EMPLOYMENT TRIBUNALS

Claimant: **Mr K Williams**

Respondent: **British Gas-Centrica**

HELD AT: **East London Hearing Centre (by Cloud Video Platform)**

ON: **3 & 4 June 2021**

BEFORE: **Employment Judge Pearl**

This was a hearing heard by full CVP video to which the parties consented.

Representation:

For Claimant: Mr A King (Friend)
For Respondent: Ms A Smith (Counsel)

JUDGMENT

1 **The Claimant's claim of unfair dismissal succeeds.**

REASONS

1 By ET1 received on 14 October 2019 the Claimant claimed unfair dismissal and age and disability discrimination. The discrimination claims are not pursued. He was dismissed on 4 June 2019. The Respondent relies on capability.

2 In resolving the issues, I heard evidence from the Claimant; and from Mr Davies and Mr Brooks. I studied the bundle of 495 pages.

Facts

3 It is not my function to resolve each and every factual conflict. What follow are the relevant findings. The Claimant has been a gas engineer with the Respondent since 2002. He has been commended for his performance and it is agreed that he was a valued employee. The dispute in this case centres around the Respondent's contention that he was no longer fit to do the work. This is not accepted. Mr Williams maintains that at the time he was dismissed, he was fit in all respects.

4 On 22 April 2013 the Claimant injured his knee at work. He had 4 weeks off work and had for a while to avoid crawling and kneeling. His work can involve doing both. The extent of this becomes relevant later on.

5 A medical report from an orthopaedic physiotherapist of 5 December 2013 records knee pain that, seemingly, was not related to any injury. The Claimant tells me this is wrong and that the pain did arise from the injury. It is a discrepancy I cannot resolve. After an MRI scan, a consultant orthopaedic surgeon in January 2014 reported "moderate tricompartmental [osteoarthritis]; strain of the medial collateral ligament and degenerative medial meniscus with small horizontal cleavage tear of the posterior horn." As far as I understand this, the degenerative meniscus need not arise from any specific injury.

6 There was an arthroscopy on 25 April 2014 and in late May Mr Williams returned to work on a phased return. An OH adviser noted (page 148) that "Keith is likely to push himself to undertake more work." This is very much in character, as I find. He has a strong and admirable work ethic that the employer was well aware of. For the next 4 years he had no time off work.

7 In April 2018 the Claimant was signed off for a month. The MRI scan of May 2018 revealed "Complex tear of the posterior horn and body of medial meniscus is evident. This has got oblique as well as vertical components. This finding has progressed as compared to the scan of 28.12.2013. Further osteophytosis with articular surface irregularity can be seen ..." The investigation was said to be consistent with chondromalacia patellae. Again, for clarity, I understand this to be evidence of degenerative change since the 2013 scan. This is not disputed by the Claimant.

8 An OH assessment of 24 July 2018 found that the Claimant was unfit for his role of Technical Engineer. Kneeling, squatting, crawling, lifting and ladder capabilities were all substantially impaired. He would not return to the role in the foreseeable future.

9 This led his manager, Danny Walker, to place him on the redeployment register. Mr Davies summarises what happened under this procedure in paragraph 15 of his statement. The process took place between 8 October 2018 to 18 March 2019. There were weekly review calls with Mr Walker to discuss job vacancies. An application the Claimant made to Aviva for Group Income Protection was declined by the insurer.

10 On 6 November 2018 Mr Walker and the Claimant had a review meeting and the Claimant said he wanted to return to work on a phased return. It seems

that the OH Case Manager was Ms Lane at a business called 'healthcare rm'. Her view, on 14 November, was that the Claimant could come back, as there was no safety issue, but "it is unlikely he will be able to do it," which I take to refer to the full role. It was therefore decided that there should be a further "FCA" (Functional Capacity Assessment). It was conducted on 12 December by Mr Hill, a Chartered Physiotherapist. He found limitations in kneeling, squatting/crouching, lifting and crawling. He could not "have adequate functional capabilities to carry out the full physical demands of his role of Technical Engineer." Kneeling and squatting ability was "well below" that required; and "in light of the degenerative underlying pathology he is not expected to now further improve significantly." It is recorded that Mr Williams accepted this.

11 Mr Hill went on to say that, if he was to return to work, significant modifications would be needed. (I) Assistance with heavy and awkward jobs. (ii) He cannot do jobs requiring sustained kneeling or squatting. He would have to avoid most fire and back boiler work. (iii) For other jobs requiring some kneeling, regular breaks would be needed.

12 In terms of self-perception, the Claimant said he had wear and tear arthritis and "is now at his best." There is some dispute as to what he meant by this, but nothing turns on the point. He said he could not carry out the full role, but "would like to try." He was not carrying out any physical work at this time, but wanted to return, initially at 25% of normal capacity. I should add that this is a very detailed report and I have selected only some of the main points.

