EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107184/2020 (V)

Held by means of the Cloud Video Platform on 25, 26 and 31 January and

1 February 2022

Employment Judge W A Meiklejohn
Tribunal Member Mr G Doherty
Tribunal Member Ms A MacDonald

Mr Gary Murray	**Claimant** **Represented by:** **Mr G Booth –** **Consultant**
SP Transmission plc	**Respondent** **Represented by:** **Ms L Miller –** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The decision of the Employment Tribunal, by a majority, is that –

(a) the claimant's claim of disability discrimination by reason of failure to make reasonable adjustments does not succeed and is dismissed, and

(b) the claimant's claim of constructive unfair dismissal does not succeed and is dismissed.

REASONS

1. This case came before us for a final hearing, conducted remotely by means of the Cloud Video Platform, to deal with both liability and remedy. Mr Booth appeared for the claimant and Ms Miller for the respondent.

5 2. The case was originally listed for a five day hearing commencing on 24 January 2022. However, on that date Mr Booth was indisposed and we postponed the start date to 25 January 2022. As we had witness statements to read and also a substantial joint bundle of documents which was extensively referenced in the witness statements, we took 24 January 2022 10 as a reading day.

Nature of claims

3. The claims brought by the claimant were –

   (a) alleged failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 ("EqA"), and

15 (b) constructive unfair dismissal.

4. These claims were resisted by the respondent. Their position was that –

   (a) they accepted that the claimant was at the relevant time disabled within the meaning of section 6(1) EqA but denied any failure to make reasonable adjustments, and

20 (b) they denied any breach of contract in response to which the claimant was entitled to resign and claim constructive dismissal and, in the alternative, asserted that the claimant had been dismissed for lack of capability and that his dismissal was fair.

Procedural history

25 5. A preliminary hearing took place on 22 January 2021 (before Employment Judge King). The principal outcomes were –

(a) The respondent was confirmed as the correct respondent, the claim having originally been brought against SP Power Systems Ltd. A Judgment dismissing the claim against SP Power Systems Ltd was issued separately.

5 (b) The witnesses were identified.

(c) The claimant was given time to provide further written details of his claim and the respondent was given time thereafter to respond.

(d) The claimant was directed to provide a schedule of loss.

(e) Directions were given in respect of documents and the use of witness
10 statements.

Evidence

6. We heard evidence from the claimant and from his wife, Mrs K Murray. For the respondent we heard evidence from –

- Mr J Christie, Team Leader

15
- Ms A Ramsden, Lead Engineer Active Circuits
- Mr D Marshall, Transmission Operations Lead Engineer
- Mr G Maclean, HVDC Manager.

7. The evidence in chief of each of the witnesses was contained in a written witness statement. The witness statements were taken as read in
20 accordance with Rule 43 of the Employment Tribunal Rules of Procedure 2013.

8. We had a joint bundle of documents extending to 613 pages. We refer to the documents below by page number.

25

Findings in fact

9. The respondent is part of SP Energy Network which in turn is part of Scottish Power. It is responsible for the transmission of electricity in central and southern Scotland.

5 10. The claimant worked for the respondent as a Linesperson. His base was the respondent's depot in Cambuslang. He worked as part of a team of 8 Linespersons who covered the geographical areas of Edinburgh to Ayrshire and Gretna to Perth. His Team Leader was Mr Christie. Prior to joining the respondent on 26 August 2013, the claimant had worked with Mr Christie at
10 Balfour Beatty.

11. The claimant's work involved the maintenance and repair of high-powered electrical distribution lines, cables and systems, plus emergency repairs. This included inspecting overhead power lines, there being a requirement on the respondent to inspect one half of the network each year. It also included
15 working at height on transmission towers.

Particulars of employment

12. The respondent (then SP Power Systems Ltd) issued an offer letter to the claimant dated 8 August 2013 (55-56) enclosing a Statement of Particulars of Employment (57-67). The Statement of Particulars contained a table setting
20 out the claimant's hours of work as follows –

"Hours of Work:

- *Contractual Hours of Work* *37 per week*
- *Normal Hours for Role* *37 per week"*

13. The Statement of Particulars also contained clauses dealing with Overtime
25 and Emergency Response as follows –

"*3.5 OVERTIME*

You may be required by your Manager to work overtime from time to time. You shall be paid for any overtime worked in accordance with the terms of the Agreements.

5 *3.6 EMERGENCY RESPONSE*

You are subject to the provisions of the Energy Networks Emergency Response Agreement. During exceptional/abnormal conditions which impact on the network, you may be required to make yourself available for work out with your normal hours. You may also be requested to carry out
10 *alternative duties for the period of the emergency. Further details of these arrangements are available from your normal place of work."*

Core hours

14. Witnesses referred to there being core hours of 8.00am to 4.00pm for Linespersons. Hours worked outwith the core hours attracted payment of
15 overtime. This was paid at (a) double time for hours worked prior to the core hours and (b) time and a half for hours worked beyond the core hours.

15. Mr Marshall gave the most detailed account of how core hours worked. He identified these as actually 8.00am to 3.54pm. Linespersons were home based and were expected to travel directly from home to the site where they
20 were working on any given day. Due to the size of the area covered, this could involve up to one and a half hours travel each way. The time spent on this travel was regarded as working time, except for the time spent (notionally) travelling from home to the Cambuslang depot and back again. Accordingly, if an employee lived 20 minutes from the depot, that amount of travel time
25 would not be paid at the start and end of the day. In practice Linespersons would travel so as to be on site at or before 8.00am.

Claimant's injury

16. The claimant suffered a traumatic brain injury during a professional boxing match on 6 October 2017. He required immediate surgery at Western

General Hospital, Edinburgh and remained in hospital until 30 October 2017. He was then transferred to Murdostoun Brain Injury and Rehabilitation Centre in Lanarkshire for a period of rehabilitation. He was discharged on 14 November 2017 under the supervision of Lanarkshire Community Brain Injury Team ("CBIT"). He was at this time medically advised to be unfit to drive.

17. With support from the respondent's Occupational Health department ("OH") and the CBIT, the claimant returned to work on 28 March 2018. This followed (a) a case conference between Dr A Colvin of OH and Mr Christie on 12 March 2018 (92-93) and (b) an OH consultation between Dr Colvin and the claimant on 19 March 2018 (94-96) at which the claimant was accompanied by Ms E Newbigging, an Occupational Therapist with the CBIT.

18. Dr Colvin's report following the OH consultation on 19 March 2018 recorded Ms Newbigging confirming that the claimant's main areas of residual impairment could be summarised as follows –

- *Gary's attention span is reduced and information processing is slowed in terms of his normal.*

- *Gary's short term memory function – especially where there is delay before he is required to use the information – is impaired. Gary uses his mobile phone to make lists to improve this area in terms of his daily life.*

- *Gary is likely to suffer fatigue particularly where he is performing intense mental work that requires high levels of concentration or focus.*

- *Gary will require specialist assessment prior to any return to driving and it is planned that a referral will be made by Gary's General Practitioner to the Driving Assessment Centre at Astley Ainslie Hospital in Edinburgh for this purpose.*

19. Ms Newbigging's description of the claimant's impairment was echoed in Mrs Murray's evidence. She referred to the claimant *"having difficulties with*

residual limitations with his memory and the time it can take to learn something new." Mrs Murray also referred to the claimant struggling with "*new and unscheduled demands on his memory and planning".*

Claimant returns to work

5 20. The claimant's return to work as from 28 March 2018 was initially on a phased basis over a period of four weeks, as described in Dr Colvin's report following the OH consultation on 19 March 2018. Over the four week period the claimant built up to working five days per week and undertook lighter duties.

21. The claimant was reviewed by Dr Colvin on 23 April 2018 (97-98) and there
10 was a case conference between Dr Colvin and Mr Christie on 21 May 2018 (99-100). The report after the case conference looked forward to the claimant undertaking a climbing assessment if deemed appropriate at the next OH review. It also noted that the claimant was on the waiting list for a specialist driving assessment

15 22. The next OH review took place on 11 June 2018 (101-102). In his report, Dr Colvin declared the claimant fit for his current duties of walking inspections and performing site tasks. He also declared the claimant fit to undertake a pylon climbing assessment, but unfit for the business driving of company vehicles or the operation of any safety critical powered equipment. The
20 claimant subsequently undertook the pylon climbing assessment successfully in July 2019.

23. In his next report following an OH review on 26 November 2018 (103-104) Dr Colvin recorded that the claimant had regained his driving licence on 8 September 2018 and had completed off road driver fitness assessments
25 conducted by Astley Ainslie Hospital. These confirmed that the claimant had made "*an excellent functional recovery in terms of his medical fitness and driving capability".* An on-road driver assessment was to be arranged. Dr Colvin declared the claimant *"fit for his normal duties including the business driving of company vehicles up to a weight limit of 3.5 tons and for any*
30 *emergency standby duties".*

24. Following the claimant's return to work, we found that Mr Christie did take steps informally to give the claimant lighter duties. Mr Christie said that he *"tended to put him on the smaller towers where only one person was required".* We understood that Mr Christie also assigned to the claimant the task of moving materials in the van during refurbishment works. We also understood that the claimant did not like to be seen as seen as doing easier work than others.

Nature of work changes

25. During the winter of 2018 and into the early part of 2019 the Linespersons were predominantly undertaking walking patrols to inspect the network. From March/April 2019 they were undertaking more in the way of refurbishment work. This reflected a move towards doing this type of work inhouse rather outsourcing it to contractors. It formed part of the duties expected of a Linesperson but it coincided with the claimant beginning to struggle with what he considered to be excessive working hours.

26. The claimant would at this time routinely work ten hours per day, from 6.00am to 4.00pm. This included travelling from/to home. From time to time he would work beyond 4.00pm. We had a table, which we understood to have been prepared by the claimant, recording his overtime hours between February and July 2019 (540-541). This showed that the claimant claimed up to 2 hours overtime on 41 occasions and more than 2 hours overtime on 8 occasions.

