EMPLOYMENT TRIBUNALS

Claimant: Mr K Rodgers

First Respondent: Stevenage Borough Council

Heard at: Bury St Edmunds **On:** 17 to 20 and in Chambers 23 August 2021

Before: Employment Judge K Welch
Ms S Morgan (via CVP)
Mr S Holford (via CVP)

Representation

Claimant: Mr S Brittenden, Counsel (via CVP)
Respondent: Mr Davies, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The Claimant's claim of harassment is dismissed upon withdrawal.
2. The Claimant's claims of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and unfair dismissal fail and are dismissed.
3. The remedy hearing on 1 November 2021 has been vacated.

Employment Judge Welch

Date: 24 August 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

RESERVED REASONS

1. The Claimant brought claims for unfair dismissal, direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment.
2. The Claimant confirmed that he withdrew his harassment claim at the start of the hearing. This was therefore dismissed upon withdrawal.
3. The claim form was presented on 6 June 2019, following a period of early conciliation from 25 February until 25 March 2019.
4. The hearing was due to commence on 16 August 2021 but due to lack of judicial resource, the hearing commenced on 17 August.
5. The hearing was a hybrid hearing, such that members of the tribunal panel and Counsel for the Claimant and one witness were remote via CVP and the parties and other witnesses and the EJ were in the hearing room. The hearing went ahead without too many difficulties and the evidence and submissions were able to be completed within the listing.
6. Following discussion at the beginning of the hearing, it was agreed that the issues for the Tribunal to decide were as set out in pages 45 to 49 of the bundle, as slightly amended in light of discussions between the parties. The Respondent conceded that the Claimant was at all material times disabled by virtue of his Autism/ Asperger's and Carpal Tunnel Syndrome (CTS). Whilst the Claimant suffers from other disabilities, these were not relied upon for the purposes of the Claimant's claims before the Tribunal.

Issues

7. <u>Direct discrimination s13 Equality Act 2010 (EqA)</u>

   7.1. Has the Claimant proved facts from which, in the absence of any other explanation, the Tribunal could decide that the Respondent treated him less favourably because of his disability than it treated or would treat others, contrary to section 13 EqA? The Claimant relies upon:

7.1.1. the Respondent advising the Claimant on 24 January 2019 that they were unable to find the Claimant suitable alternative employment due to the combined restrictions of existing disabilities and the physical limitations brought on by suspected CTS;

7.1.2. the Respondent refusing to obtain specialist medical advice and, instead, relying on inaccurate, general Occupational Health (OH) reports;

7.1.3. the Respondent dismissing the Claimant at the meeting on 11 February 2019;

7.1.4. the Respondent not upholding the Claimant's appeal on 28 March 2019.

7.2. The Claimant relies upon Miss A and Mr B as comparators. In the alternative, the Claimant relies upon a hypothetical comparator.

Discrimination arising from disability

7.3. Was the Claimant treated unfavourably because of something arising as a consequence of his disabilities? It was accepted that the dismissal dated 14 February 2019 was unfavourable treatment arising from the Claimant's CTS. The Claimant relies on the additional following matters as unfavourable treatment:

7.3.1. the Respondent advising the Claimant on 24 January 2019 that they were unable to find the Claimant suitable alternative employment due to the combined restrictions of existing disabilities and the physical limitations brought on by suspected CTS;

7.3.2. not upholding the Claimant's appeal on 28 March 2019.

7.4. The Claimant claims that the 'something arising' is absence from his substantive role related to his disabilities; pain related to his CTS; the Claimant's alleged difficulties with communication related to his autism.

7.5. In treating the Claimant in that way, what aim was the Respondent seeking to achieve?

7.6. Was that aim legitimate? The Respondent relies on the legitimate aim of employing staff able to fulfil the substantive duties of their jobs to enable the council to deliver a full service to the public.

7.7. Was the treatment a proportionate means of achieving that aim?

Reasonable adjustments

7.8. Did the Respondent apply a provision, criterion or practice (PCP)?

7.9. The Respondent accepts that it applied the following PCPs:

7.9.1. requiring employees to work in their substantive role only;

7.9.2. requirement that full time employees work full time hours; 7.9.3. requiring employees to work according to their job description.

7.10. The Claimant seeks to rely upon the following additional PCPs:

7.10.1. limiting access to the temporary redeployment process;

7.10.2. relying on OH professionals with general qualifications only, and not obtaining specialist reports in relation to autism reports only;

7.10.3. providing the Claimant's line managers and colleagues with only limited training in relation to Autism training only.

7.11. if so, did those PCPs place the Claimant at a substantial disadvantage in comparison with employees who did not share the Claimant's disabilities?

7.12. What is the alleged substantial disadvantage? The Claimant states that the substantial disadvantage included pain and exacerbation of his disabilities, the fact that the Claimant's absence level increased due to his disabilities, preventing the Claimant from carrying out his role, the Claimant being isolated from his line manager.

7.13. Would it have been reasonable for the Respondent to make reasonable adjustments in order to avoid the substantial disadvantage in question?

7.14. The Claimant relies on the following reasonable adjustments:

7.14.1. Alternative working duties;

7.14.2. An extension of the temporary redeployment to allow the Claimant to seek treatment for his CTS. The Claimant was waiting for further tests and assessment, but the Respondent was not prepared to await the outcome of the further tests;

7.14.3. A specialist OH report be obtained, prepared by a health professional with expertise in dealing with people with Autism;

7.14.4. Changes to working patterns considered, including consideration of part time working;

7.14.5. Changes to the Claimant's substantive role and rotating his duties so that the requirement of the role to use vibrating equipment complied with the HSE's minimum standards;

7.14.6. Providing the Claimant with alternative job roles in addition to his role using vibrating equipment;

7.14.7. Providing support and training for the Claimant's line managers so that they had a greater understanding of the Claimant's condition (Autism) and were better able to communicate with the Claimant using appropriate communication tools.

7.15. In respect to the proposed reasonable adjustments, would each of the adjustments have alleviated the disadvantage suffered by the Claimant and did the Respondent offer to make any of those reasonable adjustments?

