EMPLOYMENT TRIBUNALS

Claimant: Mr K Stanley

Respondent: Microlise Limited

Heard at: Carlisle **On:** 6, 7 and 8 September 2021 (in person and by CVP) and on 9 September 2021 (Tribunal meeting in Chambers)

Before: Employment Judge Leach

REPRESENTATION:

Claimant: In person
Respondent: Mr G Anderson, Counsel

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant did not have a disability as defined at Section 6 of the Equality Act 2010 at the relevant time. Therefore, his complaint of failures to make reasonable adjustments under Section 20 and 21 Equality Act 2010 does not succeed and is dismissed.

2. The claimant was unfairly dismissed.

3. There was a 20% chance that the claimant would have been dismissed in any event had a fair procedure been followed.

4. The respondent failed to comply with the ACAS statutory code of practice on Disciplinary grievance procedures and, pursuant to s.207A Trade Union and Labour Relations (Consolidation) Act 1992, we apply an uplift of 20%.

5. The respondent is ordered to pay to the claimant the following amounts.

    - A basic award of £9450

- A compensatory award of £30,074.20.

6. The first £6722.52 of the compensatory award is Post Employment Notice Pay and taxable pursuant to sections 402A to E of the Income Tax (Earnings and Pensions) Act 2003.

REASONS

Introduction

1. The respondent sells and installs vehicle telematics systems to commercial organisations. These systems allow the respondent's customers to record and analyse various data concerned with commercial vehicle usage.

2. Before his dismissal, the claimant was employed by the respondent as a Field Service Engineer. He was based in Carlisle where he lives. His work spanned a large geographical area in the North of England and sometimes also in the South of Scotland.

3. At the end of 2018 the respondent decided to merge its Engineering Services Team (in which the claimant was based) with its Engineering Installation Team thus creating one large team of engineers called the Technical Hardware Team. Engineers in the Technical Hardware Team would carry out both service engineering work and installation work.

4. The claimant made clear in various meetings that he was not prepared to agree to the changes to his role that this merger would require. Consistent with his objection, the claimant refused to attend a training session on 24 June 2019. That particular training session was only relevant to the activities that the claimant would undertake in the role of Technical Hardware Engineer.

5. The claimant also informed the respondent that he had Osteoarthritis in his knee which would prevent him from undertaking important aspects of the new role.

6. The claimant was disciplined for his non-attendance at the training session and received a written warning.

7. The claimant appealed this warning. At the appeal hearing, Gary Smith, (Interim HR Director) decided to dismiss the claimant without notice or pay in lieu of notice.

Issues

8. The issues were identified in the second Preliminary Hearing (case management) in this case before Employment Judge Dunlop on 2 July 2020. They are set out in an Annex to the case management summary and are repeated below.

Disability Discrimination (reasonable adjustments)

1. Was the claimant disabled within the meaning of s.6 Equality Act 2010 between December 2018 and August 2019? The claimant relies on the physical impairment of an arthritic knee condition. Did this impairment have a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities?

2. Did the respondent know, or could it reasonably have been expected to know that the claimant was a disabled person?

3. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

3.1 requiring field service engineers agree to a change of role to encompass installation work;
3.2 requiring them to commence doing the installation work.

4. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:
4.1 To do installation work would cause the claimant physical pain; and
4.2 Failure to comply would result in disciplinary proceedings and, ultimately, termination of employment.

5. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

6. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant; however, it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:
6.1 Allowing him to continue in his role without undertaking installation work.

7. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

8. Was the claimant's complaint of failure to make reasonable adjustments presented within the time limit set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: when the failure occurred; whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis.

Unfair dismissal

9. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct or some other substantial reason (the 'SOSR' reason being a refusal to accept the proposed changes to his role and/or a breakdown in the working relationship).

10. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

11. If the claimant was unfairly dismissed and the remedy is compensation:

11.1 What adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair

and reasonable procedure been followed and/or would have been dismissed in time anyway]? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8;
11.2 would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
11.3 did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?
11.4 Should any increase or decrease be made to the compensation payable to reflect a failure by either party to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, pursuant to s.207A Trade Union and Labour Relations (Consolidation) Act 1992?

This Hearing

9. The final hearing was held as a hybrid hearing. The claimant, the respondent's representative and two out of the respondent's five witnesses attended at Carlisle. All three members of the Tribunal also attended at Carlisle. Three of the respondent's witnesses gave their evidence remotely. There was both in person and remote public access.

10. We spent the morning of day one reading into the case and the hearing itself began at noon. Two preliminary issues were raised by Mr Anderson on behalf of the respondents:-

11. The first of these concerned a paragraph in the claimant's witness statement. Mr Anderson informed the Tribunal that the claimant had referred to a conversation that, according to Mr Anderson, was without prejudice. Mr Anderson noted that the claimant had been informed at the Preliminary Hearing on 2 July 2020 about not being able to refer to without prejudice communications including those falling under Section 111A of the Employment Rights Act 1996 (ERA).

12. The claimant told us that he did not accept the conversation in question was without prejudice. We reviewed these concerns.

13. On the morning of day 2 we indicated to both parties that whilst there may be a dispute about whether the conversation was protected by without prejudice privilege (or under Section 111A ERA) it was extremely unlikely that the detail of the conversation would influence our findings. Both parties agreed that we would proceed without us taking any account of the particular paragraph of the claimant's statement and that is what we have done.

14. The second issue concerned a late disclosure. The claimant had only just provided a typed transcript of a recorded meeting held on 24 January 2019 (we refer to this meeting below). By the beginning of the hearing, the respondent had reviewed this transcript and it accepted the typed transcript as accurate.

15. On the afternoon of day one we heard from Gemma Williams, HR manager (GW)

16. On day 2 we heard from Mark Goulding (MG), Nathan Eggleston (NE), Gary Smith (GS) and Scott Jones (SJ). Day 3 was taken up with the claimant's evidence and then closing submissions. This meant that we were able to meet on day 4 (in chambers) to consider the evidence we had heard and reach our decision.

17. The claimant had intended to call a former colleague, Andrew Rogers as a witness. Mr Anderson raised concerns about the evidence of Mr Rogers which concerned his own circumstances rather than the claimant and therefore was of no or little relevance. Further, he noted that Mr Rogers was bringing his own tribunal claim against the respondent and was concerned about the Tribunal being asked to make findings of fact about Mr Roger's circumstances. The full evidence regarding Mr Rogers was not before us in this hearing but would be before a Tribunal hearing his case and that would be the appropriate time to reach findings in relation to Mr Rogers.

18. We noted that the bundle of documents included evidence relating to 4 anonymised engineers. The respondent had provided these documents. It was clear to us at an early stage of the hearing that the circumstances regarding other engineers was unlikely to be of much assistance to us in reaching decisions in the claimant's case; a concern we raised with the parties. One of these anonymised engineers was Mr Rogers. On the morning of day 3, the claimant told us that he decided not to call Mr Rogers. We took no account of his written statement. That decision by the claimant also dealt with the concerns that Mr Anderson had raised about Mr Rogers evidence. Another one of the engineers whose details had been anonymised was Scott Jones (SJ) whose evidence we did hear.

Findings of Fact

<u>The claimant's employment with the respondent</u>

19. The claimant was employed by the respondent as a Field Service Engineer. His employment began in 2006. A written contract of employment signed in April 2010 included the following terms:-

> *"(2) Job Title*
>
> *2.1 You are employed as a Field Service Engineer. The general nature of your duties will be set out in the job description of your position, a copy of which will be given to you.*
>
> *2.2 Your job title and the job description for your position do not limit or define what you may be required to do and the company has the right at any time during your employment to require you to undertake any duties falling within your capabilities and which may be normally undertaken by others.*

2.3 You and the company acknowledge the company's entitlement to update the job description from time to time to reflect changes in or to your job.

2.4 The company agrees to consult with you regarding any proposed changes under 2.2 above".

20. The role of Field Services Engineer had a job description, also from 2010, a copy of which is at pages 164 to 168. We note the following extracts:

"Job Purpose

To work on customer sites as part of the Field Service Team, to offer support to all Microlise customers on our portfolio of products, primarily for our fleet tracking solutions but also warehouse equipment. To diagnose, repair faulty equipment and maintain where applicable. Dealing face to face with customers on both planned and emergency bases and within our SLA's".

