Case Number: 2601591/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Rogers**

Respondent: **Microlise Limited**

Heard at: **Bristol** **On: 24, 25, 26, 27 and 28 April 2023**

Before: Employment Judge Le Grys
Dr C. Hole
Mr E. Besse

Representation
Claimant: Ms S. Crawshay-Williams (counsel)
Respondent: Mr G. Anderson (counsel)

JUDGMENT ON LIABILITY having been sent to the parties on **11 May 2023** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The Claimant was employed by the Respondent as a Field Service engineer from 12 July 2010 until his dismissal on 5 March 2021. By way of a claim form received on 16 July 2021 he brought claims for unfair dismissal, discrimination arising from disability, a failure to make reasonable adjustments, and for a redundancy payment. He states that he was dismissed following a re-organisation of the Respondent's business, having been unreasonably expected to undertake additional work that he could not do because of his disabilities.

2. By way of a response form dated 18 August 2021 the Respondent resisted the complaints. The Respondent's case is that the business changes were necessary and reasonable efforts were made to engage with the Claimant in order to make adjustments that would allow him to continue in employment.

3. The issues to be determined by the Tribunal were agreed at the outset of the hearing as follows:

Unfair dismissal

4. It is admitted that the Claimant was dismissed.

5. What was the reason for dismissal? What was the set of facts or beliefs in the employer's mind at the point it made the decision to dismiss (see *Abernethy v Hay, Mott & Anderson* [1974] ICR 323).

   The Respondent asserts that it was some other substantial reason, namely a business reorganisation following which the Claimant refused to accept the altered role, which is a potentially fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.

6. Did the Respondent believe it had sound and good business reasons for the reorganisation (this is a subjective test – see *Hollister v National Farmers' Union* [1979] ICR 542, *CA and Scott and Co v Richardson* EAT 0074/04)?

7. If so, were those genuine and substantial reasons and not arbitrary (*Catamaran Cruises Ltd v Williams* [1994] IRLR 386 and *Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood and ors* [2006] ICR 1552, CA.)?

8. If so, has the Respondent produced evidence to show the reasons were substantial rather than making a bare assertion (*Banerjee v City and East London Area Health Authority* [1979] IRLR 147, EAT)?

9. Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in the following respects;

   9.1 The Respondent failed adequately to consult with the Claimant and his Trade Union representatives in respect of the proposed contract changes;
   9.2 The Respondent failed to make reasonable adjustments to the adjusted role to permit the Claimant to fulfil it.

10. Was dismissal of the Claimant for this reason within a range of reasonable responses open to a reasonable employer?

11. If it did not use a fair procedure, what is the percentage chance that the Claimant would have been fairly dismissed in any event and, if so, when would that have occurred?

12. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant committed the misconduct alleged.

Redundancy payment

13. Was there a genuine redundancy situation within the meaning of section 139 ERA?

    The Respondent asserts that there was not such a situation because the need for service work had not ceased or diminished nor was likely to.

14. Was the Claimant dismissed by reason of redundancy?

    If so, the redundancy payment due is £8,160.

Discrimination arising from disability

15. It is admitted that the Respondent treated the Claimant unfavourably by dismissing him.

16. The Respondent admits the following things arose in consequence of the Claimant's disability:

    16.1 The Claimant's joints, knees, right shoulder and hips ache and installation work involved much kneeling, crouching and working in confined spaces, which he was physically unable to do or struggled to do.
    16.2 The Claimant required medication, which made him drowsy so that he could not drive and was not able to undertake a 12 hour shift.

17. Was the dismissal because of any of those things?

    The Claimant argues that he was unable to accept the amended role because of those things and so was dismissed.

    The Respondent does not admit that the Claimant was unable to accept the proposed changes to his contract as a consequence of things arising from his disability, arguing that the Respondent was proposing to make reasonable adjustments to the role so that the Claimant could undertake it.

18. The Claimant admits that the Respondent had the following legitimate aims which were related to a business need:

    18.1 To provide a more efficient delivery of service to its customers and to remain competitive.

19. Was the treatment an appropriate and reasonably necessary way to achieve those aims?

19.1 Could something less discriminatory have been done to achieve those aims instead?
19.2 How should the needs of the Claimant and the Respondent be balanced?

20. The Respondent argues that its aim was:

20.1 Reasonable because it permitted it to remain competitive in the market by combining the service and installation engineers teams so that the single team could better meet customer expectations and demands in order to remain competitive in the market, avoiding the need for two engineers to attend a site; and
20.2 Proportionate because it was relatively straightforward to achieve through minimal training and the impact on engineers was low and the Respondent proposed reasonable adjustments which would have ameliorated or removed any disadvantage to the Claimant.

21. There is no dispute about knowledge of the Claimant's disability.

Reasonable Adjustments

22. It is admitted that the Respondent operated the following Provision, Criterion, or Practice (PCP):

22.1 The requirement for engineers to conduct installation and service work (PCP1);
22.2 The requirement to work a 12-hour shift pattern (PCP2).