Unfair dismissal

7.16. What was the reason(s) for the Claimant's dismissal? The Respondent relies on capability.

7.17. If the reason was because of capability, was that sufficient to justify the Claimant's dismissal?

7.18. Was the decision to dismiss the Claimant fair and reasonable in all the circumstances?

7.19. Did the Respondent follow a fair procedure and its own policy? Inter alia, the Claimant relies upon the following as departures from policy and procedure by the respondent:

7.19.1. The Respondent failed to consider the Claimant's work issues; his ability to work in the context of his CTS and Autism;

7.19.2. the Respondent failed to obtain updated evidence from OH after receiving the Claimant's medical evidence that he could work in his substantive post with adjustments not all the evidence was considered;

7.19.3. The Respondent's insistence that the Claimant use vibrating equipment for long periods of time goes against policy and procedure where regular breaks are recommended;

7.19.4. the Respondent did not fully consider all the options by way of alternative employment;

7.19.5. in light of the fact that the Claimant would likely return to a substantive post, he should have been offered lighter duties for a longer period of time;

7.19.6. the Respondent neglected its duty of care owed to employees with Autism to find alternative employment.

7.20. Was the decision to dismiss the Claimant within the range of reasonable responses?

<u>Jurisdiction</u>

7.21. The Respondent accepts that the unfair dismissal claim is in time. The Claimant was dismissed effective from 14 February 2019. ACAS early conciliation ran from 25 February 2019 to 25 March 2019 and the claim was issued on 6 June 2019.

7.22. Are the acts of disability discrimination in time?

7.23. if any of the acts of disability discrimination are out of time, is there a continuing act bringing them in time or is it just and equitable to extend time?

Remedy

7.24. What remedy is appropriate should any of the claims above be successful?

7.25. If the Tribunal finds that the respondent discriminated against the Claimant, should the Claimant be entitled to compensation, including compensatory losses and injury to feelings and, if so, how much (in accordance with the Vento guidelines (as amended))?

7.26. Has the Claimant mitigated his loss?

7.27. Does Polkey apply?

Background

8. The parties had agreed a bundle of documents and references to page numbers in this judgment relate to documents within that bundle. A supplemental bundle (including job descriptions and person specifications) and two further emails were provided by the Respondent with no objection from the Claimant.

9. On the last day of the liability hearing, when evidence had closed, the Respondent sought to adduce the letter before action relating to the personal injury claim that the Claimant had sought to bring against the Respondent. The Claimant objected to its inclusion and after hearing from both parties, and having given reasons orally at the hearing, the application was refused.

10. The Tribunal heard evidence from:

10.1. the Claimant;

10.2. NC - the Claimant's trade union representative;

10.3. CD, - Senior HR & OD Manager;

10.4. CM – Dismissing officer;

10.5. CP- Aboriculture and Conservation Manager; and

10.6. JC – Appeal officer.

11. All of the witnesses had provided written statements as their evidence in chief (with some supplemental questions allowed with approval). The Respondent provided an additional statement from CD, which the Claimant had no objection to being adduced in evidence.
12. The Tribunal ensured that appropriate breaks were given, and asked the parties to request any additional breaks if they were required. Also, due to the Claimant's deafness in his left ear, we ensured that the Claimant could hear the proceedings.

Findings of fact

13. The Claimant has been employed by the Respondent as an Assistant Grounds Maintenance Operative, having commenced employment on 26 September 2005. The Claimant's employment was terminated by the Respondent on 14 February 2019.
14. The Claimant suffers with carpal tunnel syndrome (CTS) and has Autism/ Asperger's. The Respondent accepted prior to the commencement of the hearing that the Claimant was a disabled person at all material times by reason of both of these conditions, and that the Respondent knew of these disabilities. The Claimant's other stated disabilities (deafness in one ear, tinnitus and anxiety/ depression) were not relied upon for his claims before the Tribunal.
15. The Respondent has a Sickness Absence Policy and Procedure [p502-537] which applied to all employees.
16. The Claimant's role was originally within the Nursery team of the Respondent's organisation, but he moved to the Cemetery team in 2012, which, on the Claimant's evidence, was due to it being a "more protected environment". This was accepted to be away from roads and wide open spaces, with little traffic or members of public. In this role he was required to use strimmers, blowers and a hand held mower (although not a ride on mower, as the Claimant had failed to

pass the ride on mower test in 2007 [p121a]). It was agreed that this equipment vibrated and were therefore all classed as vibrating tools.

17. The Claimant's evidence was that his previous team leader rotated the jobs required to be done so that less time was spent on single tasks, but this changed when a new team leader was brought in.

18. In the Claimant's role in the cemetery team, he used vibrating tools for about 3 to 4 hours a day, 4 or 5 days a week, depending upon the weather and the season. The Respondent stated that this amounted to approximately 70% of the Claimant's role, although this varied depending upon the season.

19. The Claimant underwent a risk assessment in 2008, which was updated in 2017 [p205 to 213]. The information contained within the risk assessment highlighted many serious and likely risks for the Claimant. These included, "failure to show awareness of surroundings when using potentially hazardous machinery. Ongoing risk of injury to self and members of the public…..Failure to retain essential safety information. Apparent lack of normal spatial awareness".

20. The risk assessment provided control measures being "use of blower and strimmer only" [p206/7]. It also indicated that the Claimant was unsteady when using ladders and platform devices, and that the Claimant had a significant hazard with traffic due to his lack of spatial awareness. The Claimant was prohibited from operating ride on mowers on the advice of the trainer (having failed the test in 2007).

21. When the risk assessment was reviewed in 2017, it also highlighted the problems with the Claimant using vibrating machinery due to aggravating his CTS. The hazards identified by the earlier risk assessment were not amended when they were reviewed in 2017. Page 213 states, "The original risk assessment is still valid and therefore [the Claimant] must not be requested or permitted to work with powered machinery. In particular he must not be requested to operate

or assist with the operation of the shredder unit or be requested to work in the shredder area while the equipment is in operation."

22. There was evidence [p563-4] that the risk assessment had been discussed with the Claimant in a meeting on 19 December 2017, and the Claimant gave evidence that he had seen the risk assessment and was not happy with it. He had discussed the risk assessment with his trade union representative, although he thought that this was in early 2018. The Claimant and his Union raised no issues with the Respondent about his risk assessment following those discussions.