27. The claimant also had a concern about working practices. He referred to team members *"racing"* each other on the job which he felt was unsafe. The claimant contacted the respondent's HR line in April 2019 and was advised to speak to his line manager. While it was evident from their text messages (337-368) that the claimant and Mr Christie had a good relationship at that time, the claimant did not feel comfortable doing this.

Meeting of 14 May 2019

28. The claimant spoke to Ms Newbigging about his mental fatigue and working hours. Ms Newbigging suggested a meeting with the respondent – this was confirmed by a text the claimant sent to Mr Christie on 15 April 2019 (369) –

5 "*Had a text from Liz from the brain injury team there seeing if we can have another meeting….I called that helpline last week to see if that mental fatigue thing is going to be something that effects me forever or is it possible to improve it.*"

29. Ms Newbigging approached Mr Christie by text message looking to set up a 10 meeting. This was arranged for 14 May 2019. Mr Christie asked Ms Ramsden to attend. The claimant regarded this as a formal meeting whereas Mr Christie and Ms Ramsden regarded it as informal. Neither Mr Christie nor Ms Ramsden took notes. The only written record of the meeting was contained in handwritten clinical notes prepared by Ms Newbigging (432-15 433). These were produced to the respondent much later (during the claimant's grievance appeal in 2020) but we believed that, on the balance of probability, they had been prepared by Ms Newbigging shortly after the meeting.

30. Ms Newbigging's notes concluded as follows –

20 "*The meeting ended with the management agreeing to*

1. Refer Gary to Occ Health

2. Consider and plan jobs for Gary that were risk assessed and safe

3. D/W H&S a robust lone working policy in the event Gary will be working alone during ground works but in a built up area

25 *4. Liz will contact Gary in a few weeks to find out about developments*"

31. The position of Mr Christie and Ms Ramsden, both at the time of the claimant's subsequent grievance appeal and before us, was that there were no agreed

actions. The claimant's evidence was that a referral to OH had been agreed, but did not happen.

32. It was unfortunate that neither Mr Christie nor Ms Ramsden had taken notes at the meeting on 14 May 2019. We had no reason to doubt that Ms Newbigging had recorded the meeting as it had appeared to her at the time. We did note that when she wrote to Mr Christie on 5 August 2019 (435) Ms Newbigging said that "*a referral to Occupational Health may be in order to get the right support*" and made no reference to this being one of the agreed outcomes of the 14 May 2019 meeting.

33. We did not find it possible to resolve this conflict in the evidence, as to whether there had been agreed actions. We came to the view that those of the witnesses who told us about the 14 May 2019 meeting did so to the best of their recollection and that their perceptions of what, if anything, had been agreed at the meeting simply differed.

Events of 25/26 July 2019

34. The claimant was working at height for an extended period on 25 July 2019. His evidence was that he was told that he would not be using his harness and climbing a transmission tower the following day. Mr Christie said that this did not come from him and the claimant had not reported it to him. Nonetheless, we accepted the claimant's evidence about this.

35. On 26 July 2019 the claimant worked overtime travelling to site before his core hours. He was instructed by Mr C Hamilton, an acting Chargehand, to climb a transmission tower using another employee's harness. We accepted Mr Christie's evidence that the claimant should not have done this as all safety equipment is registered to an individual employee and they are expected to wear their own harness. We also accepted the claimant's evidence that he felt pressured to comply.

36. The result was that the claimant worked another extended period at height. There was then an incident when Mr Christie asked the claimant to bring a particular shackle and the claimant twice brought the wrong one. Mr Christie

expressed his displeasure in a raised voice. The claimant then said that he was leaving for the day, around 2.30pm, to travel home.

37. Mr Christie sent a text message to the claimant later on 26 July 2019 (361) in these terms –

5 "*Gary, just start at your usual time from now on, I'm not having anyone starting early if they can't work on anymore. It's not fair on the rest of the guys that are putting in the graft."*

Claimant's second period of absence

38. The claimant felt unable to attend work on 29 July 2019 due to stress. Mrs
10 Murray described it in these terms –

"*….Gary was extremely stressed and felt he was being victimised for not doing a 12 hour shift, although he had been regularly doing a 10 hour shift and felt that despite his efforts to explain his situation and report his fatigue, none of the recommendations from the meeting with James, Adele and Liz*
15 *had been put in place. Due to the extreme stress of this situation, he reported sick on Monday 29th July."*

39. After consulting his GP the claimant submitted a fit note which confirmed that he was absent from work due to suffering from stress and anxiety. The claimant remained medically certified as unfit for work until his employment
20 ended on 1 October 2020.

OH referral

40. Mr Christie completed an OH referral for the claimant dated 5 August 2019 (106-108). In this he set out three questions for OH –

"1. Do you think you can come back and undertake your substantive role
25 *as an overhead Linesperson? Including climbing and carrying out full refurbishment duties as required by the business?*

2. *Do you feel you can work safely at height for sustained periods as required?*

3. *If the answers to the above questions are no, would redeployment within the company be a more suitable option?"*

5 41. Mr D Cassells, Senior Occupational Health Nurse Consultant, produced a report dated 13 August 2019 (105) in which he recorded the claimant as indicating that there had been "*significant change in working expectations and general workload within transmission to meet business demands"* which the claimant felt were *"a contributing factor in relation to his stress and anxiety".*

10 42. Mr Cassells indicated that he had referred the claimant to Dr Colvin for review on 11 September 2019. He indicated that he would expect the claimant, if deemed fit to return after his next GP appointment, to be able *"with temporary restrictions, to conduct his substantive position as Craftsperson OHL".* He referred to the claimant returning on "*light duties"* pending the OH review on 15 11 September 2019.

OH report of 11 September 2019

43. The claimant met with Dr Colvin and Dr Colvin produced a report dated 11 September 2019 (109-112). Dr Colvin described the claimant's issues in these terms –

20 "*Today Gary reports his main perceived work-related stressor is that the nature of his job as a Craftsperson has significantly changed over the last 6 months or so and particularly in recent weeks when Gary has found that his work environment has become progressively more demanding for him. Gary reports that, especially at the start of new projects, that the individual 25 demands placed on him working as a team member – including multi-tasking and improvising, responding to work colleagues demands, coping with high work rates and intensity of work and also with the increased management requirement for longer working days (including overtime) – has directly led to increasing work related stress for him which has significantly impacted on*

his health and wellbeing in recent months such that he has eventually had to report sick.

Gary says that the cumulative effects of the above changes to his role and the perceived work environment have meant that at the end of prolonged working days (sometimes 10 to 12 hours with overtime) or the working week (Friday) that Gary feels unduly fatigued with impact on concentration and mental processing and a feeling of being overwhelmed at times."

44. Dr Colvin expressed his opinion as follows –

"Based on my clinical assessment today I would advise that I would consider Gary to be medically unfit for any work at present until the reported perceived workplace and management stressors have been investigated and resolved as far as is reasonably practicable. I would also conclude that any return to work process, without addressing the underlying perceived management and workplace issues, would be highly likely to cause a recurrence or relapse of any stress symptoms and result in Gary requiring further sickness absence."

45. Dr Colvin indicated that he needed additional information before he could answer the management questions (a reference to the three questions in Mr Christie's original OH referral). He also said –

"*My initial clinical assessment is that all of Gary's perceived work related stress and reported difficulties at work appear to be entirely attributable to the late consequences of his known brain injury and the perceived work demands as reported by him."*

Ms Ramsden becomes more involved

46. Within his report of 11 September 2019 Dr Colvin suggested an OH case conference to discuss the report and share relevant management background should be arranged before his next review with the claimant set for 9 October 2019. The case conference took place on 25 September 2019 and was attended by Dr Colvin, Mr Christie and Ms Ramsden.

47. In his notes following the case conference (113-116) Dr Colvin recorded Mr Christie and Ms Ramsden as noting that "*there had been changes operationally which could help explain Gary's perception of a very significant increase in the personal demands of his work environment".* Dr Colvin also recorded them as confirming that those demands *"were within the normal remit of what was expected for his contracted post"* and "*what the business would require of any Linesman performing normal duties".*

48. Within his notes Dr Colvin summarised the main points of the discussion. That summary included the following –

> *"Recent workplace support given by James Christie had been on the borderline of what was operationally feasible for anything other than the short term…."*
>
> *"Management had significant safety concerns about Gary's return to normal duties taking his known and reported work difficulties into account and the safety aspects."*
>
> *"Dr Colvin confirmed that Gary's current work capacity was likely to be the best indicator for the foreseeable future."*
>
> *"All present were agreed that further modification or adjustment to Gary's duties appeared unlikely to be feasible or acceptable (to either Management or Gary) taking into account the current operational/business situation, the known and potential safety factors and the lack of any expected improvement/change in terms of Gary's future work capacity or capability."*

OH report of 9 October 2019

49. There was a meeting attended by Dr Colvin, Mr Christie, the claimant and his trade union representative, Mr J Findlay, on 9 October 2019. Dr Colvin produced a report (117-119). The outcome was best summarised in the following paragraphs from that report –

> "*I note that management have asked some specific questions in the referral however before I can answer these (legitimate) questions fully I would*

recommend that a job task and risk analysis of Gary's role be undertaken to establish which tasks and work environments that Gary can cope with safely and which are causing him difficulty or stress. Today Gary has asked whether Mr Findlay can be involved in such a process, as Union Representative, and I think this would be very helpful based on Mr Findlay's constructive input to our discussions today. However clearly this is a management decision in the final analysis.

In particular I consider that such an exercise (as described above) would be essential evidence for me to consider before I can fully answer whether Gary is medically fit to undertake the substantive role as an Overhead Linesman (including climbing and carrying out full refurbishment duties as required by the business and as confirmed to me at the occupational health case conference)."