23. It is admitted that the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that:

23.1 Regarding PCP1, installation work involved a lot of kneeling down, crouching and working in confined spaces which the Claimant struggled with or was unable to do due to his disability;
23.2 Regarding PCP2, the Claimant needed to self-medicate with pain relieving medication, which made him drowsy and unfit to drive and he was therefore unable to work a 12-hour shift.

24. It is admitted that the Respondent knew, or could reasonably have been expected to know that the Claimant was likely to be placed at the disadvantages from:

24.1 PCP1: all relevant times;
24.2 PCP2: 20 January 2021 (on receipt of an Occupational Health report). The Claimant argues the Respondent has known since 18 September 2020, when the Claimant explained he could not work a 12-hour shift.

25. The Respondent admits the following steps ("the Adjustments") could have been taken to avoid the disadvantage:

    25.1 Not requiring the Claimant to conduct heavy installations;
    25.2 Limiting his role to servicing and de-kitting;
    25.3 Permitting the Claimant to work his old shift pattern so that he was able to self-medicate around driving.

26. Was it reasonable for the Respondent to take those steps and when?

    The Respondent argues that it made the first adjustment but the second and third were not reasonable because they would have placed a disproportionate burden on it and it made or offered the following alternative adjustments, which would have removed or ameliorated any substantial disadvantage, which the Claimant refused:

    26.1 Carrying out less strenuous installation work which would not be repetitive;
    26.2 Prioritising servicing work;
    26.3 Giving the Claimant 25% extra time to complete tasks;
    26.4 Providing the Claimant with regular breaks away from work;
    26.5 Removing the requirement to undertake heavy lifting;
    26.6 Offering part time hours;
    26.7 A trial period in the new role; and
    26.8 Offering the Claimant an alternative role as a Resource Planner.

27. Did the Respondent fail to take those steps?

The Hearing

28. For the Claimant, the Tribunal heard evidence from the Claimant himself and John McGookin, his union representative. For the Respondent, the Tribunal heard evidence from Nathan Eggleston, Gemma Williams, Mark Goulding and Trevor McGahan. There was an agreed trial bundle of 559 pages, to which two additional pages were added during the course of the hearing relating to the instructions given to the Claimant's GP.

Relevant Legal Framework

Discrimination arising from disability

29. A person is disabled in accordance with section 6 of the Equality Act 2010 if they have a physical or mental impairment, and that impairment has a substantial and long term adverse effect on their ability to carry out normal day to day activities. In this case it is not in dispute that the Claimant was disabled as a consequence of three conditions during the period January 2018 to March

2021, namely arthritis in his knees; arthritis and/or pain in his shoulder and/or arm; and depression.

30. Section 15(1) Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if they treat B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Section 15(2) states that this 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.

31. In *Secretary of State for Justice and anor v Dunn* EAT 0234/16 the EAT identified the four elements that must be made out in order for a section15 claim to succeed:

    1) There must be unfavourable treatment;
    2) There must be something that arises in consequence of the Claimant's disability;
    3) The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and;
    4) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

32. The protection accorded by section 15 does not require the disabled person to show that the treatment suffered was less favourable than that experienced by a comparator. A Claimant is simply required to show that they suffered something broadly akin to a detriment without having to show that somebody else who does not have the disability would have been treated differently.

Reasonable adjustments

33. Section 20 EQA creates a statutory duty to make reasonable adjustments. This duty comprises of three requirements, any one of which triggers an application to make any adjustment that would be reasonable. A failure to comply with the requirement is a failure to make reasonable adjustments and an employer will be regarded as having discriminated against the disabled person under section 21.

34. The first requirement applies where a PCP has been applied by the employer that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. The second requirement applies where a physical feature puts a disabled person at a similar substantial disadvantage. The third requirement applies where the lack of the provision of an auxiliary aid puts the disabled person at a substantial disadvantage in relation to a relevant matter.

35. In each of these there is a duty on the employer to take such steps as is reasonable to avoid the disadvantage. A relevant matter is simply any matter

concerned with deciding to whom to offer employment and anything concerning employment by the employer.

36. Section 212(1) EQA defines a substantial disadvantage as something that is more than minor or trivial. Tribunals must identify the nature and extent of the disadvantage and consider whether the relevant PCP, physical feature or auxiliary aid causes greater disadvantage to the disabled Claimant than it does to non-disabled people in relation to whom the requirement is applied.

37. In general, tribunals will not allow overly technical arguments that a PCP has not actually been 'applied' to a disabled person to preclude an otherwise valid claim. *In Rider v Leeds City Council* EAT 0243/11, an employment tribunal found that there had been no actual application of a PCP whereby R must return to her former post because she had not actually been forced to return. On appeal, the EAT stated that the tribunal had taken a very narrow view as to whether the PCP had been 'applied'. It was satisfied that the instruction to return to the previous post, repeated on a number of occasions, without any consideration of alternative posts, amounted to the application of a PCP.

