EMPLOYMENT TRIBUNALS

Claimant: Mr G Fisher

Respondent: Vinci Construction UK Limited

Heard at: Leeds Employment Tribunal (by CVP)

On: 29, 30, 31 March 2022

Before: Employment Judge Dunlop
Ms H Brown
Mr A Senior

Representation

Claimant: Mr P Sangha (counsel)
Respondent: Mr J Wynne (counsel)

JUDGMENT having been sent to the parties on 4 April 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This case concerned claims of disability discrimination and unfair dismissal brought by Mr Fisher, a Senior Maintenance Technician, against the respondent, his former employer.

The Hearing

2. This case was listed to take place over four days. We were ultimately able to give judgment and determine remedy within three days. The panel is grateful to all the participants for their cooperation and careful preparation, which enabled the hearing to run smoothly and efficiently. The hearing took place by video (CVP). There were some connection problems which caused delay, particularly at the start of day 2, but overall the hearing was conducted successfully by video.

3. At the outset of the hearing we confirmed the issues with the parties before adjourning to read the documents and witness statements. We were

provided with a relatively short bundle of documents (170 pages) and we read this in its entirety.

4. After this adjournment we heard evidence from Mr Fisher. On day 2 we heard evidence from Mr Vallins, a former colleague who gave evidence in support of Mr Fisher. On behalf of the respondent we then heard evidence from Mr Hammond, Mr Hoyland and Mr Barnett.

5. Both Mr Sangha and Mr Wynne prepared helpful written closing submissions. These were complemented by oral submissions delivered on the morning of day 3, following which the Tribunal adjourned to consider its decision.

The Issues

6. The issues in the case had been identified in a case management hearing conducted by Employment Judge Buckley on 1 July 2021. They are reproduced as an Annex to this Judgment.

7. At the outset of the hearing the Employment Judge noted that the List of Issues did not specify what "legitimate aim" was relied on by the respondent in defending the claim of discrimination arising from disability. Mr Wynne clarified the aim as being either that "employees attend at work to fulfill their roles and carry out their duties" and/or that "employees attend at work on a regular and consistent basis to enable effective control and management of the business." It was also clarified that, for the purposes of the reasonable adjusmtents claim, the claimant was seeking for his role to be altered to a part-time role in the region of 16-20 hours per week. Finally, it was agreed that there was no issue around the respondent's knowledge of the claimant's disability at any relevant time.

Findings of Fact

8. The claimant was employed by Taylor Woodrow in 2002. He worked on the "Sheffield Schools Project", which was a PFI initiative involving the construction of a number of schools in Sheffield, which were then leased to the commissioning local authority. The contract was designed to last for 25 years, following which the schools would pass fully into public ownership.

9. Under the contract, maintenance services are provided by the private company. Penalties are payable if specifications in service-level agreements are not met. These provide response times for certain types of problems.

10. In around 2010, Mr Fisher's employment transferred to the current respondent, who had taken over the relevant maintenance contracts.

11. There were four schools within the project, across three separate sites. The respondent employed a number of caretakers across the schools. The caretakers were not qualified tradesmen but would do general maintenance tasks. Mr Fisher was employed as a Senior Maintenance Technician ("SMT"). He was a qualified commercial gas engineer and electrician. He was also qualified in safety hot water systems. These qualifications meant

that he could do certain jobs himself, and sign them off, which an unqualified worker would not be able to do. The role of SMT is one which the respondent uses across its operations. The exact professional qualifications of those in the role might vary. SMTs would call in external contractors to do work they were not personally able to do and/or qualified to sign off.

12. From around 2009 Mr Fisher was given responsibility for an apprentice maintenance technician, Scott Vallins. After 4-5 years Mr Vallins was qualified and able to work independently, although he and Mr Fisher still worked as a close team. Mr Fisher had no managerial responsibility for the caretakers, or for Mr Vallins after he completed his apprenticeship. Mr Vallins and the caretakers were all managed by Martin Cutler, and Mr Cutler was in turn managed by Anita Armstrong, who was the project manager for the Sheffield Schools project.

