



THE EMPLOYMENT TRIBUNALS

BETWEEN

Mr Antonio Forte

Claimant

AND

Habitat Retail Limited

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Region: London Central **ON:** 23, 24, 25 and 31 March 2021 **Before:** Employment Judge Paul Stewart

MEMBERS: Mr John Ballard and Ms Suzanne Lopez-Barillas **Appearances:**

For Claimant: Ms Melissa Stock of Counsel **For Respondent:** Ms Iris Ferber of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

- a. the Claimant was unfairly dismissed, and that
- b. the Respondent discriminated against the Claimant in consequence of his disability, contrary to section 15 of the Equality Act 2010.

REASONS

1. The Respondent is a well-known retail company which is now part of the Sainsbury's group of companies. The Claimant commenced employment with the Respondent on 23 September 2008 as a part-time sales assistant in the Lighting Department of the Tottenham Court Road store. He was promoted to the role of Visual Merchandiser on 9 August 2009. His employment ended on 9 August 2019 when he was dismissed. He contends that the dismissal was unfair. He also contends that he was discriminated against on the grounds of disability. Specifically, his contention is that the Respondent treated him unfavourably because of something arising in consequence of his disability thus discriminating against him in the manner set out in section 15 of the Equality Act 2010. An allegation that the Respondent had failed to comply with its duty to make reasonable adjustments imposed by section 20 of the Act had been withdrawn at an earlier stage of the proceedings.

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2. By agreement, we heard the witnesses called by the Respondent first. Mr Matthew Dewberry was the first to be called. He had been a Commercial Manager at the Tottenham Court Road store and had been asked to conduct the capability consultation process, which resulted in the Claimant's dismissal because, in his Commercial Manager's role, he had had no dealings with the Claimant. We then heard evidence from Ms Sanya Hussain, a Store Manager with Argos Limited, part of the Sainsbury's group, who had heard the Claimant's appeal against dismissal.

3. The Claimant gave evidence, as did Ms Marjorie Henry, one of the two witnesses who had provided witness statements for the Claimant. Counsel for the Respondent indicated she did not wish to cross-examine the other witness, Ms Laura-Reianne Nelson-Butler, so we read her statement.

The Facts

4. The Claimant was aged 52 when he first joined the Respondent company. He was not then disabled. The content of his work changed after he was required to attend a one-day electrical wiring course in July 2012. After that, he was required to undertake the work of an electrician when, he asserts, he was not properly trained or qualified. Much of this work involved standing on the top of a tall ladder with his neck and arms fully extended in confined spaces to handle the wiring. With staff turnover, the Claimant found himself to have become the most experienced Visual Merchandiser at wiring.
5. By the start of 2015, the Claimant was experiencing a loss of sensitivity in the tips of his fingers and between March and May of that year, his hands, forearms and left leg began to feel numb. He consulted his GP and was referred to a consultant neurologist who told him his symptoms stemmed from his neck and that his condition was probably caused by repetitive injury to his neck from doing overhead wiring work in concealed ceilings.
6. In September 2015, he underwent surgery for C4/C5 C5/C6 anterior cervical spine decompression and fusion for cervical myelopathy and foraminal stenosis. The surgery provided some improvement in the symptoms he was experiencing, but he still had a lack of sensation in his hands. He could not lift heavy weights, nor could he do prolonged overhead work. He developed a mild intermittent tremor.
7. He underwent an occupational health assessment with an organisation called Medigold in November 2015. As a result of this assessment, the Respondent agreed to make certain reasonable adjustments. Thereafter, there appears to have been an uneasy period of several years when the Claimant found himself enjoying his work but, at times, doing more of the tasks, such as heavy lifting, which he had been advised not to do.
8. In May 2018, Ms Marjorie Henry became the Claimant's line manager. On 3 January 2019, Ms Emily Perry-Musgrave replaced Ms Henry in that role.
9. The Respondent employed a proprietary online Case Reporting system that allowed Employee Relations [ER] to communicate with managers. Confusingly for us, two Case Reports were opened in respect of the Claimant in the early part of 2019. The first of these, Case Report numbered 20544, was opened on 8 January 2019. In the box marked "Topic" at the head of this Case Report, there was entered "Long Term Sickness". Note 1 on the opening date comprised Ms Natalie Bradwell of the ER department rehearsing background information which suggests Ms Perry-Musgrave had spoken to Ms Bradwell informing her that there were several concerns about the Claimant's behaviour and conduct that Ms Perry-Musgrave needed to address. The background information continued with:

Your store is within a larger building and outside of opening hours, access is gained via a swipe card secured door, which is only to be used in these circumstances

A review of the swipe card details and the manual signing in log has highlighted a discrepancy between the information on the two, showing that he has started work before he entered the building

You have recently taken over the store and are aware that his personnel file has multiple file notes issued regarding lateness and non-compliance of clocking-in procedure

His shift start times have been adjusted, at his request, and he has previously said that due to an existing back injury, he can no longer run to catch the train

The swipe logs also show that he is exiting and entering the secure door throughout the day time, which is strictly forbidden, due to security and H&S concerns, particularly given you have a theft issue in store

Antonio has previously indicated that he may wish not to work his contracted Sunday shifts and this could be accommodated within your rota
10. Under the Heading "Guidance and Next Steps", Ms Bradwell wrote:

As you are new to managing Antonio, you can take this opportunity to build a relationship and understand his needs as a colleague, given that he has previously raised various concerns with how the business has treated him

Seek to understand the reasons for his lateness and potential falsification of records, ascertaining if there are any support measures that would assist him with his timekeeping

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It would be prudent to re-brief your entire team about the rules around using the secure door, capturing signatures of all colleagues once spoken to

Set expectations of behaviour / conduct going forward and explain the consequences of non-compliance

11. Following on from a chasing message sent by Ms Bradwell on 24 January 2019, Ms Perry-Musgrave responded on 28 January 2019, in Note 3, which opened with this paragraph:

Further to our discussion, I sat down and had an informal one to one with Antonio. We thoroughly discussed his needs and well-being in this session. I provided him with notes which I allowed him to amend. I typed these up for his records. We discussed what he is and isn't able to do and what else can be done to help him at work.