23. In or around October/November 2017, the Claimant went off sick with CTS. He was referred to Occupational Health (OH) who provided a report on 20 November 2017 [p217]. This confirmed that the Claimant should avoid using vibrating tools for the following 3 months and then the case would be reviewed.

24. A phased return to work was agreed from 19 December 2017 and it was agreed that he would not use vibrating tools for 3 months. Despite this, the Claimant went off sick again on 3 January 2018 [p60] with "carpal tunnel" having had pain in his hands following hoeing bonemeal into the rose beds. He was signed off until 28 February 2018.

25. The Claimant was invited to a formal first meeting under the Respondent's Sickness Absence Policy [p502-537] to take place on 22 January 2018 by letter dated 8 January 2018 [p151], having had 45 days off sick over 3 instances during the previous rolling year. This did not appear to go ahead, following discussions between the Respondent and the Claimant's father.

26. A letter was sent by CM to the Claimant on 16 February 2018 following those discussions [p1545],which confirmed that CM would review the level of awareness of Autism within the team working with the Claimant, and arrange refresher training should new personnel have joined.

Following the meeting, CM checked that Autism training had been carried out on 31 March 2015 [p131b] and that the same staff were working with the Claimant and so did not consider that refresher training was required.

27. The letter of 16 February 2018 also sought to arrange a health review meeting with the Claimant, who was advised that he could bring his representative should he wish to do so despite this not being a formal hearing.

28. The informal health review meeting was held between the Claimant, his father, his trade union representative, CM and CP (both from the Respondent) on 26 February 2018 to discuss the Claimant's absence, progress towards recovery, advice from his medical team and a new referral to OH.

29. The Claimant returned to work on 28 February 2018. The return to work interview on this date stated, "fit to return but on certain duties only no machinery to be used until OH Ass" [p76].

30. The Claimant was referred again to OH on 6 March 2018. The report [p219] confirmed that the Claimant could return to his full range of duties but suggested a phased return to work over one month. It suggested that the Claimant should have annual assessments for his CTS and that his daily use of hand held vibrating machines should not exceed the recommended limit for the tools.

31. CP gave evidence that the Council, although not him personally, had considered alternative battery operated or electric strimmers for use by its operatives, but that these were not technologically advanced enough to do the work required by the Council. The electric strimmers would need to be plugged in and the battery chargers would have to be recharged, which was not feasible. CP confirmed in evidence that the Council would not use vibrating tools for longer than was recommended and we accept this to be the case. The evidence given was that the Council runs a traffic light system relating to the use of machinery; limiting its use dependent upon recognised guidance. We accept that to be the case.

32. The Claimant went off sick again and returned to work on a phased return on 15 March 2018. A letter was sent to him on this date [p227], which confirmed his duties and hours of work over a four week period and that he would receive refresher training on using a strimmer.

33. On 10 April 2018, the Claimant informed his line manager that his GP had advised him not to use vibrating machinery for two weeks. On 13 April 2018, the Claimant's GP provided a letter at the Claimant's request [p229] to confirm that the Claimant had been experiencing increased pain in his hands since returning to work and using strimmers. It stated, "…it would be helpful if he could avoid using any tools that cause vibration for the foreseeable future in order to help his hand symptoms settle".

34. The Claimant returned to work on 30 April 2018 and informed his line manager around this time that his GP advised that he was fit to undertake all duties within his role. He was again referred to OH on 1 May 2018. The report [p221] stated that whilst the Claimant was fit to return to work, he was not fit to work with vibrating tools, at least until a diagnosis of his symptoms had been clarified.

35. A sickness absence review meeting under the Respondent's sickness absence policy was held on 22 May 2018. The Claimant was supported by his Trade Union representative. At this meeting, CP explained to the Claimant and his TU representative that he was confused about the OH report due to the conversation the Claimant had had with his line manager the day before his OH appointment. CP gave evidence that the Claimant said in the meeting that he "should have told the OH doctor the truth".

36. A letter following this meeting was sent to the Claimant on 29 May 2018 [p231 -233]. The letter confirmed that the Claimant had been working amended duties since his return to work. It also discussed the OH report dated 1 May 2018, which contradicted what the Claimant had been telling his line manager.

37. The letter went on to explain that the Respondent was finding amended duties increasingly difficult as they were season/weather dependant. The letter set out that 70% of the Claimant's role required the use of vibrating machinery such as strimming, blowing and mowing. It was agreed that the Claimant would return to full duties, despite the OH advice, but that a case conference would be held following the Claimant's consultant appointment on 2 June 2018 with OH in attendance.

38. The Claimant went off sick on 4 June 2018 until 18 June 2018, during which time he was formally diagnosed as having CTS.

39. On 18 June 2018, a case conference was held between the Claimant, OH, CP and the Claimant's TU representative. OH provided a report following the case conference on 19 June 2018 [p223224], which confirmed that whilst each case should be taken on its own merits, the Claimant was fit for work but "not, currently, with vibrating tools." It stated that the Claimant could undertake other manual handling activities, ideally allowing some job rotation. It suggested exploring redeployment options for the Claimant, and that this may include a dynamic risk assessment.

    The Claimant contended that this was never done, but we do not accept that. The risk assessment provided for us showed that it was reviewed at least once following its creation in 2008.

40. The Claimant was invited to a final absence review hearing to take place on 21 September 2018. We are satisfied that the Claimant was aware of this meeting in advance although no letter was in the bundle.

41. The Claimant's TU representative submitted a grievance on his behalf on 18 September 2019 [p177-8]. This requested that the Council explore available positions including, but not limited to, his current post and a litter picking post. As both of those posts involved the use of vibrating equipment, the grievance confirmed that the Claimant was willing to reduce his hours and work

part time to carry out significant parts of these jobs. The grievance requested that the final absence review hearing be postponed pending the outcome of his grievance. This was refused.

42. A report was prepared by CP for the final absence review hearing [p195-240].

43. An OH Report was obtained dated 18 September 2018 [p185-6], which confirmed that CTS was "not an absolute barrier to working with vibrating tools, each case has to be taken on its own merit….. It may be possible …to work with vibrating tools in a limited way. That would mean he would not exceed 2.5 m/s squared, time weighted average in a day." It went on to confirm that the Claimant was fit for manual handling roles and could possibly work in a limited way with vibrating tools, although persistently using them throughout the working day would have an adverse impact on him. It confirmed that he could not undertake roles that exclusively involved the day long use of vibrating tools. It confirmed that the condition would hopefully be resolved by surgery in the future, although no time frame was given for this.