Long term absence review meeting on 26 November 2019

50. This was attended by Ms Ramsden, Ms Y McAllister of HR, the claimant and Mr Findlay, with Ms M Murray as notetaker. The notes were in the joint bundle (132-143). In the course of this meeting Ms Ramsden produced a document (144-148) in which she had listed the duties of the claimant's role and had allocated a level of risk to each of these. This was discussed.

51. The meeting notes recorded Mr Findlay setting out what was needed to allow the claimant to return to work –

"*GM needs clearly defined daily jobs, no overtime, no standby, longer breaks, flexible hours, no lone working, working his core hours (8am to 4pm)."*

52. Mr Findlay asked about how the claimant's colleagues would be briefed, stressing that they would *"need awareness what to look out for".* Ms Ramsden said she would *"spend a few hours with the guys to support Gary".*

53. The discussion then reverted to potential adjustments. The notes recorded the claimant as saying –

"*I'm fine with the tasks it[‘s] just the time.*"

"In a relaxed environment I can do any of the tasks."

"I don't know what work is coming up but at a reasonable pace."

"It's the speed and the pressure. If tested I can do any of the tasks."

5 54. Ms Ramsden wrote to the claimant on 5 December 2019 (151-153) to summarise the outcome of the long term absence ("LTA") review meeting. She confirmed that she would review the adjustments which had been put forward.

OH case conference on 11 December 2019

10 55. This was attended by Dr Colvin, Ms McAllister, Ms Ramsden and (in part) Mr C McDougall, Transmission Network Operations Manager. Dr Colvin produced a note (155-156). This recorded that the management risk assessment had been discussed.

56. Under "*Next steps"* Dr Colvin stated as follows –

15 "*….the next step would be for management to meet with Gary and his Union Representative to discuss this risk assessment. The goal would be to try to reach any final conclusions or consensus centering on Gary's capability to perform the duties of the role, with adjustments where reasonably practicable, in a way that means that he would not become stressed and*
20 *where it was expected that Gary could work safely at all times.*

The outcome of the risk assessment process between Gary and Management should be to confirm:

- *what tasks it was agreed that Gary could perform safely and without stress with or without reasonable adjustments.*

25
- *those tasks that Gary was unable to perform (whether due to risk of stress or safety or productivity or other management concerns) even with adjustments.*

Adele was concerned that such a meeting could be challenging for Gary and cause him additional stress. Dr Colvin confirmed that, in general terms, it could be appropriate for Gary's nominated third party representative (for example his Union Representative, Mr Findlay) to attend any such meetings to represent Gary provided this was arranged with Gary's informed consent."

LTA review meeting on 13 January 2020

57. This was attended by Ms Ramsden, the claimant and Mr Findlay, with Ms J McGrath as notetaker. The notes were in the joint bundle (159-161). Ms Ramsden gave the claimant and Mr Findlay a copy of the adjusted risk analysis and task review document. She said that reducing the time spent by the claimant working on transmission towers and allowing him to work at his own pace would be acceptable during a phased return but in the long term would be a problem. She referred to the requirement for everyone to take the same breaks and the reduction in productivity on site. She said that the claimant doing no overtime or standby would cause the same problems.

58. The outcome was that Ms Ramsden was to send all of the documentation to Dr Colvin and await his comments. Ms Ramsden wrote to the claimant on 22 January 2020 (167-168) to summarise the outcome of the meeting.

OH report of 15 January 2020

59. A further OH review took place on 15 January 2020. It was attended by Dr Colvin, Ms Ramsden, the claimant, Mr Findlay and Mrs Murray. Dr Colvin prepared a report form (162-166).

60. In this Dr Colvin confirmed that his initial impression having read the job task and risk assessment document received from Ms Ramsden on 14 January 2020 was that *"any return to work for Gary as a full time Linesman would be unlikely to [be] either viable or safe".* However, it was agreed after discussion that the document in isolation was not sufficient to support this conclusion. Dr Colvin continued –

"*In particular the further information that required clarity was on the possibility of the planning or work scheduling of Gary's work tasks, any limitation of Gary's working hours and what specific workplace adjustments might be possible and feasible for specific tasks."*

5 ***OH case conference on 27 January 2020***

61. This was attended by Dr Colvin, Ms McAllister, Ms Ramsden and Mr Findlay. Dr Colvin produced a note (169-171). Ms Ramsden's Job Task and Risk Analysis document was discussed with reference to (a) planning and scheduling of work activities and (b) the possibility of a phased return to work
10 on a trial period basis.

62. Dr Colvin recorded the following as having been agreed –

- *A phased return to work process to the contracted role of Linesman would only be worth carrying out if it was agreed that any adjusted duties for Gary's substantive role were deemed to be sustainable/operationally*
15 *feasible for the foreseeable future, reasonably practical from the management perspective and safe in the known work environment of Overhead Linesman. All agreed that this would in large part depend on the conclusions in terms of the reality of flexibility of planning of scheduling of work such that Gary could work sustainably and safely*
20 *within his (variable) limits for the foreseeable future whilst managing fatigue and where there were no significant added safety risks. Thus, it was not possible to determine whether a phased return to work process to the contracted role of Linesman would be appropriate for Gary today.*

- *A phased return to work process was also discussed where this might*
25 *be completed in a non-Linesman role for example as part of a medical redeployment process (should it be determined that Gary was not medically fit for a return to his contracted role of Linesman). All agreed that a phased return to work process could be implemented if it was determined that medical redeployment was the final outcome, when a*
30 *phased return to work process to a non-Linesman role could be drawn*

up and implemented appropriately by line management with occupational health support.

63. It was also agreed that Ms Ramsden would complete a *"desk top analysis"* of the planned work schedule of the Linesperson team over the next four days *"as a practical trial to determine what work activities could potentially be undertaken by Gary in the form of adjusted duties or as part of any planned phased return to work process in his substantive role".*

OH case conference on 3 February 2020

64. This was attended by Dr Colvin (with a colleague observing), Ms McAllister, Ms Ramsden, the claimant, Mr Findlay and Mrs Murray. Dr Colvin produced a note (172-174, also 209-211). The purpose of the meeting was described as a review of evidence in addition to the Craftsperson Role and Risk Analysis document dated 30 January 2020 (287-293) presented by Ms Ramsden.

65. The Craftsperson Role and Risk Analysis document comprised five sections –

- Section 1 Task and Risk – Ms Ramsden (a) identified the tasks associated with the role, (b) assessed the risk involved in each task, (c) expressed the risk reason and frequency and (d) added her considerations. Those considerations were in effect conclusions that, in the case of every risk, no adjustments were possible.

- Section 2 Adjustments to Role Required and Operational Feasibility – Ms Ramsden listed all of the adjustments put forward by the claimant (and/or by Mr Findlay on his behalf) and gave her assessment of operational feasibility in each case. Apart from a phased return to normal duties, where Ms Ramsden stated that she would review this "*in conjunction with OH's assessment with regard to fitness for work and any recommendations*", Ms Ramsden's view was that none of the adjustments was operationally feasible.

- Section 3 Business overview – this explained where the Linesperson team sat within the respondent's organisation.

- Section 4 Business operational context in relation to transmission Craftsperson (lines) role – this described the nature of the work of the Linesperson team and the need for increased productivity.

- Section 5 Conclusion based on Business overview, Business operational context and adjustments to role required – Ms Ramsden expressed her conclusions in these terms –

"*For the purpose of a phased return we would be able to make some adjustments based on it being a phased return and we would therefore not be counting Gary as a full time resource within the team. It would be considered that Gary would basically be re familiarising himself with his role and getting back in to the routine of work.*

Other than for a short phased return to work period Gary would need to be able to work at the pace of the other craftsmen within the team as well as working the hours dictated by the works being undertaken that day.

Out with the phased return period such adjustment could not be considered permanently. The reason for this is that the work as a team [is] like cogs in a gearbox, if one cog stops for a while all the others are forced to. We are a business and like all businesses have productivity to achieve and deadlines to meet."

66. Ms Ramsden had carried out a review of the work of the Linesperson team for the month of January 2020 (231-286). She did this for the whole of the month rather than only four days because she felt this was a more realistic timescale and would give a proper overview of the situation. Ms Ramsden described the outcomes of this exercise as follows –

"*The analysis indicated that of the 23 working days across January 2020, on 49% of those days no overtime required to be worked but that on 51% of those days overtime did require to be worked. This was due to unplanned*

work coming in. This meant that on 51% of the 23 working days in January, unplanned work had come into the team which led me to conclude that it would not be possible to always only allocate Mr Murray planned work."

67. The note of the case conference recorded Dr Colvin expressing his opinion in these terms –

"Dr Colvin confirmed his opinion, based on his knowledge of the work environment, his awareness of the difficulties reported by Gary in relation to the current job demands and his professional knowledge over 30 years, that Gary could not be considered medically fit to return to the role of Overhead Linesman in Transmission in the current work schedule unless he was medically restricted for the foreseeable future from all overtime and emergency standby duties."

68. The outcomes of the meeting were stated to be –

"*It was agreed by all that management would now go and review the relevant management evidence and liaise with Mr Findlay and Gary regarding the contracted duties of Overhead Linesman role. This is order to determine management conclusions on whether working only core hours (37 hours per week, no overtime and no emergency standby duties) would be deemed to be reasonably practicable as an adjustment.*

It was further agreed that once this matter had been decided that management, with the signed consent of Gary would send a new management referral to Dr Colvin for occupational health assessment. It was agreed that Mr Findlay would continue to participate as personal support for Gary and as his union representative and liaise with Adele."

