# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Smith

**Respondent:** Jayar Components Ltd

**Heard at:** Croydon (by CVP) **On:** 17-19 October 2022 and, on further reserved deliberation, on 14 December 2022

**Before:** Employment Judge Parkin
Ms N Christofi
Mr W Dixon

**Representation**
Claimant: In person
Respondent: Mr N Tapsell, Counsel

# JUDGMENT

**The unanimous Judgment of the Tribunal is that:**

**1)** The claimant was unfairly dismissed;

**2)** The claimant, who had a disability at all material times, was treated unfavourably by the respondent because of something arising in consequence of his disability in respect of his dismissal, contrary to section 15 of the Equality Act 2010;

**3)** The respondent failed to make reasonable adjustments for the claimant under its duty at section 20, contrary to section 21 of the Equality Act 2010; and

**4)** Remedy is adjourned to a date to be fixed

# REASONS

1. The claim

The claimant presented his ET1 claim on 23 November 2020, claiming unfair dismissal and disability discrimination. He set out that he had been demoted

from his manager position to a phone operator whilst he was shielding as instructed by the NHS during the Covid lockdown period. Later he was dismissed when he refused to return to work at a new branch he considered was not Covid-secure.

2. The response

The respondent resisted all his claims. It admitted the dismissal, contending the claimant had been dismissed for refusing to return to work after his furlough when instructed to do so in August 2020 when it had implemented all necessary Covid precautions. It dismissed him fairly following a fair process for gross misconduct because he was absent without authorisation.

3. The case management hearing and the issues

Since the content of the pleadings was sparse, the background was explored and issues were identified at the case management hearing before Employment Judge Andrews on 22 December 2021. She summarised the background thus: The claimant says that due to his medical conditions he had to shield during the pandemic. He was initially furloughed but was then required by the respondent to return to work. He said that it was unsafe for him to do so. The respondent says that they had arranged a Covid secure office for him to work in and that it was reasonable to instruct him to return. When he refused they followed a process and dismissed him due to his failure to return to work as required. The claimant says this was substantively unfair because the office they required him to work in was unsafe and other employees had (pre-Covid) been allowed to work from home (e.g. Lionel). The respondent says that it was not practicable for the claimant to work from home. As refined at the final hearing, the issues were identified as follows:

3.1 Unfair dismissal: The Tribunal will have to determine what was the reason or principal reason for the dismissal. Was it, as alleged by the respondent, the claimant's conduct in failing to attend to work and, if so, did the respondent genuinely believe the claimant had committed misconduct and act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. Further, was dismissal within the range of reasonable responses to the claimant's conduct.

3.2 Disability discrimination: The claimant says that he is and was at the relevant times disabled on account of each of:

a. having had a splenectomy as a child which has left his immune system severely compromised;
b. asthma; and
c. atrial fibrillation.

At the start of the final hearing, the respondent conceded that the claimant was disabled at the material times leading up to his dismissal and that it had knowledge of the main impairments that made him disabled.

3.3 The claimant contends the respondent breached its duty to make reasonable adjustments in that their practice of requiring him to work in the office put him at a substantial disadvantage for the reasons above in comparison with persons who are not disabled and that practice should have been adjusted to allow him to work from home. The respondent says that such an adjustment would not have been reasonable, since nobody carrying out sales work like the claimant could work from home.

3.4 The claimant also says that he suffered discrimination arising from his disability as he was dismissed because of his inability to work in the office which was a consequence of his disability. At the final hearing the respondent acknowledged that dismissal was unfavourable treatment for a reason arising in consequence of his disability; it relied upon the defence of proportionate justification put forward at the case management hearing that dismissal was a proportionate means of ensuring the business was profitable and efficient with no adverse impact on colleagues and customers.

## 4. The final liability hearing and evidence

4.1 It was agreed that the respondent would call evidence first, followed by the claimant's evidence and that he would make the final closing submission on liability. The evidence and submissions on liability were completed in 2½ days. The Tribunal panel reserved its judgment but was unable to conclude its deliberations on the third afternoon and resumed them at the first available opportunity.

4.2 The respondent called its Finance Director Caroline de Lucy; Payroll & HR Officer, Joanne Burgiss; Operations Manager, Nick Allen; and Regional Managers, Kevin Mallett and Paul Evans. The claimant gave evidence on his own behalf; he produced a statement from his former partner, whom he named but who did not give oral evidence. However, the Tribunal explained that it could not take account of this statement, which was unsigned and undated from a person not originally identified. There was a Bundle of Documents, indexed and separated into Sections A to J.

## 5. The facts

The Tribunal made the following findings of fact on the balance of probabilities.

5.1 The respondent is a major car parts distributor with 39 branches in South East England and some 400-410 employees. It is a family business, founded by John Ratcliffe and with his children now as directors: Caroline de Lucy, Finance Director, and Nick Ratcliffe, Managing Director.

5.2 At its Maidstone headquarters, there were two employees who worked on payroll and all HR matters for the company, neither of whom had any HR qualification: Ann Hepper, the HR/Payroll Manager and her assistant, Joanne Burgiss. When needed, they sought guidance from their accounts provider's employment department or external solicitors. Joanne Burgiss had not dealt previously with any disabled employees covered by the provisions of the

Equality Act 2010. The highly experienced Operations Manager, Mr Allen, who reported to the Directors and to whom the Regional Managers reported, had also never dealt with a disabled employee protected under the 2010 Act and there was no evidence that anyone else within the respondent had such experience.

5.3 The claimant, who was born on 19 January 1983, commenced employment on 27 April 2009 at Tunbridge Wells. From late 2011 he was the Branch Manager at Tunbridge Wells branch overseeing all aspects of the branch in particular sales in accordance with set targets. He was a very committed manager who took his role extremely seriously and worked very hard for the company, although he worried a great deal about his management ability and sales performance.

5.4 The claimant was open with the respondent from the outset about his medical condition. As a child, he had undergone a splenectomy (removal of the spleen), such that he remained in continual need of prescribed medication and was highly vulnerable to infection. This was expressly referred to in his application for employment where he stated he was on medication for a removed spleen (D1). He also had asthma which itself required prescribed medication.

5.5 He was highly regarded for his organisational skills and understanding of the business by the Operations Manager, Nick Allen, who had formerly been his Regional Manager, although Mr. Allen was less impressed with his ability to bring in sales and reach his targets. He was used to train other staff in the company's systems and procedures.

5.6 Mr Allen was very well aware of the claimant's consistent and conscientious approach to hygiene and cleanliness in the whole branch and especially the toilet and his workstation areas because of his medical condition. In about 2017/2018 when the Tunbridge Wells branch was being modernised, the claimant raised a hygiene and cleanliness concern with Mr. Allen that the designs meant the WC led off the kitchen giving rise to a potential hygiene problem if users did not wash their hands. The Tribunal preferred the claimant's evidence on this point to that of Mr. Allen who, despite acknowledging there was modernisation at the branch at the same time, denied there had been any such conversation. However, the designs were not changed.

