EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr S J Hussey	**AND**	Air Liquide (Homecare) Ltd

Judgment of the Employment Tribunal

Held at: Bristol **On:** 22, 23, 24 and 25 June 2021
Before: Employment Judge Mr P Cadney
Members: Mr K Ghotbi-Ravandi, Mr D Jenkins
Appearances:
Claimant: In Person (Assisted by his son Mr S Hussey)
Respondent: Ms J Duane (Counsel)

JUDGMENT

The unanimous judgment of the tribunal is that:-

The claimant's claims for:-

i) Unfair dismissal;

ii) Disability discrimination – discrimination arising from disability (s15 Equality Act 2010);

iii) Disability discrimination – indirect discrimination (s19 Equality Act 2010);

iv) Disability Discrimination – failure to make reasonable adjustments (s20 Equality Act 2010);

Are not well founded and are dismissed.

Reasons

1. By this claim the claimant brings claims of unfair dismissal and disability discrimination (discrimination arising from disability; indirect discrimination; and the failure to make reasonable adjustments).

2. The tribunal has heard evidence from the claimant; and on behalf of the respondent from Mr Ben Fish (the claimant's supervisor at the relevant time); Mr Rob Davidson (Regional Supervisor for the South West and the decision maker in respect of the claimant's dismissal); and Mr Paul Roberts (Secondary Operations Manager and the first stage appeal officer).

Summary

3. The claimant was absent from work from 12th September 2018 until his dismissal on 11th October 2019. The claimant contends that there were reasonable adjustments that the respondent could and should have made which would have allowed him to remain in employment. If correct he would necessarily succeed in the failure to make reasonable adjustment claims; discrimination arising from disability and unfair dismissal at least. The respondent contends that there were no adjustments at all and/or no reasonable adjustments which could have permitted the claimant to continue working, which if correct would dispose of the disability discrimination claims; and that it had obtained sufficient medical evidence and waited for a sufficient time to make the conclusion that the claimant would not be fit to work in the foreseeable future a reasonable one and the dismissal fair.

4. It follows that all the claims turn on one factual question, whether there were or were not adjustments that he respondent could have made between September 2018 and October 2019 which could have allowed the claimant to return to work.

Facts

5. The respondent supplies oxygen to patients under contracts with the NHS and other clients. The claimant was employed as a Homecare Technician from 2006 until his dismissal. The claimants role involved the collection of oxygen cylinders/cannisters, referred to as dewars, from the depot in Plymouth and the installation, replenishment, service and removal of them from patients homes. It involved considerable heavy lifting as the dewars had to be physically transported from the depot to the technician's van, loaded on to it and then moved into the correct position in the van. Once unloaded they had to be taken into and installed in patients' homes. The evidence before us is that in general they range from some 15kg to 45 kg. Occasionally a dewar of more than 60kg would be required which was regarded as a two man job. The vans were fitted with hoists to assist lifting the dewars into and out of the van. Prior to 2017 the hoists were electric but a decision was taken by the respondent to replace them with manual hoists, operated effectively by a mechanical winch system, from 2017. The evidence of the respondent is that its fleet of vehicles would be replaced every five to seven years and that as from 2017 the new fleet would all be fitted with manual hoists. The respondent's evidence is that the electric hoists were significantly more unreliable than the manual hoists with knock on effects on their ability to fulfil the requirements of the contracts and in maintenance costs. The claimant is extremely critical of this decision as he contends that it is contrary to the respondent's own risk assessment which shows that electric hoists are inherently safer as they reduce the risk of manual handling. For the avoidance of doubt it is no part of the tribunal's remit to determine whether that was a good or bad decision; it is a paradigm business decision which involves the management of the respondent balancing the competing benefits and disadvantages of each system and making a decision. For our purposes all that is significant is that there is no dispute that this decision had been

taken and that in consequence the claimant had been provided with a van with a manual hoist in November 2017.

