EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Majoch	**v**	Biffa Municipal Ltd

Heard: in Lincoln

On: 20, 22 and 23 June 2022

Before: Employment Judge Ayre sitting with members
Mrs C Hatcliff
Mr C Goldson

Representatives:

Claimant: Ms Dominik-Kryg, lay representative
Respondent: Mr A Ross, counsel

Polish interpreters: Ms I Zeiba on 20 June 2022 and Mr M Kiecz on 22 and 23 June 2022

RESERVED JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The claimant was disabled by reason of atrial fibrillation at the relevant time.

2. The claim for failure to make reasonable adjustments fails and is dismissed.

3. The claim for unfair dismissal fails and is dismissed.

4. The claim for wrongful dismissal / notice pay fails and is dismissed.

5. The claim for unlawful deduction from wages fails and is dismissed.

6. The claim for holiday pay succeeds. The respondent is ordered to pay the sum of £745.10 to the claimant, less such deductions for tax and national insurance contributions as it may be required to make.

7. The Tribunal does not have jurisdiction to hear the claim that the respondent breached regulation 4 of the Working Time Regulations 1998.

8. The claim that the respondent breached regulation 11 of the Working Time Regulations 1998 is out of time and the Tribunal does not have jurisdiction to hear it.

REASONS

Background

1. The claimant was employed by the respondent as a Street Cleaning Operative until 25 September 2020. On 15 December 2020, following a period of Early Conciliation that started on 19 October 2020 and ended on 3 December 2020, the claimant issued a claim in the Employment Tribunal.

2. The case was listed for a Preliminary Hearing on 11th March 2021 to discuss the issues in the claim and make orders to prepare the case for final hearing. The claimant was represented at that, and all subsequent hearings, by Ms Dominik-Kryg. Ms Dominik-Kryg asked for an interpreter to assist, and the hearing was therefore postponed so that an interpreter could be booked.

3. The Preliminary Hearing went ahead on 23rd March 2021 before Employment Judge Heap, with a Polish interpreter present. There was a detailed discussion of the issues and the following claims were identified:

    a. Unfair dismissal;
    b. Disability discrimination;
    c. Notice pay;
    d. Unpaid holiday pay;
    e. Unauthorised deduction from wages;
    f. Breach of Regulation 4 of the Working Time Regulations 1998 ("**the WTR**"); and
    g. Breach of Regulation 11 of the WTR.

4. Employment Judge Heap explained to the claimant that the claims for unlawful deduction from wages and for breach of Regulation 11 of the WTR appeared to be out of time and that the claimant would have to persuade the Tribunal that it was not reasonably practicable to present these claims in time and that they were presented within a reasonable period thereafter.

5. Ms Dominik-Kryg referred to the claimant having been treated differently because he is a foreign national. Employment Judge Heap explained that if the claimant wished to pursue such a complaint, he would need to apply to amend his claim, and provided a copy of the

Presidential Guidance on Case Management which contains a helpful section on amendment applications.

6. A further Preliminary Hearing took place before Employment Judge Welch on 2 March 2022. The claimant was unable at that hearing to identify the claims for disability discrimination, despite attempts to clarify what was being claimed. The claimant was ordered to provide further information about the complaints of disability discrimination. Case Management Orders were also made in relation to the question of disability, and to prepare the case for final hearing. Employment Judge Welch also explained to Ms Dominik-Kryg that if the claimant was seeking to bring a claim which is not contained within the claim form, he would need to make a formal application to amend his claim.

7. On 21 April 2022 another Preliminary Hearing took place. During this hearing Employment Judge Phillips noted that the claimant, despite having indicated that he wished to pursue other complaints of discrimination, had still not made a formal application to amend the claim. The existing claim of disability discrimination was clarified as being that the respondent had failed to make reasonable adjustments by not offering the claimant a reduced workload or reduced hours of work. Employment Judge Phillips also issued an Unless Order that unless the claimant applied to amend his claim by 28 April 2022, his disability discrimination claim would be limited to a complaint that the respondent had failed to make reasonable adjustments.

8. On 25 April 2022 the claimant applied to amend his claim. The case was listed for a fifth Preliminary Hearing, which took place on 23 May 2022 before Employment Judge Blackwell. The claimant's application to amend his claim was refused in its entirety, and Employment Judge Blackwell determined that the only claim of disability discrimination to proceed was a complaint of failure to make reasonable adjustments in relation to reduced working hours and reduced workloads.

The Proceedings

9. At the start of the hearing on 20 June 2022, during a discussion about the issues in the case, Ms Dominik-Kryg indicated that she wanted to 'appeal' the judgment of Employment Judge Blackwell dated 23rd May (and sent to the parties on 30th May 2022) not to allow the claimant to amend his claim. She said that she had written to the Tribunal on 3rd June about this.

10. Mr Ross, who had represented the respondent at the hearing before Employment Judge Blackwell, said that reasons for the decision were given orally on the day, and that time had now expired for requesting written reasons. He objected to the Tribunal reconsidering now the decision not to allow the claimant to amend her claim.

11. The Tribunal adjourned briefly to consider the position. It was our unanimous decision not to extend time to allow the claimant to ask for written reasons of Employment Judge Blackwell's judgment. The judgment had been sent to the parties on 30 May 2022 with the usual notice that written reasons would not be provided unless requested at

the hearing or within 14 days of the sending of the judgment. The claimant's email of 3 June does not amount to a request for written reasons. The claimant's representative clearly has some legal knowledge, despite not being legally qualified. She had, for example, cited from relevant guidance on the definition of disability. There have already been 5 Preliminary Hearings in what is a relatively simple case, and it would not be proportionate or in line with the overriding objective for there to be any further delay in the proceedings.

12. On the first day of the hearing Ms Dominik-Kryg also applied for strike out of the response to the claim. The basis for her application was that she believed the response had been filed more than 28 days after she had presented the claim. The response should, she said, have been filed on 10 January 2021 but was not in fact filed until 18 January 2021 and was therefore out of time.

13. The application for strike out was refused. According to the Tribunal file the respondent was given a deadline for filing a response of 18th January 2021. The response was filed within that timeframe and was not therefore out of time. The response has been accepted by the Tribunal.

14. There was before us a bundle of documents running initially to 604 pages. At the start of the hearing an additional 3 pages were added to the bundle, being notes taken by a Michael Lamb, HR Business Partner with the respondent, during the appeal hearing. This document was, in the Tribunal's view, relevant to the issues that we have to determine.

15. During the course of the hearing a further 9 pages were added to the bundle, namely an exchange of emails between the parties about the inclusion of payslips in the bundle, and copies of those payslips. They were added at the request of the respondent after the claimant's representative raised an issue about different versions of payslips being included in the bundle, and after the claimant said in evidence that payslips he had been taken to were not his.

16. Ms Dominik-Kryg complained at the start of the hearing that she had been provided with different versions of the bundle, and that she was working to an older version. Mr Ross told the Tribunal that a draft bundle had been sent to the claimant's representative in April or May. It had subsequently been updated, largely with additional documents supplied by the claimant, some duplicates had been removed and the bundle had been repaginated.

17. Ms Dominik-Kryg said she was working to a version of the bundle sent to her on 13 June. Mr Ross said that the only documents added since that version were all at the back of the bundle and had been provided to the claimant on 16 June. A hard copy of the final bundle was available to Ms Dominik-Kryg at the hearing, and the page numbers had not changed since 10 June, with the exception of the addition of documents at the end of the bundle.

18. The Tribunal was satisfied, given that the claimant's representative had been working to a version of the bundle that had only had documents added to it at the end, and that a complete version of the bundle was available at the hearing for the claimant's representative, that we should use the version of the bundle before us. The claimant was not cross examining the respondent's witnesses until day two of the hearing, and there was a day's break between day one (20 June) and day two (22 June) during which the claimant's representative would have the opportunity to review the bundle.