5.7 The claimant had an excellent attendance record until 2019. He did not have any time off in his first 8 or so years notwithstanding his condition. In April/May 2017, he had 3 days off due to a minor operation. Then in July 2019, he needed a fortnight off work when he had knee surgery.

5.8 However in September 2019 he needed to attend A&E as an emergency due to a heart condition and was diagnosed with atrial fibrillation, irregular heartbeat, requiring intravenous heart medication and cardioversion (B44). From then on, he needed heart medication. He was again off and unfit for work for 10 working days. There is no evidence of any return to work interviews with the claimant by senior managers or HR after either of these longer sickness

absences; as Branch Manager, the claimant simply completed the Self-Certification form himself without sign-off by his own manager.

5.9 Shortly after this, the claimant needed time off for a heart appointment at hospital which he attended over and around his lunch hour. Nick Allen expressly directed payroll to pay him only for the hours he worked i.e. to deduct over 3 hours for the attendance. Two days later Mr Allen directed that 6 minutes pay be deducted when the claimant was 6 minutes late at work, having collected his medication. The claimant complained about these deductions and after the intervention of his line manager, Kevin Mallett, Mr. Allen gave directions for the pay to be made-up.

5.10 In July and August 2019 and then on 27 November 2019, Nick Allen sent a rallying email to Kevin Mallett and all branch managers about poor sales and then especially about low margins, which John Ratcliffe was extremely concerned about (J17, J18, J19 and J24). These were general emails not expressly aimed at the claimant.

5.11 On 28 November 2019, the claimant met John Ratcliffe for the first time in his ten years with the company when the founder visited his Tunbridge Wells branch. The claimant raised some of his own concerns that the company was run on “scare tactics” towards managers and staff in the branches. He said he felt his health condition meant he had a high chance of a stroke, to which Mr Ratcliffe replied: “Me too”. Whilst he did not feel Mr Ratcliffe was very sympathetic in this meeting especially since Mr Ratcliffe said he did not want him to “go too deep” and that he did not want to hear about anybody doing wrong towards the claimant, Mr Ratcliffe did tell the claimant he could “reach out” to him if ever he needed to. In the event, when the claimant tried to telephone Mr Ratcliffe when things were difficult for him in January 2020, his calls were not returned.

5.12 By December 2019, Kevin Mallett was asking the claimant to put forward his plan for improving sales and margins at Tunbridge Wells. The claimant replied on 7 January 2020 that he was not sure what else the branch could do that hadn’t been tried. When Mallett expressed disappointment at his response, he explained on 8 January that he and the other staff members at the branch had discussed it but come up with nothing constructive, although he made some suggestions such as getting more orders from local customers (K1-2).

5.13 On 16 January 2020, Nick Allen went with Kevin Mallett for a meeting with the claimant. They took him to a local coffee shop for the meeting, which was a long meeting lasting about an hour. The claimant was surprised and suspicious at this form of meeting, with two managers taking him away from his branch, which had never happened before; he therefore decided to record this meeting.

5.14 The meeting was prompted by the senior managers considering the sales figures at Tunbridge Wells poor but also by the claimant very actively raising his concerns that stress at work was causing him health problems (very soon after his heart condition diagnosis and against the background of his absences from work in 2019).

5.15 Nick Allen certainly believed the Tunbridge Wells branch was under-performing for its locality. Mr Allen also pressed for more information from the claimant about his heart condition: whether he had actually suffered a heart attack and his heart had actually stopped. Mr Allen repeatedly told the claimant he was valued and his employment was secure. He referred to the claimant knowing the way the respondent worked inside and out, knowing the systems and having trained staff in the past and being a very good parts man. He put two options to the claimant: either move to another branch nearer home, not as manager but retaining his salary, with no branch and precise role then specified or stay as Manager at Tunbridge Wells but increase the branch sales by a significant amount for 3 months from February to April 2020.

5.16 Although in oral evidence when dealing with the note of the meeting (K3): "Maybe we need to see Medical records?", Nick Mallett suggested that this was passed on to Ann Hepper in HR, there is no documentary or other evidence showing a specific referral to HR or the respondent seeking medical input or any other follow-up at that stage (or at any time from the claimant's heart episode in September 2019 and January 2020 or after the 16 January 2020 through to the termination of his employment).

5.17 By letter on 20 January 2020, the claimant told Mr Mallett he was choosing to stay on as manager at Tunbridge Wells, referring to his past sales success there (K4-5). He referred back to exceptionally good sales figures in 2018 which he felt had made 2019 look less impressive. He said he felt he was being given an unfair choice considering what he had done for the respondent so he had no option but to carry on as manager and try to take the branch forward. He concluded: "If you then decide to remove me from Tunbridge Wells then it has nothing to do with my effort and commitment."

5.18 He was initially congratulated by Mr Mallett for making his sales and margin targets in January (K6), making sales of £55K. The new targets set for Tunbridge Wells were: February £53K at 31% margin; March £60K at 31% margin, and April £58K at 31.5%% margin. The respondent expected him to meet each of these 3 monthly targets, but claimant did not meet his February sales and margin targets, falling short with sales of £49,850 and margin 30.66% (K7).

5.19 On about 21 March 2020 the claimant began shielding on NHS advice because of Covid-19 since he was regarded as clinically extremely vulnerable (H3). In particular because of his splenectomy, he was extremely vigilant about his safety and concerned about the risk of contracting Coronavirus. Initially, he chose to shut himself away in his "studio" not seeing any other people including his autistic son who normally had regular contact visits with him.

5.20 When national lockdown was announced with effect from 23 March 2020, the respondent's business was identified as an essential trade, meaning employees could continue to work in the branches and deliver to garages but with their premises closed to the public (F4).

5.21 From the end of March 2020, the claimant's situation was converted to furlough in accordance with the Government's Coronavirus Job Retention Scheme instead of shielding, still on the basis that he was not carrying out work on behalf of the respondent.

5.22 On 3 April 2020 Kevin Mallett wrote that the claimant had not met the February target but it had been decided to see what he could achieve in March (K7). As at 18 March, sales were £31,808 with projected sales of £54,188 and margin of 28.89%. in the event the month ended on sales of £48,863 with a margin of 29.71%, against the target of £60K sales and 31% margin. He wrote:

> "As the targets set were not achieved whilst under your management, we now need to move you to a non-managerial role and will therefore relocate you from Tunbridge Wells to a branch closer to where you reside in a less demanding position".

