THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Richard Francis**

Respondent: **Nissan Motor Manufacturing (UK) Limited**

Heard at: **Newcastle upon Tyne Hearing Centre**
On: **Monday 29th November 2021 to Friday 3rd December 2021**

Before: **Employment Judge Johnson**

Members: **Ms E Wiles**
Mr M Brain

Representation:

Claimant: **In Person**
Respondent: **Mr R Dunn of Counsel**

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

2. The claimant's complaints of unlawful disability discrimination are not well-founded and are dismissed.

3. The claimant's complaints of unauthorised deduction from wages are dismissed upon withdrawal by the claimant.

REASONS

1. The claimant conducted these proceedings himself. He gave evidence himself at the final hearing and cross-examined the respondent's witnesses. He did not call any other witnesses to give evidence. The respondent was represented by Mr Dunn of Counsel, who called to give evidence Mr Alan Snaith, Ms Cheryl Francis and Mr Lee Watson. The claimant and the three witnesses for the respondent had all prepared typed, signed, witness statements which were taken "as read" by the tribunal subject to questions in cross-examination and from the tribunal. There was an agreed bundle of documents marked R1 comprising an A4 ring-binder

containing 762 pages of documents. Mr Dunn, for the respondent, had prepared a skeleton argument which was marked R2. The bundle contained a helpful cast list and chronology, which was agreed by both parties.

2. By claim form presented on 13th March 2018 the claimant brought complaints of unfair dismissal, unauthorised deduction from wages and unlawful disability discrimination. The respondent defended the claims. In essence they arose out of the claimant's dismissal on 29th January 2018, for reasons which the respondent says related to his capability to perform the duties for which he had been employed. The claimant had been on almost continuous sick leave since 2nd May 2017, following an accident at work which had occurred on 26th April 2017. The claimant accepts that the reason for his dismissal was his absence, but maintained that the dismissal was unfair. The claimant further alleged that his treatment during the period of absence, up to and including his dismissal, amounted to unlawful disability discrimination and that he was owed unpaid wages. The latter allegation was withdrawn at the start of this hearing.

3. There have been several preliminary hearings, at which specific case management orders were made in this case. In terms of the issues (the questions which the employment tribunal must decide), those were identified by Employment Judge Sweeney at a preliminary hearing on 19th February 2021 and agreed by the claimant and the respondent. The respondent accepts that the claimant is and was a disabled person as from 10th August 2017 and that it knew this to be the case from 11th August 2017. The claimant's case was that he was disabled as from 7th June 2017 and that the respondent was aware of his disability as from that date. The respondent concedes that the claimant suffered from a hip condition which amounted to a physical impairment as from 7th June and that they knew about it. However, the respondent maintains that it did not know and could not reasonably have been expected to know that the condition was "long-term", in that it had lasted for 12 months or was likely to last for more than 12 months. The respondent maintains that that information only became available to them as from 11th August 2017.

4. The allegations of unlawful disability discrimination include allegations of unfavourable treatment because of something arising in consequence of the disability, contrary to Section 15 of the Equality Act 2010. The alleged unfavourable treatment is the dismissal. The claimant brings allegations of failure to make reasonable adjustments, contrary to Sections 20 – 21 of the Equality Act 2010. The alleged provision, criterion or practice was that which required employees to undertake office-type duties during their rehabilitation, following a period of absence. The claimant alleges that this put him at a disadvantage in that the desk and chair to which he was assigned aggravated his condition and caused him to take further sick leave. The proposed adjustment would be to adjust the desk and chair so as to avoid putting him at that disadvantage. The claimant also alleges 5 separate acts of harassment by either Alan Snaith or Cheryl Francis as follows:-

   (i) Alan Snaith telling the claimant to "sit in the fucking rest area";

(ii) Cheryl Francis "attacking and questioning the claimant about why he had not got in touch with Glenn Robertson, the physiotherapist, and given him the results of the claimant's x-ray;

(iii) Alan Snaith contending that the claimant's impairment was due to a road traffic accident which happened in December 2016;

(iv) Cheryl Francis threatening the claimant that the respondent may chose to no longer support him;

(v) Cheryl Francis sending the claimant a threatening e-mail.

Finally, the claimant brings a single allegation of victimisation contrary to Section 27 of the Equality Act 2010. The claimant alleges that the respondent failed to offer him the "job search" facility prior to terminating his employment and then terminated his employment following the raising of four grievances by the claimant on 29th January 2018.

5. Those are the claims which the tribunal must deal with. Mr Francis and Mr Dunn, for the respondent, had helpfully agreed a list of issues; a copy of which appears at pages 1 – 4 in the hearing bundle.

6. Having heard the evidence of Mr Francis and the witnesses for the respondent, having looked at the documents to which it was referred and having carefully considered the closing submissions of Mr Francis and Mr Dunn, the tribunal made the following findings of fact on a balance of probability.