38. The Claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred – absent an explanation – that the duty has been breached. Once satisfied that the section 20 duty has potentially been triggered, the Tribunal will consider what adjustments could and should have been made. Again, the onus is on the Claimant to identify in broad terms the nature of the adjustment and, having done so, the burden then shifts to the employer to show that the disadvantage would not have been eliminated or reduced and/or that it was not a reasonable adjustment to make. The test of reasonableness in this context is an objective one and the focus must therefore be on whether the adjustment itself can be considered reasonable rather than the process by which the employer reached the decision.

Unfair dismissal

39. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), for example conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

40. The reason for dismissal is 'a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee'. (*Abernethy v Mott Hay and Anderson* [1974] ICR 323, CA.)

41. Under section 98(4) *"… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*

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 shall be determined in accordance with equity and the substantial merits of the case."

42. It is the Respondent's case that it dismissed the Claimant for some other substantial reason, namely a business reorganisation following which the Claimant refused to accept the altered role. This is a potentially fair reason for dismissal under section 98(2).

43. Finally, tribunals must decide whether it was reasonable for the Respondent to dismiss the Claimant for that reason. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for a tribunal to substitute its own decision.

44. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23, CA).

45. Under section 122(2) of the Employment Rights Act 1996, the tribunal shall reduce the basic award where it considers that any conduct of the Claimant before dismissal was such that it would be just and equitable to do so. Under section 123(6), where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the Claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

46. Where the dismissal is unfair on procedural grounds, the tribunal must also consider whether, by virtue of *Polkey v AE Dayton Services* [1987] IRLR 503, HL, there should be any reduction in compensation to reflect the chance that the Claimant would still have been dismissed had fair procedures been followed.

The facts

47. The Respondent provides telematic and technology solutions for fleet operators and product manufacturers. This work includes the installation and maintenance of equipment such as tachographs and tracking equipment in vehicles. The Claimant's role typically meant that he would be sent to correct faults or technical issues with company vehicles in the South West. Because of the large geographical area this meant that he would spend much time driving, and the work required when on site was often relatively straightforward to correct, taking an hour or less and not involving significant physical activity.

48. The Claimant's contract was originally for 8 hour shifts and did not involve installation work, which was undertaken by a different team. While he would sometimes need to remove parts and replace them he considered this to be maintenance rather than equivalent to installation as he did not, for example, have to deal with some of the wiring. He did not do any installation work in his 10 years at the company.

49. It is accepted that the Claimant was disabled during the period January 2018 to March 2021, as a consequence of arthritis in his knees; arthritis and/or pain in his shoulders and/or arm; and depression. It is also common ground that the Claimant had been able to fully undertake his role as it existed prior to the events that form the basis of the claim with only relatively minor adjustments, such as the provision of an automatic car.

50. In September 2018 the Respondent proposed to merge the service and installation teams and began a consultation process in respect of this. As part of these proposals the Claimant's title would become "Technical Hardware Engineer" and his role would now include installation work. The Respondent anticipated that these changes would improve efficiencies, reduce its reliance on contractors, improve the quality of their work, and save around £700,000 each year.

51. Shortly after a general consultation meeting on 7 December 2018 about these proposals the Claimant emailed Nathan Eggleston, Head of Hardware Service, raising the issue of his arthritic knee and stating that he could not kneel down on it for very long or stay in the same positions for a long time without discomfort. He believed and feared that requiring him to undertake installations would aggravate his condition. He stated that he had never conducted installations during his employment with the Respondent and asked not to be included in any installation planning for the New Year. Mr Eggleston stated that he had no recollection of this email.

52. On 21 January 2019 the Claimant had a meeting with Gemma Williams, Head of HR Operations, and his line manager, Mark Goulding. During this meeting he raised his mental health issues and Ms Williams wrote down some medication details from a tablet box that he passed to her. While we accept that the Claimant did talk about some medication at this meeting we are not satisfied that he specifically mentioned the need to take pain medication in the morning, meaning that he could not start work before 09:30. Medication of this type is not referred to in his witness statement, and the Claimant said on a number of occasions that his start time at this point meant that this medication did not cause a specific problem that needed to be discussed with his employer. Both Mr Goulding and Ms Williams gave evidence that they believed his concerns about starting earlier were in relation to stiffness in his legs and we accept their evidence in this regard.

53. Later that day the Claimant emailed Ms Williams and declined to do any installation work because of his disability. Ms Williams sent a reply on the same date confirming that the next step would be to review information from the Claimant's Doctor.

54. On 3 April 2019, after around 2½ months had passed, the Respondent received a letter from Dr Rigby, the Claimant's GP. This stated that he had longstanding problems with his left knee, and in view of this she recommended that he did not regularly kneel as this may exacerbate his underlying issues and cause pain. She further stated that she believed his current work caused him little problem. While the letter is relatively short, the Tribunal does consider it significant that it refers to aggravating his conditions as it did put the Respondent on notice that such work could cause additional problems.