5.23 On 23 April 2020 the claimant declined the offer of Skype for a meeting with Kevin Mallett, so the discussion was held by telephone which Mallett recorded and later had transcribed. They discussed the 16 January 2020 meeting and the claimant's option to remain as Tunbridge Wells manager and his performance there. Mr Mallett said the respondent still felt the claimant could do a job for them and a move would not affect his wages or hours; he acknowledged the claimant was very good on the phones, good at the parts and the systems and suggested a parts adviser/parts person role without the responsibility of being branch manager. The claimant made clear he was not interested in a transfer to St. Leonards, the only branch identified and there was no resolution (K9-15).

5.24 In another telephone conversation with Mr Mallett on 11 May 2020 (K16-18), the claimant explained that he did not want to work in St. Leonards where he had previously worked but did not enjoy working. Mr Malik told him there were no jobs in Head Office currently and nothing coming up in the near future. The claimant asked whether the only option was being a phone operator, since Nick Allen had told him at the 16 January 2020 meeting there could be different things like training and warranties. Mr Mallett replied that these were not separate roles but jobs done by people whose main job was phone operator as part of the role. The claimant said he would not be interested in stores jobs and driving jobs. He asked whether Ann Hepper had any more information about the new second phase of furlough; Mr Mallett replied that he believed the current system would remain until the end of July 2020 and more information would be released shortly. He said the respondent had started to bring back people at some branches where business had picked up and needed more but would not bring back those who were critically at risk or shielding. Mr Mallett said he would come back to the claimant with other options.

5.25 Later on 13 May 2020, in a second recorded telephone conversation with claimant (K18) Mr Mallett offered a role at Parkwood (Maidstone), although he understood the starting date could not be set. The conversation ended: "So to confirm you are happy enough with Parkwood although for the moment you can't put a date on it further down the line we can discuss dates for return to

work". The claimant agreed to this move where he knew and greatly respected the Branch Manager, Paul Isted.

5.26 Accordingly, on 14 May 2020 the respondent wrote to the claimant confirming that he had "…agreed to the move to Parkwood on your return to work and that your current salary and working hours will remain the same… We look forward to seeing you back at work as soon as it's safe for you to do so and hope you're looking forward to your new challenge at Parkwood alongside Paul Isted & team" (D15). The letter enclosed a new contract of employment, which was signed on 21 May 2020 and returned by the claimant (D16-25).

5.27 On 22 June 2020 in a formal document to those shielding (F7-15), the Government changed its advice for those shielding in two stages from 6 July and then from 1 August 2020. The first stage permitted meeting with up to 5 others outdoors, while maintaining social distancing, no longer observing social distancing with members of the household and the possibility of forming a "support bubble" with another household for single parent households. The second stage involved pausing the shielding regime but continuing to keep the claimant and others on the shielded patient list. At that second stage, the advice was that he could go to work, if he could not work from home, as long as the business was Covid-safe. Otherwise, he could go out to buy food, to places of worship and for exercise still maintaining strict social distancing and should remain cautious as he was still at risk of severe illness if he caught Coronavirus, such that the advice was still to stay at home where possible and, if he did go out, follow strict social distancing.

5.28 On 14 July 2020 a risk assessment was carried out at Parkwood branch (F21-24). However, this was carried out in terms of the safety of different processes and areas. There was no reference to the upstairs office or to any arrangements the respondent later proposed to make for the claimant.

5.29 On 27 July 2020, Ann Hepper wrote to the claimant that due to the continued increase in business and in line with government guidance they were recalling employees from furlough to branches where there was a business need, and that the government had advised that those shielding should return to work from August (H11-12). It said that his branch at Maidstone (Parkwood) was trading at pre-Covid levels and there was a need for his return, stating it had implemented safe working practices and procedures at all branches. Since he had said his doctor did not feel he was medically fit to return a sickness certificate to confirm he was to remain absent from the workplace whereupon it would place him on statutory sick pay from 1 August 2020.

5.30 That day, 27 July 2020, the claimant had a telephone conversation with Paul Evans, Regional Manager for the region covering Parkwood. Paul Evans told him that his wife had or had previously had Covid, that the respondent's premises could never be 100% secure and that staff still often passed within 1 metre of each other. No suggestion of providing him with a separate office upstairs was made during that conversation.

5.31 On 10 August 2020, Ann Hepper wrote to the claimant following a conversation with him earlier that day (H13). She attached her 27 July letter She wrote:

> "You were required to return to work from furlough on 1 August, when you discussed with Paul Evans regarding your required return to work, Paul confirmed that there have been adjustments made to the Maidstone branch to ensure it is Covid-19 secure and in compliance with government guidance and therefore safe for you to return."

Strictly, her earlier letter had not required him to return. On this occasion she set out that whereas she had previously agreed that he could self-certify that he was unfit for work for 7 days, the respondent now required a doctor's certificate to this effect. If his doctor was not prepared to sign him unfit for work then his continued absence would become unauthorised and be taken further within the disciplinary procedure.

5.32 On 14 August 2020 he emailed the respondent his new GP Fitness to Work Note (E19/H19) which stated he may be fit to work with adaptions:

> "In view of his current medical conditions he should only return to work if the workplace is guaranteed to be Covid-secure according to government guidance. Alternatively he should work from home."

5.33 This spurred the respondent's managers to discuss what arrangements could be made for the claimant to return to work, but there was no further discussion or consultation with him about this. Paul Evans gave evidence (A37, para 5) that he decided after his conversation with the claimant on 27 July to make the upstairs office a separate office for the claimant, but expressly confirmed in oral evidence that the content of para.6 where it stated that he and Ann Hepper contacted the claimant by phone explaining that they would be altering the upstairs office (for him to occupy) was not correct. There is therefore no evidence of any further discussion or consultation with the claimant about return to work arrangements ahead of the letter of 20 August 2020.

5.34 On Thursday 20 August 2020 Ann Hepper (H14-15) wrote to the claimant enclosing 3 photographs of the upstairs room at Parkwood which the respondent proposed to make into a secure office for him (H16-17). It intended that there would be no face-to-face working with the public and that he would communicate with other staff and customers by phone, and staff also by intercom. The respondent had installed a computer and phone line. She wrote:

> "As you are aware the nature of your position at Maidstone does not allow for working from home, we have arranged at Maidstone for you to have your own office (Photographs attached), which when anyone enters they will remain, in accordance with government guidance, 2 metres away from you or 1m with risk mitigation where 2m is not viable. As suggested by the government for those shielding alternative work should be arranged, we have gone to lengths to arrange a role for you at the Maidstone branch so you do not have to work in public areas or face to face with the public/customers.
>
> You will be provided on your return to work with sanitizer equipment for you to maintain the sterile working area, you will be working with your

> back to any open areas so there will be no face to face contact, unless you choose to face someone, when you and they must wear masks. There is an onsite risk assessment which all employees must today to for covered secure working practises and signage throughout the site reminding people of their responsibilities…
> If you do not return to work from Monday 24 August your absence will be considered without authorisation. We do not want to consider a further period of unpaid leave as the branch is extremely busy and there is an abundance of work to do, as explained to you furlough leave is therefore no longer an option."