12. And included this paragraph:

I have also discussed the case with my manager and we both believe that we have made as many adjustments as possible for him. He does not want another occupational health visit because this may affect his employment.

13. Ms Bradwell replied the same day with Note 4, making this comment about adjustments:

I would urge you not to make any decisions about further adjustments without an up to date medical assessment, as his condition and needs may have altered

14. The following day [29 January 2019] Ms Perry-Musgrave reported in Note 8:

I've just had the discussion with my manager and we have both agreed we are at a point where an occupational health visit would be beneficial. We have made the appropriate adjustments for Antonio over an ongoing period of time but he has recently stated he is unable to make up the display beds because of the strain on his neck. While I've said this is fine for him to avoid as I don't want him to injure himself, it does show a limit of what he can do within his role. Dressing the display beds on a morning was one of his tasks while also tidying the bed linen products. This simply involves tucking in the fitted sheet and redressing the bed to show room standard.

Other tasks for him include tidying frames and the bath section. These sections were given to him with his restrictions in mind.

Myself and Antonio discussed thoroughly what he is and isn't comfortable with doing in his role on the shop floor. I have his well being in mind and this situation has been something that has been ongoing for quite some time. Currently, he is very restricted in what he can now do within his role. We have taken much consideration into this decision and due to bed making being a fairly basic task we really think that having an OH [*Occupational Health*] would be the best thing for himself and the store.

15. On 30 January 2019, in Note 9, Ms Millie Grantham as the adviser wrote a note to Ms Perry-Musgrave that essentially was a request that she call ER so that ER could see how the case was progressing. Of interest was the way in which her note began:

Dear Emily

Case number: 20544 Topic: Disciplinary

Colleague's name: Antonio Forte

The topic of Case Report 20544 had altered from "Long Term Sickness" to "Disciplinary".

16. In Note 10, Ms Grantham sent a message to Ms Perry-Musgrave thanking her for providing an update and offering this guidance:

If an OH referral is required, please call my ER Adviser and ask to open a Reasonable Adjustments case – we can then progress this referral.

17. This Note appears to have been the catalyst for the opening of the second Case Report numbered 21266 on 1 February 2019 in which the Topic box was left blank. The Adviser was Ms Grantham, who recorded background information as follows:

Antonio is a Sales Advisor employed since 10/09/2012, with continuous service since 23/09/2008.

Habitat policies apply and no live warnings are in place.

Antonio had an operation in 2015 and since then has been on restricted duties at work.

He starts half an hour later, has gone part time and his duties have changed.

He recently told you he could not make up the display beds in the store and do other physical tasks.

You are concerned that this is becoming unsustainable and want to do an OH referral.

18. The guidance offered by Ms Grantham was:

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I advised that he should be taken off the duties he has advised in the meantime, if there is then no work available to him, it should be considered whether he should be absent due to sickness.

A referral to Occupational Health (OH) will help us understand the adjustments and support required in more detail.

Outline the purpose of the referral to the colleague. They will be asked to confirm their consent to Medigold

A referral can be made to Medigold online, using the URL below. You will need to use Firefox or Chrome, not Internet Explorer, to open this:

[and, here, Ms Grantham gave instruction on the website connection to Medigold that could be made and the password to be used]

Click on the 'View form' box, which takes you to the referral form

Complete the referral form with as much relevant detail as possible

When completing this please remember that Medigold may share your referral form and comments with the colleague

Once completed, click 'Submit'. Medigold will then get in touch to confirm the appointment details

19. On 5 February 2019 in Note 2 of this second Case Report, Ms Perry-Musgrave sought further advice:

I just wanted to query the best way to go about letting Antonio know what is happening before I book the occupational health assessment. I obviously don't want to book it first and then tell him, I'd like to make him aware of what is happening and just have transparency.

Any advice on how to proceed would be appreciated.

And she obtained this advice in Note 3 from Ms Grantham:

Antonio needs to provide his verbal consent for a referral to be made.

Please ask his permission before progressing and if he does not provide this please call to update the case and discuss it further.

20. Note 4 comprised Ms Perry-Musgrave telling ER, on Wednesday 13 February 2019, that she and her manager would be sitting down with the Claimant on either Thursday or Friday to discuss referring him to OH. Ms Grantham responded the same day (Note 5) informing Ms Perry-Musgrave that ER's attempt to call her had failed through lack of contact details and requesting that Ms Perry-Musgrave call ER. Her opening to this message indicated that Case number 21266 now had a topic, that of "Reasonable Adjustments".
21. Ms Perry-Musgrave messaged ER (Note 6) on Friday 15 February at 0653 hours indicating she would try to call ER that morning as the intention was to speak to the Claimant at 1115 hours. Ms Grantham at 1007 hours (Note 7) thanked Ms Perry-Musgrave for the update but repeated the request for her to contact ER as ER lacked the contact details for her. Ms Perry-Musgrave appears to have contacted Ms Grantham at 1019 hours because, in Note 8 which was not sent to Ms Perry-Musgrave until 1637 hours, Ms Grantham records Ms Perry-Musgrave as having given her an overview of the case and "You are due to talk to Antonio about an OH referral".
22. The Guidance that Ms Grantham wrote, but which Ms Perry-Musgrave did not receive until after she had had the meeting with the Claimant, mentioned that, if the Claimant refuses to be referred to OH:
- ... then we would need to progress and make a decision based upon the information that we have available.
- If you have concerns about Antonio's fitness to work then we should consider sickness absence.
23. That note, Note 8, was the last one in the second Case Report numbered 21266. Thereafter, communication between ER and Ms Perry-Musgrave resumed on the first Case Report numbered 20544.
24. Ms Perry-Musgrave did meet with the Claimant on 15 February 2019. She reported what happened at the meeting in a telephone conversation with Ms Bradwell, in which she said (per Ms Bradwell's summary in Note 11 on Case Report # 20544):
- You have spoken to Antonio regarding your concerns and advised that you wish to refer him to OH in order to assess his current medical situation and evaluate if the current adjustments are still appropriate to his needs and he is not being put at risk
- Given your store size and operational constraints, you have concerns with the ability to sustain the current adjustments and will seek an updated medical opinion on his condition
- Antonio has consented to the referral, but you are unsure if he will continue to engage, as he has previously been reluctant to be medically evaluated by OH

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25. Ms Bradwell's guidance was to the effect that a referral to OH:

... will help us understand the adjustments and support required in more detail.