13 The Respondent received it on 25 January 2019. Having considered it, the Claimant's manager, Mr Walker decided that there were no reasonable adjustments that could be made to the full role. Technical Engineers had to work on all gas appliances, including fires and back boilers. Removing these from his job function was feasible on a temporary basis, but not permanently. Too much of the work involved physical movements that he was unable to perform. Mr Davies, Customer Delivery Manager, who later dismissed the Claimant, makes the point that it would only be when the Claimant attended at a property that he would know where the appliance was located and whether he could work on it.

14 It was for these reasons that Mr Walker, in effect, sent the Claimant home on 4 February 2019. By this point he had been working for about 10 weeks 'buddying up' with various engineers. I am satisfied that the Claimant could not have been working in anything like the full role, in which he would normally attend premises alone.

15 There is a mis-match, both in tone and content, between paragraph 16 of his statement and his replies to Ms Smith in cross-examination. We are not dealing here with dishonesty. The Claimant is engagingly optimistic and has given his recollection of the facts a positive spin. When questioned in the hearing, he was a little more realistic. Thus, in the statement he says that he felt confident in his capabilities as an engineer. "I had been back to work for over 10 weeks with no health issues and had now been assisting a number of

engineers on difficult jobs, which included ladder climbing and crawling … I had completed the second FCA, returned to work and felt fully fit to carry out my full duties. Although Danny agreed the FCA showed significant improvement from the first FCA, I was still classed as unfit for work."

16 This seems a rather rosy way of reading the FCA report. In cross-examination he agreed with the following. He still had various physical restrictions. He was not fully fit for the full demands of the job. Kneeling and squatting functions were inadequate. He then accepted that the Respondent could not make the modifications discussed in the report on a permanent basis. He agrees with the Respondent's business rationale. This was candid and realistic evidence.

17 The rationale for the Respondent's action is set out at paragraphs 23 to 26 of Mr Davies's statement. What then happened was that there was an employee health review on 18 March and Mr Walker summarised the meeting at pages 234 to 235. The Claimant was told that the procedure would now move to stage 4.

18 The stage 4 meeting was on 20 May 2019. It was chaired by Mr Davies and the other panel member was Mr Potter, Service Manager. The Claimant had two trade union representatives in attendance. On the key question, the Claimant said he was fit for his role. He was asked why he thought this and said, "Because I know me." This introduces a relevant point. It was open to the Claimant to establish his fitness by, for example, obtaining a GP report or similar. He did not do so and, as will be seen, was later in the chronology content to rely on a further FCA assessment. In any event, at this point the Claimant was saying he was fully fit for the totality of the role.

19 Mr Davies's reasoning is set out at paragraph 36 of his statement. He considered that the Claimant was not fit for the role. He contacted healthcare rm before taking a decision. The response was that the Claimant was "deemed unfit for his substantive role": pages 271-272. Mr Davies decided to dismiss. Mr Potter agreed with him. "[He] had been absent from work for many months and his condition was not going to improve in the future … based on the medical information … and the information he had given me during our meeting." The condition was degenerative, the role would put continuous strain on the knee, adjustments could not be made to the engineering role. Redeployment had not been successful and the Respondent was not developing new roles. The dismissal letter is at pages 274-277.

20 The Claimant appealed. The hearing was on 1 July 2019 and Mr Brooks decided to adjourn it. He then decided that a further FCA was required. It was something the Claimant had sought in the appeal. The FCA took place on 21 August. As Mr Brooks comments, and as the Claimant and his union representative must have understood, "the only thing that could change would be the results of the tests."

21 Mr Hill's further report starts at page 323. These are the salient points:

(I) The conclusions start: "During today's assessment Mr Williams demonstrated more than adequate functional capabilities to carry out the full physical demands of his role as Technical Engineer." This is confirmed within the report.

(ii) In December 2018, his function had been "well below that required for the full demands of his work." There is now said to have been a significant improvement.

(iii) The Claimant attributed the improvement to the passage of time plus exercise.

(iv) However, he reported no symptoms to Mr Hill, which he found surprising "given his diagnosis and previous assessment findings." There was a "potential … to be under reporting any symptoms today."

(v) " … the fundamental underlying degenerative nature of his pathology means that symptom aggravation cannot be excluded, and to a degree is expected, if he is required to kneel, squat and sustain low level postures on a frequent basis. This would then be expected to negatively impact on Mr Williams's function and his ability to sustain any return to work."

22 I should note, in relation to this last point, that the 'Job Demands and Abilities' table has kneeling, squatting/crouching and crawling as being required occasionally, rather than frequently. It is an important and, as I understand it, agreed fact.

23 Mr Brooks told me that he valued the Claimant's contribution; he was a valued employee. He "needed to exhaust all options" and he required no great persuasion to ask for a third FCA.

