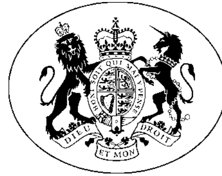

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
MR K MATEEN		**FRESH & WILD LIMITED**

Heard at: London Central

On: 16-17 August, 2021

Before: Employment Judge O Segal QC
Members: Ms L Simms, Ms P Slattery

Representations
For the Claimant: In person
For the Respondent: Mr K Wilson, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:-

(1) The claims under s. 15 Equality Act 2010 and for unfair dismissal succeed.

(2) The tribunal awards:-

a. Losses pursuant to the s. 15 claim of £528,

b. Injury to feelings of £8,500 inclusive of interest;

c. A reduced basic award of £1,040.85 in respect of the unfair dismissal claim.

(3) The claim under ss 20, 21 Equality Act 2010 is dismissed.

REASONS

Introduction – The issues

1. The Claimant (C) brings claims of discrimination arising from disability, failure to make reasonable adjustment and unfair dismissal. The Respondent (R), having initially maintained that C resigned, accepted before the hearing that it had dismissed C at a meeting on 22 April 2020. R denies that C is disabled within the meaning of the 2010 Act.

Evidence

2. We had a joint bundle of 452 pages.

3. We had witness statements and heard live oral evidence from:

   3.1.the Claimant;

   for the Respondent:

   3.2.Mr Mitulkumar Patel (MP), Whole Body Team Leader and C's line manager;

   3.3.Ms Bianca Rojas (BR), Store Team Leader (ie Store Manager).

4. We say at the outset that we find that all witnesses were in general and certainly on the points of importance giving the tribunal honest evidence to the best of their recollection.

Facts

5. There were few facts in dispute.

6. C was employed by R as a team member in the Whole Body (ie Health & Beauty) Department of its Kensington High Street store from November 2016. He worked part-time/flexible hours at the material time because of his caring responsibilities.

7. His job involved inter alia serving and advising customers and stocking shelves and displays with the products R sold to its customers.

8. In March 2019, C was diagnosed with an inguinal hernia. There were good chances of a resolution to that condition by surgery in hospital, but there were the normal risks associated with such an operation. As long as C avoided heavy lifting, prolonged strenuous activity, low bending, etc, the condition was relatively easy to manage and his GP recommended conservative management, rather than surgery, at that time.

9. R was supportive to C in making adjustments to his duties: he was not required to lift items he considered too heavy; he was allowed to take additional unpaid breaks at his discretion; he was generally allocated to work when it was likely that at least one or two other team members would be on the same shift; and all team members were informed (at C's request) of C's condition and the limitations it presented and asked to assist where requested and appropriate.

10. There was another staff member in the same team, who had very similar restrictions in respect of what she could/could not safely do at work, and in respect of whom R made similar adjustments.

11. C asked for two further adjustments to be made:

    11.1. He wanted R to provide him with a 'picker', a hand-held implement that allows a worker to pick small items from the ground without bending significantly, so that if items dropped on the floor, as happened from time to time, C would be able to pick them up without bending down too low (the first OH report supported this suggestion as sensible).

    11.2. He wanted R to allocate him a permanent locker at an appropriate height, since in general all those lockers were in use by other team members (R had about 250 lockers for the use of 400 staff, in theory no staff member having exclusive use of any particular locker).

12. R did explore obtaining a picker for C's use, but decided it would not provide much advantage for him since it could not be used to pick up glass items (many of R's products were in glass bottles, etc), it might present a tripping hazard to other workers and customers when not being used, and would still require C to bend to some extent. R felt that allowing C to seek the assistance of his colleagues to pick up any item which fell to the ground, or putting a hazard sign around the dropped/broken item if it

could not be picked up/cleared up immediately, was sufficient to deal with this issue. C felt that erecting a hazard sign would aggravate his condition as it required bending.

13. As to the locker, although this would have been easy enough to arrange, R preferred to allow C the use of a locked, shelved area (known as the 'cage'), which at the material time had a certain amount of empty space on its shelves, or an unlocked training room, to store his personal items during the working day.

