EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Miller	v	Rentokil Initial UK Ltd t/a Rentokil Pest Control

Heard at:	Reading by CVP In private	**On**: 2, 3 and 4 August 2021 and **On**: 5 August 2021 in private

Before: Employment Judge Hawksworth
Mr A Kapur
Ms HT Edwards

Appearances
For the Claimant: Mr I Browne (counsel)
For the Respondent: Mr S Sim (senior litigation consultant)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant's complaint of failure to make reasonable adjustments succeeds in respect of the failure to offer the claimant a service administrator role.

2. The claimant's complaint of discrimination arising from disability succeeds.

3. The claimant's complaint of unfair dismissal is well-founded and succeeds.

4. The respondent is ordered to pay the claimant the sum of £14,445.43 comprising:

    4.1. £2,698.87 in respect of financial losses (of which £232.91 is interest);
    4.2. £9,564.06 for injury to feelings (of which £1,564.06 is interest);
    4.3. a basic award of £1,309.50;
    4.4. a compensatory award of £873.00.

REASONS

Claim, hearings and evidence

1. The claimant was employed by the respondent from 11 April 2016 until his dismissal on 13 March 2019.

2. In a claim form presented on 12 July 2019 after a period of Acas early conciliation from 14 May 2019 to 14 June 2019, the claimant made complaints of unfair dismissal, failure to make reasonable adjustments, and discrimination arising from disability. The respondent presented its response on 19 September 2019 and defended the claim.

3. There was a preliminary hearing before Employment Judge Alliott on 6 May 2020 at which the issues were identified and case management orders were made for the parties to prepare for the final hearing.

4. The final hearing took place by video hearing (CVP).

5. There was an agreed hearing bundle with 422 pages. We are grateful to the respondent's representative for the carefully prepared bundle which had the pages in the paper copy and pdf copy aligned. This assisted considerably with the conduct of the hearing.

6. After preliminary matters had been dealt with, we took the first morning of the hearing for reading.

7. All the witnesses had exchanged witness statements. We heard witness evidence from the claimant. We then heard evidence from the following witnesses for the respondent:

    7.1 Mr Hugo Coventry

    7.2 Mr Paulo Honrado;

    7.3 Mr Steven Willis;

    7.4 Mr Michael Green.

8. Both parties' representatives made oral closing submissions.

9. Judgment was reserved.

The Issues

10. The issues for us to decide were set out in an agreed list of issues as follows (numbering from the agreed list has been retained).

<u>*Jurisdiction*</u>

1. Were all of the Claimant's discrimination claims submitted in time?

2. Was there a series of discriminatory acts or omissions ending with the Claimant's dismissal?

3. If any of the Claimant's discrimination claims were submitted out of time, is it just and equitable to hear the claims?

Disability

4. The Claimant has been diagnosed with Multiple Sclerosis. The Claimant has had this impairment since April 2016. It is agreed that the Claimant is a disabled person for the purposes of the Equality Act 2010.

Discrimination arising from Disability (Section 15 Equality Act)

5. Did the Respondent subject the Claimant to unfavourable treatment by dismissing him?

6. Was the unfavourable treatment because of something arising in consequence of the Claimant's disability? The Claimant says the "something arising" was his inability to work his substantive role.

7. Can the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

Reasonable Adjustments (Section 20 Equality Act)

8. Did the Respondent have a Provision, Criterion or Practice ("PCP") of requiring field staff to work from 8am to 5pm?

9. Would this PCP have put employees with the Claimant's disability at a substantial disadvantage?

10. Did this PCP put the Claimant at a substantial disadvantage?

11. Did the Respondent make adjustments? Were the adjustments sufficient?

12. The Claimant says the Respondent could have made an adjustment so that he worked from 8am to 3pm rather than 8am to 5pm. Was this a reasonable adjustment that would have mitigated or avoided the substantial disadvantage caused by the PCP?

13. Did the Respondent have a PCP of requiring field staff to work in their substantive roles?

14. Would this PCP have put employees with the Claimant's disability at a substantial disadvantage?

15. Did this PCP put the Claimant at a substantial disadvantage?

16. Did the Respondent make adjustments? Were the adjustments sufficient?

17. The Claimant says the Respondent could have made an adjustment to allow him to work in an office based role, such as the Service Administrator Role. Was

this a reasonable adjustment that would have mitigated or avoided the substantial disadvantage caused by the PCP?

Unfair Dismissal (section 98 Employment Rights Act 1996)

18. What is the principal reason for dismissal? The Respondent's stated reason for dismissal was capability.

19. Did the Respondent follow a fair procedure before dismissing the Claimant?

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

Remedy

21. If one or more of the claims are upheld, what would an appropriate remedy be?

Findings of fact

11. We make the following findings of fact based on the evidence we heard and read. Page references are to the agreed bundle. We heard a lot of evidence during the hearing, and we do not attempt to include everything here. We include here the facts which we have found most useful to assist us to decide the relevant issues.

12. On 11 April 2016 the claimant started work with the respondent as a pest control technician. This is a 'field' role; the claimant was required to attend customer premises and carry out inspections, maintenance and treatment for pests (page 62). He was allocated a region known as a 'patch' and was responsible for customers within his patch, including existing commercial customers with ongoing service contracts, and one-off residential customers. His working hours were 8am to 5pm. The claimant's role often required him to work at heights on ladders.

13. The claimant's role also required him to carry out some administrative functions such as reporting in writing to clients, completing accurate reports of calls, maintaining accurate records of daily activity through daily work lists and carrying out stock takes (page 62).

14. In March 2017 the claimant was diagnosed with multiple sclerosis (MS). His GP recommended amended duties until 12 October 2017. The respondent held regular meetings with the claimant to discuss his health and referred the claimant to occupational health (OH). An OH report dated 4 May 2017 said that he was managing well at the moment, but recommended that reduced hours (8am to 3pm) should be trialled for a 2 week period (page 73).