19. At the start of the third day of the hearing the claimant sought to introduce additional documents:

    a. A 'marked up' version of the amended Grounds of Resistance filed by the respondent, showing the changes that had been made in tracked changes;
    b. A document headed 'Claimant Identity Claim' which appeared to be a summary of the claims the claimant was bringing, prepared by Ms Dominik-Kryg;
    c. An email sent by the respondent's solicitors to the Tribunal applying for an extension of time to exchange witness statements; and
    d. Correspondence from the Tribunal granting the application.

20. The respondent objected to the introduction of these documents. Both parties made representations and having considered these, it was the unanimous decision of the Tribunal that the additional documents should not be admitted. An unmarked version of the first document was already in the bundle, the second document was more a matter for submissions than evidence, and the remaining documents were not relevant to the issues that the Tribunal had to decide.

21. The claimant also submitted a written skeleton argument.

22. The Tribunal heard evidence from the claimant and, on his behalf from his daughter Agnieska Gorowaska. A brief witness statement was also produced for a Natalia Ziajkiewicz who we were told had attended the meeting on 25 September at which the claimant was dismissed.

23. On the second day of the hearing the claimant's representative told the Tribunal that one of the claimant's witnesses, Ms Natalia Ziajkiewicz, was not willing to attend the hearing on a voluntary basis as she was having difficulty getting time off work to do so. It appeared to the Tribunal that her evidence was potentially relevant, as it related to the meeting at which the claimant was dismissed. A Witness Order was therefore issued ordering Ms Ziajkiewicz to attend on the third day of the hearing.

24. Ms Ziajkiewicz did not attend the Tribunal on the third day of the hearing. The Tribunal considered that it would not be in the interests of justice or in line with the overriding objective to postpone the hearing because of her non-attendance. No reason was provided as to why the witness did not attend. Her witness statement was very brief and related to the dismissal meeting. The claimant had given evidence

about that meeting, and nothing was going to turn on the evidence of Ms Ziajkiewick. We therefore continued with the hearing in her absence.

25. We also heard from the following witnesses on behalf of the respondent:

a. Peter Edison, Supervisor at the Lincoln Depot where the claimant was based;
b. Matthew Spikings, Senior Business Manager at the Lincoln Depot;
c. Jennifer O'Shea, Assistant Payroll Manager; and
d. Danny Goller, Senior Business Manager for mid-Kent.

The Issues

26. We spent some time at the start of the hearing discussing the issues that fell to be determined in the case. The claimant's representative applied again to amend the disability discrimination claim to include further allegations of a failure to make reasonable adjustments, specifically that the respondent should have:

a. Asked the claimant if he needed extra help such as an interpreter at the occupational health assessments;
b. Created a quiet working environment for the claimant;
c. Provided private medical treatment for the claimant;
d. Offered financial support to the claimant;
e. Offered welfare support to the claimant; and
f. Refrained from contacting the claimant unnecessarily.

27. The respondent objected to the claimant's application to amend the claim. Some time had been spent at the Preliminary Hearing on 21 April (at which both Ms Dominik-Kryg and Mr Ross were present) discussing the claim for reasonable adjustments, and in particular identifying the PCPs relied upon. The adjustments now being suggested by the claimant are not related to those PCPs and are new matters.

28. Having considered what both parties said on the issue, it was the unanimous decision of the Tribunal that the claimant's application to amend the claim should be refused. The application was made at a very late stage in the proceedings, after a number of Preliminary Hearings at which the issues had been discussed in some detail. Considering the factors in ***Selkent Bus Co Ltd v Moore [1996] ICR 836***, the nature of the amendment sought was not merely a relabelling of existing claims, but new allegations containing new questions of fact. The application was made at a very late stage in the proceedings, after the exchange of witness statements, and after the question of amendments to the claim had been discussed previously and had already taken up a considerable amount of Tribunal time.

29. The balance of hardship and prejudice favoured not allowing the amendment. The claimant can still argue his claim for reasonable

adjustments as set out in the claim form. The respondent would be prejudiced if new allegations were allowed to be made at this stage after the exchanging of witness statements. The overriding objective and the interests of justice favour refusing the amendment so that the hearing can proceed.

30. The issues that fell to be considered therefore were as follows:

Unfair dismissal

31. What was the reason or principal reason for dismissal? The respondent says it was capability, namely the long term absence of the claimant.

32. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? This involves considering:

    a. Did the respondent genuinely believe the claimant was no longer capable of performing his duties;
    b. Did the respondent act reasonably in relying upon an Occupational Health report conducted over the telephone without an interpreter;
    c. Did the respondent adequately consult the claimant;
    d. Did the respondent carry out a reasonable investigation, including finding out about the up-to-date medical position;
    e. Whether the respondent could reasonably have been expected to wait longer before dismissing the claimant; and
    f. Whether dismissal was within the range of reasonable responses.

Failure to make reasonable adjustments

33. Was the claimant, at the time of the alleged acts of discrimination, disabled by reason of atrial fibrillation? The respondent admits that the claimant had a physical impairment which had a substantial adverse impact on his ability to carry out normal day-to-day activities. The issue for the Tribunal to determine is whether the effects of the impairment were long term, namely:

    a. Did they last at least 12 months, or were they likely to last at least 12 months; and
    b. If not, were they likely to recur?

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

35. Did the respondent have the following PCPs (provision, criterion or practice):

    a. Not offering reduced working hours to employees with medical conditions?
    b. Not offering reduced workloads to employees with medical conditions?

36. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

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

38. What steps could have been taken to avoid the disadvantage?

39. Did the respondent fail to take those steps?

Wrongful dismissal / notice pay

40. What was the claimant's notice period?

41. Was the claimant paid the correct amount for that notice period? The claimant alleges that he was paid basic pay only for his notice period, and that his notice pay should have included overtime payments.

Unauthorised deduction from wages

42. Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted? The claimant says he should have been paid a £10 premium for each day that he worked overtime at the weekend and drove a van.

43. Was this claim brought out of time?

44. Were there a series of deductions?

45. If so, was the series broken by a gap of 3 months or more?

Holiday pay

46. Was the claimant correctly paid in respect of annual leave? There were two elements to the holiday pay claim:

    a. A claim that the claimant had been underpaid for holiday taken during the course of his employment because he had been paid basic pay only, without taking account of overtime he worked regularly; and
    b. A claim that the claimant had not been paid the correct amount of holiday pay on termination of his employment.

47. During the course of his submissions at the end of the hearing, Mr Ross conceded that the claimant was entitled to an additional £745.10 gross by way of holiday pay on termination of his employment. Mr Ross indicated that that sum would be paid to the claimant through the respondent's payroll, and subject to the deduction of tax and national insurance contributions.

Breach of the Working Time Regulations 1998

48. Does the Tribunal have jurisdiction to consider a claim that the respondent breached Regulation 4 of the WTR by not limiting the claimant's working hours to 48 hours a week?

49. Was it reasonably practicable for the claimant to present his claim that the respondent breached Regulation 11 of the WTR within the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted or, if not, was the claim presented within a reasonable period?

50. If the Tribunal does extend time in relation to the Regulation 11 claim, did the respondent refuse to allow the claimant to exercise his right under Regulation 11(1) to an uninterrupted rest period of 24 hours in each seven day period?

Findings of Fact

51. The respondent is a company that provides household waste and recycling collection services. It has a contract with Lincoln City Council to provide outsourced refuse collection services in Lincoln.