14. R obtained an OH Report in respect of C dated 2 October 2019. It expressed its conclusions in fairly general terms, confirming the position as stated above, and suggesting that for more specific information as to what weights C could safely lift R might consider undertaking a manual risk assessment.

15. In November 2019 MP carried out a risk assessment with C. That assessment was not performed on the shop floor, but at a meeting. Various 'hazards' were identified in fairly general terms and, in summary, C was told that he should be responsible for deciding what he could/could not safely do and that he should seek assistance whenever needed. Then, and later, C told R that his view was that a risk assessment should be performed by an OH specialist on the shop floor. MP asked HR to arrange this, but for whatever reason it did not take place. By the latest November 2019, R confirmed to C that it was not going to be providing him with a picker or an assigned locker.

16. It seems that, from both sides' perspectives, the adjustments that were put in place were working well, C continued to perform his role and to enjoy it, C had little or no absence from work. We note that MP says in his statement that *"Kashif never appeared to me to be particularly concerned about his hernia. He repeatedly told us that the adjustments we had made for him were working for him, He said that was part of the reason he wasn't sure if he wanted to go for surgery; because our support was working very well for him. Day-to-day Kashif appeared to be fine to me and my team. We never saw him in severe pain or discomfort because of the extra breaks he took and the fact his daily tasks had been adjusted"*.

17. R changed its OH provider at some point in late 2019 and HR apparently felt that a second OH report should be obtained in respect of C, given a lack of specificity in the

first report. C attended an examination on 27 February 2020 and a report was obtained dated 3 March 2020.

18. The examination was a difficult and painful one for C. The OH doctor, C told us, roughly manipulated him, to such an extent that his symptoms were exacerbated to some extent for a long time thereafter. The report itself went through the 'intrinsic physical requirements' of C's JD; those requirements were associated mainly or solely with the shelf-stocking part of C's role. The report gives a very negative account of C's capabilities under most of the 9 headings, somewhat misrepresentative at times of the true position. For example, it states that C could not work for 8-10 hours a day, could not lift loads and could not push/pull the trolleys at work; whereas the true position was that C could work those hours provided he took short breaks (he typically took two short additional unpaid breaks during a shift), he could lift loads up to a certain weight (many of R's products are not particularly heavy) and he could push/pull trolleys if they were in good condition and not overloaded.

19. The report concluded that C could not discharge approximately 75% of his intrinsic physical duties – which, unless one reads that as saying that C could not <u>fully/on each occasion</u> discharge 75% of those physical duties, gives a misleading impression. Finally, the report stated that C was unlikely to be 'disabled' in law, that C had decided not to undergo curative surgery and that his *" capability to carry out his intrinsic duties is subject to standard management protocols and procedures"*. As to the option of surgery, C had in fact obtained a reference from his GP to discuss that option with a surgeon, and he sought to correct that part of the report and informed MP accordingly.

20. MP on reading the report felt that the assessment and prognosis was so poor that it was likely C would have to be dismissed. Following a call with his manager, BR, and a senior HR colleague a draft 'script' was produced in advance of a meeting with C, which culminated with informing C that he was dismissed. That initial script (which MP later revised, but not very materially) was prepared at a time before the Covid pandemic had begun to take effect in the UK and before any responsive measures were introduced by the government.

21. On 13 March 2020 MP wrote to C inviting him to a meeting to discuss the OH report and informing him that his employment might be terminated on grounds of capability. That meeting eventually took place on 22 April 2020, at which C was represented by an experienced TU rep, Anna Lee (AL). By that time, the country was in lockdown; there was a level of panic buying, R was doing unusually high levels of business and had reduced staff by reason of illness (including the long-term sickness of the other team member working with physical restrictions), shielding, etc, so that the team MP managed was under untypical pressure.

22. The meeting on 22 April is well-noted. We mention the following matters:-

    22.1. C and AL confirmed C was waiting for a hospital referral for an operation, but that all such non-urgent referrals had been cancelled for the time being because of the pandemic.

    22.2. MP repeatedly stated that his team was at 'breaking point' and that R could not sustain the level of support provided by it to C any longer.