7. The respondent owns and operates a vast factory and industrial complex in Washington, Tyne and Wear, at which it manufactures various models of motor car. The claimant was employed as a production line operative from 15th November 2010 until his dismissal on 29th January 2018. The claimant worked on the production line known as the "Zone Trim 2 and Chassis 2 Workshop". It is acknowledged that working on the production line involves demanding, physical work which includes bending, lifting and assembly which must keep up with the pace of the production line. At the relevant time, the claimant's task involved "lifting glass roofs over my head and placing them onto the glazing facility and preparing them for the machine." There was a machine available to help lift glass roofs for some of the models of car, but that could not be used on the model being assembled on the production line where the claimant worked, because it was too slow to keep up with the production line. The claimant's evidence, unchallenged by the respondent, was that he had to lift glass roofs by hand at the rate of 3 every 5 minutes.

8. On 22nd December 2016, the claimant was involved in a road traffic accident unconnected to his work, which involved another driver driving into the driver's side door of the claimant's vehicle. Liability for that incident was admitted by the other driver. The claimant sustained an injury to his right shoulder. Following that incident, the claimant had 3-5 days absence, followed by a period of light duties, before he made a full recovery and recommenced his original work on 8th February 2017.

9. On 24th April 2017 the claimant began to experience lower back pain. On 25th April 2017 he informed his supervisor, Mr Alan Snaith, that he had hurt his back the previous day and asked that he be "rotated off" the production line which involved the lifting of the glass roofs. That request was refused. On Wednesday 26th April the claimant worked for 6 hours in a row on the production line which involved lifting the glass roofs. During the second of those 3-hour sessions, the claimant experienced "a sharp pain in my lower body – my right leg gave way, which made me place the glass down with a lot of force, plus my weight on top of it, cracking the glass. My back and right side went numb following this. I informed my team leader Mark Foley about what had happened, but he only took the roof away and didn't do anything regarding what happened to me. According to Alan Snaith he was not informed about this accident. I managed to finish the shift, but as the numbness faded, I started to experience not only back pain, but pain in my right hip."

10. The following day, the claimant attended work and was again on the same production line. He asked to be changed from that rotation, but was told he had to finish the entire shift. The claimant informed his line manager that he was experiencing pain in his lower back and right hip and that it was getting "progressively worse".

11. On Friday 28th April 2017 the claimant was again undertaking the first 3-hour session when he described how "the pain became too much – I was barely able to walk and my whole body was shaking from the pain." The claimant informed his supervisor, Alan Snaith, who advised that he present himself to the Nissan on site medical centre. That was the first time that the claimant had reported back and hip problems to the Nissan medical centre. Following that, the claimant was put on restricted light duties upon the advice of the Nissan nurse.

12. On Monday 1st May the claimant went to see a doctor at his local "walk-in centre" who, upon examining the claimant, advised that the claimant's back pain was "sciatic" and prescribed Codeine to try and ease the pain. On Tuesday 2nd May the claimant informed Mr Alan Snaith that he would be unable to attend work due to his back pain. Mr Snaith asked the claimant to attend for a further medical assessment. The claimant attended Nissan on 3rd May, where he was assessed by the physiotherapist, Mr Glenn Robertson. The claimant completed an "injury at work" form. On Thursday 4th May the claimant attended his local health centre where he was prescribed anti-inflammatory drugs and was given a fit note certifying that he was unfit for work for 2 weeks from 4th May to 18th May. On 8th May the claimant attended the Nissan medical centre, where the physiotherapist, Mr Glenn Robertson, gave his opinion that the claimant's condition was "more mechanical and exercises will help ease the pain." The claimant went from there to see his line manager, Mr Alan Snaith, and gave him the fit note from 4th May to 18th May. Mr Snaith asked the claimant why he was unable to return to work and that there were "check duties and rest area duties" that the claimant could perform. Mr Snaith also asked whether the claimant's condition was related to the motor accident which had happened the previous December. The claimant's reply was that his condition was related to the work he had been performing on the production line. The claimant alleges that Mr Snaith was wrong to suggest that the pain in his back may be related to the claimant`s recent road traffic accident. The Tribunal found that this was no

more than an innocuous enquiry as to the cause of the pain, which Mr Snaith in his capacity as line manager was entitled to ask.

13. The claimant returned to work on Monday 22nd May, performing duties which did not involve bending, twisting or lifting, but immediately noticed an increase in pain in his right hip. On 7th June Mr Snaith asked the claimant to undertake different tasks which involved transferring parts from the kitting trollies to the various vehicles. The claimant described this as being "outside my restrictions and involved a lot more bending, lifting and walking." The claimant identified that he would be unable to perform those duties and informed Mr Snaith accordingly. The claimant's evidence to the tribunal was that Mr Snaith's response was to shout at the claimant saying, "Go sit in the fucking rest area then". Mr Snaith's evidence to the tribunal was to deny that this was said, although he accepted that he had formed the view that the claimant just wanted to "stand around" rather than do any work. Mr Snaith accepted that he may have raised his voice, but he denied shouting. The tribunal found it likely that the claimant's version of this incident was correct, and that Mr Snaith had shouted at the claimant, telling him to "Go sit in the fucking rest area then".

14. On 8th June the claimant attended his GP and obtained a further fit note till 22nd June 2017. On 14th June the claimant was examined by the respondent's occupational health specialist and was certified as "unfit for work in any capacity". Mr Snaith was informed and he in turn informed Cheryl Francis, the respondent's HR controller.

15. On 22nd June the claimant's sick note was extended by his GP to 6th July. The claimant in fact remained absent from work until his attempted return to work on 22nd November 2017. That return to work lasted for only one day and the claimant was thereafter absent continuously from 23rd November until his dismissal on 29th January 2018.