15. The claimant's hours were reduced from his standard hours of 8am to 5pm to reduced hours of 8am to 3pm on a trial basis (page 66). The respondent also reduced its expectations of the claimant during this period, from a productivity target of 8 tasks per day to 6 tasks per day. This 25% reduction matched the 25% reduction in hours (page 82). He was working fewer

hours, so he could not complete as many tasks. The reduction of the productivity target did not constitute a reduction in the respondent's expectation of the claimant's speed of work or productivity. He was still expected to work at the same speed during the hours he worked.

16. On 24 May 2017 the claimant had a meeting with Hugo Coventry who was at the time a Senior Local Operations Manager. It was agreed that the reduced hours trial would be extended (page 78). Mr Coventry said that if the reduction became permanent, the respondent could make arrangements which would include adapting pay (page 76).

17. The claimant struggled to meet his productivity targets and the respondent received some complaints from clients about the claimant missing follow up visits or carrying them out late. The claimant's Team Leader, Paulo Honrado, spoke to the claimant about this on 20 June 2017. The claimant emailed Mr Honrado later that day and said he thought his reduced hours were a problem for the respondent and he had decided that he would go back to his normal working hours. He said he would consider his future with the respondent as he felt his illness was an issue for the respondent (page 79).

18. By 19 July 2017 the claimant's performance or 'state of service' was at 77.7% of expected performance. He had had 31 complaints, mostly about missed follow up visits. This significantly exceeded the respondent's expectation of maximum complaints of 3 per quarter (page 85).

19. At around this time, Mr Coventry rezoned the claimant's patch. Rezoning means removing some customers from a technician's patch to lighten their workload. Mr Honrado also asked the other members of the claimant's team to pick up extra customer visits to assist the claimant. He put together a 'helping rota' with another technician allocated to assist the claimant four days a week (page 86 and 87).

20. The claimant was on sick leave from 27 July to 21 August 2017 (page 66).

21. After the claimant returned to work he remained on reduced hours. He fainted while at a client's premises on 14 September 2017 (page 96).

22. The claimant was referred to OH again and a report produced on 25 Sept 2017 (page 98). The OH report recorded that the claimant had a higher workload than average because of the backlog of cases which arose during his sickness absence. The OH physician said that in his opinion the claimant was now fit to perform his normal hours and normal role of Pest Control Officer without adjustment or restriction. However, he said that a high workload could adversely affect his MS, and therefore he would advise limiting his workload to that of the average Pest Control Officers (pages 98 and 99).

23. The claimant met with Mr Honrado on 11 October 2017 to discuss this OH report. The claimant's hours and daily targets were returned to normal (page 103).

24. In February 2018 the claimant was provided with a wheeled bag to assist him to carry his tools.

25. From 1 March 2018 Steven Willis took over from Mr Coventry as the Senior Local Operations Manager with responsibility for the claimant.

26. On 17 April 2018 the claimant was asked to attend a meeting with another manager to discuss his timekeeping. It was noted that he had been on productivity alerts 11 times and was generally underperforming in his job role. It was recorded that he owed the company 110 hours from unauthorised late starts and early finishes between October 2017 and April 2018 (page 132). The claimant was asked to work an additional hour each day to pay back these hours (page 132).

27. On 19 April 2018 the claimant met with Mr Willis to discuss working at height issues. He had been issued with a shorter two step ladder because of concerns about him working at height. However, the ladder was too short for him to access some areas such as ceiling voids. During the discussion the claimant told Mr Willis that due to spasms he may not always be able to climb a ladder safely. Mr Willis agreed to investigate whether a suitable replacement ladder was available and asked the claimant to visit his GP to obtain advice on ladder use (page 133). There was also an issue about the weight of the ladder, and a lighter ladder was provided to the claimant in August 2018 (page 167).

28. The claimant had another period of sickness absence from 16 May 2018 to 16 June 2018. He had a return to work meeting with Mr Honrado on 19 June 2018 (page 138).

29. On 22 July 2018 the respondent received a letter from the claimant's GP. It said that the claimant's symptoms day-to-day were very unpredictable, but could on occasion be severely debilitating. It said he had no major recent flares but 'he has been coming into the surgery more frequently with symptoms such as muscular weakness and aches and sometimes swelling of his joints which can make it difficult for him to work'. It said he was requiring daily medication to prevent muscular spasms which can be very painful (page 149).

30. The claimant had another meeting with Mr Willis on 10 August 2018 (page 160). On 22 August 2018 the claimant attended an investigatory meeting under the disciplinary procedure, to investigate allegations of bad timekeeping, unsatisfactory attendance and failure to work contracted hours. The meeting was conducted by Mr Willis (page 163). The claimant said he had been starting and finishing his working day early because of his condition and because the spasms are worse later in the day. He said he had not told his manager about the hours he was working. Mr Willis said that the claimant had to inform the respondent if he wanted to do different hours, saying, 'We can discuss and organise this formally'. The claimant replied that this was fair.

31. On 28 August 2018 Mr Willis made further reductions to the claimant's patch to make his workload more manageable for him. After these reductions the claimant's workload was around 19.5% lower than average (page 237).

32. On 29 August 2018 another OH report was received (page 172). In response to a question in the referral about whether temporary or permanent restrictions were required, the OH physician said:

    > "I believe Mr Miller should be restricted from working at heights. He reports spasms which could make it difficult to maintain his balance whilst on ladders. However, he is able to manage using a stepladder with appropriate handles. I would also restrict him from working fulltime and reduce his hours to 08:00 to 15:00 on a permanent basis with an associated decrease in his expected routines to six per day. He is also likely to require restrictions to driving of up to one hour continuous driving without a break."

33. On 8 September 2018 the claimant was asked to attend a disciplinary hearing (page 182). He was issued with a first written warning for timekeeping. The letter confirming this was sent to the claimant on 10 September 2018 (page 191). The claimant was told that he had to comply with all company policies, and must ensure that his time keeping improved and that he worked his contracted hours of 8.00am to 5.00pm.