    22.3. C expressed considerable dissatisfaction with the accuracy of the OH report in several respects, noting inter alia that the OH doctor had told him he could safely lift about 5kg, that he could generally push the trolley. C and AL suggested that further evidence was needed, including a shop-floor specialist risk assessment.

    22.4. C stated that he was in fact being offered more support at times by his colleagues than he needed.

23. At the end of the meeting, MP stated that he was terminating C's employment, with immediate effect, but (as a draft letter he wrote later that day made clear) with payment to be made in lieu of notice.

24. That draft letter was never sent. MP emailed HR copied to BR setting out 'Points in query', being the matters C and AL had raised in particular about the inaccuracies in the OH report and that C was now in effect awaiting surgery. In retrospect, MP feels that he erred in dismissing C at the meeting; that he should have obtained more medical evidence and reached a decision in dialogue with his manager and with HR

(though he offers the view that the eventual decision would probably have been the same).

25. C was predictably distressed at being dismissed. He and AL chased first MP and then BR for formal confirmation of the dismissal so that he could appeal. BR informed AL on 29 April that she was reviewing the case; and on 1 May BR phoned C to explain the outcome of that review (the call was recorded by C).

26. BR was not at work for much of the time between 22 April and 29 April; however, the tribunal considers it to be unfortunate that for 9 days C was left believing he had been dismissed and not allowed to return to work, but with no formal confirmation to that effect.

27. On 1 May BR explained to C that MP had been too hasty in dismissing C on 22 April, that MP and she, and R, apologised for that, that his employment was 'reinstated' and that 'the disciplinary procedure [presumably, the capability procedure] is paused'. She told him that R wanted to consider the new evidence and information C had raised and that the process would be resumed once those investigations were completed. In the meantime C should return to work with no loss of pay. C said he needed written confirmation of the position, which was promised.

28. There was then a without prejudice conversation between BR and C, the contents of which the tribunal properly was not informed of.

29. The content, and in so far as one can judge it the tone, of the conversation was friendly and open on both sides.

30. Later that day (1 May) BR emailed C confirming the summary of the conversation and saying that his case would be passed to a new person who could review it with a fresh pair of eyes. AL emailed BR in reply to say that C had no email access so she was writing to say that he was still very distressed and would not be attending work the next day, and that there should be a formal acknowledgement by R that C had been treated unfairly.

31. On 4 May AL emailed BR asking for written confirmation as to what had happened about C's dismissal and asking that this be sent by post to C as he did not have email access.

32. On 6 May BR wrote again to AL by email copied to C saying that no dismissal letter had been issued, as far as R was concerned C had not been dismissed, whether there was a capability issue still to be addressed would be determined by the new person dealing with the matter and R wanted to support C's return to work. BR recalls sending that, or perhaps a letter in similar terms dated 7 May to C and AL, by post as well as email. C does not believe he received anything by post. There is no copy of any posted letter disclosed by either party. On balance we find that although BR may have intended that such a communication should be posted to C, it was not in fact posted to him.

33. Over the coming weeks there was no further open correspondence, although without prejudice communications were exchanged. C did not return to work and he returned the money paid to him for the period after 22 April. On 3 August, R wrote to C saying that it was treating him as having resigned his employment with effect from 22 April.

34. The tribunal sought to understand from C why he had not accepted R's invitation to return to work after 1 May. He told us that he wanted R to admit it had dismissed him and that he had a right of appeal; that he did not want to compromise his position by returning to work in the meantime; that he felt there must be some catch; that if he had been formally dismissed, he would have pursued an appeal accepting the risk it might not succeed; that he would then feel a sense of justice; he could not remember if AL had advised him in this regard; he thought that R had wanted to rely on the 'dodgy' OH report and that he would prejudice his rights if he returned to work and was subsequently dismissed following a proper procedure – that R could thereby 'cover their tracks'; that it was the 'safe option' not going back.

35. Finally, we mention that C had raised non-related concerns during 2019, in respect of which BR had become involved. As a result, BR had told C that if he had any other concerns, he could and should raise them with her. C suggested that this meant that BR should not have been dealing with his employment situation in May 2020

(although neither he nor AL said so at the time). We do not agree with that perspective.