52. The claimant was employed by the respondent as a street cleaning operative. He joined Cory Environmental Municipal Services Ltd ("**Cory**") on 29th September 2008 and was provided with a Statement of Terms and Conditions of Employment for weekly paid employees, which he signed. The Statement gave him the right to 28 days holiday a year, explained that the holiday year ran from 1 April to 31 March, and stated that "*Holiday pay is calculated as basic daily contractual hours x normal hourly rate x number of days entitlement."*

53. The Statement also contained a provision headed 'Hours of Work' which included the following wording: "*Your contracted hours of work are 39 per week*".

54. On 10th September 2008 the claimant signed a document headed 'Working Time Regulations' which contained the following wording: "*I agree to work more than the 48 hour average weekly limit. I understand and agree that I may cancel my agreement at any time I wish"*.

55. On 5th October he signed another document, this time headed a 'Working Time Directive Opt Out Form', in which he agreed "*to work more than the 48-hour average weekly limit for an indefinite period. I understand and agree that I may cancel my agreement upon giving you three months notice in writing.*"

56. In 2016 Cory was acquired by the respondent and the claimant's employment subsequently transferred to the respondent. The parties agree that the claimant's continuous employment goes back to the 29th of September 2008.

57. The claimant's role as street cleaning operative involved litter picking, emptying bins, fly tip removals and other street cleaning duties. The claimant worked out of the respondent's depot in Lincoln and normal

practice would be for him and two colleagues, one of whom is employed as a driver, to go out in a van to carry out their duties. The claimant was not however employed as a driver.

58. Drivers are paid a supplement of £2 per day for driving during the week, so if they work every day Monday to Friday they are entitled to be paid a supplement of £10. Drivers are not paid any additional supplement if they work at the weekend. As well as driving, drivers also carry out general street cleaning duties.

59. The respondent's contract with Lincoln City Council operates seven days a week. The claimant's normal working hours were Monday to Friday, 39 hours a week. Overtime was always available at the weekends for street operatives who wanted it and was paid at time and a half. Overtime was however voluntary, and no one, including the claimant, was required to work it. The normal practice was that a team meeting would take place on a Monday morning. At that meeting the supervisors would ask the team who wanted to work overtime the following weekend.

60. The claimant liked to work overtime and did so on a regular basis over several years. He told his supervisor Peter Edison that he wanted to be put down for overtime every week unless he said otherwise. Peter Edison therefore agreed with the claimant that he would be on the rota to work every weekend unless he told Mr Edison that he did not want to work. The claimant therefore regularly worked seven days a week without making any complaint about this. He was paid for his overtime hours.

61. When working at the weekend the claimant regularly drove one of the respondent's vans. He was provided with the option to drive a van to assist him, as he could then drive around the route which reduced the amount he had to walk. The claimant was not however employed as a driver.

62. The claimant asked the respondent if he could be paid a driving supplement for driving at the weekend. He was told that he was not entitled to it, firstly because he was not employed as a driver but as a Street cleaning operative, and secondly because the supplement was not paid at weekends.

63. The claimant's role is a manual one and is the lightest manual role that the respondent has in Lincoln. The claimant is a Polish national and cannot read, write or speak English.

64. The respondent's holiday year runs from April to March and the claimant was entitled to 28 days' holiday a year. The claimant used all of his holiday entitlement in the holiday hear running from 1 April 2019 to 30 March 2020. He took 6 days' holiday in May 2020, 8 days in August, 7 days in October and 7 days in January.

65. In the months that the claimant took holiday he was paid at his normal basic rate of pay, which does not include overtime payments. However, he then received an additional payment of holiday pay in the

month after the holiday was taken. This additional payment was calculated using the claimant's average earnings (including overtime) in the 52 weeks before the holiday was taken and was designed to ensure that holiday pay included not just basic pay but overtime as well.

66. The claimant took 8 days' holiday in August 2019 and was paid his normal basic pay for August. In September he received a supplementary holiday payment of £202.76. This additional payment was referred to as 'Holiday Sup' in the payslip provided to the claimant. It was paid for the first twenty days' holiday in each leave year.

67. The claimant was off sick throughout the holiday year that started on 1 April 2020 until his employment terminated on 25 September 2020. He did not take any holiday during that period.

68. On 13 March 2020 the claimant became unwell, experiencing chest pain and struggling to breathe. After work he went to hospital with a suspected heart attack, and he remained in hospital for 3 days before being released. He was diagnosed with atrial fibrillation.

69. The claimant was off work sick due to atrial fibrillation from 14 March 2020 until his employment terminated on 25 September 2020. Throughout that period, he was unable to carry out any work. He is still, as at the date of the Tribunal hearing, unfit to work. He has not worked at all since March 2020 and has not looked for work because he is too unwell to do so. In September 2020 his wife left her job to help care for him.

70. The claimant's condition makes it difficult for him to walk and to breathe. He is able to stand and to walk for very short periods, but he becomes breathless and tired very quickly. In May 2022 he was awarded the standard rate of Personal Independence Payment for the period from November 2021 to April 2026 to help with his mobility needs. His evidence to the Tribunal, which we accept, was that his health was worse in March 2022 than it had been in 2020.

71. The claimant was advised to have a medical procedure called a cardioversion procedure which it was hoped would reduce his symptoms and improve his health. The procedure was delayed due to the Covid 19 pandemic but has now taken place. It has, unfortunately, not worked as expected and the claimant remains unwell.

72. Whilst the claimant was off work due to ill health his supervisor Peter Edison telephoned the claimant to ask how he was doing and when he may be able to return to work. As the claimant does not speak English he did not always answer the telephone.

73. The claimant was referred to the respondent's occupational health advisors on two occasions. The first was in June 2020 and his daughter acted as translator for him during the assessment. The report prepared following that assessment included the following comments:

"*…Mr Majoch is currently absence from work with diagnosed atrial fibrillation. He was admitted to hospital for a couple of days in March 2020 with a rapid heard rate, shortness of breath and chest pains. Having had abnormal blood test results and an echocardiogram he was advised that he had atrial fibrillation, an abnormal heart condition where the heart beats much faster than normal, with the upper and lower chambers of the heart not working together as they should. This causes the symptoms of shortness of breath and fatigue that Mr Majoch is experiencing. He is currently unable to walk very far as he becomes very breathless and tired.*

Mr Majoch …was advised that he requires a procedure called cardioversion that will restore the normal rhythm of his heart…

Mr Majoch is not currently fit for work. He needs to have the cardioversion treatment and for it to be successful before he can plan to work…"

74. The second occupational health assessment was carried out on 9 September 2020 and a family member was also present as translator. The Occupational Health Advisor concluded that the claimant's absence was not work related and made the following comments:

"*…Mr Majoch is feeling generally unwell, experiencing breathlessness, palpitations, fatigue and episodes of chest pain, and is also experiencing swelling of his feet.*

…Mr Majoch remains unfit to return to work at this time.

…With effective treatment I would hope Mr Majoch would be able to return to his role, however until such time as he has had the pending treatment and his response can be assessed, I am unable to advise any specific timescales for his return to work…

There are no adjustments at this time which would expediate his return to work…"

75. After receiving the occupational health report, the respondent arranged to speak with the claimant to discuss its contents. Andrew Cockcroft, Operations Manager, called the claimant on 18 September 2020 but was unable to reach him. He therefore wrote to the claimant on 23 September asking him to get in touch by Friday 25 September to discuss the report. Mr Cockcroft sent the letter by email to the claimant's daughter and asked her to pass it to her father.

76. The meeting went ahead on 25 September via Microsoft Teams. The claimant was accompanied by a friend of his daughter, Natalia Ziajkiewicz, who acted as translator. Mr Cockcroft was present in the meeting with Michael Lamb, HR Business Partner, and Matthew Spikings, Senior Business Manager. No notes were taken of the meeting.