She counselled that Ms Perry-Musgrave should complete the referral form to OH with as much relevant detail as possible and to remember that Medigold [*the OH service*] might share the referral form and comments with the Claimant.

26. On 21 February 2019, in Note 12 Ms Perry-Musgrave wrote:

We're in the process of drafting questions at the moment. My store manager is currently away this week but I will be conducting any meetings in the future with another member of management team.

I just wanted to check I've covered all my bases - I believe I can ask him to do tasks, and it is up to him to tell me if he is unable to? I've been clear in the past that he must tell me if there's something he is unable to do (and there will be no judgement) to prevent him hurting himself. As I'm not able to read his mind, I think this is appropriate? Other than the things I know for certain he can't do, such as heavy lifting etc. I asked him to dress a bed today but leave the bottom sheet for myself (as he has told me that he cannot do these as it creates neck strain). I later went on to check if he was okay doing it and he said absolutely.

Just wanted to check I'm following procedure.

27. The same day, Ms Bradwell offered this guidance in Note 13:

Your actions so far are appropriate and in line with policy

Please ensure you informally document any activities that Antonio states he cannot complete, as you may wish to reference this in the referral

28. Some delay then occurred because the store had a busy period. Ahead of Note 22, dated 1 April 2019, Ms Perry-Musgrave would appear to have had a telephone conversation with Ms Bradwell, which the latter summarised thus:

The OH referral was made and agreed to by Antonio

He has subsequently stated that he is not willing to go to OH before his next medical appointment, but he has not disclosed when his next appointment is

The adjustments that Antonio has can no longer be sustained in the store

You are aware that changes have previously been proposed to Antonio, including redeployment into other roles, but these have not been accepted by him In previous meetings Antonio has requested to have representation

Ms Bradwell then set out her contribution under "Guidance & Next Steps":

We discussed that as the adjustments cannot be sustained in the long term, you need to obtain medical information on the adjustments and support that are currently needed, given the previous medical advice is out of date

A meeting should be arranged to discuss when his next medical appointment is and if it is reasonable to delay OH until this has been held

Ascertain if Antonio will consent for OH to request a GP/specialist report, as this may be a useful tool in determining the adjustments needed

Speak to Antonio and arrange a planned, but informal meeting, to discuss the above, allowing him the opportunity to have a representative to accompany him, if he wishes

Explain that if he declines consent, decisions may be made on the evidence available and if the adjustments cannot be sustained in your location, redeployment to another role or arm of the business (e.g. Sainsbury's or Argos) may be proposed

Ultimately, if a suitable position cannot be found or is not accepted, dismissal with notice via the capability process may be instigated Please update following the informal meeting

29. In Note 26, sent on 10 April 2019, Ms Perry-Musgrave sought confirmation that the meeting she proposed to hold that day – responding to the Claimant's refusal (as she saw it) to meet ahead of his next consultation with his treating neurologist – was acceptable to ER:

Hello,

This is the direction I'll be taking today's chat with Antonio:

To begin with I'll state that we've agreed to a witness because he has requested it before but that the conversation is informal. However, anything discussed within the conversation is confidential. It would have otherwise been a one to one.

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I'm going to firstly mention that we're having the conversation because he has refused to see OH and that I would urge him to reconsider this as the next

When he mentions he isn't refusing, just "delaying until his next neurology appointment" I will talk about his welfare and the adjustments we have made already. I want to illustrate how important the OH would have been to help us in helping him, and how he has deteriorated recently meaning that OH was necessary. I will also show him the list of tasks and duties myself, my area VM and the head of creative compiled. I will ask him out of the points on the list what he can do.

I will ask where he thinks he stands currently and when I describe my concerns about his ability to do his role, I will ask him to confirm if this is where we are in terms of abilities. I will give him examples of not being able to do his role if needed.

If he again refuses, I will then say that the next stage is capability. I will explain what this means - it will be a formal hearing in a formal setting with decisions about his employment based on his ability to do his job.

Let me know if you have any amendments!

30. The Guidance supplied by Ms Bradwell in her response [Note 27] was as follows:

Be transparent about the next steps

Outline that you need a current medical assessment of his condition and that

he if he does not wish to go to OH, you can get OH to request a report from his GP/doctor and obtain an assessment of his capabilities

Assure him that this is to seek to understand what support and adjustments are needed, but be clear that the business will need to assess if it can sustain these

Explain that the business determines the roles and hours that are needed to effectively manage the store and that if a colleague is not able to complete their full role, this has an adverse impact on the operation, which needs to be addresses [sic]

Once you have an understanding of the support that is needed, you will need to evaluate if this is reasonable and sustainable, if it isn't and this will be discussed at a first capability hearing where alternate roles (within the wider business, if necessary) and duties will be discussed

If a suitable alternative isn't found or accepted, this may result in the decision being made to dismiss Antonio on the grounds of capability, which is dismissal with paid notice Please update following the meeting and we will discuss the next steps

