



EMPLOYMENT TRIBUNALS

Claimant: Mr D Nicaastro

Respondent: Openreach Ltd

Heard at: London Central

On: 14, 15 and 16 October 2020

Before: Employment Judge Khan
Mrs H Cook
Ms J Marshall

Representation

Claimant: Mr A Moosa, union representative

Respondent: Ms G Hicks, counsel

JUDGMENT having been given orally on 16 October 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By an ET1 presented on 4 February 2020 the claimant brought a claim of disability discrimination. The respondent resists this claim.
2. The claim against the second respondent, BT Group Plc, was dismissed on 5 June 2020.

The issues

3. We were required to determine the following issues as set out in the Tribunal's Case Management Order dated 5 June 2020 and which were clarified following discussion with the parties during the hearing:

3.1 Disability (section 6 and Schedule 1 EQA)

- 3.1.1 The respondent concedes that the claimant was disabled at all relevant times, by reference to a back condition.

- 3.2 Failure to make reasonable adjustments (sections 20 and 21 EQA)
- 3.2.1 It is agreed that the respondent had a practice of requiring employees in the claimant's patch to work 12 Saturdays a year. It is also agreed that this PCP has been applied to the claimant since 7 November 2019.
- 3.2.2 Did it put the claimant at a substantial disadvantage in comparison with persons who are not disabled in that he was unable to take two consecutive days off which impeded his recovery from the working week?
- 3.2.3 If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to have been placed at the substantial disadvantage claimed?
- 3.2.4 If so, did the respondent fail to take such steps as were reasonable so as to avoid this disadvantage? The claimant relies on the following:
- a. A fixed roster pattern consisting of a five-day week, 36 hours a week, with two consecutive days off.
- 3.2.5 Would any or all of these adjustments: (i) have been reasonable; and (ii) have avoided the disadvantage?

The evidence and procedure

4. The claimant gave evidence himself. We also heard from John Ballard, lay trade union representative.
5. For the respondent, we heard from: Brian McDermott, Patch Manager; and David Kelly, Regional Director for London South East.
6. There was a hearing bundle of 522 pages. We allowed one additional document into evidence. We read the pages to which we were referred.
7. We also considered the respondent's skeleton argument and the closing submissions made by both parties.

The facts

8. Having considered all the evidence, we made the following findings of fact on the balance of probabilities. These findings were limited to points that are relevant to the legal issues.
9. The respondent is a wholly owned subsidiary of BT Plc. It runs BT's UK digital network business. The claimant's employment with BT, which commenced on 14 August 2000, was transferred to the respondent on 1 October 2018.
10. The claimant has been employed in the role of Customer Services Engineer at all relevant times. He is a multi-skilled engineer required to work in

telephone exchanges, in the external underground and overheard network and also in customer premises to install and repair telephony lines, subject to the restrictions which have been placed on his duties on health grounds.

11. It is accepted that the claimant is disabled for the purposes of the Equality Act 2010 (EQA) because of a back condition. This was the result of a road traffic accident in March 2002 when the claimant sustained permanent injuries to his back and neck. This accident took place whilst the claimant was at work.

Roster patterns

12. From the date in 2003 that the claimant returned to work following his industrial injury until November 2019 he worked 36 hours a week on Mondays to Fridays, with Saturdays and Sunday off work.
13. The claimant was diagnosed with central serous chorioretinopathy in 2010. This eye condition meant that it was unsafe for the claimant to drive in low ambient light conditions. The claimant's roster pattern remained suitable because his shifts ended at 1552.
14. The claimant explained how this working pattern supported his back and eye conditions at an Occupational Health appointment in December 2010. The resulting report put it in the following terms:

“He has a long term routine where he works normal hours for 5 days and on a Saturday and Sunday does rehabilitation so that he can work the next week. He described that on Saturdays he does a number of exercises and sometime goes to a local authority physio. On a Sunday he rests before the next week...he is concerned that he will not be able to manage his condition if he does not get a 2 day break...His condition has been managed previously because he was able to have Saturday's and Sunday's off...he feels that without this break he may struggle doing full duties...Overall Mr Nicastro appears to be able to do most of the duties of a customer service engineer apart from repetitive climbing. The key issue is whether management can accommodate the adjustment that he has 2 days off back so that he can have a rest period and do his rehabilitation which is likely to be a longer term requirement and also while his eye problem appears to be active that he should avoid night time driving and later shifts wherever possible. If these can be accommodated there is no strong argument for redeployment.”