That letter gave the impression that the move to Maidstone (Parkwood) was a specific response to or adjustment for the claimant's health vulnerability, rather than the result of poor branch sales performance and suggested there would still be contact with colleagues at work even though none with the public. Its implication was very much "Take it or leave" i.e come back to work or else.

5.35 The claimant felt the photographs showed a cluttered office with a clocking in machine and numberplate making machine still present. Although the respondent could easily have moved the clocking machine out and arranged for the claimant to work the number plate machine or removed that too, it did not tell him so or that other staff would not be entering the upstairs office and that he would have a separate entrance. Given the reference to 2 and 1 metres in the letter, that was not the claimant's understanding.

5.36 Instead of seeking medical input, the only correspondence with the claimant's GP is the respondent's letter of 20 August 2020 to the GP practice (H18-19) in which it enclosed its letter to the claimant requesting his return to work in case the claimant wished to discuss the matter again with his doctor. It did not set out in writing to the claimant that it was doing so.

5.37 The claimant replied swiftly on 21 August 2020 (H20):

> "Thank you for keeping the pressure on me to return to work during this unprecedented pandemic. All the time they're limitations in this country regarding Covid-19 I'll be staying in the safety of my own home where I have control of my wellbeing and safety. After 12 years of loyal service I'm fully aware that the nature of the business isn't Covid secure at Jayar and never will be. I'm sure measures have been put in place that on paper comply with the guidelines the government had put in place but there isn't a 0% chance that I'll contract the virus. I have had Jayar staff confirming this and I'm also in contact with customers who have become friends and this is also contributing factor that I'll be delaying my return. With the ever rising number of new Covid-19 cases and the threat of a 2nd wave I'm keeping a close eye on the situation and I was aiming to return to work mid September.

5.38 By letter dated 24 August 2020, the respondent invited the claimant to a disciplinary hearing. (H22-23). It stated:

> "You have not returned to work as requested today, as I made clear in my previous letter the company takes a serious view of this situation.

> Absence without good cause is regarded as gross misconduct and grounds for disciplinary action, up to and including dismissal.
> We have now reached the stage where the company is considering your dismissal. You are therefore required to attend a formal disciplinary hearing to discuss your absence and failure to comply with the company's absence notification procedure…
> …If you fail to attend the hearing without good cause, it will go ahead without you."

The claimant's right of accompaniment was spelt out and a copy of Disciplinary Procedure was provided. Otherwise, although the letter referred to "our supporting evidence" with its 20 August letter, it was silent about what documentation, in particular medical records, the respondent was going to consider although it had earlier acknowledged the claimant's statement of fitness for work dated 14 August (H19). It concluded:

> "I sincerely hope that you will reflect on the seriousness of the situation and that you will attend the hearing. If, for any reason, you are unable to attend or if you have any queries on the contents of this letter, please contact either Paul Evans… or myself..."

No suggestion was made by the respondent that the hearing could go ahead with the claimant participating by telephone or by video.

5.39 On 25 August 2020, the claimant replied: "Like I said previously I will not be leaving my home so the disciplinary will have to take place in my absence." (H30).

5.40 On 25 August 2020 (H31). the respondent wrote: "If you are not attending the disciplinary we are happy for you to provide a written submission to be received at our office... stating your defence. Attached is a further copy of our invitation under company's disciplinary procedures regarding gross misconduct and the sanctions which may be applied as we are considering summary dismissal for unauthorised absence…". The claimant replied that it should use previous emails as his written submission.

5.41 On 27 August 2020 the claimant's employment was terminated by Paul Evans after a discussion at Head Office between him and Ann Hepper. No notes of any meeting that day, still less a formal hearing, have been provided. Joanne Burgiss was not in attendance although the letter calling the claimant to a disciplinary hearing said she would be there to take notes. In reality, there was no disciplinary hearing meriting that description but only a discussion between Ann Hepper and Paul Evans, with no clarity of what documentation they considered. Although Mr Evans gave oral evidence that there was a pack of case notes ready for him including emails between Ann Hepper and the claimant, the sales targets Mr Mallett and Mr Allen had required and the photographs of the office, this had not been shared with the claimant and no list of contents was in evidence before the Tribunal.

5.42 Mr. Evans' witness statement only dealt with the meeting briefly at para.9. He had never met the claimant and had only had two telephone conversations

with him. He took his lead from the Payroll/HR Manager Ann Hepper and the outcome was pre-ordained. He gave clear evidence that one aspect they took into account, as well as the claimant's refusal to return to work, was his not reaching the targets at Tunbridge Wells set by his previous manager. In Mr Evans' words: "That was relevant because that was part and parcel of what I was advised by HR". There was a shift in Mr Evans' evidence from admitting the outcome was pre-ordained to later disputing this and saying he had made the final decision to dismiss (after cross-examination, when questioned on the point by the Tribunal). However, this change was wholly unconvincing after his clear evidence earlier that he was advised by Ann Hepper the claimant had committed gross misconduct, that there was no discussion about the sanction and that nothing the claimant could have said would have changed the decision to dismiss him.

5.43 Mr Evans' letter of dismissal dated 27 August 2020 (H32-35), stated at point 1 that the decision to dismiss on grounds of gross misconduct was based on evidence that:

> "On 13 May 2020 you had a telephone conversation with Kevin Mallett regarding the need for you as branch manager of Tunbridge Wells to return to manage your branch. Due to shielding you said you could not return to work and a discussion was held about placing a manager at Tunbridge Wells and moving you on the same terms and conditions to another branch…".

This assertion wholly contradicted the respondent's case that the claimant was transferred from being Branch Manager at Tunbridge Wells because of poor sales performance there. Thus, the letter gave the wrong context for the move at the outset.

5.44 Mr Evans was unaware of the claimant's splenectomy and clinical vulnerability providing the background to his shielding. In oral evidence, he acknowledged the possibility that, had he known of the claimant's background of splenectomy, medication and clinical vulnerability, he may have or would have considered another sanction such as an ultimatum or final written warning. Point 5 of his dismissal letter referring to the GP Fitness to Work note of 14 August 2020 did not mention the claimant's specific conditions listed by the doctor and overlooked the alternative suggestion of working from home made in it. Mr Evans had never discussed with Ann Hepper the claimant working from home or any possibility of him working at Head Office.