31. At the meeting on 10 April 2019, Ms Perry-Musgrave took the Claimant through the list of tasks and expectations of the VM team which she had drawn up in concert with her manager. She provided a copy of that list to ER annotated with comments from the Claimant and slashes through those tasks he could not complete.
32. Ms Perry-Musgrave later reported on the meeting at some length which Ms Bradwell summarised in Note 32 thus:
- We discussed the informal meeting you held
- Antonio has consented to an OH referral
- You felt his behaviour towards you was patronising, condescending and insubordinate
33. Ms Perry-Musgrave's perception of the Claimant's behaviour did not improve in discussions she had with him on 15 April 2019 on which she reported at length in Note 33 describing his behaviour at times as being "argumentative", "incredibly hostile", "aggressive" and "incredibly rude and belligerent". She had raised the issue of his behaviour with him. In response, he had said that he was very stressed and wished he hadn't told Ms Perry-Musgrave anything about his condition.
34. Ms Bradwell, in Note 34 dated 17 April 2019, responded thus:
- Dear Emily,
- Thank you for the update, I appreciate that this is a difficult situation for you to manage. If there are clear conduct / attitude issues, you are correct in addressing these with the colleague.
- If you feel that these are significant enough to warrant formal action taking, we can discuss opening a separate disciplinary case, with an independent manager to take it forward.
35. On 23 April 2019, the Claimant attended his OH appointment. Afterwards, Ms Perry-Musgrave must have spoken to Ms Grantham at ER because, in Note 35, Ms Grantham recorded the background facts that the Claimant had attended that appointment and had then asked Ms Perry-Musgrave for a copy of the letter

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that had been used to make the referral. As the referral was an online form, Ms Grantham's advice was that she believed Ms Perry-Musgrave would not be able to retrieve the information. She made the point, though, that:

the report answers any questions you posed so by default he will know the content of the referral through the report itself.

36. In the days that followed, Ms Perry-Musgrave continued to be vexed by certain behaviour of the Claimant that she reported on. The report from Medigold came through and she announced its arrival in Note 40, dated 9 May 2019.

The OH report came back, it was nothing groundbreaking and was essentially confirming the adjustments we've already made. It would be great to speak to someone about the next step.

I think the next step would be to offer another role in the store, and if he declines it then we have it in formal writing. My manager has said she may be able to find him the 30 hours he works in store.

37. Once the report was uploaded for ER to see, Ms Sara Barwick of ER summarised the background information as she understood it in Note 43 on 10 May 2019:

OH report received.

Antonio is fit for some duties, but not all.

As such a small team it is difficult to accommodate restricted duties.

Other roles turned down previously, Antonio denies this.

You plan to explore at redeployment again.

38. The OH report was signed by Dr Paul McGovern, a Specialty Registrar in Occupational Medicine and was made in response to a referral form that had been completed by Ms Perry-Musgrave on 22 March 2019. In that referral form and under the heading "Reason for Referral", Ms Perry-Musgrave had written:

Incapability to undertake current role

Workplace adjustments

39. She gave the number of days the Claimant had been absent during "this current period" as 4. We were never informed what the phrase "this current period" meant but, from the reasons given for such absences, we concluded it meant in the past 12 months.
40. Under the heading "Performance" on the referral form, there was a question "Has there been a change in behaviour towards the required standards of the job?" Ms Perry-Musgrave had answered "Yes. Employee has communicated he is not able to perform significantly more areas of his remit. On the task list attached he cannot do 4, 7, 8, 9 + 10". Further, Ms Perry-Musgrave indicated: "Employee has been offered by way of support reduced hours and change of job role, but has refused due to medical restrictions."
41. The last section that was filled in on the form by Ms Perry-Musgrave was that entitled "Notes" where the referral form reads as follows:

Questions you would like answered or any other notes regarding this form. Please give any other information you think may be helpful.

These are the requirements of the role, is he able to complete them? Does he feel physically capable of being able to complete his role? What are his expectations with regards to his job role from this OH assessment? As we have made so many allowances, can you put a time frame on when you are able to begin fulfilling your job role? See attached job requirements Adjustments made in 2017 and he can no longer do tasks 6, 4+8. Since 2018 additionally can't fully do task 1

42. Dr McGovern reported under the headings "Occupational Background", "Medical Background" and "Functional Assessment". In respect of the latter, he wrote:

Mr Forte struggles to do repetitive or prolonged work overhead. He can lift his arms above his head for brief periods but is not able to work overhead or indeed above shoulder height for any significant length of time. He sometimes struggles with some of the heavier aspects of his role including lifting mattress corners to fit sheets to beds. He uses a pump truck to help him move heavier objects. He is able to use a computer, but not for prolonged periods as he needs to keep moving. He told me he is able to hang small paintings, but not large ones. He feels able to hang banners and vinyls. He also feels able to move rugs, but sometimes needs help from colleagues. He notes that he sometimes finds it hard to work at a significant pace and that he needs help from colleagues sometimes.

43. He then went on to state his conclusions:

Opinion and Outcome

In my opinion Mr Forte is fit for parts of his role, but not fit for others. His health is likely to remain stable and I do not anticipate a significant improvement going forwards. Practically this means that he will not be able to do repetitive or significant work above shoulder height. He will be able to lift objects above shoulder height if they are light and if he does this briefly, but this would not be something he can sustain for long periods of time. He will also be limited in the amount that he can lift. I would not suggest a specific weight as it very much depends on the nature of the load as well as the weight and how frequently the load is lifted, as well as Mr Forte's symptoms. Management may wish to consider assessing the operations Mr Forte does using the Health and Safety Executive's MAC / ART tools. [Manual-handling Assessment Charts tool and Assessment of Repetitive Tasks tool]

In Answer to Specific Questions

1. **These are the requirements of the role, is he able to complete them?**

Mr Forte is able to complete aspects of his role subject to the restrictions noted above.

2. **Does he feel physically capable of being able to complete his role?**

I discussed this with Mr Forte in clinic and he agreed with my assessment which is noted above.