15. This referral had been made to Occupational Health to obtain advice on whether the claimant was fit to work on Saturdays following the introduction of a six-day service, including Saturdays, in 2010. For the London and South East region which included the claimant's patch there was a requirement to work 12 Saturdays each year. Following this Occupational Health report the claimant's exemption from working on Saturdays remained in place.

16. From 2010 BT / the respondent has operated six standard roster patterns, the main three of which are:
 - a. A five-day week of shifts from 0800 to 1552.
 - b. A nine-day fortnight of shifts from 0800 to 1640.
 - c. A seasonal four-day week of shifts from 0800 to 1740 (March to October) and 0800 to 1552 (from November to February).
17. An employee who is unable to work a standard roster pattern because of welfare, health, personal or domestic reasons can request a unique roster pattern referred to as a Personal and Domestic (P&D) roster. The 'P&D Toolkit' provides guidance on this process. There is a flowchart which highlights that working on lates or Saturdays has been a recurrent issue for the business. When an employee makes an application under this process an initial consideration for management is whether an alternative solution can be found to enable the employee to work these problematic shifts. If not then the P&D application is determined by the Forum, a panel made up of senior managers. If an application lacks sufficient detail the Forum will invite the applicant to provide this detail before making its decision. If it is agreed, a P&D roster has a maximum duration of 52 weeks so that an annual review is required. There is a right to challenge a decision under the escalation procedure.

2011 Personal & Domestic (P&D) roster

18. The claimant's working pattern was formalised on 4 March 2011 when he was given his first unique P&D roster. He continued to work a five-day week from 0800 to 1552 with two consecutive days off on the weekend.
19. At the request of his employer, the claimant provided a letter from his GP in January 2012 which advised in the following terms that the claimant required two consecutive days off work:

“Due to the physical nature of his job, he finds that he needs two consecutive days off in the week to allow him to recuperate to be able to cope with the physical demands of work”.
20. This recommendation was reiterated by the claimant's GP on 5 April 2012. Further, on 10 July 2012, the claimant's GP wrote:

“It is likely that if he worked consecutive days and did not have a rest, things would aggravate not only acutely but also in the long run for aggravating and creating a more chronic problem. It may also create more frequent acute flare ups which may be more disruptive to his work patterns.”
21. An Occupational Health report dated 20 February 2012 noted that the claimant completed his exercises every day and for a more prolonged period on a Saturday, with Sunday being used as a rest day.
22. In January 2012 the claimant submitted a tribunal claim to complain that the respondent had failed to make adjustments.

