EMPLOYMENT TRIBUNALS

Claimant: Mr S Wright

Respondent: Jaguar Land Rover Limited

Heard at: Liverpool

On: 25, 26, 27 and 28 May 2021 and (in the absence of the parties) on 11 June 2021

Before: Employment Judge Horne
Sitting with members: Ms C Doyle
Mr A Barker

Representatives
For the claimant: In person
For the respondent: Mr J Heard, counsel

RESERVED JUDGMENT

The unanimous decision of the tribunal is that the claim has **failed,** because:

1. The tribunal has no jurisdiction to consider the complaint of failure to make adjustments in respect of any disadvantage caused by the requirement to work in any role prior to July 2017. The claim was presented after the expiry of the statutory time limit and it is not just and equitable for the time limit to be extended.
2. So far as the claim relates to the period from July 2017 onwards, the tribunal did not determine whether or not it had jurisdiction, but concluded that respondent did not breach the duty to make adjustments.
3. The respondent did not discriminate against the claimant arising from disability.
4. The claimant was not unfairly dismissed.

REASONS

Introduction

1. This reserved judgment follows a four-day hearing. The employment judge, Mr Barker, the claimant and Mr Heard (counsel for the respondent) participated from inside the tribunal room. Witnesses gave evidence from inside the room. Ms Doyle attended remotely using the Cloud Video Platform. The same platform enabled a number of observers to follow the hearing.

Complaints and issues

2. By a claim form presented on 18 February 2020, the claimant raised the following complaints:

   2.1. Unfair dismissal, contrary to section 94 of the Employment Rights Act 1996 ("ERA") and said to be unfair within the meaning of section 98 of ERA;

   2.2. Discriminatory dismissal arising from disability, within the meaning of section 15 of the Equality Act 2010 ("EqA") and in contravention of section 39(2)(c) of EqA; and

   2.3. Discriminatory failure to make adjustments, contrary to section 39(2)(d) of EqA and as defined by sections 20 and 21 of EqA.

3. Following three preliminary hearings, Employment Judge Benson recorded a complete list of the issues that the tribunal would have to decide at the final hearing. We set out the list in full here, with an explanatory note in square brackets. We have made one amendment. The relevant "cut-off" date for time limit purposes was said to be 10 October 2019. Counsel for the respondent submitted that the correct date was actually 19 November 2019. We agreed.

Jurisdiction

[Jurisdiction means the tribunal's legal powers. They are affected by the statutory time limit.]

Are any of the Claimant's claims out of time as:

(i) They occurred on or before 19 November 2019?

(ii) They do not form part of a continuing act or state of affairs; and

(iii) It is not just and equitable to extend time?

Unfair dismissal

1 What was the reason or principal reason for dismissal? The Respondent relies on

(i) capability by reason of unacceptable levels of sickness absence and

(ii) conduct by reason of deliberately manipulating the information provided to Occupational Health.

2 Was it a fair reason under section 98(2) of the Employment Rights Act 1996 such as to justify the dismissal of the Claimant?

3 Did the Respondent act reasonably in treating this as a sufficient reason for dismissing him, having regard to equity and the substantial merits of the case (section 98(4) ERA)?

4 Did the Respondent follow a fair procedure in dismissing the Claimant? If not, what is the likelihood that the Claimant would have been fairly dismissed in any event, had a fair procedure been followed (i.e should any compensation be reduced due to Polkey?)

5. Should any compensation be reduced on account of the Claimant's conduct?

Disability

1 Was the Claimant disabled by virtue of his work-related stress as per s.6 Equality Act 2010?

2 The Respondent concedes that the Claimant had a disability (namely arthritis and an annular tear in his lower back and arthritis in his knees) within the meaning of section 6 of the Equality Act 2010 at the material times, for the purposes of the Claimant's claim relating to a failure to make reasonable adjustments under section 20 of the Equality Act 2010 and/or disability discrimination because of something arising in consequence of the Claimant's disability under section 15 of the Equality Act.

Disability discrimination: reasonable adjustment – section 20 of the Equality Act 2010

1 Did the duty to make reasonable adjustments arise?

2 Did the Respondent apply a provision, criterion or practice (PCP) of

(i) The requirement to perform a "red job"; and

(ii) The requirement for an employee to attend work in their current role.

3 Did the PCP put the Claimant at a substantial disadvantage in comparison to persons who are not disabled?

4 At the time that the PCP(s) were applied, did the Respondent know, or could it reasonably have been expected to know that the Claimant had a disability and was likely to be placed at that disadvantage by the PCP(s)?

5 Did the Respondent take such steps as it was reasonable to take to avoid the disadvantage including:

(i) finding an amber or green job for the Claimant; or

(ii) putting in place the claimant's suggestion to offer him a vehicle driving role; or

(iii) referring the matter to OH to assist in the identification of a suitable role for the claimant?

6 Were such steps reasonable and would they have overcome the substantial disadvantage relied upon?

Discrimination arising from the disability – section 15 Equality Act 2010:

1 Did the Respondent treat the Claimant unfavourably (namely by dismissing him) because of something arising in consequence of his disability.

2 'The something arising' relied upon by the Claimant is:

(i) that he was unable to carry out a "red job"; and

(ii) his sickness absence;

(iii) his inability to attend work because of his stress/anxiety; and

(iv) the failure of the respondent to provide him with a job which he was able to perform taking into account his physical impairment.

3 If it is found that the Respondent did treat the Claimant unfavourably, can the Respondent demonstrate that the treatment was a proportionate means of achieving a legitimate aim? The legitimate aim relied upon is:

(i) maintaining an appropriate and acceptable level of attendance and availability within the manufacturing part of the business, whilst also maintaining productivity, as well as

(ii) ensuring reasonable attendance levels to meet the expectations and demands of customers.

4 The Respondent submits that it is proportionate to apply a sickness absence procedure (including sanctions up to and including dismissal), including finding alternative work in line with medical restrictions for employees. The Respondent has a business requirement to maintain full upstanding roles wherever possible to maximise the efficiency of the workforce and its productivity levels.

4. During the hearing, we became concerned about paragraph 5(iii) of the list of issues. In our view it was not clear enough for the tribunal to know, even in broad terms, what steps the claimant was saying it should have taken. What was needed, in our view, was a complete list of the roles which (in the claimant's view)

were suitable for him. The claimant provided that list during his evidence. We noted the following roles:

4.1. Bagging;

4.2. Driving;

4.3. Launch Team; and

4.4. Door Line Repair.

Adjustments to the hearing

5. It will be seen from EJ Benson's list that it is common ground that the claimant was disabled with a physical impairment and that the claimant alleges that he was also disabled with the effects of work-related stress. It is well known that tribunal hearings can be stressful. They put participants with stress-related disabilities at a real disadvantage, especially when they are representing themselves. Tribunals are experienced in adapting their hearings in order to try and keep such disadvantages to a minimum. Looking at the previous case management orders, there did not appear to have been a discussion with the claimant about what adjustments the tribunal might need to make. The employment judge raised the topic at the start of the hearing, explained the usual procedure, including the scheduled break times, and asked the claimant if there was anything that the tribunal ought to do to make the hearing easier. In response, the claimant informed the tribunal that he might need things explained to him as he was not a lawyer. He considered that the breaks would be more than adequate. He did not ask for any other arrangements to be made.

Evidence

6. We considered documents in an agreed bundle. In keeping with the warning we gave to the parties at the start of the hearing, we did not read every page. Rather, we concentrated on those pages which were drawn to our attention both in witness statements and orally during the course of the hearing.

7. At various points in the hearing, a party asked us to consider documents that were not in the bundle. There was no objection from the other party. The additional documents were:

7.1. A mapping spreadsheet which we called "R2" and

7.2. The claimant's general practitioner records, which we called "C2".

8. The claimant gave oral evidence on his own behalf and called Mr Conroy as a witness. The respondent's witnesses were Mr Broady and Mr McLoughlin. All four witnesses confirmed the truth of their written statements under oath and then answered questions.

9. We had to make a number of contested decisions about the conduct of the hearing. All our decisions were unanimous. Each time we made a decision, the employment judge announced it to the parties and explained the reasons for it. Written reasons for those decisions will not be provided unless a party makes a request in writing within 14 days of the date when this judgment is sent to the parties. The disputed decisions were:

9.1. The claimant applied for witness orders to compel the attendance of three trade union representatives, Mr Williamson, Mr Curphy and Mr Cooper. He

also asked us to order the attendance of Mr McCormack (a Production Leader) and Ms Hilton (an occupational health physiotherapist). We refused all these applications.

9.2. The claimant asked us to read the statement of, Ms Walsh, his former partner. Ms Walsh did not attend the tribunal to give evidence. We agreed to read the statement, but indicated that we would have to bear in mind that we had no way of knowing how Ms Walsh's evidence would have stood up to questioning. This difficulty, we said, might affect what weight we could give to her evidence, especially if it conflicted with the account of a witness who had answered questions.

9.3. The respondent objected to the claimant calling Mr Conroy. The objection was based on a dispute over whether or not the claimant had previously sent Mr Conroy's witness statement to the respondent's solicitors. It was the claimant's case that he had sent the document by post shortly after the last preliminary hearing. The respondent invited us to make a finding that this had not happened, based on various inferences to be drawn from the parties' correspondence. In order to make such a finding we would have needed to conduct a mini-trial. We did not think that such an exercise would be proportionate. We allowed the claimant to call Mr Conroy. We did, however, refuse permission to the claimant to ask certain questions of Mr Conroy in chief. We granted permission to the claimant to ask a number of questions in re-examination (despite objections), and refused permission for him to ask others.

9.4. Once the claimant's oral evidence had concluded, the employment judge asked the parties whether or not the claimant had provided a statement setting out the effect of his mental impairment on his ability to carry out normal day-to-day activities. The claimant had not done so. The employment judge asked the claimant if he would like permission to give oral evidence on that topic. The respondent objected. We decided to defer our decision until the remaining witnesses had given evidence, the better to assess the impact of eliciting the new evidence on the remainder of the timetable. Having heard the parties' arguments, we then allowed the claimant 5 minutes to describe the effect on day-to-day activities in his own words, 30 minutes for Mr Heard to take instructions and prepare, and a further 15 minutes for Mr Heard to ask questions. The parties kept to that timetable.

9.5. The claimant asked the tribunal to order the respondent to disclose records showing when the claimant worked certain day shifts. We refused that application.

10. Our general impression of all the witnesses was that they were trying their best to tell us the truth as they remembered it. That did not mean that all parts of their evidence were equally reliable. In broad terms:

10.1. Where there was a dispute about what was said in conversation, where the alleged remark was not clearly documented, we found that those disputes were harder to resolve for conversations that happened longer ago than for conversations that had happened more recently.

10.2. It was difficult for us to attach any significant weight to generalisations such as "He has never had to work against his DDR", "I had to work against my

DDR", or "Nothing would be done or resolved". This observation affected some of Mr Broady's evidence, but also affected much of the evidence of the claimant and Mr Conroy. We were aware that, in Mr Conroy's case, the lack of specific detail was due to the brevity of his witness statement and the tribunal's restrictions on the questions that the claimant was allowed to ask him. We took this into account as a factor when deciding whether or not to give permission for the claimant to ask those questions.

Facts

11. The respondent is a very well-known car maker. It assembles high quality cars from a huge factory complex at Halewood, Merseyside. To give an idea of the scale of the operation, the Halewood workforce comprises about 4,000 workers and one witness likened the size of the site to the whole of Liverpool City Centre.