LTA review meeting on 2 March 2020

69. This was attended by Ms Ramsden, Ms McAllister, the claimant and Mr Findlay with Ms McGrath as notetaker. The notes were in the joint bundle (177-186). Ms Ramsden provided a detailed summary of events leading up

to this point. Her evidence of what she then said was expressed in these terms and was consistent with the meeting notes –

"*….I explained to Mr Murray what I had done following the occupational health case conference meeting on 3 February to arrive at a final conclusion. I explained all the matters I had considered but ultimately my conclusion was that I was not able to support the adjustments Mr Murray sought ie Mr Murray working only his core 37 hours per week with multiple breaks and specific planned tasks. I also required the full range of duties to be carried out and was unable to change the role to the extent of the adjustments he required. Having an employee unable to work overtime when unplanned work was such a regular feature of the role was not feasible and severely limited options. Having an employee unable to work standby in a small team of eight would place an unreasonable burden on other members of the team who would need to pick up the extra hours, and further, would not be in accordance with our company agreement on standby. It would also leave the company exposed as it may be vulnerable to not being able to supply standby cover if other members of the team were sick or on holiday potentially creating a breach of statutory duties."*

70. Ms Ramsden indicated that she would prepare a management referral form to send to Dr Colvin in advance of the claimant's next OH review on 9 March 2020. There was then discussion about a Substation Inspector role possibly becoming available, based at Cambuslang. The claimant confirmed that he would be interested in this.

71. The meeting notes recorded Ms McAllister telling the claimant –

"*AR has put in a lot of work to try to support you back to work in conjunction with OH advice. Given what AR has informed you, you are therefore unable to carry out the Overhead Linesman role. A possible outcome following your OH review on 9.3.20 may be Medical Re-deployment or Ill Health Retirement. AR will see what OH states."*

72. Ms Ramsden wrote to the claimant on 6 March 2020 (188-189) to summarise the outcome of the meeting. She recorded the agreed actions –

- *You will consider and discuss the Substation Inspector role and inform me if you would like me to explore this further. You have since informed me you would be interested in the role.*
- *I will send you a copy of my management referral for your information.*
- *I will send you a copy of the job description for the Substation Inspector role. I have now sent this to you.*
- *You will keep in regular contact with me in order that we keep lines of communication open. You will call me on a fortnightly basis. If I am not available, you will leave me a message and I will return your call.*

OH report of 9 March 2020

73. Ms Ramsden duly sent the OH referral on 6 March 2020 (190-193). In this she asked the following questions –

"*1. Is the Substation Inspector role a suitable role that Gary would be medically fit to carry out?*

a. If not, given I require the full range of duties to be carried out, should redeployment (medical) now be commenced and/or ill health retirement application process be started?

2. What type of roles would Gary be medically fit to carry out."

74. Dr Colvin prepared a report form (194-196). This included the following paragraphs –

"*The new management referral states that within Gary's contract he may be required to work overtime from time to time and the job description for his role includes flexibility (of working hours) as being essential. Overall the management referral concludes that from a business perspective that management cannot operationally accommodate an Overhead Linesman*

working (only) core hours on planned works without being able to be flexible in terms of working overtime when required and carrying out contractual standby duties. Thus, the management conclusion is that it is not operationally feasible to support Gary carrying out his role of Overhead Linesman if he is medically restricted to core hours of 37 hours per week on planned works and he is not able to work overtime or emergency standby duties.

Thus today, based on my previous discussions and assessments, (and it is not considered by management to be reasonably practicable to modify or adjust Gary's duties to only core hours of 37 hours per week on planned works without overtime or emergency standby duties) I have confirmed my occupational health conclusion that Gary is medically unfit for the full contracted duties of Overhead Linesman within Transmission and that this will be the case for the foreseeable future.

Today Mr and Mrs Murray both strongly dispute that this is the case. They argue that Gary is capable of performing all of the duties of the Overhead Linesman role safely with some adjustments and Gary cannot see any reason why it should not be possible for him to return to his job whilst restricted to core hours but also with some flexibility so that he could work overtime or standby duties when he felt capable of doing so safely (ie without fatigue).

Both Gary and Mrs Murray also wish it to be documented that they strongly disagree that Gary ever made requests with regards to a reduced work pace, a more relaxed working environment, reduced time spent in the tower, being limited to clearly defined tasks, be restricted from any overtime or emergency standby rota, being allowed to take longer breaks at work if required, having flexibility on working hours (start/stop times), and being restricted from lone working. I advised them to raise these concerns directly with line management."

75. Dr Colvin's report answered Ms Ramsden's questions. He advised that the claimant could be deemed medically fit for the role of Substation Inspector.

He also advised that the claimant "*could be deemed medically fit to carry out many roles, including safety critical roles, where the work can be planned and scheduled such that Gary is unlikely to become fatigued, particularly towards the end of working days or working weeks.*"

5 ***LTA review meeting on 13 May 2020***

76. There was supposed to be a further OH review on 15 April 2020 but due to a failure in communication this did not take place. The next meeting the claimant attended was the LTA review meeting on 13 May 2020. Present at this were Ms Ramsden, Ms McAllister, the claimant and Mr Findlay, with Ms
10 McGrath as notetaker. The notes were in the joint bundle (202-208).

77. At this meeting the claimant disputed what Dr Colvin was saying about his not being medically fit for the role of Linesperson. Ms McAllister told the claimant he could take that up with Dr Colvin. We pause to observe that this was a less than helpful response when it was Dr Colvin who had advised the
15 claimant to raise his concerns with management (see paragraph 73, last sentence, above).

78. The claimant also disputed that he had asked for all of the measures said to be required to enable him to return to his job. Ms McAllister responded with reference to the Risk Analysis undertaken by Ms Ramsden. She reminded
20 the claimant that Dr Colvin had advised that he was not medically fit for the Craftsperson role and that there was no point in trialling a phased return to work. The meeting then moved on to the Substation Inspector position, with the claimant confirming that Ms Ramsden should explore this.

79. Ms Ramsden wrote to the claimant on 27 May 2020 to summarise the
25 outcome of the meeting (221-222).

Dumfries job becomes available

80. The Substation Inspector job based in Cambuslang had been mentioned to the claimant because it was thought that the employee in that role was to retire.

However the said employee decided not to do so, and accordingly this position was no longer available.

81. It then transpired that a Substation Inspector post had become available, covering the Dumfries/Borders area, based out of Dumfries. Ms Ramsden wrote to the claimant about this on 2 June 2020 (508).

OH report of 9 June 2020

82. A further OH review took place by telephone consultation on 9 June 2020. Dr Colvin produced a note (226-227). This did not list the attendees but it did mention that Mrs Murray accompanied the claimant.

83. Dr Colvin's note recorded that the claimant and Mrs Murray continued to dispute that the claimant had ever proposed any changes to the normal duties of Overhead Linesman for his return to work process and that he had detailed his concerns in an email to Ms Ramsden of 8 June 20.

84. Dr Colvin's report included the following paragraphs –

"*Thus, I can advise that the occupational health advice in my report dated 9th March 2020 remains valid. As before, and based on my previous discussions and assessments, (and as it is not considered by management to be reasonably practicable to modify or adjust Gary's duties to only core hours of 37 hours per week on planned works without overtime or emergency standby duties) I can confirm my occupational health conclusion that Gary is medically unfit for the full contracted duties of Overhead Linesman within Transmission and that this will be the case for the foreseeable future. As before Mr and Mrs Murray both strongly disagree that this is the case.*

I note that Gary has been offered a Substation Inspector role working in Dumfries/Borders district via the company redeployment process which is fixed hours 08.00-16.00 hours Monday to Friday role without overtime or emergency standby duties. However, Gary estimates the post will require approximately 1.5 hours driving commute to work each way. This is a

significant added time to the working day for Gary (estimated 3 hours) and although Gary stated that he does not believe that he would have any difficulties coping with the prolonged hours or added driving I would suggest that any added fatigue risks would best be assessed after some practical experience in post. Thus, for Gary to be considered as medically fit for this role, management would have to be prepared to offer a shortening of the working day to accommodate any fatigue arising from the prolonged commute to work should this be required on occupational health advice. Otherwise, as before, I can confirm that I would consider Gary to be medically fit for this role."

Claimant submits grievance

85. The claimant submitted a grievance, initially on 29 May 2020 (324-328). He then resubmitted his grievance on 8 June 2020 (330-334). The second version was slightly expanded from the first. Mr Marshall was appointed by Mr McDougall to deal with the claimant's grievance.

86. Mr Marshall held an initial meeting with the claimant via Microsoft Teams on 15 June 2020. He was accompanied by Ms A Mitchell, HR with Mr R Halfpenny as notetaker. The claimant was accompanied by his trade union representative, Mr J Thomson, and by Mrs Murray. The notes were in the joint bundle (371-374).

87. The claimant's grievance letter was to a large extent a timeline of events since March/April 2019. Mr Marshall sought to clarify with the claimant *"who his complaint was against and why".* The claimant told him it was against Mr Christie and Ms Ramsden although he acknowledged that Ms Ramsden had been "*understanding and helpful through most of this".* The claimant then talked Mr Marshall through the reasons for his complaints against Mr Christie and Ms Ramsden. Following this meeting Mr Marshall was provided with a timeline (375-378) and Ms Ramsden's Summary and Conclusions document dated 28 February 2020 (294-316).

88. Mr Marshall met with Ms Ramsden via MS Teams on 25 June 2020. He was accompanied by Ms L Brown, HR with Mr Halfpenny as notetaker. The notes were in the joint bundle (385-389).

89. Mr Marshall asked Ms Ramsden about the meeting on 14 May 2019. Ms Ramsden told him that she had attended at Mr Christie's request, that it was not a formal meeting and that she did not take notes. She said that the meeting was a discussion about the impact of the claimant's brain injury. When asked by Mr Marshall whether any commitments were made or agreement that something would happen, Ms Ramsden replied "*No, we would have got HR involved if it was in any way formal".*

90. Mr Marshall met with Mr Christie via MS Teams later on 25 June 2020. He was accompanied by Ms Brown, with Mr Halfpenny as notetaker. Mr Christie was accompanied by Mr A Convery, trade union representative. The notes were in the joint bundle (379-384).

91. Mr Marshall asked Mr Christie about the meeting on 14 May 2020. Mr Christie said that the meeting was informal and had been arranged by text message from the claimant's support worker. No notes were taken. When asked whether it had been agreed to refer the claimant to OH Mr Christie said that he was *"not 100% sure"* but questioned why, if this were the case, the claimant had not pursued it.

