that the use of such a stool was impracticable (and he thought it might be unhelpful as he thought it could strain his back), the Tribunal does not accept that to be the case. It would not work for packing, which involves moving about to pick up a flat packed box,



opening it and then filling it with the machine and accessories, but it would for the other assembly stages which not seated (some are) which are carried out on a bench. That some stages are seated is also relevant – 2 of 6, typically, are carried out seated, so reducing the amount of standing. Mr Goodes said that this might mean 4 x 1 hour standing followed by 2 x 1 hour sitting, and 4 hours standing would be prolonged and not advisable. Mr Goodes was not able to say that this ever occurred. In any event there is a break every 2½ hours. Mr Goodes was able to move about, as set out elsewhere in this decision, and he did have a period of nearly a year from June 2017 without knee related absence (but had other absences), which did not indicate that work was the issue (see below).

27. The chronology of the process is set out above. Mr Trump did not take any action on 05 June 2018, when Mr Goodes was on a first written warning, because the trigger for that review was a four day absence following a pre-planned operation on his teeth carried out in hospital. It was unconnected with anything else and Mr Trump felt it was unfair to take any action in those circumstances.
28. The OH report of 23 July 2018 noted that Mr Goodes had no other back or knee related absence since the last report of 03 July 2017. (There were 33 days of absence for other reasons in that 12 month period: 4 days absence when he sustained an impact to the knee (10-13 October 2017), 25 days for a fractured finger (20 November 2017–21 December 2017), and 5 days for hospital treatment (21-25 May 2018).)
29. On 24 August 2018 Mr Trump held a review meeting after Mr Goodes returned from an absence caused by back and knee pains which lasted from 28 June 2018 to 17 August 2018, and reissued the first warning given on 27 February 2018. Mr Goodes attributed this absence to working on the blue auto line, which he said was too static. Numatic's managers do not agree that this is so, but Mr Phillips and Mr Trump did not allocate him to that line again. For that reason that line could not have been a cause of the absence through knee pain from 31 October 2018 – 07 December 2018.
30. This means that in 2018 Mr Goodes benefitted from no action being taken on two occasions after the trigger points were reached, but still reached the stage where consideration of dismissal was triggered.
31. Mr Goodes lodged a grievance by emails of 06 July 2018 and 03 August 2018, addressed to Mr Cochrane, heard on 14 August 2018 by Graeme Milne. This was about being put on the blue line on 27 June 2018, which had, he said, been the cause of him going off sick half an hour into the next working day because of the pain he said resulted from that shift. His 3 page email stated that this *“caused a severe failure in my back resulting in severe pain and virtually being incapacitated at home due to the pain”*. He refers to chiropractic back treatment which has helped. It was not knee pain that caused him to be absent. His disability is left knee pain.
32. That grievance was not upheld by Mr Milne and Mr Goodes appealed. He told Stuart Cochrane, who chaired that hearing, that he had no problem with the blue line if he could move around. He said it was either a catastrophic accident or being static that caused his absence from 28 June 2018.