12. The claimant worked briefly for the respondent as an agency worker from 2011 and was then employed by the respondent from 19 May 2012 until his dismissal on

13. Manufacturing roles are divided, broadly, into two categories:

    13.1. Roles in the first category are called "Full upstanding roles", otherwise known as "Required to Operate" or "RTO". These are the core roles that are essential to the production process.

    13.2. Other roles are called Temporary Containment Roles or IPC Roles. Launch Team roles come into this category and are described more fully later in this judgment.

14. The respondent has a business need to keep as many associates in RTO roles as possible.

15. Another important distinction is between jobs on the production line, on the one hand, and Off Track Area ("OTA") roles, on the other. Examples include driving roles, Door Line Repair, "bagging" of pilferable items and temporary roles in the Launch Team.

16. OTA jobs are generally oversubscribed. The respondent does not recruit into them externally. The roles tend to be allocated temporarily to disabled employees with severe restrictions or to long-serving employees with particular specialist qualifications. This was certainly true of the Bagging Area roles, which were fully-populated by people who needed to sit down due to severe conditions such as COPD.

17. The driving roles involved driving production cars around the site. It was not clear to us how many vehicles the role-holder would need to drive during a working day. One fairly obvious component of the role was getting in and out of vehicles.

18. Within the site there are various departments, one of which is called "Trim and Final". Within that department are various assembly lines. These include Engine Dress, Paint, and the Door Line.

19. Cars are manufactured around the clock. Lines need to be staffed accordingly. Associates worked a shift pattern which, unless it was varied, would consist of early shifts, late shifts and night shifts. At the relevant time there were three shift blocks, known as X, Y and Z. Some employees worked permanent days. This could be because they had an off-line role which did not need to be carried out at

night. Or it could be the result of a flexible working agreement, for example to accommodate childcare responsibilities.

20. Associates doing the same role were divided into groups of seven. A Group Leader was responsible for each group. In turn, the Group Leader reported to a Production Leader (sometimes called a “Supervisor”), who would have about seven Group Leaders to supervise. A Production Manager line managed the Production Leaders. Approximately 250 employees would report to the Production Manager.

21. Most work on assembly lines is known as “paced” work. This means that a worker must work at a speed dictated by the production process. If the task is done too slowly, the car will pass to the next stage of the line with the job unfinished.

22. Assembly line work generally involves repetitive manual tasks. Certain types of repeated body movements, especially at pace, are well known to create a risk of physical injury. That risk is particularly acute where an employee has an existing disability or vulnerability.

23. The respondent had a number of operating procedures designed to address risks such as these. One of these was a system of referrals to occupational health. Broadly speaking, an associate could not self-refer to occupational health, but would be referred by their Supervisor. Whether or not to refer was a generally a matter for the Production Leader’s discretion and would depend on the circumstances of an associate’s absence from work, or any medical difficulty that they had reported in carrying out their role.

24. Generally, the occupational health assessment would be carried out by a physiotherapist. In exceptional cases, a manager could sanction a referral to an occupational health physician.

25. Another of these procedures was an ergonomic risk assessment using the Sue Rodgers Ergonomic Job Analysis tool. Here is a slightly over-simplified summary of how the risk assessment worked:

    25.1. A separate risk assessment was done for each role in the production process.

    25.2. Each assessment was done on the same template form. The form was pre-populated with the scoring methodology that was devised by physiotherapists and risk assessors.

    25.3. The assessment of the role was carried out by a Group Leader responsible for that role.

    25.4. The written risk assessment was kept in a folder at the station where each job was carried out.

    25.5. On each form, the role was divided into approximately 20 “specific job elements”, being the manual tasks involved in the role. A separate analysis was done for each specific job element.

    25.6. The effort score that is of greatest relevance to this claim is Effort Intensity. As a mechanism for assessing Effort Intensity, the template form identified seven major muscle groups, including the back and the knees.

25.7. The analysis involved combining three effort scores: Effort Intensity, Continuous Effort Duration and Efforts Per Minute. Each effort score was, for our purposes, 1, 2 or 3.

25.8. The effort score that is of greatest relevance to this claim is Effort Intensity. As a mechanism for assessing Effort Intensity, the template form identified seven major muscle groups, such as “legs/knees”. Each muscle group was given a row in a pictoral table. There was a separate column in the table for each of the Effort Intensity scores. In that column, the cell for each muscle group was pre-populated with an illustrated description of physical movement that would attract that Effort Intensity Score for that muscle group. The highest (worst) score of all seven muscle groups would then represent the Effort Intensity score for that specific job element.

25.9. For example, a task which involved pushing or pulling with moderate force in an awkward posture would attract an Effort Intensity score of 2 for “legs/knees”. If no other muscle groups scored 3, the Effort Intensity score for that specific job element would be 2.

25.10. The severity rating for a specific job element was based on all three effort scores. The scores were not aggregated. Rather, the template form listed all the possible permutations of scores (for example, 3,3,1) and assigned a severity rating to that permutation.

25.11. Severity ratings were then grouped into traffic light colours. A severity rating of 2 or 3 was designated green. The amber ratings were 4, 5 and 6. Anything higher than that was red.

25.12. Roles involving red specific job elements were then considered for control measures such as job rotation, to lessen the risk of physical injury.

26. During early 2018 the Trim and Final department started a trial of a separate job assessment process. This was known as job mapping. The process was documented in a series of spreadsheets. Here is an overview.

26.1. An ergonomic spreadsheet listed parts of the body, in a similar way to the Sue Rodgers spreadsheet.

26.2. For each part of the body, there were a number of descriptions of physical movements. For example, one of the knee movements was “stepping up or down”.

26.3. Each physical movement was given a traffic light colour: red, amber or green. Stepping up or down was one of the red knee movements.

26.4. A separate spreadsheet listed roles and tabulated them against the same parts of the body that were listed in the ergonomic spreadsheet. For each role, the different parts of the body were assigned one of the traffic light colours.

26.5. Confusingly, these colours had nothing to do with the Sue Rodgers colour coding scheme. All the mapping document colours did was indicate what kinds of movement each part of the body would have to do in a particular role.

27. Even more bizarrely, there was a third way in which traffic light colours were used in the ergonomic assessment process. In order to explain that how that colour

scheme worked, we must first describe a key policy in managing manual workers' physical health. This was the Restricted Worker Procedure, which established Restricted Worker Process (RWP). Here is a brief overview of the scheme:

27.1. Where an associate developed a medical condition that might restrict their ability to perform their job, they were required to inform their Production Leader or Production Manager. They were also required to advise their Production Leader/Manager of any subsequent change in their condition.

27.2. The Production Leader would make a referral to occupational health.

27.3. The occupational health practitioner would make an assessment of whether any adjustment was required and produce outcome report or "Duty Disposition Report" (DDR). The report would list the restricted physical movements (such as repeated twisting the neck) and recommend adjustments. If the associate's role included movements that were restricted in the DDR, the associate would be placed into the RWP.

27.4. The aim of the RWP was to place the associate into a long-term RTO role that was compatible with their DDR restrictions.

27.5. Whilst an associate was in the RWP, the Production Leader would temporarily redeploy the associate into a lighter role which would not necessarily be an RTO role and was often off the production line altogether. Temporary placements such as these would often involve the associate's shift pattern changing, for example, by being placed onto exclusive day shifts.

27.6. The RWP consisted of three stages. At Stage 1, the Production Leader or Manager was required to consider all RTO placement opportunities for the associate within their area, with the involvement of a trade union representative. If the associate could be placed into a RTO role, the associate would exit the process. If not, their case would be escalated to Stage 2.

27.7. Stage 2 began with a meeting. Following the meeting, the associate completed a self-assessment form and then re-attended occupational health for a further DDR. In the light of that DDR, a wider search for RTO roles would take place. This time it would encompass the whole function area (for example, the whole of Trim and Final). Again, if the search resulted in a successful placement, the RWP would cease to operate. Otherwise, the associate would have to proceed to Stage 3.

27.8. At Stage 3, up to three suitable RTO roles would be identified and presented to the associate at a meeting. The associate could then trial each role for up to two weeks. If that exercise was not successful in securing a long-term placement, the associate would be invited to an Employment Review meeting, where a senior manager would decide whether or not to terminate the associate's employment.

27.9. Sometimes an associate would leave the RWP, but who then became medically unable to work in their new role. In that case, they would enter the RWP at the stage where they left it.

27.10. Although the written procedure did not spell this out, we are satisfied that the DDR reports were intended to be self-contained. Each DDR would supersede the last one. If, for example, a DDR listed two restrictions, and the

next DDR did not mention any, managers could reasonably assume that the first two restrictions were no longer needed.

28. Now we can return to the third system of traffic light colours. Some Production Managers, including Mr McLoughlin, understood that, under the RWP, associates were categorised red, amber or green. As the managers saw it, this was a system of classification of *employees,* rather than *roles.* Associates were marked as "red" if they were incapable of carrying out the majority of RTO roles. This system of classification gave the RWP the nickname, "Red Restricted Process".

29. The respondent also had a written Attendance Management Procedure. The procedure was laid out in table form, with defined trigger points based on patterns of absence over a rolling 12-month period. On hitting the relevant trigger point, the associate would escalate to the next stage of the process. Sustained periods of perfect attendance would result in the associate dropping down a stage or achieving a clear record. The various stages were Counselling, Stage 1, Stage 2 and Final Counselling/Employment Review.

30. Various forms of sickness absence were exempt from the Attendance Management Procedure. These included disability-related absence, reasonable recovery time from surgery, and absence "directly linked to accepted works related injuries".

31. Under the heading, "Abuse of Procedure", the rubric stated,

    "The Company reserves the right to take formal action where employees have been found ot be abusing the procedure eg if an employee works an incomplete day on repeat occasions."

32. Over the page, the Policy continued,

    "If there comes a point where it becomes reasonable for the Company to conclude that the employee is not able to fulfil their contractual obligations to attend work on a regular basis, employment may be terminated under the terms of the employee's Contract of Employment."

33. The respondent had a written disciplinary procedure. The procedure defined "Gross misconduct" as "any act which causes a fundamental break in the confidence and trust underlying the employment contract". The definition was followed by a non-exhaustive list of examples.

34. The respondent also had a written grievance procedure. It is sufficient to describe it in broad terms. An associate had the right to raise a grievance, and, if unsuccessful, to appeal against the outcome. If the associate was dissatisfied with the appeal decision, they could apply for a second-stage appeal on limited grounds. The application would screened by Human Resources to check that one of the permissible grounds was engaged. If not, the application would be rejected and the grievance process would be concluded. If one of the grounds was potentially made out, a second-stage appeal meeting would take place.

35. During the course of 2013 the claimant developed worsening pain in his lower back. He attributed his back problems to prolonged working in the same role. He subsequently brought a personal injury claim against the respondent. In essence, his claim was that the respondent had breached its legal duties towards him by failing to implement proper job rotation. The respondent admitted liability.

36. During the course of 2013, the claimant was absent for a total of 32 days. He was taken up to Stage 2 of the Attendance Management Procedure. He successfully appealed against the Stage 2 warning. He was de-escalated to Stage 1.

37. He was also referred numerous times to occupational health in 2013. DDRs over the course of the year all listed temporary restrictions against "frequent or excessive bending". Two of these DDRs also temporarily restricted him from using steps and lifting more than 10kg. By 2014, those additional restrictions had disappeared, leaving just the bending restriction in place. This restriction persisted and, in April 2015, the occupational health physiotherapist added that the claimant would be "best suited to mainly upright posture".