21. Under the heading "Technical duties and responsibilities" the following is included:-

(1) The engineer will be responsible for ensuring a rapid response to field support requirements with ability to investigate and rectify problems on site.

(2) Identify faults, resolve problems and repair equipment to module or component level as required. These should be completed in such a way as to ensure product repair and maintenance standards are met and high standards of housekeeping are maintained at all times.

(3) Liaise on a technical level with other persons within Microlise in order to investigate and/or resolve with customer equipment and solutions.

(4) Liaise with customers at all levels of the customer operation effectively.

(5) Proactively manage your own workload and timekeeping to ensure achievement of SLA's.

(6) Responsible for upkeep and safety of tools and equipment required to fulfil the role efficiently, ensuring own levels of stock required is constant.

……..

(10) Assist where necessary other teams within the business in installation and implementation of systems.

22. Under the general duties and responsibilities:-

(1) Support your line manager to contribute to the success of the business and assist in improving the overall customer experience in relation to your department.

(2) Support and promote the Microlise mission and vision and strategy and contribute to your team's area of the business plan.

…….

(9) Ensure that relevant health and safety requirements are adhered to, including undertaking any mandatory training as required.

(10) Treat all your colleagues equally and fairly.

(11) Undertake any other duty or responsibility at the request of your manager that may be required within reason within the remit of your role.

23. The claimant is an experienced engineer and had considerable knowledge of the respondent's systems. He was well regarded by his engineering managers. This finding is supported by the evidence that we heard from Mr Goulding, and Mr Eggleston. The bundle of documents also includes examples of performance reviews, for example the 2018 appraisal form at pages 117 to 119.

24. We note the following manager comments in this appraisal form.

"Carl is a very experienced Field Service Engineer who is very knowledgeable about current Microlise and third-party products. Future training plans on new products will only improve his technical knowledge. Carl regularly updates other engineers and via the engineer forum on any new issues he finds whilst on site. Carl has good customer service skills and a good working relationship with the other engineers".

Installation Engineers

25. Prior to the merger of the two teams (Field Services and Installation) in 2019, the respondent had a separate installation team. This was smaller than the service team. The work required in installing the components relevant to the telematics systems, required less technical expertise and it attracted lower pay.

Differences between the role of Field Service Engineer and Installation Engineer

26. Field Service Engineers were required to have considerable knowledge and understanding of the telematics and other systems supplied by the respondent. They needed this in order to diagnose faults and fix them. The role of an Installation Engineer was to fit the relevant components to vehicles. This involved attaching various components of a system in the correct places of the vehicle and then wiring up/connecting those components. Much of the work involved fitting kits to HGV vehicles. Installations on HGV vehicles required the installer to work underneath HGV trailers, running wires along the length of a trailer and attaching wires to the relevant components at each end. The role of the service engineer was more diagnostic and, particularly with an experienced engineer such as the claimant, required much more problem

solving and less physical fitting of components although sometimes components did need replacing (and therefore installing) as part of a service.

Change in hours in 2018

27. In 2018 the respondent looked to change the hours that engineers were obliged to work. The respondent accepted that this change of hours would require employees to agree to changes to their contractual terms. In broad terms the respondent wanted its engineers to be obliged to work different days and different hours on a rota basis so that engineers became obliged to work on some Saturdays.

28. The claimant was concerned about the proposed new contractual terms that he was asked to agree. He believed that whilst he was told verbally that the respondent was only looking for employees to work one Saturday in four, the contractual terms he was being asked to sign, did not limit the obligation to one in 4 as they provided that employees work *"a five from seven working week which will include weekend days as required to meet customer demands".* The claimant was concerned that he may be required to work more weekends and possibly every weekend. Previously the claimant had been willing to work flexibly, which included early starts, late finishes and weekend working when he could. The respondent had often been able to rely on the claimant's flexibility but this was voluntary. The respondent wanted to ensure that the claimant (and its other engineers) were contractually bound to work on Saturdays.

29. Whilst the claimant was not willing to agree the proposed new contractual term in 2018, he proposed alternatives to accommodate the respondent whilst keeping a limit on the number of Saturdays that he was contractually obliged to work.

30. The respondent accepted that the changes being sought required a change to the contractual terms of employment. It encouraged agreement by the offer of a payment of £1,500 to those employees that agreed the change. As the claimant would not agree the new terms, the respondent threatened the claimant with dismissal on the terms that he was employed under and then by offering him new terms which would include terms relating to the changes in working hours (often referred to as "fire and rehire").

31. The claimant offered the respondent some options one of which was for him to work one weekend in four (which the claimant says was how the change was originally put) but limited to that. Alternatively, other options including an agreement to work one weekend in three for a higher salary or to succumb to the weekend working with no limitation in exchange for a further salary increase.

32. The respondent decided not to agree any of the options put by the claimant and also decided that it would not "fire and rehire" thus keeping the claimant on the contractual terms he had agreed in 2010.

33. We find the following in relation to this 2018 exercise:-

(i) The respondent did not/ does not recognise any trade union and has no collective consultation mechanism. Its chosen approach in 2018 (and again in 2019 as we note below) was to speak with individual employees on an individual confidential basis;

(ii) The claimant had been told that the respondent was asking its engineers to be available to work one weekend in 4. However, he was genuinely and reasonably concerned that the clause that he was being asked to sign would require him to work many more weekends than one in four.

(iii) The claimant honestly believed that he was told in a consultation meeting, that the weekend working would be limited to one in four. This was later changed and a rota drawn up by the respondent, required a one in three working pattern. The claimant believed that the respondent had changed its position in a way which did not abide by the assurances the respondent made at an earlier consultation meeting. However, no notes or other record of this meeting had been kept. The assurances the claimant believed had been given at that meeting were not recorded and subsequently denied by the respondent.

(iv) The claimant wanted to negotiate with the respondent in a way which would allay his concerns of excessive working. We have no criticism of the claimant's actions here.

34. In his evidence Mark Goulding noted the claimant's "attitude". When asked about this Mr Goulding explained that the claimant did have a reputation as having an attitude, and the reason he gave was that the claimant had raised concerns about the European Working Time Directive at a stage in relation to the hours that he was being required to work. This was an example from some years earlier. We find that the claimant's reputation of having an "attitude" also arose from his stance over the contractual changes being sought in 2018.

35. We find that the claimant was seen by the respondent as having an "attitude" due to rare occasions when he raised valid questions and concerns about statutory and contractual rights and obligations.

Merger of two teams

36. The claimant first heard about the respondent's intention to merge the field service and installation teams in late 2018. By that stage the installation teams had already been consulted about the changes. The respondent's view was that the impact of this team merger would be much greater for installation engineers as they would be required to undertake significantly more training and obtain greater knowledge and experience in order to carry out the field service work effectively.

37. The respondent set out its business reasons for wanting to merge the teams which the respondent considered would enable more effective working and ensure that they remained competitive. For example, where a customer site

required both service and installation work to be carried out at the same time the respondent would only need to send one engineer to undertake all outstanding tasks.

38. We accept the respondent's business case for merging these teams as genuine.

39. The claimant was informed of the intention to merge the teams at a meeting at the respondent's main offices in Nottingham on 18 December 2018. Whilst he was initially told that the merger of the two teams would only involve minor changes for him, the claimant was concerned about hours, days worked and significant changes to his duties and pay. Later that day, he arranged to meet privately with one of the respondent's directors, Trevor McGahan. At that meeting he provided Mr McGahan with ACAS guidelines that the claimant had found about employers making changes to employment contracts.

40. Mr McGahan told the claimant that the changes would go ahead and he was not interested in the information that the claimant tried to provide to him.

41. Whilst individual consultation meetings with the field service engineers took place in the first few months of 2019, we find that by the end of 2018 the respondent had decided that the two teams would merge. This was made clear by Mr McGahan on 18 December 2018.

Consultation meeting 24 January 2019

42. The claimant secretly recorded this meeting using his mobile phone. We make the following findings in relation to the claimant's actions of recording the meeting:-

    (i) The reason the claimant did this was to ensure that there was an accurate record of this meeting;

    (ii) He was concerned that the respondent had misrepresented the position in consultation meetings in relation to the change in hours noted above. The claimant believed that the respondent had told engineers that they had initially said that they were looking for engineers to work one Saturday in four, changed this to a position where they required one Saturday in three and also required engineers to sign up to a contractual term obliging them to work every weekend if required.