55. Another 2½ months later, on 15 July 2019, the Claimant agreed to a referral to Occupational Health (OH). The provider was listed as Health Assured and it was on their headed paper. While the Claimant did provide this consent, his covering email stated that *"regardless of any medical checks that confirms my disabilities I still do not agree to any changes in my contract/profile which need my permission".*

56. On 23 December 2019, a further five months later, the Claimant signed a consent form now allowing a different OH provider, Red Umbrella, to access his medical records. Ms Williams explained that this significant delay was because Health Assured were only conducting telephone assessments and they therefore needed to find a different provider who could actually observe the Claimant in practice.

57. The OH report was provided by Dr Cheesman, who specifically observed the Claimant for around 45 minutes as well as the work of three other engineers, in all over the course of 2 days. He did not see the Claimant complete any installations.

58. Dr Cheesman's main area of expertise related to psychiatric conditions but his CV also shows a qualification in Design and Ergonomics. He is also experienced in providing OH reports, albeit does say the majority of these related to psychiatric issues. Neither Dr Cheesman nor the Respondent requested medical reports relating to the Claimant, although the Claimant had raised again the fact that he took medication. On sight of the draft report the Claimant raised a number of concerns about accuracy and Dr Cheesman's qualifications, and Dr Cheesman indicated that he was unable to comment on arthritis in terms of the Equality Act as it was outside of his professional expertise because he was not a medical doctor.

59. In his final report, Dr Cheesman made recommendations including that the Claimant could cope with cab installation but with increased timings, and that he should avoid trailer installation work, but could possibly cope with one-off

installations. While the report acknowledges that the Claimant did raise concerns about working in the cold, it does not specifically make any comments or recommendations in relation to this.

60. We accept that the Respondent was entitled to consider the report from Dr Cheesman. They had requested someone who could undertake this specific work and it was reasonable to expect that the OH provider would therefore provide someone suitably qualified. The recommendations of such a report are exactly that – recommendations – and so as long as the Respondent did not then close its mind to the task and treat them as absolute it was reasonable to treat them as a starting point for the subsequent discussions.

61. Despite the report being obtained, the matter was then put on hold and there was a further significant delay. The Claimant had emailed Ms Williams on 18 February 2020, shortly after the report was received, asking for a meeting but following an initial exchange he received no further reply for nearly four months, on 7 July 2020. During this period the Claimant continued in his existing role. In their subsequent conversation the Claimant indicated to Ms Williams that he would not discuss the topic further until a further report was received from his GP, so on 20 July 2020 Ms Williams wrote to his GP requesting this.

62. On 13 August 2020 a second GP, Dr Gately, sent a letter to the Respondent. This stated that the Claimant was fit to do his current role but would struggle with prolonged kneeling/lying. Dr Gately further stated that adding *"EBS installation"* to his role would be detrimental to his underlying condition. She concluded by stating that she believed it would not be in his best interests to impose other responsibilities/roles that may be detrimental to his health.

63. On 4 September 2020 the Respondent delivered a presentation in which it explained its intention to make a further, separate, contract change. This would see engineers move to a 12 hour shift and weekend working. A letter was sent to the Claimant on the same date confirming these proposed changes.

64. On 18 September 2020 the Claimant attended a consultation meeting about the additional changes with Ms Williams and Mr Goulding. John McGookin, his trade union representative, also attended. The Respondent's note of the meeting records the Claimant as saying that he could not do a 12 hour shift, as he struggled with the current 8 hours and in the winter it became harder because of the cold. The actions arising from that meeting were that Ms Williams and Mr Goulding would review the Doctor's report, consider whether the medical and consultation processes should be merged, and that further consultation was required. In his evidence Mr Goulding stated that a change to the requirement that the Claimant move to a 12 hour shift was not considered to be an option.

65. Mr Goulding and Ms Williams also stated that the Claimant did not specifically raise morning medication during this meeting. Given that he does not refer to this meeting at all in his statement we accept their evidence on this point.

66. A further consultation meeting was held on 13 October 2020 about the proposed changes, again with Mr Goulding but on this occasion accompanied by Victoria Milnes, HR advisor, rather than Ms Williams. The preparatory notes for that meeting are headed 'disciplinary investigation'; Mr Goulding was unable to state why. While it is not suggested anywhere that this was a disciplinary process, we note that this record was sent to the Claimant after the meeting and the reference caused him unnecessary additional concern. The error was not rectified at any point.

67. During the meeting the Claimant said that he could not undertake a 12 hour shift as he could not start at 6:00am. He suggested possible adjustments, such as carrying out lighter work on a seasonal basis, his pain being worse in the winter months. The Respondent asked the Claimant to consider whether he could do some installation work. It also asked if he had considered part time work or a job share; the Claimant stated that he could not do these for financial reasons.

68. Following this meeting the Respondent asked the Claimant to consider possible adjustments, with Ms Milnes stating in a letter of 28 October 2020 that it would not be possible for the company to allow him to remain undertaking his current role. The letter further stated that, if agreement could not be reached following a further meeting, one option was to terminate the current contract and offer re-engagement on a new contract that incorporated the changes.