6. The medical evidence is set out in greater detail below but in summary the claimant had first consulted his GP about pain in his right shoulder in May 2017. He had two cortisone injections in May and November 2017 but found it increasingly difficult to cope with his duties. On 13th February 2018 the claimant informed his supervisor Ben Fish of the condition of his shoulder. There is no dispute that this was the first time that the respondent was made aware of this. It was agreed that the claimant would be referred to Occupational Health but that in the meantime a number of adjustments would be put in place. The claimant's workload was reduced to a maximum of three deliveries per day from the normal 6 or 7; and he was provided with an older van fitted with an electric hoist which was still in service. In addition he was permanently provided with an electric step trolley to assist in transporting the dewars. The evidence of Mr Fish is that whilst this was a standard piece of equipment they were kept at the depot and not routinely allocated to one technician, as was the case with the claimant from February 2018. The claimant found particular difficulty in working with his arms raised above shoulder height and from June 2018 the requirement to install piping "pipe ins", was removed. These adjustments remained in place until the claimant went off sick on 12th September 2018.

7. At some point in early 2018 the respondent had introduced a new software system Opti-Time, which was designed to optimise deliveries. The claimant found it extremely stressful to be constantly allocated jobs on the system although it is not in dispute that he had permission from Mr Fish to reject any jobs that were allocated to him. In evidence Mr Fish accepted that the system was not particularly well suited to the respondent and was removed shortly after the claimant went off sick and has not been readopted. As is set out below all of the claimant's fit notes cite anxiety and shoulder injury as the reasons for the sickness absence, and the claimant attributes the anxiety to the introduction of the Opti -Time system. For our purposes, however it is of little significance. Firstly the tribunal held that the claimant was not disabled by reason of anxiety or depression and so it has no bearing on the disability discrimination claims; and neither party contends that it has any bearing on the question of whether he was or was not capable of returning to work in October 2019.

8. Having been absent since September 2018, the claimant had a first fitness capability meeting with Mr Fish on 5th March 2019. At that point the claimant was awaiting the nerve ablation. On 25th May 2019 he was invited to a final fitness capability meeting, the letter informing him that it could result in his dismissal. It was conducted by Mr Davidson on 20th June 2019. At this meeting Mr Davidson expressed the view that any adjustments which could be made had already been made but had not been sufficient to allow him to carry on working. The claimant expressed the view that the nerve ablation was key, and Mr Davidson made the decision to await the outcome of the nerve ablation which had not yet taken place, and also referred the claimant for a musculoskeletal and ergonomic workstation assessment which was carried out on 23rd August 2019.

9. The final fitness capability meeting took place on 11th October 2019. Prior to this the respondent and received the ergonomic /workplace report and the most recent medical report (dated 26th September 2019) which stated that the nerve ablation had not been successful and that the claimant had "..discomfort in his right shoulder with any activity involving reaching away from his trunk, he also has pain at rest". Mr Davidson took the view that he could not see how the claimant could work at all if he was in pain simply sitting still. After the meeting Mr Davidson sent a letter dismissing the claimant on capability grounds giving 12 weeks' notice.

10. The claimant appealed to Mr Roberts. The hearing took place on 12th November 2019 and the claimant was represented by his union representative. There were a number of points of appeal but the critical one for our purposes was the assertion that with adjustments, in particular the provision of a van with an electric hoist, that the claimant could return to work. This was rejected by Mr Roberts for a number of reasons one of which was that the adjustment had already been attempted and had not been successful in allowing the claimant to continue to work beyond September 2018

11. The claimant was permitted a second stage appeal which was also unsuccessful.

Medical Evidence

12. A great deal in this case turns on the medical evidence and the weight that is to be given to different aspects of it. In May 2017 the claimant experienced right shoulder pain with loss of movement and strength. His GP administered cortisone injections in May and November 2017. An X ray in November 2017 showed " *Gross, essentially end stage glenohumeral OA change with multiple fragments of joint debris and erosion of acromion*" (Medical notes 20th November 2017). The first medical report dated 13th February 2018 states that he is not suitable for physiotherapy and recommends referral for a shoulder orthopaedic opinion. The claimant subsequently received at least one ultrasound injection. This was at best only temporarily successful and a medical report of 15th February 2019 states that he is "..*currently limited by significant advanced osteoarthritis of his shoulder and .. is awaiting an image guided nerve ablation to try to manage his pain better.*" A report of 7th March 2019 states "..*the orthopaedic team.. believe that there is scope for a shoulder replacement but they want to wait and see whether conservative measures help him cope with the situation better*." In July 2019 he underwent nerve ablation. The final report we have, dated 26th September 2019 states that "..*the suprascapular nerve radiofrequency denervation has failed to improve this patients right shoulder pain*.", and later *"We have agreed to list him for reverse polarity arthroplasty of the right shoulder.."*.

