EMPLOYMENT TRIBUNALS

Claimant:	**Mr R Perryman**
Respondent:	**Ellis Event Power Services Limited (1) Mr G Ellis (2)**
Heard at:	**Exeter** **On: 13-14 February 2022**
Before:	**Employment Judge A Matthews**
Members:	**Mrs V Blake** **Ms H Scadding**
Representation: **Claimant:**	**In Person**
Respondent:	**Mr T Challacombe of Counsel**

UNANIMOUS RESERVED JUDGMENT

1. By consent, Mr Grant Ellis is added as a respondent in these proceedings.

2. Mr Perryman's claims that he was discriminated against because of the protected characteristic of disability by reference to sections 13 (direct discrimination) and 39 of the Equality Act 2010 are dismissed.

3. Mr Perryman's claims that he was subjected to discrimination arising from his disability by reference to sections 15 and 39 of the Equality Act 2010 are dismissed.

4. The Respondents discriminated against Mr Perryman in that they failed to comply with their duty to make reasonable adjustments by reference to sections 20 and 21 (duty to make adjustments and failure to comply with duty) and 39 of the Equality Act 2010. Specifically, they failed to provide risk and medical assessments of Mr Perryman's fitness to drive a forklift truck and a Company vehicle in a timely way.

5. Mr Perryman's claims that he was harassed in relation to his disability by reference to sections 26 and 40 of the Equality Act 2010 are dismissed.

6. The Respondents are ordered to pay to Mr Perryman £7,897.53 being compensation for injury to feelings in respect of the discrimination of £7,000 including interest of £897.53.

7. For the avoidance of doubt, the Recoupment Regulations do not apply.

REASONS

INTRODUCTION

1. Mr Richard Perryman's claims and the issues involved were discussed at a preliminary hearing before Employment Judge Goraj on 8 September 2022. At the hearing before us, it was agreed that they were as set out in paragraph 59 of the Case Summary (the "CS" 53-64) sent to the parties on 15 September 2021.

2. Paragraph 59.1 of the CS listed "Time limits" as an issue. During the hearing before us and after discussion, Mr Challacombe, on behalf of the Respondents, agreed that there were no such issues.

3. In terms, the CS recorded that Mr Perryman relied on a physical impairment, being injuries to his right hip, leg and knee as having a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. The CS recorded, again in terms, that the Respondent Company accepted this was a disability for the purposes of section 6 of the Equality Act 2010 (the "EA"). This became the joint position of the Respondents when Mr Grant Ellis was joined into the proceedings. The CS also recorded that it was agreed that Mr Perryman had been a disabled person at all material times for the purposes of the issues. The matter of when the Respondents knew of this was recorded in the CS as an issue. By the end of the hearing before us, Mr Challacombe agreed this was not an issue. The Respondents, therefore, knew of Mr Perryman's disability at all material times.

4. Around April 2020 Mr Perryman was diagnosed with Type 1 insulin dependent diabetes. The parties agree that this is not relevant to the proceedings.

5. We will list Mr Perryman's claims in the order they appear in the CS.

6. Paragraph 59.3 of the CS sets out Mr Perryman's claim of direct discrimination. Mr Perryman says that requiring him to work at the Company's premises, not permitting him to use the forklift truck at those premises and not providing or delaying in providing him with an

alternative automatic vehicle were, severally and together, less favourable treatment for the purposes of section 13 of the Equality Act 2010 (the "EA"). Mr Andy Goddard is offered as a comparator.

7. Paragraph 59.4 of the CS details Mr Perryman's claim of discrimination arising from disability. The "something arising in consequence of" Mr Perryman's disability relied on, is described in this way: *"The claimant's case is that he had an accident in the respondent's company vehicle on 24 February 2021 which was caused by the effects of his disability (the injury sustained to his right hip/leg/knee) and which gave rise to the above unfavourable treatment."* The alleged unfavourable treatment is the same as for the direct discrimination claim.

8. Paragraph 59.5 of the CS sets out Mr Perryman's claim that the Respondents failed to make reasonable adjustments in relation to his disability. This is put both by reference to a "provision, criterion or practice" ("PCP") of the Respondents and the lack of an auxiliary aid. The PCPs relied on are requiring Mr Perryman to work from the Company's premises and not permitting him to use the forklift truck. Mr Perryman suggests that reasonable adjustments would have been the timely provision of an automatic vehicle with cruise control which would have enabled him to resume his duties in the field (off the Company's premises in Exeter) and the timely provision of a forklift medical which would have enabled him to resume his forklift duties.

9. Paragraph 59.6 of the CS details Mr Perryman's claim of harassment. Mr Perryman refers to the conduct relied on as less favourable treatment in paragraph 6 above, together with his being monitored at the Company's premises by CCTV, as unwanted conduct related to his disability having the required purpose or effect to amount to discrimination. If the required purpose was not there, Mr Perryman says it was reasonable for the conduct to have had that effect.

10. The Respondents defend the claims. In short, the Respondents say there was no discrimination.

11. Mr Perryman gave evidence supported by a written statement. On the Respondents' side we heard from Mr Ellis (the second Respondent in these proceedings – Managing Director of the family run business), Mr Andy Goddard (Exeter Yard Manager) and Mrs Emma Roberts (Operations Director of Sekoya Limited, a supplier of outsourced human resources services). Each produced a written statement.