5.45 His letter concluded:

> "Your mitigation for the disciplinary hearing was based on your e-mail of 21 August in which you said you would not be returning to work when we requested but would keep an eye on the situation and with the threat of a 2nd wave and increase in Covid-19 cases you were aiming on returning to work mid- September.
>
> As all staff at Maidstone have now returned to working their full hours and are exceptionally busy the need of the business is to have this position manned. If you are not prepared to return to fulfil your contract for this position then we need to look at other options to ease the work pressure on the staff at this branch.

> Therefore I have decided that your conduct constitutes gross misconduct and your explanation about not returning as you do not believe Jayar are Covid secure in accordance with the guidance given by the government of the measures we have taken to ensure your safety of providing an office remotely from other all other staff was not acceptable because we have followed all guidance available and given you a remote working location with all necessary PPE available to you. Having taken all the facts and circumstances into consideration, I have decided to summarily dismiss you from your employment with immediate effect.

5.46 The claimant appealed his dismissal by letter dated 1 September 2020. Although on 3 September 2020 he said he would not attend an appeal hearing in person, there was no suggestion of a telephone conference or video hearing.

5.47 Originally the appeal was to have been heard by Nick Allen, but he was named by the claimant in one of the 3 letters of grievance he provided on 9 September 2020 entitled "Harassment and Bullying", Discrimination, and Unfair Dismissal and Wrongful Dismissal (H39-43). In the first he made many historic allegations against Nick Allen and included his complaint about Mr. Allen stopping payments in 2019 and the unsympathetic response he felt he had from John Ratcliffe when he met him. In the second and third, he expanded upon his Covid-security concerns, referring to the photographs sent him and setting out that he had been demoted from his manager's role due to shielding instructed by the NHS, how Paul Evans had described how closely employees passed each other and how the recent infection figures had soared.

5.48 The Finance Director, Caroline de Lucy, took over the appeal and dealt with it on paper without a hearing. By letter dated 22 September received by the claimant on 30 September 2020, she dismissed the appeal and rejected the grievances (H46-49). She set out that the respondent company had remained open throughout the pandemic and strictly adhered to Government guidance so as to be Covid-secure and listed the specific efforts the respondent to gone to make him a secure working environment at Parkwood: creating a separate workspace upstairs, putting in a new telephone line computer workstation and intercom system to communicate with colleagues within the counter area, having provided him with photographs in advance. She made no reference to the GP's reference to working from home or to moving the clocking-in or number plate machines or applying a deep clean to the premises and did not deal with the claimant's assertion that Paul Evans had told him the premises could never be fully secure because of the nature of the trade and how employees passed less than a metre from each other.

5.49 She also found no evidence of discrimination or bullying and rejected his separate grievance complaints, in the course of which she rejected the contention that he had been demoted from Branch Manager because he was shielding, despite the dismissal letter suggesting this was so.

5.50 On 5 October 2020, the claimant sought to appeal his grievance and dismissal outcomes to Nick Ratcliffe, Managing Director but on 6 October 2020

Mr Ratcliffe refused the appeal which he regarded as a further appeal against dismissal when he had already exercised his right of appeal (H52).

5.51 As a sales operation based upon customers attending at branches and deliveries being made from branches, the respondent had no general pattern of employees, whether based at Head Office or in branches, working from home with access to the company IT systems. Its witnesses referred in general terms to the security concerns about commercial security or cyber security which working from home would give rise to but gave no specifics. However, the evidence was that directors could work from home. In addition, the respondent employed an IT administrator, Lionel Crook, who was normally based at Aylesbury branch but who worked remotely from all branches. Mr Crook worked alone and was not customer-facing. In the summer of 2020, special arrangements were made permitting him to work from home for several weeks because he was the carer for his mother who was terminally ill.

6. The parties' submissions on liability

6.1 The respondent dealt with events in 2020 in great detail. It submitted the Tribunal should look at the claimant's entire employment and how much the respondent knew of his disability at relevant times. The sick note of 14 August 2020 referred to his splenectomy and heart condition; his managers knew about the splenectomy and his heart condition in 2019 was common knowledge. He had an excellent attendance record, with just a short absence in 2017, then a knee operation and later heart issues in 2019; the respondent was fully aware of the circumstances of his absence. This played into the conversation with him about the performance of the branch. During 2018 to 2020 Nick Allan was always chasing sales. Although the claimant took great exception to the deductions from pay in 2019, pay was swiftly made up after Kevin Mallett became involved; it was a "storm in a teacup". His emails on 7 and 8 January 2020 followed a discussion with Mallett about productivity at Tunbridge Wells; the claimant said he had tried everything to improve sales. On 16 January 2020, Allen and Mallett told him how much they valued him but were concerned about sales at Tunbridge Wells and his heart condition given the stress and anxiety as Branch Manager; alternative employment would play to his strengths as an administrator, protect his salary and be closer to home. The employer recognised his problems as Branch Manager and was seeking a solution, but he declined saying he wanted to continue and make a success there: "If you then decide to remove me from Tunbridge Wells it is nothing to do with my effort and commitment"; the respondent accepted this - it was simply the lack of sales. Had the claimant felt the February-April targets unrealistic, you would expect him to challenge them or say: "They're a bit high but I will try and make them". By 18 days into March the branch was already not reaching target; then the claimant was instructed to shield and put on furlough once it was available. He was at home, still as Branch Manager, but there is no evidence he said he could work from home - that was a late addition from him in the proceedings. Furlough was only an option not a requirement since the respondent's business did not close; its branches stayed open and its delivery drivers were still on the road. By 3 April 2020 the respondent decided to move him as targets were not being met. On 23 April he rejected the option of a move to St Leonards, the branch

closest to his home. On 15 May 2020, Mallett confirmed there were no Head Office jobs but they later agreed a position as Senior Parts Adviser at Parkwood with a manager the claimant said “he loved”. This was not forced on him and the respondent felt it a solution he was entirely happy with. A new contract was sent out confirming his protected salary and hours (so he could still see his son at weekends) with a similar commute; he could still use his skills to the full but did not suggest he could work from home in this role.

6,2 The respondent’s letter of 27 July 2020 referred to the Government’s new guidance indicating restrictions would be relaxed and the advice to shield would be paused. On 10 August 2020, the claimant said his doctor had told him he should not return to work; this is not what the doctor's certificate said when it was received. The respondent felt working from home was not an option for branch or even Head Office employees; there was no specific consideration of it because they were aware that the telephone systems would not support someone not at the branch and the security of the computer systems prevented it. On 20 August 2020 the respondent referred to the doctor’s note, saying work at Maidstone did not allow working from home but a separate office would be provided and sanitising equipment available; there would be no contact with public/customers and an online risk assessment; if he didn't return, he would be absent without leave. Whilst it was accepted the letter was unhappily worded, referring to 2 metres and 1 metre distancing, the clear evidence is that the respondent intended the claimant to be separate in the upstairs office, with a separate entrance. The only document from the claimant is his e-mail of 21 August 2020. Despite the GP letter, he said he was not returning yet and the respondent could never make the office Covid-secure.