13. The maintenance work done by the team was both reactive and proactive. Emergency repairs would take priority over planned maintenance work, and so there was a requirement to be flexible. There was some dispute between the parties about the nature of Mr Fisher's role and, in particular, the balance between the practical and administrative elements of the work he undertook. Our detailed findings about this are set out separately below.

14. Unfortunately, in January 2020, Mr Fisher suffered a serious stroke which had a long-lasting impact on his health. He was off work for several months. The respondent covered his work by appointing an interim SMT and by increasing its reliance on external contractors. Mr Fisher's absence was managed by Martine Lush of HR and by Anita Armstrong.

15. In summer 2020, around the time Mr Fisher's sick pay entitlement was running out, a referral was made to Occupational Health to gain a report on Mr Fisher's condition and his ability to return to work. The conclusion, which has never been disputed, was that Mr Fisher was unlikely ever to be able to return to the physical aspects of the role. It was, however, suggested that he may be able to return to a sedentary role, such as an administration/advisor based role. The advice was that if such a role was available Mr Fisher might be fit to return to work in October 2020. The Occupational Health practitioner recommended an "open dialogue" regarding this.

16. Mr Fisher was keen to establish if such a role was a possibility. He pushed the point with Ms Armstrong and Ms Lush and it was discussed in welfare meetings. Although no notes of these meetings were kept, we accept Mr Fisher's evidence that he emphasised how keen he was to return. A second occupational health report was then commissioned in October – the point at which it had been suggested that Mr Fisher might be able to return to an administrative role.

17. The second report noted that Mr Fisher continued to have lasting effects from his stroke, particularly weakness in his left side. He could walk around 10m but beyond that he used a motorised wheelchair. He did not have full use of his left hand which affected, for example, his ability to use a computer keyboard. Following assessment, he had regained his driving license but was awaiting a motability vehicle.

18. The clinician recorded Mr Fisher's comments that "as a senior technician, a lot of his time has been spent on administrative work, for example sourcing and buying materials." In this context, the primary conclusion of the report was as follows:

> *Mr Fisher is not fit to resume the full range of duties of a mobile repair technician, and there is little prospect of him becoming so in the immediately foreseeable future. However, a return to the administrative component of his previous work would be both possible and appropriate. It is recognised that implementation of such a recommendation, or otherwise, will reflect a managerial decision.*

19. The report went on to recommend a phased return, working up to Mr Fisher's 'target' of 16 hours per week with on-going occupational health review. It also recommended a further driving assessment if he was required to drive for work.

20. Around the time when this report was produced HR responsibility for the case switched from Ms Lush to Lee Hoyland.

21. Mr Hoyland discussed the report with Mr Fisher by phone, and Mr Fisher explained that he considered he spent a large portion of his time doing administrative work and that he wanted to return to work doing only that element of the role. Mr Hoyland took this back to Ms Armstrong by email dated 20 October 2020. In this email, Mr Hoyland offered to progress down a route of exploring a return to work, or alternatively down a capability route i.e. one which would lead towards a possible dismissal. Ms Armstrong replied the same day in these terms:

    I am very disappointed that this is still ongoing. I can confirm I have personally met with Graham twice and Martine had a number of calls and emails with him. Myself and Martine have both told Graham on a number of occasions that there is no administration of his role available, it is a hands on MRT role. I know graham believes he spent more than 16 hours a week sourcing parts online but this is most definitely not the case.

22. From there, Mr Hoyland set in motion the respondent's capability procedure. A first capability meeting with Mr Fisher and Ms Armstrong took place on 2 November. In the meeting, Mr Fisher outlined his proposal that he could undertake an administration role which would allow the company to recruit a more junior maintenance technician whom Mr Fisher could then mentor. Ms Armstrong's response was that the new employee would still have to be qualified and that the company could not afford an additional member of staff on the contract.

23. Emails in the bundle show that the proposal was discussed 'behind the scenes' between Mr Hoyland and Ian Bancroft, the Senior Account lead for the project. Mr Bancroft also considered it unfeasible for various reasons, including accountability (the need for the engineer who carried out work to be personally responsible for completing all parts of it and signing it off) and cost. Mr Bancrofts concerns were not discussed with Mr Fisher and some

seem to be unfounded – for example the concern that another employee would have to drive Mr Fisher to and from work.