12. There was a 178 page bundle of documentation supplemented during the hearing by a further 7 pages (labelled "Appendix A") together with a structure diagram of the Company's personnel. References in this

Judgment to page numbers are to the pages in the bundle unless otherwise specified.

13. There was a chronology. Before the hearing Mr Challacombe had produced a skeleton argument, which he spoke to.

14. The Hearing was completed in two of the three days allocated to it. This was achieved on the basis that Judgment was reserved.

15. The relevant factual matrix in this case is not complicated nor the subject of much material dispute. In deciding this case it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal's findings are on the balance of probability taking account of the evidence as a whole. Where appropriate, the provisions of section 136 EA (Burden of Proof) have been considered. Credibility was not a material issue in this case. All the witnesses were, so far as we can tell, truthful, but spoke to their differing points of view. In his summary, Mr Perryman suggested that notes (presumably those of Mrs Roberts) could not be relied on as he had not signed them off contemporaneously. We saw no evidence of any inaccuracy and we accept the notes as a true record. It was apparent to us that, although doing his best, Mr Goddard had no clear recollection of many of the events he was involved in.

FACTS

16. Mr Perryman's background is in mechanical engineering. We understand that, before joining the Company, Mr Perryman was trading on his own account working on cars and vans. Mr Ellis was very complimentary of Mr Perryman's skills as a mechanic.

17. Mr Perryman had an accident in November 2010 which resulted in his disability. Mr Perryman continues to experience pain, which he controls with regular exercise and medication. When driving, Mr Perryman finds that using vehicles with automatic gearboxes and cruise control makes a *"massive difference"* to the pain he experiences. During the hearing there was some discussion about the effectiveness of an automatic gearbox and cruise control in alleviating Mr Perryman's pain. We need record nothing further about this, however, because the Respondents have not disputed the recommendations of an occupational health report, which we will come to.

18. The Company had two yards, one in Redruth in Cornwall and one in Exeter in Devon. At the relevant times the Company had eight employees including Mr Ellis. Mr Ellis was based at the Redruth yard and Mr Perryman at the Exeter yard. The group's business is the rental

of generators to businesses and the public to provide temporary power supply to cover outages and for events.

19. Mr Perryman started work for the Company on 16 March 2020. Mr Perryman resigned with effect from 23 September 2021 (see 172-173).

20. During the hearing there was some focus on what Mr Perryman had been employed to do. At 75-76 there is a *"Position Agreement".* This served as Mr Perryman's contract of employment. It specified the work that Mr Perryman was to do including both workshop-based and field servicing work (in other words, servicing away from the Exeter Yard). Mr Perryman described the breakdown between these two as 70/30 yard based/out in the field (see also 94). This was not claimed to be an exact breakdown, but Mr Perryman offered it as an approximation.

21. What happened on the ground was this. When Mr Perryman joined the Company. the Exeter yard had not long been opened as an addition to the Redruth yard. It was staffed by Mr Goddard on his own. As a result, Mr Perryman had spent a considerable amount of his time away from the yard supporting installation as well as servicing in the field. Later, at the start of January 2021, Mr Reece Hammond was recruited as a driver. Mr Ellis's intention had been that Mr Perryman would, thereafter, be able to spend more time in the Exeter yard doing the mechanical work which Mr Ellis considered Mr Perryman was very good at.

22. The relevant conclusion from this is it cannot be argued that Mr Perryman's job, either contractually or in practice, was confined to work at the Exeter yard (see also the occupational health referral form at 124).

23. Mr Perryman was supplied with a company vehicle to do his job and for travel to and from work on the understanding that he would be flexible about emergency call outs (Ellis WS 13).

24. Mr Perryman's work at the Exeter yard was interrupted at the start of 2020 by the Covid-19 pandemic. Around June, the Company resumed work at the Exeter yard. The disruption to the business caused by the pandemic was one of the factors that resulted in Mr Perryman doing more field work. It seems that between March 2020 and 24 February 2021 Mr Perryman covered some 18,000 miles (see 85).

25. Mr Perryman says that he mentioned that he found his company vehicle uncomfortable to drive on several occasions between August and December 2020. However, Mr Perryman did not want to make a fuss and does not seem to have been specific either about what the cause of the discomfort was or what might be done to alleviate it (WS 9).

26. Mr Perryman says that, on 18 January 2021, he had been out all day driving and was in a lot of pain. On arriving back at the Exeter yard, Mr Perryman says that he spoke to Mr Goddard (WS 12). Mr Perryman says he made full disclosure of his pain and the background to it and that Mr Goddard said he would speak to Mr Ellis to see what Mr Ellis might be able to arrange by way of another vehicle. Mr Goddard's account of this is somewhat lower key, but to the same effect (WS 10 – we think this is probably the same occasion although Mr Goddard says he does not remember the conversation on 18 January – WS 22). Mr Perryman makes the point that, at this time, the Company already owned three automatic vehicles. However, it does not seem to have occurred at any stage to either Mr Perryman, or to the Company, that one of those vehicles could have been reallocated to Mr Perryman. Certainly, Mr Perryman made no such contemporaneous suggestion.

27. During the hearing some time was spent on the possibility of reallocating one of the three vehicles in question. Here we need only record that we are satisfied that this subject was never raised at the time and that there were operational reasons that meant that the right way forward was what was eventually agreed to: that Mr Perryman should be allocated a vehicle purchased by the Company to address the adjustments required. This, we will come to.

28. In the five or so weeks that followed, there was no further development on the provision of an alternative vehicle for Mr Perryman. Mr Perryman sees this as causative of what happened next.