Disability Passport

23. A Disability Passport is a document which sets out an agreement between a disabled employee and their line manager in relation to adjustments necessary to support the employee at work. This document could also be used to support a P&D roster application.
24. We were taken to a 2010 document and two documents for 2012.
25. In relation to 2012, we found that the original document was the passport which was disclosed by the respondent. This referred, crucially, to action points and owners for these actions. We did not find that the documents which the claimant disclosed and which were purported to relate to passports agreed by his managers in 2010 and 2012 were the final documents. The documents which the claimant disclosed were identical in content (including a reference to an Occupational Health report dated February 2012) save for the name of the line manager identified on the front page and the date of the meeting. Both of these documents list only the claimant and John Ballard, the claimant's lay trade union representative, as attendees. We noted that the claimant subsequently complained (in the context of a grievance which was concluded in 2015) that the 2012 passport had taken two years to complete. We therefore found that the documents which the claimant disclosed were working documents which he drafted with Mr Ballard.
26. A Disability Passport was agreed between the claimant and his then line manager, Lee Clarke, on 11 September 2012. It was agreed that subject to an Occupational Health report the following adjustments would be made:
 - a. A roster pattern which gave the claimant two consecutive days off. The document noted that "for the ongoing period this is to be Saturday and Sunday and reviewable every March. Dino has agreed to trade Saturday's for additional lates and these to completed in the GMT summer period taking into account the effect of working in darker nights during the winter period".
 - b. He did not need to contribute to any contractual overtime commitments
 - c. A preferred work area (PWA) of Muswell Hill / Crouch End
 - d. Minimal climbing duties
 - e. Driving restricted to a maximum of 30 minutes
27. The claimant withdrew his tribunal claim when these adjustments were agreed.

2014

28. An Occupational Health report dated 21 April 2014 confirmed that the claimant was fit for duties if the current restrictions remained in place. These included minimal pole work, heavy lifting or bending, not working in confined spaces and driving for no longer than 30 minutes.
29. The claimant submitted a second tribunal claim, in November 2014, to complain that the respondent had failed to make adjustments.

30. By this date and until 2017, Brian McDermott, Patch Manager, was the claimant's line manager.
31. In February 2015 the claimant was taken off lates to enable him to support his parents for whom he had caring responsibility.
32. The claimant submitted a grievance the details of which were unnecessary to elaborate. Although this grievance was initially dismissed, it was upheld on appeal by Kerry-Anne Lawlor, Director for UK South. An outcome of this appeal was that the adjustments made to support the claimant would be reviewed.

2015 Disability Passport review

33. Because of this appeal outcome, the review of the claimant's Disability Passport was led by Steve Powell, General Manager Strategic Resourcing, on Ms Lawlor's behalf. Mr McDermott, was also in attendance together with Richard Painter, Senior Operations Manager, Steve Powell, GM Strategic Resourcing, the claimant and Mr Ballard. The following adjustments were agreed:
 - a. The claimant would have a roster pattern that allowed two consecutive days off i.e. Saturday and Sunday.
 - b. He was not expected to work lates.
 - c. Nor was he required to work overtime on Saturdays (but to consider working overtime at the start and end of his weekday shifts)
 - d. He would cover a reduced geographical area. When his performance was reviewed his managers would take this into account.
34. In his evidence, which we accepted, Mr Ballard said that every possible roster pattern was discussed. He and the claimant felt that a 36-hour working week with two consecutive days off on weekends was the only pattern which facilitated the claimant's health needs in relation to his back and eye conditions. We found that the claimant told his managers at this meeting that he completed exercises to manage his back condition and he also had physiotherapy treatment as and when required. We did not find he went into great detail. This was reflected in the Disability Passport completed by Mr Powell which referred to the claimant's need for regular stretching and also to physiotherapy but which provided no further details of what this entailed.
35. Following the respondent's agreement to accommodate these adjustments, the claimant withdrew his tribunal claim.

2017 Disability Passport

36. The claimant's Disability Passport was reviewed on 4 July 2017 by Canan Hassan, who was now the claimant's line manager. The same adjustments from 2015 were agreed. Although the claimant's P&D roster expired in the same month, Mr Hassan manually removed Saturdays from the claimant's roster so that his established working pattern subsisted.

2017 P&D roster application

37. In October 2017 the respondent cancelled all extant P&D rosters and affected employees were required to apply again. The claimant did so and his application was declined. He escalated this decision. In the meantime, Mr Hassan, continued to adjust the claimant's roster pending the outcome of his escalation. This escalation was never determined. The claimant's roster continued to be adjusted manually in the absence of a P&D roster and he was not required to work on Saturdays.