24 In evidence, he stressed that he thought the Claimant was under-reporting or masking his symptoms. He accepted that kneeing and squatting were said to be required occasionally in the full role. However, the rationale for his decision to reject the appeal involved two main considerations. (a) He believed that the Claimant would attempt tasks he was physically incapable of performing. (b) The risks could not be mitigated in the long term

25 He also volunteered that he spoke to 'OH' before he took his decision. There is no note of the conversation and it is not mentioned in the witness statement. He also told me in two separate passages of evidence that he believed that the Claimant had been given an opportunity "to improve." It is also clear from his oral evidence, as I find, that he believed the Claimant had been "underplaying his symptoms". He also believed that if he returned to work, he would be a risk to himself and customers. The tenor of his evidence was a belief that Mr Williams would continue working at tasks, even though he was in pain and physically unable to kneel, squat or crawl.

26 This contrasts somewhat with his witness statement.

(a) He states at paragraph 26: “although improvements were reported in the testing and he had fewer restrictions in his abilities, it did not result in a different conclusion”.

(b) “Symptom aggravation, due to the underlying degenerative nature of his condition was expected” from kneeling, squatting and low level postures that were fundamental to the role. (Paragraph 30.)

(c) “Even if Keith was functioning well”, the prognosis was that aggravation would be expected if he had to kneel, squat, etc. If a return was attempted, “the outlook was bleak.” (Paragraph 31.)

(d) He gave the Claimant the benefit of the doubt as to whether he was underreporting pain and symptoms at the most recent FCA. This possibility made no difference to his decision to reject the appeal: paragraph 30.

27 Mr Brooks’s letter rejecting the appeal, dated 19 September 2019 states, in the first relevant paragraph for these purposes: “Although the FCA showed improvements, the medical experts believe that you have underrated your level of discomfort and pain during the assessment …[and] that if you return to your role your symptoms are likely to be aggravated again.” Returning to the role “would likely lead to aggravation and further deterioration to your condition.”

28 I need to refer to one other document. On 5 September 2019 healthcare rm, previously referred to as the OH manager, submitted a further report. This appears to have been compiled by Alex Lane: see the first sentence. The significance is that it has every appearance of being an overview, or further consideration of the third FCA. The first two headings include the word ‘summary’ and appear to summarise the FCA report. The third heading omits that description. It is: “Temporary Work Modifications: Information on time limited adaptations to duties.” The section is then written in these terms, which are not a simple restatement or cut and paste of the FCA report:

“It is highly likely that Mr Williams will experience an increase in symptoms should he be required to kneel, squat and sustain low level postures on a frequent basis. This would then be expected to negatively impact on Mr William’s function and ability to sustain any return to work. Should Mr Williams acknowledge and accept the risk to return to work he would benefit from a phased return to work plan to facilitate a successful return to his fully assigned role, provided this can be accommodated within the needs of the business. It is recommended that he commence a graduated return to work at approximately 60% of his normal capacity and increase to the duties of his full substantive role over the period of 6 weeks.”

29 I will further refer to the significance of this in my conclusions. Mr Brooks makes no further reference to it in his statement. His summary of the situation after receiving the FCA report and this further OH document is: “If a return was attempted the outlook was bleak.” This is in paragraph 31 of the statement and is based on and preceded by the opening sentence of that paragraph. Mr Brooks dismissed the appeal.

Submissions

30 I am grateful to both parties for their final oral submissions. Where relevant I refer to them below.

The Law

31 Section 98(4) provides that: "where the employer has fulfilled the requirement of sub section (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"

Conclusions

The correct legal approach

32 Ms Smith stresses that I must not substitute my own view for that of the employer. This is axiomatic. It is well established that the question is whether dismissal lay within the band of reasonable responses, open to a reasonable employer, in these circumstances. I cannot put myself in the shoes of the Respondent and re-take the decision, after the event.

33 It is worth going to the leading case of HSBC v Madden [2000] EWCA Civ 3030, which restated and reaffirmed the orthodox view.

> " 50. … But in between those extreme cases there will be cases where there is room for reasonable disagreement among reasonable employers as to whether dismissal for the particular misconduct is a reasonable or an unreasonable response. In those cases it is helpful for the tribunal to consider "the range of reasonable responses".
>
> 51. Substitution Point
>
> 52. It was also made clear in Iceland Foods at pp.24G-25B that the members of the tribunal must not simply consider whether they personally think that the dismissal is fair and they must not substitute their decision as to what was the right course to adopt for that of the employer. Their proper function is to determine whether the decision to dismiss the employee fell within the band of reasonable responses "which a reasonable employer might have adopted".
>
> 53. In one sense it is true that, if the application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting their judgment for that of the employer. But that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to "reasonably or unreasonably" and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the

> tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer, which they were not."