29. On 24 February 2021 Mr Perryman was involved in an accident, for which he admitted fault. Apparently, this was the second accident that Mr Perryman had been involved in since he started work with the Company (see Goddard WS 13-14). Mr Perryman has not linked the first accident to his disability.

30. That day, 24 February, Mr Perryman sent an email to Mr Ellis, copied to Mr Goddard (85). It included:

> *"Today's accident was a result of my physical inability to get brake in time. Over the last 6 weeks or so ive had to drive predominately with my left leg as I've been in substantial pain in my right leg driving the Isuzu. I raised this 4 weeks or so ago and there has been no positive response, in fact no response at all."*

31. Arrangements were made for Mr Perryman to be given a lift to and from work. On the same day, 24 February 2021, the Company contacted its human resource service providers, Sekoya Limited. We have seen no instruction to the effect, but it appears that Mr Perryman was told not

to drive a company vehicle and not to use the forklift in the yard until the effects of the injury to his right leg could be assessed (see Ellis WS 17). Not being able to use the forklift became a significant issue for Mr Perryman because he could not, for example, move heavy components without it. Although he could ask others to do this for him, Mr Perryman found it embarrassing to have to ask and his work schedule would be interrupted in any event.

32. On 8 March 2021, Mrs Roberts called Mr Perryman to arrange a videoconference to include Mr Ellis (87). One of the purposes of the meeting was to discuss Mr Perryman's email of 24 February to Messrs Ellis and Goddard.

33. On 9 March 2021, in preparation for the meeting, Mr Perryman sent Mrs Roberts a comprehensive summary of his relevant medical history (93-95). Mr Perryman expressed his view that his increasing pain and discomfort were attributable to the vehicle he had been driving and he had requested a replacement with an automatic gearbox, cruise control and climate control. With Mr Perryman's permission, Mrs Roberts shared this summary with Mr Ellis.

34. The videoconference took place on 10 March 2021 and Mrs Robert's note is at 99-105. Asked about the period between his accident in 2010 and his joining the Company, Mr Perryman said that he had not had any significant issues. They had started when he began driving for the Company, particularly since July 2020. It was agreed that Mr Perryman should be assessed by an occupational health specialist. Mr Perryman's view was that he just needed an alternative vehicle. Notwithstanding, Mrs Roberts said that she recommended expert advice and Mr Perryman should continue working from the yard for the time being. Mr Perryman is recorded as reluctantly agreeing. Mrs Roberts explained that the effect of the pandemic on occupational health advisors might slow things up.

35. On the same day, Mrs Roberts started the process of obtaining occupational health advice (106).

36. On 23 March 2021 Mr Perryman chased Mr Ellis about progress on the occupational health referral (112). Mr Ellis, late in the evening, sent a reply to Mr Perryman which included a somewhat irritated comment that (111) *"it will take the time it takes."*

37. Mrs Roberts chased the occupational health advisor on 24 March 2021 (113).

38. On 7 April 2021 Mr Perryman sent Mr Ellis another chasing email (114). The content of this is instructive. Having explained the negative effects

being confined to the yard was having on him, Mr Perryman's wrote that he felt the delay was intentional on the Company's part. Mr Perryman continued:

> *"The longer the situation continues the more it feels discriminatory." ….*
>
> *"I've been very patient up to this point. That patience has run out. If you aren't able to show some form of significant progress (other than "it takes as long as it takes") then I will need to revert to a formal grievance procedure, seek specialist legal advice, refer to my GP and investigate the employment tribunal process."*

39. Mr Ellis replied on 8 April 2021 (115). Mr Ellis was surprised, shocked and feeling pressurised by the threat of legal action. There was no intentional delay and Mr Ellis was only a phone call away. Mr Ellis added:

> *"You have plenty of work to do at the yard and this has not impaired your ability or limited"* [your?] *"ability to do the job you were employed to do."*

This, we believe, reflects a tension underlying these events. From Mr Ellis's point of view, he had employed Mr Perryman to work as a mechanic at the yard. There had been a temporary need for Mr Perryman to support Mr Goddard by driving. Mr Perryman had enjoyed that work, despite the pain he had experienced (which he asked to be addressed by the provision of a different vehicle). With Mr Hammond joining as a driver in January 2021, the need for Mr Perryman to drive was reduced in any event. This coincided with Mr Perryman's confinement to the yard unable to drive a Company vehicle and the forklift. Mr Ellis saw no issue with this because, from his perspective, Mr Perryman's job was in the yard. Mr Perryman, however, saw his job as continuing to be yard and field based. The two, therefore, had different objectives. This inevitably complicated the position.

40. Mr Ellis now looked to Mrs Roberts for advice (see Mrs Roberts' note of a telephone conversation on 9 April 2021 at 116).

41. Mrs Roberts contacted Mr Perryman on 12 April 2021. Mrs Roberts' note is at 117-118). Mrs Roberts explained why the referral was taking time and asked Mr Perryman to bear with this. Mr Perryman said that he was bored working in the yard but understood Mrs Roberts' point that he could not be allowed to drive until he had been seen by occupational health.

