EMPLOYMENT TRIBUNALS

Claimant: Mr S Deanie

Respondent: Aston Martin Lagonda Ltd

Heard at: Birmingham (in person on day 1 and 2 and then by CVP)

On: 16, 17, 18, 19, 22, 23, 24, 29 November 2021

Before: Employment Judge Meichen, Mrs RJ Pelter, Dr G Hammersley

Appearances:
For the claimant: in person
For the respondents: Ms A Palmer, counsel

JUDGMENT ON LIABILITY

1. The claimant's claim for direct disability discrimination fails and is dismissed.

2. The claimant's claim for failure to make reasonable adjustments succeeds to the extent explained below.

REASONS

Introduction

1. This was the final hearing to determine the claimant's claims of direct disability discrimination and failure to make reasonable adjustments.

2. The claimant worked for the respondent as a Leather Trimmer in their trim shop at a site in Gaydon, Warwick from 21 January 2018 to 8 July 2019.

3. It is accepted by the respondent that the claimant was disabled at the material time (24 March to 8 July 2019) because of spinal arthritis. The claimant suffers from back pain, among other issues.

4. We had an agreed bundle of 531 pages. A few documents were added by consent during the hearing.

5. The claimant gave evidence and was cross examined. He called two witnesses (Anna Quinn and Allen Deanie) who were also cross examined. In addition the claimant provided statements from two other witnesses (John McFadden and

Luke Clark). Those witnesses did not attend the hearing and therefore were not cross examined. We took that into account when deciding what weight to attach to their evidence.

6. The respondent called 4 witnesses: Ian Cummings, Matthew Lee, Gary Upton and Andy Sutton. All of the respondent's witnesses were cross examined. The respondent's witnesses were each involved in supervising the claimant. Mr Cummings and Mr Lee were Lead Technicians (first line supervisors). Mr Sutton was a Group Leader and the claimant's line manager. Mr Upton was the Area Manager (effectively a second line manager).

7. We heard submissions on the last day of the hearing. Both sides produced written submissions and supplemented these with oral submissions. We did not finish hearing submissions until after 4 pm. We reserved our decision. We made it clear to the parties that we would consider remedy issues separately and only if they arose. Therefore this judgment deals with the liability issues only.

The conduct of the hearing

8. There were a few issues during the course of this hearing. We endeavoured to deal with these in the way which we felt was most in accordance with the overriding objective.

9. The first issue was that the claimant did not prepare a witness statement. The claimant explained that he had not realised he had to prepare a witness statement. We noted that there were a number of documents in the bundle where the claimant had explained his case. These included the claimant's particulars of claim (14) which he had later submitted as a statement (84), his further particulars (34), a response to the respondent's response (80), a list of acts of discrimination (91), a reply to the respondent's list of issues (93), an amended reply to the respondent's list of issues (107) and a "witness and impact statement" prepared at an earlier stage in the proceedings (460).

10. We suggested to the parties that we could read and consider the documents provided by the claimant in the bundle and treat the earlier statements as the claimant's evidence. Both parties were content with and agreed to that approach.

11. Perhaps inevitably in view of the lack of a proper witness statement by the end of the claimant's cross examination the Tribunal felt there were still a few gaps in our understanding of his case. We sought to address this by way of the Judge asking the claimant open questions in order to fully understand the claimant's case as pleaded and as identified in the list of issues and his evidence. We were careful to ensure that the claimant was not led into any particular answer and to only ask essential questions about matters central to the issues in the case.

12. Ms Palmer raised a concern about this. We clarified with her that she did not wish to make any application arising from it. In order to address Ms Palmer's concern we made it clear that the claimant could be recalled in order for her to

cross examine on any matters which had come out in the course of the Tribunal's questions. We also indicated that Ms Palmer had permission to ask her witnesses any supplemental questions arising from the claimant's answers.

13. As it happened the claimant's evidence was completed on Friday afternoon and so Ms Palmer had the weekend in order to consider whether she wished to ask any further questions. We also said that if Ms Palmer needed more time on Monday morning she could have it. Ms Palmer indicated she was ready on Monday morning. The claimant was recalled and Ms Palmer asked him some more questions. Ms Palmer also asked the respondent's witnesses some supplemental questions without any objection.

14. Another issue in the case concerned Mr Sutton's evidence. Shortly before the hearing was due to start the respondent obtained a witness order for Mr Sutton. We were informed he would be available on the second day of the hearing (the first day was a reading day). We agreed to consider his evidence first, even though that was out of the usual order.

15. The respondent took steps to obtain a witness statement for Mr Sutton. This was made available around lunchtime on the first day of the hearing. As we explained to the claimant it was beneficial to everyone (including the claimant) that Mr Sutton provided a statement in advance of attending the tribunal.

16. Nevertheless it seemed that the claimant felt wrongfooted by the late arrival of the statement. When he attended the Tribunal on the second day it was clear he was feeling upset and emotional. The claimant said he had stayed up late to read Mr Sutton's statement but had not had time to prepare all the questions he wanted to ask Mr Sutton.

17. This difficulty was exacerbated by the following. First, it appeared that the claimant was uncomfortable in the Tribunal room. The claimant had requested a high backed chair which was provided and he also brought in his own cushion but he seemed to be in some discomfort. Second, the claimant explained he was travelling in by train and this was difficult due to his disability.

18. We sought to address these issues in the following ways. First it was suggested that the hearing could move to CVP so that the claimant could be more comfortable and not have to travel. This was agreed by all parties and so from day 3 the case took place by CVP. This worked without any major difficulties and nobody suggested any unfairness was caused.

19. Second we allowed the claimant further time before he had to cross examine Mr Sutton. In the end the claimant was given most of the morning to finish preparing his questions for Mr Sutton. The claimant confirmed before starting his questions that he had had sufficient time. The claimant was also able to take some painkillers which seemed to help him. We then did not start the claimant's evidence until the third day.

20. Following the move to CVP the claimant appeared to be more comfortable as he was in his own home. We took regular breaks and increased the length of the breaks to 15 minutes as the claimant found that worked better.

21. The claimant did still become emotional and distressed on occasion and he obviously found parts of the hearing difficult. There were also a number of, in our view unnecessary, interruptions during the hearing which did not help matters.

22. The claimant was upset about some of the issues in this case and on occasion his emotion got the better of him. We encouraged the claimant to remain calm and used breaks to give him the opportunity to compose himself. This worked. It was also necessary to remind the claimant of the need to be respectful of all participants in the process, for example when he raised his voice to Ms Palmer. We should record that the claimant was quick to apologise whenever something like this happened.

23. Not surprisingly the claimant was unfamiliar with some of the rules and practices associated with Tribunal hearings, which led to some further concerns raised on behalf of the respondent. In particular Ms Palmer on more than one occasion raised concerns that the claimant appeared to be giving new evidence during his closing submissions. We reminded the claimant on more than one occasion that submissions are not the time to introduce new evidence. We assured Ms Palmer that as a professional Tribunal we would not take into account evidence which had not been properly adduced. We have not done so.

24. Despite these challenges we were satisfied that the hearing was fair and both parties had a fair opportunity to put forward their cases. Nobody suggested otherwise.

The issues

25. At the start of the hearing we were presented with a list of issues which had been agreed between the parties. We attach that as an appendix to this judgment. However, it is necessary to clarify a number of points concerning the issues for us to determine, which we will do below.

26. To put this matter into context we should explain how the list of issues came into existence. When this case first came before the Tribunal for a preliminary hearing on 14 April 2020 the respondent had not yet been identified as the correct respondent to the claim. EJ Butler added the respondent at that hearing. The claimant was ordered to provide further and better particulars of claim, although he remained a litigant in person, rather than the Tribunal identifying the issues at that stage. The claimant provided further and better particulars.

27. There was then a further preliminary hearing before EJ Richardson on 20 July 2020. By that stage the respondent had only provided a holding response and had requested further time to provide a substantive response. EJ Richardson noted that the respondent had already requested and received further information from the claimant *"although yet further information is required".* EJ

Richardson also noted that the respondent had provided a draft list of issues in advance of the hearing. The claimant agreed with the PCPs as drafted by the respondent and the respondent undertook to include some minor amendments to the issues requested by the claimant. Other than recording that EJ Richardson did not identify the issues in the claim. EJ Richardson listed the case for an open preliminary hearing ("OPH") to determine time limits and disability.

28. At paragraph 5.1 of her Order it is apparent that EJ Richardson anticipated that the OPH could also include discussion of the list of issues. However at the OPH EJ Miller decided instead to list a further preliminary hearing to confirm the agreed list of issues, among other matters. He made an order for the claimant to provide more further and better particulars, at the respondent's request.

29. The further preliminary hearing was heard by EJ Hughes. Again the issue of the correct respondent was raised and EJ Hughes had to deal with an application from a different respondent that they should be removed. Regarding the list of issues EJ Hughes simply recorded the following. She was satisfied that the claimant had set out his case in his statement and list of allegations in response to requests and orders to clarify his claims. The reasonable adjustments claim had been set out in the list of issues and it was open to the respondent to argue they have not all been pleaded and/or are out of time. The only amendments to the list of issues identified as necessary related to the claimant's direct disability claim, which at that stage had not been incorporated into the list of issues, and so EJ Hughes identified the issues in that claim so that they could be inserted. She then went on to case manage the claim to final hearing.

30. It therefore seems to us that there has been minimal judicial oversight of the list of issues, in particular as it concerns the reasonable adjustments claim. Further, at the hearing before us Ms Palmer explained that she had not drafted the list of issues. We assume they were drafted either by the respondent's solicitor or the barrister previously instructed by the respondent (we note there has been a change of representation in this respect). In any event, there had been no application to amend the list of issues following Ms Palmer's involvement.

31. This context perhaps explains why we think some of the issues require clarification. We discussed each of these matters with the parties during the hearing.

The claimant's employment status

32. It was not suggested that we had to determine any issue relating to the claimant's employment status.

33. The claimant has been described as an agency worker or a contract worker. We understand the claimant was supplied to work at the respondent via an agency. He never had a contract of employment with the respondent and it is not suggested that he did. During the hearing Ms Palmer made it clear on behalf of the respondent that they accepted they were the correct respondent to this

claim and they would be liable for the claims identified in the list of issues, if successful. Specifically, Ms Palmer accepted that the respondent had a duty to make reasonable adjustments for the claimant. In light of those concessions we agree that we do not need to determine any issue concerning the claimant's employment status.

34. We refer to the claimant in this judgment as a worker and those who had a contract of employment with the respondent as employees.

The relevant time for this claim

35. At the hearing on 20 October 2020 EJ Hughes recorded as follows: *"The claimant confirmed that his disability discrimination claims are for the period after 24 March 2019. Consequently, it is unnecessary for the Employment Tribunal to decide whether he met the definition of disability before that point."*

36. The claimant's concession before EJ Hughes that his discrimination claims only apply to the period after 24 March 2019 remains. We have not therefore decided whether the claimant met the definition of disability before that point: he may or may not.

37. This means that the key period for this claim is between 24 March 2019 and 8 July 2019 when the claimant stopped working for the respondent, in circumstances which we will describe below.

Time limits

38. In his judgment dated 14 September 2020 Employment Judge Miller found that the claim was brought out of time but it was just and equitable to extend time in respect of the allegation relating to the claimant being required to work "standup" overtime culminating in his assignment ending on 8 July 2019.

39. Judge Miller's decision was based on his findings as to the claimant's poor mental health and his difficult personal circumstances.

40. Judge Miller decided that it would be a matter for this Tribunal to determine whether any acts before the standup overtime allegation form part of conduct extending over a period within the meaning of s.123 (3) Equality Act 2010. We will therefore consider that matter, if it arises.