77. There was a dispute of facts as to what happened at the meeting. Mr Spiking's evidence was that there was a discussion about the second

occupational health report, that the claimant had a copy of the report, and that the claimant said he agreed with the assessment and there was no prospect of him returning to work in the near future.

78. Mr Spiking also told us in evidence that the claimant was given the option of remaining in employment, off sick, until he was well enough to come back to work, but was concerned that his Statutory Sick Pay was about to run out so he would have no income. According to Mr Spiking there was then a discussion about whether there were any other roles that the claimant could do, but the only ones available were as a driver or a loader. The claimant was not qualified to do the driver roles and the loader roles were more physically demanding than the role the claimant had been carrying out. It was agreed that there was nothing else the respondent could do to help the claimant return to work.

79. According to Mr Spiking the respondent then suggested that an alternative option would be for the claimant's employment to be terminated on the grounds of ill health, with the claimant being paid 12 weeks' pay in lieu of notice and his outstanding holiday pay. His evidence was that the claimant agreed with the suggestion that his employment would terminate, and that the respondent also told the claimant that they would be happy to take him back on when he was well enough to work again.

80. In his witness statement the claimant said that he had not seen the second occupational health report. When giving evidence in the final hearing however he accepted that the report had been sent to him in the post but could not recall exactly what had happened because he was having difficulties at the time. He said that he was 'not interested' in the report because he could not understand it.

81. The claimant told the Tribunal that there had been no discussion about his health on 25 September, that he was not aware his SSP was about to run out because 'nobody informed me of anything' and that there had been no discussion about a potential return to work. He denied that he had agreed that his employment would end.

82. On balance, we prefer the evidence of Matthew Spikings to that of the claimant and we accept his version of events at the meeting on 25 September. The claimant struggled to remember what had happened, and in cross examination he gave answers which at times contradicted his witness statement.

83. Mr Spikings' evidence was also consistent with the letter that was sent to the claimant following the meeting on 25 September. That letter was dated the same day as the meeting and was headed 'Long Term Sickness Review meeting – Outcome'. In the letter the respondent wrote that:

"*During the course of the meeting we discussed the assessment by the company's occupational health advisers…*

…we discussed the possibility of alternative employment, but unfortunately there are no vacancies that would be suitable for you.

In the circumstances we agreed that your employment will be terminated on grounds of capability. We agreed that your final date of employment will be 25 September 2020…"

84. The letter also set out the payments that would be made to the claimant, namely a payment in lieu of notice of £4,080.92 gross and a payment of £782.18 gross in respect of 11.5 days' holiday pay. It advised the claimant that he had the right to appeal.

85. On 1 October the claimant appealed against the decision to terminate his employment. The appeal letter, which was written by Ms Dominik-Kryg on the instruction of the claimant, stated that:

"*…I believe my redundancy is unfair…*

…You arrange meeting on 25 September 2020, it was first meeting since I went at sick notice. The meeting was by phone with Andrew Cockcroft (AC) Polish interpreter translates us conversation. AC didn't ask me about my health. AC didn't ask me I want to return to work. AC during this meeting redundancy me.

I believe you not follow English Legislation and not respect Employment Rights…

Therefore my claim is about:

Statutory Redundancy	*£9,684.00/ 18 weeks*
Statutory Holiday Entitlement	*£1,457.98/ 20.9 days*
Compensated for lost my health	*£8,324.94/ 6 months basic salary*

86. The claimant was invited to an appeal hearing which took place on 24 November. The hearing was chaired by Danny Goller. Notes were taken during the meeting by Michael Lamb but were not shared with the claimant. The claimant was accompanied at the appeal hearing by Ms Dominik-Kryg.

87. During the appeal hearing Mr Goller offered to reinstate the claimant. In response to this suggestion the claimant replied that he was not fit to work. He therefore refused the respondent's offer to reinstate him.

88. The claimant said in his evidence to the Tribunal that if the respondent had told him he could come back to work on reduced hours then he would have been well enough to do so. This evidence is not credible in our view. At the time of his dismissal the claimant had been signed off by his GP as unfit to do any work. He has remained unfit for work ever since. He has not carried out any work, even on a part time basis, nor has he looked for work. We therefore do not accept the claimant's evidence that he would have come back to work on reduced hours either in September 2020 or in November 2020.

89. Mr Goller formed the view that the claimant's main concern was not that his employment had been terminated, but rather that he had not received enough pay when his employment had terminated. This was

supported by the comments made in the appeal letter, which focused on additional payments that the claimant wanted, and by the fact that the claimant did not want to be reinstated.

90. During the appeal hearing the claimant suggested that the respondent had not followed a proper process when dismissing him and should have waited longer. He also complained about having been put under pressure to work weekends. After the appeal hearing Mr Goller spoke to Matthew Spikings and Andrew Cockcroft who had been present at the dismissal meeting. They told Mr Goller that the claimant had effectively asked for his employment to be terminated because he could not manage without his salary. They also told him that weekend working was entirely voluntary and that the claimant had been happy to work weekends.

91. Mr Goller decided that the appeal should not be upheld. On 7 January 2021 he sent a detailed letter to the claimant explaining the reasons for his decision. He wrote that:

"…*At the appeal meeting we discussed Marian Majoch's fitness to return to work and I said that we would consider reinstatement had he been fit to return to work at that point or shotly thereafter. You informed me at the appeal meeting that Marian Majoch had no immediate prospect of a return to work…*

In terms of your point that the business would have waited longer before terminating his employment, the business was no proposing to terminate his employment at the meeting on 25 September 2020. The business was actually complying with his request to terminate your employment. You had accepted that the occupational health reports were accurate and that there were no future adjustments that the business could consider to aid a return to work….

As we discussed at the appeal meeting, Marian Majoch's views on returning to work was of great importance to the business. He did not want to ignore Marian Majoch's views that termination on grounds of capability would be the best option for him. I have considered your assertion that the business did not follow a proper procedure, however I consider that the business had consulted with him and proceeded with the termination on the ground of his wishes…

We indicated at the appeal meeting that we would consider reinstating Marian Majoch on the basis that he would be in a position to return to work. Marian Majoch accepted that he was unlikely to return to work in the foreseeable future and therefore did not wish us to explore the option of a return to work…"

The Law

Unfair dismissal

92. In an unfair dismissal case, such as this one, where the respondent admits that it dismissed the claimant, the respondent must establish that the reason for the dismissal was one of the potentially fair reasons set out in section 98(1) or (2) of the Employment Rights Act 1996 ("**the ERA**").

93. Section 98(1) provides that: "*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*"

94. Under section 98(2)(a) of the ERA a reason for dismissal is potentially a fair reason if it "*relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do*". Section 98(3)(a) defines capability as "*in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality*".

95. The burden of proving a potentially fair reason for dismissal lies with the respondent. If it discharges that burden the Tribunal must then go on to consider whether a dismissal is fair under section 98(4) of the ERA which states as follows:

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

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

(b) Shall be determined in accordance with equity and the substantial merits of the case.

96. The range of reasonable responses test applies in capability dismissals not just to the decision to dismiss but also to the procedure that the employer follows when reaching that decision (***Pinnington v City and Country of Swansea and anor EAT 0561/03***).

97. Where an employee has been off work on long term sickness absence, the Tribunal must consider whether the employer can be expected to wait any longer for the employee to return (***Spencer v Paragon Wallpapers Ltd [1977] ICR 301***). In ***S v Dundee City Council [2014] IRLR 131*** the Inner House of the Court of Session suggested that when deciding this question the Tribunal must balance relevant factors, including:

a. The likely length of the absence;

b. The nature of the illness causing the absence;
c. The size of the employer;
d. Whether other employees can cover for the absent employee' and
e. The cost of continuing to employ the employee.