The Law

36. We are grateful to Mr Wilson for his comprehensive and fair setting out of the relevant law in his closing written submissions. We do not repeat all of those, but note as particularly material the following:-

Unfair dismissal (capability)

37. The answer to the ***s.98(4) ERA*** question is to be determined by reference to the range of reasonable responses test, as set out in ***Iceland Frozen Foods v Jones*** **[1983] ICR 17**. *Per* the Court of appeal in ***Foley v Post Office*** **[2000] ICR 1283**, that test recognises that *"there is room for reasonable disagreement among reasonable employers"* as to whether dismissal is an appropriate outcome. It is not for the Tribunal to substitute its own view for that of the employer's; the question for the Tribunal to determine is one of objective reasonableness – see ***NC Watling & Co Ltd v Richardson*** **[1978] ICR 1049** at 1056.

38. The starting point in cases of dismissal for ill health capability was articulated in ***Spencer v Paragon Wallpapers Ltd*** **[1976] IRLR 273** at [14]:*"Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? Every case will be different, depending upon the circumstances."* The circumstances of the case will include, as was noted at [13], *"the nature of the illness, the likely length of the continuing absence, [and] the need of the employers to have done the work which the employee was engaged to do"*. R suggested, and we agree, that this principle can be extended to cover continuing inability to fulfil duties.

39. It was further emphasised in ***Spencer*** at [10] that: *"There should be a discussion so that the situation can be weighed up, bearing in mind the employers' need for the work to be done and the employee's need for time in which to recover his health."* The nature of the discussion and/or consultation which is necessary for a dismissal to be fair for ill health capability was discussed by the EAT in ***East Lindsey DC v***

***Daubney* [1977] IRLR 181** at [18]: *"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. ....".*

'Disability' – s.6 EqA 2010

Substantial adverse impact on normal day-to-day activities

40. ***Section 212(1) EqA 2010*** defines substantial as *"more than minor or trivial"*. The ***Equality Act Guidance at B1*** states that the meaning reflects *"the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people."* The words *"minor"* and *"trivial"* are not synonymous; something can be minor while not being trivial.

41. In ***Anwar v Tower Hamlets College* [2010] UKEAT/0091/10/RN**, where the claimant suffered from headaches, the Tribunal had stated (as quoted at [20] in the EAT's decision) that: *"...these headaches, although by no means negligible, did not give rise to a substantial adverse effect within the meaning of the Act. In my judgment, again referring to the words in the guidance, one could not describe these headaches as trivial. However they are, as I find, an example of the sort of physical condition experienced by many people which has what can fairly be described as a minor effect. I have no doubt that the headaches are unpleasant while they last. However, many people suffer pains whether in the form of headaches, backaches, neck pain or whatever that is either at a relatively low level or, as is the case here, of relevantly short duration and taking that into account I find that there was not a substantial adverse effect amounting to disability."* The EAT held at [24]-[25] that the Tribunal's approach did not disclose any error of law in respect of this issue.

42. While normal day-to-day activities does not include work of a particular form, it may include general work-related activities which are performed day-to-day – see ***Equality Act Guidance at D3***. The EAT has recently clarified that lifting and moving heavy cases may be regarded as a normal day-to-day activity as an aspect of participating in professional life, applying the approach developed as part of EU law: see ***Banaszcyk v Booker Ltd*** **[2016] IRLR 273**. The EAT observed the tension between that position and the ***Equality Act Guidance*** at [31]-[33], which suggests that inability to lift heavy items will not amount to a substantial adverse impact on ability to carry out day-to-day activities. However, it is clear, as the EAT stated, that the EU jurisprudence must be followed and applied.

Discrimination arising from disability – s.15 EqA 2010

Objective justification

43. The proportionality test is essentially a balancing exercise. It was summarised in the context of indirect discrimination, by reference to the leading EU case of ***Bilka-Kaufhaus GmbH v Weber von Hartz*** **[1986] IRLR 317**, by Mummery LJ in ***R. (Elias) v Secretary of State for Defence*** **[2006] 1 WLR 3213** at [151]: *"…the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*

44. What that balancing act requires was expressed as follows by Sedley LJ in ***Allonby v Accrington and Rossendale College*** **[2001] ICR 1189** at [29]: *"…at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter."*

45. *Per* Pill LJ in ***Hardy & Hansons Plc v Lax*** **[2005] ICR 1565** at [32]: *"It must be objectively justifiable (Barry v Midland Bank plc [1999] ICR 859) and I accept that the word "necessary" used in Bilka-Kaufaus [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The*

presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary."