92. Mr Christie denied that the claimant had approached him *"multiple times"* in the following weeks to highlight his fatigue. He said that the claimant had continued to carry out work activities as normal until he reported sick at the end of July 2019. Mr Christie gave Mr Marshall his version of the events of 25/26 June 2019. When asked about his text message to the claimant in 26 July 2019 Mr Christie acknowledged "*maybe a bad choice of words saying "graft" but the context was that GM wanted to start early, but not work late".* Following their meeting Mr Christie provided Mr Marshall with text messages between the claimant and himself (337-368 and 369-370).

93. After these meetings Mr Marshall was provided with additional information including various meeting notes. He arranged to meet with the claimant again on 3 July 2020. He was accompanied at this meeting by Ms Brown, with Mr Halfpenny as notetaker. The claimant was accompanied by Mr Thomson and Mrs Murray. The meeting notes were in the joint bundle (398-409).

94. Mr Marshall covered with the claimant the events since he returned to work in March 2018, what had changed between April and July 2019, whether overtime was mandatory, the meeting on 14 May 2019, the events of 25/26 July 2019 and the Job Tasks Risk Analysis. There was reference to producing Ms Newbigging's notes from the 14 May 2019 meeting. These were not provided before Mr Marshall issued his decision but the claimant did provide an extract from Ms Newbigging's notes (410-411). Mr Marshall followed up with Mr Christie and Ms Ramsden after the meeting and obtained responses from them (413-417).

95. Mr Marshall wrote to the claimant on 16 July 2020 (418-422) with his grievance outcome. He referred to *"the safety and working practice concerns raised by you at both our interviews and in the amended grievance letter received from you on 8th June 2020".* Mr Marshall said that he would *"discuss this directly with management"* but that he believed –

> "*it would not be appropriate to respond through this grievance process, as while you have provided this information as background to why you were feeling stressed, it is my understanding that this grievance was not about the working practices of the team."*

96. Mr Marshall's conclusions can be summarised as follows –

- The claimant's workload had been well within the scope of work for a Transmission Linesman, and allowances had been made informally to reduce his work activities.

- In relation to the matters alleged to have been agreed at the 14 May 2019 meeting but not actioned by management, the evidence pointed

to the meeting being informal and this made producing evidence to prove the meeting outcomes extremely difficult to ascertain.

- In relation to the events of 25/26 July 2019, an employee feeling fatigued, exhausted or stressed should feel able and had a responsibility to flag this and take regular breaks where required. This should have been managed at site level by the working team and the Team Leader.

- In relation to Mr Christie's text message, the text messages supplied by Mr Christie provided an insight into their working relationship. Mr Christie accepted his language was not appropriate and apologised, but felt that his relationship with the claimant at the time was such that he was able to communicate with the claimant in an open and honest way.

- In relation to the time taken to produce the Job Tasks Risk Analysis, there had been no intention to prolong the process but the time taken was necessary to allow all parties to input and comment.

Mr Marshall's decision was that he was unable to uphold the claimant's grievance. He advised the claimant of his right to appeal the grievance outcome.

Claimant appeals

97. The claimant exercised his right of appeal on 24 July 2020. He did so by producing a document in which he set out Mr Marshall's conclusions and inserted his appeal points in bold print (424-430). He also provided supporting documentation (431-437). This documentation included Ms Newbigging's handwritten clinical notes in respect of the meeting on 14 May 2019 (432-433) and a typewritten transcript of these (434).

98. Mr Maclean was appointed by Mr McDougall to deal with the claimant's appeal. He was provided with the appeal document and supporting documentation, the grievance documentation, the text messages supplied by Mr Christie and various OH reports. Mr Maclean arranged the appeal hearing

for 13 August 2020 (rescheduled from 11 August 2020 due to an issue with the original choice of notetaker).

99. The appeal hearing duly took place by conference call on 13 August 2020. Mr Maclean was accompanied by Ms A Mitchell, HR with Mr G Corr as notetaker. The claimant was accompanied by Mr Thomson and Mrs Murray. The notes (in which the hearing date was erroneously stated as 11 August 2020 and the start time erroneously stated as 10.30am) were in the joint bundle (456-471).

100. In view of the format in which the claimant had presented his appeal, Mr Maclean sought during the appeal hearing to identify the main points of the appeal. It is convenient to set these out as recorded in Mr Maclean's outcome letter (494-499) –

- Point 1 - This relates to your concern about the number of hours that you were working and that this has been consistently stated at OH meetings and LTA meeting by you. You specifically cited the example of having worked two 16 hour days on 8th and 9th May 2019, hours were reduced to contractual hours only for 2 weeks before increasing again because of overtime from 3rd June 2019.

- Point 2 – You state that whilst you were frustrated at the lack of notes and evidence from this meeting *[meaning the meeting on 14 March 2019]*, you had sourced a copy of the notes taken by Liz Newbigging from the Brain Injury Team.

- Point 3.1.1 – Is that an Occupational Health appointment was not made following meeting held on 14th May 2019.

- Point 3.1.2 – You state that when you contacted 1HR for advice, they said to liaise with your line manager and as you did not feel comfortable doing this, you engaged with the brain injury team.

- Point 3.2 – You refer to an agreement relating to planning jobs that are risk assessed and safe. You are stating that there were no formal arrangements in place, no clear instruction or guidance.

- Point 3.3 – This point referred to SP to discuss lone working. You state that you have no evidence of this and that you would have expected it to be formally documented.

- Point 4.1 – You had referred to conditions on 25th and 26th July 2019 being unacceptable and could have been the catalyst for your current sickness absence. David had commented on the duration and conditions in a tower environment and also safe working practices and breaks and stated that is an employee feels fatigued, exhausted or stressed, they have a responsibility to flag this.

- Point 4.2 – Relates to a text sent to you by James "*Gary, just start at your normal time from now on. I'm not having anyone starting early if they can't work on anymore. It's not fair on the rest of the guys that are putting in the graft".* You say this is highlighting that you were not supported.

101. We were satisfied that Mr Maclean worked through the points made by the claimant in his appeal document. The appeal hearing lasted over two hours including a couple of short adjournments. Towards the end of the meeting Mr Maclean asked the claimant if there was anything else he wanted to raise that had not already been discussed. The claimant said there was not. Mr Maclean also checked with Mrs Murray and Mr Thomson and received a similar response.

102. We comment on some of the answers given by Mr Maclean under cross-examination and in answer to our questions. Mr Maclean said that prior to going off sick in July 2019, the claimant had been deemed fully fit for all of his duties. He also said that at the time of the appeal, he did not know that the claimant was a disabled person. This was not entirely consistent with the

notes of the appeal hearing where (at page 462, penultimate paragraph) Mr Maclean is recorded as saying –

> "*You mentioned that you have a disability but I note that you were deemed fully fit with no restrictions and you were working overtime which you were being paid for. There were no substantive changes to your role. I am not happy that you are saying you are working and have a disability."*

103. When asked why he had not spoken directly to anyone in the claimant's team, Mr Maclean's answer was that he wanted "*to get a clear and honest view of how things were working".* He said that if he had found any safety issue, he would have investigated it. When asked how he could get a *"clear and honest view"* if he did not speak to other witnesses, Mr Maclean said this was through his own knowledge. If there had been something wrong within the team, it would have been flagged up, but nothing was.

104. Following the appeal hearing Mr Maclean emailed the claimant on 17 August 2020 (473) to ask what would resolve the grievance for him. The claimant replied on 18 August 2020 (473) stating that he would "*look for Scottish Power to deal with my grievance as they see appropriate".*

105. Mr Maclean interviewed Ms Ramsden and Mr Christie via MS Teams on 28 August 2020. The notes of these interviews were in the joint bundle – Ms Ramsden (484-491) and Mr Christie (475-483). These notes indicated that Mr Maclean had been reasonably thorough in covering the relevant points with Ms Ramsden and Mr Christie.

106. Mr Maclean issued his outcome letter to the claimant on 4 September 2020 (494-499). He provided his response to each of the appeal points (as set out in paragraph 98 above). He did not uphold the appeal.

Job offer/redeployment

107. On 5 August 2020 the respondent's HR Shared Services wrote to the claimant (511-512) offering him the position of Substation Inspector based at their Dumfries office. The claimant replied on 11 August 2020 declining this as

"not suitable". He stated "*The role would approximately incur an extra 15 Working Hours Per Week (Travel) that I would not be paid for, therefore due to this reason I will not be accepting."*

108. On 2 September 2020 Ms Ramsden wrote to the claimant (528) inviting him to a *"Formal Meeting – Redeployment (Medical)"* on 15 September 2020. At that meeting, conducted via MS Teams, Ms Ramsden was accompanied by Ms N Hodge, HR with Mr R Barr as notetaker. The claimant was accompanied by Mr Thomson and Mrs Murray. The notes were in the joint bundle (529-532).

109. Ms Ramsden explained that the respondent's redeployment process involved assisting the claimant to find a new role over a period of 8 weeks. He would be placed on the redeployment register and, if a suitable position was found, it would potentially be offered to the claimant without the need for an interview. There would be a review after 4 weeks and a final review after 8 weeks if no role had been secured. Thereafter an independent manager would be appointed to review the redeployment procedure and make a final decision which might be termination of employment. A further meeting was scheduled for 18 September 2020. Ms Ramsden wrote to the claimant on 18 September 2020 (533-534) to summarise the outcome of the meeting on 15 September 2020.

110. On 18 September 2020 the claimant attended a skills review meeting with Ms Ramsden. They looked at current vacancies. The claimant's view was that there were no suitable roles available. Ms Ramsden was then to be on holiday the following week and a further meeting was scheduled for 2 October 2020.

111. Ms Ramsden did not share the claimant's view that there were no suitable roles available. She referred to two positions which she had discussed with the claimant at their meeting on 18 September 2020. These were Team Member Compliance (based in Glenrothes) and Team Member Technical. According to her notes (537) Ms Ramsden had tried unsuccessfully to make

contact with the hiring managers for these roles. She intended to discuss these positions further with the claimant on 2 October 2020.