38. In 2015 the claimant raised a grievance. In a nutshell, his grievance was that his back condition was continuing to deteriorate as a result of his job role. At the time, he was working on the Door Line, rotating between two jobs which had been assessed as suitable for his DDR restrictions. He believed that the job rotation was beneficial, but disagreed with the occupational health advice. His grievance was heard on 8 May 2015 by a Production Leader, Mr Coulter. By letter dated 22 May 2015, Mr Coulter informed the claimant that the grievance was not well founded.

39. The claimant appealed. By the time his appeal was heard in September 2015, he had been back to occupational health and been given a new DDR. This report contained a new restriction: the physiotherapist recommended that he should be allowed to sit down for 5 minutes every hour. His appeal meeting was heard by Mr Whitty, a Production Manager. At the meeting, the claimant mentioned that he had been diagnosed with arthritis in his knee. He said that standing for long periods of time in his role was not helping. His trade union representative, Mr Williamson, urged the claimant to "give it a chance". When asked what role he could be offered, the claimant mentioned a person with a bad back who was moved to "OTA". According to the minutes of the meeting, it was then Mr Whitty who raised the subject of a driving role. It was Mr Whitty's view that driving would not be suitable, because the restriction on bending would mean that the claimant would not be able to get in and out of cars. Mr Whitty checked that the claimant was being given an opportunity to sit down every 5 minutes and the claimant confirmed that he was. At a reconvened appeal meeting, the claimant agreed that the opportunity to sit down was helping him, but he was still working in pain. When Mr Whitty suggested that the claimant should go back to occupational health if he was still in pain, the claimant replied, "It is what it is." Mr Whitty subsequently informed the claimant in writing that his appeal was unsuccessful.

40. There is a gap in the evidence as to how this particular grievance was concluded. The claimant tells us that he applied to bring a second-stage appeal, which got as far as a meeting with Mr Kevin Wood. His case is that the appeal was adjourned pending updated occupational health advice and was never reconvened.

41. During 2015, the claimant attended hospital for two injections in his back. Each time he missed two days' work. These absences were marked, "EX", which meant that they were exempt from consideration under the Attendance Management Policy. Apart from those two occasions, he had only one day's absence in 2015 with a cold.

42. Also in 2015, the claimant's father sadly died following a long illness. The claimant went to see his general practitioner at around that time. The doctor noted that the

claimant had a stress-related problem. In our view, the stress problem was probably a reaction to losing his father. We were unable to conclude that it was the effect of a mental impairment at that time.

43. From 19 January to 11 February 2016, the claimant was absent for 17 days with back pain. He was referred to an occupational health physician by the name of Dr Amer Manzoor. Having examined the claimant, Dr Manzoor produced a DDR with further restrictions. The list retained the the long-standing restriction on bending and recommendation of mainly upright posture. Under the heading, “Temporary Restrictions”, Dr Manzoor repeated the more recent recommendation of 5 minutes’ sitting time in every hour, but added, “Best suited to reduced pace work”. To this list he also added, “No twisting” and “Fit 25% HSE Manual Handling Guideline Weight”.

44. On his return to work, the claimant was removed from the Door Line. This is because the Door Line work was paced, and Mr Dilsworth, the claimant’s Production Leader, considered that this environment was incompatible with Dr Manzoor’s DDR. Instead, the claimant was placed temporarily in an OTA role in the Launch Team. This role did not involve working on a production track. The team would do multiple different jobs between them to build a relatively small number of cars from scratch. This was a daytime-only role, which meant that the claimant would not receive a premium for working shifts.

45. On 26 February 2016, the claimant attended a Stage 1 meeting under the RWP. The meeting was chaired by Mr Whitty. The claimant told Mr Whitty that he was happy with his temporary role, except for the money. It was agreed that the claimant would go back to occupational health.

46. His next occupational health consultation was on 14 April 2016 with Ms Carys Turner, a physiotherapist. In her DDR, Ms Turner repeated Dr Manzoor’s restrictions and recommended a review in 3 months’ time. Subsequent DDRs on 19 July 2016, 5 January 2017 and 1 May 2017 contained the same restrictions.

47. On 7 July 2016, the claimant attended a Stage 3 Absence Review Meeting. We are not entirely sure how the claimant got to Stage 3. The respondent appeared to rely on the claimant having been moved to Stage 2 on 8 September 2014. According to the records in the bundle, the claimant’s stage in the process had been reduced to Stage 1 after the Stage 2 warning had been issued. Moreover, one of the absences that contributed towards the Stage 3 trigger was one of the back treatment absences which had been marked on his attendance record as exempt. Be that as it may, the claimant was issued with a warning that future absence could trigger an Employment Review.

48. In parallel with Attendance Management, the claimant remained on the RWP. On 26 October 2016, the claimant’s Production Leader, Mr Kris Skulberg, certified that no suitable RTO role could be found for the claimant. He was invited to a Stage 2 RWP meeting on 12 December 2016. The Production Manager chairing the meeting was Mr Richard Mann. In advance of the meeting, Mr Mann had given the claimant some time out of his role so that he could “walk the line” and look at different jobs that he might be able to do. The claimant was accompanied by his trade union representative, Mr Paul Cooper. Once the claimant had confirmed that his restrictions had been the same for a year, Mr Mann asked the claimant whether he agreed that there were no suitable jobs on the Door Line. Mr Cooper said, “We

asked occupational health to have a look at Door Line repair area. To the best of my knowledge, it was never done. I don't think John Whitty was keen on it as if you have a bad back you can't carry doors." Mr Mann observed that Door Line Repairs was a skilled job. He then asked the claimant whether he had "walked the line" as requested. When the claimant said no, Mr Mann expressed his frustration and adjourned the meeting.

49. The Stage 2 meeting reconvened on 14 December 2016. By then, the claimant had put forward some further role suggestions. One of the proposed roles was Bagging, which Mr Mann was not prepared to offer. The role was already fully staffed with restricted workers who could not be moved. Door Line Repair was considered unsuitable because of the lifting involved. They agreed, however, that the claimant should be allowed to try out a different role. This was called VCATS.

50. We never got to know what VCATS stood for. It was an RTO role. Tasks included doing electrical system tests on cars as they passed along the line. The associate would perform the role standing up, but would have to reach into the car to connect a plug into an area below the dashboard.

51. Those present at the Stage 2 meeting discussed one matter of concern – it was doubtful whether the claimant could be given an opportunity to sit down. The claimant's union representative (Mr Williamson this time) suggested that the claimant return to occupational health to see if the 5 minute per hour sitting requirement could be lifted.

52. The claimant briefly tried out the VCATS role. He returned to occupational health in 5 January 2017, but as we have already observed, his restrictions remained the same as before. As a result, the claimant was taken off VCATS and given housekeeping duties until July 2017.

53. In July 2017, the claimant began a new role on the Engine Dress Line, still within Trim and Final. The role was found for him by Mr Andy Evans, who was then a Production Leader, with the assistance of the claimant's trade union representative, Mr Carl Cunningham. The role was known as Gear Box Bolts. As the role title suggested, it involved fitting and stud bolts on various parts of the vehicle engine.

54. The Gear Box Bolts role could be done standing or sitting. The claimant was provided with a wheeled chair with compartments where he could keep his tools. Whilst seated, he would use his legs to propel the chair around the vehicle engine in order to complete the various tasks.

55. In December 2017, the claimant sought to resurrect his second-stage appeal in respect of his March 2015 grievance. Following an initial meeting with Ms Harkin of Human Resources, he was invited to a first-level grievance meeting on 19 January 2018. Ms Harkin refused to re-open the second-stage appeal, partly because she considered it to be stale, and partly because Mr Wood no longer worked in the same area. Instead, the claimant's concerns were treated as a new grievance. The meeting was chaired by a Production Leader, Mr Evans. They discussed the history of how the claimant had ended up in the Gear Box Bolts role. It took some time for Mr Evans to establish what the claimant's current cause for concern was, or what should be done about it. In essence, the claimant considered that he was still unsuitable for a paced role.

56. On 29 January 2018, the Gear Box Bolts role was risk-assessed using the Sue Rodgers ergonomic assessment tool. Three of the specific job elements were given a severity rating of 5, which was colour-coded amber. The rest were green. The amber severity ratings could not have involved in Effort Intensity score of more than 2. So far as the legs and knees were concerned, this meant that it could not involve exerting any more than moderate force whilst pushing and pulling.

57. By this time, the job mapping trial had started. The Gear Box Bolts role was colour-coded under that process, based on information about the role supplied by a Group Leader. For "Knees", the role was given the colour red. This meant that the role would involve one or more of the following activities:

    57.1. stepping up or down,

    57.2. using steps or ladders,

    57.3. repetitive squatting,

    57.4. kneeling or sitting with knees to chest inside a vehicle,

    57.5. high forces whilst pushing through legs.

58. The Gear Box Bolts role assessor gave an amber rating to "Head and Neck" and "Lower Back".

59. On 20 March 2018, the claimant was examined by Ms Suzanne Lupton, an occupational health physiotherapist. She noted that the claimant was presenting with new symptoms in his neck and shoulders. She produced a DDR report with quite different restrictions from the DDRs that had been produced previously. As Ms Lupton stated, the change in restrictions reflected not only the claimant's new medical complaints, but also new mapping spreadsheet. The key changes were:

    59.1. There was no longer a restriction on working in a paced environment. Instead, the report recommended "changes of positions[;] a mix of sit and stand avoiding more than 2 hours sit or stand.

    59.2. The report stated, "No head held in sustained or repetitive mid to end range movements. No combined head rotation with extension (looking up).

    59.3. The lifting restriction was clarified at "No lifting objects over 3kg with an outstretched arm. No lifting more than 7kg.

    59.4. More detail was given in relation to the bending restriction: there should be no sustained or repetitive bending beyond 20 degrees and no reaching forward more than 50cm.

    59.5. There was a specific restriction on getting in and out of vehicles.

60. In general, Ms Lupton reported, the claimant was "fit to work on roles designated Amber or Green on the restricted worker job mapping database for lower back and now head and neck." As will be recalled, on the mapping spreadsheet, Gear Box Bolts had been assessed as amber for both lower back and head and neck. Ms Lupton did not mention any restriction in roles that job mapping had assessed as red for "knees".

61. On 15 May 2018, the claimant had a meeting with Mr McLoughlin, Production Manager. The purpose of the meeting was to mark the claimant's formal exit from the RWP. Mr McLoughlin's impression of the meeting was positive. The claimant,

in the presence of his union representative, said that he was currently happy in the Gear Box Bolts role. As this was an RTO role, it meant that the RWP process could be signed off. He added that he might need more treatment for his knee in June. Mr McLoughlin advised him to inform management of any restriction changes, which would cause him to re-enter the RWP at Stage 2.

62. In the meantime, Mr Evans still had not got back to the claimant with the outcome of his grievance. Finally, on 23 November 2018, he informed the claimant that the historic part of the claimant's grievance was not upheld: Mr Evans was not prepared to re-open the claimant's 2015 grievance, and was not prepared to look into why Mr Wood had not dealt with the second-stage appeal. As for the current situation, Mr Evans considered that a satisfactory outcome had been achieved by the claimant having been successfully placed into Gear Box Bolts. The claimant appealed unsuccessfully and his application for a second-stage appeal was rejected. In the meantime, he carried on working in the Gear Box Bolts role.

63. On 24 April 2019, the claimant underwent a surgical procedure on his knee in an attempt to treat his arthritis. Although we heard no medical evidence, we are sure that, prior to surgery, he would have been experiencing significant knee symptoms. As a result of the surgery, he was absent from work for twelve weeks, returning on 16 July 2019. During his sick leave, he was assessed three times by Ms Alison Hilton, an occupational health physiotherapist. All three of Ms Hilton's DDR reports repeated the restrictions from Ms Lupton's 2018 DDR. Her first report stated that adjustments and restrictions were "not considered during absence at this time" and that an "annual restriction review" was in place. The third report, however, expressly endorsed the restrictions and recommended that the claimant return to work with those restrictions.