98. In order for an employer to fairly dismiss an employee on long term sickness absence, the employer must also follow a fair procedure. In most cases this will involve obtaining medical evidence, consulting with the employee and considering alternatives to dismiss.

99. Consultation with an employee on long term sickness absence should be carried out with a view to finding out the medical position and prognosis. Warnings are often not appropriate in cases of long term absence (***Taylorplan Catering (Scotland) Ltd v McInally [1980] IRLR 53***). In **East Lindsey District Council v Daubney [1977] ICR 566** Mr Justice Phillips stated that "*Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position."*

100. Consultation with the employee should ideally start at the beginning of the employee's sickness absence and continue periodically throughout that absence.

Disability

101. The relevant statutory provisions are contained Section 6 of the Equality Act 2010 which provides that;

"(1) A person (P) has a disability if -

a) they have a physical or mental impairment, and
b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to- day activities".

102. Schedule 1 Part 1 Para 2 of the Equality Act defines long-term as;

"an impairment which has lasted for a least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person effected".

103. Paragraph 12 of Schedule 1 of the Equality Act provides that:

"When determining whether a person is disabled the Tribunal must take account of such guidance as it thinks is relevant".

104. The Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability ("the Guidance") was issued by the Secretary of State pursuant to section 65 of the Equality Act in May 2011. The Guidance states that in assessing whether it is likely than an effect will last for 12 months, "*account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).*"

105. In ***SCA Packaging Ltd v Boyle [2009] ICR 1056*** the Supreme Court held that 'likely' means that something is a real possibility and 'could well happen', rather than something that is probable or more likely than not.

Reasonable adjustments

106. Section 20 of the Equality Act 2010 states as follows:-

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

(2) The duty comprises the following three requirements.

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

107. Section 21 of the Equality Act 2010 provides that:-

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

(2) A discriminates against a disabled person if A fails to comply with a duty to make reasonable adjustments…"

108. The importance of a methodical approach to reasonable adjustments complaints was emphasised by the EAT in ***Environment Agency v Rowan [2008] ICR 218*** and in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, both approved by the Court of Appeal in ***Newham Sixth Form College v Sanders [2014] EWCA Civ 734***.

109. Part 3 of Schedule 8 to the Equality Act 2010 ("Work: Reasonable Adjustments") provides, at paragraph 20 ("Lack of knowledge of disability, etc") that:

"(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know…that

an interested disabled person has a disability and is likely to be placed at the disadvantage…"

110. Assuming that the claimant is a disabled person, the following are the key components which must be considered in every case:

a. What is the provision, criterion or practice ("PCP"), physical feature of premises, or missing auxiliary aid or service relied upon?

b. How does that PCP/ physical feature/missing auxiliary aid put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

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

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

e. Is the claim brought within time?

111. Paragraph 6.28 of the EHRC Code of Practice on Employment (2011) sets out factors which it is reasonable to take into account when considering the reasonableness of an adjustment. These include:-

a. The extent to which it is likely that the adjustment will be effective;

b. The financial and other costs of making the adjustment;

c. The extent of any disruption caused;

d. The extent of the employer's financial resources;

e. The availability of financial or other assistance such as Access to Work; and

f. The type and size of the employer.

112. There is no limit on the type of adjustments that may be required. An important consideration is the extent to which the step will prevent the disadvantage. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law.

113. It is almost always a good idea for the respondent to consult the claimant about what adjustments might be appropriate. A failure to consult the claimant makes it more likely that the employer might fail in its duty to make reasonable adjustments.

Unlawful deduction from wages

114. Section 13 of the Employment Rights Act 1996 states that:

"*(1) An employer shall not make a deduction from wages of a worker employed by him unless –*

(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) The worker has previously signified in writing his agreement or consent to the making of the deduction…

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

115. Section 23 of the Employment Rights Act 1996 gives workers the right to bring complaints of unlawful deduction from wages to the Employment Tribunal.

Holiday pay

116. Claims for holiday pay can be brought either as complaints of unlawful deduction from wages, as claims under the WTR or, if they arise or are outstanding on the termination of the claimant's employment, as claims for breach of contract.

117. Regulations 13 and 13A of the WTR contain the right for all workers to 28 days' paid holiday a year. Regulation 14 deals with compensation for untaken annual leave on the termination of employment and provides that:

"*(1) Paragraphs (1) to (4) of this regulation apply where –*

(a) A worker's employment is terminated during the course of his leave year, and

(b) On the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be –

(a) Such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) Where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula

(AxB) – C

Where –
A *is the period of leave to which the worker is entitled under regulation 13 and regulation 13A*
B *is the proportion of the worker's leave year which expired before the termination date, and*
C *is the period of leave taken by the worker between the start of the leave year and the termination date."*

Claims under Regulations 4 and 11 of the Working Time Regulations

118. Regulation 4 of the WTR contains limits on maximum weekly working time, and the relevant provisions state as follows:

"*(1) Unless his employer has first obtained the worker's agreement in writing to perform such work, a worker's working time, including overtime, in any reference period which is applicable in his case shall not exceed an average of 48 hours for each seven days.*

(2) An employer shall take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that the limit specified in paragraph (1) is complied with in the case of each worker employed by him in relation to whom it applies and shall keep up-to-date records of all workers who carry out work to which it does not apply by reason of the fact that the employer has obtained the worker's agreement…"

119. Regulation 5 of the WTR provides that workers can agree to exclude the limit on maximum weekly working hours in writing, either for a specified period or indefinitely.

120. Under Regulation 28 (Enforcement), responsibility for enforcing Regulation 4(1) lies with the Health and Safety Executive. It does not lie with the Employment Tribunal. Although it may be possible to enforce a right under Regulation 4 in the civil courts on a contractual basis (see ***Barber v RJB Mining [1999] IRLR 308***) there is no obvious remedy available to the claimant.

121. Regulation 11 of the WTR provides that:

"*(1) Subject to paragraph (2), a worker is entitled to an uninterrupted rest period of not less than eleven consecutive hours in each 24-hour period during which he works for his employer…*"

122. Under Regulation 30 of the WTR complaints that an employer has refused to allow a worker to exercise any right he has under Regulation 11(1) may be made to an Employment Tribunal.

Time limits

123. The time limit for presenting claims under the WTR is set out in Regulation 30(2) which provides as follows:

"S*ubject to regulation 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented –*

(a) Before the end of the period of three months…beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three…months".

124. Time limits are extended in claims under the WTR to allow for Early Conciliation. In summary, the period beginning with the day after Early Conciliation starts up to and lasting until the day upon which ACAS issues the Early Conciliation Certificate does not count for the purposes of time limits, so that the clock does not run during that period. In addition, if a time limit is due to expire during the period beginning with the day ACAS receives the request for Early Conciliation, and ending one month after the Certificate is issued, then the time limit for presenting the claim expires one month after the Certificate is issued.

125. Time limits for presenting claims are a jurisdictional issue (***Rodgers v Bodfari (Transport) Ltd 1973 325 NIRC***) and if a claim is out of time, the Tribunal must not hear it.

126. In cases, such as this one, in which a question arises as to whether it was reasonably practicable for the claimant to present his claim on time, there are three general principles that fall to be considered –

a. The question of reasonable practicability should be interpreted liberally in favour of the claimant;
b. It is a question of fact as to whether it was reasonably practicable for the claimant to present his claim on time; and
c. It is for the claimant to prove that it was not reasonably practicable for him to present his claim on time.

Submissions

Claimant

127. Ms Dominik-Kryg submitted that the respondent had breached the claimant's employment rights and his human rights. The claimant is a vulnerable person, and it took him longer to formulate answers to questions. This should be taken into account when considering his evidence.