46. In ***Hensman v Ministry of Defence*** **[2014] UKEAT/0067/14/DM**, Singh J referred to the above passage and stressed at [44] that in applying this approach the Tribunal: *"must have regard to the business needs of the employer."*

Failure to make reasonable adjustments – ss.20-21 EqA 2010

Limitation

47. ***Section 123(4) EqA 2010*** provides that in the case of a discriminatory omission, time runs from when the employer does something inconsistent with doing the thing contended for, or (if there is no inconsistent act) on the expiry of the period when the employer might reasonably have been expected to do it.

Reasonableness of adjustments

48. The test of reasonableness in the case of reasonable adjustment is an objective one – see ***Smith v Churchill Stairlifts Plc*** **[2006] ICR 524**. ***Paragraph 6.28, EHRC Code of Practice on Employment*** sets out some of the factors which may be taken into account when assessing what is a reasonable step for an employer to have to take:

"- *whether taking any particular steps would be effective in preventing the substantial disadvantage;*

- *the practicability of the step;*

- *the financial and other costs of making the adjustment and the extent of any disruption caused;*

- *the extent of the employer's financial or other resources;*

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

- the type and size of the employer."

49. The reasonableness of a particular adjustment will always depend on the circumstances of the particular case – see ***para 6.29 EHRC Code of Practice on Employment***. In some circumstances, it may be difficult to consider an adjustment in isolation.

50. Where there is a series of adjustments to offset disadvantage, the Tribunal should adopt a holistic approach to considering reasonableness. The Tribunal is entitled to take into account the adjustments that *already* been put in place to determine whether they sufficiently address the disadvantage experienced by an employee. See ***Burke v The College of Law*** **[2012] EWCA Civ 37**, at [36]. The suitability of the holistic approach to determining reasonableness was endorsed by the EAT in ***Home Office (UK Visas and Immigration) v Kuranchie*** **[2017] UKEAT/020/16** at [9].

Remedy

51. A Tribunal may reduce compensation where there is a chance that the employee might have been fairly dismissed or dismissed in non-discriminatory circumstances – see ***Polkey v AE Dayton*** **[1988] AC 344** and ***Chagger v Abbey National plc*** **[2009] EWCA Civ 1202**.

52. An employee's refusal to accept an offer of re-employment with their former employer may amount to an unreasonable failure to mitigate loss. A summary of the relevant principles is set out in ***Wilding v BT plc*** **[2002] ICR 1079** (which concerned a finding of unfair dismissal and disability discrimination, and an offer of re-engagement made after the Tribunal had made a finding on liability) at [37] as follows:

"As was made clear in the judgment of the EAT, (at paragraph 64) the various authorities referred to by the Tribunal (see paragraph 22 and 23 above) and Payzu v Saunders [1919] 2 KB 581 are apt to establish the following

principles which (in a form which I have somewhat recast) were accepted as common ground between the parties. (i) It was the duty of Mr Wilding to act in mitigation of his loss as a reasonable man ***unaffected by the hope of compensation from BT as his former employer****; (ii) the onus was on BT as the wrongdoer to show that Mr Wilding had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv) in applying that test, the circumstances in which the offer was made and refused, the attitude of BT, the way in which Mr Wilding had been treated and all the surrounding circumstances should be taken into account; and (v) the court or tribunal deciding the issue must not be too stringent in its expectations of the injured party. I would add under (iv) that the circumstances to be taken into account included the state of mind of Mr Wilding"* (emphasis added).