42. On 14 April 2021 Mrs Roberts sent Mr Perryman the requisite paperwork for the occupational health referral (119).

43. On 29 April 2021 Doctor Stephen Thake, an Occupational Health Physician with Medigold Health, conducted an occupational health review with Mr Perryman by telephone. The final report is at 147-149. The report can be read for its full content. We note:

> *"He tells me the pain in his leg has improved dramatically since he has been doing less driving." ….*
>
> *"In my opinion he is fit to continue in his role bearing in mind the following recommendations:" ….*
>
> *"As he reports an improvement in his pain driving an automatic vehicle with cruise control, I would recommend that you consider whether or not it is possible to supply him with such a vehicle as much as possible.*
>
> *I recommend that in the event he returns to driving a company vehicle, that you consider conducting a risk assessment with regard to his safety performing this task." ….*
>
> *"I would recommend that you consider:*
>
> *a. Allocating him a vehicle with automatic transmission and cruise control if he is required to drive longer distances. This is in order to assist him to manage the pain in his leg." ….*
>
> *"With regard to driving forklift trucks, I recommend that he have a specific medical to assess his fitness to perform this, in line with company policies and HSE guidance."*

This last recommendation seems to have been under the heading *"Do Richard's diabetic conditions impact on his ability to drive for his day to day duties?"* It is not clear to us whether this recommendation related just to diabetes, just to Mr Perryman's right leg injury disability or to both. What is clear is that the parties proceeded on the basis that Mr Perryman could not use the forklift until he had both a medical assessment and a risk assessment and that these would include the right leg injury disability. Certainly, the Respondents have taken no point on this.

44. As far as Mr Perryman was concerned (WS 30) *"6th May 2021. I received an email containing the O.H. report. I felt a sense of relief, in that I assumed this would be an end and I could get back to normal."*

45. On 11 May 2021, Mr Perryman had a videoconference with Mr Ellis and Mrs Roberts. Mrs Roberts' note is at 152-154. The note succinctly captures what happened. Mr Perryman expressed his keenness to get back on the road as part of his role. A risk assessment was required before Mr Perryman could drive and a risk assessment and medical were needed before he could use the forklift (the risk assessment for forklift driving seems to have come from this meeting rather than the occupational health report). The Company was exploring the possibility of an automatic vehicle, looking at sourcing and cost. (it seems to have been taken as read that the automatic vehicle would include cruise control and we will not refer to this specifically again.) Until all those areas were addressed, Mr Perryman would need to work at the Exeter yard. Mr Perryman was disappointed at this but confirmed he had enough work to do at the yard. Mr Perryman questioned the length of time it was all taking and there was some discussion about that.

46. Taking stock at this point, the way forward had been agreed. Although not happy about the time it had taken to reach that point, Mr Perryman had reluctantly agreed to remain in the yard and not drive a company vehicle or the forklift truck until steps had been taken to allow him to do so. Those steps were an exploration of the sourcing and cost of a replacement automatic vehicle and the provision of medical and risk assessments for the forklift and a risk assessment for driving a Company vehicle.

47. As we will record briefly below, the process continued. The Respondents do not seem, in the end, to have questioned the need for a vehicle with an automatic gear box. Mr Ellis got on with sourcing one. The second part of the process, however, the health assessment and the risk assessments, did not make any real progress. The issue of a medical assessment before Mr Perryman could drive a company vehicle seems to have dropped off the agenda altogether. Certainly, there had been no such assessment before Mr Perryman was eventually provided with an alternative vehicle, as we will record.

48. In the meantime, Mr Perryman was experiencing frustration at the yard, which, he says made him feel depressed (WS 32). The frustration seems to have been mainly attributable to the continuing need for him to have to rely on others to operate the forklift before he could do some tasks. This comes through clearly in the notes Mr Perryman made between 13 July and 14 September 2021 (80-83). Mr Perryman gives further evidence on his personal experience at the yard during this period at WS 33 and 35.

49. In essence, Mr Perryman thought it took the Respondents far too long to source a suitable vehicle and, as far as he was concerned, they never did source the required risk assessments and medical.

50. It seems that, as Mr Perryman's manager, Mr Goddard was aware that Mr Perryman wanted to get back into the job, but he does not seem to have picked up on Mr Perryman's frustration (see WS 24, for example). From Mr Goddard's perspective, Mr Perryman wasn't going back into the field, at least to the extent he had done in 2020, because Mr Hammond had been recruited to do the driving. Mr Perryman's focus would be on repairs and servicing at the yard.

51. On 6 (Mr Goddard WS 19) or 7 July (Mr Perryman WS 36) 2021 Mr Goddard had a serious road traffic accident involving the total loss of his company vehicle towards the end of the working day. By late that evening, Mr Ellis had arranged for the vehicle he used personally, which had an automatic gear box, to be made available to Mr Goddard. Mr Perryman contrasts this with his own position and asks why this could not have been done for him (WS 36). Mr Goddard's job was to oversee the Exeter yard but, in practice, Mr Goddard spent most of his time in the field dropping off and picking up generators and was available for emergency out of hours call outs.

52. After the meeting on 11 May 2021, Mr Ellis took on the task of considering a new vehicle for Mr Perryman, as we have recorded. Mr Ellis did this against a background of recovery from the pandemic, the consequent supply shortage in vehicles and the high level of business the Company was experiencing in June/July 2021 because of the G7 Conference in Cornwall at the time. During the week commencing 17 May 2021 Mr Ellis found a suitable vehicle but was subsequently outbid by another purchaser (see 159). On 8 July 2021, around 9 weeks after the need had been discussed on 11 May 2021, the Company purchased a Freelander from a vehicle supplier in Stafford at a cost of around £11,000 as a replacement vehicle for Mr Perryman. It required a towbar to be fitted and the Company's livery to be sign written on to it. Mr Elis's evidence is that it was ready in the first week of August 2021 (WS 40). This was some 12 weeks after the 11 May 2021 meeting.

