EMPLOYMENT TRIBUNALS

Claimant: **Mr Andrew Heath**

Respondents: **Howmet Ltd t/a Arconic Engines (1)**
Mr Keith Herselman (2)
Mr Timothy Adams (3)

Heard at: **Exeter** **On: 1 – 4 November 2021**

Before: **Employment Judge Smail**
Members: **Ms R Hewitt-Gray**
Ms E Smillie

Representation
Claimant: **In Person**
Respondent: **Mr D Leach (Counsel)**

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant brings three claim forms to the Tribunal numbered 1406408/2019, dated 24 December 2019 when the Claimant claimed age and sex discrimination. The second claim 1400001/2020 dated 31 December 2019 when the Claimant claimed age, race and sex discrimination. Thirdly, 1404941/2020 dated 21 September 2020, when the Claimant added a claim of unfair dismissal to claims of age race and disability and sex discrimination. The Claimant has not pursued his claim of disability discrimination, not being disabled at any relevant time, but he has pursued claims of age, race and sex discrimination, as well as unfair dismissal. The claim against Mr Adams was withdrawn in the course of the hearing.

2. The Claimant was dismissed ostensibly for capability - not in the form of performance capability - but in the form of long-term absence capability -with effect from 7 July 2020, when the Claimant was dismissed with pay in lieu of contractual notice.

3. The Claimant was employed by the Respondent as a Wax Room Operator and he had reached the level of Grade 6. He spent much of his time as a Level 2 Inspector, which involves a significant degree of expertise. It is common ground that he was very good at his job. The Respondent makes parts for aerospace and industry, including for example wind turbines. It is plainly a specialist precision engineering company. The wax room was where wax moulds were created for use within the manufacturing process.

THE ISSUES

4. The issues in the case were recorded comprehensively and definitively at a preliminary hearing before Employment Judge Gray on 25 March 2021. There had been previous preliminary hearings but Judge Gray recorded the composite issues. I will set those out below.

Direct Sex discrimination

(1) Did the Respondents do the following things? Namely allow women colleagues to work convenient single shifts such as early shifts, reduced day shifts or part-time early shifts, even without having made flexible working requests when the Claimant was denied the same opportunities.

(2) Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone was treated known as the Claimant's comparators. There must be no material difference between the circumstances of this comparator and those of the Claimant. The Claimant relies on actual comparators namely Katazyna Ocskowska early shifts, Beth Palmer, Lana Swierczynska and Sally on permanent early shifts, Sara Finch, Michelle Paynter, Jo Cole and Jane Hughes all working reduced day shifts and Georgina Woodley, Vicky Snell and Amanda Bellamy all working part-time on the early shifts.

(3) If so, did the Claimant suffer the less favourable treatment above, and was this because of sex?

Direct Age Discrimination

(4) The Claimant was born on 23 September 1963 and was aged 56 at the time of the commencement of these proceedings. He compares himself with people in a younger age group.

(5) Did the Respondents do the following things? Namely, allow younger colleagues to work convenient single shifts such as early shifts or late shifts even without having made flexible working requests when the Claimant was denied the same opportunities.

(6) Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated known as the Claimant's comparators. There must be no material difference between the circumstances of the comparator and

those of the Claimant. The Claimant relies upon as actual comparators Ricky Carpenter and Bradley Calf permanent early shifts and Attilla Novac, late shifts.

(7) If the Claimant did suffer the less favourable treatment above was this because of age?

(8) The Respondent denies that there was any less favourable treatment on the grounds of age. It does not seek to justify any less favourable treatment; its primary position is there was no less favourable treatment on the grounds of age.

Direct Race Discrimination

(9) The Claimant describes himself as white English.

(10) Did the Respondent do the following things? Namely, allow Eastern European colleagues to work convenient single shifts such as early shifts or late shifts even without having made flexible working requests when the Claimant was denied the same opportunities.

(11) Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated known as the Claimant's comparator. There must be no material difference between the circumstances of the comparator and those of the Claimant. The Claimant relies on two actual comparators, namely Katazyna Ocskowska and Bart Glowacki. They are both of Polish origin.

(12) If the Claimant did suffer the less favourable treatment above, was this because of race?

(13) We should add not only is the Respondent company a Respondent to this part of the claim but so is Mr Keith Herselman, the Production Manager. A claim against Mr Tim Adams has been withdrawn.