64. The claimant was provided with a copy of Ms Hilton's reports before they were released to management.

65. On 21 June 2019, the claimant attended a long-term absence case management meeting. At this meeting he mentioned that occupational health had advised him that he should not be working in the Gear Box Bolts role as it was "red".

66. During one of his consultations with Ms Hilton, she informed him that the Gear Box Bolts role was "red" for knees. The claimant's evidence to us was that she also told him that he should not be working in that role. Although we did not hear from Ms Hilton, we are confident that the claimant must have misunderstood her. His misconception may well have resulted from the confusing multiple systems of traffic light coding. At any rate, we are sure that Ms Hilton did not tell the claimant that the Gear Box Bolts role was unsuitable for him. If that was Ms Hilton's view, we are sure that she would have mentioned it in one of her DDR reports. She would either have declared expressly that the role unsuitable, or she would have included a restriction on the knee movements that were identified as "red" on the spreadsheet. We cannot imagine that she would have positively recommended that he should return to work on a particular date into an unsuitable role.

67. On the claimant's return to work, he maintained his stance that he would not be able to work in Gear Box Bolts. He asked his Production Leader for a further referral to occupational health, so that the physiotherapist could "come and assess the jobs". This request was turned down on the grounds that Ms Hilton had already

assessed his restrictions and it was not for physiotherapists to assess the jobs on the line.

68. As Mr McLoughlin had previously warned him, the claimant re-entered the RWP at Stage 2. He completed Role Suggestion Forms indicating that he would be prepared to trial three roles.

69. A meeting took place on 27 August 2019 between the claimant and a Production Manager, Mr Phil Hannah. (By this time, the claimant had been to see his general practitioner on 21 August 2019 and mentioned a stress-related problem, but he was not prescribed any medication at that stage.) The claimant told Mr Hannah that he should not have been placed in the Gear Box Bolts role, because it was “red for knees”, was in a paced environment, and, in his opinion, had exacerbated his arthritis. He said he disagreed with the restriction on getting in and out of vehicles as he would be able to do a driving role. He said he could not do any work in a paced environment.

70. On 21 August 2019, the claimant attended an extended hours NHS clinic, reporting a “stress related problem”

71. On 24 September 2019, the claimant raised another grievance, essentially about the same matters.

72. On 14 October 2019, the claimant met with Ms Ashleigh Peterson of Human Resources “to assist” the claimant “through the restricted worker process”. During this meeting, the claimant said to Ms Peterson that he would not be able to work in any roles in Trim and Final. At the conclusion of the meeting, Ms Peterson informed the claimant that there would be a Stage 3 meeting. The claimant then said that it was also his medication that restricted his ability to work in his role. Ms Peterson made another referral to occupational health.

73. In about October 2019, probably some time between the Stage 2 meeting and 15 October 2019, the claimant walked into the Production Leaders’ office and started talking with Mr Williams, one of the Production Leaders. Mr Dave Broady, Production Manager, was in the same office on unrelated business. He overheard the conversation. It related to the claimant’s RWP paperwork, which the claimant was refusing to sign. Mr Williams tried to explain the process, but the claimant would not accept Mr Williams’ explanation. Mr Broady intervened. He told the claimant that the paperwork was to assist the respondent to place the claimant into an RTO role within his current DDR restrictions. The claimant asked for a trade union representative to be present before he signed and said he wanted Mr Paul Cooper. As the claimant told it to Mr Broady, Mr Curphey was “useless” and Mr Williamson was “a liar”. Mr Broady said that the choice of union representative was not up to him, but agreed to approach Mr Cooper. Some time later, Mr Broady made a written statement of his recollections of that meeting.

74. On 15 October 2019, the claimant met with his trade union representatives, including an external Unite representative. The purpose of the meeting was to discuss the claimant’s concerns that he was not being properly represented in the RWP. Despite the union representatives thinking that the meeting was “really good”, the meeting did not go well from the claimant’s point of view. Far from agreeing to argue the claimant’s case more energetically, they tried to persuade the claimant to be more cooperative. One of the representatives said that the

claimant was "walking himself out of the door" and that he was "making himself unemployable".

75. In the claimant's words, this experience "blew his head". He saw his general practitioner the same day. He was given a fit note stating he was unfit for work for two weeks with a "stress-related problem". He told the doctor that he had no thoughts of deliberate self-harm. He was prescribed Sertraline.

76. The claimant was well enough to attend an occupational health consultation with Ms Lupton on 17 October 2019. Ms Lupton formed the opinion that the claimant was unfit for work and recommended a further referral to consider his stress condition. She advised that the claimant should not get in or out of vehicles, that his role should have a combination of sitting and standing. She repeated her previous head movement restrictions, but not the lifting restrictions. Her report added that the claimant "also advised me that he struggles with faster paced role and therefore may benefit [from] slower paced roles."

77. On 18 October 2019, the claimant met with Ms Peterson and Mr Broady for an early intervention absence review. He was accompanied by Mr Curphey. Ms Peterson explained that later occupational health reports supersede earlier ones. There was a discussion of what roles the claimant could do if he could not manage a pace of 92 seconds per operation. The claimant mentioned the possibility of a driving role.

78. Nearer to the end of the meeting, the claimant indicated that he was feeling suicidal. Ms Peterson insisted that he stay on site until a next of kin could be found to take him to see a doctor. After a break, the meeting reconvened. Mr Broady told the claimant that he wanted him to return to work on Monday 21 October 2019 so they could continue to manage him. The claimant said that he would not be returning. Mr Broady informed the claimant that his absence would not be supported with occupational sick pay. The claimant then left. Mr Broady followed up the meeting by giving the claimant information about mental health support services.

79. On 29 October 2019, the claimant attended a further occupational health review with Ms Carys Turner. Ms Turner confirmed that the claimant was unfit for work with stress. She recommended a discussion about the role to which the claimant was expected to return.

80. On 8 November 2019, the claimant went to a clinic session with an NHS well-being specialist.

81. By letter dated 12 November 2019, the claimant was invited to an Employment Review Meeting, scheduled for 18 November 2019. According to the letter, the purpose of the meeting was "to discuss the fundamental breakdown in the relationship with Jaguar Land Rover and despite our best efforts to resolve your issues, we cannot reach an outcome which you deem as satisfactory." The factors that were said to have caused the breakdown were listed as, "Attendance", "Capability" and "Conduct". These factors were explained in more detail:

    81.1. Under the "Attendance" heading, the letter cited the claimant's absence since 15 December 2019 and alleged that the real reason for his absence was his refusal to sign the Stage 3 paperwork under the RWP.

81.2. Dealing with "Capability", the letter paraphrased Ms Turner's occupational health report and emphasised the need to find the claimant an RTO role. The letter indicated that a decision would need to be made about whether such a role could accommodate the claimant's adjustments.

81.3. The final heading was "Conduct". This stated:

> "It is alleged that whilst being within the Restricted Worker Process you have deliberately attempted to frustrate this process by refusing to sign the appropriate stage paperwork."
>
> "It is alleged that on [10 October 2019] you refused to cooperate with Production Management in order to progress your case to a Stage 3. Your alleged conduct has frustrated the Company's ability to continue within the Restricted Worker's Process which is your alleged barrier for returning to work at present."

82. The claimant attended a further occupational health assessment on 15 November 2019, this time with Dr Dagens, an occupational health physician. He told Dr Dagens that he was having poor sleep, variable appetite and poor concentration and focus. By then he had had six sessions of counselling and his medication had increased.

83. The report repeated the restriction on getting in and out of vehicles and neck movements, together with a requirement for mixed sitting and standing. There was no specific mention of his knees. Having said that, Dr Dagens expressed the view that, for any role, the claimant would have to decide whether or not he would agree to carry out the role, because "only [the claimant] can truly determine at any given time the level of pain that is acceptable to him".

84. Dr Dagens was unable to give a time frame for the claimant's return to work. In Dr Dagens' opinion, a return would only be achievable if his concerns could be addressed.

85. The claimant returned to his general practitioner and his Sertraline dose was increased to 100mg.

86. This is a convenient point for us to record our findings about the claimant's ability to carry out normal day-to-day activities. Our ability to find the facts was hindered by the claimant often describing the effects of his mental health in the present tense, which suggested that he was conflating his difficulties in autumn 2019 with the problems he was experiencing at the time of the tribunal hearing. Nevertheless, we were able to find that, at about the time of the Employment Review Meeting, the claimant was finding it difficult to concentrate at home, to the point where he would leave the iron switched on, or leave the house with the door wide open.

87. The Employment Review Meeting took place on 18 November 2019. It was chaired by Mr McLoughlin. The claimant was accompanied by Mr Williamson and Mr Curphey. At an early stage, Mr Williamson went out of his way to stress how much support he thought the respondent had already given the claimant.

88. During the meeting, Mr McLoughlin asked the claimant:

> "Why do you feel you have not yet been placed on a role as part of that process?"

To which the claimant replied,

I need a sit down job. I have got bad knees. It's just not suitable for me the job I was on."

89. Mr McLoughlin checked with the claimant that previous DDRs had stipulated that he was not suitable for a paced role. The claimant agreed and added that he thought he was suitable for a driving role. Mr McLoughlin thought it suspicious that the claimant had raised the subject of driving roles.

90. Mr McLouglin asked the claimant why he had refused to sign the RWP paperwork, as witnessed by Mr Broady. The claimant replied, "I never refused. All I said was didn't have an up to date DDR, so I didn't want to sign." Mr McLoughlin asked the claimant what had changed so as to warrant an up-to-date DDR. The claimant replied that his surgery had not been a success. The claimant told Mr McLoughlin that he had been assured by Ms Hilton that he would have a further occupational health referral on his return to work.

91. Mr McLoughlin took the claimant to Dr Dagens' report and, in particular, the passage in which Dr Dagens' expressed the view that return to work would depend on his work concerns being addressed. Having done so, Mr McLoughlin rhetorically asked, "How can we resolve issues if you have prevented the process continuing?"

92. They returned to the topic of a paced working environment. At this point, on the claimant's behalf, Mr Williamson suggested that the claimant could do a role in the same building, but with a higher chair. After some discussion about what this role would be, and whether or not the claimant could return to work, Mr McLoughlin asked the claimant what had changed that prevented him from being able to work in Gear Box Bolts. The claimant replied that he thought he would need a stool.

93. Mr McLoughlin adjourned the meeting for three weeks pending further enquiries. It was agreed that the claimant would return to work the next day.

94. As agreed, on 19 November 2019 the claimant returned to work. On 20, 21 and 22 November 2019, the claimant completed several template Role Suggestion Forms, each concerning a different proposed role in Trim and Final. In some of the forms he agreed to "trial the role". These included Gear Box Bolts, provided that it was rotated with a different job. He gave Gear Box Bolts a try, in combination with a role called "Throttle Body". At the time of the reconvened Employment Review Meeting, he was trialling a different role.

95. In the meantime, Mr McLoughlin e-mailed Ms Hilton on the subject of the assurance that, according to the claimant, she had given him during his recovery from surgery, that he would have a further occupational health referral after his return to work. The query was forwarded to Ms Lupton, who replied on 28 November 2019. She did not directly engage with Mr McLoughlin's question. Instead, she summarised the three recent occupational health reports that had been prepared during the claimant's absence starting in October 2019. Her summary made clear that the assessments of his restrictions had been done during the claimant's absence and that they included measures to help him recover from his knee surgery. Although Ms Lupton did not expressly say it, she implied that there would therefore be no need for a further assessment on return to work, unless the claimant was saying that his symptoms had changed. From this reply, Mr McLoughlin concluded:

95.1. straightforwardly, that the latest DDR restrictions took account of the claimant's knee surgery; and

95.2. more tenuously, that the claimant had not been telling the truth about what Ms Hilton had told him in May/June 2019.