34. A welfare meeting to discuss the OH report of 29 August 2018 took place on 17 September 2018 with the claimant, Mr Willis and a member of the respondent's HR team (page 194). There was a discussion about working at heights. The claimant confirmed that he needed ladders to access lofts and ceiling voids. He said there was the odd occasion where his right leg started to shake. He said that around 40% of his working time was working at height. We accept that this was broadly accurate.

35. In the same meeting there was a discussion about the OH recommendation for permanent reduced hours. The respondent's HR manager said that a reduction in working hours and a reduction in targets could be considered, but that working at heights was the area of concern. The claimant said that he liked to have a ladder with a rail in case he was to lose his balance or if his 'leg goes or something stupid like that' when he was up a ladder.

36. The respondent asked the OH advisor for clarification on a number of points including working at heights (page 214). A letter from the OH advisor dated 25 September 2018 said that the claimant should be restricted from working at heights due to deteriorating problems in his limbs (page 213). It said that he had reported spasms, pain and fatigue which meant that carrying, climbing and working on ladders was likely to be unsafe. However, he was still able to work on a step ladder with handles. The doctor said that if there was a further deterioration in his health, 'a risk assessment to confirm that he is safe to continue climbing, using and carrying the step ladder' would be recommended.

37. The doctor also suggested that reasonable adjustments could include working on jobs below head height or working with a colleague who could undertake any working at height.

38. On 18 October 2018 the claimant fell twice at work.

39. Further welfare meetings took place on 19 October 2018 and 8 November 2018 (page 219). With the claimant's permission, the respondent spoke to the claimant's specialist MS nurse, and she sent a letter dated 21 November 2018 which said that the claimant's

> "MS symptoms have rapidly progressed since his diagnosis and he is now using a walking stick…[He] experiences spasms in his right leg, especially at the end of the day when he tries to relax. His legs can give away without any warning and he has had few falls within the last two months."

40. The letter concluded by saying that the specialist nurse strongly supported the request for adjustments at work. In her opinion he was still able to work (pages 253 and 221).

41. From 12 November 2018 the claimant was restricted from working at height. The respondent asked a colleague to accompany the claimant on site visits and the colleague carried out any work at height which was required (page 220).

42. Another OH report was received on 5 Dec 2018 (page 229). The report said that due to his condition, the claimant would require reasonable adjustments. In addition to the current restrictions on working at heights, it was recommended that the claimant work earlier shifts to avoid fatigue and that the number of calls/jobs that he was allocated to do within a shift was reduced by at least 25%. The OH advisor explained, "this is because Mr Miller's MS symptoms will make him relatively slower at executing his tasks at work relative to an unaffected peer." We accept that this was a reference to a further reduction in workload, not to the reduction which had already been made. This is because of the wording of the OH report which is a recommendation that the number of calls/jobs 'is reduced by at least twenty five percent'. That sounds like an additional reduction which needs to be made. If the OH advisor had intended to say that the current reduction should remain in place, it would have been more likely to have said that or words like that.

43. The OH advisor also recommended that the claimant be provided with a personal alarm pendant to allow him to access remote assistance in the event that he was unable to stand up unaided following a fall. With these adjustments, Mr Miller was said to be fit to continue in his role.

44. The report concluded by saying:

> *"I have not suggested any routine occupational health follow-up at this stage. I do not believe that another occupational health follow-up would be warranted except in the event of Mr Miller suffering a relapse that causes a significant decline in his function."*

45. On 10 December 2018 Mr Willis spoke to the claimant and confirmed the discussion in an email (page 232). He said that the colleague who had been accompanying the claimant was required to train new starters and would no longer be able to accompany the claimant. He said that the respondent was still concerned that if the claimant was working alone and an incident occurred, the respondent may not be able to support him. The claimant was asked to stay at home on full pay. He did not return to work after this date. The respondent looked into personal alarms but could not find an appropriate alarm and decided in any event that an alarm would not sufficiently address the health and safety concerns because it would not prevent a fall from occurring.

46. The claimant fell down the stairs at home on Christmas Eve 2018 (page 242).

47. On 9 January 2019 the claimant attended a meeting with Mr Willis and an HR Advisor at which they discussed the adjustments which were already in place and the recommendations which OH had advised (page 253). The respondent said that paired working was not commercially viable and that early start times were not viable because there was no manager available until 0730. Mr Willis said that the claimant was no longer required to work extra hours to repay the hours he owed to the company. The respondent hoped this would alleviate some of the stress on the claimant arising from workload.

48. Another welfare meeting took place on 25 January 2019 (page 260). The claimant said he was feeling a lot better following a change in his medication. Mr Willis said there was still a concern about the claimant's safety and that the respondent was struggling commercially to accommodate the adaptions which had been made and would struggle more with additional adaptions.

49. At the meetings on 9 and 25 January 2019 the respondent discussed the possibility of the claimant moving to a different role. On 1 February 2019 Mr Willis sent the claimant a list of vacancies (page 270).

50. The Claimant expressed an interest in a Medical Technician's role. Mr Willis replied in an email to say that this role was more physically demanding than his existing role, and so similar issues would arise. Mr Willis also said that two additional vacancies had become available for office based service administrators (page 290). The role was a more junior role than the claimant's role. It was the equivalent of a level 1 technician role while the claimant was level 2. The service administrators supported the technicians: the role included allocation of calls, chasing up outstanding tasks and processing commission payments.

51. The claimant applied for the service administrator role. On 14 February 2019 Mr Willis sent the claimant's CV to the Head of Operational Support who was the recruiting manager for the role and the decision maker as to whether the claimant should be offered the role (page 304). We did not hear evidence from him.