Amendment

41. On day 4 of the hearing Ms Palmer indicated that the respondent intended to argue that the claimant required permission to amend to include his claim of direct disability discrimination and that permission should be refused. This had not been clear to the Tribunal on reading the agreed list of issues. The claimant said he was not aware of this point either. Nevertheless it was an issue going to jurisdiction and we had to consider it.

42. In our view the claimant's claim form pleaded a clear claim of failure to make reasonable adjustments. It did not contain a claim for direct disability discrimination and the facts relied upon to establish this claim were not pleaded. Therefore the claimant requires permission to amend in order to proceed with this claim.

43. The direct disability complaints appear to have been set out for the first time in the claimant's "acts of discrimination" document which was provided on 27 August 2020.

44. The hearing before EJ Miller took place on 2 September 2020. It is not clear from reading his judgment whether the amendment point was raised with him or whether he considered his judgment applied to the potential claim of direct discrimination as well as the claim for reasonable adjustments. He simply says that the claimant's claim for "disability discrimination" was presented out of time and that it would be a matter for this Tribunal to determine whether any acts before the act relating to stand up overtime form part of conduct extending over a period.

45. The respondent took the point that the claimant required amendment at the hearing before EJ Hughes on 20 October 2020. However, EJ Hughes did not determine the matter. She directed instead that the direct discrimination issues should be included in the list of issues but the respondent retained the right to argue that some of the matters in the list of issues had not been pleaded.

46. When Ms Palmer first introduced this issue to the Tribunal she indicated that the respondent would rely on the fact that Mr Thomas (who was the alleged perpetrator of the first two allegations of direct discrimination) was not available. We were told that Mr Thomas had retired and was unavailable. In view of the potential significance of this matter the Judge enquired if the respondent had any evidence of Mr Thomas' unavailability – so that we could understand why it was being suggested he was unavailable.

47. No such evidence was produced and by the time of closing submissions the respondent did not rely on Mr Thomas' unavailability as a reason why amendment should be refused. Ms Palmer frankly and fairly explained that enquiries had revealed that proper efforts to obtain Mr Thomas' evidence had not been made after all.

48. Instead Ms Palmer's written submission made it clear that the respondent relied upon the lateness of the application. In terms of the crucial balance of prejudice test it was said that the prejudice to the respondent was *"having to defend a claim made long after the time of the alleged complaints".* The suggestion was that this outweighed the potential prejudice to the claimant which was that *"he is not allowed to add new claims long out of time, but he still has his claims for failure to make reasonable adjustments".*

49. We have now heard all of the evidence and submissions and there has been no indication that the respondent has faced any prejudice in responding to the direct discrimination claim. The only reason why the respondent had not called

Mr Thomas was that it had failed to make proper enquiries to check if he was available. We have concluded that the amendment should be granted. These are the legal principles which we applied to this decision:

a. The key test for considering amendments is identified in Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650: *"In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."*

b. That key test was refined in the seminal case of Selkent Bus Co Ltd v Moore [1996] ICR 836 where some of the factors which may be taken into account in considering whether to exercise the discretion were set out. They are: the nature of the amendment, the applicability of time limits and the timing and manner of the application. However, the balancing exercise identified in Cocking remains the paramount consideration.

c. The fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise (Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07). A tribunal can allow an amendment to introduce a claim that might be out of time, and order that the question of time limits be determined at the final hearing (Galilee v. Commissioner of Police for the Metropolis UKEAT/0207/16/RN).

d. In Abercrombie and others v Aga Rangemaster Ltd [2014] ICR 209 Underhill LJ made this important observation:

"Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

e. In Vaughan v Modality Partnership UKEAT/0147/20/BA HHJ Tayler made it clear that the Tribunal should focus on the practical consequences of allowing an amendment and the practical approach should underlie the entire balancing exercise. This means that the considerations for the tribunal may include if the application is refused how severe the consequences will be in terms of the prospects of success of the claim or defence and if permitted what would be the practical problems in responding. HHJ Tayler identified that the real question when considering the injustice of refusing an amendment is whether the claimant will be prevented from getting what they need. An amendment may be of practical

importance because, for example, it is necessary to advance an important part of a claim or defence.

50. We considered that although the amendment was being made late this should not be decisive given that time was already extended for the claimant to pursue one allegation of disability discrimination and this gave rise to the possibility of a continuing act argument. We therefore took the view that we should consider the question of time limits as part of our final assessment of the claim. We considered this was consistent with the decision already made by EJ Miller.

51. We found that the consequences for the claimant of refusing the amendment at this late stage would be severe as he would not be permitted to proceed with an entire claim which he had already presented argument and evidence on. The direct discrimination claim was an important part of the claimant's case. We found that the respondent faced no practical problems in responding to this claim. The issues had been clearly defined at the hearing on 20 October 2020 and the respondent could and should have prepared the evidence to respond to them. This was particularly the case because the respondent had an experienced legal team behind them, who could, for example, have applied for another witness order if required. Since the point about the potential unavailability of Mr Thomas had been dropped the respondent did not make any point which suggested any practical difficulty at all in responding.

52. We therefore concluded that the balance of prejudice lay in favour of granting the amendment and the claimant should be permitted to rely on his direct disability discrimination claim as formulated in the list of issues.

Knowledge

53. At the hearing on 20 October 2020 EJ Hughes recorded as follows: *"There is an issue as to whether either respondent knew (or ought to have known) the claimant was disabled as from 24 March 2019 onwards in respect of the allegations of failure to make reasonable adjustments."*

54. The issue regarding knowledge of the claimant's disability was set out in the list of issues. However, during the hearing Ms Palmer conceded on behalf of the respondent that it either knew or ought to have known that the claimant was disabled from 24 March 2019 onwards. This is therefore no longer an issue for us to determine.

55. We consider that the respondent was entirely right to concede knowledge of the claimant's disability. It was in fact obvious from the respondent's own evidence and the unchallenged evidence including that of Anna Quinn that it was widely known that the claimant had a serious back condition which caused him significant pain and was likely to be a disability. By way of example:

    (i) The claimant had two substantial periods off work with back pain in November 2018 and February 2019.

(ii) The claimant's second absence for back pain commenced on 12 February 2019 when he had to leave a shift at the respondent and go to A and E because of his back pain. Mr Lee advised the claimant to go to A and E because of the pain he was evidently in. As we explain below it was obvious to Mr Lee that the claimant was in excruciating back pain on that occasion as Mr Lee saw that the claimant's pain was so severe that he was *"gasping for breath".*

(iii) Anna Quinn said that on the claimant's return from absence he said he was really suffering with his back *"And clearly people could see he was".*

(iv) Mr Sutton accepted he was aware that the claimant had a bad back, he discussed it with the claimant and repeatedly asked what adjustments the claimant would like.

(v) Mr Sutton observed the claimant in pain and struggling to move around. Mr Sutton said that on occasion the claimant's pain caused his face to go grey.

(vi) The claimant was seen wearing a back brace at work.

(vii) The respondent (Mr Lee) provided the claimant with a chair so that he could rest his back as he could see the claimant was struggling with his back.

(viii) The claimant brought in a stool from home to work to rest his back in as that was more comfortable for him.

(ix) The claimant did discuss his back problem with his superiors to some extent. For example Mr Lee accepted in his witness statement that the claimant told him that he had a back problem, was taking painkillers and this medication made him drowsy.

(x) Mr Thomas agreed that the claimant would be given a full time sprayer to assist him and it is very likely that was done as a result of the claimant's issues with his back.

(xi) Mr Lee could see that the claimant was struggling at work because of his back pain and he made Mr Sutton aware of that.

56. Ms Palmer made it clear however that the respondent continued to argue that it did not know and could not reasonably have been expected to know that the claimant was likely to be placed at the disadvantages relied upon for the purpose of his reasonable adjustments claim. We consider this below.

The correct interpretation of the first PCP

57. It is important to be clear about the provision criterion or practice ("PCP") which is relied upon in the reasonable adjustments claim. There were two PCPs

identified in the list of issues. The meaning of the second PCP as drafted was clear. The first PCP was drafted as follows:

A requirement to carry out the headlining role as a “1 person job”.

58. This is a broad PCP. It was acknowledged to be broad and indeed was asserted to be broad by Ms Palmer in her closing submissions on behalf of the respondent.

59. An issue arose during the hearing as to how we should interpret this PCP. This turned out to be a controversial matter which did not appear to have been resolved at the preliminary hearings, which were, as we have explained, primarily concerned with other matters. The following context is relevant.

60. From May 2018 until he stopped working for the respondent the claimant was performing the headlining role referred to in the first PCP. The claimant had carried out this role during a previous period working for the respondent in 2017. It is not in dispute that at that time the headlining role was a 2 person job and so the claimant was performing it with another operative alongside him. However in May 2018 the respondent changed its operation so that the area in which this role was based moved to 2 shifts – a day shift and a night shift. The respondent decided that one person would do the headlining role on the night shift and one person on the day shift.

61. The claimant performed the headlining role on the night shift from May 2018 until June 2019. In June 2019 the respondent changed its operation again so that the headliner role was only done on the day shift. However the role did not revert to being a two person job. From June 2019 until he left on 8 July 2019 the claimant performed the headliner role on the day shift but as a one person job.

62. Therefore the claimant was performing the headliner role as a 1 person job from May 2018 until he stopped working for the respondent. This covers the entire period which the claimant relies upon for his disability discrimination claim.

63. The respondent’s written procedures for how the role should be performed identify that a second person is required for only a specific and limited part of the process. The respondent referred to as the “page 8 step” as it was set out on page 8 of the respondent’s procedures. It relates only to one step in a detailed set of steps. The respondent’s case is that for that small part of the process the claimant should have stopped and called for help by using the “stop call wait” procedure. There is a dispute over whether that applied in practice. The claimant described how the use of anti-bond sheeting was adopted by the respondent to avoid the need for a second person at the page 8 step. We will consider this further below. However it is undisputed that at the relevant time the claimant was as a matter of fact required to carry out the headlining role as a “1 person job”, with only at most a specific and limited exception in the process where a second person is required.

64. With that in mind the Tribunal asked the parties at an early stage in this hearing if the PCP simply meant the requirement to undertake the duties of the headlining role as one person.

65. Ms Palmer did not agree with the above interpretation. We were concerned to ensure that the case we were adjudicating was in fact the claimant's case and that all parties understood what the issues were.

66. We understood the first PCP to involve the physical aspects of the headlining role which the claimant was performing. Specifically, the claimant had referred to two alleged physical requirements when he was performing the headlining role: the process he was using to do his job involving large amounts of stretching and twisting of the torso whilst in various bent or tilted forward body positions and being required to use a glue spray booth and the spraying process consisting of a lot of arm waving with a heavy spray gun in your hands whilst leaning into the booth. It seemed clear to us that those were the specific requirements of the role which the claimant had identified which he said put him at a substantial disadvantage.

67. We therefore asked Ms Palmer if she accepted that the PCP as formulated on the list of issues included those two alleged requirements. Ms Palmer confirmed that she did. On that basis we considered that the PCP in the list of issues correctly reflected the claimant's case and did not require amendment. The claimant agreed with that. We therefore proceeded on the understanding that we would have to decide whether the respondent had the PCP of a requirement to carry out the headlining role as a "1 person job" including the physical aspects of the role and specifically alleged requirements for the claimant to use processes involving large amounts of stretching and twisting of the torso whilst in various bent or titled forward body positions and to use a glue spray both and the spraying process consisting of a lot of arm waving with a heavy spray gun in your hands whilst leaning into the booth.