16. During this 7-month period of absence, the claimant attended 8 "medical counselling" meetings. Those took place in accordance with the respondent's absence management policy and were attended by the claimant, Mr Street (Works council), the HR controller and, occasionally, Mr Snaith, his line manager. The purpose of those meetings was to identify the current medical situation, to discuss when the claimant may be able to return to work and what support could be offered to the claimant both to facilitate his return to work and to enable him to continue at work once he had returned.

17. One of those medical counselling meetings took place on 5th July. During that meeting, Ms Francis asked the claimant why he had not contacted the Nissan physiotherapist Mr Glenn Robertson to make an appointment and that it was the claimant`s responsibility to do so. The claimant said that he had lost faith in Mr Robertson and wished to see someone else. Ms Francis believed that the claimant would have to raise a formal complaint against Mr Robertson if he wished to change to a different physiotherapist. The claimant subsequently did so. The claimant took exception to the manner in which Ms Francis conducted this meeting. The Tribunal found that Ms Francis had acted reasonably in discussing this with the claimant and

that she had not acted aggressively towards the claimant in any way during this discussion.

17. On 10th August 2017 the claimant attended an appointment with Mr Paul Partington, Orthopaedic Surgeon at Nuffield Health, who confirmed that the claimant was suffering from a Femora Acetabular impingement in both hips and that he suspected the claimant to be suffering from a labral tear in his right hip. The claimant informed the respondent of this the following day. The claimant had an MRI scan and hip arthrogram on 16th August and on 24th August Mr Partington informed the claimant that the MRI scan confirmed a labral tear in his right hip. The claimant reported this to the respondent on 25th August.

18. There was a further medical counselling meeting on 30th August, when the claimant informed the respondent that Mr Partington had recommended surgery on his hip and that thereafter the anticipated recovery time would be some 3 – 4 weeks before the claimant could return to work, a full 3 months before the claimant would know if the surgery had been successful and between 4 to 6 months for a full recovery. The claimant alleges that during this meeting, he was told by Ms Francis that the respondent, " would no longer be able to support me due to the length of my absence." That she said any such thing was flatly denied by Ms Francis. The Tribunal found it unlikely that Ms Francis said what the claimant alleges. It is accepted by the claimant that the respondent did in fact continue to provide the same support thereafter as it had done up until that meeting. The respondent subsequently confirmed in writing that it would continue to support the claimant with his surgery.

19. The claimant underwent surgery on 25th September and on 29th September informed the respondent that his anticipated recovery time would be between 8 to 12 weeks for a possible return to work, 3 months before he would know if the surgery had been successful and 4 to 6 months for a full recovery.

20. Further medical counselling meetings took place on 10th October, 18th October and 30th October. Meanwhile, the claimant continued to attend the Nuffield Health Centre for physiotherapy and also attended the respondent's in-house physiotherapists.

21. On 3rd November 2017 a senior physiotherapist at Nuffield Health reported to Mr Nick Smith, the physiotherapist at Nissan, as to the claimant's progress and suggested that the claimant may benefit from a phased return to work, beginning with light duties. On 9th November the surgeon, Mr Partington, reported to the claimant's GP in the following terms:-

> "This gentleman is making a steady recovery following his arthroscopic hip surgery. I think if he was doing a desk job, he'd be back at work properly, but as he works on the assembly line at Nissan, he is finding it difficult to try and do any of that sort of work. I don't think he is capable of working on an assembly line for another four weeks. He could do some sedentary work now and possibly light duties in another two weeks, if his hip will put up with them comfortably. Sometimes it takes months longer than expected to fully recover and I may need to update on this."

Mr Partington also indicated that the claimant had complained about knee pain and Mr Partington expressed concern that the claimant could have a medial meniscal tear, upon which surgery could not be performed whilst the claimant continued to recover from his hip surgery. Mr Partington recommended an MRI scan on the claimant's knee.

22. On 22nd November the claimant agreed to return to work following a request by Mr Snaith, which had been based upon the recommendation of Mr Partington. The intention was to ask the claimant to do "rest area duties, for example paperwork". The claimant requested a phased return to work on reduced hours. The claimant returned to work on 22nd November, having informed Cheryl Francis that morning:-

> "I will return to work this evening under duress. After our last meeting I was under the impression that a further meeting would take place between myself, you, Alan and Andy to discuss my return to work. I was hoping to discuss the possibility of a phased return to work on a short-term basis to assess how my hip injury reacts before performing a full shift."

That was the claimant's reply to a letter from Ms Francis earlier that day, which included:-

> "Further to your communication with Alan yesterday, please see below a copy of the advice from physio regarding your capability for work in any capacity. You should return to work without delay, to carry out rest area paperwork duties. The exact detail of the duties will be discussed with you on your return to work, but rest assured these will be paperwork based and you will be able to sit/stand/move about freely as you need to. We will be advised by Mick in terms of your fitness for work. I must make you aware that if you refuse to return to work in this capacity, you will not be paid for your absence and the matter will quickly become a disciplinary issue. Please return to work for your night shift tonight as discussed with Alan."