53. By that time, Mr Perryman had visited his doctor and was signed off with work related stress from 2-29 August and 5-26 September 2021. There is a puzzle associated with this. If Mr Perryman's notes at 80-83 are right, he was at work on some of those days. This certainly seems to be the case from the notes for 2, 3, and 5 August and 6, 7, 8 and 9 September.

54. On 21 August 2021, whilst he was at home on sick leave, Mr Perryman says that he was told his new vehicle had arrived (WS 40).

55. Looking at Mr Perryman's evidence (WS 41 and his notes at 81-82) we deduce that what happened next was this. On 20 August 2021 Mr

Hammond had a major gearbox problem with his Isuzu company vehicle. On 21 August Mr Perryman's replacement vehicle (a Freelander) arrived at the Exeter yard. On 22 August the Freelander was allocated to Mr Hammond whilst his Isuzu was repaired. On 31 August Mr Ellis called Mr Perryman to explain that, whilst the Freelander was the vehicle allocated to Mr Perryman, Mr Hammond was using it because of the gear box failure on the Isuzu. Despite his fit note, Mr Perryman seems to have worked on in the yard, without the use of the Freelander, until on or around 14 September. By that time, the Freelander was, itself, temporarily unserviceable due to electronic faults. It was subsequently repaired.

56. Whilst progress had been made on finding a replacement vehicle for Mr Perryman, no progress was made on providing risk assessments for either driving a company vehicle or a forklift. Nor was any progress made on a medical assessment for Mr Perryman driving a forklift.

57. The picture is not entirely clear. As Mr Perryman pointed out, there is no paperwork in the bundle confirming that any of these had been booked. However, we accept Mrs Roberts' evidence on the point. What had happened was this. Either immediately after the meeting on 11 May 2021 or very soon after it, Mrs Roberts had contacted Medigold Health to ascertain it could provide the necessary service. Medigold was able to do so, provided the Company started the process off by providing generic risk assessments for operating the forklift and (presumably) driving a Company vehicle. This task was left with Mr Ellis.

58. On 14 June 2021 Mrs Roberts was chased by Mr Perryman on the subject and Mrs Roberts, in turn, chased Mr Ellis (160). Mr Ellis was to provide the risk assessments by the end of the week. They did not appear. On 15 June Mrs Roberts thanked Mr Perryman for being patient on the subject of the forklift (161). On 21 June Mr Perryman chased Mrs Roberts again (162). On 2 July Mrs Roberts chased Mr Ellis again, commenting that *"we really do need to move this forward"* (163). On 12 July Mrs Roberts spoke to Mr Ellis on the telephone (164). Mr Ellis had done the assessments and was asked to send them to Mrs Roberts. Mrs Roberts went on holiday shortly afterwards. On her return, Mrs Roberts sent Mr Ellis a somewhat concerned email on 16 August (167-168). The risk assessments had still not appeared. Mrs Roberts who, as she confirmed in her evidence to us, had seen too many of these situations go wrong, included: *I want to ensure that this has been done as if we don't do it he could try to hold this against us."* Earlier in the same email, Mrs Roberts asked: *"Also if he" [*Mr Perryman] *"had given any indication to yourself or Andy prior to his absence regarding any issues at work?"*

59. In summary, Mr Ellis did not provide the necessary paperwork before Mr Perryman had resigned. That was some 19 weeks after the meeting on 11 May 2021. It seems from Mrs Roberts' evidence that, at some stage before Mr Perryman resigned, the appointments had been booked by the Company. This information was not passed on to Mr Perryman because he was off sick and, in any event, the appointments were conditional on provision of the risk assessments.

60. In the meantime, Mr Perryman had decided he had had enough and started to look for other jobs. Having secured another job at a better salary, Mr Perryman resigned with effect from 23 September 2021. It is clear this was a planned move and Mr Perryman suffered no financial loss as a result.

61. Mr Perryman tells us of the impact these events had on him in his witness statement at page 8. Mr Perryman struggled with self motivation, felt depressed, had suicidal thoughts and feelings and hated going to work. He became short tempered at home and his confidence was badly affected.

62. Throughout the relevant period, the Company had CCTV coverage of the Exeter yard, including we understand, the internal areas. This was installed to detect theft, of which there had been previous instances (Goddard WS 33). Whilst Mr Perryman says he did not like it, there is no evidence that it was installed to monitor him, far less that it was in some way related to his disability.

APPLICABLE LAW

63. Section 4 of the EA, so far as it is relevant, provides:

> *"**4 The protected characteristics***
>
> *The following characteristics are protected characteristics-" ….*
>
> *"disability;"*

64. Section 6 of the EA, so far as it is relevant, provides:

> *"**6 Disability***
>
> *(1) A person (P) has a disability if-*
>
> *(a) P has 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."*

65. Section 13 of the EA, so far as it is relevant, provides:

> *"**13 Direct discrimination***
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

66. Section 15 of the EA, so far as it is relevant, provides:

> *"**15 Discrimination arising from disability***
>
> *(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.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

67. Even though a Respondent did not apply itself to the issue at the time, it may, after the event, avail itself of the statutory defence in section 15 EA that the treatment was a proportionate means of achieving a legitimate aim. The test is an objective one for the Tribunal and involves weighing the justification against the discriminatory impact.