2019

38. Mr McDermott resumed line management of the claimant in June 2019, following a patch reorganisation.
39. The claimant was now one of 45 engineers doing installation or repair work across three patches and six exchanges. Approximately 30 engineers were rostered on every week day and between 8 – 10 engineers on a Saturday. Fewer engineers were needed on a Saturday because only repair work was done i.e. fixing faults and there was no installation work. Engineers could also be moved to another patch / area if required to meet service demand and Mr McDermott had regular discussions with his line manager, Ian Young, Senior Engineering Area Manager, North & West Area, about the deployment of engineers.
40. By this date the claimant had been restricted to office-based duties because of persistent knee pain before going on sick leave. He met with Mr Young on 26 June 2019 when they agreed to a return to work plan commencing on 2 September 2019.

2019 P&D roster application

41. The claimant submitted a P&D request on 27 June 2019 which was supported by Mr McDermott. This was for the same roster pattern he had been working since February 2015 i.e. no lates and no Saturdays. In his request form the claimant explained that he needed two consecutive days off work because of his back condition, to include Saturdays due to rehabilitation and primary caring responsibilities. In the part of the form completed by Mr McDermott he cited the claimant's 2017 Disability Passport which referred to the claimant's "ongoing back problems and the adjustments that need to take place to allow him to deliver effective service". Mr McDermott noted in this form that Mr Young also supported the claimant's P&D request.

2019 Disability Passport

42. The claimant reviewed his Disability Passport with Mr McDermott the next month in July 2019. The same adjustments were agreed. The 2019 Disability Passport contained the same content as the 2017 document.

Forum decision

43. Although Mr McDermott and Mr Young supported the claimant's P&R request the Forum was required to assess whether the roster pattern sought by the claimant was operationally feasible.
44. Having received the claimant's recently renewed Disability Passport and the 2014 Occupational Health report, the Forum queried why the claimant's two-day rest period needed to include a Saturday. Mr McDermott replied to explain that the claimant had worked the same pattern for the last seven years and this was the only roster pattern which gave him a two-day break.
45. On 1 August 2019, the Forum offered the claimant an alternative roster of a nine-day fortnight which the respondent accepts was unsuitable owing to his eye condition because of the later finish time of 1640.
46. A second roster pattern was offered to the claimant on 9 August 2019 under which the claimant would be required to work 12 Saturdays per year. The adjustment which the respondent agreed to make was that the claimant would have a fixed rostered day off (RDO) on either the Friday preceding, or the Monday following, each Saturday worked. A Friday RDO would mean that the claimant would not have two consecutive days off work in the week he worked on a Saturday. This would occur in every fourth week. A Monday RDO would ensure that the claimant had two consecutive days off work but would mean that in the week he worked on a Saturday the claimant would be required to work six consecutive days (i.e. 43 hours, 12 minutes) followed by a week of four consecutive days (i.e. 28 hours, 48 minutes).
47. The claimant misunderstood that this meant that if he took the Monday as the fixed RDO then he would only have worked four days in that week and would need to make up his hours across the rest of the month. The claimant refused this offer.
48. He returned to work on 2 September 2019. Although the claimant did not have an agreed P&D roster his exemption from Saturdays remained in place pending the outcome of his P&D request.
49. Mr McDermott acted as go-between for the Forum and claimant. The claimant explained why he required two consecutive days off. He noted that this had been in place for eight years. He said that "The rationale behind this is that I have one day of treatment/Physio Exercise followed by one day of rest before returning to work". Although the claimant explained to us in evidence, that he carried out his intensive exercises and had physiotherapy treatment as and when necessary followed by a second day to rest this was not clear to the Forum nor did the claimant's reply make this clear. Nor did the Forum have access to the claimant's more historic Occupational Health reports dated December 2010 and February 2012 which referred to this. As noted, the claimant's 2015 Disability Passport included very limited detail of the claimant's exercises and physiotherapy treatment and his subsequent passports contained the same limited detail.
50. The Forum understood from the claimant's reply that he had physiotherapy appointments on a Saturday which was why he was unable to work on that

day. It therefore requested evidence of this treatment. The claimant failed to provide this information. In his reply, which Mr McDermott forwarded to the Forum, the claimant said that he had already provided the respondent with all relevant documents. He felt that being asked repeatedly to “prove things over and over and over again is in my opinion unreasonable if not plain harassment.” He referred to the restrictions in his Disability Passport which he felt were based on medical evidence. However, the claimant had not provided any evidence in relation to the actual physiotherapy treatment he received.