68. In closing submissions the respondent modified its position.

69. First, as part of her written closing submissions Ms Palmer changed from what she had said previously. She submitted that on reflection the glue spraying requirement *"was not pleaded as a PCP"* (paragraph 72) and/or did not *"form part of the pleaded PCP"* (paragraph 59). She therefore now argued it did not form part of the PCP identified in the list of issues.

70. Then, in his closing submissions the claimant described the movements containing large amounts of stretching and twisting of the torso whilst in various bent or titled forward body positions as the methods associated with the headlining job generally. The claimant said his claim was about *"the job itself"* which he considered could not be done without the movements identified. We did not consider that the claimant's submissions were inconsistent with his broadly pleaded and particularised case summarised below, the broad first PCP in the list of issues or the evidence which we had heard.

71. Nevertheless, following the claimant's submission there was a further development in the respondent's position. Ms Palmer said that she now made the same submissions about the second requirement as the first – i.e. that it *"was not pleaded as a PCP"* and/or did not *"form part of the pleaded PCP".* We reached this point very late in the hearing – 15.45 on the last day when we were just about to conclude submissions.

72. In light of these developments we have to go back to reconsider how we should interpret the broadly stated PCP in the list of issues. Nobody suggested that the list of issues should be amended. In particular the respondent did not propose a narrower PCP. In any event we did not consider that we should amend the PCP at this stage. The parties had, at the respondent's instigation, agreed to the PCP being formulated in the list of issues in a broad way. We think we have to interpret what it involves in accordance with the claimant's case as pleaded and particularised.

73. As part of her submissions Ms Palmer suggested that the claimant's pleading was lengthy and rambling. We do not agree. Like many litigants in person the claimant did not use the phrase PCP in his pleading but we consider on a fair and natural reading of it what he was complaining about was clear. Overall we consider the claimant has in fact pleaded and particularised his case effectively (bearing in mind he is a litigant in person and not a lawyer). The claimant's pleaded and particularised reasonable adjustments claim is, to our mind, straightforward and not difficult to understand. It is a broad claim relating to the physical duties that he was required to do in the headlining role and that he found more difficult once the role was changed from a 2 person to a 1 person role. The claimant provided this succinct summary of his case in the concluding paragraph of his particulars of claim:

    "I feel the job role, having been condensed from a two person role to one, was a physically demanding and challenging role that I had the skills for but was unable to continue to do sufficiently due to Aston Martins lack of reasonable adjustments for my physical and mental needs."

74. As this demonstrates the claimant is not claiming anything more complicated than identifying the job role, and in particular the physical nature of the role, as the part of the respondent's operation which caused him a disadvantage, and that he found it easier to do it when it was a two person job (essentially because the duties were shared). We consider that we can and should interpret the PCP in the list of issues so as to ensure that we adjudicate this plainly stated claim. We do not consider this involves any deviation from the list of issues or the claimant's pleaded and particularised case. On the contrary, it is our view that the respondent's approach, which was only explained during this final hearing and confirmed only during closing submissions, would involve a deviation. In fact it seemed to us that the PCP had likely been drafted (by the respondent's own solicitor or the barrister they previously instructed) to give effect to the summary of the claimant's case quoted above. We think that was the right decision.

75. As we have recorded above in the early stages of this litigation the claimant was required to particularise his claim in quite a large number of documents both in response to requests from the respondent and orders of the Tribunal including requests and orders related to agreeing the list of issues. We noted that the claimant had set out his case in the same broad way in the documents clarifying his claim which he had provided at an early stage.

76. In his further and better particulars of claim the claimant explained his reasonable adjustments case as follows:

"Due to the lack of adjustments I was unable to continue in my employment due to increasing pain and being unable to manage the expected workload and work hours. The quota of jobs to be done was applicable to the whole team at Aston Martin Lagonda. This expectation required a large amount of physical movement which exacerbated my back condition".

77. In his first response to the draft list of issues the claimant again explained the difficulty he experienced in performing the headlining role:

"My work headlining was arguably the most physically taxing on the mid-section with twisting bending and stretching to manipulate the covers into place. All of my work would more than likely have to have consisted of a high risk of repeat damage to the injury of which I am being led to believe could not be foreseen by the highly trained AML management team. With the back being one of the most noted danger injuries in the health and safety policy in any work place.

My back and neck were in constant use in this role and on my returns to work at AML twice they knew I had left with a severe back problem that had become a persistent problem in moving and even walking properly."

78. Similarly in his second response to the respondent's draft list of issues the claimant said:

"Due to the physical aspects of my role my ability to safely and comfortably execute my role were affected immediately following the onset of symptoms in July 2020. The consequence of my pain meant midsection twisting, bending and stretching became exceedingly difficult".

[the date in that quote must be an error – the agreed list of issues records that the claimant says his symptoms started in July 2018 not 2020]

79. Later in that document the claimant said:

"completing my role as someone not disabled meant that further pain was caused, causing me to have further time off and requiring more medication for this pain".

80. We consider that what the claimant said in these documents particularising his case was consistent with the summary of his claim provided in his claim form. The claimant had plainly explained when he particularised his case at an early

stage that the physical aspects of the role were what caused him a substantial disadvantage. This was not therefore a case of a claimant attempting to change his case at the eleventh hour. The respondent was on notice of the claimant's case since the start, and it was reflected in the list of issues they had drafted.

81. It seemed to us that the respondent was at a very late stage asking us to interpret the claimant's pleaded and particularised case and in particular the alleged PCP in a technical, restrictive and narrow way. To our mind the respondent's approach went against the grain of how we should interpret the PCP (see the guidance in Carreras set out below about adopting a liberal rather than an overly technical or narrow approach which is consistent with the requirement to construe the term PCP broadly).

82. We do not accept the respondent's arguments that the two requirements we have identified were not pleaded as part of the PCP. They were set out in the claim form and they form part of the broad PCP which the claimant has, we think, clearly and repeatedly identified.

83. We consider that we would not be acting fairly if we interpreted the PCP in the narrower way as suggested by the respondent as we would not be adjudicating on the claim brought by the claimant. If the respondent wished to argue that the PCP in this case related only to a specific part of the headlining role then they should have drafted the PCP so as to identify the specific part of the role, so the claimant could have responded to that suggestion at an early stage. We were of the view that it could not fairly be open to the respondent to have drafted the PCP in the list of issues in such a broad way but then argue at the final hearing that we should interpret it in a narrow way.

84. We do not consider that there is any unfairness caused to the respondent in interpreting the PCP to include the physical aspects of the headlining role. The respondent has been on notice that this was the claimant's case since the claim form and the particulars which the claimant was required to provide identified that was his case. It was the respondent who (correctly in our view) drafted the list of issues so as to include the broadly stated first PCP. It appeared to us that the respondent's evidence in fact dealt with the broad PCP rather than the narrow interpretation latterly contended for.

85. For those reasons we concluded that the first alleged PCP involved the physical aspects of the headlining role which the claimant was required to do as one person, and had found easier when there were two people doing it. The physical aspects of the headlining role include alleged requirements for the claimant to use processes involving large amounts of stretching and twisting of the torso whilst in various bent or titled forward body positions and to use a glue spray both and the spraying process consisting of a lot of arm waving with a heavy spray gun in your hands whilst leaning into the booth.

The law

The burden of proof

86. The burden of proof provisions apply to this claim. Section 136(2) Equality Act 2010 sets out the applicable provision as follows: *"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".* Section 136(3) then states as follows: "*but subsection (2) does not apply if A shows that A did not contravene the provision".*

87. Well-known case law has demonstrated that the burden of proof provisions enable the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant to prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination (this is often referred to as a "prima facie case"). The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that they did not commit the unlawful act. That approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258.

88. We reminded ourselves that the Supreme Court has emphasised that it is for the claimant to prove the prima facie case. In Hewage v Grampian Health Board [2012] IRLR 87 Lord Hope summarised the first stage as follows: *"The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be* proved*, and it is for the claimant to discharge that burden."*

Direct discrimination

89. Section 13 Equality Act 2010 provides that: *"a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others".*

Failure to make reasonable adjustments

90. The duty to make reasonable adjustments is in section 20 Equality Act 2010. The relevant duty in this case is at subsection (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."

91. The claimant's case is that the respondent discriminated against him by failing to comply with that requirement. The respondent accepts that if the requirement arose it had the duty to make reasonable adjustments.

92. It should be noted that the duty requires positive action to avoid substantial disadvantage caused to disabled people. To that extent it can require an employer to treat a disabled person more favourably than others are treated (Archibald v Fife Council [2004] ICR 954). It should also be noted that *"the purpose of the legislation is to assist the disabled to obtain employment and to*

integrate them into the workforce" (O'Hanlon v HM Revenue and Customs UKEAT/0109/06).

93. Schedule 8, Part 3, paragraph 20 Equality Act provides, so far as relevant:

> **20 Lack of knowledge of disability, etc.**
> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

94. The correct approach to reasonable adjustments complaints was set out by the EAT in Environment Agency v Rowan [2008] ICR 218:

a. What is the provision, criterion or practice ("PCP") relied upon?

b. How does that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was likely to be at that disadvantage?

d. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

95. As to the identification of the PCP the EHRC Employment Code ("the Code") makes it clear the phrase is to be broadly interpreted. The Code says (paragraph 6.10): *"[It] should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions."*

96. In Lamb v The Business Academy Bexley EAT 0226/15 the EAT confirmed that the term "PCP" is to be construed broadly *"having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".*

97. In Ishola v Transport for London [2020] ICR 1204 the Court of Appeal observed that: "*The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee."* In Yorke v GlaxoSmithKline Services Unlimited Appeal No. EA-2019-000962-BA HHJ Tayler observed: "… *it is clear that the requirement to undertake the duties of a job can be a PCP …".*

98. The approach that Tribunals should take to PCPs was considered by HHJ Eady QC in Carreras v United First Partners Research UKEAT/0266/15/RN:

"As noted by Laing J, when putting this matter through to a Full Hearing, the ET essentially dismissed the disability discrimination claim because it found that an expectation or assumption that the Claimant should work late was not the pleaded PCP.

The identification of the PCP was an important aspect of the ET's task; the starting point for its determination of a claim of disability discrimination by way of a failure to make reasonable adjustments (see Environment Agency v Rowan [2008] IRLR 20 EAT, para 27). In approaching the statutory definition in this regard, the protective nature of the legislation means a liberal rather than an overly technical or narrow approach is to be adopted (Langstaff J, para 18 of Harvey); that is consistent with the Code, which states (para 6.10) that the phrase "provision, criterion or practice" is to be widely construed.

It is important to be clear, however, as to how the PCP is to be described in any particular case (and I note the observations of Lewison LJ and Underhill LJ on this issue in Paulley). And there has to be a causative link between the PCP and the disadvantage; it is this that will inform the determination of what adjustments a Respondent was obliged to make."

99. Like in this case in Carreras the PCP concerned a "requirement". HHJ Eady QC observed*: "A "requirement" might imply something rather narrower than a PCP; after all, the adoption of the language of "provision, criteria or practice" rather than "requirement" or "condition" - for the purposes of defining indirect discrimination - is generally viewed as heralding a broader and more flexible approach.".* She found that *"an expectation or assumption placed upon an employee might well suffice"* as a requirement and, relevantly, noted that *"employees can feel obliged to work in a particular way even if disadvantageous to their health".* The Employment Tribunal's approach in that case had been *"overly technical and led it to treat the Claimant's case as having been put more narrowly than it in fact was".*

100. As to substantial disadvantage section 212 Equality Act 2010 defines "substantial" as meaning "more than minor or trivial". It must also be a disadvantage which is linked to the disability. That is the purpose of the comparison required by section 20. Simler P said in Sheikholeslami v University of Edinburgh UKEATS/0014/17/JW that:

"It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question. For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.

…. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be

disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

101. Simler P further observed that *"in determining what operative effect the PCP has, medical evidence is not a pre-requisite in every case (though there may be cases where the particular facts do make it necessary)."*

102. In relation to knowledge the burden is on the respondent to prove it did not have actual or constructive knowledge of (in this case) the substantial disadvantage. The EAT has held (in Secretary of State for Work and Pensions v Alam 2010 ICR 665) that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

(i) Did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?

(ii) If not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?

It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments

103. The Code states at para.6.19:

"For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment…"

104. The Code then gives the following example:

"A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements."

105. Failure to enquire is not by itself sufficient to invest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know had it made such an enquiry *(*A Ltd v Z 2020 ICR 199, EAT*).*

106. As to adjustments, paragraph 6.28 of the Code sets out the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- Whether taking any particular steps would be effective in preventing the substantial disadvantage;
- The practicability of the step;
- The financial and other costs of making the adjustment and the extent of any disruption caused;
- The extent of the employer's financial or other resources;
- The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- The size and type of employer.

107. An important consideration is the extent to which the step will prevent the disadvantage. We should consider whether a particular adjustment would or could have removed the disadvantage: Romec Ltd v Rudham [2007] All ER(D) (206) (Jul), EAT.

108. In Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 the Court of Appeal said: *"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."*

109. Accordingly it is unlikely to be reasonable to make an adjustment that involves little or no benefit to the disabled person in terms of removing the disadvantage. We have to consider whether on the evidence there would have been a chance of the disadvantage being alleviated. Our focus should be on whether the adjustment would, or might, be effective in removing or reducing the disadvantage that the claimant is experiencing at work as a result of his disability and not whether it would, or might, advantage the claimant generally.

110. Effectiveness must be assessed in the light of information available at the time, not subsequently: Brightman v TIAA Ltd UKEAT/0318/19 2 July 2021 (paragraph 42).

111. Cost implications are to be considered on a case-by-case basis. The Code states at para. 6.25 that *'even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms — for example, compared with the costs of recruiting and training a new member of staff — and so may still be a reasonable adjustment to have to make'.*

112. In Cordell v Foreign and Commonwealth Office 2012 ICR 280 the EAT noted that a tribunal is required to make a judgement based on what it considers right and just in its capacity as an industrial jury. This may include a number of considerations, such as the size of any budget dedicated to reasonable adjustments, what the employer has spent in comparable situations, what other employers are prepared to spend and any policies set out in collective agreements. However, the EAT made the point that such considerations, even where they have been identified, can be of no more than suggestive or supportive value — there is no objective measure for assessing one kind of expenditure against another.

113. Consulting an employee or arranging for an Occupational Health or other assessment of his or her needs is not in itself a reasonable adjustment because such steps do not remove any disadvantage: Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT. The only question is, objectively, whether the respondent has complied with its obligations or not. If the respondent had done what is required of it, then the fact that it failed to consult or did not know that the obligation existed is irrelevant.

114. The Code gives examples of steps which may be reasonable in practice in paragraph 6.33. These include allocating duties to another worker, transferring the disabled worker to an existing vacancy, altering hours of work, tolerating absence, providing supervision or support, and modifying disciplinary or grievance procedures.

115. The Code gives the following example of altering the disabled worker's hours of work or training at paragraph 6.33: *"An employer allows a disabled person to work flexible hours to enable him to have additional breaks to overcome fatigue arising from his disability. It could also include permitting part-time working or different working hours to avoid the need to travel in the rush hour if this creates a problem related to an impairment. A phased return to work with a gradual build-up of hours might also be appropriate in some circumstances."*

116. It can be reasonable for a respondent to make an adjustment even if the claimant does not suggest it. In Cosgrove v Caesar and Howie 2001 IRLR 653 the EAT emphasised that the duty to make adjustments is on the employer. It did not follow that just because the claimant and her GP were unable to come up with any useful adjustments the duty could be taken, without more, to have been complied with. The EAT held that the tribunal had made an error of law in treating the claimant's views and those of her GP as decisive on the issue of adjustments when the employer had given no thought to the matter itself.

Continuing act

117. Applying s. 123 Equality Act 2010 and following the decision of the Court of Appeal in Hendricks v Metropolitan Police Commissioner [2003] IRLR 96 the burden was on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept

of conduct extending over a period. There was no suggestion in this case of a continuing act which should be approached as being a rule or a regulatory scheme which during its currency continues to have a discriminatory effect.

Findings of fact

118. The respondent is a well-known premium car maker.

119. The claimant was a leather trimmer at the respondent's site at Gaydon, Warwickshire from 21 January 2018 to 8 July 2019. The claimant had previously worked for the respondent in 2017. It was agreed evidence before us that the claimant was a good worker; conscientious, diligent and reliable.

120. At the time we are concerned with the claimant worked in the headliner role; where the internal trim was placed onto the cars' headliner. The claimant had previously performed the same role whilst working for the respondent in 2017. The claimant performed his duties in an open plan work area known as the trim shop.

121. The headliner role was initially carried out by a two person team working on day shifts. The claimant formed part of that two person team in 2017 but when he first started in January 2018 he was working in a different role within the trim shop. However in May 2018 the area moved to two shifts - a day shift and a night shift. The respondent decided that rather than having two people doing the headlining role on one shift one person would do it on the day shift and one on the night shift. The claimant was offered the headlining role on the night shift. The claimant accepted because it meant more money.

122. The role the claimant was doing was described by Mr Upton in his witness statement. It involved collecting and lifting the headliner substrate from the racking and taking it to a spray booth where the claimant would apply adhesive using a spray gun. The claimant would then take it back to the jig to be worked on. The claimant would collect the headliner cover from its rack, take it to the spray booth and apply adhesive again using a spray gun and then take it back to the workbench. The claimant would then align the headliner cover and substrate together ensuring it was in line and then stick them together. Once joined he would then cut away the excess material around the edges with a scalpel. These tasks were performed largely on workbenches and the size of the materials the claimant was working with meant that he would spend a large part of his time leaning over the workbench in order to complete his tasks.

123. The respondent has documentation to show the process which should be followed to perform the headliner role. In their written closing submission the respondent identified this as the documentation at pages 284 – 295, 304 – 321 and 327 – 337 of the bundle. Each set of documents related to a detailed process the claimant was expected to do in the headliner role. This documentation showed that the headliner role was designed to be done by one person with a specific part in two of the processes identified where a second person was intended to be used to achieve the desired quality by making sure the centre line is in the correct position. This was at the "trimming the headliner"

part of the process. It was referred to in the respondent's written submission as the "page 8 step" because it was on page 8 of the respondent's process documentation. Other than the page 8 step the role the claimant was doing was not designed to be a two person process. This was the only point at which the respondent's process documentation identified that two people were needed.

124. We have to deal with a dispute over how this part of the process worked in practice. The respondent's case was that whenever the claimant reached the page 8 step he should have used the "stop call wait" process. A copy of this process was available in the bundle at page 488. It applies whenever a technician identifies a "problem or an issue" during a process cycle and then the process is that they should stop what they are doing, call for assistance and wait for a lead technician to attend before doing anything.

125. The claimant's position was summarised in his closing submissions: he said that "stop call wait" had been introduced into his case in order to confuse the situation and it had nothing to do with his case. The claimant instead described in his evidence that in practice the respondent discouraged stopping the production process and the expectation was for the person completing the headlining role to undertake the process by themselves if nobody else was available to assist. In consequence the claimant explained that he had adapted the process to use anti-bond sheeting to ensure that everything was held in the right position rather than using 2 operatives.

126. During the hearing the claimant, in our view successfully, developed the point that this variation to the process had been adopted by the respondent. In particular the process photos which were attached to the ergonomic review (which we will describe below) showed that the use of anti-bond sheeting had been adopted by the respondent in preference to using two people to complete the role.

127. We doubted whether the stop call wait process was in fact designed to be used as the respondent now alleges. It seems to us clear from reading the process that it is designed to deal with situations where a problem or issue has occurred. It is not designed to deal with the ordinary production process. It is notable that it is not identified as part of the page 8 step that the operative should use stop call wait. If using stop call wait was a necessary part of the process we would expect it to be identified as such in the respondent's written procedure.

128. Moreover, the claimant's successor on the headliner role was Anna Quinn. When she was asked during her evidence whether the stop call wait process was used as part of the headlining role she denied that it was and appeared genuinely perplexed by the suggestion. We take into account that Anna Quinn left the role after only three days and was still being trained up. However we would expect that if "stop call wait" was integral to the headlining role as the respondent now suggests then Anna Quinn would at least have been trained up on how to use it.

129. On 1 October 2018 the claimant went off sick with back pain, initially self-certifying for one week. The claimant was then signed off sick for a further three weeks with his sick notes identifying the reason for his absence as back pain. The claimant's GP records reveal that the claimant had in fact consulted his GP about back pain prior to going off sick, on 17 September 2018. On that occasion he informed his GP that he'd experienced two weeks of pain and that this had been sustained at work whilst leaning forward. There was no reason for the claimant to mislead his GP about what caused his pain and we do not think that he did.

130. The claimant's GP records relating to his visits to the GP in October show that the GP discussed with the claimant that he may be suitable to be referred for amended duties. It is therefore clear that the claimant's GP felt that amended duties might assist the claimant. However when he returned to work the claimant did not provide a sick note recommending light duties as it appears he did not progress this with his GP. This reflected one of the features of the evidence we heard which was that the claimant was reluctant to ask for help from the respondent.

131. The reason why the claimant was reluctant to ask for help was because he viewed himself as being in a particularly vulnerable position due to the fact that he was a worker rather than an employee. This meant that the claimant did not receive any sick pay and therefore he did not want to take time off unless he absolutely had to. It also meant that the claimant was worried about asking for help and he feared that if he did so that he would be in his words "culled" meaning that he would not be able to work for the respondent any longer. The claimant not only wanted to continue working for the respondent but he also wanted to become an employee of the respondent and he did not want to do anything which he thought might jeopardise his working relationship with the respondent.

132. Accordingly, when the claimant returned to work in early November 2018 he still had some residual pain in his back but he did not object to returning to full duties. The issues with the claimant's back pain continued but he never asked for or was provided with light or alternative duties until he stopped working for the respondent. This was a clear example of a case where the claimant felt obliged to work in a particular way even though it was disadvantageous to his health.

133. Despite the claimant's worries he did inform his managers that he was having problems with his back to some extent. He told Mr Cummings he had problems with his back and he also made him aware that he was on painkillers. Mr Cummings advised the claimant to go to the doctors to get his back looked at. The claimant also told Mr Lee later he had problems with his back. Further, Mr. Lee observed that the claimant wore a back brace at work.

134. Mr. Lee was aware that the claimant was taking painkillers and the claimant also told Mr. Lee that the medication he was taking made him drowsy. Mr Lee also observed that at times the claimant was struggling at work because of his back pain.

135. Mr. Lee made Mr Sutton aware that the claimant had back issues and at times struggled with the role he was doing.

136. Mr Sutton accepted that he was aware that the claimant suffered from a bad back and was taking painkillers. He asked the claimant what adjustments he would like be made. Mr Sutton said that if the claimant needed to take breaks then he could. However the claimant's targets were not changed and he was still expected to fulfil his production role. Mr Sutton also asked the claimant if it would help to change the height of the workbench but the claimant said *"no it's not worth it don't bother".* Mr Sutton asked the claimant if he had any other suggestions and the claimant said that he did not.