Unfair Dismissal

(14) That is a claim only against the corporate Respondent. The Claimant was dismissed on 7 July 2020 as we have said. The Respondent asserts that it was a reason related to capability and of course capability has two legal meanings. The first is performance capability - unable to do the job because of lack of ability - it was not that. The Claimant was recognised as being very good at this job. This is capability in the sense of long-term sickness or being unavailable to do the job because of absences; and we return later to the analysis of the reason for the dismissal.

(15) Did the first Respondent act reasonably in all the circumstances in treating capability as a sufficient reason to dismiss the Claimant?

(a) Did the first Respondent genuinely believe that the Claimant was no longer able or perhaps willing to perform duties?

(b) Did the first Respondent adequately consult the Claimant as to his ability to do the job?

(c) Did they carry out a reasonable investigation including finding out about the medical position?

(d) Could the first Respondent reasonably be expected to wait longer before dismissing the Claimant; put perhaps more accurately was it reasonable for them to dismiss at the time?

(16) Was there a fair procedure? If there wasn't a fair procedure, would the Claimant nonetheless have been dismissed had a fair procedure been followed or there to be a percentage reduction if there was unfairness for the chance that that procedural fairness may have been cured.

(17) Was dismissal within the range of reasonable responses.

THE LAW

Direct Discrimination

5. Direct discrimination is defined by section 13 Equality Act 2010. An employer discriminates against another if because of a protected characteristic, the employer treats the employee less favourably than the employer treats or would treat others. Age, race and sex are protected characteristics. If it is otherwise made out, direct age discrimination can be justified if it amounts to a proportionate means (i.e. a balanced position) of achieving a legitimate aim.

6. Burden of proof is important in discrimination cases. By section 136(2), if there are facts from which the court could decide, in the absence of any other explanation, that the employer had contravened the provision concerned, the court must hold that the contravention occurred. By subsection (3), subsection (2) does not apply if the employer shows that the employer did not contravene the provision. What this means is that the employee must establish facts which amounts to a prima facie case of discrimination. If the employee does that, the burden transfers to the employer to show that discrimination played no role whatsoever in the relevant decision making: Igen v Wong [2005] IRLR 258 (CA).

Unfair Dismissal

7. By section 98(1) of the Employment Rights Act 1996 it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. A reason relating to the capability of an employee is a potentially fair reason. By section 98(4) where the employer has fulfilled the requirements of subsection (1), 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.

FINDINGS OF FACT ON THE ISSUES

8. In reality there are two topics which are the focus of the case. The first is the decision not to modify the Claimant's shift pattern - to early shifts or night shifts only - made by Mr Herselman, for reasons set out in his letter dated 18 October 2019. That decision was then subject to appeal to Mr Wreford and this first topic embraces the decisions first of Mr Herselman and then of Mr Wreford. The second topic is the decision to dismiss. The first topic - the shift patterns - is the subject of the discrimination claims.

Request for fixed shifts

9. The Claimant asked for permanent early shifts, alternatively for permanent night shifts, in 2019. The flexible working request system operated by the First Respondent is that you are allowed one request per year. This was his 2019 request. The decision in respect of the request was made by Mr Herselman in the first instance. He records his reasons in a letter dated 18 October 2019 which followed their meeting on 15 October 2019. He records that the request was to amend shift pattern from swing shifts to permanent night shifts, if this was not possible then permanent early shifts.

10. He wrote that having reviewed the desired working pattern in line with business requirements, the decision was to decline these requests for two principal reasons. First, detrimental impact on performance; secondly, insufficient work for the periods the employee proposes to work. He dealt with night shifts by saying there were currently ten operators who work permanent night shifts made up of the following grades:

    - Shift Leader Grade 6
    - Other Grade 6
    - 4 Grade 5
    - Grade 4

11. He noted that the Claimant was a Grade 6 operator. The above ratio, reasoned, Mr Herselman meant that on a night shift there were currently two grade 4 or grade 5 operators for each grade 6. The business could not warrant approving an increase to the grade 6 ratio of more than 1 to 2 versus a swing shift ratio of 1 – 4. That would make the process unmanageable and counter productive for production, attainment, grade 6 accountability and the ability to fulfil the requirements of the role.