44. On 20 September 2018, CP sent an email to the HR person responsible for the Claimant, who has since left the Council's employment [p240a], relating to considerations for the Claimant's transfer to the town centre cleansing team. CP had discussed the possibility with the manager in charge of that team, who had identified a number of concerns including the need to use vibrating equipment (billy goat vacuum cleaners, pedestrian scrubbers and blowers) sometimes for the whole day, and to the previously documented issues in the Claimant's risk assessment regarding spatial awareness (referring to a few near misses when the Claimant had stepped out into the road without looking). It also stated that the role was one of the most challenging environments due to having to deal with potentially difficult members of the public.

45. CP gave evidence that he had heard about his near misses from the Claimant's colleagues. There was no evidence in the bundle of any reports relating to these incident(s) about the Claimant stepping into the road, and the Respondent's witnesses confirmed that there had been no such incidents in the last 10 years, although the Respondent considered that this was due to working in a more sheltered or confined area where this was unlikely to happen.

46. The final absence review hearing took place on 21 September 2018. A letter following the hearing was sent on 28 September 2018 (incorrectly dated 2017) [p241-5]. CM would not allow the Claimant to use hand held vibrating machinery not exceeding 2.5m/s despite the OH report dated 18 September 2018 confirming that this was possible. One of the reasons given was that the Council would be negligent in allowing the claimant to use vibrating tools when he had presented a personal injury claim for his CTS relating to the use of such equipment.

47. It was decided that the final absence review hearing would be reconvened in two months' time to enable the Claimant to undertake a spatial awareness test, to try and seek redeployment and obtain a further OH report, together with a date when surgery for the CTS was likely to take place. This was confirmed in the letter dated 28 September 2018 and the Claimant was told, at the reconvened final absence review hearing that, should the Council be unable to redeploy the Claimant, and/or the Claimant was unable to return to work, one possible outcome could be his dismissal from the Council on grounds of capability.

48. A meeting was held with the Claimant and his TU representative on 3 October 2018 to discuss the possibility of a temporary, part time role in the 'shops crew' for a period of two months. This was not a new substantive role, but was a supernumerary position which had been agreed by CM to get the Claimant back to work. CM gave evidence that his level of seniority was required to authorise an additional post to be recruited. On 5 October 2018 a letter was sent confirming the details of the role [p247-8]. The Claimant carried out this role on a temporary, part time basis.

49. On 20 November 2018 the assistant street scene manager over the temporary role in the shops crew sent an email to CP [p267]. The email reported on the Claimant's performance in the temporary role. This confirmed that his work rate was slow (approximately 75% of the agency worker who was covering for a long term sick employee), that he had taken long and frequent toilet breaks (which meant that the team working with him had to pack up and drive to toilets in

the area) and that the team had to constantly work alongside the Claimant, as on at least one occasion he had disappeared to collect litter outside of the area in which they were working.

50. On 30 November 2018 the Claimant underwent what was referred to as a spatial awareness test, which he passed [p251-3]. The test involved using a strimmer for approximately 20 minutes and the report from this was entitled "Training and observation of [the Claimant] using a Line Trimmer". The Claimant suffered pain as a result of using the strimmer for the 20 minutes in the spatial awareness test.

51. The Clamant attended a further OH appointment on 4 December 2018 [p255-6]. During this appointment he informed the OH doctor that using the strimmer the previous week had aggravated his symptoms. The OH report therefore was more prudent than the earlier OH report dated 18 September 2018 in saying that the Claimant should avoid working with hand held vibrating tools "at the moment" and work in a "more controlled environment" such that he was fit to work in a more "sheltered role avoiding the use, currently, of vibrating tools."

52. A further sickness absence report for the final absence review hearing was prepared by CP [p257-262] dated 6 December 2018. This confirmed that the hearing would consider dismissal of the Claimant on grounds of capability.

53. The temporary work arrangement was extended until 7 February 2019 [p269].

54. The Claimant was invited to a final absence review meeting by letter dated 7 January 2019 [p273] which confirmed in the heading, "possible outcome: Dismissal".

55. The hearing took place on 18 January 2019. It was decided that the final absence review hearing would be postponed once again until after the Claimant had seen his consultant. The outcome letter was sent on 24 January 2019 [p282-4].

56. The Claimant's specialist Mr Patil, Senior Clinical Fellow in Trauma & Orthopaedics, sent a letter [p286] which confirmed that as the Claimant's job involved the use of a strimmer, he should have "less use of vibrating instruments" and suggested the use of splints.

57. We consider that the advice of all of the medical reports obtained in respect of the Claimant's conditions (including the GP and Consultant report) was that the use of vibrating tools should be limited. We do not accept that the tension relied upon by the Claimant between the different reports of the OH Doctor and the Claimant's Consultant was material. All of the medical advice raised concerns over the Claimant's use of vibrating tools, and whilst this may not be seen as a complete bar to using them, the medical professionals were all concerned that the use of vibrating equipment could aggravate the Claimant's condition.

58. The final absence review meeting was reconvened on 11 February 2019 at which the Claimant's employment with the Respondent was terminated with effect from 14 February 2019. The dismissal letter [p295-7] made clear that CM, the dismissing officer, had considered whether rotational use of equipment could be considered. It was not considered a practical or reasonable solution, and there was concern expressed that it would rely upon the Claimant giving accurate levels of pain in order to make appropriate adjustments.

59. The Respondent did not consider that there were any suitable alternative vacancies appropriate to meet the Claimant's requirements. Therefore, as the Claimant had not operated the machinery and equipment in his substantive role for any significant length of time since October 2017, the Claimant's employment was terminated and he was paid in lieu of notice. CM's evidence was that the Claimant remained employed during his notice period, but we do not accept that to be the case.

60. The Claimant was given the right of appeal which he did on 19 February 2019 [p299-300]. The grounds of appeal were provided by the Claimant's TU Representative and were that not all of the evidence had been taken into account, there had been a failure to obtain further advice from OH on the most recent diagnosis and that there was discrimination relating to the Claimant's Autism.