52. On 25 February 2019 the claimant had an interview for the service administrator role. Mr Willis thought that the claimant was interviewed before other candidates because Mr Willis had been made aware of the vacancy before it was advertised more widely. He was not sure whether the claimant was interviewed on a different day to other candidates, although he thought he could have been. However, he was not sure how the process was handled and said that other people were interviewed around the same time.

53. The interview process included written tests on verbal usage and maths as well as a standard interview. The claimant scored 16 correct answers out of 30 in the verbal usage and 7 correct answers out of 30 in the maths test (page 394). All candidates for jobs with the respondent have to take maths and spelling assessments. There were no documents before us as to whether the claimant took the same or similar assessments when he first applied to join the respondent. Mr Green did not think they were in place when the claimant joined, but was not sure.

54. The claimant was interviewed by the recruiting manager, the Head of Operational Support. He said that the claimant had irrelevant skills and experience for the role (page 394). He noted that the claimant did not have much experience of using the spreadsheet programme Excel (page 307).

55. The recruiting manager decided after interviewing the claimant that the claimant could not be offered the role (page 306). Neither Mr Willis (nor Mr Green, who considered the claimant's appeal) had the authority to move the claimant to the role, it was entirely the decision of the Head of Operational Support whether he would be offered the role or not. The respondent did not consider offering the claimant the position on a trial basis or providing him with any re-training.

56. On 13 March 2019 the claimant attended a capability meeting with Mr Willis (page 340). Mr Willis decided that the adjustments which were required to the claimant's existing role could not all be put in place. While the respondent was confident that a permanent reduction in hours to allow the claimant to work 8.00am to 3.00pm could be granted, the claimant's workload had already been reduced and it was not possible to make a further 25% reduction to workload, and there was no way to address the safety concerns about working at height. The claimant had been unsuccessful in his application for the service administrator role and there was no other suitable alternative. The claimant was dismissed at the end of the meeting. A dismissal letter dated 28 March 2019 confirmed the reasons for dismissal (page 362). He was paid in lieu of notice.

57. The claimant appealed against his dismissal (page 366). He said that his health was significantly improved following a new drug regime, and that he had not been appointed for an alternative role.

58. The claimant's appeal was heard on 1 May 2019 by Michael Green, Area Operations Manager (page 372). The claimant accepted that his leg could still give way without warning, although the new medication had helped and it had not happened since 24 December 2018. In relation to the alternative

role, Mr Green told the claimant that he had scored about 50% on the verbal test and 30% on the maths. Mr Green carried out some further investigations after the appeal meeting with the claimant (page 380).

59. Mr Green wrote a detailed appeal outcome letter to the claimant on 31 May 2019 (page 389). The dismissal was upheld. Mr Green felt that the company had explained why the claimant was not successful in his application for the service administrator role, namely the poor test results and the recruiting manager's view from the interview that the claimant had irrelevant skills and experience for the role. In his evidence to us, Mr Green did not know whether the claimant was considered before or at the same time as other candidates.

60. After his dismissal the claimant applied for Employment Support Allowance (ESA). He received ESA from 9 April 2019, having been assessed as fit for work-related activity. Following a medical assessment, it was determined that from 9 July 2019 the claimant was not fit for work or work-related activity and he was entitled to the higher weekly rate of ESA from that date (page 422).

The Law

Disability

61. Disability is a protected characteristic under sections 4 and 6 of the Equality Act 2010. Multiple sclerosis is a disability pursuant to paragraph 6 of schedule 1 of the Equality Act.

Failure to make reasonable adjustments

62. The Equality Act imposes a duty on employers to make reasonable adjustments. The duty comprises three requirements, in this case, the first requirement is relevant. This is set out in sub-section 20(3). In relation to an employer, A:

> *"(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."*

63. The EHRC Code of Practice says that transferring a disabled worker to fill an existing vacancy is a step which it might be reasonable for employers to have to take as a reasonable adjustment (paragraph 6.33). It gives the following example:

> *"An employer should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. Such a post might also involve retraining or other reasonable adjustments such as equipment for the new post or transfer to a position on a higher grade."*

64. The leading authority on reasonable adjustments and redeployment, *Archibald v Fife Council* [2004] ICR 954, concerns a claim brought by a local authority employee who had become unable to carry out manual duties owing to the onset of a disability but who was unable to secure an office-based role through the council's interview processes. Explaining the duty to make reasonable adjustments, Lady Hale said in paragraphs 67 to 70:

> *" … to the extent that the duty to make reasonable adjustments requires it, the employer is not only permitted but obliged to treat a disabled person more favourably than others.*
>
> *. …[the duty] is capable of including the step of transferring a disabled person from a post she can no longer do to a post which she can do, provided that this is a reasonable step for the employer to have to take.*
>
> *This will depend upon all the circumstances of the case… There is no law against discriminating against people with a background in manual work, but it might be reasonable for an employer to have to take that difficulty into account when considering the transfer of a disabled worker who could no longer do that type of work. I only say "might" because it depends upon all the circumstances of the case..."*

Discrimination arising from disability

65. Section 15(1) of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if:

> *"A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *A cannot show that the treatment is a proportionate means of achieving a legitimate aim."*

66. There are four elements to section 15(1), as explained by the EAT in *Secretary of State for Justice and another v Dunn* EAT 0234/16:

    66.1 there must be unfavourable treatment;

    66.2 there must be something that arises in consequence of the claimant's disability;

    66.3 the unfavourable treatment must be because of the something that arises in consequence of the disability; and

    66.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

Burden of proof in complaints under the Equality Act 2010

67. Sections 136(2) and (3) provide for a shifting burden of proof:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) This does not apply if A shows that A did not contravene the provision."

68. This means that if there are facts from which the tribunal could properly and fairly conclude that there has been unlawful discrimination, the burden of proof shifts to the respondent.

69. In a complaint of failure to make reasonable adjustments, for the burden to shift, the claimant must demonstrate that there is a PCP causing a substantial disadvantage and evidence of some apparently reasonable adjustment that could have been made (*Project Management Institute v Latif* 2007 IRLR 579, EAT).