96. Mr McLoughlin examined the claimant's recent Role Suggestion Forms, which included work in a paced environment. In his view, the fact that he was prepared to try out some of these roles meant that the claimant knew that he was capable of working in a paced environment all along.

97. The reconvened meeting took place on 9 December 2019. The same people attended. During the first part of the meeting, Mr McLoughlin put various matters of concern to the claimant. These included:

97.1. the claimant's apparently being able to trial more roles in November 2019 than he had been prepared to try in July 2019;

97.2. the inconsistency between his preparedness to work in a driving role and the DDR restriction on getting in and out of vehicles; and

97.3. the contradiction between Ms Lupton's e-mail and the claimant's assertion that he needed a further DDR to reflect his unsuccessful knee surgery.

98. The way in which these concerns were raised at the meeting made it difficult for the claimant to address each one separately. In fact, he said very little, other than to confirm what roles he had recently been trialling. His trade union representatives did in fact respond. They suggested that a further occupational health referral might have resulted in more knee restrictions.

99. Mr McLoughlin asked the claimant whether or not the claimant or his companions had any further representations to make, Mr McLoughlin informed the claimant of his decision. It was his view that the claimant had deliberately and "vexatiously" manipulated and frustrated the RWP in an attempt to avoid being placed in the RTO roles that were being suggested for him. As Mr McLoughlin saw it, the claimant's main motivation was to try and secure a job that he wanted, such as driving, even though there were RTO jobs he was actually capable of doing.

100. Mr McLoughlin's reasons for coming to this conclusion were:

100.1. The three matters that he had just put to the claimant.

100.2. Mr McLoughlin rejected the claimant's assertion that the Gear Box Bolts role was "red". There was no record of occupational health having given that advice. He did not take into account any possibility that the claimant might have been confused by the multiple traffic light colour schemes.

100.3. The timing of the claimant having taken sick leave just after his meeting with his trade union representatives, and whilst managers had been trying to escalate the RWP from Stage 2 to Stage 3.

100.4. What he saw as the contradiction between, on the one hand, the claimant needing to resolve the issues over his role before he could return to work (according to Dr Dagens), and, on the other hand, the claimant refusing to sign the paperwork that would enable him to be placed in a role under the RWP;

100.5. A further contradiction between that opinion of Dr Dagens and the claimant having returned to work four days later, despite there having been no resolution of what role he would do. In Mr McLoughlin's opinion, the timing was suspicious, and indicated that the claimant had actually been well enough to work all along.

100.6. The fact that the claimant had put himself forward for driving roles on numerous previous occasions, when managers had been discussing his suitability for RTO roles on the assembly line.

100.7. The claimant's repeated assertion that the Gear Box Bolts role had been unsuitable for him, apparently contradicted by both occupational health advice and the claimant's recent Role Suggestion Form indicating his willingness to try out the role in rotation.

100.8. The fact that the claimant continued to assert that he should not have been required to work in a paced environment, long after occupational health reports had superseded Dr Manzoor's original recommendation.

100.9. The claimant's apparent refusal to move on from his 2015 grievance.

101. Mr McLoughlin took into account that the claimant had caused considerable cost to the business by his sickness absences and occupational health interventions. He took into account the full history of the claimant's sickness absences when evaluating the cost.

102. It was Mr McLoughlin's view that, against that background, the claimant's manipulation of the respondent's processes seriously undermined the relationship of trust and confidence and justified dismissal. He considered alternative sanctions, but, in his view, no lesser sanction was suitable.

103. The dismissal was confirmed to the claimant in a letter dated 10 December 2019.

104. Very shortly after being informed of his dismissal, the claimant started to develop shingles. He went to his GP surgery on 16 December 2020, mentioned his shingles and told the doctor that he was suffering from stress as a result of having lost his employment.

105. The claimant appealed against his dismissal. His appeal was considered by Mr Williams, another Production Manager. We heard very little evidence about what happened. Appeal meetings took place on 6 and 9 January 2020. Having heard the claimant, Mr Williams decided that the original decision to dismiss should stand.

106. The claimant first thought about bringing a complaint of discrimination once he had been dismissed. Prior to his dismissal, he did not know about disability discrimination claims or the statutory time limits that affected them. He had, during his employment, brought a personal injury claim against the respondent in respect of the alleged failure in 2013 to rotate his jobs properly. He had trade union support in respect of that claim. He also had regular access to trade union representatives if he wanted to discuss escalating his complaint beyond internal procedures. He avoids using computers where possible and had only limited capability to research his employment rights on the internet.

Relevant law

Unfair dismissal

107. Section 98 of ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
> (a) the reason (or, if more than one, the principal reason) for the dismissal and
> (b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it…(b) relates to the conduct of the employee…
>
> (4) 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.

108. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

109. Where the reason for dismissal is the employee's misconduct, it is helpful to ask whether the employer had a genuine belief in misconduct, whether that belief was based on reasonable grounds, whether the employer carried out a reasonable investigation and whether the sanction of dismissal was within the range of reasonable responses: *British Home Stores Ltd v. Burchell* [1978] IRLR 379, *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

110. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

111. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

Definition of disability

112. Section 6 of EqA provides:

> (1) A person (P) has a disability if- (a) P has a … mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

…

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

113. According to section 212(1) EqA, "substantial" means "more than minor or trivial".

114. Schedule 1 to EqA supplements section 6. Relevant extracts are:

2. Long-term effects

(1) The effect of an impairment is long-term if- (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or….

…

5. (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

PART 2 - GUIDANCE

10. Preliminary

This Part of this Schedule applies in relation to guidance referred to in section 6(5).

11. Examples

The guidance may give examples of- (a) effects which it would, or would not, be reasonable, in relation to particular activities, to regard as substantial adverse effects…

12. Adjudicating bodies

(1) In determining whether a person is a disabled person, [a tribunal] must take account of such guidance as it thinks is relevant.

115. The relevant guidance is to be found in the Secretary of State's *Guidance on Matters to be Taken Into Account in Determining Questions Relating to the Definition of Disability (2011).* The following passages appear to be helpful:

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people...

B12. The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, "likely" should be interpreted as meaning, "could well happen"…

C3. The meaning of "likely" is relevant when determining

- whether an impairment has a long-term effect …
- whether an impairment has a recurring effect…

In these contexts, 'likely', should be interpreted as meaning that it could well happen.

C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood…

…

D2. The Act does not define what is to be regarded as a 'normal day-to-day activity'. It is not possible to provide an exhaustive list of day-to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping… getting washed and dressed …, and taking part in social activities. Normal day-to-day activities can include general work-related activities…such as interacting with colleagues, … carrying out interviews…

…

APPENDIX

AN ILLUSTRATIVE AND NON-EXHAUSTIVE LIST OF FACTORS WHICH, IF THEY ARE EXPERIENCED BY A PERSON, IT WOULD BE REASONABLE TO REGARD AS HAVING A SUBSTANTIAL ADVERSE EFFECT ON NORMAL DAY-TO-DAY ACTIVITES.

…

116. The tribunal must focus on what the claimant cannot do, or can do only with difficulty, rather than the things that she can do: *Goodwin v. Patent Office* [1999] IRLR 4. That is not to say, however, that the things that the claimant can do are completely irrelevant; they may shed some light on the extent of any difficulty in carrying out the activities upon which the claimant relies.

117. In assessing whether an impairment has an effect on a person's normal day-to-day activities, it is appropriate for a tribunal to consider the effect on the person's ability to cope in his or her job: *Paterson v. Commissioner of Police for the Metropolis* [2007] ICR 1522.

118. An adverse effect which is more than minor or trivial satisfies the definition of "substantial", even if the person's ability to do the activity in question is still within the range of normal differences amongst ordinary people. To the extent that paragraph B1 of the Guidance is inconsistent with section 212 of EqA, it is the statutory definition that must prevail: *Elliott v. Dorset County Council* UKEAT 0197/20.

119. Tribunals do not need to make a medical diagnosis or identify the precise cause of an impairment. Whilst it is good practice to make separate findings about the

impairment and its effect, the tribunal need not proceed in rigid consecutive stages. Indeed, in the case of recurring bouts of depression, it may be preferable to start by looking at whether the claimant's ability to do normal day-to-day activities is adversely affected on a long-term basis and then consider the question of impairment in the light of those findings: *J v. DLA Piper* UKEAT/0263/09 per Underhill J at paragraph 40.

120. Care must be taken to distinguish between the effects of an impairment on the one hand and reactions to adverse life events on the other: *J v. DLA Piper* cited above.

121. When considering whether or not the effects of an impairment were likely (at any given point in time) to last for 12 months, the tribunal must decide that issue in the light of the circumstances as they were at the time in question. It is not open to the tribunal to take account of events that have taken place subsequently: *SCA Packaging v. Boyle* [2009] UKHL 1056. Nor can a tribunal simply assume that removing the immediate cause of stress (for example by dismissal) will prevent the effects of an impairment from continuing or recurring: *Parnaby v. Leicester City Council* UKEAT 0025/19.

<u>Duty to make adjustments</u>

122. Section 39(2)(d) of EqA prohibits employers from discriminating against employees by subjecting them to detriment. Section 21 provides that a breach of the duty to make reasonable adjustments in relation to a disabled person amounts to discrimination against that person.

123. Section 39(5) of EqA provides that the duty to make adjustments applies to an employer. By section 20 of EqA, incorporating the relevant provisions of Schedule 8, the employer's duty comprises three requirements.

124. We are concerned only with the first requirement, which is contained in section 20(3). Where a provision, criterion or practice (PCP) of the employer's puts a disabled employee at a substantial disadvantage in relation to the employer's employment in comparison with persons who are not disabled, the first requirement is to take such steps as it is reasonable to have to take to avoid the disadvantage.

125. In *Lamb v The Business Academy Bexley* UKEAT 0226/15 the EAT commented that the term "provision, criterion or practice" is to be construed broadly "having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".

126. In *United First Partners Research v Carreras* [2018] EWCA Civ 323 the Court of Appeal held that an expectation (in that case, to work longer hours) was sufficient to amount to a PCP. There was no need for the claimant to demonstrate an actual requirement to work those hours: an expectation was enough.

127. A disadvantage is substantial if it is more than minor or trivial: section 212(1) of EqA.

128. Assessment of disadvantage does not involve comparing the disabled person to a real or hypothetical comparator. Where, for example, the PCP consists of an attendance policy that prescribes for action to be escalated on an employee's absence reaching defined trigger points, it is not necessary for the tribunal to ask whether a non-disabled person would be any better off under the policy if their absence reached the same trigger points. The PCP puts the disabled employee at

a disadvantage where, as is often the case, that employee's disability makes them more likely than a non-disabled person to be absent from work: *Griffiths v. Secretary of State for Work and Pensions* [2015] EWCA Civ 1265.

129. Schedule 8, paragraph 20, of EqA provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know, and could not reasonably be expected to know that the disabled employee is likely to be placed at the disadvantage referred to in the first requirement.

130. The Equality and Human Rights Commission's *Code of Practice on Employment* gives further content to the knowledge provisions in paragraph 20. In the context of knowledge of an employee's disability, paragraph 6.19 states that, to avail themselves of the knowledge defence, employers must "do all they can reasonably be expected to do to find out" about the disability.