61. JC was appointed to hear the Claimant's appeal but had a narrow remit for her appeal as set out in the appeal Policy and Procedure [p551-562], which was a review and not a rehearing of the

case. She had to determine whether the procedure was followed correctly, whether the decision was fair and reasonable and whether the action taken, or outcome reached, was reasonable.

62. The appeal hearing took place on 22 March 2019. The appeal was dismissed by JC by letter dated

25 March 2019 [p490-496].

Alternative employment

63. The Respondent gave evidence that the number of employees had significantly reduced from the time the Claimant commenced employment until his termination meaning that redeployment options were limited. There were approximately 850 employees in 2013, which had reduced to approximately 650 by 2017.

64. The Claimant gave evidence that he could carry out approximately six or seven of the vacancies which were available when the Respondent should have considered redeploying him and whose job descriptions and person specifications were provided in a supplemental bundle [pagesA70A540]. The Claimant's evidence was that he would have been able to carry out the alternative roles providing appropriate training was given and reasonable adjustments were made to those roles. The roles were Mobile Caretaker, Mobile Caretaker Apprentice, Caretaker, Cleansing

Operative Street Scene, Supported Housing Cleaner, Driver / Labourer and Loader Operative.

65. Five of the roles required a full manual driving licence, since the vehicles the Council used were manual and not automatic and the job holder would be required to drive as an essential element of the roles. The Claimant has an automatic driving licence only, having tried to obtain a manual licence previously and his evidence was that he had given up on his lessons to obtain a manual licence as he could not do it. The Claimant also, however, gave evidence that he could have taken a crash course to pass a manual driving test, although there is no evidence that this would have been successful, particularly in light of his failure to pass a ride on mower test. His

evidence was that hearing and coordination were needed for a manual licence and implied that he might struggle with obtaining this.

66. Additionally, the cleansing roles required the use of vibrating equipment including billy goat hoovers and petrol blowers and the need to possess a "mechanical insight".

67. The driver/ labourer role required reasonable knowledge of plumbing and construction, as it involved ordering building materials and collecting the right parts from a depot and returning them to site. It also involved working at heights.

68. The Labourer/ Operative: Refuse and Recycling role was for the collection of domestic refuse and recycling. This required working with dangerous machinery and working on the roads.

69. The Mobile Caretaker Apprentice role was considered by the Claimant to be the most suitable alternative role for him, as by its very name, it would be reporting to others, and would not have the level of experience required for the Mobile Caretaker role. However, this role had essential requirements including that the holder should have experience of working with contractors and tenants/residents on site to achieve agreed works completion within agreed timeframes, knowledge of health and safety and safe systems of working, an ability to analyse and resolve site based problems and competent verbal and written communication skills.

70. It was clear that there had been some consideration of alternative employment with the Claimant, both by CM in his formal hearings, which resulted in the temporary redeployment in to the part time cleansing role, but also during a meeting held on 10 July 2018. CP confirmed in an email to CM [p159d] that they would continue to look for reasonable options, but prior to his final termination meeting, no alternatives could be found. CP was only responsible for looking for alternative employment within his areas (which included grounds operatives teams and cleaning), but we are satisfied that HR had considered all other vacancies, although the person who had done this had left the Council and did not therefore give evidence.

71. The Clamant was requested to complete a skills profile by the HR person considering redeployment [p159e], which he completed and returned on 10 August 2018 [pages 166a to 175]. It was not clear what the Respondent had done with the skills' profile as this did not appear to have been discussed with the Claimant. The Claimant was sent a list of vacancies and gave evidence that he had not applied for any alternative roles.

Comparators

72. The Claimant relied upon two actual comparators together with a hypothetical comparator:

72.1. Miss A – who suffered with CTS like the Claimant, although underwent surgery which was not fully successful. She was redeployed into a Cleansing operative role following a clinical functional assessment, which concluded that she was able to undertake 91% of the alternative role.

72.2. Mr B – suffered with stress caused by workload and lone working in open spaces, depression, heart condition, blood pressure and diabetes. He was unable to undertake Operative and Assistant Operative roles due to recommendations concerning his use of vibrating equipment, but was offered a vacancy in the Cleansing team, which was initially rejected due to the reduction in salary following a protected period, but which was ultimately accepted.

Submissions

73. The parties provided the Tribunal with skeleton arguments prior to the commencement of the hearing. The Claimant provided further written submissions, and both parties expanded upon their submissions orally.

74. In brief, the Respondent's closing submissions were that the claims of direct discrimination were misconceived. Under Section 15 of the Equality Act 2010, the Claimant's dismissal was justified in that the Respondent required its employees to be able to carry out the functions of their roles, which was a legitimate aim and the Respondent pursued it proportionately. The

Respondent had complied with its duty to make reasonable adjustments. However, there was no adjustment that could reasonably have been made to enable the Claimant to continue in his existing role as his carpal tunnel syndrome prohibited him from using vibrating equipment and the Respondent was under no obligation to create a role for the Claimant where there was no other role which he could do, taking into account the restrictions on him due to his disabilities. The Claimant's dismissal was fair: the Respondent's decision that it could not wait any longer fell within the band of reasonable responses. The Respondent consulted and took reasonable steps to discover the employee's medical condition and his likely prognosis. The Claimant would have been dismissed soon after in any event. He was simply not fit to carry out any role within the Respondent which fell within his abilities. The Respondent took the panel through the chronology, particularly in relation to the medical evidence received, and urged the panel to consider the case as a whole rather than take individual aspects out of context as he contended the Respondent had done.

75. The Claimant's submissions in brief were that this was not a case where there are disputed facts or documents, but that the heart of the case related to what was done, what was not done and what ought to have been done. There were failures by the Respondent which pervaded the case, including the failures to investigate alternative lower vibration equipment, to trial the Claimant in alternative roles or even his own role. The tension between the OH advice and the specialist consultant letter should have warranted further investigation, which did not take place. There was a wholesale failure to consider redeployment for the Claimant.

76. The Claimant had been treated unfavourably compared to his comparators, including the absence of a functional evaluation assessment for alternative roles, which was carried out for Miss A.