33. The OH reports have a consistent opinion, reflected in that of 10 December 2018. This stated that the doctor had seen Mr Goodes in July 2017 and July 2018. He reports that had then felt that *"I did not feel at either time that there was anything significant going on in the knee, but he did have some mechanical back pain that appeared to be exacerbated by the symptoms relating to his knee, which I felt was otherwise in good shape."*
34. The report stated *"As before, he has episodic low back pain as does 80% of the UK population, and he has occasional left knee pain. I am unable to understand the reasons for the left knee pain."* He reported that a pain clinic specialist diagnosed it as neuropathic, but the OH doctor doubted this was correct because the medication, gabapentin, prescribed specifically for that cause, had so little effect. He believed that Mr Goodes was now fit for work and would be able to undertake all that was required of him on the various lines he was employed upon. He suggested that the most important thing was for Mr Goodes to remain mobile and not adopt any static postures either standing or sitting. He ought to move every 15 to 20 minutes. He was best off in a workplace where he was naturally moving to do the job. He saw no reason for long-term use of medications.
35. There is reference in the OH reports to good muscle tone around the knee consistent with Mr Goodes walking the 4-5 miles a day he said he did, and doing the exercises prescribed for him in August 2018 by the chiropractor.
36. Mr Goodes' GP's letter of 20 September 2018 stated that there was unlikely to be a long term cure for the pain. It stated that Mr Goodes said that standing in a stationary position for a prolonged period made it worse, and that he was better if allowed to sit at times, or mobilise.
37. Numatic paid for Mr Goodes to have initial chiropractic treatment for his back, and then paid half the cost of further treatment. A chiropractic report of 09 August 2018 reported on treatment to his back, which had resulted in a significant improvement in range of movement and pain.
38. Mr Goodes was asked to attend an OH assessment in Yeovil on 05 July 2018. Three days before he said he could not drive there. Numatic said they would pay for a taxi. Mr Goodes said that he could not travel one hour there and one hour back, and declined to go. By letter of 04 July 2018 Mr Goodes's sick pay was suspended. It was reinstated when he attended the OH doctor on 17 July 2018, the doctor coming to Chard to see him.

## Conclusions

39. Although Mr Goodes made much of having no individual risk assessment on joining the assembly line on 14 March 2016, the only provision recommended was that he should be able to sit at some point in his shift. The shifts were 8 hours so less than the 9 hour maximum the OH recommended. There was no reason to conduct a risk assessment.
40. Mr Goodes was not happy that there was no trial period, but as he had previously asked for a transfer to the assembly line, there is nothing in his objection that it should be tried out before being made permanent. As the

shifts in the mould shop were 12 hours he could not stay there, and the Tribunal was told of no other possible option. In December 2018 the CSS section was suggested as a possibility, but it was not monitored and was being wound down with its work being put into ordinary assembly lines. It was not an option in December 2018, Mr Goodes had not asked for it before, and there was nothing in the return to work meetings or in the OH reports to suggest it might be beneficial.

41. Mr Goodes also thought it significant that having moved on 16 March 2016 he was then off work by reason of knee pain between 19 April 2016 and 23 May 2016, so that management should have known the move was not solving his problem of working with a bad knee.
42. However, he had previously asked to go to Vac B, had never voiced any objection to working in the assembly line, and he had then worked from 23 May 2016 to 28 June 2018 with no knee related absence (other than 10-13 October 2017 when he suffered an impact to it). There was no reason for management to think that there was any specifically knee related issue with him working there.
43. Mr Goodes was asked to work on the blue line on 27 June 2018. After an hour, at 07:00, Mr Goodes said to Mr Phillips that he thought it was too static for him, and that would cause him problems. Mr Phillips said that as far as he was concerned there was no reason why he could not work the blue line, as he was said to be fit to work anywhere: he would have to go to his doctor if he thought otherwise. Mr Goodes said that he would speak to his union representative, and went back to work. He came in the next day, and then was off work after ½ hour work, because of his knee pain, until 17 August 2018. He then asked not to work on the blue line again, and was never asked to do so. There was no formal decision not to do so, and this was just the line of least resistance for Mr Phillips and Mr Trump, and no issue for anyone else working in Vac B.
44. Mr Goodes felt that his GP letter, commissioned by Numatic, was not given weight by them. He said that it had a diagnosis which they ignored. In fact all the GP letter did was to set out his symptoms – “*chronic bilateral patella femoral pain*”: simply put, long term pain in both knees (patella being kneecap and femoral being to do with the femur bone). The GP letter clearly stated that the GP was not an occupational health specialist, and Numatic had a current OH report. There was no reason to have a review meeting after the GP letter. It made no other recommendations. That GP letter also opined that there was no likely solution to the problem, so there was every reason for Numatic to think that absences were going to continue.
45. There was a pattern of absence from both knee related pain, but also extensive absence from other unrelated things, such as back pain, flu, achilles’ tendon, stomach bug, and a tooth operation. The levels of absence from absences unrelated to his knee were substantial. Together with the knee related absences, the result was absence from work over a four year period of between one quarter and one third of the time. Put the way, it was over a year’s absence in four years. In that time there were 29 separate absences. Mr Goodes in cross examination, when asked to look at the list, accepted that it was “*frightening*”.