69. On 30 October 2020 there was a third consultation meeting. The Claimant indicated that he may be able to complete some installation work and Mr Goulding highlighted that some such work was relatively short and they were not proposing that he did several in one day, but rather that if the Claimant was already on site or close by and it needed a short installation he could do that. Ms. Milnes offered to put some figures together in relation to job share or part time work, although in the letter that followed the meeting she instead suggested how the Claimant might be able to calculate the figures himself using a particular hourly rate. The letter gave no totals or assurances as to pay protection.

70. That letter, of 6 November 2020, also summarises the reasonable adjustments that the Respondent was prepared to make. These included that the Respondent work with the Claimant to determine whether he could undertake certain installation work, which would not be scheduled to be repetitive and with 25% extra time allowed; the arrangement of further training; and a two week trial period, during which time the Claimant would be accompanied by another engineer to support him during any installation work. The letter also

stated that the company deemed it reasonable for him to work 10:00-22:00 shift pattern as the Claimant had indicated that a 06:00 start would not work.

71. In relation to the second engineer accompanying the Claimant the letter does not state how work would be divided up between them. There was also no record as to how the other engineer would be briefed about what the Claimant could and couldn't do. The Respondent stated in evidence that its expectation was that the Claimant would only do what he could manage and the other engineer would undertake the remaining work, but the proposed reasonable adjustment does not specify such expectations or limitations. The letter further repeats the fact that if agreement cannot be reached then termination was an option.

72. As the Claimant did not agree to the changes he was sent a letter dated 17 November 2020 in which he was told that his contract was being terminated with effect from 24 January 2021. The letter was signed by Ms Milnes from HR, and when giving evidence Mr Goulding could not recall if he had been the one who took the decision to dismiss. It is therefore unclear who in fact decided to terminate the Claimant's employment. The letter also stated that it was an offer of re-employment on the terms of the new contract, and that the Claimant had a right of appeal in respect of the termination.

73. At no stage in these discussions or the letters that followed were possible alternative roles raised. The Respondent was clear that it would not consider the option of the Claimant continuing in his current role, or continuing to work an 8 hour shift, given its general reasons of costs and the detriment to workplace planning, and felt that the adjustments it had already proposed were the only reasonable way forward. As such, we are satisfied that the Claimant was not offered an alternative position before the decision to terminate was taken, nor had consideration been given by the Respondent to this possibility.

74. On 19 November 2020 the Claimant raised a grievance. This was acknowledged as a grievance and Ms Milnes sent the Claimant a copy of the grievance procedure in response. He was invited by Ms Milnes to a grievance hearing.

75. It was suggested in the Respondent's submissions that this was in fact an appeal, as paragraph 5.2 of the company grievance policy said that it should not be used in respect of dismissal. However, the correspondence from the Respondent before the meeting referred to it as a grievance, and continued to do so after the meeting when it began describing it as 'grievance/appeal'. The Respondent did not tell the Claimant that it was now treating the matter as an appeal, nor offer an explanation as to why the word 'appeal' had been added, nor remove the word 'grievance' from its correspondence. In his evidence Mr McGahan categorically stated that he considered the matter as a grievance, and in line with the grievance policy, which he read and considered before beginning the process. The grievance policy also refers to organisational

change and discrimination issues, which it what the Claimant was raising. We are therefore satisfied that this was considered by the Respondent to be a grievance rather than an appeal.

76. The grievance meeting was held on 27 November 2020, with an outcome letter sent on 11 December 2020. Mr McGahan was the decision maker and upheld the original decision. He did state that if the Claimant was prepared to undertake a further OH report then he would be willing to look into this further.

77. This additional OH report was obtained on 13 January 2021 from Lesley Seagars. It stated that the Claimant was not able to do any task which would involve kneeling, crouching, or manoeuvring weights over 10kg, albeit later it qualified this by saying he would not be able to kneel or crouch for extended periods of time. It stated that in her opinion the Claimant would not be able to carry out all aspects of the adjusted role and was not medically fit to work the proposed 12 hour shift, but in light of the fact that the company had indicated that maintaining his current hours and duties were not an option, she recommended that he tried the adjusted duties with alternative medication, reviewed at weekly intervals to see if he was coping and his level of performance. The report acknowledged that tramadol made him drowsy and he would be unsafe to drive while taking it.

78. On 27 January 2021 there was a further meeting with Mr McGahan. During this meeting the Claimant agreed to a trial period and his notice was extended to accommodate this. He agreed to work the 10:00-22:00 shift and would see whether he might be able to adjust his medication.

79. During this meeting the Respondent raised for the first time the possibility of an alternative role. Ms Milnes told him that there were other jobs that he may wish to apply for; when Mr McGookin asked if the renumeration would be the same Mr McGahan stated that it was to be discussed and that he was sure there was some sort of compromise they could come up with. The Claimant also expressed concern about the loss of a company car and working from home but it was suggested that he consider the role. During a break in the meeting Ms Milnes sent him the job description which showed a salary of around £18,500, which was around half of his current salary.