131. When considering whether or not the employer has proved that they could not reasonably be expected to know of an employee's disability, it may not be enough for the employer to show that they relied unquestioningly on information from occupational health: *Gallop v. Newport City Council* [2014] IRLR 211. This, in our view, is true of knowledge of disadvantage as well as knowledge of disability.

132. Paragraph 6.28 of the Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

132.1. Whether taking any particular steps would be effective in preventing the substantial disadvantage;

132.2. The practicability of the step;

132.3. The financial and other costs of making the adjustment and the extent of any disruption caused;

132.4. The extent of the employer's financial and other resources;

132.5. The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

132.6. The type and size of employer.

133. Before a respondent is required to disprove a failure to make adjustments, there must be sufficient facts from which the tribunal could conclude not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be a broad indication of what adjustments it is alleged should have been made: *Project Management Institute v. Latif* UKEAT 0028/07.

134. It may be reasonable for an employer to have to take a step that the employee never suggested whilst they were in employment. To put it another way, the employer may be under a duty to make an adjustment proactively, without waiting for the employee to ask for it.

135. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law. The Court of Appeal put the matter this way in *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160:

"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."

136. Section 20(3) requires steps to be taken. It does not require thought processes. In *Tarbuck v. Sainsbury's Supermarkets Ltd* UKEAT 0136/06, the EAT (Elias P presiding) considered whether consultation was capable of amounting to a reasonable adjustment. They decided it was not:

> 71.… The only question is, objectively, whether the employer has complied with his obligations or not. That seems to us to be entirely in accordance with the decision of the House of Lords in *Archibald v Fife Council* [2004] ICR 954. If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant. It may be an entirely fortuitous and unconsidered compliance: but that is enough. Conversely, if he fails to do what is reasonably required, it avails him nothing that he has consulted the employee....
>
> 72. Accordingly whilst, as we have emphasised, it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so- because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments- there is no separate and distinct duty of this kind."

Discrimination arising from disability

137. Section 15(1) of EqA provides:

(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.

138. Langstaff P in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14 (19 May 2015, unreported) explained (with emphasis added):

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

139. Treatment is unfavourable if the claimant could reasonably understand it to put her to a disadvantage.

140. These principles have been affirmed in *Pnaiser v. NHS England* [2016] IRLR 174.

141. It is no defence to a complaint under section 15 that the employer did not know that the reason for the unfavourable treatment had arisen in consequence of the employee's disability: *City of York Council v. Grosset* [2018] EWCA Civ 1492.

142. When considering the justification defence (now found in subsection (1)(b)), the tribunal must weigh the discriminatory effect of the treatment against the reasonable needs of the business: *Hardy and Hansons Plc v Lax* [2005] ICR 1565, applying *Allonby v. Accrington & Rossendale College* [2001] ICR 1189.

143. In *Hensman v Ministry of Defence* UKEAT/0067/14, Singh J held that, when assessing proportionality, while a tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

144. The *Code* offers guidance on the interrelationship between the making of adjustments and the proportionate means defence. The following extract appears to us to be relevant:

> "5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments…
> 5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified. …"

145. Paragraph 5.21 of the *Code* is consistent with the following statement made by Simler J in *Dominique v. Toll Global Forwarding Ltd* UKEAT/0308/13 (concerning the Disability Discrimination Act 1995) at paragraph 51:

> "….where there is a link between the reasonable adjustments said to be required and the disadvantages …being considered in the context of ….disability-related discrimination, it is important to ensure that any failure to comply with a reasonable adjustment duty is considered as part of the balancing exercise in considering questions of justification. This is because it is difficult to see as a matter of practice how a disadvantage that could have been addressed or prevented by a reasonable adjustment that has not been made can, as a matter of practical reality, be justified."

<u>Time limits</u>

146. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination or harassment in the field of work] may not be brought after the end of—
>
> > (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> >
> > (b) such other period as the employment tribunal thinks just and equitable.

> …
>
> (3) For the purposes of this section—
>
> > (a) conduct extending over a period is to be treated as done at the end of the period;
> >
> > (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> > (a) when P does an act inconsistent with doing it, or
> >
> > (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

147. In *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to “an act of extending over a period”.

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an ‘act extending over a period’…
>
> 52. ... The question is whether that is ‘an act extending over a period’ as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

148. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA.*

149. In considering whether separate incidents form part of "an act extending over a period”, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British Medical Association v Chaudhary*, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02DA) at paragraph 208, cited with approval by the Court of Appeal in *Aziz v. FDA* [2010] EWCA Civ 304.

150. In order to count towards an “act extending over a period”, an act must actually be a contravention of EqA: *South Western Ambulance Service NHS Foundation Trust v. King* UKEAT 0056/19.

151. In *Matuszowicz v. Kingston on Hull City Council* [2009] EWCA Civ 22, the Court of Appeal held:

    151.1. that an ongoing failure to make adjustments is not an act “extending over a period”; it is a “failure to do something”, the date of which is to be determined according to the statutory provisions (now in section 123 EqA);

151.2. if the respondent does not assert that the time limit started to run from a date earlier than that put forward by the claimant, the tribunal should proceed on the basis of the claimant's alleged date; and

151.3. that where confusion over the time limit provisions causes an unwary claimant to delay presenting the claim, the confusion can be taken into account as a factor making it just and equitable to extend the time limit.

152. It follows from *Matuszowicz* and section 123(4) that, where an employer acts inconsistently with the duty to make adjustments, the time limit runs from the date of the inconsistent act. If there is no such act, time begins from when the date on which claimant contends a reasonable period of time expired for the making of the adjustment, unless the respondent argues – and the tribunal accepts - that the reasonable period in fact expired sooner.

153. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298. The discretion to extend time is "broad and unfettered": *Abertawe Bro Morgannwg University v. Morgan* [2018] EWCA Civ 640.

154. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

154.1. the length of and reasons for the delay;

154.2. the effect of the delay on the cogency of the evidence;

154.3. the steps which the claimant took to obtain legal advice;

154.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

154.5. the extent to which the respondent has complied with requests for further information.

155. In *Adedeji v. University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the Court of Appeal warned against using section 33 as a checklist. The statutory test is whether or not the extension is just and equitable.

<u>Burden of proof</u>

156. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person ("A") contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

157. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

(1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the

burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Conclusions – mental health disability

158. We start with the mental health disability issue. That is a convenient shorthand for the question posed by EJ Benson, namely, "Was the Claimant disabled by virtue of his work-related stress as per s.6 Equality Act 2010?"

159. It is important to be clear about the time during which his mental health disability matters for the purposes of the claim. The only discrimination complaint based on the claimant's mental health disability is the complaint of discrimination arising from disability. Just one of the alleged reasons for dismissal is alleged to have arisen in consequence of his impaired mental health. That is his sickness absence with stress, which, we know, lasted from 15 October to 19 November 2019.

Impairment

160. In this case, we are satisfied that the claimant had the mental impairment of depression from 15 October 2019 onwards. That is the date on which he was first prescribed anti-depressant medication.

161. From mid-August to 15 October 2019, the claimant was experiencing the unwelcome effects of stress, but these were not, in our view, the effects of a mental impairment. They were an adverse reaction to a particularly stressful situation at work, namely the escalation of the RWP against the background of his disagreement with management about whether or not the Gear Box Bolts role was suitable for him.

Effect on normal day-to-day activities

162. We have found that, during the period around the first Employment Review Meeting, the claimant's depression was having an adverse effect on the claimant's normal day-to-day activities of housework, leaving the house, and going to work. It is likely in our view, that such effects had started by the time the claimant went to see his doctor on 15 October 2019.

163. In our view, these effects were more than minor or trivial.

164. Our view is strengthened when we take into account the fact that the claimant was taking Sertraline. We do not have any expert evidence about what the effect on day-to-day activities would have been had he been medication-free. In our view, however, such evidence is not needed. We do not need an expert to tell us that, without anti-depressant medication, the effect of the claimant's depression might well have been worse.

Long-term

165. By the time of the claimant's return to work on 19 November 2019, the substantial adverse effects of his mental impairment had only lasted about 5

weeks. They were not a recurring effect of any impairment that he allegedly had in 2015. If the "long-term" element of the disability definition is to be satisfied, it can only be on the basis that, by 19 November 2019, the effects were either:

165.1. likely to last for 12 months; or

165.2. likely to recur.

166. We have to ask ourselves whether or not it could not be said, at that time, that the substantial adverse effect of the claimant's depression could well last for 12 months. In our view, the answer to that question is no. At that time, the adverse effect had only lasted five weeks. It had been triggered by a meeting where the claimant felt particularly let down by his trade union. The main ongoing cause os stress was the dispute over his role, which was coming to a head. Nobody had offered a prognosis, except Dr Dagens, who considered that the claimant's fitness for work was dependent on the uncertainty over his role. We think that, at that time, recovery in twelve months was likely to the point of being able to discount the "could well happen" eventuality of the substantial adverse effect continuing.

167. We do not think that, in November 2019, it could be said that the substantial adverse effect of the claimant's depression could well recur. There was no pattern of recurring depressive episodes in the past. There was nothing in particular to indicate that this was the start of a recurring pattern in the future.

168. Our conclusion, therefore, is that the substantial adverse effect of the claimant's mental impairment was not long-term during the period that is relevant to this claim. The claimant did not therefore have a disability from any mental impairment at that time.

Conclusions – failure to make adjustments

169. We now turn to the complaint of failure to make adjustments. There are a number of separate strands to this part of the claim, and the time limit issues affect them differently. We thought it best, therefore, to analyse the time limit separately for each strand. Where we were able to reach a clear conclusion that a particular strand would fail on its merits, we did not generally consider whether the complaint would also fail because of the statutory time limit.

PCP (i) – requirement to perform a "red" job

170. Before we can reach a conclusion about whether or not PCP(i) existed, it is important to be clear about what it means. The phrase, "red job", is ambiguous. This is because of the three different ways in which traffic light colours were used in ergonomic job assessment.

171. So which meaning is the claimant's formulation of PCP(i) getting at? It could not, in our view, be the system of classification that Mr McLoughlin had in mind. On his understanding of the RWP, it was employees, rather than roles, who were grouped into colours. Under that system of categorisation, the phrase, "red job" would make no sense. We do not think that the claimant had the Sue Rodgers colour coding in mind, because he never mentioned it. In any case, if PCP(i) is based on the Sue Rodgers ergonomic assessment process, there is no evidence that the PCP existed. The only role for which we have the Sue Rodgers assessment data is Gear Box Bolts. According to those data, none of the specific job elements in Gear Box Bolts were assessed as red.

172. That leaves the job mapping spreadsheet. According to the spreadsheet, Gear Box Bolts had been assigned the colour red for knees. To that extent, it was a "red" job. The claimant was expected to do that job from June 2017 until he was dismissed. In fact, we would go further and say that he was required to carry out that job unless it was incompatible with a restriction in a DDR.

PCP (i) disadvantage

General

173. We must now assess what, if any, disadvantage was caused by the requirement to do the "red" elements of the Gear Box Bolts role. This is complicated, because the state of the claimant's knee condition got better and worse at different times.

174. Before we examine the different time periods, we must first resolve a point of fundamental disagreement between the claimant and the respondent. The "red" colour for knees on the mapping spreadsheet did not mean that anyone with a knee problem would be put to a more than minor or trivial disadvantage. What it meant was that the job included certain types of movements that would involve the knees. (We have listed those movements at paragraph 56.) Applying common sense, the description of movements, and their red coding, suggested that those movements were likely to be more strenuous than movements that were assessed as amber or green, but that did not necessarily mean that those movements would put anyone with a knee problem at a disadvantage. The existence and extent of any disadvantage would depend on what was actually wrong with the worker's knees.