53. In deciding the question of reasonableness of the refusal of an offer of re-employment, *"it is important to look at the surrounding circumstances, and the reaction of the applicant to any offer made to him must depend upon the circumstances in which that offer was made, the attitude of the employers and the way he had been treated, indeed upon all the surrounding circumstances"* – see ***Fyfe v Scientific Furnishings Ltd*** **[1989] ICR 648**. It is observed in ***IDS Employment Law Handbooks, Vol. 12, para 17.25*** that *"Even where the employer's conduct has justified the employee resigning and claiming unfair constructive dismissal, inflexibility on the part of an employee, or a refusal to listen to the employer's attempts to explain, may amount to a failure to mitigate".*

Discussion

54. Mr Wilson provided full written submissions and supplemented those orally. Mr Mateen made helpful oral submissions. We have taken all those submissions into account.

The reasonable adjustments claim in respect of a picker and an assigned locker

55. This claim is approximately 6 months out of time, the relevant refusal of these adjustments by R being in November 2019 and the claim being presented in August 2020.

56. C accepted he was aware in general terms of his right to pursue claims to a tribunal and that there were time limits applicable to such claims.

57. For the reasons given briefly below, we would not have upheld the claim in respect of the locker in any event; and the claim in respect of the picker, though we would have upheld it but for the limitation issue, relates to a matter which only marginally put C at any substantial disadvantage.

58. In all the circumstances, we do not consider it would be just and equitable to extend time in respect of these claims.

59. As to the locker, we accept that the provision of use of shelf space in the cage was an adequate alternative solution to C otherwise sometimes having to use a low or high locker (although it does seem that it would have been must easier for R simply to have allocated C a locker at a convenient height for his exclusive use).

60. As to the picker, that would have been useful when plastic items were dropped and not broken and when there was no colleague around immediately to assist. We accept that it was a little embarrassing for C to have to ask colleagues to pick up items he had allowed to drop to the floor. To that extent, the failure to provide a picker did, marginally as we say, put C at a substantial disadvantage.

Was C disabled?

61. There is no question C suffered from a physical impairment which was 'long term' (it had lasted more than 12 months by the date of his dismissal).

62. On the authorities since 2016, taking account of the relevant EU jurisprudence, it is clear C was disabled. He regularly could not perform several fairly everyday activities at work: lifting more than 5kg, pushing a laden trolley, bending to the ground – all of which he would normally have been performing several times a day.

63. In truth, Mr Wilson did not contend to contrary effect with any force.

64. We therefore only mention briefly that C's unchallenged evidence that he had to approach bathing and using the toilet with very particular care and could not pick up his young daughter who suffers from epilepsy, or pray in the normal manner in

the Mosque, was also, we considered, material to the conclusion that C was disabled.

The s. 15 claim

65. It is clear that R subjected C to unfavourable treatment by dismissing him and for a reason relating to his disability, namely the restrictions on his ability to perform certain physical activities at work. The only material issue is therefore whether the decision to dismiss was a proportionate one. We are clear that it was not.

66. We are struck by the fact that nothing had really changed between the time R first accommodated C's disability and the time MP decided C probably needed to be dismissed. Indeed, as pointed out above, both parties felt things were working well on the basis of the adjustments in place for several months by that time.

67. True, by the date of the actual dismissal the country was in lockdown and MP's team was under unusual pressure. However, nobody knew how long that situation would last and how it might change; and by that time R knew that C was going to have his hernia repaired by surgery when that became available.

68. R is a substantial organisation with many employees. It has a positive duty to accommodate by reasonable adjustment disabled employees. In effect, it took the view – it is common ground hastily and prematurely in any event – that it should not be required to continue to provide those adjustments into the future, presumably because of the marginal additional cost in terms of the additional time required to be worked by C's colleagues when they were assisting him (C's additional breaks were unpaid).

69. We do not believe that dismissing C corresponded to a real need, still less that the means of achieving that need were appropriate and necessary to that end. The impact of the dismissal on C was severe; the benefit gained by R relatively marginal. In short, in all the circumstances, dismissing C was not objectively justifiable.

Unfair dismissal

70. It is a little odd that a dismissal which R itself acknowledged as unfair at the time is said by it to have been fair in retrospect, on the basis that it was within the reasonable range of responses of an employer (even if not the reasonable response of this particular employer). In any event, we reject the premise.