23. When the claimant reported for work, he was asked to sit on a standard office chair, before a standard office desk, upon which was sat a computer. After 30 minutes, the claimant reported to Mr Snaith that he could not sit any further due to the pain in his hip and knee. In his witness statement at paragraph 84 the claimant states:-

> "I sat in the rest area for nearly 40 minutes before I was given duties in T3's rest area working at a computer. After 30 minutes I was experiencing a lot of pain sitting at the desk mainly due to the chair I was on was broken (tipped at an angle no arm supports). The others in the rest area weren't any better. The desk was also low, so I had to lean forward to use the computer. I tried standing and moving about but it didn't alleviate the pain. It was clear that there was no assessment done on the area and that it was completely unsuitable for someone in my condition. No-one from the medical centre came down to make sure I was coping well with the duties. When Alan Snaith came to tell me around this time that they had approved reduced hours and I would be working half shifts till Friday, then I will be required to do full shifts starting next week. I informed Alan at this point

> about how the chair is broken and the pain in my right hip is already getting worse, but I was met with a mocking attitude in which he mockingly enquired about what I sit on at home. I told him at home I have raised sofas, toilets due to my Dad having a back injury which are more comfortable and that I actually spend most of my time at home in bed as that's where I'm in the least amount of pain. I then went on to tell him about the importance of sitting posture specified by the Nuffield physiotherapist, that I am unable to sit properly in this chair and moving about isn't helping."

The claimant goes on to say about Mr Snaith, "He never tried to find me a suitable alternative chair or offer any assistance, nothing was done and I was again left to suffer through it. Alan made no attempt to move the chairs for me if I wanted a different chair, he expected me to move it myself, which was against my restrictions so even if there was a more suitable chair around, I was unable to get it for myself as I could risk injury and that would most likely be used against me if it did occur."

24. At page 422 in the bundle, is a photograph of the area in which the claimant was undertaking this work. The chair in question has no arms. It is not clear from the photograph how it is said to be "broken". Other chairs appear to be located within no more than two paces of that chair. The tribunal was not satisfied that the claimant had shown that the chair itself or its condition was the cause of the claimant's pain. The tribunal was not satisfied that a different chair would have made any difference.

25. The claimant worked a half-day shift on 22nd and 23rd November and then attended a further medical counselling meeting on 23rd November, at which he complained about the lack of any workplace assessment and that the chair and desk were unsuitable. The respondent decided that the claimant was not fit for work and on that date the claimant commenced his final period of absence. The claimant never returned to work thereafter.

26. The claimant continued to attend physiotherapy sessions. He attended before the respondent's consultant occupational health physician, Mr Moothadeth, on 12th December. Mr Moothadeth's report at page 434 in the bundle contains the following opinion:-

> "He has seen his specialist who was unsure as to why his symptoms have worsened and is concerned that his pain levels have increased again. He has had bloods done to rule out infection and given that he has not had any fever leading up to his pain increasing again, it is unlikely to be the case. Whether he has had some post-surgery inflammation to the hip or residual tear or any other unidentified pathology is not clear at this point. His specialist has advised him to contact his secretary if his symptoms do not improve in the coming week as he may need an urgent steroid injection. In terms of his function, he is struggling with his mobility and this is clearly evident today. He was unable to weight-bear for more than a few seconds on his right hip and his right hip movements are extremely limited. He's unable to sit comfortably and has to lean onto his left hip to take the weight off his right hip and relieve pain.

> Clearly, he is not fit to return to work in any capacity whatsoever. It is unclear as to why his symptoms have worsened and we will have to wait and see what the specialists do in the coming few weeks. I have advised him not to drive in icy conditions as his hip movements are limited and he may not be able to reliably undertake the emergency stop.
>
> At this stage it is unclear as to when he will be fit to return to work and this will obviously depend on whether he responds to his steroid injections and whether the pain relief can be sustained for a significant amount of time.
>
> I shall arrange to review him in my clinic on Tuesday the 16th of January 2018 to get an update on his health. If his symptoms do improve before he has seen me then I am happy for him to return to work half shifts off-line duties only, until he has seen me."

27. A further medical counselling meeting had been arranged for 19th December, but that was cancelled following negotiations between the claimant and the respondent about the terms of a settlement/compromise agreement, which terms included compensation being paid to the claimant and the termination of his employment. The claimant appears to have been confused about the impact of those negotiations. In paragraph 95 of his witness statement he states,

> "On Tuesday the 19th of December 2017 I get a phone call from Andy Street who tells me that Alan Snaith and Cheryl Francis have decided they are going to terminate my contract for medical incapacity if I attend the meeting that evening. He then asked if I would like him to try and sort a settlement agreement with them that would be better than being terminated as I would get more money from the settlement. I asked if I would be able to keep my medical insurance till my treatment was done and he said he would ask. Andy called me again after discussing it with Cheryl Francis he told me they are definitely planning on terminating my contract if I attend the meeting, but he has managed to arrange a settlement agreement. He went over the agreement saying it was the best he could get, saying that if I decide to take the agreement I would be given time to consider it and I would need to get it reviewed/get advice from a solicitor who would need to sign it if I decided to agree to it. Nissan would cover the cost of the solicitor. He also told me that unfortunately once my contract ends with Nissan, so does the private health care. I agreed to take the settlement agreement and get it reviewed. I travelled to Nissan to receive the settlement from Andy Street, who also said he was told by Cheryl Francis that I need to get it in by Friday the 22nd of December 2017 so it can be sorted before the Christmas shut down, so I really wasn't given much time by Nissan."