6.3 It contended its letter on 24 August 2020 shows how seriously it took the matter, explaining that unauthorised absence without just cause was gross misconduct and hoping he would reflect on the seriousness of his situation and attend the hearing. When he refused this, he was invited to provide a written submission but merely said to use his previous emails. He made no reference to his health conditions, the particular reason he could not come in or for his stance once the Government guidance on shielding had changed. He had opportunity to make written submissions which might have raised questions the respondent ought to have looked into. Since the GP said he could return to a Covid-secure place of work in accordance with government guidance, it was incumbent on him to say why the respondent should ignore the advice or what extra steps it should make. Where there is a conflict between the claimant and Paul Evans, the Tribunal should prefer Evans’ evidence; it was clear all relevant material was considered by the respondent including the GP’s sick note and the claimant’s email before deciding to dismiss. Alongside exercising his right of appeal, the claimant provided 3 grievance letters; when the claimant was asked why he didn’t raise these matters earlier, he said: “I should have done a while ago” making clear he hadn’t raised them formally. He still did not explain why he felt Covid-security was inadequate notwithstanding the GP’s advice. On 22 September 2020, the respondent summarised the claimant’s documents and gave a decision on his appeal and grievance (H46-49).

6.4 The respondent submitted that its actions from 14 August 2020 to 14 November 2020 were all entirely reasonable and supportive of the claimant. There was no justification for his failure to engage in the hearings. Given his clear view that the respondent's office was never going to be Covid-secure, he would not have returned to work.

6.5 The claimant contended that everyone agreed his attendance was outstanding; he was managing his own disabilities and went to great lengths to stay safe. The respondent's witnesses had paid great compliments about his knowledge and procedural accuracy within the company, which was one of the reasons why other branches wanted him as part of their team. There were really only 4 days at the end of August 2020 when they said his absence was unauthorised. The respondent showed not an ounce of compassion for a dedicated member of staff who had worked for a third of his life for the company. His integrity had been challenged. Although he was not proud of recording a few meetings, his judgement on this had served him correctly. He had other recordings. Kevin Mallett said he never had to challenge Nick Allen's decision to reduce wages – but this only happened to the claimant; even if it was a storm in a teacup at the time, it was much more significant when he looked back. He did well on sales targets in February as Mallett confirmed but he never had the chance to complete the last two months.

6.6 The claimant found listening to Paul Evans concerning: he said the disciplinary had been decided before the meeting but then went on to put most of the blame on Ann Hepper; his backtracking was unconvincing - he said twice it was already decided and then when he was pressed, said: "Oh no, no. I got it wrong" and he made the decision to dismiss. Ann Hepper was getting the blame from all the employer's witnesses. Although Paul Evans said he worked closely with Ann Hepper about the lead up to dismissal, his evidence was different about the office selected for him; Evans said noone would enter but Ann Harper had suggested others would enter by referring to distancing. That in turn left the claimant with no faith in what the respondent was doing. Whilst Caroline de Lucy said shielding ended on 1 August, it was only paused and the government recognised that different people would feel differently about their own risk and have different priorities, see F10-11. The shielding programme actually only finished in September 2021 (H55-56). Since the words "clinically extremely vulnerable" were never used in any of the respondent's correspondence especially its dismissal letter (H11), the claimant contended the respondent had refused to accept he was clinically extremely vulnerable; this was consistent with it only acknowledging on day 1 of this hearing that he was disabled. Yet his disabilities were known to everyone including those in other branches; the fact he had had a splenectomy and then had a heart condition from September 2019. People who claimed not to know him would have more clout if they were honest and just said: "We aren't educated in these matters of disabilities - what does it mean?" He maintained he had told both Kevin Mallett and Paul Evans he was extremely clinically vulnerable; Nick Allen also acknowledged he had had a splenectomy and the link to his disabilities. HR were fully aware of his situation. In his application form for the job, he put that he was on medication for his removed spleen; HR should have added atrial fibrillation to the pages themselves. The respondent cross-examined him why

he never asked for work while shielding or on furlough but Nick Ratcliffe, Director, in his letter (H7) in bold and underlined said…" you should not undertake any work whilst you are furloughed." and "… we will contact you as soon as we need you to return". It was urged that he indicated he had no intention to return, yet at H20 he said he intended to return, when there were whispers of an early vaccine. There was never a point when he said he was never coming back to work. With all the information he had and knew, the respondent's office was not a safe place for him to work. He used the photos provided in emails and content of phone calls and relied on news reports.

6.7 The claimant maintained that for him it was about staying alive but for the respondent it felt as if it was about money and power. He could have done plenty of jobs from home. You could get the parts from all over the Internet and order them. To say it is a security risk suggests they did not trust him. Someone in the branch could mirror the computer of someone else or from a different branch. He could have done Head office duties or cold-called customers. He spoke to Kevin Mallett about Head office duties and was told there just wasn't anything going at the time but the respondent could have moved things around to fit him in; he knew their systems inside out, so whether there were vacancies or not they could have fitted him in. Caroline de Lucy said you couldn't do it because it takes more than one day to train. Nick Allen on 16 January 2020 (A5) referred to his wide experience and knowledge of systems. After two weeks following his first vaccine, his immune system should be up to strength and he probably would have gone back to work then but he had no protection against symptoms which could cause death without a vaccine.

7. <u>The Law</u>

7.1 Unfair Dismissal claim under the Employment Rights Act 1996. By section 98:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

> ,,,(b) relates to the conduct of the employee …

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

> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

7.2 Disability discrimination claims under the Employment Act 2010

Disability is one of the protected characteristics within the Act and the first step is to determine whether the claimant has proved he was a disabled person within the meaning of section 6 of the Act, having regard to schedule 1. Although the respondent conceded at the hearing that the claimant was disabled within the meaning of the Act and that it had knowledge of the conditions making him disabled, this was still an issue for determination by the Tribunal.

7.3 Discrimination arising from disability. By Section 15:

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

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim…

7.4 The duty to make adjustments is at Section 20:

(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…

Failure to comply with the duty is at Section 21:

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

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

7.5 Section 39 provides that:

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment…

7.6 For the unfair dismissal claim, the respondent must prove a potentially fair reason or principal reason for dismissing the claimant (here related to the claimant's conduct). Thus, the Tribunal must decide whether the respondent genuinely believed the claimant had committed misconduct. If so, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? There is no burden of proof either way on reasonableness. The Tribunal will consider whether the respondent had reasonable grounds for that belief; at the time the belief was formed, whether the respondent had carried out a reasonable investigation; whether the respondent otherwise acted in a procedurally fair manner and whether the sanction of dismissal was within the range of reasonable responses.