    (iii) The claimant was not looking to entrap any participant in the meeting into saying something. The sole purpose of the recording was to keep an accurate record.

    (iv) This was the only meeting the claimant recorded. In the course of the hearing the respondent doubted it was the only meeting recorded by the claimant. We find that it was.

    (v) The claimant disclosed his recording in the course of these proceedings.

(vi) The recording is the only accurate record of this meeting. The claimant had a right to be concerned that an accurate record might not be kept. As we note below a letter followed the meeting (page 221 to 224) but much of this letter is in standard "precedent" terms as every field service engineer was written to. Some of the letter (particularly 223) does comment on the claimant's position but is not in any complete respect a record of the discussions that took place.

43. The typed transcript is at pages 571 to 585. The respondent has agreed this transcript. We note the following

(i) At paragraph 1 (GW) *"I'll made a few odd notes because after this meeting over the next week or so, I'm gonna send a letter out to every engineer I have had the one to one with and just detail what we've discussed … it will be a true representation of what I believe I discuss in the meeting. If I've missed anything off that you want to add on, add it in"*

(ii) At paragraph 3 (GW) "*so the whole point of today is for us to just clarify that you understand what changes are going to be made and to listen to any concerns you have about them really*".

(iii) The claimant was given details about a training exercise that would take place so that members of the two teams would migrate over at different times. Whilst significant detail about training was provided, in her evidence to the Tribunal GW accepted that the only training the claimant required (given his extensive skills and experience) was to complete relevant installation paperwork.

(iv) The claimant was told that he wouldn't receive lots of installation work straight away. MG at paragraph 15, "*what point would it be sending a service engineer to go and do, I don't know, eight installs on a day here who doesn't really even fully yet understand or has no idea about the speeds and efficiencies that they do and vice versa and why would we send an installer to go and look at several CAN issues, its just you are almost setting yourself up to fail, so from our point of view and the remit we will be giving them and guiding them on is that they need to take these things all into consideration. But that doesn't mean to say that equilibrium in time won't occur, it will, but it will take time. You can't tell the difference between the starter in which team. Or that's what we hope".*

(v) At a later stage of the meeting (paragraph 38) the point is made to the claimant that *"the level of work for services is like nearly a third like treble the level of work of that the installers*". In other words, the claimant would still be spending the majority of his time on field service work. The claimant's response is at 39 "*that still means for one week in three I could be underneath 30 trailers*". The claimant's concerns here about having to spend a significant amount of his working time on installations, (particularly working under HGV trailers) was not answered at this stage (or at any stage prior to his dismissal).

(vi) At paragraph 16 the claimant was informed that the service team currently worked Monday to Saturdays on a rotation basis and the installation team worked Monday to Sunday on a rotation basis, working one weekend in four whereas the service team worked one Saturday in three. GW noted that there would be a requirement for field service engineers, in the new team, to work on some Sundays.

(vii) Paragraph 21 to 22, it was noted that installation engineers worked slightly different hours (8.30am to 5.30pm) to the field service engineers (who worked 9.30am to 6.30pm).

(viii) The claimant informed GW and MG that he had not agreed to the obligation to work weekends and therefore would not consider that working Saturdays and Sundays would apply to him.

(ix) At paragraph 26 GW said" *because we are effectively not going to have service and installers any more, the titles that everybody has will effectively be redundant, it won't be a true reflection of what the function is. We want to rebrand this whole section of the business as hardware engineer".*

(x) At paragraph 25 GW "*the only thing we want to change, and this would be … so we are clear from my perspective … and you may have a different opinion, and we can go through that. From my perspective the change in terms of installations and servicing merging is the slight difference in the job description. It's the job description changing, therefore not contractual and that is why we are going through this process how we are. We are not doing what happened previously you got involved in with a dismissal and re-engage, we are consulting to find out are there any problems like what we've created that we maybe need to reconsider or have a look at from our perspective. Like I say the training will take place and people will migrate over as they are competent. The one thing that is more contractual, that would be on an agreement basis, is your job title".*

(xi) The claimant asked GW why the respondent considered that this was not a change to the claimant's contract of employment and the claimant stated as follows "*you're changing my role. So, I have spoken to three separate lawyers and the very first one said "well if that is not contractual, I don't know what is*". A further discussion took place in which the claimant referred to other sources of advice that he had obtained including ACAS. In response GW noted that it was the job description only that was being changed and stated *"in the contract it does say that if we make any changes to your job description that will be, we will consult with you… which is the whole point of doing this. It's not the same consultation process as what it would be for agreement or dismiss and re-engagement which you may have been part of before, because that is not what I am doing, I don't need to get agreement from the advice I have been given and I'm not dismissing anybody to re-engage them on the new contracts, I'm not changing the contract, I'm changing the job description".*

(xii) The claimant raised particular concerns about having to work on installations with HGV trailers, we note the following at paragraph 31 *"so, what could happen in a months' time is I get twenty Tesco trailers, it's pouring down with rain and I am lying underneath a trailer, with a rear axle that far from my face, reaching up and trying to do stuff, install this stuff, now remember I am 55 this year, I've got an arthritic left knee, I've got a dodgy hip, I've got a sore back and its alright if you're 25 doing this sort of work but when you're on your eighth one of the day and its been raining and you have had a mini river running through you all day which would you rather do? Can you see why I don't want to do this? That's my concern, it is not remotely the same job as far as I'm concerned.*

(xiii) MG responded saying *"I think we are missing, there could be that element of doing eight in a row yes, but there could be situations where you are working on a trailer and lets say you need to access the EBS/TEBS unit whatever it is ….. or the cable has been nicked somewhere, there would be a situation where you would have to potentially remove the cable and fit a new one."* The claimant responded *"that's right but the chances of me getting more than one of them at once and don't get me wrong, I realise there is a similarity there, but it's a completely different job. …… I'm 55 I don't want to be scrabbling around under the back axles of trucks for days at a time.*

(xiv) Later in the meeting the claimant asked whether there would be disciplinary action if he did not attend the training or if he is given installation work and refuses to do it. We note the following at para 43: GW *"if you refuse the training then we would look at as a disciplinary situation, I am not saying dismissal, I am saying investigate, disciplinary, that is what I am saying, well I am not saying well you'd be booted out it's not going where I am going with this, it would be, like I say, investigation, then the disciplinary would come in and those are first written warnings, final written warning, dismiss, you know there are other options within that disciplinary situation*".

(xv) The claimant noted that his concerns about accepting the training *" you see you are on a legal minefield there because as soon as I accept the training, you're then in a position to come back and refer to 2.2 in my contract that says oh he is now trained its within his capabilities. …. So what I say is, if I accept the training then that opens up another can of worms".*

(xvi) The claimant informed MG and GW about his pains, particularly his bad left knee GW replied, *in regard to you know, the pains that you experience, are these things that have been medically diagnosed and could we look into, and get proof right?* The claimant replied that he had not been medically diagnosed; he did not go to the doctors.

44. The letter GW referred to (see 41(i) above) as a record of the meeting, was dated 22 February 2019 and sent with an email, the subject heading for which was *"consultation conclusion."* (page 219).

Meeting on 1 April 2019

45. Whilst the letter of 22 February 2019 was sent within an email noting that consultation had closed, a further meeting took place with the claimant (referred to by the respondent as a second consultation meeting). There are no notes of this meeting and the claimant did not make a recording of the meeting. The meeting was not in the nature of consultation. Rather it was to inform the claimant of the respondent's position that the merger of the two teams did not add any new elements to what the claimant already did. Specifically, there were times when he was required to remove and reinstall kit if there were issues during a service and the only element of installation work that the claimant did not already do was to complete the installation paperwork. The claimant was also informed that the terms of his contract did not limit or define what he may be required to do and that the decision to merge the two roles and require the claimant to undertake training and then installation work did not amount to a termination or variation of his employment contract.

46. The claimant was also informed that failing to attend the training may result in *"action being taken pursuant to our disciplinary procedure"*.

47. These points were confirmed in a letter which followed the meeting of 1 April 2019 but which did not go to the claimant until 10 May 2019.