70. If the burden shifts to the respondent, the respondent must then provide an "adequate" explanation, which proves on the balance of probabilities that the respondent did not fail to make reasonable adjustments.

71. In a complaint of discrimination arising from disability, the claimant must show that they have a disability and have been treated unfavourably by the employer. It is also for the claimant to show that 'something' arose as a consequence of their disability and that there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment.

72. Where the burden shifts to the respondent the respondent can defend the claim by showing that it did not know the claimant was disabled, that the reason for the unfavourable treatment was not the 'something' alleged by the claimant, or that the treatment was a proportionate means of achieving a legitimate aim.

73. The respondent would normally be expected to produce "cogent evidence" to discharge the burden of proof. If there is a prima facie case and the explanation for that treatment is unsatisfactory or inadequate, then it is mandatory for the tribunal to make a finding of discrimination.

<u>Unfair dismissal</u>

74. Section 98 of the Employment Rights Act sets out the tests for determining whether a dismissal is fair or unfair. Subsection 1 provides:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) 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."*

75. Capability is a reason falling within subsection (2).

76. If the reason for dismissal is a potentially fair reason within sub-sections (1) and (2), then the tribunal must go on to consider whether the dismissal is fair in all the circumstances of the case, and, under sub-section (4):

> *"the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *(a) 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*
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

Conclusions

77. We have applied the legal principles to our findings of fact to reach our conclusions in respect of the issues we had to decide. We have addressed the issues in a different order, starting by considering the complaints of failure to make reasonable adjustments, then discrimination arising from disability and unfair dismissal. We have considered the question of jurisdiction separately at the end of our conclusions on each complaint.

Disability

78. The respondent agrees that the claimant was a disabled person at the material time within the meaning of section 6 and schedule 1 of the Equality Act because of multiple sclerosis. It is agreed that he had the condition from April 2016 when he joined the respondent. The condition was diagnosed in March 2017.

Failure to make reasonable adjustments

79. A PCP is a provision, criterion or practice. The claimant relied on two PCPs:

    79.1 requiring field staff to work from 8am to 5pm and
    79.2 requiring field staff to work in their substantive roles.

80. Looking first at the working hours PCP, we conclude that there was a PCP requiring field staff to work from 8.00am to 5.00pm. Those were the normal working hours of a pest control technician. There were times when the claimant was not required to work those hours, but, as explained by HHJ Richardson in *General Dynamics Information Technology Ltd v Carranza* [2015] IRLR 43, EAT, paragraph 40:

> *"The PCP should identify the feature which actually causes the disadvantage, and exclude that which is aimed at alleviating the disadvantage."*

81. There were periods when the normal working hours put the claimant at a substantial disadvantage because of fatigue, caused by his MS, which got worse as the day progressed. There were other periods when the claimant

and OH considered him fit to work normal hours, when he was not disadvantaged by the normal working hours of his role.

82. The respondent did make adjustments to the working hours of the claimant’s role when that was required to prevent him from being at a disadvantage. The respondent reduced the claimant’s hours on a trial basis in May and June 2017 as advised by OH, and told the claimant that if reduced hours were needed on a permanent basis this could be looked at. The claimant’s hours returned to normal in July 2017 at his request, and the OH physician confirmed in October 2017 that he could work normal hours. When the OH advice on this changed on 29 August 2018, the claimant was told by the respondent’s HR on 17 September 2018 that a permanent reduction in his working hours would be considered. On 22 August 2018 Mr Willis also told the claimant that he could request a permanent change to his hours. The claimant did not make a formal request for reduced hours. In the meeting on 13 March 2019 the respondent confirmed again that a formal reduction in hours would be possible.

83. The respondent did not fail to make reasonable adjustments to prevent the claimant from being disadvantaged by the working hours of his role.

84. The second PCP relied on by the claimant is the requirement that field staff work in their substantive roles. We find that this was applied by the respondent. (Again, those steps which were taken by the respondent which were aimed at alleviating the disadvantage are excluded at this stage.)

85. The PCP put the claimant at a particular disadvantage in comparison to people who are not disabled because:

    85.1 he was permanently restricted from working at height because of the risk of falling, and working at height made up around 40% of his role;
    85.2 his MS symptoms made him relatively slower at executing his tasks at work relative to an unaffected peer;
    85.3 he was therefore at risk of dismissal from his substantive role.

86. The respondent knew that the claimant was likely to be placed at that substantial disadvantage by the PCP. The occupational health reports clearly set out the claimant’s impairments and restrictions.

87. Our conclusions mean that the respondent was under a duty to take reasonable steps to avoid the substantial disadvantage to the claimant which arose from the PCP. The final limb of the complaint of failure to make reasonable adjustments is whether the respondent failed to do so.

88. The claimant says the respondent could have made an adjustment to allow him to work in an office based role, such as the service administrator role. This adjustment would have removed the disadvantage to the claimant of facing dismissal because of being unable to perform his technician role.

89. Transferring an employee to another role when they become unable to perform their role is an example of a reasonable adjustment included in the

EHRC Code of Practice. Here, there were vacancies for two service administrator roles which may have been suitable for the claimant. We conclude that the burden shifts to the respondent at this stage to satisfy us that the decision not to transfer the claimant to the service administrator role was not a failure to make a reasonable adjustment.