7.7 In respect of the section 15 claim, the respondent admitted the unfavourable treatment of the claimant's dismissal was connected to the claimant's disability and thus because of something arising in consequence of it. On the defence of proportionate justification, it is for the Tribunal to carry out an objective balancing exercise: could different, lesser measures have been applied by the employer? Generalisations will not be sufficient to provide proportionate justification. Where the outcome is dismissal, it will often be the case that the justification defence and the range of reasonable responses will align (but this does not have to be so).

7.8 Under section 20, the adjustment desired must be capable of alleviating the effects of the provision, criterion or practice (PCP) in question, the work arrangement which puts the employee to substantial disadvantage in comparison with the non-disabled employee. The possible adjustment must be shown to have a 'reasonable prospect' of preventing the disadvantage in question (not merely providing an opportunity of avoiding it); if so, the Tribunal should decide whether it was reasonable to expect the employer to have implemented the adjustment.

7.9 The Tribunal had regard to the Equality and Human Rights Commission statutory Code of Practice: Employment 2015 at chapter 5 on discrimination arising from disability, chapter 4 on objective justification and chapter 6 on the duty to make reasonable adjustments.

## 8. Conclusions

8.1 Standing back and considering the claims in the light of its fact-finding based upon the oral and documentary evidence, the Tribunal found three features most significant. First, although carried out with great expedition in late August 2020, the outcome of dismissal had its roots in the discussions about sales performance at Tunbridge Wells, especially on 16 January 2020. Secondly, this respondent had a completely fixed mindset about the impossibility of working from home within its operation; and thirdly, it showed almost complete lack of awareness about its responsibilities as an employer towards disabled employees, particularly about making reasonable adjustments where its work arrangements disadvantaged such an employee.

8.2 Starting with the unfair dismissal claim, the Tribunal first had to determine the real or principal reason for dismissal. Mr Evans in oral evidence said the claimant's poor sales performance when manager at Tunbridge Wells was part of the respondent's decision-making, which was why the sales target figures were relevant and provided to him by Ann Hepper alongside the guidance that the claimant was guilty of gross misconduct in refusing to return to work. In contrast, the content of the dismissal letter suggested that the reason for dismissal was solely his failure to return on Monday 24 August, although this letter was also undermined by the assertion in the same dismissal letter that the basis for the claimant's transfer to Parkwood was his shielding rather than sales performance. Whilst he was ultimately equivocal about his own role in making the decision to dismiss, the primary oral evidence about why the claimant was dismissed came from Mr. Evans who was clear there were there these two factors influencing the decision. The seeds of the claimant's dismissal dated back to 16 January 2020 when, the Tribunal inferred, Mr. Allen "protested too much" that the respondent was not looking to dismiss him. The Tribunal concluded that the claimant's failure to perform as Branch Manager at Tunbridge Wells in terms of sales performance was still held against him and very much a causative reason for dismissal, notwithstanding that the timing and trigger for the dismissal was his refusal to start work at Parkwood. Accordingly, at the first stage under section 98(1) ERA, the Tribunal was not satisfied on the balance of probabilities that the respondent proved the principal reason was the claimant's conduct i.e. his misconduct in the form of the refusal to attend work at the Parkwood branch on 24 August 2020.

8.3 In any event, if the respondent had proved its potentially fair reason, the dismissal would still have been unfair having regard to the reasonableness consideration under section 98(4). A dismissal based on the claimant's conduct of refusing to attend work at Parkwood on 24 August 2020, after a process which can only be described as a "sham" disciplinary hearing, still falls well outside the range of reasonable responses open to a reasonable employer. The respondent's letter of 20 August 2020 was very much: "Come back or else", setting the claimant up for a disciplinary process and likely dismissal. That dismissal came about remarkably swiftly when viewed in the whole timeline under consideration in these proceedings. Whilst the claimant did not assist himself by not engaging in the disciplinary process by any means and relying only on his brief email of 21 August 2020, which did not set out in full his medical history and the basis for his fears as a clinically extremely vulnerable person of catching Covid, there was no real attempt made by the respondent to get to the bottom of his refusal. The brevity of Mr. Evans' witness statement in relation to the disciplinary hearing and his purported decision-making spoke volumes but his oral evidence, notwithstanding the late equivocation seeking to deny that the decision to dismiss was pre-ordained, was even more telling. In purporting to make a decision finding the claimant guilty of gross misconduct for refusing a direct instruction to return to work at the Parkwood branch office from 24 August 2020, Mr. Evans admitted he had no knowledge at all of the claimant's splenectomy condition which was the claimant's first disabling condition and was central to him being identified as clinically extremely vulnerable. Mr. Evans accepted that, had he known of this, it would or may have influenced the finding of gross misconduct and sanction of summary dismissal. The Tribunal

concluded that this was a pre-ordained dismissal in which Mr Evans was directed by Ann Hepper, although it inferred that she was unlikely to have been the original instigator of the decision to dismiss. Whilst Mr Evans' frankness on these matters does him some credit, it considerably undermines the respondent's case that this was a straightforward employee misconduct dismissal where it acted reasonably both in substance and procedurally.

8.4 None of the defects in this flawed dismissal were put right by the appeal process. At appeal stage there was no engagement with the sales performance issue by Caroline de Lucy which, the Tribunal finds, was part of the reason for dismissal. She did not uncover that this was a pre-judged disciplinary process with no genuine disciplinary hearing and bound to result in a finding of gross misconduct and summary dismissal. Although in seeking to deal with the claimant's refusal to return to work, she correctly summarised his concerns as being that: the respondent was not Covid-compliant; it had unfairly and wrongfully dismissed him; and it had not considered his health issues or grievances, she did not explore his explanation and reasons for this: the starting point that his splenectomy and heart condition marked him as clinically extremely vulnerable. She concentrated on the respondent's actions in seeking to ensure that the company was Covid-secure and the changes made to the upstairs workspace at Parkwood branch in concluding his continued absence was unreasonable and unauthorised. Her stance throughout was about the measures the respondent was taking but with no analysis of why the claimant was so dogged in his resistance. Regarding the dismissal and appeal stages as a whole, the respondent acted unreasonably and unfairly in dismissing the claimant as it did.