Claimant resigns

112. The claimant's evidence was that by 15 September 2020, having exhausted the respondent's grievance procedure, he finally accepted that the respondent would not allow him to return to his job as a Linesperson. He wrote to Ms Ramsden in these terms –

> *"I am writing to inform you that I am resigning from my position of Overhead Linesman at Scottish Power with immediate effect. Please accept this as my formal letter of resignation and a termination of our contract. I feel that I am left with no choice but to resign in light of my recent experiences and Scottish Power's failure to allow me to return to my role as Overhead Linesman."*

113. The claimant's letter (535) was undated but we understood that it was written on 29 September 2020. It was received by Ms Ramsden on 1 October 2020. Ms Ramsden responded to the claimant on 6 October 2020 (536) accepting his resignation.

Mitigation

114. The claimant provided evidence of three job applications (one prior to and two after his resignation). He also provided evidence of undertaking voluntary work. He was in receipt of Employment Support Allowance and then Jobseekers Allowance. In the two months preceding the hearing he had started to work as a boxing trainer on a self-employed basis. His earnings to date from that activity were £800.

Comments on evidence

115. It is not the function of the Tribunal to record every piece of evidence presented to it and we have not attempted to do so. We have sought to focus on those parts of the evidence which had the closest bearing on the issues we had to decide.

116. All of the witnesses were broadly credible (subject to what we say below) and gave their evidence to the best of their recollection.

117. Where notes of meetings were provided we found no reason to doubt their accuracy.

5 118. We did have an issue with the evidence of all of the respondent's witnesses that overtime was voluntary. It seemed to us that this was clearly at odds with both the terms of the claimant's contract of employment (see paragraph 13 above) and with their case as pled (see paragraph 5 of the Paper Apart to their ET3).

10 **Submissions – claimant**

119. Mr Booth provided written submissions which he supplemented orally at the hearing. He couched some of his written submissions in the language of section 19 EqA (**Indirect discrimination**) which was not part of the claimant's case as pled, but we were able to transpose his arguments to the context of 15 alleged failure to make reasonable adjustments.

120. Mr Booth submitted that the provision, criterion or practice ("PCP") of the respondent's had been the requirement to work overtime. The substantial disadvantage to the claimant as a disabled person was that he *"was adversely affected by working long hours, he became fatigued, his safety was put at risk* 20 *and he ultimately lost his job".* The step which Mr Booth contended it was reasonable for the respondent to take was not to require the claimant to work overtime (or, as the claimant put it, *"excessive hours"*).

121. Under reference to paragraphs 3.5 and 3.6 of the claimant's Statement of Particulars of Employment, Mr Booth said it was clear that working overtime 25 was compulsory if the claimant was required to do so by his manager. For the respondent's witnesses to say that it was voluntary was wrong and deliberately misleading.

122. Mr Booth was critical of Ms Ramsden's Craftsperson Role and Risk Analysis document (287-293) as being one-sided. She had been the only one

permitted to comment in the *"Considerations"* column. In relation to the *"Risk Reason/Frequency"* column, Mr Booth submitted that there was no real reason the claimant could not have carried out the tasks if an adjustment had been made.

123. Mr Booth referred to Dr Colvin's comments in his report of 26 November 2018 (103-104) where he expressed the view that the claimant was "*fit for his normal duties including the business driving of company vehicles up to a weight limit of 3.5 tons and for any emergency standby duties. I would advise that Gary should be medically restricted to company vehicles within this weight limit and also medically restricted from the driving of trailers at present."*

124. Mr Booth also referred to Dr Colvin's comments in his report of 9 June 2020 where he said that "*based on my previous discussions and assessments, (and as it is not considered by management to be reasonably practicable to modify or adjust Gary's duties to only core hours of 37 hours per week on planned works without overtime or emergency standby duties) I can confirm my occupational health conclusion that Gary is medically unfit for the full contracted duties of Overhead Linesman within Transmission and that this will be the case for the foreseeable future."*

125. Mr Booth submitted that the only reason for this *"was because the Respondent did not allow him to do so because it was not considered reasonably practicable to modify or adjust Mr Murray's duties".* It would, Mr Booth contended, have been a reasonable adjustment to allow the claimant to work fewer hours. If the respondent had done so, the claimant would have been able to resume his duties

126. Mr Booth acknowledged that the effectiveness of such an adjustment might have depended on the cooperation of the claimant's colleagues. However, the respondent had not approached his colleagues. Mr Booth referred to paragraph 6.35 of the Equality and Human Rights Commission: Code of Practice on Employment (2011) –

"*In some cases, a reasonable adjustment will not succeed without the co-operation of other workers. Colleagues as well as managers may therefore have an important role in helping ensure that a reasonable adjustment is carried out in practice. Subject to considerations about confidentiality, employers must ensure that this happens. It is unlikely to be a valid defence to a claim under the Act to argue that an adjustment was unreasonable because staff were obstructive or unhelpful when the employer tried to implement it.*"

In this case, Mr Booth argued, the respondent had not even tried to implement the adjustment.

127. Mr Booth argued that the respondent's purported consideration of reasonable adjustments was a sham. He referred to the meeting on 14 May 2019. It was likely that the notes taken by Ms Newbigging, as a healthcare professional within the NHS, were accurate. The evidence of Mr Christie and Ms Ramsden that nothing was agreed was not credible. The respondent was trying to wriggle off the hook by saying that the meeting was informal. That, however, was just a play on words. The facts were that the meeting took place and things were agreed, but they were not actioned by the respondent.

128. Mr Booth was critical of Mr Marshall for not addressing the safety concerns which the claimant raised in his grievance. As well as ignoring these concerns, Mr Marshall had disregarded the claimant's concerns about his hours. Mr Marshall's findings might have meant that the workload was well within the scope of work for a Transmission Linesman, but that did not address whether the level of work was within the scope of work for a disabled person. Mr Marshall also failed to consider the application of the Working Time Regulations 1998 and the absence of an opt-out in this case.

129. Turning to the constructive dismissal claim, Mr Booth submitted that there had been an express breach of contract by the respondent in not allowing the claimant to work his contracted hours. There had also been a breach of the implied term of mutual trust brought about by the respondent's discriminatory

conduct in failing to make a reasonable adjustment and in denying the claimant access to a meaningful grievance procedure.

130. Mr Booth disputed that, if the claimant were found to have been constructively dismissed, it had been a fair dismissal on the grounds of capability. The claimant, he argued, had been capable of doing his job. He had done so for more a year without any problems.

Submissions – respondent

131. Ms Miller proceeded on the basis that there were two aspects to the claimant's allegation of failure to make reasonable adjustments –

(a) Failure to reduce/adjust the claimant's hours of work to basic contractual hours.

(b) Failure to take certain actions following the meeting on 14 May 2019.

132. Under reference to ***Caen v RBS Insurance Services Ltd ET/1801133/09***, ***Pointon v Alpha Omega Securities Ltd ET/1301938/2019*** and ***HK Danmark acting on behalf of Ring v Dansk almennyttigt Boligselskab and another, case C-335/11*** Ms Miller accepted that reducing working hours could be a reasonable adjustment. The key question was whether any adjustment sought was reasonable. This was fact-sensitive and the test of reasonableness was objective and to be determined by the Tribunal – ***Smith v Churchill's Stairlifts plc 2006 IRLR 41***.

133. The matters which the Tribunal had to consider were –

(a) Will the adjustment work? Will it operate to alleviate the disadvantage complained of or not?

(b) The cost of the adjustment to the employer together with the financial and other resources available to the employer is relevant to whether or not the adjustment is reasonable.

(c) The wider implications for the whole workforce, ie the impact on them of the adjustments is a matter for the Tribunal to consider.

134. In relation to a reduction in the claimant's working hours, Ms Miller submitted that the respondent was entitled to accept the OH advice – that basic contracted hours was what was required. Ms Ramsden had looked at matters in considerable detail when she took over management of the case in November 2019. She prepared a job task and risk analysis as recommended by OH, with input from the claimant and his trade union representative. She factored in the adjustments sought by the claimant and his representative. When the claimant later disputed that he had raised all of these, it had been reasonable for the respondent to treat this as the claimant challenging Dr Colvin's opinion and to advise him to go back to Dr Colvin if that was the case.

135. Ms Ramsden had also conducted an analysis of planned versus unplanned work. She concluded that there was unplanned reactive work which could not be planned in advance on around 50% of working days. The point was that it was not just hours of work that needed to be considered in assessing whether core hours only could be applied. It was clear that unplanned work was not suitable for the claimant. Ms Miller directed us to the overall conclusion reached by Ms Ramsden as set out in the notes of the LTA meeting on 2 March 2020 (at 182).

136. In relation to the alleged failure to take certain actions following the meeting on 14 May 2019, Ms Miller reminded us of the evidence given by Mr Christie and Ms Ramsden. She noted that Ms Newbigging had not been called as a witness. She argued that Ms Newbigging's letter to Mr Christie of 5 August 2019 was supportive of the evidence of the respondent's witnesses. Ms Miller also invited us to consider the genuine possibility of a misunderstanding between the parties at this meeting. In any event, Ms Miller argued, even if the respondent had failed to carry out actions agreed at this meeting, it would have made no difference to the reasonableness or otherwise of the adjustments ultimately sought.

137. Addressing Mr Maclean's evidence that he was not aware that the claimant was a disabled person at the time of the grievance appeal, Ms Miller argued that this did not affect the position on reasonable adjustments. The duty was to "*make"* adjustments, not to *"consider"* if adjustments were reasonable. Ms Miller submitted that Ms Ramsden's conclusion, that the adjustments sought were not reasonable, stood and was the key to the case as to whether the respondent had failed in its duty or not.

138. Ms Miller submitted that the respondent had continued to make adjustments with the offer to the claimant of the Substation Inspector role and their willingness to review this if the claimant was not able to cope with the additional driving required to get to and from Dumfries.