No disadvantage in 2017 and 2018

175. In our view, in 2017 and 2018, the requirement to do the knee movements in the Gear Box Bolts did not put the claimant at substantial disadvantage when compared with a non-disabled person. We reach this conclusion for the following reasons:

175.1. The claimant did not complain in 2017 or 2018 that the role was affecting his knees, despite having sought referral to occupational health on many prior occasions when roles caused him discomfort.

175.2. In the claimant's DDR on 20 March 2018, Ms Lupton set out the claimant's restrictions in detail. Other than the requirement to alternate sitting and standing, there was nothing that appeared to affect the claimant's knees at all. Not only that, but she specifically tailored her report to the job mapping process. She recommended an amber or green colour for the neck and lower back elements, without mentioning the requirement for an amber or green rating for knees.

175.3. At his Stage 2 RWP exit meeting on 15 May 2018, the claimant told Mr McLoughlin that he was happy in his role. Although he said he might need knee treatment for the following month, he never suggested that this would make his role any more difficult to do. He was advised to go back to occupational health if this was the case, but he did not do so.

Disadvantage in early 2019

176. We next considered the period during the weeks leading up to the claimant's knee surgery. We do not have any medical evidence about the claimant's ability to do the knee movements in the Gear Box Bolts role at this time, nor what his ability to do those movements were compared to people who did not have arthritis in their knees. Despite the lack of such evidence, however, we think it likely that the claimant would have been at a disadvantage that was more than minor or trivial. The difficulties he was experiencing with his knees in general were sufficient to justify surgical intervention.

No disadvantage from summer 2019

177. Whilst the claimant was on sick leave recovering from surgery, PCP (i) did not put him at any disadvantage, because he was not expected at that time to be doing any work. Following his return to work from surgery, we are satisfied that the claimant was not at a disadvantage that was more than minor or trivial. By that time, the claimant had been assessed three times by Ms Hilton and, in her latest report, she had specifically considered what restrictions he would need. There was no restrictions concerned with the knees, except for the need to alternate sitting and standing.

178. The claimant was, of course, unhappy about returning to the Gear Box Bolts role. This was not because he was actually at a substantial disadvantage. Rather, it was because he wrongly believed that he had been told that "red" (in the job mapping process) meant that the role was unsuitable for him.

Knowledge of PCP (i) disadvantage

179. In any event, we were satisfied that the respondent did not have the requisite knowledge of the disadvantage. That is to say, the respondent did not know, and could not reasonably have been expected to know, that the claimant was likely to be at a substantial disadvantage caused by the requirement to work in Gear Box Bolts. Of course, Mr McLoughlin knew in May 2018 that the claimant was expecting knee treatment, and he also ought to have known that the Gear Box Bolts role involved certain knee movements that had been given a red colour code in the job mapping spreadsheet. But he, and other managers, were entitled to take the claimant's assertion at face value that he was happy in the role. They could not be reasonably expected to know that the claimant was finding the role significantly harder than non-disabled people, because the claimant did not seek referral to occupational health for over a year. Following return from surgery, the respondent could not be reasonably expected to second-guess Ms Hilton's opinion, after three consultations, that the claimant had no relevant knee restrictions. They were entitled to take into account that Ms Hilton was specifically assessing the claimant's restrictions following return from knee surgery.

Reasonable steps

180. The respondent has identified three steps which he says the respondent should have taken. Strictly speaking, in view of our conclusions so far, we do not need to consider whether or not it was reasonable for the respondent to have to take those steps. Nevertheless, for completeness, we record our conclusions here:

Step (i) – finding an amber or green job

181. The Gear Box Bolts role was rated amber and green under the Sue Rodgers assessment process. If this is what the claimant meant by an amber or green job,

then the respondent took the allegedly-required step and fulfilled the duty to make adjustments.

182. If what the claimant means is a job that contained no "red" markings for his knees in the job mapping spreadsheet, we do not consider that it was reasonable for the respondent to have to find him such a job. The occupational health advice was consistent and clear – the Gear Box Bolts role was suitable for him.

Step (ii) – driving job

183. It was not reasonable for the respondent to have to find the claimant a driving job. They were entitled to prioritise RTO roles on the assembly lines. Driving roles were oversubscribed. More fundamentally, the claimant had consistent DDR restrictions against getting in and out of vehicles.

Step (iii) – referring him to occupational health to assist in the identification of a suitable role

184. We understand the claimant to be making a number of separate points here. First, he argues that he should have been referred to occupational health on his return to work in July 2019 and in November 2019. In our view, it was not reasonable for the respondent to have to refer him at either stage. This is because Ms Hilton had already specifically assessed his restrictions prior to his July 2019 return, and Ms Turner and Dr Dagens had done the same during his stress-related absence in the autumn. In any case, a referral, by itself, would not have helped to overcome any disadvantage caused by having to do the Gear Box Bolts role. Disadvantage would only have been avoided if occupational health had recommended some form of management action, which had been implemented.

185. The second argument from the claimant is that someone from occupational health should have "walked the line" to assess for themselves what roles might be suitable for the claimant. It would not have been reasonable for the respondent to have to arrange such an inspection. Group Leaders knew better than physiotherapists what tasks were required in each role. The respondent was entitled, in our view, to ask occupational health to identify an individual's movement restrictions, and then to allow Production Leaders and Managers to identify suitable roles for the claimant under the RWP, with the assistance of the trade union.

186. The claimant's third argument is that he should have been placed in one of the four roles we listed at the start. Here, we are concerned with a long-term role change, as opposed to a temporary placement whilst the RWP ran its course. We considered each in turn and considered that each one would be asking too much of the respondent. In each case, we thought it a significant factor that the claimant was already capable of working in Gear Box Bolts. But there were also other factors, specific to each job that the claimant says he should have had.

Bagging

187. It was not reasonable for the respondent to have to place the claimant into a bagging role. Taking that step would have increased the disadvantage to other workers with disabilities. The role was already fully populated with colleagues with more severe restrictions.

Driving

188. We have already considered this role under Step (ii).

Launch team

189. Roles in the Launch Team were not permanent and were not RTO roles. It was not reasonable for the respondent to have to place him into such a role on a long-term basis.

Door Line Repair

190. The Door Line Repair job was a skilled role which involved lifting doors. Owing to the limits on lifting in the claimant's DDR restrictions, such a role would not have been suitable for him. Even if it helped to avoid the disadvantage caused by having to do "red" knee movements, it would have created other problems for him in connection with his physical disability. It was not reasonable for the respondent to have to place him in this role either.

<u>PCP (ii) – The requirement for an employee to attend work in their current role</u>

191. This PCP clearly existed: the claimant was required to attend work in his current role.

192. PCP (ii) affected the claimant differently at different times, as his role changed and his arthritis progressed.

<u>Gear Box Bolts – no additional disadvantage caused by PCP (ii)</u>

193. We start with the disadvantage when his "current role" was Gear Box Bolts. We have already looked at the disadvantage caused by the "red" knee movements involved in the role. But in order to assess the overall disadvantage caused by the role as a whole, we must also look at how the role affected other parts of the claimant's body as well as his knees. The analysis is therefore subtly different from the assessment of disadvantage under PCP (i).

194. So far as the claimant's neck and back conditions were concerned, the Gear Box Bolts role did not put the claimant at any substantial disadvantage compared to non-disabled people. As the job mapping process and Sue Rodgers assessments both indicate, the role involved only slight demands on the neck and lower back.

195. The claimant's argument, as we understand it, is not about his neck and lower back. Apart from the alleged impact on his knees (already discussed above), the only other aspect of the role which is said to have put him at a disadvantage was that it involved paced work. In our view, the paced environment did not put him at any substantial disadvantage beyond that which was already caused by the knee movements. Here are our reasons:

195.1. From March 2018 onwards, the claimant's occupational health DDRs no longer advised against a paced environment.

195.2. Previously, the problem with paced work appeared to be that it allowed minimal opportunities to sit down. We infer this from the 5-minute sitting adjustment that had previously been recommended in connection with paced work. The Gear Box Bolts role, being one which allowed combination of sitting and standing, did not cause such a problem.

195.3. The claimant stopped complaining about a paced environment from March 2018, and indicated in May 2018 that he was happy in the Gear Box Bolts role.

Gear Box Bolts – knowledge of additional disadvantage

196. For largely the same reasons, we are also persuaded that the respondent did not know that the Gear Box Bolts role, as a whole, was likely to put the claimant to a substantial disadvantage. Nor could it be reasonably expected to know.

Reasonable steps – Gear Box Bolts

197. We have now analysed the totality of the Gear Box Bolts role, and found that it put the claimant to no disadvantage beyond what was caused by PCP(i). We have also found, in any event, that the respondent could not reasonably have been expected to know of any such disadvantage. Having got to that stage, we can deal swiftly with the steps which the claimant says that the respondent ought to have taken. So far as Gear Box Bolts is concerned, PCP (ii) gives us no additional reason, beyond what we have already analysed under PCP (i), for thinking that it was reasonable for the respondent to have to take those steps. Or, to put the same point more crisply, PCP (ii) adds nothing.

Previous roles - jurisdiction

198. Of course, prior to July 2017, the claimant's "current role" was not Gear Box Bolts. For a few months before that, he was doing temporary roles whilst he went through the RWP. The temporary roles were outside of a paced environment and matched his DDR restrictions. They did not put him at any substantial disadvantage compared to non-disabled persons.

199. In order to find a role that did put the claimant at a substantial disadvantage, we have to look back to December 2016 and January 2017. This was the period during which the claimant worked in the VCATS role.

200. Before continuing with our substantive analysis of PCP (ii) and VCATS, we take a moment to check our jurisdiction.

201. If PCP (ii) did put the claimant at any disadvantage in relation to the VCATS role, that disadvantage ceased in January 2017, when VCATS ceased to be his "current role". If there was any discriminatory failure to make adjustments, that failure must have been "done", for the purposes of section 123 of EqA, before the end of January 2017.

202. In our view, any discriminatory failure in respect of VCATS was not part of an act extending over a period beyond January 2017. This is for two reasons:

202.1. First, the alleged failure was isolated from any failure to make adjustments in respect of Gear Box Bolts. The personnel involved were different. It was Mr Mann who was responsible for placing the claimant into VCATS – he had no responsibility for making adjustments in relation to Gear Box Bolts. The nature of the disadvantage – if any – was different, too. So far as it is relevant, the Gear Box Bolts role affected the claimant's knees. There was no suggestion that this was the problem with the VCATs role. And there was an intervening period where the claimant appeared to be happy in his role.

202.2. In any event, there was no discrimination after January 2017 which could form part of the same discriminatory state of affairs as any failures in respect of VCATS.

203. The claim was therefore presented nearly three years after the expiry of the statutory time limit.

204. We have considered whether or not it would be just and equitable to extend the time limit. A relevant factor, in our view, is that the claimant did not know about discrimination claims or statutory time limits until after he was dismissed. Nevertheless, we do not think it would be just and equitable to extend the time. The delay is very long. In our view, it has had a detrimental effect on our ability to make crucial findings of fact. There was little evidence about what disadvantage was caused by the VCATS role. This, in part, was because the respondent had not called Mr Mann. It probably would not have occurred to the respondent to do so, because this part of the claim was so stale. We have therefore reached the opinion that such an extension of time would be unfair.

205. In those circumstances, we have no jurisdiction to consider the claim in respect of VCATS, or any earlier role.

Discrimination arising from disability

<u>Unfavourable treatment</u>

206. The respondent dismissed the claimant. That treatment was clearly unfavourable. He did not want to be dismissed. Being out of a job was reasonably seen by him as a disadvantage compared to people who still worked for the respondent.