8.5 Based on the respondent's admission, the claimant's own evidence and the GP letters dated 8 September 2020 (B45) and 22 March 2021 (B44), the Tribunal had no difficulty in concluding that the claimant was disabled at all material times. The removal of his spleen made him vulnerable to infection and in need of life-long medication, his asthma and his heart condition (atrial fibrillation and arrythmia) each required prescribed medication; these made for substantial and long-term effect on his ability to carry out day-to-day activities or would certainly have done so but for his ongoing reliance upon medication. His condition of asthma was little evidenced in the proceedings and had no separate bearing but the respondent had knowledge of the removal of his spleen and consequent need for medication from the start of his employment onwards and then of his heart condition from mid-September 2019.

8.6 Turning to the section 15 disability claim, the respondent admitted that the dismissal was linked to the claimant's disability such that the real issue turned on the defence of proportionate justification: that the dismissal was a proportionate means of ensuring that the business was profitable and efficient with no adverse impact on colleagues and customers. The Tribunal found the dismissal was indeed because of something arising in consequence of the claimant's disability. He would not have been so concerned about the safety and security of his workplace and would not have refused to come to work physically there without his medical conditions which made him clinically extremely vulnerable. His refusal provided the opportunity in time and, as set

out above, as a matter of causation was part of the respondent's reasoning for the dismissal. However, there was never a full discussion with the claimant either about the specific upstairs room arrangements which the respondent proposed for him to return to work at Parkwood or about the substance of his claim that the branch could never be made Covid-secure. The respondent fell short of dealing with the claimant in a proportionate way: there was no evidence of a carefully thought out and reasoned analysis, perhaps because of the respondent's lack of experience in dealing with disabled employees protected by the 2010 Act. Except for a slight reference to a clinically vulnerable employee at Head Office who was very frightened, there was no evidence of who else was returning from furlough to work, whether other employees were still shielding and their relation to those employees who were not significantly affected by the security and sanitisation aspects of returning to work in a branch office. There was a complete blanket refusal to consider making a special case for the claimant over working from home, even though the respondent had taken such a course in the very different situation of the IT specialist.

8.7 Save that it was a busy branch by August 2020, there was little evidence of the impact on the running of Parkwood branch of the claimant's refusal to attend to cover the work on 24 August 2020 or whether his absence could be covered in another way. It could be said the respondent made its task of proving the defence of proportionate justification more difficult in that it had transferred the claimant away from a Branch Manager position. As a matter of logic, it was more difficult to establish that the Senior Parts Adviser role created for him was crucial and his absence from it was severely damaging for the business. Whereas Ann Hepper's letter of 27 July 2020 told him the respondent was "recalling employees to branches where there is a business need", there was no evidence about personnel normally based at other branches and whether they were still on furlough because their branches were not so busy, particularly those who were parts advisers/telephone operators at other branches within travelling distance of Parkwood. The Tribunal concluded that the respondent needed to do much more to prove that dismissal of the claimant on 27 August 2020 was a proportionate means of ensuring its business was profitable and efficient with no adverse impact on colleagues and customers; in the event, it failed to provide sufficient evidence of this. Since it did not establish its defensive proportionate justification, the claimant succeeds in his section 15 claim.

8.8 On the section 20-21 claim, the Tribunal found that there was indeed a provision, criterion or practice, namely the requirement to work in person at a branch office, which put the disabled claimant at a substantial disadvantage in relation to non-disabled employees. The respondent was therefore subject to the section 20(3) duty to take such steps as were reasonable to avoid that disadvantage. The claimant simply suggests the adjustment of being permitted to work from home. Both Lionel Crook, the IT administrator, and the respondent's own directors were able and permitted to work from home. In the case of Mr Crook, although he was in a unique IT role rather than customer-facing, that was not the basis for his permission to work from home which was entirely humane in his personal situation. However, this meant that in terms of both practicability and security it was possible for an employee who was not a

director to work remotely online in the respondent's IT systems when not at a branch or head office. The security concerns about an employee working from home were never fully explained by the respondent, beyond the statement that it was a matter of commercial security or there were cyber security concerns; it was not explained why these did not apply to the IT specialist. The claimant viewed it as a matter of trust - was the respondent saying it didn't trust him?

8.9 The Tribunal found the approach of the respondent constrained by its own lack of awareness of the scope of the duty to make reasonable adjustments. The pandemic afforded the opportunity or forced many employers to reassess the way their individual employees were able to carry on working within the business in different ways; in many organisations, methods of working and employees' existing roles were subject to change. There was no consideration of creating a role for the claimant allowing him to work online, whether based on sales, accounts, warranties, training, marketing, purchasing and the Ebay account or a combination of two or more of these so as to make use of his exceptional parts, sales and systems knowledge for the benefit of the business. Mr Mallett had said on 11 May 2020 that training and warranties were part of an existing role rather than roles in themselves which exemplifies the respondent's inflexibility of approach. The Tribunal concludes that an adjustment which would have had a reasonable possibility of avoiding the substantial disadvantage to the claimant of the blanket requirement to work from a branch would have been to permit him to work from home in this way as a temporary measure until shortly after his first vaccination. This is because his suggestion in his 21 August 2020 email of a possible return in mid-September 2020 relied upon the availability of an effective vaccine by that time. Such an adjustment permitting the claimant to work from home using the respondent's IT system with telephone communication to Head Office, branches and other employees could have been strictly time limited and reviewable after 4 months. In these circumstances, the Tribunal finds a breach by the respondent of its duty to make reasonable adjustments.

8.10 Remedy: Issues relating to remedy if the claimant succeeded were not expressly identified in the initial Case Management Order. On a fuller deliberation, the Tribunal concluded that it lacked sufficient evidence from the parties on which to make a determination providing for a percentage reduction of compensation under "Polkey" principles i.e. to reflect the chance that the respondent may later have dismissed the claimant fairly or his employment would otherwise have ended in any event. It is open to them to present their evidence about this at a remedy hearing.

8.11 Determination of remedy is adjourned to a date to be fixed, if need be. All aspects will be open for determination including the Polkey issue above, as well as reinstatement/re-engagement, compensation for unfair dismissal and disability discrimination including for injury to feelings, mitigation of loss, uplift/reduction for and breach of ACAS Code of Practice on Disciplinary and Grievance Procedures. The parties should notify the Tribunal office by 56 days from the date this judgment is sent out to them whether they wish a Remedy Hearing to be listed. The hearing will be before the same Tribunal by CVP video,

with an allocation of one day. The claimant must provide an updated Schedule of Loss to the respondent and the Tribunal by 28 days thereafter. A new remedy hearing Bundle, indexed and consecutively paginated, should be agreed between the parties following any further disclosure of documents including those relating to the claimant's job search and mitigation of loss by two months before that hearing, with exchange of witness statements for the remedy hearing from the claimant and any witness to be called to give oral evidence on the behalf of the respondent (setting out their primary evidence in respect of injury to feelings, mitigation of loss, Polkey issues etc.

Employment Judge Parkin

Date: 27 December 2022