139. Turning to the constructive unfair dismissal claim, Ms Miller referred to ***Western Excavating ECC Ltd v Sharp 1978 ICR 221***, quoting from the Judgment of Lord Denning –

> "*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct."*

140. Under reference to the case of ***Malik v Bank of Credit and Commerce International SA [1997] UKHL 23*** Ms Miller submitted that the implied term of trust and confidence imposed an obligation that the employer shall not "*….without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".* Ms Miller adopted Dyson LJ's explanation of what might constitute a *"last straw"* in ***London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493***.

141. Referring to the terms of the claimant's resignation letter, Ms Miller submitted that it appeared to be the events leading up to the respondent's decision not

to allow the claimant to return to his role as an Overhead Linesman, which was predicated on management's conclusion that they could not make the OH recommended adjustments to reduce the claimant to basic contractual hours with no overtime or standby, which was the reason for his resignation.

142. Ms Miller referred to the documents provided by Ms Ramsden – the job task/risk analysis (287-293), the summary and conclusion document (294-316) and the analysis of planned vs unplanned work (231-286). These demonstrated that the respondent's decision that they could not support the adjustments sought by the claimant was reasonable. It was not a breach of contract.

143. If we found that there had been a breach of contract, Ms Miller argued that the claimant had waited too long before resigning. He had affirmed the contract. Ms Miller quoted from ***Western Excavating*** – "*….the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged".* It should, Ms Miller contended, have been clear to the claimant by March 2020 that the respondent could not allow him to return to his role of Overhead Linesman. That had been reinforced at the LTA review meeting on 13 May 2020.

144. In relation to the alleged failure of the respondent to take action following the 14 May 2019 meeting, Ms Miller submitted (a) that no actions had been agreed or (b) the alleged agreed actions would have made no difference to the situation in which the claimant found himself given Ms Ramsden's findings about his fitness and her ability to adjust his role. In any event, a referral to OH had been made in August 2019 shortly after the claimant's absence began.

145. Ms Miller argued that here also the claimant had waited too long before resigning. He was complaining about events which took place in May 2019. However, he took no action about them until he raised his grievance in May/June 2020. Ms Miller submitted that it was clear the claimant had not

resigned because of any issue relating to the 14 May 2019 meeting but because he was not permitted to return to the role of Overhead Linesman.

146. Ms Miller argued that it was not sustainable for the claimant to say that he did not realise that he would not be able to return to his former role until the redeployment process started. The claimant, she submitted, could have been in no doubt when this was made clear in the OH report of 9 March 2020 and restated at the LTA review meeting on 13 May 2020. Further and in any event, implementing the redeployment process was not in breach of contract. The claimant resigned despite two possible alternative roles having been discussed with him.

147. Ms Miller submitted that if the claimant was found to have been constructively dismissed, the respondent had shown a potentially fair reason for his dismissal. This was capability based on the claimant's ill health and was clearly in the respondent's mind when dealing with the matter. The respondent had, Ms Miller contended, done all that was required in the case of a capability dismissal, under reference to ***East Lindsey District Council v Daubney 1977 IRLR 181***. They had taken steps to discover the true medical position and had discussed matters with the claimant. If there was found to have been a dismissal, it had been fair.

148. Ms Miller also argued (a) that the claimant had failed to mitigate his loss and (b) that his assessment (at £9100) of his claim for injury to feelings was overstated.

Applicable statutory provisions

149. The right not to be unfairly dismissed is found in section 94(1) of the Employment Rights Act 1996 ("ERA") –

> "*An employee has the right not to be unfairly dismissed by his employer."*

150. What amounts to constructive dismissal is found in section 95 ERA –

> *"(1) ….an employee is dismissed by his employer if….*

(a) ….

(b)

(c)

(d) ….

5 *(e) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

151. If we found that the claimant had been constructively dismissed as he contended, the following provisions of section 98 ERA would be engaged –

10 *"(1) In determining….whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

a. *the reason (or, if more than one, the principal reason) for the dismissal, and*

b. *that it is either a reason falling within subsection (2) or some*
15 *other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

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

….(b) relates to the capability….of the employee for performing work of the kind which he was employed by the employer to do….

20 *(3) In subsection (2)(a) –*

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

(4) Where the employer has fulfilled the requirements of subsection (1),
25 *the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

5 (b) *shall be determined in accordance with equity and the substantial merits of the case."*

152. The duty to make reasonable adjustments is found in section 20 EqA which, so far as relevant, provides as follows –

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

(2) *The duty comprises the following three requirements.*

(3) *The first requirement is a requirement, where a provision, criterion or*
15 *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."*

153. Failure to comply with the duty to make reasonable adjustments id dealt with
20 in section 21 EqA which , so far as relevant, provides –

"(1) A failure to comply with the first….requirement is a failure to comply with a duty to make reasonable adjustments.

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

25 **Discussion**

154. We decided to deal firstly with the disability discrimination claim, ie that the respondent had failed to make reasonable adjustments. The claimant's case

as pled in his ET1 was that he was "*entitled to resign due to the discriminatory conduct of his employer that resulted in a breach of his express and implied terms".* It therefore seemed to us to be logical to determine whether there had been discriminatory conduct before moving on to consider whether the claimant had been entitled to resign.

155. We considered the issues which arose in the claimant's reasonable adjustments claim. We believed these were –

   a. What was the PCP of the respondent's?

   b. Did the respondent's PCP put a disabled person at a substantial disadvantage?

   c. What steps was it reasonable for the respondent to take to avoid that disadvantage?

   d. Had the respondent failed to take those steps?

What was the PCP?

156. This was said to be the requirement to work overtime. This took us to the tension in the evidence which we mentioned in paragraph 117 above. The respondent's witnesses all said that overtime was not compulsory. Even when taken to section 3.5 of the claimant's particulars of employment – "*You may be required by your Manager to work overtime from time to time"* - they maintained that an employee would not be compelled to work overtime if he/she did not wish to do so.

157. We had a number of difficulties with this. Firstly, it was contrary to the respondent's case as pled. At paragraph 5 of the Paper Apart to their ET3, the respondent's position was stated to be –

> "*Due to the geographical locations of work and the area covered by the team, flexibility is required with regards to both overtime and working standby, both of which were required in terms of the Claimant's contract of employment."*

158. Secondly, the respondent's witnesses agreed that section 3.6 of the claimant's particulars of employment imposed a requirement to be available when required for emergency response work. It did not seem to us to be sustainable to argue that "*required"* could have a different meaning in section 3.5 as compared with section 3.6. We considered that "*required"* bore its normal meaning, which indicated that both overtime and standby were compulsory. That the respondent might in practice take a more relaxed line on overtime did not alter the contractual position.

159. Thirdly, Ms Ramsden's Craftsperson Role and Risk Analysis document contained her assessment of the operational feasibility of each of the adjustments she understood the claimant was seeking. These included *"No overtime or Standby"* – see page 289. Ms Ramsden said this –

> "*If we were working overtime it would not always be feasible for the team to operate efficiently if a member was not able to work the same hours. It may mean works having to cease on time for the whole team or delay the start of works for the rest of the team waiting for members to arrive. Overall operationally this would have an impact on meeting key deliverables. This is not practical to manage and the role does require flexibility and to be on a standby rota."*

In other words, overtime was an operational necessity. We were satisfied that the requirement to work overtime was a PCP of the respondent's.

Did the PCP put a disabled person at a substantial disadvantage?

160. Our answer to this was in the affirmative. The *"relevant matter"* was the requirement for the Linesperson Team to operate efficiently and to meet key deliverables. A disabled person who was medically restricted from working beyond core hours, ie unable to do overtime or standby duties, was clearly at a substantial disadvantage if overtime was required. That this applied to the claimant was evident from Dr Colvin's OH report of 9 March 2020 (see paragraph 73 above – *"Gary is medically unfit for the full contracted duties of Overhead Linesman and…this will be the case for the foreseeable future").*

What steps was it reasonable for the respondent to take to avoid that disadvantage?

161. The adjustment contended for in the present case was expressed by Mr Booth with admirable simplicity – *"to allow the claimant to work fewer hours".* Ms Miller had reminded us of the matters we should consider – see paragraph 132 above. It was in relation to this (and the issue of whether the respondent had failed to take steps they should have taken) that we were unable to reach a unanimous conclusion.

162. The view of the majority of the Tribunal was that it was not a reasonable step for the respondent to take to reduce the claimant's hours. The necessity for this step was supported by the OH reports. The advice available to the respondent was that the claimant was not medically fit to work his full contracted hours, ie including overtime and standby. The respondent's decision that they could not accommodate a reduction to core hours only was based on Ms Ramsden's Craftsperson Role and Risk Analysis document.

163. The view of the majority was that this document was a reasonably thorough review of the claimant's role and the impact of the adjustments sought. Ms Ramsden explained her view that the inability of a team member to work the same hours as his colleagues was not practical to manage in operational terms. The majority accepted that explanation. This informed the opinion of Dr Colvin when he advised that the claimant was medically unfit for his full contracted duties.

164. The dissenting member of the Tribunal (Mr Doherty) believed that the respondent had not listened properly to the concern the claimant was expressing. What they heard was the claimant saying that his job had changed. What the claimant was telling them was that the job was being done in a way that was unsafe. The result was that the respondent was not looking at the same concern as the claimant was expressing, and so they were under a misapprehension as to what the issue was.

165. The view of the dissenting member was that the respondent could and should have adjusted the claimant's hours and, to facilitate that, could and should have spoken with his colleagues. Because the respondent did not ask the claimant's colleagues, they simply did not know if a reduction in the claimant's hours was operationally achievable. To do so was a necessary component of making the reasonable adjustment contended for by the claimant.