77. The Respondent had relied upon a 10 year old risk assessment, and made assumptions concerning the Claimant's abilities to carry out roles without carrying out any investigation, or proper consideration, as to whether the Claimant could do them.

78. As the Respondent contended that the dismissal was discriminatory, it considered that the dismissal was unfair. However, in the alternative, the Respondent contended that the dismissal was nevertheless unfair and was not within the range of reasonable responses. The Respondent had failed to carry out a proper investigation, had failed to consider alternative employment and had terminated the Claimant and paid him in lieu of notice. Due to the size and administrative resources of the Respondent, this was an unfair dismissal.

LAW

Burden of Proof and discrimination claims

79. The Tribunal had regard to the burden of proof in discrimination claims. This lies with the Claimant. However, if there are facts from which a Tribunal could decide in the absence of another explanation that the employer contravened the provisions of the EqA, the Tribunal must hold that the contravention occurred by virtue of section 136 (2) EqA.

80. In considering the reverse burden of proof as it relates to a duty to make reasonable adjustments, which is one of the claims brought by the Claimant, we had regard to Project Management Institute v Latif [2007] IRLR 579. *"The Claimant must not only establish that the duty has arisen, but there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred, that there is a breach of that duty. There must be some evidence of some apparently reasonable adjustment which could have been made".* **Section 13 EqA: Direct Discrimination**

81. **Section 13 (1) provides:**

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

It is therefore necessary to consider whether the Claimant was being treated less favourably because of his disability. The approach to be adopted in direct discrimination cases is as set out

in *Law Society v Bahl [2003] IRLR 640* where the EAT provided at paragraph 91: "*It is trite but true that the starting point of all Tribunals is that they must remember that they are concerned with the rooting out of certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error".*

82. It is not possible to infer discrimination merely from the fact that an employer has acted unreasonably (Glasgow City Council v Zafar [1998] ICR120). Tribunals should not punish employers by finding discrimination when their procedure or practices are unsatisfactory or where commitment to equality is poor (Seldon v Clarkson, Wright and Jakes [2009] IRLR 267). However, the Tribunal was clear that direct discrimination need not be consciously motivated.

83. The Claimant's disability does not need to be the only reason for the treatment in order to succeed in a direct discrimination complaint, however it must be an "effective cause" (O'Neill v Governors of St Thomas More (Roman Catholic Voluntary Aided Upper School And Another [1997] IRC33).

84. The Claimant must show that he has been treated less favourably than a real or hypothetical comparator, whose circumstances are not materially different to his as set out in section 23(1) and (2) EqA which states: "23(1) on a comparison of cases for the purposes of section 13….there must be no material difference between the circumstances relating to each case".

85. The EHRC code confirms at paragraph 3.23 that "it is not necessary for the circumstances of the two people that is (the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator".

86. In Owen v Amec Foster Wheeler Energy [2019] All ER 86 the Court of Appeal confirmed that the identity of the comparator in a disability case must focus upon a person who does not have the particular disability.

87. The Tribunal reminded itself that the comparator need not be a "clone" of the Claimant, that there is no obligation to construct a hypothetical comparator in every case and that failure to do

so will not necessarily lead to an error of law in the decision by virtue of the case of Stockton on Tees Borough Council v Aylott [2010] ICR1278.

88. Finally, the Tribunal reminded itself that direct discrimination is not capable of justification when the claim is for disability discrimination.

Discrimination arising from disability Section 15 EqA

89. The Claimant complained that he had been treated unfavourably because of something arising as a consequence of his disability. The protection is laid out in Section 15 which states:

"(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 the treatment is a proportionate means of achieving a legitimate aim.

(2) sub-section (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had a disability.

90. No comparator is required for this assessment. In order for this to apply, the employer must have treated the Claimant unfavourably. The EHRC employment code explains at paragraph 5.6 that it is sufficient to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability. There must therefore be a link to the unfavourable treatment and the Claimant's disability.

91. The code states, *"Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example a person may have been refused a job, denied a work opportunity or dismissed from their employment but sometimes unfavourable treatment may be less obvious. Even if an employer thinks they are acting in the best interests of a disabled person, they may still treat that person unfavourably"* [paragraph 5.7 of the code].

92. In Ms Pnaiser v NDS England (1) Coventry City Council (2) UKEAT/0137/15, Mrs Justice Simler DBE provided the proper approach to s15 EqA cases as:

"A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

"The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

"Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant... "The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links… In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability…However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

"This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator…

"Moreover, the statutory language of section 15(2) makes clear … that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the

'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so…

"As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

93. The Employer may seek to rely upon an objective justification for the unfavourable treatment where it is a proportionate means of achieving a legitimate aim. **Section 20 EqA Duty to Make Adjustments**

94. Section 20 provides:

(1) "Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

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

95. Section 21 Failure to comply with duty provides:

"(1) A failure to comply with the first…..requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first….requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this act or otherwise."

96. There is no onus on the disabled person to suggest what adjustments should be made, although it is good practice for employers to ask.

97. The Tribunal must identify:-

97.1. The PCP applied by or on behalf of any employer;

97.2. The identity of non-disabled comparators where appropriate; and

97.3. The nature and extent of the substantial disadvantage suffered by the Claimant. This is an objective test. There is no need to show group disadvantage. Substantial disadvantage is more than minor or trivial although this was noted to be a low threshold to overcome.

98. The Tribunal had regards to paragraphs 6.16 of the code relating to the use of comparators in cases concerning alleged failure to make reasonable adjustments. There is no requirement, unlike direct or indirect discrimination under the duty to make adjustments, to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person.

99. The employer must know, or reasonably be expected to know, that the employee has a disability, and is likely to be placed at the disadvantage referred to in the legislation in order to be under a duty to make reasonable adjustments.

100. At paragraph 6.3.3 gives examples of possible adjustments that might be reasonable for an employer to make.

101. The test of whether an adjustment is reasonable is an objective one to be determined by the Tribunal. The code lists a number of factors that might be taken into account in deciding what are reasonable steps for an employer to take, these being:

a) the extent to which the steps would have prevented the substantial disadvantage;

b) the extent to which the adjustment was practicable;

c) the financial and other costs of making the adjustment, and the extent to which the step would have disrupted the employer's activities;

d) the financial and other resources available to the employer;

e) the nature of the employer's activities and the size of the undertaking.