90. We have concluded that the respondent has not satisfied us that it was not reasonable to have offered the claimant the service administrator role, for the following reasons:

    90.1 By February 2019, when the claimant was being considered for the alternative role, it was clear that because of his MS he was permanently restricted from working at heights and that a further reduction in his workload would be required. The health and safety concerns had meant that he had not worked alone in his role since 12 November 2018 and he had not been at work at all since 10 December 2018. It was clear that it was very unlikely that he would be able to remain in his substantive role and therefore dismissal was a real likelihood if another role could not be found;

    90.2 The service administrator role was a more junior role than the claimant's technician role;

    90.3 We do not agree that the claimant had limited relevant experience, because the service administrator role was a support role to the role the claimant had been performing for over two and a half years, and knowledge of the substantive role would be expected to be helpful to someone working in a position supporting that role;

    90.4 the claimant's technician role included a number of administrative functions such as report writing, record keeping and stock check functions which would also be relevant experience for the support role;

    90.5 The claimant's lack of experience with the Excel spreadsheet programme could have been addressed by providing him with training on Excel;

    90.6 The claimant performed poorly on the maths and verbal written tests, however the respondent did not provide us with cogent evidence as to whether or not he had passed the same or similar tests at the time he successfully applied to be a technician (and that role included functions which could have been expected to require some verbal and maths skills);

    90.7 We accept that the claimant's poor performance on the written tests may have given the respondent some concerns about whether the claimant would be able to perform the role. However, these concerns could have been met by offering the claimant a trial period.

91. We accept that as part of its consideration of whether the claimant should have been offered the alternative role as a reasonable adjustment, the respondent would want to consider whether the claimant could do the role. However, the procedure in this case seemed to us to go beyond that and to be more like a process to assess whether the claimant should be appointed to the role.

92. Mr Willis thought the claimant was given priority consideration for the service administrator role. However, we were not provided with cogent

evidence of this. There was no written evidence of this. The recruiting manager was not a witness before us. The respondent's witnesses were unsure. From the point at which the claimant applied for the alternative role, there was no cogent evidence before us that he was considered any differently to any other candidate for the role. In other words, there was no cogent evidence that the respondent considered the role as a reasonable adjustment, rather the recruiting manager considering whether he wanted to appoint the claimant to the role.

93. There was no evidence that the respondent considered whether, because of his disability, the claimant's application for the service administrator should have been treated more favourably than other candidates, and the claimant offered a trial period in the role rather than the decision being made on the basis of the interview and written tests. The decision was taken by a manager who had not managed the claimant and was making the decision on the basis of the claimant's performance in interview and written tests only rather than knowledge of his performance in his substantive role. Mr Willis, who had been dealing with the claimant's adjustments, did not feel he had the authority to move the claimant into the role or offer a trial without any competitive interview. Mr Green, who heard the claimant's appeal, also felt that it was not his decision.

94. We conclude that it would have been a reasonable adjustment to transfer the claimant to the service administrator role for a trial period. There was a reasonable chance that the claimant would have been able to perform better in the role than his interview and tests suggested. A reasonable trial period would have been 4 weeks. The claimant was entitled to be treated more favourably than other candidates in respect of the service administrator position. There was no evidence that he was. Given the nature of the role which was a more junior support role for the claimant's substantive role, and given the administrative tasks which the claimant was already required to perform in his substantive role, the service administrator role would on the face of it have been suitable for the claimant. Although he performed poorly in the interview and written tests, this could have been addressed by allowing the claimant a trial period in the role. The failure to offer a trial period in this role meant that dismissal was almost inevitable, because there were no other suitable roles available, and the claimant was unable to perform his substantive role.

95. The complaint of failure to make reasonable adjustments therefore succeeds in relation to the second PCP. The respondent's failure to offer a trial period in the service administrator role was a failure to make reasonable adjustments for the claimant.

96. The respondent decided not to offer the claimant the role of service administrator on 25 February 2019. Acas early conciliation took place from 14 May 2019 to 14 June 2019 and the claim form was presented on 12 July 2019. This complaint was therefore presented in time, when the extension for early conciliation under section 140B(3) and (4) of the Equality Act 2010 is taken into account.

Discrimination arising from disability

97. The claimant was dismissed by the respondent. This amounts to unfavourable treatment.

98. The unfavourable treatment was because of something arising in consequence of the claimant's disability. The claimant was unable to work in his substantive role because of MS. MS meant that he was unable to work at heights and that he required a reduction to his workload which could not be accommodated. These were material reasons for his dismissal.

99. The burden of proof shifts to the respondent at this stage. The respondent accepts that it knew the claimant was disabled and has not said that the reason for the unfavourable treatment was not the 'something' alleged by the claimant. The respondent says that dismissal was a proportionate means of achieving a legitimate aim, namely to ensure the claimant's safety at work and to fulfil the requirements of customer contracts.

100. We accept that the claimant was not able to perform his substantive role. It was not safe for him to work at height and working at height made up a substantial proportion of the role. There was no adjustment which the respondent could have reasonably put in place on a permanent basis to address this. An emergency alarm would have provided better support if the claimant did have a fall, but could not have prevented a fall from occurring. It was not commercially viable to have the claimant work permanently with a partner or to reduce his workload to remove all working at height. It was not commercially viable to make a further reduction to the claimant's workload. We accept that the claimant's managers gave careful and proper consideration to these issues and implemented those adjustments which they could.

101. However, as set out above, we have found that there was a further reasonable adjustment which was not implemented. It would have been reasonable to have transferred the claimant to the service administrator role for a trial period. This would have meant the claimant would not have been dismissed when he was, and he would have had the opportunity of demonstrating that he could perform the role on a permanent basis. The respondent's failure to do this means that the dismissal of the claimant was not proportionate. There was a less discriminatory way than dismissal to address the claimant's inability to perform his substantive role.

102. The complaint of discrimination arising from disability therefore succeeds.

103. The dismissal took place on 13 March 2019. Acas early conciliation took place from 14 May 2019 to 14 June 2019 and the claim form was presented on 12 July 2019. This complaint was therefore presented in time, when the extension for early conciliation under section 140B(3) and (4) of the Equality Act 2010 is taken into account.

Unfair dismissal

104. The reason for the claimant's dismissal was capability. This is a potentially fair reason for dismissal.

105. We need to consider whether in the circumstances (including the size and administrative resources of the organisation) the respondent acted reasonably or unreasonably in treating capability as a sufficient reason for dismissing the claimant.