137. Mr Sutton's discussions with the claimant over adjustments again demonstrate the point that the claimant was reluctant to ask for help for the reasons we have explained.

138. In his witness statement at paragraph 10 Mr Sutton said that if the claimant had asked for lighter duties or shorter hours such requests would have been accommodated. This evidence does not sit very well with the fact that when the claimant requested shorter hours - on 8 July 2019 - his request was flatly refused as we shall explain.

139. In addition to what the claimant told his managers it was also obvious on occasion that the claimant was struggling with pain whilst at work. We refer to the evidence that Mr Sutton observed the claimant's face go grey on occasion due to the pain he was in and the other points we summarised when explaining why we considered the respondent was right to concede knowledge of the disability.

140. It was as a result of Mr Lee observing the claimant struggling that he gave the claimant a chair so that he could rest if he needed to. In his particulars of claim the claimant described the provision of the chair as a policy of allowing "in part" for his back problem which struck us as accurate. The chair which Mr Lee gave to the claimant was not designed to be supportive for the claimant in particular or people with back pain generally. It was simply a standard office type chair. The claimant explained in his evidence and we accept that the chair was not very suitable because it was too low and was therefore difficult for the claimant to get in and out of.

141. As a result of that the claimant stopped using the office chair and brought in his own chair from home. The chair which the claimant brought in was one of his sister's hairdressing stools. Again this was not designed to be supportive for the claimant in particular or people with back problems generally. The stool had the advantage of being higher but it was still not particularly suitable for the claimant because it was on wheels and was therefore unstable.

142. The fact that the claimant had to bring in his sisters hairdressing stool to rest on due to his back pain does not appear to have generated any particular

concern among his managers at the respondent. In particular it did not prompt them to refer the claimant to occupational health.

143. A striking feature of the evidence in this case is that despite what we think were the very obvious problems which the claimant was experiencing with his back whilst at work the respondent did not refer the claimant to occupational health at any stage. The respondent has on site occupational health support at Gaydon which was therefore easily accessible.

144. The respondent also did not refer to claimant for an ergonomic assessment which is another facility which was open to the respondent.

145. In their witness statements the respondent's witnesses explained that as the claimant was a worker he was not afforded the same access to occupational health as employees.

146. We were informed that the respondent's policy is not to refer workers or contractors to occupational health except in cases of skin conditions caused by the working process or lung conditions. Apparently this applies to workers such as the claimant who had worked for the respondent for a long time and were providing good service. We asked to view the written procedure where this difference in policy might have been explained or identified but were told that there was no such written procedure. There was therefore no formal procedure prohibiting the claimant's managers from referring the claimant to occupational health. Despite this the respondent steadfastly stuck to its practice of not referring workers to occupational health even in a case like this - which we should make clear is a case which we consider was crying out for occupational health advice and assistance.

147. There was some suggestion during the hearing that the claimant could have obtained occupational health support from his agency. However this seems to us to be completely unrealistic as the claimant was working full time with the respondent and occupational health support was needed to see if and if so how the claimants role at the respondent could be adjusted. The respondent's on site occupational health department was plainly best placed to do that.

148. We have not lost sight of the fact that referring to occupational health is not in itself a reasonable adjustment. However, undertaking formal consultation and referrals to occupational health are prudent practice in any case where a worker has a disability which is affecting them at work. A failure to formally consult and take advantage of occupational health and other facilities which are designed to assist with making reasonable adjustments makes it more likely that a respondent might fail in its duty to make reasonable adjustments. Given that the respondent accepts that it had a duty to make reasonable adjustments for the claimant we might have expected it to utilise the resources which were available to it in order to ensure that it complied with the duty, in a similar way as it would do for its employees.

149. On 12 February 2019 at about 10:30 PM whilst working on the night shift the claimant suffered from bad back pain and went to A and E. The claimant was in fact advised to go to A and E by Mr. Lee who had observed the claimant to be in considerable pain whilst at work. In his oral evidence Mr Lee explained that he could clearly see the claimant was struggling and in fact he was in so much pain that he was *"gasping for breath".*

150. The claimant described himself, we think accurately, as being in excruciating pain on that occasion. The claimant effectively spent the night at A and E and was given painkillers. The claimant visited his GP the next day and was signed off until 4 March 2019. The claimant's GP records from 13 February 2019 record that the claimant had presented with a history of pain in his lower back for three months which was worsening. He had by that stage tried acupuncture and an osteopath with no success.

151. The claimant explained to his GP that he had been forced to go to A and E because he'd been unable to work due to the pain. On examination the claimant was observed to be unable to walk upright, he was leaning forward and was tender in the whole of his spine. He was prescribed pain killers and an MRI scan was arranged which took place on 24 March 2019.

152. The claimant attended his GP on 26 April 2019 to chase the results of the MRI scan. The claimant also told his GP that the painkillers he had were not strong enough. The claimant was prescribed some additional painkillers and warned as to the risks of drowsiness. The claimant said he did not want a sick note as he needed to work and he did not want to be recommended for amended duties either.

153. On 3 May 2019 the claimant attended his GP again. On that occasion he was trying to expedite his appointment with a neurosurgeon which was then scheduled for August. The claimant told his GP that was too long to wait due to the pain he was in. However, the claimant again said he did not want a sick note.

154. On 3 June 2019 the claimant met with a specialist in neurosurgery, Mr Alok Ray. Mr Ray had the results of the MRI scan and observed degeneration to the claimant's spine. He diagnosed lumbar spondylosis with facet arthropathy (spinal arthritis) an important component. This was identified as the cause of the claimant's back pain.

155. The claimant informed Mr Ray that his job involved *"bending, twisting and lifting"* and that he found it difficult to stand for long. The fact that the claimant explained to Mr Ray that his job involved those things was good evidence that it in fact did. There was no reason for the claimant to misrepresent the situation to Mr Ray at that time.

156. On examination Mr Ray noted that the claimant's cervical spinal movements were mildly restricted. There was no peripheral sensory motor deficits but examination of the lumbar spine revealed increase in low back ache

on hyperextension. This was said to be "pathognomic" (i.e. characteristic) of facet arthropathy.

157. Mr Ray advised that the way forward was for the claimant to adopt the right posture and *"avoid aggravating factors like bending, twisting and lifting".* The claimant was referred to the pain clinic for further management. There was no challenge to the medical evidence that bending, twisting and lifting aggravated the claimant's back and we accept that evidence.

158. In June 2019 the area the claimant was working in moved back to a single shift. This meant that the claimant went back on a day shift. However the claimant continued to perform the headlining role as a one person job.

159. Around this time the claimant raised some concerns with another Lead Technician, Dave Thomas. We have already observed that the respondent did not call Mr Thomas so we did not have the advantage of hearing his version of events, and there was no evidence to contradict the claimant's account.

160. The claimant agreed with Mr Thomas that a full time sprayer would assist the claimant so that he did not have to spray his own work. As is made clear on page 81 this agreement was reached to help the claimant with his issues which we think means the issues with the claimant's back. This is consistent with how the claimant described the situation in his statement on page 463 where he said it had been agreed that he would not be made to spray the glue as that required a lot of arm movement. We therefore conclude that the claimant raised concerns with Mr Thomas about how the work he was doing was affecting his back – specifically the difficulty he had using the spray gun. There was no other reason suggested why Mr Thomas would have agreed for the claimant's glue spraying duties to be done by another operative.

161. The arrangement the claimant reached with Mr Thomas was short-lived. Mr Thomas approached the claimant the day after it was made and said that the man count for the day's work was short and so the claimant would have to spray his own work again. When the claimant said about his back issue Mr Thomas held onto his own back and said *"we all got back problems here mate"*.

162. In his oral evidence the claimant explained that Mr Thomas also had a bad back and had just come back from time off with his back. It seems to us that the withdrawal of the assistance by Mr Thomas demonstrates again that the claimant required formal agreed adjustments rather than a halfway house – which is what we think this agreement and the provision of the office chair were.

163. The respondent operates a system of compulsory overtime known as "standup" which applies to both employees and workers. Standup means that employees and workers can sometimes be required to work above and beyond their usual hours up to a maximum of five hours per week.

164. On 27 June 2019 standup was called to start on 1 July 2019. Because he had been working the night shift the claimant had not previously been

required to do standup. However, the claimant was absent on sick leave on 27 June and he did not work the stand up on 1 July 2019.

165. On 2 July 2019 the claimant left work early after having been informed that his mother was seriously ill. The claimant let the respondent know about the circumstances which were that his mother had been unwell for a significant period and was sadly dying. The claimant was therefore authorised to take leave.

166. On 4 July 2019 Mr Sutton texted the claimant to tell him that standup was required for the following week. Mr Sutton also said he hoped the claimant was doing OK and he asked the claimant to give him a call when he was able to do so. The text was sent in the afternoon when the claimant's mother was in a very bad way. She died at about 6:30 PM that evening.

167. In these proceedings the claimant initially asserted that Mr Sutton had also telephoned him on the afternoon of 4 July. However, and consistent with what Mr Sutton said in his text message, it appears that it was in fact the claimant who telephoned Mr Sutton.

168. The claimant also texted Mr Sutton back in the evening to say that his Mother had died. Despite the fact that the claimant was obviously extremely upset he said that he would be in on Monday morning (8 July 2019). This meant that the claimant would be required to do the standup overtime which had been called to start on that day. The requirement was that the claimant would be required to work an additional one hour and 15 minutes on top of his regular shift of eight hours each day that he was working.

169. On 8 July 2019 the claimant returned to work. He asked Mr Sutton if he could not work the standup. Mr Sutton referred this issue to Mr Upton. In his witness statement Mr Upton accepted that he understood from Mr Sutton that the claimant had asked not to do the standup due to his back pain. Nevertheless Mr Upton's view, as it was communicated to Mr Sutton and recorded in Mr Sutton's witness statement, was that if the claimant's back was so bad that he was not fit to work the overtime then he was not fit to work and he should not be coming into work at all.

170. As a result of that view Mr Upton instructed Mr Sutton to communicate to the claimant that his request not to work the standup overtime was refused. Mr Upton did not attempt to speak to the claimant to understand any more about why this request had been made and what the effects of refusing it might be on the claimant.

171. In his oral evidence the claimant explained that the specific reason why the standup would cause him a problem in terms of his back pain was because he would normally take his painkillers at the start of the day and at lunchtime. If he had to work an extra 1 hour and 15 minutes the lunchtime painkillers would have worn off but he would not want to take more as he would then run the risk of drowsiness on the drive home. For that reason working the overtime would have caused the claimant back pain as he would have been working without

the benefit of painkillers. We found this to be a cogent and credible explanation and we accepted it.

172. In his witness statement Mr Upton explained that his position was that if the claimant was presenting himself at work then he should work, but if his back was causing him issues such that he couldn't work then he shouldn't come in as he wasn't fit. It seems to us that this fails to take account of the fact that the claimant was not saying he was not fit to work generally – just that he was not able to do the standup due to his back pain.

173. Mr Upton nevertheless concluded that he was not authorising the claimant to be released from stand up as he didn't consider it to be in line with the claimant's contractual requirement to work stand up. The respondent now accepts that they knew or ought to have known the claimant was disabled since 24 March. Mr Upton had been expressly told that the claimant was saying he could not do the standup due to his back pain. Mr Upton's approach does not appear to us to recognise the duty to make reasonable adjustments for the claimant as a disabled person. It suggests the claimant's fears over how he may be treated if he revealed the extent of his difficulties might have been justified.