80. We do not find that this discussion amounted to an offer by the Respondent to move the Claimant into an alternative role; it essentially amounted to an offer to discuss the possibility. There was no mention of pay protection and the fact that he was invited to ‘apply’ suggested that it would be part of a competitive process. The reference to a ‘compromise’ also suggests that the Claimant may have to sacrifice at least part of his salary, and the fact that the job advert referred to a substantial lower salary, as well as the previous discussions about job share or part term working, furthered this impression. Whilst Mr McGahan said in evidence that this was not his intention and he would have maintained

the salary, this is not what was said and any such intention was certainly not made clear to the Claimant.

81. A letter was sent by Mr McGahan following this meeting, on 29 January 2021. This included proposed reasonable adjustments including a four week trial period, during which the Claimant would complete installation activity deemed less strenuous. There was a reference to some work only being undertaken as part of a two man team, albeit again it did not specify how the work would be divided between the Claimant and the other engineer, or how that engineer would be briefed. It was also again accepted to be reasonable for the Claimant to undertake the 10:00-22:00 shift pattern. His notice period was extended to cover this trial period.

82. During the trial the Claimant experienced difficulties when he was asked by the engineer he was accompanying to undertake some physical work that was beyond his capability. He also raised concerns about some of the other work he had witnessed the other engineer doing, which he said would be beyond his abilities. The Claimant did not feel competent in relation to some other work without additional training.

83. On 3 March 2021 there was a final meeting. The letter that followed offered some similar adjustments as had previously been offered but the requirement to work a 12 hour shift now extended to the 6am-6pm shift. It offered no explanation as to why this change had been made other than a reference to the need to work the same shift pattern as his colleagues. References to 25% additional time were also removed, as were references to further training. When giving evidence Mr McGahan was unable to explain these changes, and suggested that it was because the Claimant had not provided any evidence from his GP to show that he had tried alternative medication. We note that this was not requested in the meetings or the letters that followed, nor was it given as the reason prior to Mr McGahan giving evidence. We therefore find as fact that the Respondent had changed its position and removed adjustments that it had previously considered reasonable without a satisfactory explanation. The Claimant was given until 5 March 2021 to decide whether to accept the adjusted role.

84. The Claimant did not accept the offered adjustments and so on 12 March 2021 the Respondent deemed his employment to have terminated on 5 March 2021. The Claimant responded to the dismissal on the same date saying that he wished his correspondence to be treated as an appeal against his dismissal. On 16 March 2021 he emailed again wishing to raise a grievance.

85. The Respondent replied on 17 March 2021 to state that there were no further routes of appeal, and on 18 March 2021 the Claimant was sent a letter confirming that his grievance was not upheld.

Discussions and conclusions

Redundancy

86. We deal with this briefly at the outset. The Claimant clarified that the claim for a redundancy payment was included as an alternative and that both the Claimant and Respondent agreed that this was not a redundancy situation. We therefore do not find that the Claimant was entitled to a redundancy payment and this claim is dismissed.

Discrimination arising from disability

87. It is accepted that the Respondent treated the Claimant unfavourably by dismissing him.

88. The Respondent also accepts that the Claimant's joints, knees, right shoulder and hips ached and installation work involved much kneeling, crouching and working in confined spaces, which he was physically unable to do or struggled to do. Furthermore, it is accepted that the Claimant required medication, which made him drowsy so that he could not drive and was not able to undertake a 12 hour shift. Both of these are things that arose in consequence of the Claimant's disability.

89. We are satisfied that the dismissal was because of these things. While the Respondent suggests that it proposed reasonable adjustments that would have allowed the Claimant to undertake the role, it is common ground that he could not do so without such adjustments and that these could not be agreed. As such, the Respondent's proposals go to the final question of whether the treatment was appropriate and reasonably necessary. They do not provide an alternative reason for the dismissal, which ultimately remained the fact that the Claimant was not able to do the job as required, in consequence of his disability.

90. The Claimant accepts that the Respondent had a legitimate business aim to provide a more efficient delivery to its customers, and to remain competitive. The business changes were expected to bring considerable savings and efficiencies and it is not suggested, nor do we find, that it was unreasonable for the Respondent to pursue them.

91. The central issue is, therefore, whether the treatment was a proportionate way of achieving those aims, or whether something less discriminatory could have been done to achieve them instead.

92. We are not satisfied that the treatment was appropriate or reasonably necessary for a number of reasons. Firstly, the decision to dismiss was taken without consideration of alternative job opportunities which the Respondent

later accepted could have provided an ideal solution. Both Mr McGahan and Mr Goulding said that the Claimant was a good worker and they wanted to keep him employed. In evidence Mr McGahan suggested that the salary would not have been an issue, and his only concern was in relation to the company car; as such, pay protection was clearly both possible and reasonable. While not directly comparable due to a different medical situation and location, the company did take similar steps in relation to SB, another colleague. In all the circumstances the consideration and offering of this role would have been a proportionate and less discriminatory way of achieving the Respondent's aims. The Respondent instead took the decision to dismiss without such an option having been considered at all.