51. In the absence of this information and having chased the claimant without success via Mr McDermott, the Forum declined the claimant’s P&D request on 7 November 2019. He was told that his request could not be held open indefinitely. It had already taken four months.
52. The claimant reverted automatically to a standard roster pattern which meant that from this date he was now required to work 12 Saturdays each year. The first Saturday on which the claimant was rostered to work fell on 7 December 2019.

P&D escalation

53. The claimant submitted an escalation form on 12 November 2019 in which he complained that the Forum had failed to explain the rationale for their decision. Mr McDermott emailed the claimant a week later to repeat the rationale given by the Forum on 7 November 2019. He also asked the claimant for information about his physiotherapy treatment on the weekends. We found that this demonstrated that Mr McDermott remained supportive of the claimant’s P&D request.
54. The claimant’s escalation was referred to David Kelly, Regional Director for London South East, on 26 November 2019, together with a decision timeline, the claimant’s 2017 and 2019 disability passports, and Occupational Health reports dated May 2014 and February 2019. Mr Kelly was also provided with the Forum’s rationale which was more detailed than the limited one given to the claimant.
55. This rationale confirmed that the Forum had refused to exempt the claimant from Saturday working without evidence of his physiotherapy appointments. It also noted:

“Underlying medical conditions do not automatically preclude working certain times of day or days of the week. A medical opinion would be needed to confirm [this]...”

However, despite the deadlock between the claimant and the Forum and the limited medical information at the Forum’s disposal it failed to consider obtaining medical or Occupational Health opinion in order to inform its decision.

56. The rationale also included the following statement:

“The Forum considers in every case attendance lost during Saturdays not only puts a strain on service levels, but also on team members to cover any shortfall.”

We found that this generic statement of policy contradicted the principle that a P&D request would be considered on a case by case basis. The Forum made no reference to any specific operational reason which explained why the claimant’s request could not be accommodated. Notably, both Mr McDermott and Mr Younger who were the two managers on the ground and were best placed to assess the operational feasibility of the claimant’s request supported it.

57. Mr Kelly rejected the claimant’s escalation. He took less than a day to reach this decision. This was because he agreed that the claimant had failed to provide the information which the Forum had requested and he concluded that the claimant had been offered other suitable roster patterns.
58. The claimant responded to Mr Kelly to explain that the roster he had been offered meant that he would have a Sunday and a Monday off work was not suitable because he had “Physio and other treatments” on Saturdays and he could not have physiotherapy on a Sunday. He forwarded a letter from Annette Whitehead, his physiotherapist, dated 27 October 2019 (which he had not sent to the Forum) which explained that his back pain was exacerbated by

“long distance driving and by working long hours...Due to his work commitments he can only attend for treatment and the gym on a Saturday and, in order to prevent further deterioration in is pain levels, he requires a rest day afterwards.”
59. When Mr Kelly asked his PA to call the physiotherapy practice they confirmed that they did not work on weekends. This was inconsistent with Ms Whitehead’s letter and with the claimant’s evidence, which we accept, that he had a long-standing agreement with Ms Whitehead who treated him on Saturdays when needed. However, it was notable that the claimant provided no evidence then or in these proceedings to show when he has required physiotherapy treatment on a Saturday.
60. In the meantime, Mr Kelly remained intent on finding a solution for the claimant. In early December 2019 he had an informal discussion with Mr Ballard when he discussed two potential areas of work i.e. Frames and Network Solutions to which the claimant could be redeployed and which were within his purview. Mr Ballard discussed this with the claimant and reverted to Mr Kelly two days later to confirm that the claimant was not interested. Although Mr Kelly had not made a formal offer of redeployment we found that this was a genuine offer which he made to resolve this issue and to support the claimant.
61. The claimant went on sick leave in early December 2019 because of knee pain.
62. The claimant submitted a letter from his GP and a fit note dated 18 December 2019 which supported his need for two consecutive days off