68. Sections 20 and 21 of the EA, so far as they are relevant, provide as follows:

> *"**20 Duty to make adjustments***
>
> *(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 others who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage." ….*
>
> *"(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid." ….*
>
> *"(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service."*

> *"**21 Failure to comply with duty***
>
> *(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 that duty in relation to that person."*

69. Paragraph 20(1) of Schedule 8 to the EA, so far as it is relevant, provides as follows:

> ***"20 Lack of knowledge of disability, etc***
>
> *(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know-" ….*
>
> *"(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."*

70. Section 23 of the EA, so far as it is relevant, provides as follows:

> *"**23 Comparison by reference to circumstances***
>
> *(1) On a comparison of cases for the purposes of sections 13,14, or 19 there must be no material differences between the circumstances relating to each case.*
>
> *(2) The circumstances relating to a case include a person's abilities if-*
>
> *(a) on a comparison for the purposes of section 13, the protected characteristic is disability;"*

71. Section 26 of the EA, so far as it is relevant, provides as follows:

> *"**26 Harassment***
>
> *(1) A person (A) harasses another (B) if-*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) The conduct has the purpose or effect of-*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B." ….*
>
> *"(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-*
>
> *(a)The perception of B;*

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

72. Section 39 of the EA, so far as it is relevant, provides as follows:

*"**39 Employees and applicants***

"(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 access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;" ….

"(d) by subjecting B to any other detriment." ….

"(5) A duty to make reasonable adjustments applies to an employer."

73. Section 119 of the EA, so far as it is relevant, provides:

*"**119 Remedies"** ….*

"(2) The county court has power to grant any remedy which could be granted by the High Court-

(a) in proceedings in tort;" ….

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)".

74. Section 124 of the EA, so far as it is relevant, provides:

*"**124 Remedies: general***

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may-

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate". ….

> *"(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119."*

75. Section 136 of the EA, so far as it is relevant, provides:

> *"**136 Burden of proof***
>
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

76. The Tribunal was referred to *Environment Agency v Rowan* [2008] IRLR 20.

CONCLUSIONS

77. **Direct discrimination**

78. Mr Perryman alleges three instances of less favourable treatment. We deal with each in turn.

79. Requiring Mr Perryman to work at the Company's premises

80. There is no dispute that the Company required Mr Perryman to work at its Exeter yard from on or around 24 February 2021 until Mr Perryman left the Company's employment on 23 September 2021. Was that less favourable treatment?

81. The hurdle for less favourable treatment is low. However, Mr Perryman had reported pain driving. Mr Perryman later told an occupational health advisor that the pain in his leg had improved dramatically since he had been doing less driving. Further, that occupational health advisor referred to Mr Perryman as fit to drive but only with adjustments. We do not see that requiring Mr Perryman to work at the Company's yard in Exeter to ensure his health and safety could amount to less favourable treatment in such circumstances. However, this must be tested by comparators.

82. The CS identifies Mr Goddard as an actual comparator. We suspect Mr Goddard is only intended to be a comparator in relation to the provision of an automatic vehicle. Certainly, Mr Goddard is not a comparator for this purpose. His circumstances were materially different. Mr Goddard did a different job. He was employed as a full time manager and spent

most of his time driving to and from installation sites. Further, he was not prevented from driving for any reason.

83. The hypothetical comparator would be someone employed in Mr Perryman's 70/30 role, who could not drive for some reason other than a disability. For example, because a problem had been discovered with his driving licence. On our primary findings of fact, we have no doubt that such a person would have been subjected to the same treatment as Mr Perryman. Putting this into the context of the burden of proof set out in section 136 EA, there are no facts from which we could decide, in the absence of any other explanation, that either of the Respondents subjected Mr Perryman to unfavourable treatment in this respect, because of his disability.

84. Not permitting Mr Perryman to use the forklift truck.

85. Using the same reasoning as in 79-82 above, we reach the same conclusion.

86. Not providing or delaying in providing Mr Perryman with an automatic vehicle.

87. On the facts, Mr Perryman was provided with an automatic vehicle. We are, therefore, concerned only with the delay. The Respondents did delay in providing the automatic vehicle. This is more obviously potentially unfavourable treatment. Again, Mr Goddard is not a suitable comparator. Mr Goddard did not require an automatic vehicle and his job was more orientated to driving.

88. The hypothetical comparator would be someone employed in Mr Perryman's 70/30 role, who could not drive for some reason other than a disability. For example, because a problem had been discovered with his driving licence. On our primary findings of fact, we have no doubt that such a person would have been subjected to the same treatment as Mr Perryman. In other words, there would have been the same delay. Putting this into the context of the burden of proof set out in section 136 EA, there are no facts from which we could decide, in the absence of any other explanation, that either of the Respondents subjected Mr Perryman to unfavourable treatment in this respect, because of his disability.

89. The claims of direct discrimination by reference to section 13 EA are, therefore, dismissed.

90. **Discrimination arising from disability**

91. For the purposes of these claims, Mr Perryman relies on the same allegations as for the claims of direct discrimination. Again, we will deal with each in turn.

92. It is accepted by the Respondents that they knew of Mr Perryman's disability.

93. The disability caused the "something arising in consequence" of the disability. That was Mr Perryman's inability to drive a Company vehicle or a forklift truck because of the injury sustained to his right hip/leg/knee).