12. He turned then to the request for early shifts. Currently shifts were proportionately balanced to ensure process and manning level stability. That included absence and holiday cover. Granting the request for permanent early shifts would lead to shift imbalance which had the potential to impact on production. Those were the asserted reasons in that letter.

13. The evidence in this case has put far more meat on the bones of that position than was set out in that letter. There is a system of appeals in the Respondent and this matter was appealed to Mr Wreford, the Operations Manager, and he met with the Claimant on 8 November 2019.

14. There was no challenge to Mr Herselman's decision on the night shift. There was already sufficient number of employees with a reasonable ratio between the grades on the night shift; there was no business need for the night shift to change. With regards to early shifts, Mr Wreford agreed as a gesture of goodwill to grant temporary early shifts until the end of 2019. This was from 8 November 2019 to the end of December 2019, approximately two months. That would give the Claimant time to deal with his childcare arrangements. In particular the childcare problem that the Claimant had to address was picking up his 7 year old son, Rafael, at 3.10pm at the local primary school. His wife had been successful in obtaining a nursing position in Exeter hospital, which was in the Covid ward. Her work finished at 6.00pm in the evenings; there was a challenge then to pick Rafael up at 3.10pm. That was the basis for the Claimant's flexible working request.

15. Mr Wreford went on to say that the temporary arrangement could be extended if the Claimant was able to find a suitable partner who could work the opposite late shift, providing they were the same grade 6 and had matching skill set. The Claimant's skills in particular related to his role at inspection level 2. If that was an option he wished to pursue, the Claimant was to provide the nominated work partner's name to Mr Herselman as soon as possible. In the event that that did not materialise, the Claimant would have to revert to the swing shift from the beginning of 2020. Mr Wreford explained that from a manpower perspective it was important that both early and late shift were evenly balanced over five days a week to ensure a smooth production flow.

16. We have learnt in this case a great deal about the Respondent's shift system. The primary shift pattern worked in the wax room is called the swing shift. This means that an employee would work one week on the early shift 6.00am – 2.00pm and the following week on the late shift 2.00pm - 10.00pm. There was a night shift 10.00pm – 6.00am, but that was not part of the swing system. That was for those who found it convenient to work nights. The Respondent found that they had enough people on the night shift.

17. The idea behind the swing shift is there could be something like 24-hour capability taking into account the night shifts. It was explained to us - and this makes sense - that historically the early shift has been the more popular shift because people could get their work done early and then have the rest of the day and evening to themselves. The counterbalance that the swing shift system involved was to make sure there was production capability the entire day long.

18. We have seen that there are three exceptions to people in production working the swing shift. The first is that they have a disability or a caring obligation for someone who is disabled. The second is that part-time workers who are only available to work at certain times would be more likely to have a fixed shift. And thirdly, in respect of full-time workers, a system of pairing whether it be temporary or permanent.

19. The Respondent has late in the day produced arguably the most relevant documents in the case and perhaps it is unfortunate that they were produced late in the day. Mr Heath being a reasonable person recognised that they were relevant, and they have gone in, as we would have ruled also. We now have the rules for the wax working department. The shift hours are set out and there is a passage on wax shift change. It is said

> "Shift change requests will only be granted for exceptional circumstances agreed in advance with supervision. The employee requesting the shift change must have reached a mutual agreement with an employee with the same skill set on the other shift in order to change permanent swing shift change. Supervision can only consider a permanent swing shift change request if two members with the same skill set and on different shifts have reached a mutual agreement prior to the request. This only applies to swing shift rotations".

This is the pairing principle which we have discovered, fundamentally, is applied.

20. To get off the swing shift you have to pair with someone on the same grade and of a similar skill set. So, it may be convenient to one person to work early principally, and it may be convenient to someone else to work late principally. Those two can then pair and this pairing principle appears to be an established exception to the requirement otherwise to work swing shifts.

21. A further very instructive document was produced, again late, by the Respondents but there is no doubt it is a genuine document and it sheds a lot of light on the position. As at 10 January 2019, one of the managers set out what were the contemporary issues in 2019 about swing shifts. Mr Herselman in evidence told us that there had been work done on balancing the shifts. We accept from him that this was the position. We see that the swing shift then is the primary model. There were permanent alterations for four employees who were either disabled or who cared for someone with a disability called reasonable adjustment amendments. There were then three people who it was planned to move back to swing shifts. Interestingly, that included the Claimant because towards the end of 2018, the Claimant had been working on late shifts solely; but we see that as at January 2019 the intention was to integrate him back into staff support work. He had been doing inspections, principally on the late shift, but his grade required him to have some supervisory responsibilities also. The Tribunal accepts from the Claimant that his work principally over the years was an inspection role. His grade was a supervisor's one, however.