28. The claimant then began to receive messages from colleagues asking whether his employment had been terminated, with some stating that they had been told that his contract had been terminated. The claimant's appointment with the company physiotherapist which was arranged for 16th December, was cancelled because the claimant's employment would be ended under the terms of the compromise agreement prior to that date. When the claimant contacted the respondent`s Private Patient Plan, he was told that if his employment was terminated then he would have to pay for any further treatment himself. The claimant returned his

Nevos car to the respondent on 20th December, again in the belief that his employment had already been terminated.

29. On 21st December, the claimant sent an e-mail to the respondent stating that he would not sign the settlement agreement and in which he raised a formal grievance in connection with the manner in which the negotiations about the settlement agreement had been conducted.

30. On 8th January the claimant contacted Andy Street to try and clarify his employment status and was informed that his employment had not been terminated. On 9th January the claimant received a letter from the respondent inviting him to a further medical counselling meeting on 11th January, "To discuss medical information, absence from work which commenced in May 2017 and to review the support you have received from the company to date. Please be advised, as you have failed your rehabilitation to work plan and you currently remain absent from work with no indication of when you may be able to return to your work as manufacturing staff, a potential outcome of this meeting could be the termination of your employment for the reason of medical incapacity." The claimant alleges that this letter was "threatening" because of that final sentence. The Tribunal found that not to be the case. It was perfectly reasonable in all the circumstances for the respondent to make clear to the claimant what may be the consequences of his continued lengthy absence.

31. By letter dated 9th January the claimant informed the respondent that he was "under the impression that my contract was terminated on 19th December. Even though my solicitor was aware of this as in the agreement it stated the termination date which she found usual considering I was being dismissed for medical reasons which also was not stated in the agreement. I rang Andrew Street yesterday who informed me that I am still employed and I didn't sign the agreement. On the 19th December he contacted me and explained that should I attend the meeting it was already decided that I will be dismissed for medical incapacity. That was the only reason I considered the agreement in the first place as my health therefore my medical insurance was the most important thing to me.

I was also convinced of my termination because Alan Snaith told the people who I work with that I am no longer employed by Nissan, from 19th of December. This was before I was even given time to seek advice on the agreement which shows he was sure of my termination either way.

If you wish to continue with you plan for dismissal due to medical incapacity that was decided would happen in our meeting on the 19th of December, then can you not send it me in the post. As I'm not in the right mood or frame of mind to attend such a meeting."

Elsewhere in that letter the claimant states, "If you wish to continue my employment then I'd like to inform you that any meetings regarding my medical condition before seeing Mr Partington are pointless and a waste of time as I will have no new information for you because as I have stated all medical treatment has stopped due to the impression of dismissal you have given me."

32. A medical counselling meeting took place on 11th January, but due to the claimant's failure to attend, the respondent did not make any decision. By letter dated 15th January at page 483 in the bundle, Cheryl Francis wrote to the claimant in the following terms:-

> "Further to recent communications, I write to confirm the situation. You were invited to attend a medical counselling meeting on Thursday 11th January 2018, however you failed to attend this meeting. I confirm the meeting has been rescheduled for Wednesday the 17th January 2018 at 4.30pm. I would also like to take this opportunity to remind you of your next appointment with the company doctor, which is planned for Tuesday the 16th of January 2018 at 9.30am. Please be advised as you have failed your recommended rehabilitation to work plan and you currently remain absent from work with no indication of when you may be able to return to your role as manufacturing staff, a potential outcome of the medical counselling meeting could be the termination of your employment for the reason of medical incapacity. It is therefore extremely important that you attend both the appointment with the company doctor and the medical counselling meeting to allow us to fully understand your situation and capability in order to make a decision on your case and how much further support the company may be able to offer, if any. Please be advised that if you fail to attend either meeting, we will be left with no option but to make a decision regarding your case without current information and/or in your absence. If you have any queries as a result of this letter please contact me."

33. The claimant in fact attended Doctor Moothadeth on 17th January, following which Doctor Moothadeth confirmed that the claimant should be referred back to Occupational Health once he'd undergone further treatment and rehabilitation, because at that stage he was not fit for work in any capacity.

34. On 22nd January, Cheryl Francis confirmed to the claimant that, because he was still an employee, then he remained entitled to treatment through Axa Private Patients. When the claimant contacted Axa, he was told that they would require a guarantee of employment from the respondent before any further treatment could be given.

35. By letter dated 25th January the claimant was invited to a medical counselling meeting on 29th January. The same warning about potential termination of his employment was set out in accordance with the previous letter.

36. On 28th January the claimant submitted 4 formal grievance letters to the respondent's HR department, complaining about alleged termination of his employment on 19th December, about the alleged bullying behaviour of Alan Snaith, the alleged bullying behaviour of Cheryl Francis and the respondent's alleged failure to provide him with a safe working environment and a rehabilitation plan suitable to his medical condition.