work. These were documents which the claimant relied on in connection with his ongoing dispute about his roster and not his current sickness absence which related to his knee pain. A second GP letter in late January 2020 provided essentially the same information.

2020

63. The claimant returned to work on 9 March 2020 for around 10 days. He was on restricted duties because of his knee pain. He was sent home because of Covid-related restrictions on 23 March 2020. He was not required to work any Saturdays in this 10-day period.
64. The claimant obtained a fit note from his GP dated 12 March 2020 which confirmed that he “may be fit for work” on the basis of a 36-hour week from Monday to Friday “to enable physiotherapy sessions on weekend...” Once again this related to the claimant’s ongoing dispute about his roster.
65. The claimant remained at home until mid-June 2020. He was not required to complete any work tasks other than signing on and off, submitting his daily timesheets and checking his emails. The claimant said that he would look at his emails at the start and end of each day and twice during the day. He said that on some days there was one email and on other days two or three. He also completed computer-based training courses. He has completed three such courses this year. The claimant signed on and off on the Saturdays on which he was rostered and checked his emails, and submitted timesheets. He said that because of this he was unable to complete the same intensive exercises that he would have done when he had the day off, although he was still able to do some of these exercises. He also said that he was able to do more intensive exercises throughout the week.
66. We found that the work which the claimant was required to do was minimal, it only required short and intermittent computer-based activity. This was in contrast with the more physically demanding work which the claimant undertook when he was on operational duties.
67. The claimant was due to return to work in June 2020. There were ongoing discussions about his roster pattern. Mr Kelly considered another bespoke pattern which involved a seasonal working pattern in which the claimant would be required to work on Saturdays in the summer months only. The claimant submitted fit notes dated 10 June 2020, which ruled out his current roster pattern, and 24 June 2020, which ruled out the seasonal roster pattern that Mr Kelly had proposed.
68. The claimant returned to work on 22 June 2020. He remained on restricted office-based duties because of his knee pain. The claimant could not do ladder work. Nor could he enter customer premises because he was shielding. He was sent home on 22 June 2020 because he had not been certified by his GP as being fit to return to work. Once duly certified by his GP, the claimant commenced a phased return to work on 13 July 2020. He was only able to complete three days of non-operational work before Mr McDermott sent him home because he was unable to deploy the claimant to the field because of his knee pain.

69. At around the same time, Mr McDermott met with Mr Young and they agreed to reinstate the claimant's previous roster pattern because of the June 2020 fit notes. The claimant took the whole of August as leave. In September 2020 the claimant's previous roster pattern was reinstated and he has not been required to work on Saturdays since this date.
70. The claimant has therefore been required to work on a Saturday three times between 23 March and June 2020.
71. The claimant remains at home undertaking limited administrative work. An Occupational Health report is being obtained in relation to the claimant's knee pain.