3. **What are his expectations with regards to his job role from this OH assessment?**

Mr Forte appeared to expect that I would suggest adjustments and limitations in his physical ability at work.

4. **As we have made so many allowances, can you put a time frame on when you are able to begin fulfilling your job role? See attached job requirements-Adjustments made in 2017 and he can no longer do tasks 6, 4+8. Since 2018 additionally can't fully do task 1.**

Mr Forte is likely to need long term adjustments effectively they will be permanent because his clinical situation is stable.

In my opinion Mr Forte is likely to be covered by the Equality Act 2010 because, save for treatment, his medical condition has a substantial adverse impact on his day-to-day life and is present long term. However, it should be noted this is ultimately a legal and not a medical decision.

44. While the Claimant appears not to have seen anything untoward in the relationship he had formed with Ms Perry-Musgrave, this was not quite as Ms Perry-Musgrave saw it. On 23 May 2019, she wrote in Note 51 to ER:

I am opening a case regarding Antonio's behaviour towards myself. I was looking at his occupational health case as his line manager, but due to his recent comments and attitudes towards myself I am putting forward a complaint.

I'm not sure how to go about this, however I am in the process of writing a statement for my manager. This will include evidence such as documented instances of his hostility.

45. Ms Perry-Musgrave went on holiday on 24 May 2019, but, by then, it had been decided that Mr Dewberry would take over the job of dealing with Claimant concerning the report from OH. On 6 June 2019, when Ms Perry-Musgrave had come back from holiday, she recorded in Note 54 that the Claimant was requesting a letter setting out what Mr Dewberry would be talking to him about in a one-to-one meeting that was imminent. Ms Perry-Musgrave suggested, and ER approved, the following:

The purpose of the conversation is to discuss the contents of the occupational health report, which was received on Friday the 3rd of May. As previously explained, the occupational health assessment was requested with your welfare in mind and to review your ability to complete the full spectrum of responsibilities in the visual assistant's job role. After receiving the report, it is necessary that the contents are discussed as a matter of policy and importantly, with your welfare in mind.

46. In Note 57 created on 7 June 2019, Ms Perry-Musgrave set out a "timeline of adjustments, meetings and incidents between myself and Antonio" that contained about 10 occasions when she perceived the Claimant to have been hostile, disrespectful, aggressive or patronising towards her.
47. Although we did not hear evidence from Ms Perry-Musgrave, it is clear from the contemporaneous record that she found managing the Claimant to be a challenge. The document she created on 7 June 2019 is consistent with the reports she made to ER for the purposes of receiving advice in the first half of 2019. It also explains why it was that Ms Perry-Musgrave decided she would prefer someone else to deal with the Claimant and determine the way forward in the light of the OH report that had been received. Mr Matthew Dewberry, a commercial manager in the Tottenham Court Road store, who had had little to do with the Claimant, was approached and he accepted the task. He had experience of carrying out investigations and disciplinary processes. In his statement, he said:

Prior to undertaking the capability process with Antonio, I made myself familiar with Habitat's long term sickness policy and procedure.

48. Mr Dewberry may have chosen to consult the long-term sickness policy and procedure, but the Claimant was not an employee for whom that policy and procedure was appropriate. The Long Term Sickness Policy and Procedure opens with a summary provided under the heading:

At a glance

We recognise that occasionally colleagues become unwell and are absent from work for a prolonged period of time. This policy and procedure is designed to ensure contact is maintained between colleagues and the Company and encourage colleagues to return back to the workplace.

49. And "long term sickness absence" is defined in the document:

Long term sickness absence occurs when you are/will be absent from work for a continuous period of time, usually four weeks or more. Its purpose is to get you back into the workplace within a reasonable timeframe. If this is not possible, then we may need to instigate the capability procedure to ascertain whether we can sustain your absence from the workplace or not.

If however, the absence has no clear underlying medical condition, then we may find it appropriate to apply the Company's short term sickness absence policy and procedure.

This policy and procedure may also apply if you have been diagnosed with a long term illness which is causing intermittent but persistent short term absence from work, or if the absence is pregnancy related.

50. The Claimant had only been absent from work for 4 days and those 4 days were for separate and distinct causes. He was not absent from work for any continuous period of time.

51. The Long Term Sickness Policy and Procedure includes a section entitled "The capability procedure". Again, the procedure described here is not designed for an employee who is attending work on a regular basis, but rather for an employee who is absent from work. The introductory two paragraphs make this clear:

We aim to support you in your return to work. You may be invited to a capability hearing, when it appears that your health is such that it is unlikely that you will be able to return to work within a reasonable timeframe, whether in your current role or to another available suitable alternative role.

In such circumstances, it is necessary for us to consider terminating your employment on notice due to your absence/s caused by ill health. You will be invited to at least two formal capability hearings in which we will consider and seek to understand all of the circumstances regarding your absence before a decision to dismiss you is taken. Further in the event the decision is taken to dismiss you we will provide you with full reasons for our decision.

52. It would appear that Mr Dewberry, in familiarising himself with this Long Term Sickness Policy and Procedure, did not pick up on the fact that the Claimant's situation did not obviously make him a candidate for the application of that policy. The term "long term sickness absence" did not chime with him as being inappropriate in considering the Claimant's position.

53. Mr Dewberry told us in his statement:

16. On or around 17 May 2019, I took over the capability process from Emily. This was because Antonio had become very difficult for Emily to manage; she reported that he was condescending towards her (calling her a young girl), hostile and aggressive (pages 312- 314) and their relationship had therefore broken down. I took over so there could be a clean slate, and I also had more experience of managing complex HR situations.

17. Around this time, Antonio was seemingly struggling to perform his role or to find tasks that he was able to do. He spent portions of his shifts wandering around the stores and chatting to people, assumedly because there was little else he was able to do. Other colleagues were having to work twice as hard as they were having to do their own role as well as Antonio's, so it was beginning to have a real impact on the team. Considering this in conjunction with the occupational health report (pages 193-194), which had indicated that there was unlikely to be any significant improvement in Antonio's ability to perform parts of his role, I formed the view that it was appropriate to commence a formal capability process with Antonio.