93. We do not consider that this omission was corrected during the subsequent grievance procedures. The language used suggested that the Claimant would need to apply for any role as part of a competitive process and it was not at all clear that his pay would be protected. The nature of the discussion in fact implied, through language such as 'compromise', that there might be a reduction in salary, something the Claimant had already made clear he could not afford. It would have been relatively straightforward for Mr McGahan to have either clarified during the meeting that he thought salary could be maintained but he needed to confirm this before making a firm commitment, or to follow up on this afterwards and notify the Claimant.

94. As such, we are not satisfied that the Respondent has shown that the unfavourable treatment through dismissal, without consideration of possible alternative roles, was a proportionate means of achieving a legitimate aim.

95. In addition to this, the Respondent accepted at an early stage, and before the original decision to terminate, that certain adjustments were reasonable. These included adjustments such as 25% extra time and that the Claimant would not be expected to work the 6am-6pm shift. Such adjustments had been made in light of the medical advice that had been received. The trial period continued to consider such adjustments to be reasonable. Notwithstanding this the Respondent removed these adjustments in its final offer to the Claimant. As noted above, we have rejected the explanation provided for the first time in cross examination that this was because the Claimant had failed to provide certain information from the GP.

96. Given that the adjustments were previously considered to be reasonable we cannot be satisfied that their removal, without explanation or justification, was a proportionate means of achieving a legitimate aim.

97. We further note the Respondent's decision to bring the consultation period to an end after the trial period. While reference was made to the process having already taken two years and that it could not go on indefinitely, much of the delay was caused by the Respondent itself, for example in obtaining the initial OH advice. Further time then passed when the Respondent decided not to

pursue the matter pending the second upcoming contractual changes. It is therefore not a situation where an employer had been working in vain to reach an agreement but was unable to do so in the face of a stubborn employee, finally realising the matter could go no further after an unacceptable delay; instead, the matter had drifted and does not appear to have been considered a priority, particularly given the substantial other changes the Respondent was also undertaking at the same time.

98. Given this, it would have been reasonable for the Respondent to further consider the position at the conclusion of the trial period. It had previously received advice that the Claimant was not medically able to undertake a 12 hour shift, and that further duties could exacerbate his problems. The Claimant had been unable to alter his medication, as suggested in the OH report as a possible way forward, and so the overall position needed to be reviewed in light of this development. Furthermore, the Claimant had not actually attempted any installation work during the trial period and so it remained unclear as to exactly what he could manage. It should also have been clear by this stage that the simple reference to a two man team in the proposed reasonable adjustment – without any further explanation as to what this meant or a briefing to the other engineer – had not adequately protected the Claimant from exposure to work which might put him at risk, or made clear to him exactly what he was being expected to do. It would therefore have been reasonable to consider how this could be clarified.

99. While the Claimant may not have been able to continue in his existing role indefinitely it was not suggested that the position had become untenable by March 2021; the Respondent's financial position was stable, and there remained some work for the Claimant. It was also never suggested that the Respondent's aim of reducing its reliance on contractors went as far as an intention to completely remove their use, and so this remained at least a short term option to cover any shortfall. As such, the matter was brought to a conclusion while the information remained incomplete and with an unnecessary urgency. It would have been reasonable, and less discriminatory, for the Respondent to further explore the options at the conclusion of the trial period, rather than confirm the dismissal.

100. Finally, it would have been reasonable for the Respondent to give further consideration to the specific situation of the Claimant. While the focus was on specific physical actions such as kneeling, the Claimant had said on a number of occasions that these were not the only cause of difficulties, highlighting matters such as the impact of the cold. His suggestion that he could therefore try seasonal working, where he did not have to be outside in the winter evenings, does not appear to have been considered at all.

101. Taking all of this into account we are not satisfied that the unfavourable treatment was a proportionate means of achieving a legitimate aim. This claim is therefore well founded.

Reasonable adjustments

102. It is agreed that the Respondent operated a PCP to conduct both installation and service work, and another to work a 12 hour shift pattern. While the Claimant remained on his old shift pattern for the majority of the consultation period we are satisfied that these PCPs did apply to him; the entire reason for the dispute was the repeated instruction that they would do so, and he was ultimately dismissed when he did not agree. We therefore do not find that this claim was out of time, an argument which we note was raised for the first time during the course of the hearing.

103. It is also agreed that the PCPs put the Claimant at a substantial disadvantage compared to someone without the disability. It is not suggested that the Respondent was unaware of the disabilities or the disadvantages. While the Respondent does raise an issue in respect of PCP2 before 20 January 2021, when the second OH report was received, there is no doubt that the Claimant had raised the issue of 12 hour shifts and early starts from an early stage, and the Respondent's letters and notes refer to such issues having been discussed and reasonable adjustments being made as a result. We therefore consider it more likely than not that he had made the Respondent aware of his issues with medication before receipt of the OH report in January 2021, notwithstanding the fact that it may not have been directly discussed on the dates specifically mentioned by Mr Goulding and Ms Williams. While we have not taken it into consideration in reaching this decision, we again note that this was an issue raised for the first time during the course of the hearing, the Case Management Orders recording that knowledge had previously been conceded.