The law

Failure to make adjustments

72. The duty to make reasonable adjustments is set out in sections 20 – 21 EQA and in Schedule 8. Where a provision, criterion or practice (PCP) of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage.
73. Under Schedule 8, paragraph 5(1), a 'relevant matter' is either deciding to whom to offer employment or the employment of the complainant.
74. Section 212(1) defines 'substantial disadvantage' as one that is more than minor or trivial.
75. Under Schedule 8, paragraph 20(1), an employer has a defence to a claim for breach of the statutory duty if it does not know and could not reasonably be expected to know that the disabled person is disabled *and is likely* to be placed at a substantial disadvantage by the PCP, physical feature or, as the case may be, lack of auxiliary aid. A tribunal can find that the employer had constructive (as opposed to actual) knowledge both of the disability and of the likelihood that the disabled employee would be placed at a disadvantage. In this case, the question is what objectively the employer could reasonably have known following reasonable enquiry.
76. In Environment Agency v Rowan [2008] IRLR 20 the EAT said that in considering a claim for a failure to make adjustments the tribunal must identify the following matters without which it cannot go on to assess whether any proposed adjustments are reasonable:
 - (1) the PCP applied by / on behalf of the employer, or
 - (2) the physical feature of the premises occupied by the employer, or
 - (3) the identity of non-disabled comparators where appropriate, and
 - (4) the nature and extent of the substantial disadvantage suffered by the claimant
77. The onus is on the claimant to show that the duty arises i.e. that a PCP has been applied which operates to their substantial disadvantage when

compared to persons who are not so disabled. The burden then shifts to the employer to show that the disadvantage would not have been eliminated or alleviated by the adjustment identified, or that it would not have been reasonably practicable to have made this adjustment.

78. If the claimant is unable to show that the PCP has put him at such a substantial disadvantage the respondent will not be under a duty to make any adjustments in relation to that PCP.

Conclusions

79. Having reviewed all of the relevant background facts in this case the focus of the claim is the respondent's requirement for the claimant to work 12 Saturdays each year from November 2019 and our assessment of whether, as the claimant contends, this put him at a substantial disadvantage in that it impeded his recovery from the working week.

80. We found that the PCP did not put the claimant at this substantial disadvantage for the following reasons:

- (1) The claimant's requirement to have two consecutive rest days was based on his need to recover from the physical demands of his work in the preceding week.
- (2) However, in the period when the respondent applied the PCP to him the claimant was not working in the field undertaking the physically demanding tasks his engineering work entailed but instead undertook intermittent desk-based work of limited duration at home.
- (3) On the three Saturdays when he was on duty in April, May and June 2020 the claimant was able to complete rehabilitation exercises. Even if the claimant was unable to complete exactly the same programme of exercises he did when he was not working, we found that this was more than compensated for by the fact that he was not engaging in physically vigorous and repetitive tasks in the preceding week (or throughout 2020) and he was able to do more exercises throughout the week when he was only undertaking minimal administrative tasks at home.
- (4) The claimant did not provide any evidence to show that working these Saturdays had any impact on his back condition or that on any of these three dates he required physiotherapy treatment which his work commitments precluded.
- (5) Accordingly we found that this PCP did not impede the claimant's recovery from the working week.

81. For these reasons the unanimous judgment of the tribunal was that the claim failed and was dismissed.

82. We were not required to make, and did not make, any speculative findings on the impact that this PCP would have on the claimant in the circumstances in which his health and caring responsibilities as well as the restrictions brought about by the current pandemic permit his return to his substantive i.e. operational duties. However, should the claimant return to his substantive duties we would commend the parties to ensure that medical and Occupational Health advice is obtained which establishes the extent to

which, if any, the roster pattern applied to the claimant will have on his back condition and which identifies any adjustments necessary to avoid or minimise this impact.

The respondent's application for costs

83. Upon hearing our oral judgment the respondent applied for an order for costs in the amount of £500 under rule 76(1)(b).
84. We refused this application because we were not satisfied that it was in the interests of justice to make such an order. We took account of the following factors: the claimant had until a few days before this final hearing been a litigant in person; he was represented at this hearing by a trade union official who was not legally trained; discrimination law is particularly complex and technical, and this is particularly so in relation to a failure to make adjustment claim; although not determinative in itself, the respondent had not put the claimant on notice of costs.

Employment Judge Khan

19th Nov 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
19/11/2020

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FOR EMPLOYMENT TRIBUNALS