174. Mr Sutton confirmed Mr Upton's decision to the claimant at around 10:00 AM. The claimant then left the respondents premises at around 12 noon. He never returned to work for the respondent. The effect of Mr Upton's decision on the claimant was therefore that he felt unable to work for the respondent any longer, notwithstanding the high level of dedication to his work he had shown up to that point.

175. In his list of acts of discrimination on page 91 the claimant explained that when Mr Sutton told him that he had to do the overtime he said that he felt it was too much and that he had no choice but to leave. However the claimant said that he would stay until 12 to give the respondent a chance to find somebody to replace him. The claimant further explained that in that two hour period the respondent effectively ignored him - nobody came to speak to him to attempt to understand why he felt he had to leave and nobody enquired if they could help in anyway. We accepted the claimant's account of these events. The claimant also pointed out that there was ample opportunity for the respondent to help in the period before he left. We agree.

176. After the claimant left his headliner role was initially covered by John Lawrence. Mr Lawrence was an Aston Martin employee who worked as a "floater" covering roles as needed. He only occupied the headliner role on a temporary basis. Another Aston Martin employee, Anna Quinn, was then asked to do the headliner role.

177. As it happens Anna Quinn also has a problem with her back. She was reluctant to do the role because of that. She referred to colleagues who had worked in that job saying that it really hurts your back.

178. Anna Quinn was nevertheless placed into the headlining role and was trained by John Lawrence. After three days in the job she experienced back pain and had to stop. She then went off sick. Anna Quinn described pulling, tugging and stretching and that she was having trouble reaching over the work benches to do the job. This description, particularly reaching over the work benches, is consistent with the claimant's description of the job.

179. Like the claimant Anna Quinn had experienced back pain at work and was signed off with back pain. However, there were a number of significant differences in the respondent's treatment of Anna Quinn compared to their treatment of the claimant.

180. The respondent conducted a return to work interview with Anna Quinn to understand more about the absence and the reasons for it. The return to work interview also covered what future support may be appropriate.

181. An occupational health referral was then arranged. Anna Quinn was quickly seen by the respondent's occupational health manager who is on site at Gaydon. The occupational health manager provided Anna Quinn with "the back book". This gave helpful advice on how to deal with back pain.

182. Following the occupational health consultation an occupational health report was produced which made recommendations as to what could be done by way of adjustment for Anna Quinn so that she might be more comfortable.

183. The respondent completed an accident report and investigation form. Anna Quinn was described as having felt a "twinge" in her back whilst working. On the face of it this appears to be less serious then the occasion when the claimant had to go to A and E due to the excruciating back pain he was in.

184. An action which was identified as appropriate from the accident report was that ergonomic specialist support should be arranged at the next available opportunity. An ergonomic assessment was then completed and this made recommendations which could assist Anna Quinn in performing the duties of the role. It was an assessment which looked specifically at the role and the person doing it. This was in contrast to the assessments which were done on the role alone which did not take into account a worker's particular needs.

185. It is salient that attached to the ergonomic assessment was a series of photos called "process photos" which showed John Lawrence performing the duties of the headliner role. It is obvious that these photos were taken and attached to the ergonomic assessment in order to show what the process was to do the headliner role. They were valuable evidence showing how the role was expected to be done in practice. There is no suggestion in the photographs of the role being carried out at any stage by two people, or of the stop call wait process being engaged. Instead the photographs show Mr. Lawrence using the technique which was initiated by the claimant of using anti-bond sheeting to make the job more manageable for one person rather than waiting for another person. We found this to be compelling evidence that, as the claimant had suggested, his innovation of using anti-bond sheeting had been adopted by the

respondent and formed part of how they expected the role to be done in practice.

186. The process photos quite clearly showed that the headliner role involved large amounts of stretching, twisting and lifting.

187. From the photographs we could see how the headliner role involved stretching and leaning over the workbench in bent or tilted forward body positions (for example when "steaming the leather") and twisting and using a lot of arm movements (for example when "spraying glue on the leather in the spray booth"). There were also parts of the role which involved lifting – for example when transferring the leather onto the substrate and then smoothing it down. It was notable that the photographs show how the operative doing the role was expected to "reach from the edge of the workbench" into the middle of the leather on the workbench. In order to demonstrate that part of the process a smaller member of staff was used in the photos to show that she had to stand on her tiptoes in order to do it. We understand that was done because Anna Quinn felt the role could be more easily done by someone taller. The claimant is only 5 foot 10 inches tall whereas we understand Mr Lawrence is taller. In any event this again demonstrated quite clearly that a significant part of the role involved stretching and bending over the workbench.

188. To our mind the process photos were important evidence because they showed how the respondent actually required the headlining role to be done in practice. The expectation was for it to be done exclusively as a 1 person role using the claimant's innovation of anti-bond sheeting. The respondent had plainly been aware of this innovation and they had in fact adopted it and expected it to be used. This was why Mr Lawrence was demonstrating that method in the photographs. As Mr Upton himself noted in his witness statement at paragraph 15 it is not uncommon for roles to change over time and it seems to us that is what happened here.

Conclusions

Direct disability discrimination (Equality Act 2010 section 13)

189. We will deal with each allegation in turn.

(i) Having work taken off him by a supervisor, but returned to him the next day

190. This allegation was raised in the "Acts of discrimination" document which the Claimant provided on 27 August 2020 (page 91) where he gave the following explanation:

> *"The date is around 06/2019 on start of shift, LT Mr Dave Thornton on the spray booths issue and how he gave me the work straight back the day after it was deemed to be given to a full time sprayer to do for me. Mr Thornton's man count for the day's work were short and so he said "sorry Sean but you will have to spray your own work again".*

191. We understand the reference to Dave Thornton is a typo and it should say Dave Thomas. As we have mentioned the respondent did not call Mr Thomas and so the claimant's version of events was not challenged. We accept the claimant's version of events. We refer to our findings of fact.

192. The claimant has not named anyone in particular who he says was treated better than he was in this respect.

193. We conclude that there was no less favourable treatment because of disability. As the claimant himself said:

> *"Mr Thornton's man count for the day's work were short and so he said "sorry Sean but you will have to spray your own work again".*

194. Accordingly Mr Thomas did not withdraw the help because the claimant is disabled. He did it because his man count was short. The reason for the treatment was not disability. A non-disabled comparator would have been treated in the same way.

(ii) Being told by a supervisor "we all have back problems"

195. This allegation also involves Dave Thomas and it follows on from allegation (i) above:

> *"…and when I said about my back issue he held onto his own back and said "we all got back problems here mate" and he just carried on with the day."*

196. Again, as the respondent did not call Mr Thomas there was nothing to contradict the claimant's version of events and we accepted what he said. We refer to our findings of fact.

197. The claimant has not named anyone in particular who he says was treated better than he was in this respect.

198. Even on the claimant's own evidence it is clear that Mr Thomas was saying that even if the Claimant had a bad back, he still had a job to do, despite having back problems. We agree with the respondent that direct discrimination is treating someone less favourably than a comparator because of a protected characteristic, not despite the protected characteristic.

199. We conclude that there was no less favourable treatment here because of disability. Mr Thomas was telling the claimant that he still had a job to do because he needed the work to be done. We considered that Mr Thomas would have treated a non-disabled comparator in the same way.

200. Further, we did not consider that there was any evidence of a detriment here other than the detriment which had been identified in (i) above of Mr Thomas withdrawing the agreement for help.

(iii) Not being offered an OH assessment or ergonomic assessment at his workstation, by contrast to his [stepson], Mr Clark, who was provided with these when he reported a skin condition

201. This allegation involves a comparison between the claimant and his stepson, Luke Clark who also worked for the respondent. We understand Mr Clark was referred to occupational health because he had a rash on his hand. This was in line with the respondent's practice of only referring agency/contract workers to occupational health if they had a lung or skin condition.

202. As we have recorded it is correct that the claimant was not offered an occupational health assessment or ergonomic assessment at any time. The alleged discriminator is presumably Mr Sutton, who was the Claimant's line manager from 24 March 2019 until he left on 8 July 2019.

203. However, Mr Sutton did not deal with Mr Clark at all; Mr Clark worked in a different department. This was a material difference between the claimant and his chosen comparator, Mr Clark. This is the first problem with this claim.

204. The second problem is that it is clear that the reason why Mr Sutton did not refer the claimant to occupational health was not disability. It was that the respondent does not refer contract / agency workers to occupational health except in cases of lung concerns and skin conditions. The reason for the difference in treatment between Mr Clark and the claimant was not disability.

205. We therefore conclude there was no less favourable treatment here because of disability.

(iv) Not being afforded the same compassionate leave as his brother, Mr A Deanie, when his mother was dying;

206. As we have recorded the claimant requested and was granted leave on 2 July when his mother was dying. After the claimant's mother died on 4th July it was his decision that he would return to work on the following Monday, 8 July. He did not request any more compassionate leave.

207. The claimant produced a witness statement from his brother, Allen Deanie, stating that after their mother died his Group Leader told him to take as much time off as he needed. However, it was not suggested that Allen Deanie was managed by Mr Sutton. Allen Deanie is not a valid comparator because he was not managed by Mr Sutton. There was a material difference in the circumstances of the claimant's comparator.

208. There was in any event no evidence on which the tribunal could conclude that the reason for the difference in treatment might have been disability. Mr Sutton would have treated a non-disabled comparator under his line management whose mother was dying in the same way as he treated the claimant.

209. We therefore concluded that there was no less favourable treatment because of disability here.

(iv) Being telephoned about returning to work when at his mother's bedside

210. As we have recorded in our findings of fact Mr Sutton did not call the claimant when he was at his Mother's bedside; he texted him and then it appears that the claimant phoned Mr Sutton and texted him back later in the evening.

211. The reason why Mr Sutton contacted the claimant was to give notice of the requirement to work stand up the following week. It was not because of disability.

212. There was no evidence to suggest that in contacting the claimant when he did, Mr Sutton treated the Claimant less favourably than he would have treated a non-disabled comparator at his mother's bedside. We were satisfied that he would in fact have a treated a non-disabled comparator the same way. Accordingly there was no less favourable treatment because of disability here.

213. The claimant was plainly very upset about the fact that Mr Sutton had contacted him about the standup and requested a call back when his Mother was so gravely ill. We understand the claimant's sense of grievance about that. Mr Sutton could have acted more sensitively by waiting for the claimant to contact him given it was known how poorly the claimant's Mother was. However for the reasons we have explained we do not think Mr Sutton's actions were direct disability discrimination.

(vi) Being required to return to work shortly after his mother's death

214. This allegation fails on the facts. Mr Sutton did not require the claimant to return to work shortly after his mother's death. Rather, the Claimant told Mr Sutton that he would return to work on the Monday after his mother died. This was the claimant's own choice.

(vii) Being required to return to work 5 hours overtime on his return to work although unfit to do so, and despite his request for a reconsideration of that decision

215. As we have recorded in our findings of fact the factual basis of this allegation has been made out.

216. However, we have also recorded Mr Upton's reason why he made the decision to continue to require the claimant to work the overtime and to refuse his request for a reconsideration. In short Mr Upton made his decision because of the claimant's contractual requirement to work standup. There is no evidence to suggest that the reason why Mr Upton made his decision was because of disability. Again it appears to us that the claimant is complaining about a decision which was taken despite his disability rather than because of it.

217. We concluded that Mr Upton would have treated a non-disabled comparator in the same way. There was no less favourable treatment because of disability here.