The s.98(4) question here

34 The initial decision to dismiss was one that a reasonable employer could take on the basis of the information then available. I refer to paragraphs 8 to 18 above. The essential perception was that the Claimant was dealing with degenerative change that would not improve. He was not fit for the role. The dismissal decision can be justified at that point in time as being one available to a reasonable employer, acting reasonably in those circumstances.

35 That situation changed after the third FCA was received in the appeal process. The report was also supplemented by the further 5 November report from healthcare rm. The basis of my decision is that Mr Brooks read the reports in a way that a reasonable employer would not, indeed could not. In evidence, he stressed that he was taking the new material alongside the earlier reports. That, in itself, was an approach that a reasonable employer could not take, indeed I conclude that this has been used as a way of rationalising the dismissal decision. It amounts to an unfair and unreasonable relegation of the third FCA to just one other piece of evidence. Although it was a new piece of evidence, the Respondent here is disabling itself from recognising that the situation had fundamentally changed with this report.

36 The report recognises that the Claimant had "demonstrated" functional capabilities for the full physical demands of the role. This is, it was emphasised, a major change since the previous FCA. It is the fundamental point that the appeal discounted. When one looks further into these two latter reports, the rationale can be seen to be clearly set out.

37 Mr Hill states at the outset of his report that the objective of the assessment was "to determine current functional abilities", especially with regard to the Claimant's ability to work in his own, or an alternative role. The job demands table makes clear that kneeling, squatting/crouching and crawling are needed occasionally, as opposed to frequently. That table is said to have been based on a workplace assessment carried out by a Senior Physiotherapist and "verified with management representatives in HR and operations" (page 334.)

38 The clinical conclusion (page 328) showed: "fairly normal active and passive range of motion" for the left knee, no crepitus and unremarkable related findings. The conclusion on muscle power is that it "was equivalent at the right and left knees which would indicate his left knee has significantly improved when compared to his previous FCA last December." This is of central significance. No reasonable reader could discount or set aside such a conclusion.

39 Other clinical tests support these conclusions: page 335. They included McMurray's test, anterior and posterior draw tests and use of computerised inclinometers and a dynamometer.

40 It is no surprise that the conclusions are as summarised in paragraph 21 above. It is clear from page 327 that “frequent” kneeling, squatting etc could change the picture, but the report is based on occasional such movements. Both Mr Hill and the Claimant were proceeding on that basis. Therefore, Mr Hill concluded that as long as the Claimant accepted a risk of exacerbation, he would be able to make a graduated and, then, sustained return to his full role. That is a clear recommendation and all the supporting detail justifies it.

41 This is confirmed by the healthcare rm Case Management Report. In rejecting these recommendations and the evidence of significant improvement, the Respondent on appeal was acting outside the range of reasonable responses open to a reasonable employer. Specifically, no reasonable employer could have ignored the report and used the earlier examinations to conclude that the Claimant was unfit to return to work. Mr Brooks says in his statement that he disagreed with the decision to place the Claimant back at work in late 2018 before a stage 4 review (paragraph 19) and I conclude that this coloured his approach. When he received the report of the FCA, his statement says, “improvements were reported … it did not result in a different conclusion …" No reasonable employer could come to that view. The conclusion was not just different, but diametrically so. In stressing the few notes of caution, he has put on one side, so as to ignore, the larger conclusion, which was that the Claimant was fit to undertake the full role. The additional point made in the evidence, that he posed a risk to customers, was never alluded to and there is no factual basis for it. Perhaps there was some risk to the Claimant if his knee gave way, but this was covered in the reports. He was fit to return to his old role and should acknowledge the possibility of such a risk. This was only sensible.

42 One possibility that might explain the appeal officer’s divergence from the latest FCA is that he rejected the frequency of kneeling, squatting, etc. But this was never raised, the report’s table was not contradicted and the appeal did not consider this point or turn on it. The Claimant did not have any opportunity to deal with it. In any event, I have very little or no evidence that this was Mr Brooks’s view.

43 It is, accordingly, my overall conclusion that the decision to reject the appeal was so unreasonable as to amount to an unfair dismissal. No reasonable employer, in these circumstances, could treat incapacity as a sufficient reason to dismiss the Claimant, in view of the most recent reports. By doing so, the Respondent was acting outside the range of reasonable responses, so as to render the dismissal substantively unfair. For completeness, I consider that both the dismissal letter and the witness statement unfairly summarise the two recent reports and misrepresent the conclusions within them.

44 I am aware that remedy may raise various issues, including a need for medical evidence. I would be happy to undertake a video case management hearing if that would assist. My current view is that some care will be required

when relevant orders are made. Equally, the parties may wish to speak on a without prejudice basis or via Acas.

Employment Judge Pearl
Date: 26 July 2021