22. Someone we refer to as JD had been recommended late shifts for two to three months at the end of 2017 to help with tinnitus, which is a reasonable adjustment concept. Whether that should be ongoing was to be reviewed. Then Bart Glowacki was mentioned. He had been put on permanent late shifts in 2015 owing to domestic reasons, but this was to be reviewed with Bart. For business reasons three employees including Lana Swierczynska were working on one shift only. In Lana Swierczynska's case, she was a grade 6. This vacancy had been advertised; the Claimant might have applied for it but chose not to but there was a business reason why she was not on the swing shift. The Respondent stated to us that she is the most directly relevant comparator.

23. We then have a table of established shifts pairings in this document. We see in terms of pairings the first name mentioned works the early shift, the second name the late shift. Steve Bellow was paired with Steve Selic on injection large. Sheila Allan was paired with Wael Mustaffa on trimming large. Lewis Price was paired with Tim Mack as grade 6 runners. Shaun Moulton was paired with Paul Cox on gauge large. Ricky Carpenter was paired with Mick McDonald grade 6 large. Bradley Calf was paired with Attila Novak grade 6 large.

24. What effectively Mr Wreford was saying to the Claimant at the appeal was that he needed to find a pair. Had that happened his name would have been joined in an equivalent table for 2020. The Respondent tried in part to help the Claimant find a pair by putting up a notice but regrettably no-one came forward by the end of the year.

25. The Claimant presented for work on 6 January after the Christmas holiday for the early shift but he had been rostered to work the late shift. He was told to go home and in fact he never returned to work.

26. This table is an important document for the Respondent because we see the identify of the employees who were given pairs. Of the table of twelve, ten are white British, seven were over 50 and ten were male. Those were the very characteristics that the Claimant puts forward as having been relied upon or used by the Respondent in refusing his request.

27. As the evidence developed, it seemed that perhaps his best comparator was Katazyna Ocskowska. At around the same time he was refused a request for fixed shift working, she was given a six-month transfer to the early shift, from 2 September to 28 February 2020. She was a grade 5, she is of Polish origin, she is female, and she is in her 40s not her 50s. The Claimant submits to us why did she get it when he did not. We know that she was paired for this with Mr Glowacki and we accept that was the position. We see from the January 2019 email that they had been planning to bring Mr Glowacki back to the swing shift but at least until the end of February 2020, he was paired with Katazyna Ocskowska, facilitating both their requests for fixed shifts. We accept that the pairing only went up to the end of February 2020.

28. The Claimant has taken very personally the fact that his request was not accommodated. He does not understand why his request was not accommodated. He looks at his characteristics: he is white English or white British, he is male, he is over 50 years. He looks at people such as Katazyna Ocskowska and Bart Glowacki who got their requests and, therefore, he submits it is discrimination. He says it is age discrimination, it is race discrimination and it is gender discrimination.

29. The difficulty with that position, we find, is that we see from the table of the pairings as at January 2019 that people with the Claimant's characteristics have in fact been given pairings; a substantial number of people over 50, a substantial number of people who are white English or white British, a substantial number of men. We find that the reason, following the appeal with Mr Wreford, as to why the Claimant did not get a fixed shift for either a temporary or for a permanent period beyond 2019 was down to the fact that a pair was not found. We accept from the Respondent that the evidence

supports the primacy of the pairing principle. Had the Claimant found a pair, then he would have got a deal. The reason why he did not get a deal was not because he is white English or white British; not because he is over 50; and it was not because he was a man. It is because he could not find a pair and there is no reason tarnished with discrimination for that fact.

30. We note that the fact that a pair was not found was a contributory reason to him leaving the business, and insofar as the Respondent loses a well-respected and good employee, it was very largely down to the fact that they did not accommodate his request for fixed shift working; but the cause of action before us is discrimination. There has to be a prima facie case, unrebutted by the Respondent, that the reason for not giving him what he wanted is tarnished by discrimination. Even if the Claimant shows a prima facie case of discrimination by reference to Katazyna Ocskowska, then nonetheless the Respondent shows that the reason why the Claimant did not get the shifts he was asking was for non discriminatory reasons. He did not get the night shift because there was no room on the night shift, the ratios did not enable that; and he did not get a permanent or a temporary early shift because he could not find a pair.