Training 24 June 2019.

48. The claimant attended the respondent's Nottingham premises to undergo training. Much of the training was about new kit/systems which the claimant attended. However, the claimant refused to attend the session which was specifically to train the claimant on the completion of installations paperwork. The claimant refused to attend this training for two reasons because:-

    (i) he had not agreed to the changes that the respondent was making to his role. As the claimant had not agreed to the changes, the training was not relevant to the role that he was carrying out.

    (ii) he was concerned that, should he attend the training and become capable of completing the installations paperwork, the employer would be entitled to rely on clause 2.2 of the written contract (see above) as the installation work would then be *"duties falling within* [the claimant's] *capabilities".*

49. As the claimant refused to attend the training, he was invited to a disciplinary investigation meeting which took place on 27 June 2019. The meeting was with MG. Notes of this meeting are at pages 228 and 229. At the start of the meeting MG stated, "*before we begin are you recording this meeting on an electronic device"*. The claimant replied that he was not and (we find that he

was not). In the course of the investigation meeting the claimant explained his position that he had received advice from various parties that all state that what the respondent was trying to do was enforce a contractual change. She asked the claimant if there was anything to add. We note that the claimant stated *"you need to think very carefully about what you are going to do next; both my union and solicitor are saying that this is on the verge of constructive dismissal. Be very careful with what you do next".*

50. The disciplinary hearing took place on 12 July 2019. The letter inviting the claimant to the hearing included the following paragraphs:-

> *"During the investigation meeting you confirmed that you did not undertake the installation training on 24 June 2019 because you believe it isn't a reasonable request as you haven't agreed to the change to your role and therefore it cannot be mandatory". ..*
>
> *"You are entitled to be accompanied by a fellow employee or trade union representative to the meeting in accordance with our disciplinary policy and procedure. If you wish to bring a companion, please let me know their name as soon as possible and no later than Thursday 11 July 2019 midday. If I think the person you choose is not appropriate to be your companion, I will ask you to choose someone else. Please note your companion will not be permitted to answer questions on your behalf".*
>
> *"As the allegation may amount to an act of misconduct, the outcome of the disciplinary meeting may amount to a first written warning".*

51. Notes of the meeting are at pages 234 to 236.

52. During that meeting the claimant queried where the disciplinary policy stated it should go to a first written warning rather than a verbal warning. We note the respondent's policy does not say "verbal warning stage" but notes that stage one is a first written warning, stage two a final written warning and stage three dismissal (or other penalty) (pages 150 to 153).

53. Whilst the notes do not record this discussion it is clear from a letter from NE to the claimant dated 12 July 2019 the claimant raised issues about working with trailers due to his knees and hips. NE asked for medical evidence of these conditions "*on or before Friday 19 July 2019 for this to be considered as part of the decision-making process. Should I not have received the specified evidence by this date, then I will take it that you will not be supplying the verification and therefore the decision will be made on the basis of the evidence before me"*.

54. Whilst this did not provide the claimant with a great deal of time, he quickly arranged a medical appointment and received a diagnosis of Osteoarthritis.

55. On 17 July 2019 the claimant emailed the respondent (Victoria Milnes of the respondent's HR department) (page 569). He informed her that he had had a confirmed diagnosis of Osteoarthritis in his left knee and that that was also the probable cause of pain in his hips. He added the following *"given that the*

knee is the greatest issue and that prolonged kneeling or forcing legs into unnatural positions will exacerbate the problem, causing enhanced pain for some days, can I request that this is taken into account when considering any future work you give me. I don't see this being a particular issue in my current role but please be aware for any proposed changes to my role in future. If you require proof of this diagnosis please have occupational health contact me and I will grant the required permission for them to see my medical records".

56. We note that the claimant had also informed Victoria Milnes that as far as any possible medical diagnosis was concerned *"this shouldn't be forming part of any mitigation of the current proposed disciplinary action. You should only take into account the mitigation is that the change to my role is a contractual one and that any clauses within my current contract do not allow for such a substantial change".*

57. The disciplinary hearing did not resume. Instead Mr Eggleston provided his decision by letter dated 2 August 2019. The following paragraph of the letter is confusing:

> *"After careful consideration and considering all evidence collected as part of the investigation process carried out by Mark Goulding on 27 June 2019 because the request to attend a classroom based training on 24 June 2019 is not of a physical nature, I asked that medical evidence was provided now for it to form part of my decision making. You have made no effort or shown any cooperation to get this information to me within the timeframe provided or to date. In the absence of medical evidence, I have no other option than to decide based on the information I have available to me. Had you provided medical evidence to state that your physical medical condition prevents you from attending classroom-based training then the outcome could have been different".*

58. The outcome was to provide the claimant with a first written warning.

59. This paragraph is confusing because:-

(i) The claimant had cooperated and obtained a diagnosis very quickly and within the respondent's time scales.

(ii) There was at no stage any suggestion that the claimant was physically unable to attend the training. The knee and hip problems about which the claimant had complained were relevant to the respondent's requirement for him to start installing equipment underneath HGV trailers.

60. Mr Eggleston also noted that it was the respondent's intention to refer the claimant to an occupational health provider (with access to the claimant's medical records assuming the claimant's consent) *"to assess whether or not the physical requirement for you to carry out installation work could adversely affect your alleged medical condition. In the meantime, we will seek advice from an independent expert to assess the duties in both installation and*

servicing. I will arrange for you to attend the installation element of the mandatory training at a future date and I sincerely hope that you reconsider your position. I really hope that we can now move forward in an amicable manner. However, if you have any concerns about the non-contractual changes which have now been implemented since January 2019 please do let me know." Mr Eggleston also provided him with an opportunity to appeal against the decision and for the appeal to be sent to Trevor McGahan, Operations Director.

The Claimant's Appeal

61. The claimant raised an appeal by email dated 7 August 2019 to Trevor McGahan. The claimant's email stated as follows:

> *"The reason for the appeal is that after taking considerable legal advice, it is both mine and my union's view that the changes you are proposing to my job role are substantial and therefore contractual. As the change is contractual, I am not obliged to attend training for a job I haven't accepted. These changes cannot be legally enforced without my consent which I currently haven't given. By being given a written warning you are trying to bully me into accepting these changes, taking no account of current employment legislation. As to the appeal process itself, the ACAS code of practice on discipline and grievance advices "the appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case." As we have already met to discuss these changes and given your stance at that meeting, I don't believe that the impartiality aspect is being met and would kindly request that appeal is dealt with by another suitably qualified person".*

62. By this stage the claimant had in place an interim HR Director called Gary Smith (GS). GS was engaged on a temporary consultancy basis and had been engaged as an interim HR Director since May 2019. GS was engaged for genuine operational reasons unconnected with the claimant. He was not (as the claimant has alleged) engaged specifically in order to deal with him and his objections to the changes being made to his role. The claimant was informed by letter dated 9 August 2019 that GS would hear his appeal. We also note the following from this letter (page 246):

> *"the purpose of the hearing is to consider your appeal under the disciplinary policy and procedure against the decision made by Nathan Eggleston (Head of Hardware Services) on 2 August 2019 to issue you with a first written warning due to "failing to follow reasonable instructions".*

63. As with the disciplinary meeting the claimant was also told he had a right to be accompanied by a fellow employee or trade union representative but with the same caveat that the person holding the meeting was entitled to decide whether or not the chosen companion was appropriate.

64. The appeal meeting took place on 21 August 2019. Notes of the meeting are at pages 248 to 251. These are largely agreed although the claimant does

not agree the notes that record the end of the meeting. The claimant's version is of the final part of the meeting is at page 254. Having heard from both GS and the claimant we are satisfied that the claimant's amended version is the accurate version and that is the version we refer to below.

65. GS undertook some preparatory work for the appeal hearing. He spoke with GW about the merger of the roles, the business case for the merger and the effect this would have on the claimant. Prior to the hearing (and before he had spoken with the claimant) he had already decided that any changes to the claimant's role would be minor and therefore it was reasonable for the respondent to insist on the changes.

66. He was also told by GW, incorrectly, that the claimant had not provided any evidence of the problems he had with his knees and hip.

67. These matters were all confirmed in the witness evidence of GS (see in particular paragraphs 11 to 16 of his written statement).