37. The medical counselling meeting took place on 29th January. There are no minutes of the meeting in the bundle, but at page 523 – 525 is the letter from the respondent confirming the outcome of the meeting, which was that the claimant should be

dismissed "for the reason of medical incapacity." The letter specifically refers to the two reports from Doctor Moothadeth, which concluded that the claimant was "unfortunately unlikely to be fit to return to work in any capacity at Nissan for the future." The letter confirms that Mr Francis agreed with the content of those reports and accepted that he would not be able to return to work in any capacity in the foreseeable future. The letter records how the claimant had been absent from work continuously since May 2017, apart from a short period of 3 weeks in late May/early June 2017. The letter records that Mr Francis had no comments to make on those observations and had no further information to present about his potential to return to work in the future. The letter finally states:-

> "After a short adjournment, I explained having taken everything into consideration and the fact that you have been absent from work nearly 9 months less the 3 week period in your return to work, we were still without any indication of when you may be able to return to work in any capacity. I also reiterated we were now past the initial time scales for a return to work following your surgery and you have been able to carry out sedentary duties as expected. I confirmed due to all of the above and the length of your absence we could no longer continue to support your absence and I informed you of my decision to terminate your contract for the reason of medical incapacity."

38. The letter went on to state that the claimant had the right to appeal against that decision and by letter dated 1st February the claimant submitted an appeal. The claimant's letter runs from pages 526 – 529 in the bundle. The salient points are as follows:-

    (i) The reason for my medical incapacity is due to a work-related incident on 26th April 2017.

    (ii) I was forced back to work on my feet all day by Glen Robertson, physiotherapist, between 22nd May 2017 and 8th June 2017, whose advice to "push through the pain" not only caused me severe amounts of unnecessary pain but also worsened my symptoms."

    (iii) I was forced back on extremely short notice into inadequate conditions, conditions which had not been assessed for my needs that aggravated my recovering hip. If there was an actual plan in place and I was asked to work in better conditions I would have completed rehabilitation without issue. As stated in Mr Partington's report, I should have been capable to performing sedentary duties.

    (iv) If Glen Robertson hadn't delayed things at the start by making his own diagnosis and ignoring other medical professionals` opinions, I would have received treatment sooner. I was left with no choice but to transfer my treatment to the NHS.

    (v) I don't understand why Cheryl Francis in the weeks leading up to my 29th January 2018 termination, insisted I was still employed by Nissan and to also insist that I start my medical treatment through Axa PPP again, even though

she knew that I was going to be terminated and this would have led to even further delays on my treatment.

(vi) I strongly believe that it is because of the actions/lack of actions taken by Nissan's members of staff that have caused this injury to occur, have aggravated it and hindered my recovery, a recovery which was progressing smoothly until 22nd November 2017. It is because of this that I have been deemed medically incapable. If not for their actions/lack of actions I would have already returned to work on light/sedentary duties as advised by Mr Partington.

39. The appeal hearing took place on 5th March 2018. Again, there are no minutes of that meeting, but at pages 537 – 543 is the respondent's letter of 8th May by Mr Lee Watson, setting out the reasons for the dismissal of the appeal. The summary of Mr Watson's findings is as follows:-

(i) I did not feel that I could make any kind of judgment on how you had sustained your medical condition.

(ii) Your main issue was the rehabilitation plan and the fact that you did not believe it to be appropriate for you, as no risk assessment had been done prior to your return. In an investigation it was established that Mick Smith did not believe a risk assessment was needed. He was confident that the conditions for your return could be met in that you had the opportunity to get up, walk around and work at your own pace and within your own comfort levels. Furthermore, Mick was implementing the advice of your own specialist who had indicated that a sedentary desk job was entirely suitable. You complained to me that all the chairs in the rest area had been broken, but I could find no evidence to support this claim.

(iii) Confusion which occurred towards the end of your employment when you believed that you had been dismissed, was an unfortunate misunderstanding. I do not believe that this compromised the management of your case or made your dismissal an unfair one.

(iv) Having studied the paperwork associated with your case, I could not find any evidence to suggest that there was any kind of procedural failure within the management of your absence. Medical information was reviewed and discussed with you and the appropriate actions taken.

(v) As a result of all of the above, I cannot uphold your appeal. I believe the decision made by your supervisor, Alan Snaith, to dismiss you was a reasonable and fair one.

40. The claimant has alleged that the respondent failed to undertake a "job search" for him, rather than dismiss him. That process is one made available to employees who require a different job within the respondent`s organisation. The Tribunal accepted the respondent`s explanation that the claimant`s doctors had said that he was unfit for any kind of work at the relevant time, so that there was no point in undertaking that search.

41. The claimant underwent steroid injections in his right hip in May 2018 and up until December 2018 continued treatment for his injury, during which time he also began to suffer problems with his left hip. As at the date of this Employment Tribunal hearing, the claimant accepted that he remained unfit for work any kind of work on the production line at the Nissan factory.

The law

42. The claims brought by the claimant engage the provisions of the **Employment Rights Act 1996** (unfair dismissal) and the **Equality Act 2010** (unlawful disability discrimination).

Employment Rights Act 1996

Section 94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.
(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 98 General

(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.

(2) A reason falls within this subsection if it--

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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.