54. The formal capability process for the Claimant appears to have been a discussion at two meetings called the first and second capability hearings. The Claimant attended the first on 9 July 2019 and the second (or the final) one on 17 July 2019. Mr Dewberry considered the Claimant came across as "very standoffish, unhappy and argumentative" at the first meeting.

55. Mr Dewberry's evidence concerning the first meeting continued:

23. During the meeting I recall discussing the basic requirements of the Visual Merchandising Assistant role with Antonio and going through item by item what he was comfortable doing and what he wasn't comfortable doing, and also what he should and shouldn't be doing according to the occupational health advice (page 384). It became clear that he was not capable of performing the majority of the tasks and expectations for his role. I also read out a copy of a letter which Antonio's former line manager, Liisa Hyryrynen, Visual Merchandising Manager, had sent to him in August 2017 to confirm the adjustments which had been made to his role, a copy of which is at pages 121-122, as I considered this to be a helpful summary.

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24. We then considered alternative to roles to see whether any might be suitable for Antonio in light of his capabilities. Antonio advised that movement is the best exercise, but that he cannot rush and was unable to be mobile for long (page 228). We discussed a few different roles within Habitat and I also suggested opportunities within Sainsbury's Supermarkets Ltd (as a group company), but he was not interested. The roles were discussed included a shop floor role, the tills, the stockroom, an adviser role and an administrative role. A stockroom role would not be suitable due to the need to do a lot of lifting; an adviser role required a lot of standing, but Antonio was unable to sit or stand for long periods of time; Antonio had also previously confirmed he was unable to work on the tills because he was unable to operate the till drawers. The administrative role would also involve a lot of sitting down and opening of a large safe which was heavy and was therefore not suitable, and Antonio also pointed out that he came from a creative background.
56. Mr Dewberry's statement dealt with the second capability meeting thus:
30. At the start of the hearing I summarised what we had discussed at the first capability hearing, including that we had gone through the list of tasks / expectations and determined that there were several he was not capable of performing and some which he was partly capable of performing. Antonio's view was that "several" may be an exaggeration but that he understood and did not want to go through the list again (page 236). I asked Antonio if there was anything else he wanted to raise and he told me that his solicitor had advised him that one option might be early retirement, which he'd like me to consider that as an option, and that his solicitor had sent a letter. I advised him that I had not received the letter.
31. I asked Antonio whether he had any other comments in relation to the impact his inability to carry out his role was having on the business, but he said that he understood. He also confirmed that he could not think of any other adjustments which could be made to his role, and that he was not interested in any of the alternative roles which we had previously discussed (page 237). I asked whether there were any other roles he had thought of which he thought he might be able to do, and he said that although there may have previously been a creative head office role he might have been able to do in 2014, this was no longer do-able. He also confirmed that an adviser role would not be suitable as it was too stressful. Finally, I asked whether he had thought of any roles we could create for him (as I had proposed at the end of the first hearing), but he said he could not think of any (page 239).
32. Before adjourning the meeting to make my decision, I asked Antonio if there was anything else he would like me to consider. He asked me to wait until I had received the letter from his solicitor. I told Antonio that I would be making a decision today and gave him the opportunity to summarise the content of the letter. Antonio asked me to consider early retirement on the basis that his injury had been caused by him being asked to do something he should not have been doing. I advised Antonio that there had been no fault or blame established with regard his injury and that he had already exhausted the appeal process in this regard. I also advised that I was unable to make a decision with regards early retirement and that this was something he would need to look into separately.
33. Finally, I asked Antonio to confirm whether he thought his current role was not suitable, and he confirmed that considering everything, he would have to agree that it was not suitable (page 242). He also agreed that a role in-store would not be sustainable for him and that he had no suggestions for an alternative role for us to create for him.
34. Taking all the facts into consideration, I concluded that Antonio was unable to effectively carry out his role and that there were no further adjustments which could be made. There were also no suitable alternative roles for him. Antonio had also confirmed that he agreed with both of these findings. I therefore decided to dismiss him with notice. I advised Antonio of his right to appeal my decision.
57. In his letter to the Claimant dated 9 August 2019 whereby Mr Dewberry informed the Claimant that he was being dismissed, he wrote:
- The meeting [on 17.07.19] was held to discuss your continuing employment with the Company, whether there were any other options to consider and to give you the opportunity to put forward your comments before any decision was made regarding your employment and I explained that it is necessary for the Company to consider the termination of your employment on medical grounds.
- At the meeting we discussed your current situation and the circumstances regarding your capability. You had been seen by Occupational Health on 30.04.19.
- At a previous meeting on 09.07.19 we discussed how you were feeling and talked through the occupational health report. As you were unable to meet the minimum performance standards of your role and the fact that there appeared to be little likelihood of you being able to increase your capabilities to an acceptable level in the near future, was discussed.
- At the meeting on 09.07.19 we also talked through the Occupational Health report. This report confirmed your current situation and that you are unable to carry heavy loads and not to do above shoulder work, unable to use a computer for long periods as you need to keep moving, not able to do repetitive or significant work above shoulder height and that there is not a significant anticipated improvement expected going forward. You confirmed that you agreed with the contents of the Occupational Health report.
- I asked how you were feeling at the moment and you commented that your health was stable.
- I discussed all reasonable adjustments previously arranged for you: not to start work from 7am to avoid rushing in the morning to avoid stiffness in the body. Not required to do any heavy lifting or strenuous activity. Not required to do till work to avoid the twisting motion. Not required to do any work which involves looking up for sustained periods of time.

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At both meetings we also discussed the possibility of alternative employment but unfortunately there are no vacancies which you would be suitable for you and you agreed you did not wish to accept another job role if one could have been offered.