13. In summary, conservative treatment of the symptoms of the osteo-arthritic damage to the claimant's right shoulder between May 2017 and September 2019 was unsuccessful and the decision was taken that he should undergo a reverse joint artificial shoulder replacement. The claimant's evidence is that he is still waiting for the operation.

14. The claimant was absent from work from 19th September 2018. He was certified unfit for work on 19th September 2018; 15th October 2018; 22nd November 2018; 4th January 2019;14th February 2019; 25th March 2019; 23rd May 2019; and 19th July 2019. In addition, although it is not in the bundle, there is reference in the medical notes to a further fit note signing him off from 18th October 2019 to 17th January 2020. All of the fit notes give similar reasons for absence, *"Stress and anxiety and shoulder problems*" for the first three, and "*shoulder problems and anxiety*" thereafter. All of the fit notes have the box "you are not fit for work" ticked, and none of them recommend a phased return to work; amended duties; altered hours; or workplace adaptations as potentially allowing a return to work. The only specific reference to his ability to work in the medical reports is contained in the report of 15th February 2019 from Dr Chris Anthony which refers to the awaited nerve ablation and states " *Until this occurs and until his pain is under control he will not be fit to return to any form of physical work. If his shoulder is functioning and not causing pain then there is no other reason why he cannot return to work.*" On the basis of Dr Anthony's report it appears that although the claimant may have been absent from work both by reason of the shoulder condition and anxiety it was, at least by February 2019, only the shoulder condition that was preventing his return.

15. In addition to the medical evidence there are a number of reports from the respondent's Occupational Health provider. The first is dated 15th March 2018 and expressed the view that the claimant was fit for work with adjustments. This report did not make any specific recommendations as to adjustments but noted the restrictions already in place and suggested a manual handling risk assessment; a Work Place assessment to be caried out by Connect Physical Health or alternatively consulting Access to Work. It is not in dispute that none of these were undertaken at this stage.

16. The next referral was on 13th September 2018. It recommended that once a return to work with adjustments had been agreed that the claimants return was phased over 1-2 weeks. No specific recommendations for adjustments were made.

17. He was seen again on 18th October 2018. On this occasion the Occupational Health advisor expressed the view that he was fit to start a phased return to work with adjustments. Those were the that the requirement to lift dewars be limited to three per day; a health and safety risk assessment be carried out; and a phased return over four weeks.

18. There are no further Occupational Health referrals but on 23rd August 2019 Connect Health carried out a musculoskeletal workplace assessment. That is discussed in greater detail below but in summary it concluded that the claimant was fit to return to work with a number of adjustments.

<u>Disability Discrimination Claims</u>

19. The claimant brings claims of the failure to make reasonable adjustments; indirect disability discrimination and discrimination arising from disability.

They are set out below and are interlinked. If the respondent has failed to make reasonable adjustments which would have allowed the claimant to return to work it is unlikely to be able to justify the admittedly unfavourable treatment of dismissing him. Conversely if there are no such adjustments dismissal may be relatively easily justified. The two are linked to the unfair dismissal claims for the same reason. In our view the indirect discrimination adds little to the claim for the failure to make reasonable adjustments. If that claim succeeds it becomes redundant, and if that claim fails any indirect discrimination can be relatively easily justified. The sections relied on are :

S15 - Discrimination arising from disability

(1)A person (A) discriminates against a disabled person (B) if-

(a)A treats B unfavourably because of something arising in consequence of B's disability, and

(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

S19 Indirect discrimination

(1)A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-

(a)A applies, or would apply, it to persons with whom B does not share the characteristic,

(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c)it puts, or would put, B at that disadvantage, and

(d)A cannot show it to be a proportionate means of achieving a legitimate aim.

S20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply;

and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

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

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

Disability.