24. Mr Fisher was invited to a further capability meeting on 3 December. He was told that the meeting might result in his dismissal. It was originally meant to be with Mr Bancroft, but around this time Ms Armstrong left her role and was replaced by Anthony Hammond, who was then asked to conduct the meeting.

25. In advance of the meeting Mr Fisher submitted a detailed email dated 24 November 2020. In the email he set out in detail the aspects of his role that he considered he could continue with, including 'administrative' and 'advisory' elements. He proposed a "reset" of the way the contract was serviced whereby he would be employed in an advisory role to watch over two semi-skilled electricians and an apprentice would be taken on to train in both gas and electric work. Mr Fisher suggested that by the time he retired these employees would be "fully fledged" to take over responsibility for the contract.

26. The date for the meeting was changed to 18 December. In advance of the meeting, on the 14, Mr Fisher put forward another proposal. In this, he attempted to address the cost concerns of the respondent. He proposed to be paid only £140 hours per week, which would allow him to continue to receive benefits. For this, he would work up to 16 hours per week, allowing the respondent to make a significant saving on his previous salary. Mr Hoyland forwarded this email to Mr Bancroft and Mr Hammond, who both replied to the effect that there was no need for an extra person on the contract. Again, this email discussion excluded Mr Fisher.

27. The consultation meeting was brief. Although Mr Hammond has told the Tribunal that he found it "*impossible to believe*" that Mr Fisher did the amount of admin work that had been suggested, he did not engage with Mr Fisher on this issue, or try to understand or clarify how Mr Fisher had got to that total. He explained, in very brief terms, that the respondent did not consider the proposal of an administrative role on the Sheffield Schools project to be feasible. There was no discussion around the parts of the role that were not paperwork-based but did not involve hands-on work e.g. driving to suppliers or accompanying contractors, to determine how much of this work was actually required and the extent to which Mr Fisher would be able and willing to do it.

28. Nor did anyone in either meeting invite Mr Fisher to address concerns that the respondent had about the proposed new set up. For example – how would an apprentice learn from a mentor who was not actually performing the physical role, and who was working part-time? How would he know what parts he was trying to order if he had not identified them for himself? How would his part-time working hours be arranged when it was impossible to predict when administration work would arise? How could work be signed-off as required by safety regulations and processes if it had been physically completed by one person but the paperwork completed by someone else?

29. It is unsurprising, given the superficial level of discussion in the meeting, that Mr Fisher was left with the impression that Mr Hammond had a closed mind and was not prepared to listen to him.

30. Mr Hammond duly decided to dismiss Mr Fisher on capability grounds. It is notable that the letter of dismissal did not engage with the question of alternative work and the proposals that Mr Fisher had put forward.

31. Mr Hammond appealed and that appeal was heard by Mr Barnett. Again, Mr Barnett did not engage with the dispute as to what "admin work" meant and how much of it Mr Fisher had been doing prior to his sickness absence. His outcome letter did engage a little more fully with the alternative work proposal and did include some explanation of the practical difficulties with the proposal, including around signing off work and duplication of responsibility.

Findings in relation to work done prior to January 2020

32. Mr Fisher was, unquestionably, an extremely dedicated employee. This dedication reflected two things. First, we find he had a real sense of duty to the schools and the children being taught there. He strove to ensure that problems which might disrupt the life of the school did not arise, and that any problems which did arise were solved quickly, and at minimal expense. Secondly, we find that Mr Fisher was highly engaged and interested in his work. He was not a clock-watcher (to use his own words), and he was happy to spend his own time trying to hunt down solutions to problems.

33. An example of this is recorded in a record of a 1:1 meeting between Mr Fisher and Mr Cutler, dated 4 November 2019. Mr Cutler notes that:

    Graham has made many innovations across the project and enjoys finding ways to save money across in particular lighting panels. Rather than replacing which costs hundreds Graham can replace components which costs pennies.

34. Mr Fisher had a 40-hour working week. We find that he voluntarily spent extra time working from home in the evening, going online to try to source parts, sometimes spending many hours doing so. We note that in the same 1:1 meeting Mr Fisher is recorded as saying that he has a good work/life balance, and we do not find this contradictory. Essentially, this sort of problem-solving was a satisfying hobby for Mr Fisher. Both his employer and the schools benefitted from this being the case.

35. Mr Fisher's role would involve some administrative work. The sort of administrative work is most clearly set out in an email dated 24/11/20 – sourcing and purchasing parts for active work orders, emails to and from management and other staff and completing of forms. The forms work included both legally-required sign-offs on jobs which required regulated gas or electrical work as well as internal 'clearing down' of reactive and pre-planned maintenance jobs.

36. We find that the amount of administration work in any given week varied. This depended on whether it was term-time or school closure time, and also

on the balance between reactive and pre-planned work being undertaken. Mr Fisher asserts that it averaged 16 hours out of a 40-hour working week, extra hours spent at home would be over and above this. His evidence is supported by Mr Vallins. There is evidence from the respondent that it would be less – Mr Hammond gave this evidence directly and his predecessor, Ms Armstrong, was of the same view as evidenced by her email of 20 October 2020. We are conscious that all the witnesses are attempting to look back from a distance of at least six months, without the benefit of records. We do not disregard the respondent's views entirely, but note that Mr Fisher and Mr Vallins are able to give more direct evidence. Whilst there are no grounds for finding that they are seeking to do so untruthfully, we consider that there may be a degree of putting the case at its highest. Taking all the evidence together, our finding is that Mr Fisher did a variable amount of administration work, which would sometimes reach 16 hours within his 40-hour working week. The average was probably a little below this, but it was a significant part of his working time and not a "small" element as described by Mr Hammond.

37. We are satisfied that the physical and administration parts of the role were, to some degree, inextricably linked. We accept, for example, that where a regulatory sign-off was required, this would need to be done by the technician who had completed the work. In relation to ordering and sourcing parts, which seems to be the lion's share of the administrative work identified by Mr Fisher, the position is less straight forward. An initial identification of what was causing the fault – including removing a faulty part if needed - would obviously lie with the person doing the work. In most cases, it would seem natural for the same person to identify the part (for example by code number) using the diagrams or manuals that would be on-hand for the repair. One can imagine circumstances where it would be possible to hand over the sourcing process from that point to someone else. That is why the respondent has a separate requisitions team, although on Mr Fisher's evidence they were not always successful. The bottom line is that the person doing the maintenance would also have to have some level of involvement.

38. Similarly, in relation to the administrative task of closing down jobs where formal sign off was not required, we accept that this was a task that could be handed over, as C, Mr Vallins and the caretakers occasionally covered for each other. However, it still requires the involvement of the person doing the task to indicate what has been done and pass on the required information.

39. One task which is separate from the physical maintenance work, and which had previously been part of the claimant's role, is accompanying contractors – something particularly important in a school. In addition, we find that the claimant offered informal advice and mentoring to the other staff. Following Mr Vallins' qualification, that was not formally part of his role, but was intrinsic to the way in which he operated and undertook the role.

Relevant Legal Principles

40. As the respondent conceded that Mr Fisher was disabled at all material times we did not need to consider the definition of disability within s.6 EA.

41. The representatives and the Tribunal agreed that it made sense to consider the reasonable adjustments claim, then the discrimination arising from disability claim and finally the unfair dismissal claim. Although this is not the order adopted in the List of Issues, it is evident that our conclusions in respect of reasonable adjustments will be highly relevant in considering the other two claims. We have therefore set out our summary of the legal principles in that order, and will follow the same order in setting out our final conclusions at the end of the Judgment.

Reasonable adjustments

42. The duty to make reasonable adjustments is set out in ss.20-21 EA. It arises (for the purposes of this case) when an employer applies a provision, criterion of practice ("PCP") which puts the claimant at substantial disadvantage compared to non-disabled people. The duty requires the employer to take such steps at it is reasonable to take to avoid such disadvantage.

43. Guidance is given in chapter 6 of the EHRC Code of Practice on Employment (2011) ("the Code"). The gives examples of adjustments which *may* be required, depending on the circumstances of the case. These include allocating some of the disabled person's duties to another worker and transferring the disabled worker to an existing vacancy.

44. Paragraph 6.28 of the Code sets out factors which may be relevant in considering whether a putative adjustment is reasonable. We are grateful to Mr Wynne for setting out those factors in his skeleton argument. For brevity, we do not repeat them here, but we have considered them carefully.

45. The question of whether an adjustment will be reasonable is an objective question and will depend on the circumstances of each case. There is no principle that it would never be reasonable to require an employer to create a new role for a disabled employee although, obviously, it might well be easier to show that a minor adjustment (or whatever sort) would be reasonable than a major adjustment.

Discrimination arising from disability

46. This type of discrimination is defined in s.15 EA. It occurs when an employer treats an employee unfavourably because of something arising in consequence of the employee's disability. Unlike some other forms of discrimination, the employer can successfully defend the claim if the treatment is justified i.e. if it is a proportionate means of achieving a legitimate aim.

47. The burden of proof in establishing both elements of the justification test lies with the respondent: **Homer v West Yorkshire Police [2012] UKSC 15**. In many cases the aim may be agreed to be legitimate but the argument will be about proportionality. This will involve an objective balancing exercise between the reasonable needs of the respondent and the discriminatory effect on the claimant as tests established in the context of indirect discrimination in **Hampson v Department of Education and Science**

[1989] ICR 179 CA. We have also considered guidance on this point from the Court of Appeal in the judgment of Pill LJ in **Hardy & Hansons Plc v Lax [2005] EWCA Civ 846**, which was emphasised by Mr Sangha.

48. We had regard to paragraph 5.12 of the Code:

"It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations."

49. In conducting this balancing exercise any failure to comply with the duty to make reasonable adjustments will be relevant. Paragraph 5.21 of the Code states:

"*If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it will be very difficult for them to show that the treatment was objectively justified*."

50. Cost alone will not provide a justification for discriminatory treatment, but it is a legitimate factor to consider alongside other factors (**Woodcock v Cumbria Primary Care trust [2012] ICR 1126 CA**).

51. For the purposes of objective justification there is no rule that justification has to be limited to what was consciously and contemporaneously taken into account in the decision-making process (see **Cadman v Health and Safety Executive [2004] EWCA Civ 1317**).

52. The relationship between the test of objective justification and the band of reasonable responses test (applied in unfair dismissal claims) has proved to be a problematic issue. It is not necessarily any error of law for a tribunal to find that a claimant succeeds in a section 15 claim but fails in the unfair dismissal that runs alongside it (see **City of York Council v Grossett [2018] IRLR 746 CA**).

53. However, the Court of Appeal in **O'Brien v Bolton St Catherine's Academy [2017] IRLR 547** had this to say about such cases where they arise from long-term sickness absence:

"53. *However the basic point being made by the tribunal was that its finding that the dismissal of the appellant was disproportionate for the purpose of s.15 meant also that it was not reasonable for the purpose of s.98(4). In the circumstances of this case I regard that as entirely legitimate. I accept that the language in which the two tests is expressed is different and that in the public law context a 'reasonableness review' may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately I see no reason why that should be so. On the one hand, it is well established that in an*

*appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat – what is sometimes insufficiently appreciated – that the need to recognise that there may sometimes be circumstances where both dismissal and 'non-dismissal' are reasonable responses does not reduce the task of the tribunal under s.98(4) to one of 'quasi-*Wednesbury*' review: see the cases referred to in paragraph 11 above[2]. Thus in this context I very much doubt whether the two tests should lead to different results.[3]*

54. We take from this both a caution - that we must afford the proper "substantial degree of respect" to the respondent's judgment in taking the steps that it considered to be proportionate in furtherance of its aim - and also an indication that it is likely in long-term absence situations that the same result should be reached whether the dismissal is viewed through the lens of justification or the lens of reasonableness.

Unfair dismissal

55. Subject to what we have said above about the inter-relation of the two tests, in a claim of unfair dismissal involving an ill-health capability dismissal we must determine, in accordance with equity and the substantial merits of the case, whether the employer acted reasonably in treating the absence as a sufficient reason for the dismissal of the employee. The essential framework for such an enquiry was described as follows by Eady J in **Monmouthshire County Council v Harris EAT 0332/2014** as follows:

'Given that this was an absence-related capability case, the employment tribunal's reasoning needed to demonstrate that it had considered whether the respondent could have been expected to wait longer, as well as the question of the adequacy of <u>any consultation</u> with the claimant and the obtaining of proper medical advice'. (our emphasis)

56. In **East Linsey District Council v Daubney [1977] ICR 566** the EAT stated the following principle,

"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill-health it is necessary that he <u>should be consulted</u> and the matter discussed with him, and that in one way or another steps be taken by the employer to discover the true medical position." (our emphasis)

57. Consultation, within the context of employment law, is commonly considered in light of the definition given in **R v British Coal Corporation, ex parte Price (No.3) 1994 IRLR 72, Div Ct**:

"fair consultation' means '(a) consultation when the proposals are still at a formative stage; (b) adequate information upon which to respond; (c) adequate time in which to respond; and (d) conscientious consideration… of the response to consultation".

Submissions

58. As noted above, both counsel produced comprehensive and helpful written submissions.

Discussion and conclusions

Reasonable adjustments

59. The PCP was expressed as being "*a requirement for the claimant to return to the full duties of his role*". This was accepted by the respondent as being a valid PCP in law, and, factually, as being a requirement that was applied to the claimant. The respondent also accepted – and indeed it is obvious in this case – that the PCP placed Mr Fisher at a disadvantage as the physical difficulties resulting from his stroke meant that he could not perform the physical aspects of the role and was therefore liable to be the subject of a capability process and, ultimately, dismissed.

60. In accordance with ss.20-21 EA, the duty to make reasonable adjustments therefore arose in this case.

61. The respondent says that there were no adjustments which could reasonably be made which would remove the disadvantage. The claimant says that his role could be adjusted to remove the physical elements of the work or, failing that, a new administrative-only role could be created. This is the crux of the dispute between the parties.

62. It is worth noting at this point that there was undisputed evidence that the respondent had looked for administrative vacancies elsewhere in its organisation and had informed Mr Fisher of two vacancies in the south of England. Mr Fisher, understandably, was not interested in pursuing those roles. The focus for both parties was on whether his own role could be adjusted, or a new role created, within the Sheffield Schools project.

63. Both parties devoted significant time and energy to debating whether Mr Fisher's proposals amounted to adjusting his existing role or creating a new one. We considered that this was something of a distraction. As a matter of logic, it might well be the case that adjusting an existing role is more likely to be reasonable than creating a new one, but there is no general principle that creating a new role will never be a reasonable adjustment. Our task is to consider whether it was reasonable for the respondent to provide Mr Fisher with non-physical work. That task depends on a close examination of the specific circumstances of the case, rather than making a semantic delineation between whether Mr Fisher was seeking an adjusted version of his existing role, or a new role. So far as it is necessary for us to decide, however (and in deference to the time spent by the parties on this point) we are satisfied that Mr Fisher's proposals *would* amount to requiring the respondent to create a new role. The administrative element of this role was wholly ancillary to the physical maintenance element. The physical maintenance was the purpose of the role – that was the service the respondent was being paid to provide and was employing the claimant to fulfil. A maintenance technician who does not do hands-on maintenance

(who does not work "on the tools" to use the phraseology of the witnesses) is not, in our judgment, working as a maintenance technician.

64. We must apply an objective test to determine whether the adjustment proposed – of creating a purely administrative role for the claimant – was reasonable, having reference to factors set out in the statutory guidance and the case law. It is not simply a matter of reviewing the respondent's decision.

65. In this case we are satisfied that the adjustment was not reasonable, in our view these are the key factors;

    65.1 The starting point is that we accept that moving Mr Fisher into an administrative role would require someone else to be recruited to the Sheffield schools contract to undertake the physical work he had previously done (and which was being covered in his absence as an interim role). That means that Mr Fisher's role, whether it is considered to be 'new' or 'adjusted,' would be supernumerary to the requirements of the contract. That is not determinative, but it is important.

    65.2 Following on from that, the creation of such a role would have had a significant impact on other roles, and the structure of the maintenance as a whole. It is difficult to see how the respondent could have recruited a Senior Maintenance Technician who would be deprived of administrative work in order to reserve it for Mr Fisher. A new SMT would be required to sign off paperwork for their own jobs, and may well wish to order their own parts corresponding to their own preferred ways of working. It is notable that Mr Fisher's more detailed proposal of how a role with a more advisory emphasis could work had effectively involved a restructure of the whole function, creating a separate tier of middle-management (Mr Fisher) supervising more junior technicians.

    65.3 Related to this, we accept that any version of the proposal gave rise unavoidable risks of duplication, confusion and error. This is because the person undertaking the work would not be taking full responsibility for the work by completing the associated administration tasks. To the extent that the person undertaking the work would be an apprentice, or unqualified, we accept that it would not be feasible for that person to receive instruction from someone who was not doing the physical work themselves and could not physically show the apprentice how to do the tasks.

66. We therefore find that the respondent did not fail to make reasonable adjustments.

Discrimination arising from disability (s.15)

67. The s.15 claim requires us to consider whether the claimant was treated less favourably as a result of something arising from his disability. Again, it is agreed that he was. His inability to continue with the physical aspects of his role meant that he was dismissed. That dismissal will be unlawful unless

the respondent can justify the treatment by showing it was a proportionate means of achieving a legitimate aim.

68. As noted above, the respondent was asked to identify at the start of the hearing what the "legitimate aim" was that it was relying on. The answer given was that "*employees attend at work to fulfill their roles and carry out their duties*" and/or that "*employees attend at work on a regular and consistent basis to enable effective control and management of the business*."

69. The claimant did not dispute that the aims, as articulated, were appropriate legitimate aims for the purposes of the legislation. Instead, the claimant argued that dismissal was not a proportionate response. However, that argument was premised on the basis that a more proportionate response would have been to allow Mr Fisher to continue in the adjusted role.

70. We have found that the respondent was not obliged to offer an adjusted role of the sort envisaged by Mr Fisher. On the particular facts of this case, our conclusion on the s.15 claim flows naturally from our conclusion on the reasonable adjustments claim. As the respondent was not obliged to adjust the role in the way Mr Fisher was arguing for, it follows that he could not continue in the existing role and therefore the dismissal was justified. This claim also fails.

Unfair dismissal

71. Finally, we turn to the unfair dismissal claim. The claimant was dismissed for capability, which is a potentially fair reason for dismissal within s.98(2) ERA. We find that the substantive decision to dismiss on capability grounds was within the band of reasonable responses. That is because Mr Fisher was permanently unable to perform his existing role and, in the circumstances we have already described, there was no alternative role for him to do and the respondent was not obliged to create one.

72. However, we do have serious concerns about the procedural fairness of this dismissal. Superficially, the respondent followed an appropriate process in terms of obtaining occupational health advice, inviting Mr Fisher to meetings, allowing him an opportunity to appeal to an independent manager, and so on.

73. Unfortunately, we consider that process can accurately be described as a "tick-box exercise". The various managers involved considered it was 'obvious' that the claimant's role could not be adjusted and that a new one could not be created simply for the sake of retaining the claimant. They did not seek to engage with the serious difference in views around what Mr Fisher had been spending his time doing whilst he was active in the role, which would have been the starting point for considerations of whether the role could sensibly be adjusted. Building on that, there was no attempt to actually talk to Mr Fisher in a constructive way about what his alternative proposals might look like, to explain the problems with them (from the respondent's perspective) and to consider Mr Fisher's responses.

74. In Mr Hammond's case, that failure went so far as to fail to put anything in the outcome letter acknowledging the detailed proposals that Mr Fisher had made, far less addressing the difficulties with them. It is telling that we are able to glean more about the respondent's managers' thought processes at the time from their internal emails to each other, than from any communication they had with Mr Fisher.