Unfair dismissal

43. The respondent relies upon “capability” as its potentially fair reason for dismissing the claimant. The claimant has always accepted that this was the reason why he was dismissed. The respondent’s position is that the claimant was no longer capable of performing work of the kind for which he had been employed because of his illness and long-term absence. That is a potentially fair reason under Section 98 (2) (a). The relevant authorities which provide guidance to the tribunal on the interpretation of that statutory provision, are as follows:-

Spencer v Paragon Wallpapers Limited [1977 ICR 301]
East Lyndsay District Council v Daubney [1977 ICR 566]
HJ Heinz Company Limited v Kenrick [2000 IRLR 144]
BS v Dundee City Council [2014 IRLR 131]

44. The basic principles established by those cases are as follows:-

(i) It is essential to consider whether the employer can be expected to wait any longer for the employee to return. The tribunal must expressly address this question, balancing the relevant factors in all the circumstances of the individual case.

(ii) Those factors include whether other staff are available to carry out the absent employee’s work, the nature of the employee’s illness, the likely length of his or her absence, the cost of continuing to employ the employee, the size of he employing organisation and the unsatisfactory situation of having an employee on very lengthy sick leave.

(iii) A fair procedure is essential. This requires in particular, consultation with the employee, a thorough medical investigation (to establish the nature of the illness or injury and its prognosis) and consideration of other options (in particular alternative employment within the employer’s business). In one way or another, steps should be taken by the employer to discover the true medical position prior to any dismissal. Where there is any doubt, a specialist report may be necessary. The employer must take into account

not only the employee's current level of fitness, but also his or her likely future level of fitness.

(iv) The employee's opinion as to his or her likely date of return and what work he or she will be capable of performing should be considered.

45. In dealing with cases where a disabled employee is dismissed for capability reasons which are related to that disability, the Tribunal considers the guidance from The Court of Appeal in **O`Brien v Bolton St Catherine` s Academy (2017 ICR 737)**. Where there are allegations of both unfair dismissal under S98 Employment Rights Act and unfavourable treatment because of something arising from disability under S15 Equality Act which the employer says is justified, then if the dismissal is found to be justified under the Equality Act, then it is likely to be reasonable under the unfair dismissal legislation.

Equality Act 2010

Section 15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if--

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Section 20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to--

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to--

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	**Applicable Schedule**
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

Section 21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

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

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

Section 26 Harassment

(1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of--

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if--

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if--

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are--

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

Section 27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

a) B does a protected act, or

b) A believes that B has done a protected act

(2) Each of the following is a protected act-

(d) making an allegation (whether or not express) that A or another has contravened this Act.

Section 136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

1. Impairment

Regulations may make provision for a condition of a prescribed description to be, or not to be, an impairment.

2. Long-term effects

(1) The effect of an impairment is long-term if--

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

4. Substantial adverse effects

Regulations may make provision for an effect of a prescribed description on the ability of a person to carry out normal day-to-day activities to be treated as being, or as not being, a substantial adverse effect.

5. Effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if--

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.

46. The respondent concedes that the claimant is and was at all material times suffering from a disability as defined in Section 6 of the Equality Act 2010, namely that he had a physical impairment which had a long-term substantial adverse effect on his ability to carry out normal day to day activities. The respondent's position is that it knew or ought to have known about the claimant's disability as from 11th August 2017 when the claimant received his prognosis from the consultant, Mr Partington. The claimant's case is that the respondent knew or ought to have known about his disability from 7th June, when the claimant was unable to perform the sedentary duties allocated to him by Mr Snaith.

47. Before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person. For that purpose, the required knowledge, whether actual or constructive, is of the **facts** constituting the employee's disability

as identified in Section 6 of the Equality Act 2010. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day to day activities. Whether those elements are satisfied in any case depends also on the clarification as to their sense. Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a "disabled person" as defined in Section 6.(**A Limited v Z – UKEAT 0273/1ARN)**

48. In **Pnaiser v NHS England and Coventry City Council [2016 IRLR170]** the Employment Appeal Tribunal set out the proper approach to claims under Section 15 in the following terms:

> "The tribunal must determine whether the reason/cause (or if more than one) a reason or cause, is "something arising in consequence of the claimant's disability." That expression "arising in consequence of" could describe a range of causal links. A causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration and it will be a question of fact to assess robustly in each case whether something can properly be said to arise in consequence of disability. This stage of the causation test involves an objective question and does not depend upon the thought processes of the alleged discriminator."

49. Once the claimant has established that he has been subjected to unfavourable treatment because of something arising in consequence of his disability, the respondent may then go on to show the "justification" defence in Section 15 (1) (b). The authorities which give guidance to the employment tribunal as to the interpretation of the justification defence were recently summarised by the Honourable Mrs Justice Eady sitting in the Employment Appeal Tribunal in **Gray v University of Portsmouth [EA-2019-000891/00]**. Those authorities are:-

Hardy & Hansons Plc v Lax [2005 EWCA-CIV-846]
MacCulloch v ICI [2008 ICR1334]
Lockwood v Department of Work and Pensions [2014 ICR1257]
O'Brien v Bolton St. Catherine's Academy [2017 ICR737]