106. In relation to the claimant's capability for his substantive role, the procedure adopted by the claimant's managers was fair and reasonable. This is not a case where the employer did not follow any procedure. The respondent had regular welfare meetings with the claimant, referred him to occupational health several times, sought clarification from occupational health and the claimant's medical practitioners where necessary, followed the advice given, and made adjustments to the substantive role where it was reasonable to do so. The claimant's managers dealt sympathetically with him.

107. However, the respondent failed to make the reasonable adjustment of offering the claimant the service administrator role on a trial basis. This took the decision to dismiss outside the range of reasonable responses. A reasonable employer would not have dismissed the claimant when there was a role available to which he could have been transferred on a trial basis and where there was a reasonable chance that he would be able to perform the role.

108. For this reason, we have concluded that the decision to dismiss the claimant fell outside the range of reasonable responses and was unfair.

109. The dismissal took place on 13 March 2019. Acas early conciliation took place from 14 May 2019 to 14 June 2019 and the claim form was presented on 12 July 2019. This complaint was therefore presented in time, when the extension for early conciliation under section 207B(3) and (4) of the Employment Rights Act 1996 is taken into account.

Summary

110. In summary:

    110.1 The complaint of failure to make reasonable adjustments succeeds in relation to the failure to offer the service administrator role on a trial basis;
    110.2 The complaint of discrimination arising from disability in respect of dismissal succeeds; and
    110.3 The complaint of unfair dismissal succeeds.

Remedy

Additional findings of fact

111. The claimant was 45 at the time of dismissal and he had two years continuous service (page 418). At the time of dismissal he was paid in lieu of 4 weeks notice.

112. In his substantive role the claimant's gross weekly pay was £436.50 and net weekly pay was £333.38 (page 418).

113. The salary for the service administrator role was £18,000 per year (page 293). This is equivalent to £346.15 gross weekly pay and (for the tax year 2019/20) £303.38 net weekly pay.

114. After his dismissal, the claimant became depressed and was unable to look for work. His MS also got worse and he was declared not fit to work in any capacity by the DWP (in the context of his application for Employment Support Allowance). There was no evidence before us that this would not have been the case if he was not dismissed, and the claimant has only claimed his losses up to the date when he was declared not fit to work in any capacity. The claimant thought this was 13 November 2019 but we find that although the DWP letter was dated 13 November 2019, the medical assessment was backdated to 9 July 2019 (page 422).

115. The claimant received ESA at £73.10 per week from 9 April 2019 (having been assessed as fit for work-related activity) and at £111.65 per week from 9 July 2019 (when he became unfit for work or work-related activity) (page 422).

Legal principles on remedy

116. The remedy for complaints of discrimination at work is set out in section 124 of the Equality Act 2010. Under section 124(2)(b), where a tribunal finds that there has been a contravention of a relevant provision, as there has been here, it may order the respondent to pay compensation to the claimant. The compensation which may be ordered corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (section 124(6) and section 119(2)). There is no upper limit on the amount of compensation that can be awarded.

117. The aim of compensation is that '*as best as money can do it, the [claimant] must be put into the position she would have been in but for the unlawful conduct'* (*Ministry of Defence v Cannock and ors* 1994 ICR 918, EAT). In other words, the aim is that the claimant should be put in the position they would have been in if the discrimination had not occurred. This requires the tribunal to look at what loss has been caused by the discrimination.

118. Loss includes past and future financial losses and injury to feelings.

119. In *Prison Service and others v Johnson* [1997] ICR 275 EAT, the EAT set out the following principles that the ET should consider in making an award for injury to feelings:

"(i) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

(ii) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned

discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham M.R., be seen as the way to "untaxed riches."

(iii) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.

(iv) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

(v) Finally, tribunals should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made."

120. In *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871 the Court of Appeal identified three broad bands of compensation for injury to feelings awards. The 25 March 2019 Presidential Guidance on injury to feelings set out updated Vento bands which include the 10% *'Simmons v Castle'* uplift. The guidance says that for claims presented on or after 6 April 2019, as the claimant's was, the lower band is £900 to £8,800 (less serious cases); the middle band £8,800 to £26,300 (cases that do not merit an award in the upper band); and the upper band £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.

121. Section 118 of the Employment Rights Act 1996 provides that compensation for unfair dismissal consists of:

    121.1 A basic award; and

    121.2 A compensatory award.

122. Section 123 of Employment Rights Act says that 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 insofar as that loss is attributable to action taken by the employer".

<u>Conclusions on remedy</u>

123. We have first considered the award in respect of the disability discrimination complaints.

124. We start by considering financial loss. We consider what the claimant's financial position would have been if he had not been subjected to unlawful discrimination, compared with his actual financial position.

125. If the claimant had been offered a 4 week trial period in the service administrator role, he would have been entitled to pay for the 4 week period from 13 March 2019 to 10 April 2019. We conclude that he would have been paid for this trial period at his substantive rate of pay. This means loss of net weekly pay for this 4 week period is £333.38 x 4 = £1,333.52.

126. As there are no recoupment provisions in respect of compensation for discrimination, the claimant must give credit for benefits received (as he would not have received those benefits if he had remained at work). However, the claimant was not in receipt of ESA until 9 April 2019, and we make no deduction in respect of ESA for this initial period.

127. In respect of the period after the trial period, we conclude that there is a 50% chance that the trial period would have been successful and the role made permanent for the claimant. We have reached this conclusion taking into account the fact that the claimant's substantive role already included some administrative functions and that the administrative role was a more junior support role, weighed against the claimant's poor performance on the written tests and interview.

128. We have found that the claimant was assessed for benefits purposes as unfit to work at all from 9 July 2019. He would have been on sick leave from then. We find that the respondent would have recommenced the capability procedure at that point, and the claimant would then have been fairly dismissed at the end of the capability process which would have taken 4 weeks. There would not be any loss of salary after this date, 6 August 2019.