Conclusion on direct discrimination

218. For the reasons set out above the claimant's claim of direct disability discrimination must fail and be dismissed.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

219. We will consider each element of the reasonable adjustments claim.

PCPs

220. We conclude that the respondent had the following two PCPs:

    (i) A requirement to carry out the headlining role as a "1 person job"; and
    (ii) A requirement for the Claimant to work stand up compulsory overtime.

221. The respondent accepted it had the second PCP. Specifically, it accepted that there was a provision, criterion or practice that the claimant was required to work "stand up" (5 hours compulsory overtime in a week) on occasions when stand-up was called, proper notice was given and he was at work. This PCP was applied to the claimant on 8 July 2019 when he was at work and was required to work standup having been put on notice of it the previous week.

222. In terms of the first PCP the claimant was required to carry out the headlining role as a 1 person job from May 2018 until 8 July 2019. This was a manual role, in which the claimant was required to perform physical movements including bending, twisting and lifting. The claimant had found it easier to do the role when he had someone else working alongside him in 2017, as the physical aspects of the role could be shared and the other operative could assist him. These findings may well be enough to deal with the essential nature of the claimant's case. However we will go into more detail in order to ensure that we address the points raised by the respondent concerning the nature of the first PCP and the specific requirements the claimant had identified.

223. We did not find that the headlining role had been specifically designed as a two person job or that the instructions identified it was a two person job (other than the page 8 step). However it was accepted that it had in fact previously been a two person job when the claimant performed it in 2017. We accept the claimant's case that he found it easier to do when it was a two person job – essentially because the parts of the role which he found difficult could be shared. The respondent changed its operation to make the headlining role a one person job when the claimant returned to it in 2018. This is the essential nature of the PCP, not how the role was originally designed or what the instructions said. As drafted

in the list of issues the first PCP does not mention how the role was originally designed or what the instructions said. This was the correct approach.

224. Further, as we have explained in our findings of fact we were satisfied that by March 2019 the claimant was required to perform the headlining role exclusively as a one person job because the innovation of using anti-bond sheeting had been adopted by the respondent and was in practice part of the standard procedure that the respondent expected to be used to perform the headlining role. This meant that the small part of the headlining role which had been designed to be a 2 person job (the page 8 step) was not required to be performed as such in practice.

225. As we have explained in our findings of fact we accept that the headlining role involved stretching and twisting of the torso while in bent or tilted forward body positions. Our clear impression from the descriptions of the job we heard, the respondent's procedures for the job and the "process photos" which show how it was to be carried out was that it would in fact not be possible to do the job without stretching and twisting whilst bending or leaning forward. This is because a key part of the role in relation to several of the processes involved bending over workbenches while working on and around large items. This was in fact accepted by Mr Upton in his witness statement at paragraph 20 where he referred to an assessment of the role which was carried out in January 2018 which concluded that it involved a "moderate" amount of bending and twisting.

226. The claimant's case is that the role involved a "large" amount of bending and twisting. Given the nature of the role as we understand it to be and the fact that the claimant was doing the role continuously over 8 hour shifts for a period of about 14 months we think it is accurate to say it involved a large amount of bending and twisting. One part of the role, among others, which required bending, twisting and stretching was the claimant's innovation of using anti-bond sheeting which we are satisfied by March 2019 was what the respondent required to be used.

227. It was also plainly part of the claimant's job that he was required to use the glue spray booth and this involved a lot of waving his arms with the glue spray gun whilst leaning into the booth. Again this was evident from the descriptions of the job we heard, the respondent's procedures for the job and the "process photos" which show how it was to be carried out.

228. The claimant described the gun as heavy. This is a subjective assessment. We do not think we were referred to any objective evidence as to what the gun weighs. We are satisfied that the claimant found it to be heavy.

Substantial disadvantage

229. The physical nature of the headlining role aggravated the claimant's back condition and caused him back pain. Working standup in July 2019 would also cause the claimant back pain. This was again due to the physical nature of the role and also the claimant's inability to be aided by painkillers for the standup period. This meant the claimant could not perform the standup. Mr Upton decided

that if he could not do the standup the claimant should not be in work and so he left work and did not return. These were substantial disadvantages which were linked to the claimant's disability. Somebody without the claimant's disability would not have been put to these disadvantages. These findings might have been sufficient to deal with the essential nature of the claimant's case.

230. However, three alleged substantial disadvantages were identified in the list of issues:

    (i) That the claimant had to work in uncomfortable conditions, specifically having to "twist" into "bent or tilted forward body positions" which caused significant back pain.
    (ii) That due to his disability, these positions caused the claimant further pain which led to him requiring further time off and more medication;
    (iii) That he suffered a degeneration of mental health due to the ongoing factors related to the increasing level of disability and lack of support.

231. We followed the list of issues. We concluded that the PCPs put the claimant at the first two disadvantages compared to a person without his disability but not the third. The first two disadvantages were substantial and linked to the claimant's disability.

232. The first PCP meant the claimant had to work in conditions which he found uncomfortable, specifically having to twist into bent or titled forward body positions. This was an inevitable feature of the role the claimant was doing which in large part meant he was leaning over a work bench and then turning his body to do various tasks. Leaning into the glue spraying booth whilst holding the gun and then doing the gluing is one clear example of this. In his consultation with Mr Ray the claimant had explained that his job involved bending, lifting and twisting and we viewed that as good contemporaneous evidence of the nature of the claimant's role in reality. The claimant found these conditions uncomfortable compared to someone without his disability, who would not experience the significant back pain which the claimant did.

233. The positions the claimant worked in due to the first PCP caused him significant and further back pain. The root cause of the claimant's back problems may well have been the arthritis identified by Mr Ray but it seems clear that the first PCP was a cause of the pain he experienced. We accept the claimant's evidence to that effect. It is overwhelmingly likely that the physical headlining role the claimant was doing and the specific requirements we have identified aggravated the claimant's back condition thereby causing him significant and further pain. This is why the claimant was on a number of occasions in serious pain at work and observed to be struggling with his role. It is why he reported to his GP that doing his job had caused him pain. It is why his GP signed him off work and suggested he should be recommended light duties. It is why he was offered a chair, assistance with the glue spraying and other possible adjustments. Most pertinently Mr Ray advised that the claimant should *"avoid aggravating factors like bending, lifting and twisting".* By far the most likely explanation as to why Mr Ray advised the claimant to avoid those things was because they were likely to cause him pain. As we have explained all of these factors were part of the

headlining role and part of the first PCP. Somebody without the claimant's disability would not have experienced significant and further back pain as the claimant did when he was required to perform the headlining role as a one person job.

234. In the time period which we are concerned with the claimant did not take any time off for his back so that part of the second substantial disadvantage is not made out. However it is accepted that in the relevant period the claimant had to take more painkillers than he had done previously and we consider it is more likely than not this is due to the pain the claimant was experiencing at work due to the first PCP. The claimant complained about experiencing pain at work to his GP and had experienced excruciating back pain at work necessitating a trip to A and E and more medication.

235. As to the second PCP it was quite clear that this put the claimant at the first two substantial disadvantages; working the stand-up would mean the claimant working in the uncomfortable conditions and positions we have described above and cause him significant and further back pain compared to someone without his disability. It was agreed evidence that on 8 July the claimant had specifically said that he could not work the stand up due to his back pain. There was no reason for him to say that unless it were true. As we have explained the claimant gave a credible and cogent explanation as to why working the stand-up and therefore being required to work in the uncomfortable conditions and positions we have described for longer was a particular problem for him and would have caused him significant and further pain compared to someone without his disability. We accepted that evidence.

236. The application of the second PCP to the claimant on 8 July 2019 led to the claimant having time off as he could not continue working when the respondent refused to excuse him from standup and said he should not be in work at all if he could not do the standup. Someone without the claimant's disability would not have been put to that disadvantage. The second PCP could not be said to have led to the claimant requiring more medication so that part of the second substantial disadvantage was not made out.

237. In terms of the third alleged substantial disadvantage there was general evidence of the claimant struggling with his mental health and having been prescribed anti-depressants however we did not feel there was sufficient evidence to conclude that either of the two PCPs had put the claimant at this disadvantage compared to someone without the claimant's disability.

Knowledge

238. The respondent accepts it knew the claimant was disabled; the only issue was whether it knew or could reasonably have been expected to know that the claimant was likely to be placed at the identified substantial disadvantages.

239. In relation to the first PCP we found that the respondent knew that the claimant's disability was likely to disadvantage him substantially in the ways identified. The claimant was presenting at work as somebody not just with a back problem in

the background but somebody whose back was causing them significant pain at work and causing them to struggle with the role. We refer to our findings of fact concerning the level of knowledge about the pain the claimant was being caused at work when performing the headliner role and the fact that measures were in fact taken to deal with the obvious substantial disadvantage the claimant was experiencing; for example the provision of the chair and the short lived arrangement with Mr Thomas.

240. In any event we were satisfied that the respondent ought to have known that the claimant was likely to be substantially disadvantaged in the ways identified. We were in no doubt that the respondent could not be said to have done all they reasonably could be expected to do to find out whether this was the case. The respondent had significant and relevant resources at their disposal which they chose not to use; specifically the option to refer the claimant for an occupational health assessment and/or an ergonomic assessment. We took into account that there was a degree of informal consultation with the claimant about the difficulties he was experiencing and possible adjustments. However we felt that the failure to use the options which would have involved formal consultation with the claimant by relevant professionals was an obvious example of a failure to do all that can reasonably be expected to be done to find out about the disadvantages which the claimant was experiencing, in the circumstances of this case.

241. We have to consider what the respondent might reasonably have been expected to know had it made the enquiries which we think it should. This is an entirely hypothetical question because the respondent never once attempted to refer the claimant for an occupational health or ergonomic assessment. We considered this question carefully. We took into account that the claimant was reluctant to ask for help and he had therefore been unwilling to ask for help from either his GP (in particular when the GP suggested light duties) or his managers (particularly Mr Sutton when he asked what adjustments could be made).

242. However we felt we also had to consider the reason why the claimant had been reluctant. He was not being awkward and he was not embarrassed about his disability. He was not in denial about the effect of his disability. There was no mental health reason why the claimant could or would not disclose the extent of his problems. He was simply, and sadly, worried that if he revealed the extent of his difficulties and asked for help he would not be permitted to continue working for the respondent. It seems to us then that what the claimant really needed in order to open up more about his disability and the disadvantages was reassurance that adjustments could be made for him without any adverse effect on his prospects with the respondent. A formal referral to occupational health and/or the ergonomics assessor would have been an effective way of providing that reassurance. It would show to the claimant that he was being treated as supportively as the respondent treated its employees. On balance we think the claimant would have engaged with that process and the extent of his disadvantages would have been revealed.

243. We took into account that the claimant had referred to this probability in one of the pieces of information he had been asked to provide in these proceedings. In his reply to the respondent's list of issues the claimant explained that he had

never been given a return to work meeting which is what the respondent used to refer people to occupational health and the ergonomics department. Tellingly, the claimant described how he could have been saved from harm had the respondent taken these steps and he described to it as a “safety net” had he been referred. This suggested that the claimant recognised that he would have opened up about the extent of the disadvantages he was experiencing had he been referred. This accorded with our findings.

244. In conclusion on this point we think this is a paradigm case where the intervention of a formal third party – outside of the claimant’s managerial relationships - in the form of ergonomics advisor or occupational health assessor was likely to resolve the situation. That is after all part of the job that these professionals are specifically trained to do and it remains mystifying to us that the respondent chose not to use them in this case when it was so clear that the claimant needed help.