What the employment tribunal must do is to expressly identify the legitimate aim and then establish the level of need of the respondent or the impact of the claimant's absence and whether the measures taken by the respondent in respect of the claimant's absence would assist with and/or achieve the effective running of the relevant operation. The tribunal must be satisfied that the measures, "correspond to a real need and are appropriate with a view to achieving the objectives pursued and are necessary to that end." That requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it. It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the

employer's measure and to make its own assessment of whether the former outweigh the latter. The tribunal must take into account the reasonable needs of the business, but it must make its own judgment on a fair and detailed analysis of the working practices and business considerations involved as to whether the dismissal is reasonably necessary. That critical evaluation is required to be demonstrated in the reasoning of the tribunal. In principle, the severity of the impact on the employer of the continuing absence of an employee who was on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified and it is not unreasonable for the tribunal to expect some evidence on the subject. What kind of evidence is appropriate will depend on the facts of each case. Often it will be so obvious that the impact is very severe that a general statement of that effect will suffice, but sometimes it will be less evident and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing.

50. In cases where there is an allegation of failure to make reasonable adjustments, **(S.20-21)** the duty to make any such adjustment arises in the following circumstances:-

(i) The employer imposes a provision, criterion or practice which puts the disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. The requirement is to take such steps as it reasonable to have to take to avoid the disadvantage. The burden is upon the claimant to establish the following:-

(a) what is the provision, criterion or practice;

(b) how does that put disabled persons at a disadvantage;

(c) does it put the claimant at a personal disadvantage;

(d) what is the proposed adjustment;

(e) how would that adjustment remove the disadvantage.

Archibald v Fife Council [2004 IRLR651]
Griffiths v Secretary of State for Work and Pensions [2016 IRLR216]

51. The definition of harassment in **Section 26** covers harassment which "relates" to the relevant protected characteristic and not mere harassment which is "because of" the characteristic. That requires a consideration of the mental processes of the putative harasser (**GMB v Henderson – 2017 IRLR340**). In determining whether the conduct has the effect of violating the employee's dignity or creating the relevant environment for the purposes of Section 26, the tribunal must take into account the employee's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. In **Land Registry v Grant [2011 IRLR748]** the Court of Appeal focussed on the words "intimidating, hostile, degrading, humiliating or offensive" and observed that:-

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

52. Victimisation under **Section 27** effectively provides protection from retaliation to employees who complain about contravention of the Equality Act 2010. Employees are protected from being subject to detriment as a result of having a performed a protected act. The complainant need only show that he has been treated badly, not that others have been treated better. However, the treatment which amounts to a detriment must be **because** of the protected act. The protected act thus has to be an effective and substantial cause of the employer's detrimental actions, but does not have to be the principal cause (**Chief Constable of West Yorkshire Police v Khan – 2001 IRLR830**).

Conclusions

53. The Tribunal found that the claimant genuinely, but mistakenly believed that the respondent had caused his injury and therefore had to continue to employ him until he recovered, or otherwise compensate him. That belief flavoured the entirety of his case. He had issued personal injury proceedings in the County Court, but that claim was not successful.

53. The Tribunal was satisfied that the respondent had acted reasonably throughout the claimant`s period of illness and absence. It had sought and obtained from the appropriate medical experts, sufficient information about the claimant`s medical condition, its prognosis and the prospects of recovery. It had supported the claimant with physiotherapy and private medical care. It had implemented such recommendations as were made by those experts. It had waited 9 months for the claimant to show that there was a reasonable prospect of him returning to work. The claimant himself accepted that there was no prospect of returning to work within the foreseeable future. The claimant had been fairly and reasonably consulted at all times through the numerous medical counselling meetings, when his views and opinions were obtained and taken into account. The claimant`s absence meant that other employees had to be found to undertake his work. The claimant continued to accrue holiday entitlement and the right to private health care, yet he accepted that he had no prospect of returning to work after his lengthy absence. The Tribunal was satisfied that the respondent could not reasonably be expected to wait any longer for the claimant to return to work. The unfair dismissal claim is dismissed.

54. The respondent accepted that the claimant`s dismissal was unfavourable treatment because of something (the absence) which arose as a consequence of his disability. The respondent argued that the dismissal was a proportionate means of achieving a legitimate aim. The aim was to have a workforce capable of attending work to perform the tasks for which they are employed. The tribunal found that to be a legitimate aim. For the reasons set out in para graph 53 above and in accordance with the decision in **O`Brien v St Catherine`s**, the Tribunal found the dismissal to be proportionate in all the circumstances. It would be disproportionate to require or expect the respondent to wait any longer to see whether the claimant may recover. The claim under S.15 is dismissed.

55. The tribunal found that the 4 allegations of harassment were not well-founded. Whilst the claimant may say none were wanted, the tribunal found that none had the purpose or were likely to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The only allegation in respect of which the tribunal accepted the claimant`s description of what happened, was that when Mr Snaith told him to " Go sit in the fucking rest area". The tribunal found that the use of such "industrial language" in those circumstances did not have and was not likely to have the necessary effect. Those claims are dismissed.

56. The allegations of victimisation are not made out. The claimant has accepted throughout that he was dismissed because of his lengthy absence and not because of his grievances. The claimant has not complained that those grievances were not reasonably dealt with. The alleged failure to offer him the "job search" facility was because he remained unfit for any kind of work and not because he had complained in his grievances. Those claims are dismissed.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
10 February 2022