46. With that level of absence, and with the procedure being followed (and it was not said to be an unfair procedure), unless there is some other failure by Numatic, the dismissal cannot be considered unfair or disability discrimination. It was not reasonable to expect Numatic to cope with these absences, during which (save for a two week period when sick pay was suspended for not going to an OH assessment) Numatic paid Mr Goodes his full pay.
47. Mr Goodes' case effectively depends on his assertion that there was a failure by Numatic to make reasonable adjustments which failure, he says, caused him to be away from work. This does not stand up to scrutiny. He asked only not to go on the blue line after, he says, one day's work on that line on 27 June 2018 led him to go off work the next day after only ½ hour. He had not asked before. After this he was not put on the blue line again. His working pattern and conditions accorded with what the OH reports said, and his own GP said no different. He was able to move about. He could go to the toilet whenever he wished, or make tea or coffee. He had micro breaks (he made the point that he was proficient at his assembly work, and not trying to avoid any specific line by reason of workload, so he could do the work in the time allowed without difficulty). There was no penalty for underperformance, so he could walk up and down had he wished. Some of his work was seated, as the reports suggested should be the case. Being seated too much was also a problem for Mr Goodes so it was never in contemplation that a seated role should be found. There were breaks frequently, as people moved at the end of each hour and in mid shift breaks. There is no justifiable criticism of Numatic in anything they did in connection with Mr Goodes work. Nothing they did was not in accordance with (frequent) OH reports from a specialist doctor.
48. The Tribunal took careful note of Mr Goodes' extensive questioning about the individual assembly lines, but even if it had weight, this was not something brought to Numatic's attention. The Tribunal finds that even if this submission was correct there was no way that Numatic could have known. However for the reasons given, the Tribunal could not accept that any small differences in layout or work type were such that Mr Goodes could not mobilise during his shifts as recommended.
49. The OH reports indicate scepticism about whether Mr Goodes was genuine. Numatic now adopt that position. Neither he nor the GP could find any pathological reason for Mr Goodes' pain. The OH doctor found some age related change to his patella and a bad back, like 80% of the population, and extended use of heavyweight medication not warranted by clinical examination. Notwithstanding that analysis, while Mr Goodes was employed Numatic never took the view that Mr Goodes is other than entirely genuine in his absences (the Tribunal thinks they were entirely correct in this view – just because medical professionals do not know why there is pain does not mean there is none). It is solely the number and length of his absences that were the reason for his dismissal, not any doubt about whether they were genuine.
50. It may be that Mr Goodes' frame is simply not able to cope with the work in the Vac B line: if so it would not be disability discrimination or unfair dismissal if Mr Goodes were simply physically not capable of carrying out the work

without suffering debilitating pain.

51. We find as a fact that Mr Goodes was able to mobilise as was suggested by OH and his GP, and that he was not required to stand or sit for prolonged periods, and was able to take a break or move about, stand or sit whenever he wished. We find as a fact that it was reasonable for Mr Phillips to require Mr Goodes to work on the blue line on 27 June 2018 (as it accorded with all recommendations Numatic had received), and note that after Mr Goodes went off after that he was never asked to work on the blue line again.

52. We turn to the individual heads of complaint.

S15:

*Being removed from the company sick pay scheme:* This was temporary by reason of non attendance at an OH appointment, restored when he attended. It was entirely reasonable to do so. There was no medical evidence to indicate that Mr Goodes could not go in a taxi paid for by Numatic. The policy on attendance management expects attendance at OH appointments. In any event the reason – as is abundantly clear from the grievance and the chiropractor’s report – was his back, not his knee. He could not drive because of his knee, but a taxi was offered. In submissions Mr Goodes accepted that it was his back that was the reason he said he could not go to Yeovil, but linked his back problems to his knee, by reason of weight shifting from his left leg to his right. The point is academic because it was a reasonable decision in any event, but the Tribunal considers this to stretch the law impermissibly.