245. In relation to the second PCP the claimant informed the respondent on 8 July that he could not work the standup due to his back pain so it seems to us the respondent knew of the disadvantages. The claimant did not explain the specific difficulties around the positions and conditions but in our view he communicated the essential nature of the first two disadvantages. The respondent was not aware of the specific problem the claimant had around his painkillers. However it clearly would have been reasonable for Mr Upton to speak to the claimant to understand his position and so the respondent would have constructive knowledge of the issue with the painkillers and the specific difficulties around the positions and conditions in any event. There was no doubt in our mind that the claimant would have explained the problems which he had if Mr Upton had taken the time to speak to him because on 8 July the claimant was being open about the fact that the standup would cause him back pain and therefore there was no reason for him to hide the reasons for that.

Reasonable steps

246. We find that it was reasonable for the respondent to have taken the following steps to avoid the disadvantages:

(i) <u>Lower completion quota.</u> The claimant explained that a lower completion quota would have enabled him to work at a lesser speed and reduce the amount of movements within the time period. We accept that point and therefore it seems to us that this step may well have been effective in avoiding the substantial disadvantages. The broad suggestion was made by the respondent that the cost of this adjustment would be such that it would not be reasonable. It was not suggested this adjustment would have been disruptive in any other sense. The cost was not set out and we have to balance the potential cost against the fact that the respondent is clearly well resourced (as demonstrated by the resources it had available such as occupational health and ergonomics assessor). Further, the adjustment may well have resulted in the services of a good worker being retained and a disabled person being able to remain in work. We did not accept that

it would not have been possible to reduce the claimant's quota without employing another member of staff. It seems to us that other options were available, for example utilising floaters to help the claimant at specific points in his shifts.

(ii) Provision of a specialised chair. The claimant explained that specialised seating would have helped to support his back when completing tasks. We accept that point and we concluded that a specialist seat would likely have alleviated the pain the claimant was in and therefore could have removed the disadvantages. It seems clear to us that what the claimant really needed was seating which was at the right height, supportive and stable. That was never provided by the respondent and the hairdressing stool was not suitable either.

There was some debate at the hearing over how much of the claimant's role he might be able to do sitting down; the claimant felt he could do rather more sitting down that the respondent did. In our view there was at least a good chance that the claimant could do a significant part of his role while seated if he had an appropriate adjustable chair and if his workbench was set sufficiently low.

In their closing submissions the respondent did not put forward any particular reason why it would not have been reasonable to provide a special chair but instead made the point that the claimant had not asked for one. However we felt this was a clear example of where it would be reasonable for the respondent to make an adjustment even though the claimant had not asked for it. Firstly because as a general point the respondent failed to utilise the resources which it had available (occupational health and ergonomic assessors) which would have been likely to identify the claimant's need for adjustments including a special chair. Secondly because the claimant's need for a special chair was actually rather obvious – as Mr Lee had taken it upon himself to provide an office chair and then the claimant had brought in his sister's hairdressing stool because the office chair was unsuitable.

(iii) Increasing the role to a 2 person role. We consider that this adjustment could have removed the disadvantages as the claimant has consistently said, and we accept, that he found the headliner role easier when there were two people doing it as it meant the difficult parts of the role could be shared out between two people.

The respondent relies on the cost of this adjustment as a reason why it would not have been reasonable. We accept there would be a cost, however this was again not set out or explained within the context of the respondent's financial position. Moreover it should be borne in mind that the headliner role was being performed by two people up until June 2019. Prior to May 2018 it was done by 2 people on the

same shift and after May 2018 it was done by two people split over two shifts.

Moreover, we accept the claimant's evidence that when he was performing the role as a 2 person job if there were periods when he and/or the other operative were not working on the headlining role they were able to help out in other areas of the trim shop. This indicates that the role could be done efficiently as a two person team with benefits to the rest of the trim shop operation.

Taking these matters into account along with the significant resource at the respondent's disposal, the likely efficacy of the adjustment and the potential to retain the valuable services of the claimant and keep a disabled person in work we concluded that it would have been a reasonable step to take.

(iv) Implementing light duties on the claimant's return to work in July 2019. There were other roles in the trim shop which were not as physically demanding as the headliner role. The claimant worked in another part of the trim shop until May 2018 when he was asked to go back on the headliner role and he had found working in that period less physically demanding. In the tribunal's view lighter duties of this sort would have been effective in preventing the substantial disadvantage experienced by the claimant. It would not have been very disruptive or expensive to move the claimant when he returned to work and complained of back pain on 8 July 2019.

In closing submissions the respondent suggested that the only adjustment contended for by the claimant in July 2019 was the removal of stand up rather than light duties. That submission arose from an answer the claimant gave in cross examination. However in the agreed list of issues light duties was identified as a separate adjustment contended for by the claimant. We did not understand the claimant to have withdrawn that and the respondent had not suggested an amendment to the list of issues so that the claimant could have a fair chance to respond to the suggestion that something had been withdrawn.

Moreover, in the respondent's evidence (Mr Sutton's statement at paragraph 10) it was said that if the claimant had asked for lighter duties this would have been accommodated. This demonstrates that light duties were available and that it would likely be reasonable for the respondent to facilitate this adjustment. It would be extremely odd to ignore this suggested adjustment in light of that evidence.

In the particular circumstances of this case (including the obvious nature of the claimant's difficulties and the respondent's failure to utilise occupational health and ergonomics assessor) we do not think the fact that the claimant did not suggest light duties means it was not reasonable to expect the respondent to provide them. The claimant

had specifically explained that he could not work standup due to his back pain on 8 July and it was reasonable to expect the respondent to explore adjustments in light of that.

(v) Relieving the claimant of the requirement to work standup on 8 July 2019. As we have explained the claimant had a cogent and credible explanation as to why the requirement to work standup put him at the substantial disadvantages. Removal of the requirement to work standup would in those circumstances have removed the disadvantage.

It would not have been very expensive or disruptive for the respondent to remove the requirement for the claimant. The claimant specifically asked for this and the decision maker refused it without speaking to the claimant to understand his reasons. We think had the decision maker done so the adjustment would in fact have been allowed as there was no good reason not to. This is consistent with Mr Sutton's evidence when he said that if the claimant had asked for lighter duties or shorter hours such requests would have been accommodated.

Further, the claimant gave evidence, which we did not understand to be disputed and which we accept, that workers were excused standup if they had a good reason (for example childcare). There is no good reason why the same allowance should not have been made for the claimant by way of reasonable adjustment.

In oral closing submissions the respondent placed some reliance on the fact that the claimant only requested not to do stand up on 8 July and therefore the respondent would have had to have acted quickly on the day. We do not think that detracts from the reasonableness of the step contended for, for the following reasons:

- The claimant had only been informed of the standup on 4 July, which was the day his Mother died, so he cannot reasonably have been expected to raise this with the respondent any sooner.
- The claimant made his request at the start of the day so the respondent had the rest of the day to make any arrangements to cover the claimant's role.
- The claimant's back problem and the difficulty he was experiencing with the role did not come out of the blue - the respondent had known about them for some time (in fact the respondent has now conceded knowledge of disability from 24 March 2019).
- The claimant had not worked the standup the previous week and it was not suggested that this had caused the respondent any problems, in particular it was not suggested they had any difficulty in covering his role.
- We accepted that other workers were excused standup if they had a good reason such as childcare.
- Overall we think it can be reasonable to expect a respondent to act quickly if the circumstances require it. This was in our view such a

> case. It was reasonable to expect the respondent to act quickly to support the claimant rather than deciding that if he could not do the standup then he shouldn't be in at all. The outcome of the respondent's approach was that the claimant left work and did not return. We think this is an outcome which could and should have been avoided.

247. The respondent's case as to why it would not have been reasonable to make adjustments due to cost relied on assertion rather than cogent evidence. For example there was no attempt to analyse the cost of any proposed adjustment within the context of the respondent's financial position; the respondent just asserted they would be too expensive.

248. Overall in the Tribunal's view these adjustments were not excessively disruptive or expensive taking into account their likely efficacy and the size and resource of the respondent. They would likely have meant that the claimant would remain in work and the respondent could retain the services of a good and valued worker. We find it was reasonable for the respondent to make these adjustments.

249. We did not feel it was reasonable to expect the respondent to make any of the other adjustments contended for by the claimant, principally because we considered that those identified above were most likely be effective and the other adjustments referred to by the claimant were unclear or were not valid adjustments.

250. We should say that we took into account the adjustments which the respondent asserted it made. Some of these were not actually adjustments (for example an ergonomic assessment of the headlining role in January 2018 when the claimant was not even working in that role) and we have made findings about the ineffective nature of others already (for example the provision of the office chair). Our overall conclusion was that the adjustments claimed by the respondent were not effective in removing or alleviating the substantial disadvantages.

Burden of proof

251. As part of our decision making we stepped back and considered the operation of the burden of proof in the reasonable adjustments claim. When we did that the picture, and our conclusion, became even clearer.

252. The claimant had proved facts from which it could reasonably be inferred, absent an explanation, that the duty to make adjustments had been breached. In particular he had proved facts relating to the application of the PCPs, the substantial disadvantages, and the adjustments which might have avoided the disadvantages.

253. The burden had then shifted to the respondent. It might have discharged that burden by proving there was no knowledge of the substantial disadvantages or by showing that the proposed adjustments were not in fact reasonable. It had not done so.

254. Our analysis reflected the reality that at its core this case involved a straightforward failure by the respondent to comply with its duty to make reasonable adjustments for the claimant.

Time issue - continuing act?

255. The claimant has succeeded in his allegation of failure to make reasonable adjustments concerning the requirement to work stand-up on 8 July 2019. This is the allegation which EJ Miller found the Tribunal had jurisdiction to hear. We now have to consider whether the Tribunal has jurisdiction in respect of the other allegations which have succeeded. Consistent with EJ Miller's decision and the agreed list of issues we have to determine whether any acts before the standup overtime allegation form part of conduct extending over a period within the meaning of s.123 (3) Equality Act 2010.

256. We did not see any evidence of the respondent doing an act inconsistent with making the reasonable adjustments. Following Hull City Council v Matuszowicz 2009 ICR 1170 and applying s.123(4) Equality Act 2010 we first considered the period within which the respondent would, had it been acting reasonably, have made the reasonable adjustments.

257. The claimant contended that the reasonable adjustment of lighter duties should also have been made on 8 July 2019. We agree. We note this is in fact the same time for the standup adjustment which EJ Miller decided the Tribunal had jurisdiction for. The claimant had specifically complained of back pain on 8 July and had it been acting reasonably the respondent would have ascertained the reasons behind that and acted quickly to put the claimant in an alternative role with lighter duties.

258. The claimant did not attach a timescale to the other suggested adjustments. It seems to us that all the adjustments should have been made in the period between May 2019 and 8 July 2019. The respondent has accepted knowledge of the claimant's disability since March. Had it been acting reasonably it would have formally consulted with him and identified and then implemented the required adjustments in that period.

259. We were satisfied that the acts of failing to make reasonable adjustments would be covered by the concept of "conduct extending over a period" within the meaning of s.123(3) Equality Act 2020. The incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs. The acts were all of the same nature (failing to make reasonable adjustments), they took place over a relatively short period and they involved the same people (the claimant and his managers). The continuing act of failures to make reasonable adjustments only came to an end on 8 July 2019 with the failures in respect of the requirement to work standup. Following EJ Miller's decision therefore the part of the claim which has succeeded is in time.

Overall conclusion on reasonable adjustments

260. The reasonable adjustments claim succeeds to the extent explained above.

Next steps

261. The case has already been listed for a remedy hearing. We will issue a case management order concerning that separately.

Employment Judge Meichen on 24.02.22