I then adjourned the meeting to consider the medical evidence and your own comments before making a decision. When we reconvened, I advised you that I had considered all the information available to me. Taking into consideration the Occupational Health report and your own comments regarding your current condition, I felt that you were unfit for your job role on the grounds of capability and confirmed that I had decided to dismiss you from your position with the Company on the grounds of ill health.

58. Mr Dewberry was cross-examined about his assertion that the Claimant's colleagues were having to work twice as hard as they were having to do their own role as well as the Claimant's. He was taken to the note that had been made on 24 May 2019 of a one-to-one meeting that the Claimant had had with Ms PerryMusgrave. In that note, there were five asterisks denoting separate comments recorded by Ms PerryMusgrave under the heading "In a nutshell – what we discussed" and these were:

- * Attention to detail
- * Excellent critical eye. – problem solving
- * Graphics – brilliant @ spotting
- * Product knowledge is excellent, inc history of interiors
- * Team player – supporting team players

59. Mr Dewberry agreed there was nothing in that note about colleagues having to work twice as hard and he suggested that the reason the Claimant had obtained good reviews for his work was "to avoid conflict". He asserted his role "was to look

at capability for the role and to explore any more reasonable adjustments". The only recent reasonable adjustment made for the Claimant was for the lifting of the corner of any mattress on show so that the sheet could be folded underneath. He was questioned as regards the basis of his view that "It became clear that [*the Claimant*] was not capable of performing the majority of the tasks and expectations for his role" and he replied that it was the result of reports he had received and conversations he had had with the Claimant.

60. The Claimant appealed the decision on 22 August 2019 and a hearing was arranged before Ms Sanya Hussain on 20 September 2019. In her statement, Ms Hussain said:

10. I recall that Antonio's two main grounds of appeal were that he was not considered for ill-health retirement, and that the capability process had not been impartial as the same person had carried out the investigation and the dismissal process.

11. In respect of Antonio's concerns about ill-health retirement, he asked why nobody had explained to him why he had not been considered for ill-health retirement. I told him that as far as I was aware it was not something which I had seen the business offer, but that I would go away and look into it further. I told Antonio that my understanding of ill-health retirement was that it was something which individuals arranged themselves and was related to the level of cover they had with their pension provider. I recall Antonio mentioning that if this had all been explained to him he would not have appealed.

61. Ms Hussain informed the Claimant that she was upholding the decision to dismiss him on the grounds of ill health in a letter dated 1 November 2019. She recorded his grounds of appeal as being twofold:

1. The dismissal of my request for early retirement without justification amounts to discrimination given my disability.
2. The same manager conducting your disciplinary leading to dismissal who gathered evidence for the hearing.

62. As she had indicated at the appeal hearing, her view was that it was up to the Claimant to contact his pension provider, Legal & General, to see whether he could claim ill health retirement. As to the second ground of appeal, she cited the investigation she had mounted and her conclusion:

There is no evidence to indicate that the same managers were involved in different parts of the process and at each stage a new impartial manager has been involved. Therefore, I do not uphold this point of your appeal

The Law – Unfair Dismissal

63. The statutory basis for unfair dismissal is contained in Part X of the Employment Rights Act 1996 with the most pertinent part being section 98. Ms Stock for the Claimant brought to our attention the cases of **Sainsbury's Supermarkets v Hitt** [2003] IRLR 23 and **HSBC Bank plc (formerly Midland Bank plc) v Madden** [2000] ICR 1283, both of which cases are concerned dismissal for misconduct.

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The Court of Appeal in both cases endorsed the approach that the Employment Appeal Tribunal's then President, Browne-Wilkinson J, had adopted in a misconduct dismissal case, **Iceland Frozen Foods v Jones** [1983] ICR 17:

The starting point should always be the words of section 57(3) of the Employment Protection (Consolidation) Act 1978¹ themselves;

1. In applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;
 2. In judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
 3. In many (though not all) cases there is a band of reasonable responses to the employee conduct within which one employer might reasonably take one view, another quite reasonably take another;
 4. The function of the Industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.
64. Ms Ferber did not cite case law to us but referred in her submission to Issue (4) culled from the list of Issues that was agreed between the parties at the PH on 10 September 2020: "Was the dismissal fair in all the circumstances; that is, was it within the range of reasonable responses?"

The Law – Discrimination arising from Disability

65. The statutory basis of this type of discrimination is section 15 of the Equality Act 2010 which reads:

15 Discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

66. Ms Stock for the Claimant brought two cases to our attention: **Hendricks v Commr of Police for the Metropolis** [2003] IRLR 96 and **Hardy and Hansons plc v Lax** [2005] ICR 1565 per Pill LJ at [32] – [34].

67. We also consulted the case of **City of York Council v Grosset** [2018] EWCA Civ 1105, [2018] I.C.R. 1492 in which the Court of Appeal approved the approach of the Employment Appeal Tribunal to discrimination arising from disability under the Equality Act 2010 (EqA 2010), s 15. The court confirmed that:

- for a finding of unlawful discrimination to be made under s15 the employer must have treated the employee unfavourably because of something arising from the employee's disability, but the employer does *not* have to be aware that the 'something' arises from the disability; • a tribunal is to assess objectively whether the 'something' arose from the disability, and may consider evidence which was not available to the employer in doing so, and
- whether the unfavourable treatment was justified is also an objective question, unlike the fairness of dismissal, so it is possible for a dismissal to be fair under s 98 of the Employment Rights Act 1996 but not justified under s15 EqA 2010.

Discussion

Unfair Dismissal

68. Section 98(1) requires the Respondent to show the reason (or, if more than one, the principal reason) for the dismissal and that it 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.