94. Requiring Mr Perryman to work at the Company's premises

95. We refer to our conclusions in paragraph 81 above, save that comparators have no place in claims of discrimination arising from disability. We see no disadvantage to Mr Perryman being required to work from the Exeter yard to ensure his health and safety whilst adjustments were investigated. If we were to be wrong about that and this did constitute unfavourable treatment, we would have found that the treatment was a proportionate means of achieving a legitimate aim. The legitimate aim was to ensure Mr Perryman's health and safety. Suspending Mr Perryman from driving, was a proportionate means of achieving that aim for the 12 weeks it took to source a suitable vehicle and have it available at the Exeter yard for use.

96. Not permitting Mr Perryman to use the forklift truck

97. For the same reasons as those set out in the preceding paragraph, we see no disadvantage to Mr Perryman in this. Equally, if we were to be wrong about that, we would have found that the treatment was a proportionate means of achieving a legitimate aim using the same reasoning.

98. Not providing or delaying in providing Mr Perryman with an automatic vehicle

99. As we observed above, the automatic vehicle was supplied, so we are concerned only with the delay.

100. Unfavourable treatment is widely construed and the delay was unfavourable treatment. The Respondents knew about Mr Perryman's disability and that a consequence of that was that he could not drive a Company vehicle. Unless the Respondents can show that the delay in providing an automatic vehicle was a proportionate means of achieving a legitimate aim, the discrimination is made out.

101. The justification or legitimate aim put forward is to ensure Mr Perryman's health and safety, which, as mentioned above is a legitimate aim.

102. Objectively viewed, in the circumstances, the delay of 9 weeks to procure the vehicle and 12 weeks to deliver it to the Exeter yard, does not amount to disproportionate means of achieving the legitimate aim. We have taken several factors into account in reaching this decision. First, Mr Ellis seems to have accepted the cost of a new vehicle (some £11,000) almost straightaway after the meeting on 11 May 2021 and got on with sourcing it. There is evidence that Mr Ellis had sourced a vehicle by the week commencing 17 May 2021, only a week or so after the 11 May meeting. That, however, fell through. Within another 7 weeks Mr Ellis had found another vehicle. This was during a period when there were supply shortages following the pandemic and the Company was very busy with orders associated with the G7 summit in Cornwall. All in all, we consider this was proportionate action.

103. The claims of disability related discrimination are, therefore, dismissed.

104. **Duty to make adjustments**

105. The PCPs of the Respondents, relied on by Mr Perryman, are two. First, requiring Mr Perryman to work from the premises. We see this as no more than a way of saying that Mr Perryman could not drive a Company vehicle (which is not a PCP and is better dealt with as the provision of an auxiliary aid in the context of section 20(5) of the EA). Second, not permitting Mr Perryman to drive the forklift at the Company's Exeter yard. These are both accepted by the Respondents as PCPs for the purposes of section 20(3) of the EA, although as we say, we think the first is better seen as falling within section 20(5) of the EA in terms of the provision of an auxiliary aid. We will, therefore, only deal with the second as a PCP.

106. It is apparent from our findings of fact that the PCP of not permitting Mr Perryman to drive the forklift put Mr Perryman at a substantial disadvantage compared to someone without his disability. It caused considerable inconvenience for Mr Perryman's work at the Exeter yard as well as frustration, and his reliance on others in this respect caused him a deal of stress. Someone without Mr Perryman's disability would have been able to drive the forklift and would not have been put at the disadvantage.

107. Turning to driving a Company vehicle and section 20(5) of the EA, this is put in this way. In brief, did the lack of an auxiliary aid (the delay in providing Mr Perryman with an automatic vehicle) put him at a

substantial disadvantage compared to someone without his disability in that he was prevented from returning to that part of his role that involved driving? On our findings of fact, it did. Mr Perryman found his inability to use a Company vehicle confined him full time to the Exeter yard, which confinement contributed to his stress. Someone without Mr Perryman's disability would have been able to drive and would not have been put at the disadvantage.

108. The duty to make reasonable adjustments does not arise if the employer does not know and could not reasonably be expected to know that the disabled person in question has a disability and is likely to be placed at the identified disadvantage. This knowledge test is different from the test we have considered above in relation to discrimination arising from disability because it includes a requirement that the employer knows that it is likely that the disabled person will be placed at the identified disadvantage.

109. As far as the inability to drive a Company vehicle and/or a forklift is concerned, the Respondents' knowledge of the disability is not in issue. Nor, do we find, was the Respondents' knowledge of the disadvantage. The Respondents knew that Mr Perryman was unhappy with that state of affairs. Mr Perryman had explained this clearly to Mr Ellis as early as 7 April 2021 in his email of that date (114). After the meeting on 11 May, Mr Perryman had continually chased Mrs Roberts and Mr Ellis. The battle of wills between Mr Ellis, who wanted Mr Perryman in the yard and Mr Perryman who wanted the former balance of his job back (70/30, yard/in the field) probably complicated matters. However, Mr Ellis knew how Mr Perryman was feeling and Mrs Roberts certainly picked up on it.

110. The duty to consider what steps it was reasonable to take to avoid the disadvantage was, therefore, engaged at the meeting on 11 May 2021. Not only was it engaged but the necessary actions were agreed on.

111. Mr Perryman has suggested two adjustments. First, the timely provision of an automatic vehicle which would have enabled him to resume driving a Company vehicle. Second, the timely provision of a forklift medical which would have enabled him to resume use of the forklift. In addition, we note the meeting on 11 May 2021 also identified a requirement for a risk assessment in this respect and, also, before Mr Perryman drove a Company vehicle.