Unfair dismissal

102. Under section 98(1) Employment Rights Act 1996 ('ERA'), it is for the employer 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.'

103. Once an employer has established a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason '…depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.' (Section 98(4) ERA). When considering reasonableness, a tribunal cannot substitute its own view. Instead it is required to consider whether the decisions and actions of the employer were within the range of reasonable responses which a reasonable employer might have adopted. The test applies to the procedure followed by the employer and to the decision to dismiss.

Conclusion

104. We accept that the Claimant has been subjected to the following less favourable treatment relied upon for his direct disability discrimination complaint:

104.1. Being advised that the Respondent was unable to find him suitable alternative employment due to the combined restrictions of existing disabilities and the physical limitations brought on by suspected CTS;

104.2. Dismissing the Claimant on 11 February 2019; and

104.3. Not upholding the Claimant's appeal on 28 March 2019.

105. We do not accept that the Respondent refused to obtain specialist medical advice in respect of the Claimant's conditions and relied upon inaccurate general OH reports. We find the OH reports to be useful and it was appropriate for the Respondent to rely upon these and other medical reports provided.

106. In finding that the Claimant has been subjected to less favourable treatment in paragraph 104 above , we then turn to the reason for that treatment. We do not consider that the Claimant has been subjected to direct disability discrimination. The Claimant's dismissal was on grounds of capability, namely his inability to carry out his substantive role for a considerable period of time due to his disability of CTS, and his absences related to that disability. The failure to identify alternative employment was related to his CTS and also his Autism, as there were significant limitations placed upon what the Claimant could do in light of the risk assessment undertaken in 2008 and updated in 2017.

107. We do not accept, therefore, that he has been treated less favourably because of his disabilities of Autism and/or CTS.

108. The Claimant's named comparators both appear to have suffered with CTS, (in Mr B's case along with other disabilities) although not Autism; we did not consider that the

reason for the difference in treatment between the Claimant and Miss A and/or Mr B was because of the Claimant's disabilities of CTS and/or Autism. It was because of the Claimant's limitations on what roles could be considered for alternative employment in light of both of his conditions. We also believe that a hypothetical comparator (being someone without CTS and/or Autism who had concerns raised and limitations placed on their ability to undertake work, and were unable to carry out substantive elements of their current post) would have been treated in the same way as the Claimant; namely, they would have been told that there were no suitable alternative vacancies available, would have had their employment terminated and their appeal would not have been upheld. Therefore, the direct disability discrimination claims fail.

109. Turning to the discrimination arising from disability claims. We note that the Respondent accepts that dismissing the Claimant was unfavourable treatment arising from the Claimant's CTS. We also find that this was unfavourable treatment arising from the Claimant's Autism, since this was taken into account when deciding to dismiss the Claimant.

110. We further hold that not finding suitable alternative employment due to the combined restrictions of existing disabilities and the physical limitations brought on by suspected CTS and not upholding the Claimant's appeal on 28 March 2019, also amounted to unfavourable treatment of the Claimant because of something arising in consequence of his disabilities. The 'something arising' being absence and/or pain related to his CTS. We do not accept that the 'something arising' was the Claimant's alleged difficulties with communication related to his Autism. We considered it was wider than this, and that it related to the limitations placed upon the Claimant's working by his Autism, including, for example, working in controlled or sheltered environments and not working with dangerous equipment.

111. We reminded ourselves that the reason for the treatment for a s15 claim need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective cause of it.

112. Even though we felt that there had been unfavourable treatment because of something arising in consequence of the Claimant's disabilities of CTS and/or Autism, we accepted (as did the Claimant) the Respondent's aim of employing staff able to fulfil the substantive duties of their jobs to enable the Council to deliver a full service to the public as a legitimate aim. We therefore needed to consider whether the treatment was a proportionate means of achieving that aim.

113. This involved an objective consideration of all relevant factors. In considering the reasonable needs of the Council against the discriminatory effect (of the Claimant's dismissal, failure to find alternative employment and failure to uphold the appeal) and we are required to make our own assessment of whether the former outweighs the latter.

114. We understand the need for the Respondent to have the work formerly carried out by the Claimant, done, particularly in light of the reduced numbers of staff carrying out work of that kind. We do not accept the Claimant's submissions that the Respondent had failed to conduct a proper investigation into what the Claimant was capable of doing, or what could be adjusted in either his existing or alternative roles.

115. The Respondent had obtained a number of OH reports, which we consider dealt with the Claimant's limitations due to his CTS and his Autism, in suggesting limitations to his roles, and the need to work in a "more sheltered role" [p255]. The Claimant had his symptoms exacerbated when not using vibrating tools but when hoeing at a time when he was not using any vibrating equipment at all.

116. Nor do we accept that the Respondent failed to explore whether the Claimant could work with vibrating equipment (which the Respondent contended was at the core of

the decision to dismiss). We are satisfied that the Respondent considered what tools the Claimant could use in his own role and in alternative, vacant roles which were suitable for him and what adjustments might be made to enable the Claimant to work in those roles.

117. The Respondent followed OH advice and, in our view, that of the Claimant's consultant, in seeking to limit the time the Claimant spent on using vibrating tools. The Respondent consulted with the Claimant over his dismissal and the possibility of redeployment. Whilst the redeployment was formally discussed on 10 July 2018, we are satisfied that it was considered at other stages during the process.

118. We did not consider that there was a less discriminatory way of achieving this legitimate aim. Therefore, we find that the failure to find alternative employment, the Claimant's dismissal and the failure to uphold the Claimant's appeal, were all objectively justified when considering all of the factors of the case.

119. Turning to the claim concerning the failure to make reasonable adjustments. The Respondent accepts, as does the panel, that the following PCPs were applied by the Respondent:

119.1. Requiring employees to work in their substantive role only; 119.2. Requirement that full time employees work full time hours;

119.3. Requiring employees to work according to their job description.

120. We do not accept the additional PCPs relied upon by the Claimant. We consider that the Respondent did not limit the Claimant's access to the temporary redeployment process. The Claimant was considered for redeployment and was offered a temporary redeployment into a cleaning role whilst investigations were undertaken concerning the Claimant's continued employment.

121. Further, we do not accept that the Respondent relied upon OH professionals with general qualifications only. OH professionals, in this case, Doctors, have specialism in

health and working environments. We accept that the Respondent did not get an OH report relating to the Claimant's Autism only, but find that the OH reports went further than just dealing with the Claimant's CTS condition only; they discussed the other limitations and concerns relating to the Claimant's employment.

122. We do not accept that limited training was provided to the Claimant's line managers and colleagues in relation to Autism only. The Claimant's line managers and colleagues had received training on Autism in 2015 and we are not satisfied that it needed updating as the same people were working with the Claimant and had therefore received the training.

123. We therefore considered the failure to make reasonable adjustments claim in relation to the PCPs we found to have been applied. We agreed with the Claimant that the PCPs would put the Claimant at a substantial disadvantage in comparison with employees who did not share the Claimant's disabilities in relation to the pain and exacerbation of his disability for CTS and his increased absence levels. However, we do not accept that a substantial disadvantage of applying the PCPs would be the Claimant's isolation from his line manager.

124. In considering whether there were reasonable adjustments to avoid the substantial disadvantage(s) in question, we considered whether allocating the Claimant alternative working duties could have ameliorated them. We did not consider the removal of the requirement to use vibrating tools was a reasonable adjustment due to the requirements of the Claimant's role. The Claimant accepted that he was working the vast majority of his time using vibrating tools and from the evidence of CP, this could be up to 95% depending upon the Season. There were limited other duties available in the team in which the Claimant worked, and unfortunately, the evidence was that the Claimant's CTS symptoms were adversely affected when carrying out some of those other duties, not related to the use of vibrating equipment (eg when hoeing). It was

not considered reasonable to allocate only the non-vibrating tool work to the Claimant. We consider that this could create a difficulty for the Respondent and other members of the Claimant's team and we were not convinced that any such adjustment would avoid his increased levels of pain and/or absence. This was also the case for rotating his duties, since the Claimant

had suffered with symptoms of CTS when carrying out a 20 minute spatial awareness test on a strimmer and also when hoeing and not using vibrating equipment at all at that time.

125. We also considered whether it would be possible for the Claimant to be given alternative working duties from roles within other teams, but did not consider that this was a reasonable adjustment, since the Claimant was recommended to work in a sheltered environment, and we felt that it would prove extremely difficult for the Claimant to work across two teams and find suitable duties which he could undertake with the limitations identified in his risk assessment and by the OH reports. We therefore did not consider this to be a reasonable adjustment, which would have overcome any of the Claimant's substantial disadvantages.

126. We were satisfied that the Respondent had considered redeployment of the Claimant. There were lists of jobs provided to the Claimant, who confirmed in evidence that he discussed the roles with someone at the Respondent, although did not apply for any of them. The Claimant gave evidence that he could do the jobs within the supplementary bundle with training and appropriate adjustments. Unfortunately, we do not accept that to be the case on the facts we have found.

127. Whilst we accept that the Respondent could have extended the temporary redeployment, whilst the Claimant underwent further tests for his CTS, it is unclear whether this would have provided any firm prognosis or treatment schedule. The Claimant had, by this stage, been suffering from CTS for well over a year and was still unable to confirm whether surgery was to be undertaken and/or whether this would

have enabled the Claimant to continue in his role or an adjusted role. We therefore did not consider that this was a reasonable adjustment in these circumstances, since it was not clear that the continuation of the temporary role would have ameliorated the disadvantage, and the role was not a substantive role in any event.

128. We are satisfied that it was not a reasonable adjustment to obtain an OH report by a professional with expertise in dealing with people with Autism. It is not clear how this would assist in overcoming any substantial disadvantages suffered by the Claimant. In any event, we are satisfied that the OH reports dealt with the Claimant's Autism and the limitations associated with that condition.

129. Part time working was considered for the Claimant as he was offered part time work in the supernumerary position whilst the Respondent further investigated the Claimant's case. Any alternative employment would have to ensure that the limitations on the Claimant's working, as identified in the risk assessment and in the OH reports, were complied with. We were not therefore convinced that part time working or changes to working patterns was a reasonable adjustment in this case.

130. We consider that the Respondent did look for alternative roles for the Claimant. The Claimant was limited in what he could be considered for, both in terms of his CTS and the requirement limiting his use of vibrating equipment, but also in terms of the limitations provided for by the risk assessment and by the OH reports. We accept that the Respondent was limited in its ability to offer alternative employment in these circumstances. In considering the roles which the Claimant gave evidence that he could carry out with appropriate training and adjustments, we do not believe that he would have been able to do so. Most of the roles required a full driving licence, which the Claimant did not have, and which was not clear that he would be able to obtain. The roles also required either working at heights, the use of vibrating equipment, or skills which the Claimant did not possess. We therefore did not accept that the alternative

job roles which were available should have been offered to the Claimant, and we were not satisfied that adjustments in those roles would have enabled the Claimant to carry them out.

131. Finally, on the disability discrimination complaints, we find that the Respondent did provide training on Autism. We therefore, do not consider that further training was a reasonable adjustment in this case.

132. Therefore, the Claimant's claims for disability discrimination fail.

133. Turning to unfair dismissal. The Respondent has shown a potentially fair reason for the Claimant's dismissal, namely capability. We then need to consider whether the Respondent acted reasonably in all of the circumstances. The Respondent considered carefully whether to dismiss the Claimant, having had a series of meetings with him and consulting with him prior to coming to the decision to dismiss him. The final review hearing was postponed on more than one occasion to enable further investigations to be carried out. It was not the case that the

Respondent failed to consider the Claimant's work issues. The Respondent obtained a number of OH reports and considered these and the Claimant's GP and Consultant letter before coming to a decision. The Respondent considered redeployment, as discussed above, and found that there was none suitable for the Claimant in this case, which we accept. We do not consider that the dismissal was rendered unfair by any procedural failings, nor by the fact that the Respondent paid the Claimant in lieu of notice, rather than allowing him to be placed on garden leave or work his notice.

134. We therefore consider that the procedure followed and the decision to dismiss were within the range of reasonable responses and that, therefore, this was a fair dismissal.

135. All of the Claimant's claims are therefore dismissed and the remedy hearing is vacated.

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