20. At a preliminary hearing on 22nd January 2021 it was held that the claimant was a disabled person at the material times by reason of his right shoulder impairment with osteoarthritis but not by reason of any other condition, in particular depression and anxiety as he had contended. The material times were not defined in the Judgment but the parties are agreed that the claims relate to the period beginning on 13th February 2018 when the claimant informed his line manager of the problems with his shoulder, and which is therefore the date of knowledge of the respondent.

21. In his Impact Statement written in September 2020 but which he accepted described his symptoms at the relevant times he describes his shoulder pain as affecting all aspects of his life. He has to use his left arm to support his right to wash, shave, and clean his teeth. His wife often has to help with those things and with dressing. He still experiences pain with the simplest of tasks including making meals, eating and drinking. He cannot reach high or low cupboards and struggles with former hobbies and dog walking. He gets pain and discomfort when driving in opening and closing windows and doors, and using the hand brake, and his wife now has to do the driving.

Failure to make reasonable Adjustments

22. It is convenient to deal with the claim for the failure to make reasonable adjustments first for the reasons given above.

23. Whilst there has been some dispute as to the calculation of the number of adjustments and whether some, for example the provision of the electric stepper trolley should be regarded as an adjustment as it involved the use of a standard piece of equipment, there is not any allegation that the respondent failed to make any reasonable adjustment in the period prior to 12th September 2018; and nor that at that stage there was any adjustment related to his disability that would have permitted him to continue working at that point. The claimant contends that had the respondent removed the Opti–Time system it would have reduced his stress and he may not have gone off sick. As the stress anxiety and depression have been held not to be a disability that issue has no bearing on these claims.

24. The first question is whether the respondent applied a PCP which put the claimant at a substantial disadvantage. The PCPs relied on (which we have slightly refined from those identified at the TCMPH) are :-

    i) The application of the capability/sickness absence policy (i.e. the requirement to achieve reasonable levels of attendance);

    ii) The policy of requiring employees to use vans with manual hoists;

    iii) The policy of requiring a (minimum) level of work on a daily basis.

25. In our judgement all of those are PCPs that were applied to the claimant. He was required like all employees to achieve reasonable levels of attendance; from November 2017 he was required to use a van with a manual hoist; and the respondent has service level agreements with its clients which require achieving a number of commitments and objectives which requires a minimum level of work.

26. The next question is whether they placed the claimant at a substantial disadvantage in comparison with persons who are not disabled. Again in our judgement they did. As from September 2018, at least in part because of his disability he was absent from work and unable to achieve an acceptable attendance level. It has not been disputed that his disability made it more difficult to operate a manual hoist; nor that his disability meant that he could not achieve the standard objectives of levels of work.

27. As set out above a number of adjustments were made for the claimant. From February 2018 he was provided with a van with an electric hoist, and an electric stepper trolley. His work load was reduced to some fifty percent of its ordinary level. From June 2018 he was relieved of the requirement to perform “pipe ins”.

28. The question for the tribunal is whether there were any adjustments which could subsequently be made, including the restoration of those set out above, which could have avoided the disadvantage. That is an objective question for the tribunal to determine.

29. The relevant evidence to resolve that question is firstly the medical evidence. Between September 2018 and January 2020 the claimant’s absence was

covered by fit notes which stated that he was not fit to work and which did not set out any steps the respondent could have made for him to return. In the15th February 2019 report, after the claimant had been absent for some five months, his GP Dr Anthony stated "*Stuart is currently limited by significant advanced osteo arthritis of his shoulder. He is currently awaiting an image guided nerve ablation to try to manage his pain better. Until this occurs and until his pain is under control he will not be fit to return to any form of physical work. If his shoulder is functioning and not causing pain then there is no other reason why he cannot return to work*." (our underlining), and " *Stuart is not currently fit to return to his work as detailed in your job description. He will not be ft to return until his shoulder pain is more manageable*.", and "*Currently there is nothing else I feel that you can be doing as it is now a waiting game on NHS waiting lists to get the nerve ablation done*..". The nerve ablation took place in July 2019 but "*failed to improve this patients right shoulder pain. I understand from him that he continues to experience discomfort in his right shoulder with any activity involving reaching away from his trunk, he also has pain at rest*". As a result it was agreed at this point that he was to be placed on the waiting list for the reverse polarity arthroplasty. On 18th October 2019 he was signed off from work until 17th January 2020.