128. The respondent had failed to provide the claimant with an interpreter and had been dismissive of him. The respondent had, Ms Dominik-Kryg submitted, failed to provide the claimant with 'basic documents' which meant that he did not know what he was being paid for his work.

129. When the claimant became unwell, he did not know he had the right to ask the respondent for help. The respondent arranged occupational health assessments of the claimant, forgetting that he was clear in indicating that he had issues with his own daily routine. They should have asked him what his day was like and whether he could carry out daily work.

130. The decision to dismiss the claimant had, in Ms Dominik-Kryg's submission, been planned. Nobody had noticed that the claimant was working too hard, too long and in bad conditions. The claimant's work for the respondent had, she suggested, affected his health.

131. The respondent's dismissal of the claimant was unjustified, and it was wrong of the respondent to assume that the claimant could not return to work.

132. The respondent had failed, in Ms Dominik-Kryg's view, to make reasonable adjustments for the claimant. It had also breached the WTR by organising his working hours so that he worked 7 days a week.

133. The claimant was entitled, she submitted, to be paid for the additional job he did at weekends as a van driver and for additional holiday pay.

Respondent

134. Mr Ross submitted that the claimant was not an impressive witness and the tribunal should not have confidence in what he said. For example, the claimant said in his witness statement that annual leave was always paid without considering overtime or bonuses. This was contradicted by the pay slips in the bundle showing that overtime had been incorporated into holiday pay.

135. The claimant's answers to questions about his health lacked credibility in Mr Ross's submissions. When asked if he could have returned to work on reduced hours in September or November 2020 he said yes. When asked if he done any work since his dismissal, he said no. When asked if he had tried to find work he said no because he was not able to do so. It is, in Mr Ross's submission, difficult to avoid the conclusion that the claimant is more concerned with winning his case than he is about giving his evidence carefully.

136. In contrast, the respondent's witnesses gave their evidence carefully and thought about their answers. Where there is a factual conflict of evidence, for example as to what was said at the meeting on the 25th of September 2020, Mr Ross argues that the tribunal should prefer the respondent's evidence.

137. In relation to the claim of unfair dismissal, Mr Ross submitted that the respondent could not reasonably have been expected to wait longer before dismissing the claimant. The tribunal must be careful not to substitute its own view on procedural issues or on the decision to dismiss for that of the employer. Fairness must be judged by reference to the process as a whole including both the dismissal and appeal meetings.

138. The respondent had up to date medical evidence at the time it dismissed the claimant, having occupational health assessments carried out in both June and in September. The claimant was still very unwell in September and was struggling with walking and breathing, as he is today.

139. The tribunal should, Mr Ross submits, accept the respondent's evidence that the claimant agreed to the termination of his employment.

140. The reason for dismissal must be assessed by looking at what was in the mind of the decision maker. The claimant could not return to work for the foreseeable future and had already been off sick for six months. Dismissal was within the range of reasonable responses.

141. The claimant was employed to work in a physical job in a physical industry. He was doing the lightest type of work that the respondent had available. There were no alternative roles in the respondent's business that the claimant could carry out. The prospect of the claimant being able to work shorter hours in his role in either September or in November 2020 or indeed even at the date of the hearing is, in Mr Ross's submission, zero. The claimant is too unwell to do any sort of physically demanding work.

142. Mr Ross argues that the claimant's condition was not long term at the time of the alleged acts of discrimination and therefore the claimant does not meet the test of disability. The question is whether the effect of his condition on his ability to carry out day to day activities was likely to last for 12 months or more. Likely means could well happen and does not mean more likely than not. the respondent could not reasonably have been expected to know that the claimant was disabled.

143. In relation to the claim of a failure to make reasonable adjustments at, there was in Mr Ross's view no evidence that the respondent operated the alleged provisions, criteria, or practices relied on by the claimant. No substantial disadvantage has been identified and there is nothing in the claimant's witness statement on either of those issues.

144. The claimant needed to be well enough to do some type of work before the duty to make reasonable adjustments is triggered. He was not, and in his witness statement he said he wanted adjustments when he returned to work. The occupational health report dated September 2020 said that there were no adjustments that could have helped the claimant to return to work.

145. In relation to the claim for notice pay, Mr Ross submitted that the claimant was only entitled to a statutory notice period of 11 weeks but had been paid for 12 weeks. Notice pay should be calculated on the basis of a normal week's pay in accordance with section 221(2) of the ERA. It should not include overtime because the employer was not obliged to offer overtime and the claimant was not obliged to work it. He referred us to the cases of ***Refrigeration Norwest (Chester) Ltd v Mrs R M Unwin EAT/0394/04/RN*** and ***Tarmac Roadstone Holdings Ltd v Peacock and others [1973] ICR 273*** as authority for the proposition that overtime should not be included in normal working hours unless obligatory on both sides.

146. Turning to the claim for unlawful deduction from wages, Mr Ross submitted that the claim is out of time. The last time he worked a weekend was in March 2020. The claimant had been told by Employment Judge Heap at the Preliminary Hearing on 23 March 2021 that this element of his claim appeared to be out of time, and yet had adduced no evidence as to whether it was reasonably practicable for him to submit his claim on time, or why he did not present it earlier.

147. In any event, the claimant is not, Mr Ross says, entitled to the additional supplement of £10 a week because this was only paid to those who were employed as drivers (which the claimant was not) and in respect of weekday working. Drivers did not get a supplement for driving at the weekend.

148. In relation to holiday pay, Mr Ross submitted that the claimant had been correctly paid for holidays taken during the course of his employment, as overtime payments had been taken into account and paid as a holiday supplement.

149. On termination of employment the claimant was paid for 11.5 days' holiday, when he should in fact have been paid for 13.6 days. There is, Mr Ross admitted, a shortfall in the holiday pay that had been paid to the claimant on termination.

150. The holiday year started on 1 April 2020 and the claimant was employed for 177 days of that holiday year before his employment ended on 25 September 2020. 177 days divided by 365 days in the year multiplied by the 28 days' holiday entitlement, gives a total of 13.5789 days' accrued holiday, which has been rounded up to 13.6 days.

151. The respondent therefore admits owing 2.1 days' holiday pay to the claimant rather than the 11.5 days actually paid. In addition, the 11.5 days' holiday pay was calculated using the claimant's basic rate of

pay giving a daily rate of £68.02. Instead, Mr Ross said, all 13.6 days should be paid at the rate of £112.30 gross per day, which included overtime worked in December 2019, January 2020 and February 2020. This calculation was, he submits, more generous than taking a 12-month average working back from the date of termination of the claimant's employment.

152. Mr Ross therefore calculates that the claimant is entitled to gross holiday pay of £1,527.28 (13.6 x £112.03) less the £782.18 that he has already been paid, giving an outstanding payment of £745.10 due to the claimant.

153. Turning finally to the claims that the respondent breached Regulations 4 and 11 of the WTR, Mr Ross submitted that the Tribunal does not have jurisdiction to hear claims for breach of Regulation 4, and endorsed the comments made by Employment Judge Heap at the Preliminary Hearing on 23 March 2021.

154. The claim for breach of Regulation 11 of the WTR is out of time, as it should have been presented within 3 months of the date upon which the claimant should have been permitted to exercise the right, in accordance with Regulation 30(2) of the WTR.

155. Mr Ross also referred us to the case of ***Grange v Abellio London Ltd [2017] ICR 287*** in which he says the EAT held that, in the context of the right under the WTR to daily rest periods, a 'refusal' does not have to be an active response to a positive request from a worker to exercise the right, but could simply be the denial of the right through the arrangement of the working day which would be a de facto refusal of the right. Employers have to take active steps to ensure workers can take rest breaks and encourage them to do so, but do not have to 'force' workers to take rest breaks. In this case, the claimant's overtime was entirely voluntary, and he chose to work every weekend with limited exceptions.