68. At the meeting the claimant informed GS of the reasons why he refused the training. The claimant was consistent with his stated position at previous meetings. In summary:-

    (i) The claimant maintained his view that the changes being sought were contractual.

    (ii) He informed GS that legal advice had been obtained by the claimant and other engineers to confirm this.

    (iii) He did not want to be doing installation work crawling around under trailers.

    (iv) He has a poorly knee and hip and work may worsen these conditions but notwithstanding that, the reason he will not undertake the installation work is because he has not agreed with it and it is not within the framework of his existing contract.

    (v) As for the training itself he had by that stage had advice to either do it under protest or don't do it at all because of Section 2.2 of his employment contract (see above).

    (vi) He considered that the instruction to undertake the training was not reasonable because it was training for a job that he had not agreed to do.

    (vii) The claimant also noted that the company had been in dispute about this for *"coming on to a year now and I assumed that we will plod on until further disciplinary action and sackings take place, then we will be going to court. It's not just me, engineers all over the company are getting legal advice and the company is doing nothing".*

69. GS asked the claimant if there was anyway of stopping the process from "ending badly" and the claimant replied that the respondent should take "all

substantial legal advice". The claimant also noted that he had told MG when he first joined the respondent that he had left his previous role because he did not want to do installation work and that he had been promised that he would not have to do installation work with the respondent.

70. GS noted that the respondent's position was that the changes were only minor changes, the claimant replied, *"how can you change a third of my working life to a role I don't want to do?".* The claimant's reference to a third of working life was consistent with the information provided by MG and GW at the meeting in January 2019.

71. GS then clarified with the claimant that he had been informed that his actions may result in disciplinary action. The claimant confirmed that to be the position. GS asked if the claimant would consider attending the training if it was rearranged and the claimant replied that he would not. At that stage GS informed the claimant *"I have no choice other than to dismiss you with immediate effect".*

72. The meeting finished with the following exchange.

> KS *You'll find you can't dismiss me if you haven't given me the opportunity to attend the training again when you haven't even rebooked it?*
>
> *GS You just told me that you wouldn't be attending the training if I rescheduled it; correct?*
>
> *KS Yes*
>
> *GS I'll get someone to dekit you, I've been doing this a long time.*
>
> *KS OK, I'm sure you have.*

73. The claimant's response of "yes" to GS's question is ambiguous. It could mean that the claimant agreed he had just told GS that he would not attend the training. Alternatively, it could be confirmation that he would not attend the training if it was rescheduled. Similar (unintentional) ambiguous answers were provided by the claimant in the course of his cross examination by Mr Anderson. On those occasions either the Tribunal or Mr Anderson obtained clarification, and the result was that the claimant made clear that he was agreeing that he had said something earlier. We find that when the claimant answered "yes" during the exchange at the end of the appeal meeting he was confirming to GS that he had told him earlier that he would not attend the training. GS did not address the ambiguity.

74. The claimant's evidence is that GS had stood up, turned away from the claimant and was walking out of the room when he made his final comments. We accept the claimant's evidence on this point. The evidence is consistent with the content of an email from the claimant dated 22 August 2019 (page 259) and with GS's failure to ask the claimant to clarify his response (as noted above).

75. GS wrote to the claimant by letter dated 22 August 2019 to confirm his decision.

76. In his email dated 22 August 2019 the claimant asked whether his dismissal was a summary dismissal or whether notice would be paid. He also asked whether he had a right of appeal and if so, to whom the appeal should be made. The respondent's letter of 22 August 2019 answered these points, confirming that the claimant was not entitled to any payment in lieu of notice, that the dismissal was immediate, the decision was final and that there was no further right of appeal. GS was the author of that letter.

77. GS made the decision to dismiss the claimant. He was not acting under instruction from other executives of the respondent. For example, NE told us (and we accept that) he was taken by surprise at the claimant's dismissal. He described GS's decision to dismiss the claimant as *"Leftfield."*

The claimant's condition of Osteoarthritis.

78. One of the complaints raised by the claimant is a failure to make reasonable adjustments under Section 20 Equality Act 2010. The respondent denies that the claimant has a disability for the purposes of EQA and it is necessary therefore that we make findings of fact in relation to the claimant's condition.

79. The claimant was first diagnosed with Osteoarthritis in his left knee on or about 17 July 2019 when he attended his doctor at the request of Nathan Eggleston.

80. The medical record with the confirmation of this diagnosis on 17 July 2019 is the only medical record in the bundle. There are no other relevant medical records because the claimant has not previously attended his doctor in relation to this condition.

81. Whilst the claimant's work as a Field Service Engineer is less physically demanding than the role of Installation Engineer, the Service Engineer role required the claimant to undertake significant amounts of driving, to kneel for short periods and to have a reasonable amount of mobility. The claimant was not prevented from carrying out these tasks over the period of his employment and did not need to see his doctor about any pain or complications when carrying out this role for many years.

82. The claimant experiences pain and discomfort when he has:

    (i) Walked for more than half a mile or so;

    (ii) Driven for significant periods of time (more than 2 hours without a break);

    (iii) Been kneeling for more than few minutes.

83. When the claimant experiences pain and discomfort he controls this by use of non-prescription drugs, including Ibruprofen tablets and gel.

84. The claimant did have some time off during his employment with the respondent because of pain in his knees. However, this followed a fall suffered by the claimant when he landed heavily on his knees. There is no other time off work due to pain in his knees.

85. The claimant's current employment is a food factory where he is engaged in physically demanding role, lifting large and heavy food stuffs into large mixing and chopping bowls. Whilst working, the claimant is on his feet about 70% of his working time. The role does not require the claimant to kneel.

The claimant's pay rise in 2019.

86. A pay rise of up to 3% was provided to engineers in July 2019. The claimant did not receive this full pay rise. Instead he was awarded a 1% pay rise.

87. The claimant raised a grievance about this on 5 August 2019 but was dismissed before that grievance was resolved. We find that the claimant was awarded a lower pay rise because he had raised his concerns and objections in 2018 and 2019 about the change in contractual working hours and the change to his role.

Engineers 1,2,3 and 4

88. The respondent provided evidence about how 4 engineers had been treated in the change exercise in 2019 and including the respondent considering reasonable adjustments to assist engineers in overcoming disadvantages caused by their disabilities. The evidence was provided on an anonymised basis although as noted above, we soon identified the names of 2 of these engineers and we heard the evidence of SJ.

89. We make the following findings, relevant to the claimant's case:-

(i) Had the claimant's employment continued it is likely that the respondent would have investigated further the claimant's claimed disability and the possibility of assisting him in carrying out the technical hardware role, through reasonable adjustments. We accept the respondent has carried out similar exercises with other employees.

(ii) SJ is a less experienced engineer than the claimant. SJ was an installation engineer, whose role was changed by him being required to undertake service duties. The process required (and enabled) SJ to become more skilled and knowledgeable about the relevant systems. He did not have the same knowledge and experience as the claimant, particularly on service tasks. When carrying out service tasks he would sometimes replace systems/kit (effectively re installing a system or part of a system) even though the claimant may not have had to, in those same circumstances.

(iii) Adjustments had been made to SJ's work. He was not required to carry out tasks working under trailers and other tasks which he was less able to do because of a back condition. Whilst SJs evidence was that many service tasks require the same physical movements as installation

tasks, we prefer the evidence of the claimant about the impact on his work that the changes to the role would have on him. Whilst he did sometimes have to change (and therefore install new kit) this was not common and when it did happen it was often just one component which did not require him to work under trailers for long periods. We find the claimant accurately described the differences between the roles in the meeting on 31 January 2019 (see particularly 43(xiii) above).

Mitigation of loss

90. The claimant was dismissed without notice on 24 August 2019. By 21 November 2019 he has applied for and obtained alternative employment in a food production factory. The claimant's employment there continues.

91. The claimant does not like working there. It is hard manual work and it does not pay nearly as well as his employment with the respondent paid. The claimant has been unable to obtain work in the local Carlisle area that would apply the skills he has and would pay better. The claimant has told us (and we accept) that skilled employment opportunities in the Carlisle area are limited. Some employment opportunities had been identified by the respondent and were included in the bundle at 433-440. Mr Anderson referred the claimant to one of these particularly, an engineering position servicing X ray machines. We accept the claimant's evidence that he was not skilled to undertake the roles that the respondent had identified and it was reasonable that he did not apply for the roles.