30. When taken in conjunction with his own description of his symptoms in the Impact Statement the respondent submits that it is clear that there are no adjustments that could have been made as at October 2019, or indeed any earlier point after he had gone off sick on 12th September 2018. Dr Anthony's report from February 2019 is clear that he will not be fit to perform any physical work until the shoulder pain was reduced, and that there are no adjustments the respondent can make in the meantime. This explicitly confirms the advice contained in the fit notes both before and after it. Unfortunately the nerve ablation did not succeed in reducing it. Thus at no point after February 2019 was there any change in the underlying medical condition. They submit that the medical evidence is clear that he was not fit to work and that there were no adjustments which would have removed the disadvantage and allowed him to do so; and that this necessarily remained the case for the whole of the period.

31. The claimant does not accept this. In particular he relies on the ergonomic workstation report following the assessment on 23rd August 2019. This includes (at p4) *" Stuart now feels ready to return to work both physically and mentally.."* and (p12) "*During the assessment Stuart demonstrated the physical capability to undertake all aspects of manual handling required for his work.."* It went on to recommend a graduated return potentially starting on alternating days, a buddy role for 1-2 weeks; to avoid piping installation; the provision of a van with an electric lift; and support at the depot in loading to reduce manual handling. It concluded "*Given that it has been suggested that he will have a shoulder replacement in the short to medium term it is reasonable to suggest that he may not return to his full duties until after surgery*." The claimant submits that the respondent should have given effect to the conclusions of the ergonomic workstation report and restored him to work with the adjustments suggested. He asserts that the respondent should have accepted the advice of Ms Collis the Occupational physiotherapist and if

and to the extent that it conflicted with the medical evidence then it should be preferred as she is a specialist in this field.

32. The respondent's response is that as set out above the medical evidence was clear, but that in any event all of the recommendations had already been implemented between February and September 2018 and had not been sufficient to allow him to carry on working. If the physical problem had not improved how could the same adjustments give a different result? In essence they submit that here is no rational basis for concluding that there were any adjustments that could have been made given the physical condition of the claimant's shoulder.

33. Clearly the central difficulty in this case is that the views set out in the medical evidence and the ergonomic workplace report appear on the face of it irreconcilable. If Dr Anthony is correct and the claimant would not be fit to work at all until the shoulder pain had been resolved, which it had not by August 2019, how could Ms Collis conclude that he was? We have not heard from either Dr Anthony or Ms Collis and therefore whilst there may be theoretical ways to reconcile the two views there is no specific evidence before us which would allow us to assess that possibility.

34. The tribunal has concluded that it accepts the medical evidence for the following reasons:-

i) The medical evidence is entirely consistent over the whole period, and based not simply on the fit notes but the written opinion of Dr Anthony, and it is absolutely clear that by the point of dismissal the only treatment even potentially capable of relieving the symptoms was the shoulder replacement surgery;

ii) The ergonomic work station report is based on the proposition that the claimant is physically fit to return to work which is a medical question; it is not the case that the report is recommending adjustments to accommodate the medical condition but expressing a view that is straightforwardly contrary to the medical opinion.

iii) The adjustments recommended had with one exception, providing assistance with lifting at the depot, already been attempted but had not been successful in allowing the claimant to continue working. No explanation is given in the report to explain why the author now considers that they will be.

iv) Given that the report acknowledges that the benefits of the nerve ablation would last for some 3 -6 months at most and that the claimant was awaiting the full shoulder replacement on any analysis the adjustments, even if possible, could only have been a temporary measure for a relatively short period.

35. It follows that on the basis of the medical evidence we accept that there were no adjustments which could have been made which would have alleviated the disadvantage.