Conclusions

156. The following conclusions are reached on a unanimous basis, after the Tribunal considered carefully the evidence before it, the legal principles summarised above, the oral submissions of both parties and the written skeleton argument submitted by Ms Dominik-Kryg.

Unfair dismissal

157. We are satisfied, on the evidence before us, that the reason the claimant was dismissed was because he was no longer able to perform the role that he was employed to do, due to ill health. All of the evidence suggests that the claimant's employment was terminated on 25th September because he had been off for more than six months due to ill health, there was no prospect of an imminent return to work, and there were no adjustments that could be made to help him come back to work.

158. No alternative reason for dismissal was suggested by the claimant. In his appeal letter the claimant referred to a redundancy payment. This was, in our view, an attempt by the claimant to persuade the respondent to pay him additional compensation. It was not an indication that the claimant was dismissed by reason of redundancy.

159. There was no evidence whatsoever to suggest that there was a redundancy situation. Quite the opposite, in fact, given the amount of overtime that the claimant had been working, and the fact that Mr Goller offered to reinstate the claimant at the appeal hearing. There clearly was an ongoing need for the work that the claimant was doing before he became unwell.

160. We therefore find that the claimant was dismissed on grounds of capability. Capability is a potentially fair reason for dismissal and the respondent has therefore discharged the burden of proving a potentially fair reason for dismissal.

161. We also find that, at the time it decided to dismiss the claimant, the respondent genuinely believed that he was no longer capable of performing his duties. We accept the respondent's evidence that there was a discussion about the claimant's health at the meeting on 25 September, and again at the meeting on 24 November 2020. We also accept that during both discussions the claimant told the respondent that he was unfit to work, that he did not think he would be fit to work at any time in the foreseeable future, and that there was nothing the respondent could do to help him come back to work.

162. We prefer the respondent's evidence as to what happened at the meeting on 25 September to that of the claimant whose recall was poor. We accept that dismissal was the claimant's preferred option, as he wanted to receive his notice and holiday pay, being very concerned that he would shortly 'run out' of SSP.

163. The respondent also had before it the two occupational health reports, prepared in June and September, which confirmed that the claimant remained unfit for work, and that no timescale could be given for a return to work. Both reports also said that there were no adjustments that could be made to help the claimant get back to work. We find, on balance, that the claimant was provided with copies of both reports and we accept the respondent's evidence that the claimant agreed with the content of them.

164. It was, in our view, reasonable for the respondent to rely upon the contents of occupational health reports that were prepared following telephone assessments of the claimant's health without an official interpreter present. A member of the claimant's family was present during each assessment and translated for him. Both reports were clear, accurate and contained no ambiguity. The claimant did not suggest that either report was incorrect in any way or would have been different if an official interpreter had been present – on the contrary, the evidence before us was that the claimant had agreed with the contents of both reports.

165. The reports were sent to the claimant and he had the opportunity to get them translated. He did not disagree with what was in the reports either on 25 September or indeed on 24 November and he confirmed verbally during those meetings what occupational health had said, namely that he was not fit enough to return to work and there was no prospect of him doing so in the foreseeable future.

166. We find that the respondent did carry out adequate consultation with the claimant. It stayed in contact with him whilst he was off, making regular attempts to get in touch via telephone. We accept the evidence of Peter Edison who we found to be a very credible and straight forward witness, that he wanted to find out how the claimant was and try and get him back to work. An occupational health assessment was carried out after three months' absence, and another after six months.

167. Before making any decisions about the claimant's future, there was a meeting with him on 25th September at which an interpreter was present. The claimant was fully consulted during that meeting about what he wanted to do. He was in agreement that his employment should be terminated, so that he could receive notice and holiday pay. We accept the respondent's evidence that they did not go into the meeting wanting to dismiss the claimant and find that, if the claimant had not wanted to be dismissed, he would not have been, but rather his job would have been kept open for him.

168. When the claimant appealed against the decision to dismiss him his focus was very much on obtaining additional compensation, rather than being reinstated. We accept Mr Goller's evidence that he offered to consider reinstating the claimant at the appeal hearing, but that the claimant was not interested in that.

169. We therefore find that the respondent did adequately consult the claimant before dismissing him.

170. We also find that the respondent carried out a reasonable investigation. It obtained two medical reports from occupational health, one of which was dated just a couple of weeks before the dismissal. The respondent also sought the claimant's views on his health, which he provided both at the dismissal and the appeal meetings. There was no suggestion by the claimant of any further investigation that could or should have been carried out, either at the time of his dismissal, during the appeal or indeed during the Tribunal proceedings.

171. We have considered whether the respondent could reasonably have been expected to wait longer before dismissing the claimant. We are of the view that dismissing an employee with the claimant's length of service after just six months' absence would often be too hasty. However, the situation in this case was significantly changed by the fact that the claimant wanted to leave.

172. But for the fact that the claimant wanted to go, it would have been reasonable in our view to wait longer before dismissing him,

given his length of service and that there was the prospect of a return to work should the cardioversion procedure be successful. The cost to the respondent of continuing to employ him would have been minimal, given that he was about to run out of SSP. However, given the comments of the claimant that he wanted to leave and his comment at the appeal that he didn't want to come back, it was in our view reasonable not to wait longer. The nature of the claimant's health condition was that it was long term and had a serious impact on the claimant. It was hoped that the cardioversion procedure would improve the condition, but no guarantee that it would.

173. We are satisfied that the procedure followed by the respondent was a reasonable one. The claimant was consulted before any decisions were made, he had the opportunity to make comment (through an interpreter), he was provided with copies of the occupational health reports and provided with a right of appeal to an independent manager.

174. In light of the above, we find that dismissal was within the range of reasonable responses. The claimant was therefore fairly dismissed. His claim for unfair dismissal fails.

Disability

175. The respondent admits that the claimant had, at the relevant time, a physical impairment which had a substantial adverse effect on his ability to carry out normal day to day activities. The only question that we have had to determine is whether the impact on day-to-day activities was long term.

176. The test we have applied is whether, at the time of the alleged acts of discrimination, the impact 'could well' have lasted for 12 months or more. The burden of proving this lies with the claimant. He does not however need to show that it was more likely than not that the impact would last for 12 months or more.

177. It is clear from the evidence before us that atrial fibrillation is a serious heart condition. It had already lasted for more than 6 months at the time the claimant was dismissed, and for more than 8 months by the time of the appeal. There was no evidence to suggest that the claimant's condition would resolve itself, or that the impact of it on his ability to carry out day to day activities would reduce. There was the hope that the cardioversion procedure would improve matters, but no guarantee that it would.

178. There was also, in September and November, no date given for the cardioversion procedure to take place, as it had been delayed due to the pandemic. The condition had already lasted for many months without any improvement. Neither the claimant nor the respondent's occupational health advisers could give any timescale for an improvement in the condition.

179. We therefore find that at the time the claimant was dismissed, and at the time of the appeal, it could well have happened that the

claimant's physical impairment would continue to have a substantial adverse effect on his ability to carry out normal day to day activities for another six months (in the case of the dismissal) or four months (in the case of the appeal).

180. We therefore find that the claimant was disabled by reason of atrial fibrillation because the impact of the condition on his ability to carry out normal day to day activities was likely to last for 12 months or more.

Reasonable adjustments

181. Turning now to the claim for reasonable adjustments, we have first considered whether the respondent knew, or could reasonably have been expected to know, that the claimant had the disability. The claimant's absence from work from March onwards was all due to atrial fibrillation. The respondent had two occupational health reports that set out the effect of the claimant's condition upon him, and also discussed that very issue with the claimant during the dismissal and appeal meetings. There was therefore ample evidence that the respondent knew of the claimant's heart condition.