104. The Respondent accepts that it would have been a reasonable adjustment not to require the Claimant to conduct heavy installations, and states that such an adjustment was in place. We are not satisfied that it was. The proposed reasonable adjustment was insufficiently particularised and still required the Claimant to be involved in complex camera installations, only referring to the fact that this would be undertaken as part of a two man team. It did not say what, as part of the two man team, the Claimant would and would not be expected to do, nor were his colleagues briefed in respect of this. The adjustment was, therefore, objectively insufficient in respect of what is agreed would have been reasonable and did not adequately avoid the disadvantage.

105. Furthermore, the Claimant gave clear evidence that installation work was of a wholly different nature to the service work he was already undertaking. The medical information gave clear cause for concern that additional tasks may be detrimental to him. The Respondent accepted that it did not know what he could and could not manage. It is not, therefore, correct to say that there was a clearly defined reasonable adjustment in place that the Claimant would not conduct heavy installations; it is more accurately described as a proposed adjustment to see what his limits were, to some extent based on trial and error

rather than sound medical grounds. In this respect it was also not adequate to avoid the disadvantage.

106. For these reasons we are satisfied that the Claimant's claim that the Respondent failed to make reasonable adjustments is well founded.

107. For the reasons given above we are also satisfied that adjustments limiting the Claimant's work to his previous role and shift pattern were objectively reasonable, at least in the short term and while the consultation process remained ongoing. While the Respondent disputes that such adjustments were reasonable, however, it did in fact apply them up until the point of termination. We therefore do not make any separate findings in respect of this.

Unfair dismissal

108. It is accepted that the Claimant was dismissed. It is the Respondent's case that this was for some other substantial reason, namely a business reorganisation following which the Claimant refused to accept the altered role. This is a potentially fair reason for dismissal under section 98(2). The burden of proof on employers at this stage is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness.

109. We are therefore satisfied that the Respondent has shown that the reason for dismissal related to the Claimant's refusal to accept the altered role. This was given as the reason in the termination letters and again in evidence to the Tribunal. Other than a slightly unclear reference to redundancy, which the Claimant accepted in submissions was no more than an alternative, it has not been suggested that there was another reason for dismissal. We are therefore satisfied that the Respondent has discharged this initial burden.

110. We are also satisfied that the Respondent had sound and good business reasons for the reorganisation, which were genuine and substantial and not arbitrary. The Respondent gave clear evidence as to the business savings and efficiencies, and this is not something that appears to be genuinely in dispute.

111. The key question is therefore whether the decision to dismiss was reasonable in all the circumstances, including the fairness of the procedure.

112. We are not satisfied that the decision to dismiss was within the band of reasonable responses for two key reasons.

113. Firstly, the decision was taken without an adequate exploration of the possible adjustments that could be made to allow the Claimant to continue in employment. These were discussed in detail above and we do not propose to

repeat them here. It is sufficient to say in relation to this specific claim that it was outside of the range of reasonable responses for the Respondent to dismiss the Claimant without giving proper consideration to alternative options, including re-deployment, particularly given the size and administrative resources of the employer's undertaking.

114. Secondly, we are not satisfied that the adopted procedure was within the band of reasonable responses. It is unclear as to who specifically took the decision to dismiss. This in itself means that it cannot be shown what decision making process was followed, and therefore be satisfied that this was reasonable. Whoever did make the decision, proper consideration was not given to alternatives to dismissal, something a reasonable employer would have done.

115. Having made the decision to terminate, the Respondent was then clearly unaware as to what policy and process was to be followed in respect of the Claimant's complaints. This was initially described by the Respondent as a grievance, and then a 'grievance/appeal'. Mr McGahan was adamant that he followed the grievance policy but his final letter referred to there being no further appeal under the appeal process. Notwithstanding Mr McGahan's unambiguous statement to the Tribunal we were told by the Respondent in submissions that it was clearly an appeal. In our judgment the Respondent's approach in this regard was somewhat chaotic, perhaps best demonstrated by the fact that there is still an argument as to what process was even followed, more than 2 years after the dismissal.

116. If it is not clear what policy was being applied then it is impossible to be satisfied that the relevant process was properly followed. Furthermore, this is not merely academic as it had a very real impact on matters such as whether the Claimant had a right to a specific appeal against his termination, conducted by someone independent of the original decision making process. Again, while it was suggested in submissions that any such appeal would have been out of time in any event, we note that we have not been provided with any policies relating to discipline, appeals or termination, and so it is not evidenced that any time limits had in fact passed; the 5 day limit we have been referred to relates to appeals about grievances. Furthermore, the Respondent did not suggest in its letters at the time that an appeal wasn't being considered because of a time limit, but rather because there was no further right of appeal. In our judgment the decision to proceed without certainty as to what process or policy was being applied was outside the range of reasonable responses.

117. For both of these reasons the claim for unfair dismissal is therefore well founded.

Employment Judge Le Grys
Date: 25 May 2023
Reasons sent to the Parties: 12 June 2023
FOR THE TRIBUNAL OFFICE