112. <u>The timely provision of an automatic vehicle which would have enabled Mr Perryman to resume driving a Company vehicle</u>

113. On our findings, the automatic vehicle was provided. Further, adopting our reasoning in paragraph 102 above, it is our finding that the vehicle was provided in a timely way. In summary, it was reasonable for the Respondents to take the step of providing an automatic vehicle in a timely way and they did so. The reasonable adjustments were made in this respect.

114. <u>The timely provision of a forklift medical and risk assessment which would have enabled Mr Perryman to resume use of the forklift and of a risk assessment which would have completed the requirements for Mr Perryman to drive a Company vehicle</u>

115. Whether it was by design or omission, Mr Ellis did not provide the necessary paperwork to enable generic assessments to become specific assessments for Mr Perryman before Mr Perryman had resigned. As we have explained above, that was some 19 weeks after the meeting on 11 May 2021. On an objective view, the necessary medical and risk assessments were not provided in a timely fashion. In short, it was reasonable to provide those assessments in a timely way and the Respondents failed to do so.

116. In this respect, the claim of a failure to make reasonable adjustments is made out.

117. **Harassment**

118. As far as the conduct complained of is concerned, Mr Perryman refers to the three acts relied on in the claim of direct discrimination and the additional act that he was monitored by CCTV at the Exeter yard. We deal with each in turn.

119. <u>Requiring Mr Perryman to work at the Company's premises</u>

120. There was such a requirement. On the evidence we see, we accept that it was unwanted conduct and it related, indirectly, to Mr Perryman's protected characteristic.

121. We do not, however, find that the Respondents, in so requiring Mr Perryman to work from the premises, had the purpose of violating Mr Perryman's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Their purpose was to ensure his health and safety. This is so even taking account of Mr Ellis's battle of wills with Mr Perryman about spending more time at the Exeter yard. (That, of course, did not relate to Mr Perryman's disability in any event.)

122. We turn to the second part of the test and section 26(4) of the EA. The evidence is that requiring Mr Perryman to work at the premises did

not have the required effect on Mr Perryman at first, because he, albeit reluctantly, consented to it. As time went on, however, we accept that Mr Perryman's perception may have been that the effect was that his dignity was being violated or an intimidating, hostile, degrading, humiliating or offensive environment was being created for him. In the circumstances of the case, however, judged objectively, that perception was not reasonable. An objective view would have recognised that the purpose was that the Company was concerned with Mr Perryman's health and safety.

123. Not permitting Mr Perryman to use the forklift truck

124. We adopt the same reasoning and conclusion as is set out in paragraphs 120-122 above. Whilst we accept that this was the cause of even more frustration for Mr Perryman, our conclusion is the same.

125. Not providing or delaying in providing Mr Perryman with an automatic vehicle

126. Once again, we are here only concerned with the delay. The vehicle was provided. We adopt our reasoning and our conclusions as set out in paragraphs 120-122 above. On an objective view, the delay was not unreasonable and there is even less reason to conclude that Mr Perryman's perception was reasonable.

127. Subjecting Mr Perryman to monitoring by CCTV

128. This conduct was probably unwanted. However, there is no evidence that it related to Mr Perryman's disability.

129. The claims of harassment are dismissed.

130. **Remedy**

131. Discrimination

132. *Declaration*

133. A declaration is made.

134. *Recommendation*

135. There is no appropriate recommendation to be made. The Respondents sought timely advice. They simply failed to act on one aspect of it.

136. *Injury to feelings*

137. An award made in this respect is to compensate for anger, distress and upset caused to the claimant by the unlawful discrimination they have been subjected to. It is not a punitive award. The focus is on the injury caused to the claimant. It is awarded in bands. The upper band for the most serious cases is £29,600 - £49,300, the middle band for cases that do not merit an award in the upper band is £9,900 - £29,600 and the lower band for less serious cases is £990 - £9,900.

138. We see here evidence of a short period of considerable anger, distress and upset, which quickly righted itself once Mr Perryman left the Company.

139. In our view, an award towards the top end of the lower band is appropriate and we put this at £7,000. Interest is payable on this award calculated as follows:

> Days between 17 July 2021 (that (as the mid point between 11 May 2021 and Mr Perryman's resignation on 23 September 2021) being taken as the day of the discriminatory act) and 21 February 2023 (the day of calculation): 585
>
> Interest rate: 8%
>
> 585 (days) x 0.08 x 1/365 x £7,000 = £897.53

140. *Financial losses*

141. Mr Perryman claims no financial loss save for the difference between sick pay for the days he was off sick and what he would have earned had he been paid his normal salary. This amounts to £2,033.89. The rationale for this is that, but for the discrimination, Mr Perryman would have been at work. We do not find the causal link made out. The medical report provided by Mr Perryman's doctor (see the Appendix to the bundle) mentions several factors that might have contributed to Mr Perryman's absence. These included stress caused by the situation at work, a strain to Mr Perryman's left hand and pain because of Mr Perryman's disability. Stress seems to have become a significant issue from 5 September 2021 onwards, a few weeks before Mr Perryman's resignation. Even if the causal connection were made out, we would make no award because we are unable to reconcile the days Mr Perryman was signed off with the days he clearly attended work, notwithstanding his fit note.

Employment Judge Matthews
Date: 23 February 2023

Judgment & reasons sent to the Parties on 09 March 2023

For The Tribunal Office