<u>Reasons for dismissal</u>

207. The next question for us, worded slightly differently from the way EJ Benson put it, is "What were the reasons why the respondent dismissed the claimant? Here, we are concerned with the mental processes of Mr McLoughlin, who took the decision. We examine each of the reasons put forward by the claimant and determine:

207.1. whether or not that reason motivated Mr McLouglin's decision to any significant extent; and

207.2. whether or not it arose in consequence of the claimant's disability.

<u>Reason (i) - the claimant's inability to do a "red" job</u>

208. For the reasons we have already given, this has to be a reference to Gear Box Bolts and the colour "red" must be a reference to the knee movements shown as red in the job mapping spreadsheet.

209. Strictly speaking, the claimant's "inability" to do Gear Box Bolts, or its required knee movements, did not influence the decision to dismiss. This was because Mr McLoughlin thought that the claimant was able to work in the role. (As we have already noted, Mr McLoughlin believed that the role was compatible with his occupational health restrictions, and also thought it significant that the claimant himself had expressed an interest in the role at the eleventh hour, albeit in rotation with another role.) We are also satisfied that the claimant was not in fact unable to work in Gear Box Bolts.

210. Mr McLoughlin was motivated by the fact that the claimant had *said* that he was unable to do that role. That was a step that helped Mr McLoughlin reach the conclusion that the claimant was deliberately trying to frustrate the RWP. We have asked ourselves whether or not the claimant's profession of inability to work in Gear Box Bolts was something that arose in consequence of the claimant's disability.

211. In our view, the highest the claimant can put the causal link is as follows:

    211.1. His disability caused him to be concerned about the impact of his role on his knees. It also caused him to attend the consultation meetings with Ms Hilton. Were it not for his disability, he would not have heard Ms Hilton mention the colour red in connection with the knee movements required in the role, and he would not have given her comment the importance that he did.

    211.2. Separately, his disability caused Dr Manzoor, and other occupational health professionals, to express the opinion that the claimant was better suited to non-paced work. Had that comment not been made, the claimant would not have relied on that recommendation in support of his argument that Gear Box Bolts was unsuitable for him.

212. There is, in our view, a real difficulty with both causal chains. Both of the claimant's arguments were based on fundamental misunderstandings on his part. The first misunderstanding was about the significance of the colour red in the job mapping spreadsheet. He wrongly equated "red" with "unsuitable". (The error was understandable, given the respondent's confusing systems of traffic light classification, but it was nonetheless an error.) The second misunderstanding was to think that a doctor's DDR restriction could never be superseded by an occupational health physiotherapist. These mistaken beliefs worked so powerfully on his mind that, in our view, they broke the causal connection between his disability and his stance of being unable to work in Gear Box Bolts.

<u>Reason (ii) - sickness absence (excluding stress-related absence)</u>

213. Under this heading we concentrate on the claimant's sickness absences during his employment, but leave out of account the absence from 15 October to 19 November 2019. That absence is specifically alleged to have been a reason for dismissal and we deal with it separately below.

214. Most of the claimant's absences, both in number and overall duration, arose in consequence of his physical disability.

215. In reaching the decision to dismiss, Mr McLoughlin was influenced, to a more than negligible extent, by the claimant's sickness absences over the years, and the cost that they had caused. This does not mean that his absence was the main reason for dismissal. Far from it. Much more important in Mr McLouglin's mind was his belief that the claimant was manipulating the process.

<u>Reason (iii) - inability to work because of stress and anxiety</u>

216. Mr McLoughlin was significantly influenced by the claimant's stress-related absence. He thought that the claimant was able to work and had timed his absence deliberately.

217. The absence did not arise in consequence of mental health disability: our finding is that the claimant's mental impairment did not meet the statutory definition of disability at that time.

218. Nor did his stress-related absence arise in consequence of his physical disability. The stress was caused by his insistence that Gear Box Bolts was unsuitable for him. That stance did not arise in consequence of his physical disability for the reasons we have given at paragraph 213.

<u>Reason (iv) – respondent's failure to find the claimant a job that he was able to perform</u>

219. This reason did not exist. The claimant was able to work in the Gear Box Bolts role.

<u>Justification</u>

220. We next consider whether the dismissal was a proportionate means of achieving a legitimate aim.

Legitimate aims

221. The starting point is the aims put forward by the respondent. The bare aim of reliable attendance would not, in our view, be legitimate. It would put a great many people with disabilities at a particular disadvantage when compared with people without those disabilities. Unless the aim of reliable attendance were itself justified as a means of achieving some other business objective, the aim would be indirectly discriminatory and therefore illegitimate.

222. We must therefore look to the underlying purpose of reliable attendance. The respondent says that the purpose was maintaining productivity and satisfying customer expectation. We accept that those aims are legitimate.

223. The respondent has satisfied us that dismissing the claimant was a means of achieving those aims. It is hard to explain it in a way that does not come across as blunt. Dismissing the claimant meant that they did not have to pay him. Not having to pay the claimant's wages meant that the respondent could then recruit someone who was much easier to place in an RTO role. It was the RTO roles that were key to productivity.

Proportionality

224. What we must now do is consider whether the dismissal was proportionate. What is required is a careful balancing act. On one side of the scales is the discriminatory effect of the dismissal. On the other side, the importance the aims. The weight to be accorded to this factor depends on whether the same aims could be achieved by other measures, such as making adjustments.

225. In our view, this was not a starkly-discriminatory dismissal. Only one of the alleged reasons for dismissal arose in consequence of the claimant's disability. That is the claimant's absences for his arthritis. This was a relatively minor factor in Mr McLoughlin's decision making, and overshadowed by Mr McLoughlin's conclusion that the claimant was deliberately frustrating the process.

226. The aims were important. Productivity was a key element of the respondent's competitiveness in an international car market.

227. We have looked to see whether or not this aim could have been achieved by some measure other than dismissal. Although the claimant did not really suggest alternatives to us, we considered the following possibilities:

227.1. Further referral to occupational health – there would have been no point in referring the claimant to occupational health again. He had already had numerous referrals, including to an occupational health physician. Ms Lupton had reviewed the latest reports and concluded that the claimant's restrictions had been properly considered since his knee surgery.

227.2. Disciplinary warning – in our view, a disciplinary warning would not have helped to achieve the productivity aim. Mr McLoughlin had lost all trust and confidence in the claimant. Even if McLoughlin's opinion in this regard had been mistaken, we still consider that a warning would have had limited benefit in achieving a successful placement into an RTO role. The claimant had been through two other formal procedures: the RWP and the Attendance Management Procedure, over a period of more than 5 years, and the claimant still had not been able to sustain a permanent RTO placement. The real problem was that there had been a stand-off between the claimant and management over the fundamental question of whether Gear Box Bolts was suitable. The claimant was entrenched in his view, which we have found to have been misconceived. He then indicated that he would trial the role, without any real explanation for his change of mind. Issuing a warning would not have helped to avoid behaviour such as this.

227.3. For similar reasons we also do not think that the respondent could reasonably have been expected to allow the claimant to trial any further RTO roles.

228. Having considered these factors, we are persuaded that the dismissal was proportionate. The respondent did not discriminate against the claimant by dismissing him.

Conclusions – unfair dismissal

<u>Reason for dismissal</u>

229. The respondent has proved to us that the principal reason for dismissal was Mr McLoughlin's belief that the claimant was deliberately manipulating and frustrating the respondent's processes in order to secure a job of his choosing. That was a reason that related to the claimant's conduct.

230. The claimant's sickness absence was one factor in coming to that decision, but it was far from the main reason for dismissal.

231. We must now consider whether the respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him.

<u>Reasonableness</u>

General considerations

232. We start by reminding ourselves that the respondent is a very large organisation. It could be expected to devote considerable resources to investigating alleged conduct issues, exploring alternatives to dismissal, and building safeguards into its procedures. We also bear in mind that the claimant was a fairly long-serving employee. We remind ourselves that any reasonable employer must take care before dismissing an employee for their conduct. This is because it is often be more difficult for an employee dismissed for their conduct to find a new job than an employee who has been dismissed for other reasons. Finally, we repeat our self-direction that we must not substitute our view for that of the respondent.

233. We now turn to the questions that tribunals often ask themselves where an employee has been dismissed for their conduct.

Genuine belief

234. We have found that Mr McLoughlin's belief was genuine.

Reasonable grounds

235. We have analysed Mr McLoughlin's grounds for coming to the belief that the claimant was deliberately frustrating the respondent's procedures. Some of those grounds were, in our view, flawed. In particular, it did not follow from Ms Lupton's review of the three most recent DDRs that the claimant had been untruthful about what he claimed Ms Hilton had told him. The claimant had undoubtedly been incorrect in his understanding that he required a further occupational health assessment, but that did not mean that he was lying. We also think that Mr McLoughlin took a somewhat harsh view of the claimant's stance that the Gear Box Bolts role was "red" for knees. It ought to have been apparent that the claimant might have been confused by the different colour coding systems. A more sympathetic manager might well have tried to explain how those systems worked before concluding that the claimant was deliberately being difficult.

236. Nevertheless, we have reached the view that, despite some defects in his reasoning, Mr McLoughlin did reach a belief that was reasonably open to him. There was no doubt that the claimant had refused to sign the RWP paperwork in the presence of Mr Broady. That paperwork was necessary in order for the respondent to look for other roles for him. The claimant had clearly fallen out with his trade union representatives at the same time, which made his position look more unreasonable from Mr McLoughlin's point of view. There were examples of the claimant proactively raising the subject of driving roles when asked about RTO roles on the assembly line, which supported the belief that the claimant's real purpose was to try to secure a driving role. The timing of his stress-related absence could reasonably be viewed as suspicious. It started as the claimant was in the process of being escalated to Stage 3 of the RWP. He returned to work on 19 November 2019 with no agreement having been reached about his role, even though Dr Dagens had stated that agreement over the claimant's role was an obstacle to his being able to return. It was, in our view, permissible for Mr McLoughlin to take into account the sheer number of times that the claimant had been referred to occupational health generally, and during his time in Gear Box Bolts in particular. He was entitled to reach the view that the claimant was unreasonably rejecting a role which he could do.

Reasonable investigation

237. The claimant has not advanced any particular criticisms of the investigation process. We identified one for ourselves, but we start with an overview. The claimant was invited to a disciplinary meeting at which he was accompanied by two trade union representatives. He was given fair warning of what the meeting would be about. Mr McLoughlin carried out further investigations and then conducted a further meeting with the claimant before announcing his decision. An added layer of protection was provided by an appeal.

238. Mr McLoughlin may have been able to make a better decision if he had structured his questions to the claimant in a different way. As we have recorded, he put his points of concern to the claimant, but did not make it easy for the claimant to answer. We do not, however, consider that this took the entire investigation outside the reasonable range. Importantly, the claimant and his union

representatives had the opportunity to make further points once they had heard what Mr McLoughlin's concerns were, and before Mr McLoughlin announced his decision. The claimant also had the chance to deal with these matters during his appeal.

Sanction

239. In our view, dismissal was within the reasonable range of responses for the conduct that Mr McLoughlin believed had occurred. We come to this opinion largely on the strength of the reasons we have given for finding the dismissal to have been proportionate.

Conclusion

240. We then stepped back and asked ourselves whether, overall, the respondent acted reasonably or unreasonably in treating the claimant's conduct as sufficient to dismiss him. We found that the respondent acted reasonably. The dismissal was therefore fair.

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Employment Judge Horne

14 June 2021

SENT TO THE PARTIES ON

5 July 2021

FOR THE TRIBUNAL OFFICE