92. The claimant could have found different employment that might have paid slightly more but that would also have been low paid, low skilled work and he has decided that it is not worth moving from the role he has until he finds a role which pays better and uses his skills.

93. The claimant did not claim any state benefits following his dismissal by the respondent.

Submissions

94. Mr Anderson and the claimant both provided us with a written submissions document. We considered carefully the content of both documents and do not propose to repeat all submissions made. We thank both for their submissions.

95. Mr Anderson referred us to case authorities, some well-known and some less so which we considered, and we refer to a number of these below.

96. Mr Anderson noted that this is an unfair dismissal complaint. It is not a breach of contract complaint. The issue as to whether or not the changes to the claimant's role were outside of his contract did not in itself determine the fairness of the dismissal. Mr Anderson referred us to **Farrant v. Woodroffe School [1998] ICR 184** (see below) in support of this submission.

97. That whilst it is unusual for a sanction to increase on appeal it was a possibility in rare but appropriate circumstances such as here. Mr Anderson cited **McMillan v. Airedale NHS Foundation Trust [2015] ICR 747** in support (see below).

98. Mr Anderson also submitted that there should be significant reductions (down to nil) to an award for unfair dismissal on the basis that

    (i) there was an overwhelming likelihood the claimant would have been dismissed in any event at the same time or shortly afterwards as there was clearly no way he would comply with the instruction given to attend training

    (ii) The claimant's contributory conduct - his steadfast refusal to undertake the training as instructed. This conduct was, in Mr Anderson's submissions, was the very definition of bloody mindedness which contributed 100% to his dismissal.

    (iii) The claimant's conduct in covertly recording the meeting on 24 January 2019. Whilst the respondent was not aware of the covert recording at any time during the claimant's employment a reduction was appropriate on just and equitable grounds.

99. In relation to the claim of a failure to make reasonable adjustments Mr Anderson noted that the claimant's condition appears to have had very limited impact on the claimant's day to day activities and thus the claim fails on the basis that, at the relevant time, the claimant's impairment did not amount to a disability.

100. The claimant's submissions included the following:-

    (i) throughout his working life the claimant had worked flexibly which included working weekends and that it was the changes to contractual obligations that concerned him.

    (ii) That the claimant was far more knowledgeable and experienced than Scott Jones and the service work he carried out did not involve the levels of physical effort (particularly service work under trailers) that SJ described.

    (iii) That the changes the respondent wanted to make to the claimant's role were not minor. They were significant and required agreement with him

    (iv) At the appeal GS ignored ACAS guidelines and the respondent's own procedures.

    (v) That whilst his current role is physically demanding, it does not require him to kneel.

The Law

Unfair dismissal, misconduct.

101. In a case such as this, a respondent bears the burden of proving, on the balance of probabilities, the reason why it dismissed the claimant and that the reason for dismissal was one of the potentially fair reasons stated in s98(1) and (2) ERA. If the respondent fails to persuade the Employment Tribunal that it had a genuine belief in the reason and that it dismissed him for that reason, the dismissal will be unfair.

102. The reason for dismissal is a set of facts known to the respondent or a set of beliefs held by it, which caused it to dismiss the claimant.

103. If the respondent does persuade the Employment Tribunal that it held that genuine belief and that it did dismiss the claimant for one of the potentially fair reasons, the dismissal is only potentially fair. Consideration must then be given to the general reasonableness of that dismissal, applying section 98 (4) ERA.

104. Section 98 (4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case.

105. In considering the question of reasonableness of a dismissal, an Employment Tribunal should have regard to the decisions in **British Home Stores v. Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v. Jones [1993] ICR 17 EAT; Foley v. Post Office, Midland Bank plc v. Madden [2000] IRLR 827 CA** and **Sainsbury's Supermarkets v. Hitt [2003] IRLR 23** ("Sainsbury)

106. In summary, these decisions require that an Employment Tribunal focuses on whether the respondent held an honest belief that the claimant had carried out the acts of misconduct alleged and whether it had a reasonable basis for that belief having carried out as much investigation in to the matter as was reasonable. A Tribunal should not however put itself in the position of the respondent and decide the fairness of the dismissal on what the Tribunal itself would have done. It is not for the Tribunal hearing and deciding on the case, to weigh up the evidence and substitute its own conclusion as if the Tribunal was conducting the process afresh. Instead, it is required to take a view of the matter from the standpoint of the reasonable employer.

107. The function of the Tribunal is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses. This band applies not only to the decision to dismiss but also to the procedure by which that decision was reached.

108. We also note (and have taken account of) the ACAS Code of Practice on Disciplinary and Grievance Procedures and the ACAS Guide on Discipline and Grievances at work 2015. We note particularly the following extracts:-

Under the Code

> *"21. A first or final warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences of further misconduct or failure to improve performance within the set period following a final warning. For instance, that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority.2*

> *"26 where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing."*

From the Guide

> *The opportunity to appeal against a disciplinary decision is essential to natural justice and appeals may be raised by employees on a number of grounds for instance new evidence, undue severity or inconsistency of the penalty. The appeal may either be a review of the disciplinary decision or a rehearing depending on the grounds of appeal.*
>
> *An appeal must never be used as an opportunity to punish the employee for appealing the original decision and it should not result in any increase in penalty as this may deter individuals from appealing."*

109. When determining compensation for unfair dismissal, employment tribunals must apply s123 ERA

> *"s123(1) ….the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*
>
> *….*
>
> *S123(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

110. Compensation is reduced under just and equitable principles under s123(1) in 2 broad categories of cases:-

(1) Where the employer can show that the employee was guilty of misconduct which would have justified dismissal, even if the employer was not aware of this at the time of the dismissal.

(2) Where it is just and equitable to apply a "Polkey" reduction (applying the case of **Polkey v. AE Dayton Services Limited [1988] AC 344)**.

Both categories potentially apply here.

111. Provisions providing for an adjustment to the basic award are at section 122(2) ERA which requires a tribunal to reduce the amount of a basic award where it is just and equitable to do so, having regard to the claimant's conduct before the dismissal.

Disability

112. The claimant claims he has a disability for the purposes of section 6 Equality Act 2010 (EQA). Section 6 provides as follows:-

(1) A person (P) has a disability if-

(a) P has a physical or mental impairment, and

(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.

113. S212(1) of the EQA defines "substantial" as meaning *"more than minor or trivial."*

114. We have also considered:-

(i) part one of schedule one to the EQA regarding the definition of disability.

(ii) The Secretary of States guidance on matters to be taken into account in determining questions relating to the definition of disability. (Guidance)

(iii) The EHRC Employment Code

115. We note from the materials above and from relevant case law:-

(i) That we are to apply this definition at around the time that the alleged discrimination took place; **Cruickshank v. VAW Motorcast Limited [2002] ICR 729;**

(ii) That we should apply a sequential decision-making approach to the test (see for example **J v. DLA Piper [2010] WL 2131720**, addressing the following in order

- did the claimant have a mental and/or physical impairment? (the 'impairment condition')
- did the impairment affect the claimant's ability to carry out normal day-today activities? (the 'adverse effect condition')
- was the adverse condition substantial? (the 'substantial condition'), and
- was the adverse condition long term? (the 'long-term condition').

This sequential approach was approved by the EAT in J v. DLA Piper (above).