31. We have had the benefit of considering a substantial body of evidence and we have a clear understanding of the pairing system. Mr Wreford's letter is perhaps a little better than Mr Herselman's letter in explaining that. Mr Wreford did offer accommodating a pair if the Claimant could find a pair; unfortunately, he could not.

32. As regards to the list of comparators relied upon by the Claimant in the issues, the Tribunal accepts the table appended to the witness statement from Sarah White of HR in answer, showing non-discriminatory reasons in respect of each. The particular reason the Tribunal finds in the Claimant's case is that no pair was forthcoming to accommodate his request to work on the early shift or the late shift permanently.

33. At the end of the day the evidential position is clear to us: the Claimant was not directly discriminated against in the sense required by the Equality Act 2010 when having his request refused. He did not get the fixed shift because a pair was not found. The claim for discrimination whether put on the basis of age, sex or race is unsuccessful. In terms of the direct claim against Mr Herselman, he made a production manager's decision based on business need. It was not based on anything discriminatory.

<u>The circumstances leading to dismissal</u>

34. The Claimant also brings a case of unfair dismissal. He was, as we know, dismissed on 7 July 2020 ostensibly for capability. The type of capability is not to do with level of performance, where performance improvement plans would be relevant; it is not in dispute that the Claimant was very good at his job. This was lack of capability in terms of long-term absence for sickness.

35. Three capability meetings had been arranged across June and July 2020. The Claimant had indicated he would not attend the first two. They were postponed. In respect of the third he was told that if he did not attend it would

proceed in his absence. He did not attend and indeed it did proceed in his absence. The relevant manager was Mr Wreford. The Claimant had of course been off work since 6 January 2020 when the issue in respect of shifts came to a head and he was told to go home. He was signed off then with work related stress. We have little doubt that the Claimant was suffering stress in the aftermath of that decision and indeed he was hospitalised with a heart issue in February 2020. We understand he was in hospital for nine days. He was discharged, we understand, on 14 February 2020.

36. Because he was absent, the Respondent unfortunately failed to notify him of the opportunity to apply for furlough directly. He found out from a friend and he did apply promptly on 16 April 2020 for furlough; but we take his point that they might have communicated to him directly by email that he could so apply. Instead his friend told him, and he did apply on 16 April 2020.

37. Before then on 4 March 2020, he had been referred to an Occupational Health Nurse who reported that the Claimant declined to agree the release of that report to management. Before us he suggested that the relevant practitioner was a nurse rather than a doctor so did not count. That was not a constructive position. The Claimant did refuse to release the report to management, so management were not assisted by that. The Claimant did agree to release the report of Dr Whiley a Company Occupational health doctor. In a full report Dr Whiley distinguished between the stress issues on the one hand, and the heart issues on the other. As to the stress issues: he identified they were solely to do with relationships at work and could only be resolved by management and the Claimant coming to arrangement as regards the Claimant's position or some other reconciliation. That was, as Dr Whiley put it, outside the realm of medicine. That was an industrial relations matter; it was not a medical issue.

38. The heart issue was a medical issue. The Claimant, in terms of Covid, although 56, had the vulnerability of a 68-year-old - 12 years older than he was. Dr Whiley envisaged a return to work, albeit a phased return to work, starting over a four-week period beginning with a quarter of usual duties increasing as the month progressed. Dr Whiley also made it clear that there would have to be a Covid risk assessment before the Claimant could safely return to the workplace. As we know, the Claimant applied for furlough on 16 April 2020. The first decision in respect of the application was made by Sarah White of HR on 22 April 2020. She told him that he would not be furloughed because there was work for him to do. That was the subject of a grievance.

39. On 29 April 2020 the grievance went to Mr Wreford, it was rejected on 15 June 2020. The basis again was that there was work for the Claimant to do when he came off sick. That determination was itself appealed to Nick Smith on 24 June 2020 who reiterated that there was work for the Claimant to do; therefore, there was no business case for a furlough. The Claimant was not required to shield. Dr Whiley had said there would be risk assessment about Covid measures and the Respondent was adopting Covid measures, social distancing and PPE and, noted Mr Smith, the Claimant did have children at school because his wife was a key worker and so he did not have to stay at home to look after the children.