36. We should deal at this point with another issue that has emerged during the hearing. In the first Occupational Heath report of March 2018 it recommended either the ergonomic workstation report or alternatively a referral to Access to Work. Neither were done at the time and a referral to Access to Work was not made at any stage. The tribunal is of the view that it would have been preferable if the respondent had at least advised the claimant to approach Access to Work, as formally it is a resource available to the employee. However the tribunal is of the view that this, whilst now relied on by the claimant is something of a red herring in the context of the tribunal claim. Firstly the tribunal is concerned with outcomes and not process and the failure of the respondent to take a particular step or obtain particular advice is not in and of itself a failure to make an adjustment (See for example; *Tarbuck v Sainsbury's Supermarket Ltd 2006 IRLR 664 / Spence v Intype Libra Ltd [2007]UK EAT / Hay Surrey County Council / Romec v Rudham [2007] UKEAT*). Secondly given that no referral to Access to Work was made by anyone at the time and there is no evidence at all before us from Access to Work, any conclusions we could draw would be wholly speculative and unsupported the evidence.

37. Similarly during the course of the internal process the respondent identified a number of alternative roles. However three of these were doing the same role in Bristol/Exeter or Wimbourne. As the respondent readily acknowledged that would not have improved the position for the claimant. The final option was of a sedentary role in North East England which for obvious reasons the claimant not anxious to accept. There has been no suggestion before us that there were any alternatives beyond these nor that there were any adjustments that could have allowed the claimant to fulfil any of these roles. None of these options was taken any further or pursued on appeal by the claimant. On the evidence before us there is therefore no basis for any finding that the was any suitable alternative roe.

38. It follows that the claimant's claim for the failure to make reasonable adjustments must be dismissed.

Discrimination arising from disability

39. It is not in dispute that the claimant was dismissed as a result of "something arising from disability" whether that is characterised as the sickness absence or his inability to return to work. Similarly it is not in dispute that the claimant was treated unfavourably as he was dismissed.

40. The substantial question therefore is whether dismissal was a proportionate means of achieving a legitimate aim. For the reasons given above we have rejected the claimants claim of the failure to make reasonable adjustments. For the avoidance of doubt had we upheld it we would also have held that the unfavourable treatment had not been justified and this claim would also have succeeded. However in our view there were no reasonable adjustments that would have allowed for a return to work. At the point at which the claimant was dismissed he had been absent for thirteen months and had exhausted all conservative treatment for his shoulder condition. He was on the waiting list for the reverse arthroplasty surgery with no indication of how long that would

be, how long the recovery period would be thereafter and what were the prospects for a sufficient recovery for a return to work.

41. Achieving consistent attendance at work is inevitably a legitimate aim (*Dynamics Information Technology v Carranza [2015] ICR 169*). It follows that the central question is that of whether dismissal was a proportionate means of achieving the legitimate aim. That involves balancing the needs of the employee against the discriminatory effect of the dismissal (See for example: *Department for Work and Pensions v Boyers EAT 0282/19*), and in our judgement dismissal after thirteen months absence when all medical intervention bar surgery had been attempted without success was a proportionate means of achieving that aim.

Indirect Discrimination

42. In our judgment the indirect discrimination claim adds nothing to the other claims; but in brief the claimant would have significant difficulty in succeeding as firstly any discrimination would be justified for the same reasons as given above, and secondly because there is no specific evidence before us which would allow us to make any finding as to group disadvantage.

Unfair Dismissal

43. Again the unfair dismissal claim can be taken relatively briefly. Capability is a potentially fair reason for dismissal; and there is no suggestion that the claimant was dismissed for anything other than capability on the basis of his long term ill health absence, and there being no prospect of a return in the reasonably foreseeable future. For the avoidance of doubt we can identify no procedural error at any stage.

44. Whether the dismissal is fair must be judged against the question of whether the employer can reasonably be expected to wait longer; and whether the employer has sufficiently appraised itself of the medical diagnosis and prognosis, considered whether there was any suitable alternative employment and whether there was procedural fairness.

45. . For the reasons given above in our judgement there were, as at the date of dismissal, no adjustments which could have allowed the claimant to return to work, and no alternative employment available to him. By the time of his dismissal the respondent had both obtained medical evidence as to his condition and awaited the outcome of all of the medical interventions short of surgery. By that point he had been off for thirteen months with no prospect of a return to work in the foreseeable future. In those circumstances in our judgement the dismissal necessarily fell within the range reasonably open the respondent

46. It follows that all the claimant's claims must be dismissed.

Employment Judge Cadney
Date: 19 July 2021

Sent to the Parties: 26 July 2021

FOR THE TRIBUNAL OFFICE