(iii) the Guidance includes guidance on what "substantial" means – see part B of the Guidance – as well as a number of illustrative examples. This part notes that people with conditions sometimes modify their behaviour in order to manage their condition and that account should be taken of the degree to which a person can reasonably be expected to modify their behaviour "*When considering modification of behaviour it would be reasonable to expect a person who has chronic back pain to avoid extreme activities such as skiing. It would not be reasonable to expect the person to give up or modify more normal activities that might exacerbate the symptoms such as shopping or using public transport."*

(iv) EQA does not define what is meant by "normal day to day activities." Section D of the Guidance provides guidance on this term. The appendix to the Guidance provides "illustrative and non exhaustive" lists of factors which it would and would not be reasonable to regard as having a substantial and adverse effect on normal day to day activities. We note factors that WOULD be reasonable to regard as having such an effect include:-

- *Difficulty in going up and down stairs or gradients; for example because movements are painful, fatiguing or restricted in some way.*
- *A total inability to walk or an ability to walk only a short distance without difficulty for example because of physical restrictions, pain or fatigue.*

We note factors that WOULD NOT be reasonable to regard as having such an effect include:-

- *Experiencing some discomfort as a result of travelling, for example by car or plane for a journey lasting more than 2 hours;*
- *Experiencing some tiredness or minor discomfort as a result of walking unaided for a distance of about 1.5 kilometres or one mile.*

Contractual issues

116. We need to consider whether the proposed changes to the claimant's role were within the framework of the existing contract or whether the requests being made of the claimant fell outside of the current contractual terms. We note the following:-

(i) Changes to the methods of performing a job are likely to fall within existing contractual obligations (see for example **Cresswell v. Board of Inland Revenue [1984] ICR 508**)

(ii) The Court of appeal's judgment in the case of Haden v. Cowan . This case concerned an employee who was a quantity surveyor and for part of his employment carried out a role with a job title of *"regional surveyor, southern region."* His contract included the words *"He will be required to carry out, at the direction of the company, all and any duties which reasonably fall within the scope of his capabilities."* In its judgment, the Court of Appeal noted that the effect of these words " *was not to give the employer the right to transfer him from his job as regional surveyor to any job as a quantity surveyor in their organisation, but only to require him to perform any duties reasonably within the scope of his capabilities as regional surveyor."*

(iii) That employers, looking to rely on vague language within flexibility clauses are unlikely to be able to apply a generous interpretation of that language (see for example **Norman v. National Audit Office UKEAT/0276/14)**

117. We have considered the case of **Farrant v. Woodroffe School [1998] ICR 184.** This case concerned the dismissal of a laboratory technician (Mr Farrant) who refused to comply with instructions from his employer to provide technical support services within a wider range of subjects and setting than those he had been originally employed to do. Mr Farrant refused because, he said, the changes being imposed were outside of his existing contractual terms. Whilst the school denied this, they took Mr Farrant down of procedural route that included suspension, consideration of the position by the school committee (which the employee in question could address) and then ultimately a decision to dismiss Mr Farrant but providing him with contractual notice and an ability, during that notice period, to change his mind and agree the new duties (in which case notice of dismissal would be withdrawn). Mr Farrant refused to agree the changes and brought an unfair dismissal claim. The EAT judgment made clear that, when determining the unfair dismissal case, the Tribunal was right to focus on the statutory test for a fair dismissal (under section 98 ERA) ("Fairness Test") . The issue of whether or not the employer was entitled, within the applicable contractual terms, to instruct Mr Farrant to carry out wider duties was a factor that was relevant in applying the Fairness Test but was not in itself determinative. We note the following extracts from the EAT's summary at the end of its judgment (page 44 at H) *"where the claim is for unfair dismissal and the employer relies upon a refusal to obey an instruction as the reason for dismissal, the lawfulness of the instruction will be central to any question of constructive dismissal but of relevance to, not determinative of, the fairness of the dismissal."*

Increase of sanction on appeal.

118. In addition to considering the terms of the ACAS Guide on this point (see above) we have also considered the case of **McMillan v. Airedale NHS Foundation Trust [2015] ICR 747.** We note the following extract from the judgment of Underhill LJ (paragraph 71)

> *I believe that the general understanding among both employers and employees is that an employee's right to appeal against a disciplinary sanction is conferred for his or her protection, so that its exercise will not leave them worse off; and that view is strongly reinforced by the terms of the Acas Guide. (It is also reflected, though not made explicit, in the phraseology of paragraph 4.23 of the code, as Floyd LJ points out at para 55.) I do not believe that it is legitimate to construe the code, or to imply a term, so as to produce a result which is inconsistent with that understanding. If an employer wishes to have the right under its disciplinary procedures to increase the sanction on appeal it must be expressly provided for. There are, I believe, some employments in which such an express power is indeed conferred, and I can see nothing wrong with that in principle; but it is not the case here.*

Covert recording of meetings

119. The EAT's judgment in **Phoenix House Limited v. Stockman [2019] IRLR 160 (at para77-78) includes the following guidance:-**

> *We do not think that an ET is bound to conclude that the covert recording of a meeting necessarily undermines the trust and confidence between employer and employee to the extent that an employer should no longer be required to keep the employee. An ET is entitled to make an assessment of the circumstances. The purpose of the recording will be relevant: and in our experience the purpose may vary widely from the highly manipulative employee seeking to entrap the employer to the confused and vulnerable employee seeking to keep a record or guard against misrepresentation. There may, as Mr Milsom recognised, be rare cases where pressing circumstances completely justified the recording. The extent of the employee's blameworthiness may also be relevant; it may vary from an employee who has specifically been told that a recording must not be kept, or has lied about making a recording, to the inexperienced or distressed employee who has scarcely thought about the blameworthiness of making such a recording. What is recorded may also be relevant: it may vary between a meeting concerned with the employee of which a record would normally be kept and shared in any event, and a meeting where highly confidential business or personal information relating to the employer or another employee is discussed (in which case the recording may involve a serious breach of the rights of one or more others). Any evidence of the attitude of the employer to such conduct may also be relevant. It is in our experience still relatively rare for covert recording to appear on a list of instances of gross misconduct in a disciplinary procedure; but this may soon change.*

That said, we consider that it is good employment practice for an employee or an employer to say if there is any intention to record a meeting save in the most pressing of circumstances; and it will generally amount to misconduct not to do so. We think this is generally recognised throughout employment except perhaps by some inexperienced employees. This practice allows both sides to consider whether it is desirable to record a meeting and if so how. It is not always desirable to record a meeting: sometimes it will inhibit a frank exchange of views between experienced representatives and members of management. It may be better to agree the outcome at the end. Sometimes if a meeting is long a summary or note will be of far more value than a recording which may have to be transcribed.

Discussions and Conclusions

Issue One. Was the claimant disabled within the meaning of Section 6 Equality Act 2010 between December 2018 and August 2019?

120. We find that the claimant was not disabled. In reaching this conclusion we have considered the claimant's evidence about what he can and particularly what he cannot do and whether the Osteoarthritis in his knee adversely affects his ability to carry out normal day to day activities.

121. We accept that the claimant has a physical impairment – Osteoarthritis in his left knee – and did so at the relevant time.

122. We accept the claimant suffers some pain and discomfort when walking and travelling (and did so at the relevant time). He suffers some pain and discomfort when walking for more than half a mile, when driving long distances and also when kneeling for more than a few minutes. The pain and discomfort suffered is not so significant that it requires (or required) him to seek medical assistance.

123. Whilst walking and travelling are normal day to day activities, the extent of the claimant's restrictions on carrying these out do not amount to substantial and adverse impacts on his ability to walk or travel. In reaching this decision we have taken account of the Guidance as noted above including the illustrative examples referred to at 110(iv) above. Those examples are perhaps "outliers"- obvious examples of what would and would not be substantial adverse effects on normal day to day activities. The claimant's position is somewhere in between the extremes set by the examples.

124. We have also taken into account that the claimant did not seek any medical diagnosis or assistance before July 2019 even though he had an active role requiring him to drive long distances and to be mobile.

125. Having considered all of the evidence, on balance we do not find the claimant's impairment of Osteoarthritis had a substantial adverse impact on his ability to carry out normal day to day activities.

126. Whilst we have understanding that the claimant did not at the relevant time have a disability for the purposes of the Equality Act it is important that we

also note that we find the claimant's concerns about the discomfort that he considers he would suffer or endure if required to spend long periods of time in a confined, uncomfortable and dirty place under an HGV trailer to be genuine. The claimant did not want to carry out that role. The claimant genuinely believed that he had a reduced capacity to carry out the role including because of his age (see his comments at 43(xii) above). However, and as already noted, the claimant did not have a disability.

Issues 2-8. As we have found that the claimant was not disabled, we have not reached conclusions on issues 2 to 8.

Issue 9. What was the principle reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996?

127. The respondent dismissed the claimant because the claimant unreasonably refused to attend training. This is a reason relating to the claimant's conduct.

Issue 10. If so, was the dismissal fair or unfair in accordance with ERA Section 98(4) and in particular did the respondent in all respects act within the so-called band of reasonable responses?