166. The dissenting member considered that the respondent (effectively Ms Ramsden in her Craftsperson Role and Risk Analysis document) had created a situation where it was made difficult for Dr Colvin to reach a view other than that the claimant was not medically fit for his contracted duties. Dr Colvin's opinion was predicated on the management view. In essence –

    a. management said they could not reduce the claimant's hours (so as to exclude overtime and standby) for operational reasons;

    b. based on that, Dr Colvin said that the claimant was not medically fit for his contracted duties; and

    c. based on Dr Colvin's OH opinion, the respondent said that they could not continue to employ the claimant as an Overhead Linesman.

167. The dissenting member was uncomfortable with the view expressed by Dr Colvin that the claimant's stress in July 2019 was a long term effect of his brain injury. That had become accepted fact. However, the view expressed by the claimant's GP was that his stress was work related. The dissenting member questioned whether an OH doctor was in a position to dismiss a GP's opinion and took the view that the respondent had discounted what the claimant and his GP were saying because it did not suit their narrative.

168. The view of the majority on this point differed. The majority did not understand Dr Colvin to have dismissed the opinion of the claimant's GP. The majority took the view that Dr Colvin accepted the GP's diagnosis of work related stress and attributed this to the long term effects of the claimant's brain injury and his perception of increased work demands (see paragraph 44 above).

Other PCPs?

169. While Mr Booth understandably focussed on the PCP of the requirement to work overtime, we considered that it was appropriate to look at the other matters raised by the claimant and/or Mr Findlay, to determine whether they represented a step it was reasonable for the respondent to have to take to avoid a substantial disadvantage to which a disabled person was put by a PCP of the respondent's (other than the requirement to work overtime). These were referenced in Ms Ramsden's Craftsperson Role and Risk Analysis document in these terms –

- Reduce time spent on the tower.
- Work at own pace.
- Clearly defined daily tasks.
- Longer breaks if required.
- Flexibility on working hours.
- No lone working.
- Phased return to normal duties.
- Working in a relaxed environment.
- Management to be aware of and address any concerns/non typical behaviours ie when Gary is fatigued.
- Colleagues briefed.
- Health and Safety.

170. The respondent had demonstrated a willingness to make adjustments in some of these areas. The claimant had made a phased return to work in March/April 2018. Mr Christie had informally managed his work. However, Ms Ramsden's analysis highlighted areas (such as working at his own pace

and taking longer breaks) where it would be difficult to accommodate adjustments given that the claimant worked as part of a team. Ms Ramsden also carried out the analysis of planned vs unplanned work referred to at paragraph 65 above.

5 171. Our view was that it would be possible to identify a PCP of the respondent's in relation to some of the matters raised by the claimant and/or Mr Findlay. For example, in the case of *"work at own pace"* the PCP would be a requirement to work at the same pace as the rest of the team. Some of the steps were not difficult to take, for example designing a phased return to work
10 and briefing the claimant's colleagues.

172. The view of the majority of the Tribunal was that Ms Ramsden was well placed to determine whether the steps contended for could be accommodated by the respondent. She had considered each of them and her overall conclusion was that, other than a short phased return to work, the adjustments sought
15 could not be considered permanently. The majority did not believe that these could be said to be reasonable adjustments if they were not operationally feasible.

173. The dissenting member did not agree that Ms Ramsden's opinion should be determinative of whether the steps contended for would be reasonable
20 adjustments for the respondent to make. His reasoning was as set out in paragraph 165 above. He considered that the adjustments, or at least some of them, should have been attempted before being adjudged as not operationally feasible.

Matters to be considered

25 174. In coming to our decision on the reasonable adjustments claim, we looked at the matters listed in paragraph 132 above. Firstly – *Will the adjustment work? Will it operate to alleviate the disadvantage complained of or not?* In the view of the majority of the Tribunal, the issue of whether an adjustment would work required to be determined not by looking at the disadvantaged disabled

employee in isolation, but by having regard to the wider context of the employment.

175. Approaching the matter in that way meant, in the view of the majority, that we should take into account the operational feasibility of the adjustment(s). The majority accepted the evidence of Ms Ramsden which was effectively that reducing the claimant's hours – and making the other adjustments sought – was not operationally feasible. Accordingly, the adjustments would not work. If the adjustment(s) would not work, it was not necessary to consider whether the disadvantage complained of would be alleviated.

176. The view of the dissenting member was that it could not be said that the adjustments sought would not work without putting them to the test. Only by doing so would the respondent be able to determine what level of performance the claimant was capable of. It might be that, at the end of the day, Ms Ramsden would be proved correct. It would however, in the view of the dissenting member, have been a reasonable adjustment to allow the claimant to make a phased return to work as an Overhead Linesman with at least some of the adjustments in place. Then, and only then, could it be decided whether the adjustments would work, and whether they would alleviate the disadvantage.

177. Secondly, we considered *the cost of the adjustment to the employer together with the financial and other resources available to the employer* as being *relevant to whether or not the adjustment is reasonable.* We noted that the respondent is part of Scottish Power which, according to information publicly available, is in turn a subsidiary of Iberdrola, a Spanish multinational energy company with global revenues (in 2020) of 33.44 billion euros. If it were simply a matter of whether the respondent could afford to make the adjustments sought, then clearly it could. However, we considered that the respondent was entitled to seek to operate its business as efficiently as possible while complying with all legal obligations incumbent on it. We formed the view that these considerations balanced each other so that the *"cost"* issue was neutral.

178. Thirdly, we looked at *the wider implications for the whole workforce, ie the impact on them of the adjustments.* The majority of the Tribunal accepted the concerns expressed by Ms Ramsden, that *"this places additional responsibility and pressure on other team members".* The dissenting member took the view that the respondent could not escape from the obligation to make reasonable adjustments on the basis of impact on their workforce when they had not taken the time to speak to the claimant's colleagues.

179. Accordingly, the view of the majority of the Tribunal was that the respondent had not failed to comply with a duty to make reasonable adjustments. The dissenting member reached the opposite conclusion.

180. For the sake of completeness, we deal with three further points. These are (a) whether the offer of the Substation Inspector position was the making of a reasonable adjustment by the respondent, (b) whether the respondent denied the claimant access to a meaningful grievance procedure, amounting to a failure by the respondent to make a reasonable adjustment and (c) the meeting on 14 May 2019.

181. Our view in relation to the Substation Inspector position was that Ms Miller's submission that this was the respondent continuing to make adjustments (see paragraph 136 above) was the answer to a question which had not been asked. We did not understand the claimant to be asserting that the respondent had applied a PCP of requiring him to continue to work as an Overhead Linesman, so as to make the offer of the Substation Inspector position a reasonable adjustment to address the disadvantage of the claimant being medically unfit to comply with that PCP.

182. In relation to whether there had been a meaningful grievance procedure, although described by Mr Booth in his submissions as discriminatory conduct, we did not understand this to be argued as a failure to make a reasonable adjustment.

183. In relation to the meeting on 14 May 2019, our findings in fact are set out at paragraphs 28-33 above. We were unable to resolve the conflict in the evidence. That meant we were unable to make a finding that specific actions had been agreed, that these amounted to reasonable adjustments (assuming there to be a relevant PCP) and that the respondent had failed to make those adjustments.

Unfair dismissal

184. We noted the arguments advanced by Mr Booth on the claimant's behalf, namely that (a) there had been an express breach of contract by the respondent in not allowing the claimant to work his contracted hours and (b) there had been a breach of the implied term of mutual trust brought about by the respondent's discriminatory conduct in failing to make a reasonable adjustment and in denying the claimant access to a meaningful grievance procedure.

185. The alleged express breach by the respondent begged the question of what were the claimant's *"contracted hours".* Our view (in this instance unanimous) was that the claimant's *"contracted hours"* were not the same as his *"core hours".* This was because he could be *"required"* to work overtime and standby. Accordingly, in any given week, the claimant's contracted hours were his core hours plus such overtime and standby hours that he might be required to work. In not allowing the claimant to return to work when he was assessed to be not medically fit to work overtime and standby hours, the respondent did not act in breach of an express term of his contract of employment.

186. We then considered Mr Booth's allegation of breach by the respondent of the implied term of mutual trust. Ms Miller accurately summarised the applicable case law in her submissions (see paragraphs 138-139 above). Our unanimous view was that discriminatory conduct by the respondent would breach the implied term of mutual trust and confidence in the claimant's contract of employment.

187. It followed from our findings as set out above in relation to the claim of failure to make reasonable adjustments that the majority of the Tribunal did not believe that there had been discriminatory conduct by the respondent. Therefore, in the view of the majority, there was no breach of the implied term of mutual trust. Absent such a breach, and having regard to the language of section 95(1)(c) ERA, the claimant was not entitled to terminate the contract without notice by reason of his employer's conduct.

188. The dissenting member did not agree. His view was that there had been a failure to make reasonable adjustments and that this was a breach of the implied term of mutual trust and confidence. He considered that (a) this was a material breach of contract by the respondent, (b) the claimant had resigned in response to that breach and (c) the claimant had not waited too long before doing so since much of the alleged delay was the time taken to go through the grievance process.

189. The dissenting member was also critical of the respondent's grievance process. Part of the grievance had related to *"safety and working practice concerns".* In his view, the respondent had wholly failed to engage with this (see paragraph 163 above). The dissenting member was also troubled by Mr Maclean's statement as recorded at paragraph 101 above – "*I am not happy that you are saying you are working and have a disability."*

190. The majority of the Tribunal recognised that these were valid criticisms. However, in the view of the majority, they were not sufficient to taint the grievance process to such an extent as to amount to a breach of the implied term of mutual trust and confidence. The view of the majority was that the grievance process had, despite Mr Marshall's failure to address the *"safety and working practices concern"* point and Mr Maclean's unfortunate comment, been reasonably thorough.

191. Accordingly, the view of the majority of the Tribunal was that there had been no breach of contract by the respondent in response to which the claimant had been entitled to resign. The constructive unfair dismissal claim required to be dismissed.

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Employment Judge: Sandy Meiklejohn
Date of Judgment: 04 March 2022
10 Entered in register: 08 March 2022
and copied to parties