71. Mainly for the reasons we have given at paras 66-69 above, as well as for the reasons given by R at the time (acting prematurely before exploring the medical position further), we are clear that the dismissal was not fair; it was not one within the reasonable range of responses open to a reasonable employer.

Polkey

72. Although for the reasons set out in the next section, this is strictly academic, we do make a finding (which to some extent assists in clarifying our view of the substantive merits of the dismissal) that if a proper capability process had been fairly undertaken, there was (only) a 30% prospect that R could have fairly dismissed C within, say, a few weeks of the actual date of dismissal.

Mitigation

73. The tribunal found this the most difficult issue to determine. In the end, we concluded that R had shown that C had acted unreasonably in refusing the offer to return to work without loss of pay on about 7 May at the latest, by way of the dismissal being revoked/ignored, and with a potential capability process to take place thereafter.

74. We refer in particular to the evidence from C that we set out at para 34 above.

75. We take into account, in favour of C, that he had in effect been dismissed summarily, had been left in an unfortunate state of limbo for 9 days – and even then was not sent the written confirmation of the position in the post as he had requested through AL, and had been caused considerable distress by what had happened.

76. However, although C spoke of his distrust of R, we found no objective basis on which that distrust was based (other than the fact of the dismissal itself), and in

particular the dealings between MP and C and between BR and C seemed to us to have been genuine and supportive (again, save for the dismissal itself). Moreover, C was clear that he wanted to appeal his dismissal with a view to overturning it and returning to work – which is inconsistent with a position that he had lost trust in R to a material extent.

77. Finally, although we understand C's position that he felt his legal rights in an subsequent tribunal claim would be stronger if R was not permitted the opportunity to ignore the dismissal on 22 April and then dismiss him after a fuller and more fair procedure later, that does not seem to us a legitimate reason for refusing an offer of reemployment and indeed it would seem to be a matter expressly precluded as relevant by the court in ***Wilding*** (see above).

78. In terms of recovering loss of earnings as part of the s. 15 or the unfair dismissal claim, we therefore limit those losses to the period between 22 April and 9 May 2020.

Other matters

79. For completeness, we reject the submission by R that C had contributed to his dismissal by acting on his GP's advice and not initially opting for surgery.

80. Further, we reject C's claim for an uplift for a failure by R to follow the ACAS Code relating to disciplinary dismissals (which does not apply in the present case).

Quantum

81. The full basic award would be £1,146.50. We make a modest reduction pursuant to s. 122(1) of 10%, by reason of C's failure to accept the offer of reinstatement without loss. Given the delay in making that offer, and more particularly that it was only an offer in effect to adjourn the capability process that might soon lead to dismissal in any event, we consider that any greater reduction would not be equitable. That gives a sum of **£1,040.85**.

82. The loss of earnings, on the basis set out above, is agreed in the sum of **£528** in respect of the s. 15 claim. We do not make a separate award of compensation for unfair dismissal, which would amount to double recovery.

Injury to feelings

83. We heard brief additional evidence from C on this matter once we had announced our decision on liability orally. That evidence confirmed and clarified the contemporaneous evidence mainly in the emails sent by AL on C's behalf in the days and weeks following dismissal.

84. C was very distressed by the dismissal, he felt his loyal service had been *"erased like a number"*. He found it difficult to explain what had happened to his daughter. He told us (and it was visibly true) that his emotional reaction had not entirely abated to date (although we take into account the peculiar strain of participating unrepresented in a tribunal case).

85. Mr Wilson, in arguing for an award in the lower half of the lower ***Vento*** band, relied on R's attempt to reinstate C, that C had wanted to appeal the decision and that R had acknowledged its wrongdoing fairly promptly. C's wish to appeal does not seem to us particularly germane to this issue. The other matters might indicate that some people in C's position would feel the injury less strongly; indeed it is quite possible that C would himself have felt the injury more strongly but for those matters. However, we must make a finding as to the actual level of injured feelings suffered by C.

86. In the circumstances, all members of the tribunal feel that an award at or near the top of the lower ***Vento*** band to be appropriate. We make an award, inclusive of interest, of **£8,500**.

Employment Judge - Segal

20 August, 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
20/08/2021