40. We are under a little doubt that at this stage the Claimant was most disgruntled indeed. He had his shift request turned down, he had his furlough request turned down. The Claimant was taking all of this personally and he might have resigned. He did not; instead he failed to engage with the Respondent. He stopped co-operating with them from this point onwards. He had been offered welfare meetings with HR; he had turned them down saying he would not attend. He declined attendance at the capability meetings even though he was told he was at risk of dismissal. He had been warned in 2019 about attendance, although the 2020 decision was about the 2020 position. Mr Wreford dismissed him on 7 July 2020. He noted that the Claimant was refusing to attend welfare meetings and he had refused to release the occupational health report from the nurse. Dr Whiley had suggested that the Claimant was fit to return to work albeit on a phased return to work. The Claimant had not returned to work on any basis.

41. On 12 June the GMB had advised the Respondent that the Claimant was ready to return to work and that the business should start preparing for that but in the event the Claimant sent in another sick note.

42. Mr Wreford wrote that 'having reviewed all of the above and considered all of the circumstances including your ongoing absence, despite occupational health advising you are fit to return and the lack of engagement from yourself in relation to the absence management process, it was decided that the business could not reasonably hold on to his job any longer.' The Respondent did not hang about. It decided to dismiss.

43. What was the reason for dismissal? There is an element of capability about it, capability in the sense of long-term non-attendance. The employer makes out this reason. Equally there was an element of irretrievable breakdown of the relationship; that in fact might be the best way of looking at it. The Claimant was refusing to engage. Possibly there was an element of misconduct about it, also. There were reasonable requests to attend meetings, he was refusing to attend.

44. The Claimant, plainly, was very disappointed with the Respondent that he had not been granted his shifts, he had not been granted his furlough; he took it personally. He saw that other people's wishes were getting accommodated; he was not getting accommodated. So, he did not engage with them. In front of us, he relies upon the fact that his doctor had issued sick notes in June, July and August showing low mood and stress; but in reality, those sick notes do not say he could not attend meetings. He could have attended those meetings, but he chose not to because he was so disillusioned with the Respondent. He made the decision that he would not turn up to those meetings.

45. Mr Wreford having viewed all of that information, having noted the Claimant was not engaging with the company, came to the decision that he did. We find that decision was within the range of responses open to a reasonable employer; though in some ways unfortunate, given the quality of employee that the Claimant was. It was within the range of reasonable responses because they were faced with an employee who was not engaging with them and repeated opportunities to engage with them had been given.

46. The Claimant did appeal, he did say in his appeal letter he would attend with a friend; but he did not attend the appeal hearing, and so there was an appeal against the dismissal with non-attendance from the Claimant. There was no medical basis to his refusal to attend. Following a letter from the Respondent asking whether he was going to attend, he purported to withdraw his appeal and replace it with a grievance. Reasonably, the Respondent chose to continue with the appeal because otherwise the Claimant was not appealing against his dismissal. The Respondent provided a platform for him to appeal but he did not engage. For the appeal to be rejected was within the range of reasonable responses. The dismissal was within the range of reasonable responses.

CONCLUSIONS

47. The direct discrimination claims fail because the Respondent shows non-discriminatory reasons for the matters the Claimant complains about. He was not placed on the night shift because there was no room for a new member of the team on that shift. He was not placed on fixed early or fixed late shifts because no one with his skill set came forward to pair with him on either of those shifts, meaning the usual swing shift pattern applied. The Claimant's discrimination claim has been misconceived as put. He notes that his shift requests were not accommodated. He then looks at his particular characteristics and submits he has been discriminated against because of those characteristics. On analysis of the Respondent's reasoning, however, his characteristics play no role. There are substantial examples of those with the Claimant's characteristics being accommodated in fixed shift requests. The difference was that no one with the Claimant's skill set came forward to be paired.

48. The unfair dismissal claim fails because the Claimant was off work for 6 months in 2020 and refused to engage with the Respondent in its absence management procedures. There was, in truth, an irretrievable breakdown of the relationship. Capability in the sense of long-term absence was made out. The decision to dismiss was within the range of decisions of a reasonable employer.

Employment Judge Smail
Date: 29 December 2021

Reasons sent to the Parties: 14 January 2022

FOR THE TRIBUNAL OFFICE