75. We consider that in a case that turns on alternative employment, consultation around the viability of potential alternatives is critical. This is emphasised in the well-known extracts set out in the Legal Principles section of this judgment.

76. In the view of this Tribunal, the value of consultation lies not simply in the possibility of achieving a different outcome, but also in the exchange of information and explanations that enable an employee to understand what decisions the employer has taken, and why. In this case, the employer has articulated its decisions in a quite different way during the hearing than they were articulated during the process – including a major shift in emphasis away from the cost of creating a role towards other reasons why it would be neither practical or appropriate. If those reasons had been explored in open and constructive dialogue – as had been suggested by the occupational health report obtained at the outset of this process – Mr Fisher may have felt more able to accept the outcome.

77. In our unanimous view, the way in which the respondent conducted this process fell outside the band of reasonable responses. The absence of meaningful consultation means that the claim of unfair dismissal is well-founded, albeit on that limited basis only.

78. Our objective conclusion that the respondent was not required to adjust the claimant's role in the way he proposed, combined with the agreed facts about the claimant's inability to perform the existing role in full, lead necessarily to the conclusion that the claimant would have been dismissed in any event. The process that the respondent followed allowed adequate time for proper consultation to take place, it is simply that the managers failed to undertake that consultation. Therefore, following a fair procedure, we are satisfied dismissal would have occurred on or around the same date as it actually took place.

Remedy

79. Following the delivery of the Tribunal's oral judgment on liability, the parties agreed that the claimant was entitled to a basic award but no compensatory award. After some discussion, the amount of the basic was agreed to be £14,526.00. The basis for that calculation is set out in the Judgment which has been sent to the parties.

Employment Judge Dunlop
Date: 27 April 2022

WRITTEN REASONS SENT TO THE PARTIES ON
Date: 6 May 2022

ANNEX – AGREED LIST OF ISSUES

1. Time limits

1.1.1 Were the discrimination claims made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1 It is agreed that the claimant was dismissed for capability, which is potentially fair reason for dismissal.

2.2 Did the respondent act reasonably in all the circumstances in treating capability as a sufficient reason to dismiss the claimant? In particular, whether:

2.2.1 Did the respondent genuinely believe that the claimant was no longer capable of performing his duties?

2.2.2 Did the respondent adequately consult the claimant?

2.2.3 Did the respondent carry out a reasonable investigation, including finding out about the up-to-date medical position?

2.2.4 Was dismissal within the range of reasonable responses?

3. Remedy for unfair dismissal

3.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.1.1 What financial losses has the dismissal caused the claimant?

3.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.1.3 If not, for what period of loss should the claimant be compensated?

3.1.4 If the tribunal finds that the dismissal was procedurally unfair, would the claimant have been dismissed in any event?

3.1.5 Does the statutory cap of fifty-two weeks' pay apply?

3.2 What basic award is payable to the claimant, if any?

4. Disability

4.1 It is conceded that the claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about.

5. Discrimination arising from disability (Equality Act 2010 section 15)

5.1 It is agreed that the respondent treated the claimant unfavourably by dismissing him.

5.2 It is agreed that the claimant's inability to carry out his full duties was a thing that arise in consequence of the claimant's disability.

5.3 It is agreed that the respondent dismiss the claimant because he was unable to carry out his full duties.

5.4 Was the treatment a proportionate means of achieving a legitimate aim?

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the claimant and the respondent be balanced?

5.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability?

6. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

6.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

6.2.1 A requirement to return to the full duties of the claimant's substantive role.

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he was unable to carry out the physical part of his role because of his mobility restrictions?

6.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

6.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

6.5.1 Altering his role so as to consist wholly of administrative duties.

6.6 Was it reasonable for the respondent to have to take those steps and when?

6.7 Did the respondent fail to take those steps?

7. Remedy for discrimination

7.1 What financial losses has the discrimination caused the claimant?

7.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.3 If not, for what period of loss should the claimant be compensated?

7.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

7.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

7.6 Should interest be awarded? How much?