69. The Respondent's case is that the reason for dismissal was ill health with Mr Dewberry having formed the view that the ill health of the Claimant meant he lacked the capability that he considered was necessary to do the job. However, in treating that reason as being sufficient reason for dismissal, the process by which the Respondent came to that conclusion struck us as unfair for the following reasons:

- a) Mr Dewberry – who was not the line manager of the Claimant, although he worked in the same store – appears to have formed a view about the effectiveness of the Claimant in his role as a Visual

¹ Now section 98(4) of the Employment Rights Act 1996

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Merchandiser that appeared to be at odds with the one-to-one that the Claimant had had with his line manager, Ms Perry-Musgrave, on 24 May 2019.

- b) The complaint made by Ms Perry-Musgrave to ER on 1 February 2019 about the fact that the Claimant was on “restricted duties at work” since he had had an operation in 2015, that he started his shift half an hour later, that he had gone part-time, that his duties had changed and that recently he had told her he could not make up the display beds in the store and do other physical tasks, all suggest a lack of insight into the duty imposed on employers by section 20 of the Equality Act 2010 to make reasonable adjustments.
- c) Her lack of insight fed into Ms Perry-Musgrave expressing her concern that “this was becoming unsustainable” and her view that the Claimant should be referred to OH. We do not understand how the Respondent’s provision of reasonable adjustments was *becoming* unsustainable when it appeared that such provision had been in place since 2015 and had allowed the Claimant to perform his role in a manner as to warrant the good review he had received from Ms Perry-Musgrave in May 2019. It is true that the Claimant was asking for a further adjustment to be made to spare him the task of lifting the corners of mattresses on display beds, but we heard no evidence to suggest that this adjustment could not be provided or that such provision could only be sustained over a very short period.
- d) ER neither carried out a critical review of Ms Perry-Musgrave’s reasons for referring the Claimant to OH nor reminded her of the Respondent’s obligations to make reasonable adjustments, with the result that the tentative wording attributed to Ms Perry-Musgrave – “You are concerned that this is becoming unsustainable” – became the unconditional “The adjustments that Antonio has can no longer be sustained in the store”.
- e) On the referral form, the reason for the referral to Occupational Health was cited as “Incapability to undertake current role” and “Workplace adjustments”. When those reasons are coupled with:
- i) the response of Ms Perry-Musgrave to the OH report – “The OH report came back, it was nothing groundbreaking and was essentially confirming the adjustments we’ve already made” – and
 - ii) the decision to manage the Claimant under the long-term sickness policy and procedure,
- it strongly suggests Ms Perry-Musgrave and Mr Dewberry both viewed the Claimant’s disability as a reason to dismiss, as opposed to a reason to provide support.
- f) The question that Ms Perry-Musgrave posed in the referral form [*framed in a way that appeared to address the Claimant as opposed to the OH physician*] –

As we have made so many allowances, can you put a time frame on when you are able to begin fulfilling your job role?

appeared to us as indicative of impatience and frustration that adjustments were having to be made for an employee and, further, that such adjustments were proving not to be temporary.

- g) There appears to have been no attention paid to the recommendation contained in the OH report that:

Management may wish to consider assessing the operations Mr Forte does using the Health and Safety Executive’s MAC / ART tools.

The manual handling assessment chart (the MAC tool), as the Health and Safety Executive’s website informs:

was developed to help the user identify high-risk workplace manual handling activities and can be used to assess the risks posed by lifting, carrying and team manual handling activities.

It is designed to help you understand, interpret and categorise the level of risk of the various known risk factors associated with manual handling activities. It incorporates a numerical and a colour-coding score system to highlight high-risk manual handling tasks.

The same website informs that:

the Assessment of Repetitive Tasks (the ART tool) is a tool designed to help assess repetitive tasks involving the upper limbs. It assesses some of the common risk factors in repetitive work that contribute to the development of upper limb disorders.

The failure to give any consideration to this recommendation reinforces our view that this was a dismissal for capability that was driven by a lack of insight or understanding of the responsibilities of an employer towards a disabled employee.

Discrimination arising from Disability

70. We were satisfied that the Claimant was treated unfavourably because of his disability. He was subjected to a capability procedure that was based on a perception that the continued provision of reasonable adjustments made necessary by his disability was not sustainable. As a result, he was dismissed. There might have been other reasons for these managers' actions, one of which was the unhappy relationship that had developed between Ms Perry-Musgrave and the Claimant. However, we were in no doubt that the Claimant's disability had a material influence on the unfavourable treatment.
71. We considered the question raised by section 15(1)(b) of the Equality Act – that is, whether the Respondent cannot show the treatment to be a proportionate means of achieving a legitimate aim. In so far as we were able to see, the aim of Ms Perry-Musgrave in referring the Claimant to Occupational Health and of Mr Dewberry in deciding to manage the Claimant's capability by reference to the Respondent's long term sickness policy and procedure was to avoid the Respondent having to provide the amount of support it was providing by way of reasonable adjustments to the Claimant, notwithstanding that such reasonable adjustments had been provided so as to avoid the Claimant being at the substantial disadvantage in performing the role of Visual Merchandiser in comparison with persons who were not disabled.
72. We do not regard such an aim – that entails avoiding the responsibility on an employer as laid down by the Equality Act – as being legitimate. Even if it can be construed as legitimate, we cannot then see how avoiding the burden placed on the employer of a disabled employee might be a proportionate means of achieving that aim.

Conclusion

73. For all the above reasons, we have come to the conclusion that both claims are made out: the dismissal was unfair and the Respondent discriminated against the Claimant in consequence of his disability.
74. We leave it to the parties to attempt to agree the remedy. If they are successful, they may wish to have what they agree enshrined in an order. If they are unsuccessful, either party (but preferably both parties) has permission (not earlier than 21 days from the date on which this Judgment is sent to the parties) to apply for a remedy hearing to be listed before this tribunal. The qualification of 21 days is to ensure that there is time for the parties to negotiate with a view to achieving agreement.

3 May 2021

Employment Judge Paul Stewart

DECISION SENT TO THE PARTIES ON

04/05/2021

FOR SECRETARY OF THE TRIBUNALS