128. We have broken this down into the following matters for our consideration and determination:-

(i) Whether the respondent genuinely believed the claimant had committed misconduct; Yes, we find that GS genuinely believed the claimant unreasonably refused to attend training.

(ii) Whether there were reasonable grounds for that belief; No. GS had not carried out any reasonable investigation and considered the claimant's position from a sufficiently impartial perspective. Even before the hearing, he decided that the changes being introduced to the claimant's role were minor and that the claimant was being unnecessarily difficult in not complying with the respondent's requirements.

(iii) At the time the belief was formed whether the respondent had carried out a reasonable investigation; No, GS gave no thought to the claimant's position. GS reached his view before even speaking with the claimant and gaining a proper understanding of the position. That position was accurately identified in the meeting of 24 January 2019 when it was accepted that the claimant could spend many days working under trailers and that around a third of his working time would be affected. GS had not obtained sufficient information (through a reasonable investigation) about the extent that the role change would impact the claimant. He had not obtained sufficient information to be able to reach a fair decision about whether the claimant's refusal was reasonable.

(iv) Whether the respondent followed a reasonably fair procedure; The respondent did not. Even accepting that the procedure up to and including the issue of a formal written warning was fair, what then happened was that the claimant was dismissed by GS at the appeal hearing. This increase in sanction is contrary to the ACAS guide. Whilst we accept that it is in some circumstances possible for an employer to fairly increase a sanction on appeal, those circumstances will be rare and will be where there is an appeal process that makes clear that a possible outcome of an appeal is a more serious sanction.

(v) Whether the dismissal was within the band of reasonable responses. It was not. We accept Mr Anderson's submissions that the issue as to whether the respondent was attempting to unilaterally apply a contractual change is not the determinative issue here. However, it is relevant that the changes being imposed were significant (whether contractually allowed or not). The claimant's concerns and objections to those changes were clearly and reasonably argued by him throughout the period from end December 2018. The concerns and objections were not properly considered and addressed with him. This includes the dismissal hearing and the actions of the decision maker(GS). Further, the respondent had made clear that it was contemplating the imposition of the changes through a process that would include warnings. See particularly the comments of GS at the meeting on 24 January 2019 – noted at para 43(xiv) above. This approach was supported by the action subsequently taken by NE of imposing a formal written warning. No reasonable employer would have suddenly and without notice, departed from that approach in the course of an appeal hearing and summarily dismissed the claimant.

Issue 11.1. If the claimant was unfairly dismissed and the remedy is compensation, what adjustment if any should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, and/or would have been dismissed in time anyway?

129. We have decided that there is some but very limited possibility that the matter would have ended in dismissal anyway.

130. We are satisfied that the claimant had the benefit of legal advice and from more than one source. We note that the claimant informed GS in the appeal hearing that he had received two pieces of advice in relation to the training:-

(i) To undertake the training under protest;

(ii) Not to undertake the training because it would compromise his position in relation to Clause 2.2 of his contract.

131. Had the claimant been told that the respondent would dismiss him if he did not undertake the training then the claimant was very likely to have continued

to register his protest but undertaken the training in any event. That accorded with advice that had been given to him. We assess the likelihood of this NOT happening as 20%.

132. Issue 11.2 Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA Section 122(2) and if so, to what extent?

133. We have decided that it is not just and equitable to regard the claimant's conduct before his dismissal as blameworthy. The claimant had reasonable, genuine and significant concerns about what was happening to his employment. There was no meaningful consultation, the decision to effect the change having already been made in December 2018. The respondent, unreasonably and erroneously described the changes as minor.

134. The claimant attempted to negotiate with the respondent in relation to his role and his contractual rights. As with many employment situations, particularly where there is no collective consultation mechanism, the claimant was in a weak bargaining position in this negotiation in comparison with his employer.

Issue 11.3 Did the claimant by blameworthy or culpable actions cause or contribute to dismissal to any extent and if so, by what proportion at all would it be just and equitable to reduce the amount of any compensatory award pursuant to ERA Section 123(6),

135. Our conclusion on this issue is the same as with 11.2 above.

136. As for the issue of the covert recording (and the assessment of a compensatory award on just and equitable grounds in accordance with section 123(1) ERA), having regard to our findings of fact as set out at paragraph 42, we consider that it is just and equitable not to take account of this in assessing the compensatory award.

Issue 11.4. Any increase or decrease be made to the compensation payable to reflect a failure by either party to comply with the ACAS code of practice on discipline and grievance procedures pursuant to Section 207A Trade Union and Labour Relations (Consolidation) Act 1992?

137. The decision to summarily dismiss the claimant was new disciplinary action even though it was made at an appeal hearing. The employee made clear that he wished to exercise a right of appeal if it was permitted (letter of 22 August 2019 – see para 76). The claimant should have been allowed a right of appeal against his dismissal. We conclude that it is just and equitable to increase an award made to the employee by the maximum 25%.

Remedy.

Basic Award

138. The parties have agreed that the basic award is calculated as 525 x 12 x 1.5 = £9,450.00.

Compensatory Award

139. The claimant was dismissed summarily without notice on 21 August 2019. He sought, applied for and obtained alternative employment with a start date of 25 November 2019 and has remained in the same employment. We have no criticism of the claimant's actions to mitigate his loss.

140. We have calculated the value of a week's pay and benefits under his employment with the respondent to be as follows.

(i)	Net weekly basic pay	£415.62
(ii)	Employer pension contributions	£ 18.14
(iii)	Other benefits (motor car and private health)	
	We have used the amount stated on theP11D form (value of benefits for tax purposes) as noted in the respondent's Counter-schedule at page 97	£118.77
	Total:	£552.53

141. Losses for period 1 (22 August 2019 to 25 November 2019). This is a period of 13 weeks) £552.53 x 13 = £7,182.89

142. Losses for period 2 (25 November 2019 to 9 September 2021 (final date of hearing). The claimant was in employment and earned £300.63 per week net. Therefore, the claimant had a weekly ongoing loss of £251.90.

143. Period 2 is a period of 93 weeks, therefore the loss is £251.90 x 93= £23,426.70.

144. Anticipated Future Losses. We consider that the claimant will have ongoing losses for a further 6-12 months. We anticipate that the claimant will be able to find alternative employment after 6-12 months that will pay him at (or closer to) the amounts he was earning with the respondent. Our decision is that it is fair to calculate anticipated future losses over a period of 39 weeks (period 3). Losses over this period therefore 39 x £251.90 = £9824.10

145. Losses for periods 1,2 and 3 is as follows:- 9450 + 23,426.70 + 9824.10 = £42,700.80

"Polkey" Reduction

146. Applying this 20% reduction leaves £34,160.64

147. Applying the uplift under Section 207A Trade Union and labour Relations (Consolidation) Act 1992 at 20% provides 6832.13 + 34160.64 = £40,992.77

148. Add an amount to compensate for loss off statutory rights - £500

Application of the Statutory Cap

149. We calculate the statutory cap to be the claimant's basic pay plus the employer's pension contributions (applying **University of Sunderland -v- Drossou [2017] ICR D23**) and therefore £560.21 (a week's pay, gross) plus £18.14 = £578.35 x 52 = £30,074.20

Summary of awards.

Basic Award	**£ 9,450.00**
Compensatory Award	**£30,074.20**

Application of PENP – to compensatory award only.

150. The first 12 weeks of the compensatory award will be categorised as Post Employment Notice Pay (PENP) and subject to deductions for income tax and national insurance (560.21x12)

£6722.52

151. The remainder will be payable without deductions of tax

(30,074.20-6722.52) **£23,351.68**

Order for payment.

152. The respondent is ordered to pay to the claimant

(i) A Basic award of **£9450**

(ii) A Compensatory award of **£30,074.20**, the first **£6722.52** of which is subject to deductions for tax and the remaining **£23,351.68** is payable without deductions for tax.

153. We are satisfied that the recoupment provisions do not apply.

Employment Judge Leach

7 October 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 October 2021

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2413669/2019**

Name of case: **Mr K Stanley** v **Microlise Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 12 October 2021

"the calculation day" is: 13 October 2021

"the stipulated rate of interest" is: 8%

For the Employment Tribunal Office