129. Loss of salary after the 4 week trial period therefore runs from 11 April 2019 to 6 August 2019, a period of 16 weeks and 5 days or 16.71 weeks. Loss of salary for this period is calculated at the net weekly rate for the service administrator role which is £303.38. In total, loss of salary for this period is £303.38 x 16.71 = £5,069.48. The claimant is entitled to 50% of this sum, to reflect our finding that there was a 50% chance that the trial period in the administration role would have been successful. Loss of salary for this period is 0.5 x £5,069.48 = £2,534.74.

130. The ESA payments received by the claimant must be deducted from this. For the period from 11 April 2019 to 8 July 2019 (12 weeks and 4 days or 12.57 weeks) the claimant received £73.10 per week which is £918.87. For the period from 9 July 2019 to 6 August 2019 (4 weeks) he received £111.65 per week which is £446.60. In total, the claimant must give credit for £1,365.47 received by way of benefits during this period.

131. Loss of earnings for the period 11 April 2019 to 6 August 2019 are therefore £2,534.74 - £1,365.47 = £1,169.27.

132. Lastly on loss of earnings, the claimant would have been entitled to 4 weeks pay in lieu of notice on dismissal on 6 August 2019, which is 4 x £303.38 = £1,213.52.

133. Losses for the period from 13 March 2019 to 6 August 2019 are therefore as follows:

Table 1: Loss of earnings		
Period	Loss	Total
13 March to 10 April 2019	£1,333.52	
11 April to 6 August 2019	£1,169.27	
Pay in lieu of notice	£1,213.52.	
		£3,716.17

134. The claimant must give credit for the notice pay he received which was £333.38 x 4 = £1,333.52.

135. Total loss of earnings is therefore £3,716.17 - £1,333.52 = £2,382.65.

136. The claimant claims loss of pension at £27.77 per month. The claimant is entitled to loss of pension in full for the period from 13 March to 10 April 2019 = £27.77 and to 50% of pension losses for the period from 11 April to 6 August 2019, which is 0.5 X £27.77 x 4 months = £55.54. In total, pension losses are £83.31.

137. Next we have considered injury to feelings. The claimant said that an award at the top end of the middle Vento band was appropriate. The respondent said that a middle band award could be appropriate, but that it should be at the lower end of the middle band.

138. The respondent failed to make reasonable adjustments when considering whether the claimant should be offered the administrative role and this led to the claimant's dismissal. In dismissing the claimant, the respondent also discriminated against the claimant because of something arising from his disability. We have not found that the claimant was subjected to disability discrimination in respect of any of the earlier treatment by his managers. We found that they dealt sympathetically and fairly with the claimant, other than the failure to offer him the administrative role on a trial basis.

139. In terms of the impact on the claimant, we have found that he became depressed after his dismissal. His MS also got worse, but there was no evidence before us that suggested that this would not have been the case if he was not dismissed.

140. Having considered those factors, we have decided that the appropriate award for injury to feelings in the claimant's case is an award at the top of the lower Vento band. The lower band as updated in the 25 March 2019 Presidential Guidance on injury to feelings is £900 to £8,800. The claimant is awarded £8,000 in respect of injury to feelings.

141. Stepping back and considering the level of this award, we are satisfied that it properly reflects the injury to the claimant's feelings which was caused by the respondent's discriminatory treatment of the claimant.

142. We award interest on the financial losses award (other than pension loss, which is a form of future loss and does not attract interest). Interest on financial loss is payable at a rate of 8% from the midpoint of the period which runs from the date of the discrimination to the date of calculation. The

discrimination started on 25 February 2019 when the respondent failed to make a reasonable adjustment. The calculation is set out in table 2.

Table 2: interest on past financial loss	
Interest start date	25 February 2019
Date of hearing	5 August 2021
Number of days	892
Number of days to midpoint	446
Daily rate of interest	0.08 x £2,382.65/365
Total interest calculation	446 days x daily rate of interest
Total interest	£232.91

143. The interest on this element of the award is £232.91.

144. Interest on injury to feelings awards is payable at a rate of 8% for the whole period from the date of the discrimination to the date of calculation. The calculation of interest on the injury to feelings award is set out in table 3 below.

Table 3: interest on injury to feelings	
Interest start date	25 February 2019
Date of calculation	5 August 2021
Number of days	892
Daily rate of interest	0.08 x £8,000/365
Total interest calculation	892 days x daily rate of interest
Total interest	£1,564.06

145. The interest on this element of the award is £1,564.06.

146. For the compensation for unfair dismissal, the claimant is entitled to a basic award of 2 x 1.5 weeks gross pay because of his length of service and age at dismissal. The basic award is 2 x 1.5 x £436.50 = £1,309.50.

147. The claimant has lost his statutory rights as a result of the dismissal. We award £873 as compensation for loss of statutory rights, that is two weeks' gross pay to reflect the loss of statutory protection (*Countrywide Estate Agents and others v Turner* UKEAT02/08/13/LA).

148. The claimant's award for the discrimination complaints includes compensation for other elements of financial loss which he would have received in the compensatory award, such as financial loss and pension loss. To avoid double recovery (compensating for the same losses twice) these losses are not included in the compensatory award.

149. No interest is payable on the unfair dismissal elements of the award.

Summary

150. A summary of the award with interest is at table 4.

Table 4: Summary of award with interest		Totals
Loss of earnings	£2,382.65	
Pension loss	£83.31	
Interest on loss of earnings	£232.91	
Total financial loss		£2,698.87
Injury to feelings	£8,000.00	
Interest on injury to feelings	£1,564.06	
Total injury to feelings		£9,564.06
Basic award		£1,309.50
Compensatory award		£873.00
Total award		£14,445.43

Employment Judge Hawksworth

Date: 27 September 2021

Judgment and Reasons sent to the parties

on:11/10/2021

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For the Tribunal Office

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