*Being put on to performance monitoring following sickness absence:* Mr Goodes hit the trigger points and exceeded them greatly. He offers no reason why it was not appropriate to manage that absence, particularly when the response of Numatic was to get OH reports. One of Mr Goodes’ assertions in his cross examination was that it was unfair to have so many return to work meetings, which is the direct opposite of this complaint.

*Having a written warning and final written warning imposed on him:* The absence record speaks for itself, and no commentary is needed. If it be that Mr Goodes says Numatic caused the absence by an asserted failure to let him mobilise that has not been shown. The policy was not said to be (and is not) unfair, and in the year he was dismissed Mr Trump twice allowed trigger points to be exceeded, one with no action, the other only by restarting a first warning. The absence in 2018, on its own, when coupled with Mr Goodes’ GP saying that Mr Goodes’ situation was not going to improve, would have been enough for dismissal. In addition, the record of other absences was far from good. The warnings were amply justified.

*Being dismissed.* With such an absence record dismissal is neither disability discrimination nor unfair. It was entirely proportionate in pursuit of the legitimate aim of effective management of the production line.

S20/21:

Was there a provision criterion or practice (“pcp”)

*allocating the Claimant work on any of the Respondent's production lines:* Mr Goodes was not put on the blue line after he requested not to be, so there was no such pcp after 28 June 2018. Before that there was, save for the manual line which was limited to about 14 people.

*the Respondent's sickness management policy:* This was a pcp, and as someone disabled with knee pain causing absence will self-evidently have more absence than someone not so disabled it causes substantial disadvantage. The issue is whether its implementation is a proportionate means of achieving a legitimate aim. It is not required of employers to tolerate sickness absence without limit, and the policy met the reasonableness test. The policy refers to "*possible outcomes*" and Mr Trump showed that there is discretion in implementation. The trigger is for consideration and action including OH reports – a positive step – not a routine progression to dismissal.

*the Respondent's sick pay policy:* This is a provision criterion or practice, but as Mr Goodes got full sick pay throughout all his absences (save two weeks) there was no disadvantage to him from it.

*Did the application of any such pcp put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:*

*the Claimant could not stand in one position for any length of time*  
*the Claimant suffered pain if required to stand for any length of time*  
*the Claimant needed to be able to move regularly*  
*the Claimant needed to sit down from time to time*  
*the Claimant had taken sick leave in order to manage his condition.*

For the reasons given above, Mr Goodes has not established the premise of these contentions. He was not required to stand for any length of time. He has no problem walking. He was able to sit down from time to time. Where he stood for a task it was not lengthy and he could have used a perching stool. There was no disadvantage shown that arose from the sick pay policy.

*Did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant identified the following as the adjustments he says it would have been reasonable for the Respondent to make:*

*allocation to a production line where he could either move regularly or be seated*

*provision of longer time for the Claimant to see the company doctor when he was off sick and unable to travel to Yeovil*

*finding him alternative work rather than dismissing him.*

None of these are established. He could move regularly and be seated from time to time. The medical reports indicate that it would have been as bad for Mr Goodes to sit all the time as it would to stand all the time. The suspension of sick pay is dealt with above. There was no other work Mr Goodes could have done within Vac B, as it was all production work of a similar sort, and he

was left off the blue line after 28 June 2018. He had left the mould shop as the shifts were too long. The paint shop involved static work. CSS was winding down. Mr Goodes did not suggest anywhere he could have worked.

53. Accordingly none of the disability discrimination claims succeed.
54. The Tribunal finds no fault in the procedure adopted (and none was raised), and so also finds that dismissal was fair in all these circumstances.
55. Accordingly all Mr Goodes' claims are dismissed.

Employment Judge Housego

Date 13 August 2020

Judgment sent to parties 21 August 2020

FOR THE TRIBUNAL OFFICE