182. We find that by the 25 September, given what the claimant said during that meeting, given also the length of his absence, the nature of the condition and the occupational health reports, the respondent could reasonably have been expected to know that the claimant had the disability of atrial fibrillation.

183. We have then gone on to consider whether the respondent applied the two PCPS relied upon by the claimant, namely not offering reduced working hours or reduced workloads to employees with medical conditions.

184. There was quite simply no evidence before us to suggest that the respondent applied PCPs of not offering reduced working hours or reduced workloads to employees with medical conditions. The respondent specifically asked its occupational health providers on two occasions 'what adjustments would be required to allow the employee to return to work'. This suggests that the respondent would have been willing to make adjustments if either occupational health or the claimant had suggested any.

185. There was no discussion about reduced working hours or a reduced workload because the claimant was so unwell, and all the medical evidence indicated that he was unfit to do any work. It cannot be said therefore that the respondent applied either of the PCPs relied upon by the claimant. The respondent did have a PCP of requiring employees to be fit enough to work, but that was not how the case before us was pleaded.

186. We also find, in the alternative, that even if the respondent had applied the PCPs, they did not place the claimant at a substantial disadvantage compared to someone without his disability. The

claimant was not capable of doing any work whatsoever. It was not the requirement to work full time or a full workload which placed him at a disadvantage, but rather the requirement to carry out any work at all. The claimant was not capable of doing any work, even on reduced hours or with a reduced workload. He remains unfit to do any work as at the date of the final hearing, more than two years after he became unwell.

187. We also find that it would not have been a reasonable adjustment to offer reduced working hours or workload to the claimant because he was not capable of doing any work. We do not accept the claimant's suggestion that he would have returned to work if he had been offered reduced hours, given that he has not done any work or even looked for work since being dismissed. The claimant is now in receipt of Personal Independence Payments, despite having had the Cardioversion procedure.

188. We therefore find that offering reduced hours or a reduced workload would not have enabled the claimant to return to work and would therefore not have been a reasonable adjustment. One of the factors to be considered when deciding whether an adjustment would be reasonable is how effective the adjustment would be in removing the disadvantage. There is no evidence in this case that reduced hours, or a reduced workload would have avoided any disadvantage to the claimant.

189. The claim that the respondent failed to make reasonable adjustments therefore fails and is dismissed.

Notice pay

190. The claimant was entitled to 11 weeks' notice of termination of his employment, as he had 11 years' continuous service. He was paid for 12 weeks' notice, at his normal basic rate of pay, based upon 39 hours a week.

191. We accept Mr Ross' submissions that there was no obligation on the claimant to work overtime, and that he chose to do so because he wanted the overtime payments. We also accept that the claimant's normal working hours, for the purpose of calculating his notice pay, were 39 hours a week, as set out in his Statement of Terms and Conditions of Employment.

192. As the claimant has been paid in respect of his normal working hours for more than 11 weeks' notice, his claim for notice pay therefore fails and is dismissed.

Unlawful deduction from wages

193. The claim for unlawful deduction from wages was in relation to supplemental payments that the claimant says he should have received for driving a van at weekends.

194. The last time the claimant drove a van for the respondent was in March 2020 as he was off sick from 14 March onwards. The claimant did not start Early Conciliation through ACAS until 19th October 2020, more than 7 months after he had last driven a van, and he did not issue his claim until 15th December 2020.

195. The claim for unlawful deduction from wages is therefore more than four months out of time. The claimant did not adduce any evidence as to why it was not reasonably practicable for him to submit his claim in time or as to whether he submitted as soon as reasonably practicable after the expiry of the primary time limit. Nor did Ms Dominik-Kryg make any submissions on the issue. This was despite the fact that Employment Judge Heap had flagged the time limit issue at the Preliminary Hearing in March 2021.

196. The burden of persuading the Tribunal to extend time lies with the claimant. He has not discharged that burden. We therefore find that the complaint of unlawful deduction from wages has been made out of time and that the Tribunal does not have jurisdiction to hear it.

197. In any event, on the evidence before us it is clear that the extra £10 a week for driving was only paid to employees who were employed as drivers and in respect of driving duties carried on Mondays to Fridays. The claimant only drove at the weekend and was not employed as a driver. He was allowed to use a van because it helped him to drive at the weekend as it saved walking. The claimant would not have been entitled to the payment, even if the claim for unlawful deduction from wages had been made in time.

198. The Tribunal therefore does not have jurisdiction to hear the claim for unlawful deduction from wages which therefore fails and is dismissed.

Holiday pay

199. It was not clear to the Tribunal how the claimant and his representative have calculated the sums that they say the claimant is entitled to by way of additional holiday pay, and there was no clear evidence from the claimant on the issue. The burden of proving that he is entitled to additional holiday pay lies with the claimant.

200. There appeared to be two distinct claims for holiday pay – the first being for holiday pay in respect of holiday that the claimant had taken whilst still employed by the respondent ('historic holiday pay'), and the second being in respect of holiday pay paid on the termination of his employment.

201. The claimant was entitled to 28 days' holiday a year. The respondent's holiday year runs from 1 April to 30 March and the last holiday that the claimant took was in January 2020. He took his full holiday entitlement for the April 2019 to March 2020 holiday year. The first 20 days of that entitlement were paid using the average earnings of the claimant in the 12 months preceding the holiday.

202. The claim for historic holiday pay is out of time. The last holiday was taken in January 2020 and the claimant did not commence Early Conciliation until October that year. For the same reasons as set out above in relation to the complaint of unlawful deduction from wages, the Tribunal does not have jurisdiction to hear this claim.

203. Even if we had jurisdiction to hear this claim, we would have found that the claimant has been paid for the holiday he took during the course of his employment at the appropriate rate, which included overtime payments. It is clear from the pay slips in the bundle and the evidence of Jennifer O'Shea that overtime was included in holiday pay.

204. In relation to the claim for holiday pay on termination, the respondent concedes that the claimant is entitled to an additional £745.10 gross but disputes that he is entitled to any additional payments.

205. We accept Mr Ross' submissions on the question of holiday pay on termination of employment. The claimant's position on this question is confused and not supported by the evidence. He has failed to discharge the burden of proving that he is entitled to any additional holiday pay.

206. We therefore find that the claimant is entitled to be paid additional holiday pay on termination of his employment of £745.10, from which deductions of tax and national insurance will need to be made.

Breaches of the Working Time Regulations

207. The claimant alleges that the respondent failed to comply with Regulation 4 of the WTR because his weekly working time exceeded 48 hours a week.

208. The Tribunal does not have jurisdiction to hear complaints about failure to comply with Regulation 4, as responsibility for enforcing that provision lies with the Health and Safety Executive.

209. We accept that it is theoretically possible for a claimant to argue that there is an implied or express contractual term that his working time will not exceed 48 hours a week, but that is not the way in which the claimant has put his case.

210. In any event the claimant signed two opt outs agreeing to work more than 48 hours a week, so the limit on working time set out in Regulation 4 of the WTR did not apply to him.

211. The Tribunal does have jurisdiction to hear complaints that the claimant has been denied his right to weekly rest under Regulation 11 (1) of the WTR. Such complaints must however be presented to the Tribunal within 3 months of the claimant being denied the right to exercise the right.

212. For the reasons set out above, the claim that the respondent breached Regulation 11(1) is out of time, and time will not be extended to permit a late claim. The Tribunal does not have jurisdiction to hear this complaint.

213. In any event, we accept the respondent's evidence that the claimant volunteered to work overtime and was happy to do so. It would in our view have been preferable if the respondent had ensured the claimant took at least 1 day off a week, but it was not a breach of Regulation 11 in the circumstances.

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Employment Judge Ayre

13 July 2022

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JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE