EMPLOYMENT TRIBUNALS

Claimant: **Mr D Kelly**

Respondent: **Mowlem and Company (Manufacturing) Limited**

Heard at: **Newcastle Employment Tribunal (in person)**

On: **26 and 27 June 2023**

Before: **Employment Judge Murphy**
Ms L Jackson
Mr R Greig

Representation
Claimant: **In person**
Respondent: **Mr P Sangha of counsel**

JUDGMENT having been sent to the parties on 7 July 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

Background

The unanimous judgment of the Tribunal was as follows:

1. The claimant was unfairly dismissed. The respondent was ordered to pay to the claimant compensation in the sum of FOUR THOUSAND TWO HUNDRED AND FIFTY POUNDS (£4,250).

2. The claimant's complaint that the respondent unlawfully discriminated against him contrary to section 15 and 39(2)(c) of the Equality Act 2010 (discrimination arising from disability) was not well founded and was dismissed.

3. The claimant's complaint that the respondent unlawfully discriminated against him contrary to section 13 and 39(2)(c) of the Equality Act 2010 (direct disability discrimination) was not well founded and was dismissed.

4. The claimant's complaint that the respondent unlawfully discriminated against him contrary to sections 20 and 21 of the Equality Act 2010 (failure to make reasonable adjustments) was not well founded and was dismissed.

5. The claimant's claim for damages for breach of contract in respect of an asserted term entitling him to a pay increase in the period from the date falling 12 weeks after 2 August 2017 until his employment ended was not well founded and was dismissed.

6. The claimant's claim for a statutory redundancy payment was dismissed pursuant to Rule 52 of the ET Rules 2013, the claimant having withdrawn his complaint at the hearing on 26 June 2023.

7. The claimant's complaints of breach of contract and / or of an unauthorised deduction from his wages relating to pay in respect of the period between 3 and 26 October 2022 were not well founded and were dismissed.

1. This final hearing took place at Newcastle ET in person on 26 and 27 June 2023. The claimant complained of unfair dismissal contrary to section 94 of the Employment Rights Act 1996 ("ERA"), discriminatory dismissal contrary to section 39 of the Equality Act 2010 ("EA"), discrimination contrary to section 15 of EA, discrimination contrary to section 13 of EA because of disability, a failure to make reasonable adjustments contrary to section 21 of EA, a breach of contract pursuant to the Extension of Jurisdiction Order 1994 (the "1994 Order"), and a failure to pay a statutory redundancy payment contrary to section 135 of ERA. The respondent denied all claims.

2. The claimant gave evidence on his own behalf and led evidence from Stephen Flynn, Managing Director of Rosebirch Limited, the claimant's employer following the termination of his employment with the Respondent. Mr Flynn did not attend the Tribunal and was not cross-examined on the content of his statement. Reference was made by the claimant to an email from Jaquelyn Kesson, Office Manager of Rosebirch, which had ostensibly been prepared for the purpose of providing evidence in these proceedings. Ms Kesson did not attend the hearing and was not cross-examined on her statement.

3. The respondent led evidence from Gavin Anderson, Operations Director of the Respondent. Reference was made by the respondent to witness statements in the bundle given by Karen Mortimer, employee of the respondent, and by Daniel Battaglia, the respondent's Foreman. Neither Ms Mortimer nor Mr Battaglia attended and so were not cross-examined on their statements.

4. For the witnesses in attendance at the hearing, evidence in chief was taken from written witness statements with some supplementary oral evidence in chief from the claimant. A joint bundle was lodged running to approximately 202 pages.

5. The issues to be determined in the case were identified in a list of Issues appended to a Case Management Order ("CMO") prepared by EJ Aspden on 4 May 2023 and sent to parties on 5 May 2023, following a PH on 6 April 2023. To that list was added a claim brought as an unauthorised deduction from wages complaint or alternatively a claim for damages for breach of contract relating to alleged short paid wages in the period from 3-27 October 2022**.** The claim was initially said to be for 19 days' full pay. However, the claimant, during preliminary discussions, conceded that he had during the relevant period been paid for 9 days' holiday, so the claim was adjusted to be for 10 days' pay. It was identified that there was a potential overlap between this claim and the claimant's complaint of a failure to make RAs. It was explained that in the event of success in both of the complaints, there would be no double recovery so that the claimant would not be compensated twice for the same period of economic loss.

6. During the preliminaries, the claimant confirmed he wished to withdraw his claim for a statutory redundancy payment.

7. The issues for determination were thus as follows (the order has been altered from EJ Aspden's original CMO to list them according to the chronology and the claim for pay in October '22 has been added):

<u>Breach of Contract (pay increase)</u>

a. Did the respondent agree during the claimant's job interview on 12 July 2017 that, after 12 weeks of employment, the claimant's pay would increase from £11.50 to £12.75 per hour?
b. Was this a term of the claimant's employment?
c. Did the respondent fail to increase the claimant's hourly rate by £1.25 per hour after 12 weeks or at all?
d. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.
e. If not, what damages are due to the claimant?

<u>Reasonable Adjustments (sections 20 & 21, EA)</u>

a. From 3 October 2022, the respondent accepts it knew or could reasonably have been expected to know that the claimant had a disability.
b. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

i. A requirement for the claimant to carry out the usual duties and / or work the usual hours of the job?

c. Did the PCP put the claimant at a substantial disadvantage that was more than minor or trivial compared to someone without the claimant's disability, in that the claimant was unable to do so up to and including the time when he was dismissed?
d. If so, from 3 October 2022, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
e. What steps could have been taken to avoid the disadvantage? The claimant suggests:
    i. Allowing the claimant to return to work on a phased basis from 3 October 2022.
f. Was it reasonable for the respondent to have to take that step and when?
g. Did the respondent fail to take that step?

<u>Breach of Contract / Unauthorised deductions: Wages in period 3 Oct – 7 Nov 2022</u>

h. In respect of the period between 3 October 2022 and 7 November 2022, did the respondent make an unauthorised deductions by failing to pay him (or to pay him in full) for 19 scheduled working days each of an 8-hour shift within that period?
i. What wages were due to the claimant? The claimant accepts he was paid 9 days' holiday during the period concerned and advises his claim is, therefore, for 10 days' pay (8 x £12.50 = £1,000 gross)
j. Alternatively, did the respondent breach the claimant's contract of employment by failing to pay him fully for these dates?
k. If so, what damages are due to the claimant?

<u>Discrimination arising from disability (s.15, EA)</u>

l. Did the respondent treat the claimant unfavourably by dismissing him on 7 November 2022?
m. Did the claimant's absence from work from 30 July 2021 to 7 November 2022arise in consequence of the claimant's disability?
n. Was the unfavourable treatment (the dismissal) because of that thing? The respondent accepts it dismissed the claimant because of his absence.
o. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aim was:
    i. To ensure sufficient paint spraying capacity to ensure the company could meet the steep rise in demand in orders.
p. The Tribunal will decide in particular:
    i. whether the treatment was an appropriate and reasonably necessary way to achieve those aims;
    ii. whether something less discriminatory could have been done instead;

iii. how should the needs of the claimant and the respondent should be balanced.

Direct Discrimination

q. In dismissing the claimant did the respondent treat him less favourably because of his disability than it treated or would have treated others in comparable circumstances?

Unfair dismissal

f. The respondent admits the claimant was dismissed on 7 November 2022.
g. What was the reason or the principal reason for the dismissal (what were the facts known or the beliefs held that caused the respondent to dismiss the claimant?)
h. Was this a potentially fair reason for dismissal? The respondent says it was a reason related to the claimant's capability.
i. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?
j. If the reason was capability, the Tribunal will usually decide, in particular, whether:
    i. the respondent genuinely believed the claimant was no longer capable of performing their duties;
    ii. the respondent adequately consulted the claimant;
    iii. the respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
    iv. the respondent could reasonably be expected to wait longer before dismissing the claimant;
    v. dismissal was within the range of reasonable responses.

Unfair dismissal: Remedy

k. If the unfair dismissal claim succeeds, and if there is a compensatory award, how much should it be? The Tribunal will decide:
    vi. What financial losses has the dismissal caused the claimant?
    vii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    viii. If not, for what period of loss should the claimant be compensated?
    ix. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
    x. If so, should the claimant's compensation be reduced? By how much?
    xi. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
    xii. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
    xiii. Does the statutory cap of fifty-two weeks' pay apply?
l. If the unfair dismissal claim succeeds, what basic award is payable to the claimant, if any?

m. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Findings of fact

8. The following facts and any referred to in the 'Discussion / Decision' section were found to be proved on the balance of probabilities. Any statements or evidence given by witnesses who were not present at the Tribunal hearing were accorded appropriate weight by the Tribunal, reflecting their unavailability to have their evidence tested in cross-examination.

9. The respondent is a company that manufactures kitchen furniture in Blyth. It employs approximately 30 people of which 16 are employed on the shop floor. They have no specialist internal HR resource, though their Operations Director, Gavin Anderson, tends to deal with staffing matters. He is supported by an external HR consultant, Mr S Duncan, who has provided support to the company for many years.

10. The claimant was employed by the respondent from 2 August 2017 as a spray polisher and was contracted to work 40 hours per week across five 8-hour shifts from 7am to 3.30 pm or 8 am to 4 pm.

11. The claimant attended an interview on or about 12 July 2017 with Mr Anderson and Dan Battaglia, foreman, before his employment commenced. The claimant is a time served spray polisher. He is very experienced, having served his time back in 1986. When he attended his interview, he had recently been made redundant by his previous employer. His hourly rate with his previous employer had been £12.75 per hour. At the interview, the matter of pay was discussed. The claimant explained to Mr Anderson and Mr Battaglia that he had previously been earning this rate. Mr Anderson offered to employ the claimant on £11.50 per hour. He told the claimant he would review this after 12 weeks when the claimant was up to speed with the job. The claimant accepted the job.

12. An offer letter was issued on or about 2 August 2017. It did not refer to any commitment to increase or review the claimant's salary after 3 months. It stated:

> *"Your starting salary will be £11.50 per hour payable weekly in arrears by credit transfer."*

13. Twelve weeks later, in around late October 2017, the claimant raised the matter of his hourly rate of pay with Mr Anderson. He met Mr Anderson in the canteen. He asked if his pay would be put up by £1.25 per hour to £12.75 per hour. Mr Anderson told him it would not. Mr Anderson said he wasn't satisfied with the claimant's figures in his post and his speed of work. The claimant was unhappy with this response.

14. At some stage after commencing employment, the respondent issued a statement of employment particulars to the claimant. It included the following clauses:

6. ***Hours of work***

Your normal hours of work will be 40 per week. This will be made up of 8 hours per day. Hours of work will be either 7:00 to 3:30 or 8:00 to 4:30. Individual start and finish times will be agreed in advance with your manager. You are entitled to take up to half an hour for lunch between the hours of 13:00 and 13:30; this break will be unpaid. You may be required to work such additional hours as are necessary for the proper performance of your duties. Any overtime worked by you will be paid at the rates specified in the Company Handbook.

7. ***Salary***

Your rate of pay will be £11.50 per hour, payable weekly in arrears by automatic bank transfer.

The company has the right to pay salary in lieu of notice (PILON).

Where the company, any client, visitor or other employee suffers a loss caused by your carelessness or recklessness or by your breach of the Company Rules or through any dishonesty on your part in the course of your employment the Company has the right to require you to repay any of those losses and you authorise the Company to deduct them from your pay.

The Company also has the right to forfeit a day's pay for each day of unauthorised absence (including leaving employment without notice or during your notice period without the Company's permission).

…

9. ***Sickness***

If you are unable to attend work then refer to the handbook for the Company's sickness policy.

15. The respondent published a staff handbook. It contained a section on sickness which included information about reporting requirements and the company's approach to monitoring absence. With respect to sick pay, it provided as follows:

Sick pay

If you are sick from work and complete all the required steps in relation to communication with the company and medical certificates, then you will be eligible for Statutory Sick Pay (SSP).

Payment of SSP will begin from the 4th day of absence if you are eligible.

In any rolling 12-week period, the company will pay 5 days at full pay (inclusive of SSP) thereafter only SSP will be paid. Payment of this additional sick pay is not guaranteed, staff must follow the

communication and certification requirements to qualify. The company may change this policy from time to time.

16. The claimant raised the matter of pay and a £1.25 per hour increase with Mr Anderson on a further two or three occasions. The last of these was in or about August 2018, approximately a year after his employment with the respondent began. This last discussion was prompted by a change in the respondent's premises. They moved to premises in Blyth. This lengthened the claimant's commute and his travelling costs. The claimant repeated the request at the time of the move to Mr Anderson that he increase his rate of pay by £1.25 per hour. He pointed out his increased commute costs. Mr Anderson refused. He said words to the effect, 'if I moved the factory closer to you, would you come to see me for a pay cut?'

17. The claimant was again with this response. From that day forward he declined to undertake any voluntary overtime for the respondent, something he had previously been doing regularly. He did not raise the issue of his hourly rate again with the respondent or refer further to a possible £1.25 pay increase. He never received any such increase but received any percentage awards that were paid to the shop floor staff generally. He continued to work for the respondent until his employment terminated on 7 November 2022.

18. In the summer of 2021, the claimant had been struggling with walking for some time and attributed his symptoms initially to his knees. The claimant's mobility problems were significant and were apparent. A consultant identified on 1 July 2021 that he had severe bilateral osteoarthritis and required hip replacements in both hips. The claimant informed Mr Anderson of the situation on 2 July 2021.

19. The claimant went off sick on 31 July 2021. He was due to have his first hip operation on 3 August 2021 on his left hip. At the last minute the operation was delayed to 23 August 2021. The claimant remained off during the intervening period due to his mobility difficulties as a result of the arthritis.

20. Following the operation on 23 August there was contact between the claimant and the respondent. The claimant provided an update on his operation, which had gone well. His consultant informed him in October 2021 that he was on the waiting list to have his right hip done and that this should take place in December 2021. In the meantime, he remained off sick, convalescing. The proposed December 2021 operation was delayed. The claimant kept the respondent updated.

21. The respondent traditionally has a downturn in orders during the winter months. The respondent has a requirement for various levels of finishing work which the claimant would undertake as part of his duties. These range from simple priming to staining which requires the highest level of skill. A number of the respondent's employees are capable of doing the simpler processes. The respondent was able to cover the claimant's work during the summer of '21 by a combination of covering the simpler processes internally and outsourcing their mid-range requirements to external providers. In the winter of '21, because of the reduction

in demand, it was possible to cover the claimant's work by using the internal relief sprayer only.

22. The claimant's second operation eventually went ahead on 25 April 2022. He remained on sick leave on his consultant's advice in the intervening period. The second operation was more complex than the first and required a bone graft. The claimant was in significant pain in the aftermath of the operation which he found far more problematic than the first operation. He found the pain relief medication ineffective. He was discharged on 27 April 2022.

23. The claimant called Mr Anderson on 29 April 2022 to update him. Mr Anderson said words along the lines, '*I'll see you in 12 weeks'* which Mr Anderson understood to be the standard recovery time for an operation of this kind. At this point, the claimant remained covered by a sick note which had been issued on 12 April 2022 (prior to the operation) and which had indicated a three-month absence period due to expire on or about 12 July 2022

24. Between March and June 2022, the respondent experienced a record influx of orders. These equated to just over 80% of the previous whole year's total. This caused pressures on the respondent's production capacity.

25. In late June 2022, during his recovery period, the claimant had a fall on the stairs. He required to be referred for X-rays to assess whether he'd done any damage. The appointment took place on 30 June 2022 and the medical advice received was to return to activities and undertake physio. The consultant issued another 3-month sick note on 30 June 2022 and indicated the claimant may need a phased return to work when he returned in 3 months' time. The consultant discharged the claimant from his care at that time (on 30 June) and the claimant had a series of 8 physiotherapy sessions thereafter.

26. On 4 July 2022 during a phone call, the claimant informed the respondent of his fall and of the extended sick period for which he had been signed off from 30 June. The respondent decided to invite the claimant to a review meeting. The meeting took place on 7 July 2022 by Zoom. Mr Anderson was present as was his external HR consultant, Steve Duncan. The claimant attended and his brother, Alan Kelly, also was present for the latter part of the meeting. At that meeting Mr Duncan told the claimant that the respondent would keep him on the books for as long as they could, "*for another twelve weeks if that's what your fit note says*". At that time, the claimant's fit note was due to expire on 30 September 2022.

27. Mr Duncan told the claimant that Mr Anderson was going to have to recruit a sprayer. Mr Duncan went on to outline three options for what would happen at the end of the three-month period. The first was that they didn't manage to get one and that the claimant would therefore come back to spraying if he was fit and able. The second was that they managed to recruit and so would have no vacancies for a sprayer at that time but would look for other work for the claimant in the factory if any was available. The third was that there would be no work

available on the expiry of the three months and the claimant would end up having his employment terminated for ill health.

28. The claimant queried at the meeting whether the respondent couldn't just recruit someone on a temporary contract or use agency staff. The respondent advised their experience of agencies was poor and that the likelihood of finding a temporary sprayer was remote because they'd have to leave a job to come to work for the respondent. This accorded with the claimant's own experience of his sector which was that professional spray polishers were a dwindling trade and so tended to be in demand and to be in permanent roles.

29. The claimant recorded the meeting electronically. After the meeting was over the claimant had a conversation with his brother which he also inadvertently recorded. During this conversation, his brother asked him "If you're honest with yourself, you don't want to go back full stop do you?" to which the claimant replied "Well to be honest, I couldn't give a fuck". The respondent did not have knowledge of these comments until the recording was disclosed in the course of the Tribunal proceedings, long after the claimant's employment terminated.

30. After the meeting on 7 July 2022, the respondent sent the claimant a letter on 11 July 2022 (purporting to be dated 7 July) regarding the discussions in the Zoom meeting, in the following terms:

> ***RE: Update on your hip replacements and date of returning to work***
>
> *Dear David,*
>
> *Thanks for attending the Zoom call today with me and Steve Duncan (Duncan HR). We are aware that you have been absent from work now since 2 August 2021, and that is approximately 48 weeks. In that time, you have had both hips replaced (the first in Aug 21 and the second in April 22) and certainly seem to be getting better.*
>
> *Recently, you let me know that you have had a fall and last Monday you informed me that you have been signed off work by the Consultant for a further 12 weeks and are receiving Physio treatment to improve your hip.*
>
> *We invited you to a catch up meeting to let you know how we plan to manage this situation going forwards and to explain to you what decision we now need to make.*
>
> *Usually, companies would keep staff on SSP who are on long term sick until their SSP is exhausted (after 28 weeks) and than* [sic] *at that point, review where they are and if a return to work is not imminent, then it is common to finish the staff members* [sic] *employment on the grounds of ill health. We have managed to get by much longer and cover your job as a sprayer up until this point (now 48 weeks) but the orders through the factory have reached a point we can no longer cope, and I need to hire some additional spraying staff.*

I will of course look at all temporary staffing options and agency staff but as we discussed, my experience of this in the past is that spraying staff are very hard to recruit (as they are very rare) and I will most likely be required (if I want to engage any new staff) to offer them a permanent job.

This means that by the time you are fit to return we may have filled your role; its [sic] *not something we would do lightly, but I cannot cover the work orders with the staff we currently have and need to recruit.*

As a result, if we have filled your role in your absence, when you return to work (in about 12 weeks) we will see what other work is available and vacancies we have and try to find you a role we feel is suitable and that you are happy with. It is hard to predict what that role might be, but we will look at that problem at the time you are ready to return. I don't feel it would be fair on any new permanent sprayer employee that we may have hired, to finish them and give you their job and so if we have hired a new person then I plan to stick with them.

If we have filled your role (with a permanent member of staff) and there are no other suitable vacancies, we may have to resort to finishing your employment on the grounds of ill health, but we will do our utmost to avoid that situation, but we want to be candid with you that it may end up in that situation. If that happens you will receive notice pay and holiday pay. You did mention if it would be classed as a redundancy, but we don't believe it because the primary reason for your departure would be that at the time we had to replace you it was due to your ill health.

We wanted to be open and honest about where we are, the increase in sales, and the staffing problems that these increase sales have given us, I hope you understand this dilemma.

Please keep up [sic] *updated with any progress and how you are feeling, and we will look forward to your return in 12 weeks and see what work we have available at that time.*

Yours
…

31. At some point fairly soon after 7 July 2022, the respondent advertised for a full-time spray polisher post. They did not advertise this role on a fixed term or temporary basis. Full time hours were regarded by the respondent as the optimum basis for performing the role from a purely operational perspective. There were a number of reasons for this. Firstly, the respondent had a high demand which would sustain a full-time recruit at the time. Secondly, the set up and clean down time for the sprayer role was significant, making shorter shifts operationally less productive. Thirdly, one person must carry out each individual production to ensure quality assurance traceability so that part time working would elongate the completion times for orders. Many spraying jobs which the

respondent had would take in excess of a week to spray so part-time hours could add significantly to production process times.

32. The claimant undertook a physiotherapy course over a five-week period and was discharged by the physiotherapist on 10 August 2022. The claimant showed the physiotherapist the respondent's letter dated 7 July 2022 (received on 11 July). The physiotherapist said words to the effect: "*They should be more understanding. Why don't you try 1-2 hours a day, but there's only one person that knows your body and that's yourself*." The claimant at that time did not feel sufficiently well to return for one to two hours per day or at all. He was working on building up his mobility by taking daily exercise, walking up and down South Shields pier.

33. The claimant rang Mr Anderson on 26 August 2022 and relayed what the physio had told him. The claimant said he wasn't ready to return to work at all at that stage. Mr Anderson asked whether the claimant was able to return to work on a phased return before his sick note expired (which it was due to do on 30 September 2022). As at 26 August, the respondent had not managed to fill the advertised sprayer post.

34. On 22 September 2022, the claimant attended at the factory without advising the respondent beforehand of his intention to do so. Mr Anderson was not initially present. The claimant had a chat with some of his colleagues. When Mr Anderson arrived, he asked to meet with the claimant in their meeting room for an update. During the visit, Mr Anderson observed the claimant limping after an hour-long car journey. This was the longest the claimant had sat in a driving position after his operations.

35. The claimant suggested coming back to work on a phased basis for four-hour shifts and Mr Anderson pointed out that this went against what he understood to be the physiotherapist's advice. Mr Anderson was referring to the claimant's discussion with the physiotherapist which the claimant had relayed to him. It was discussed that she had referred to one or two hours a day. This number of hours did not suit the claimant because of the length and cost of his commute. Nor did it suit the respondent because the set up and clean down time for the claimant's work is significant. It was also the case that one sprayer required to be assigned to each production job to ensure quality assurance traceability. At this time, the respondent had not yet filled the vacancy it had advertised for another full-time sprayer. Mr Anderson told the claimant that four hours didn't work for the respondent from an operational perspective.

36. Mr Anderson noted the claimant seemed to be limping when he attended the factory. He told the claimant to contact either his physiotherapist or his consultant to check they were happy for him to work increased hours (i.e. 4 hours), given the previous reference by the physiotherapist to 1-2 hours. The respondent had, however, indicated that 4-hour shifts would be unsuitable.

37. The claimant contacted the physiotherapist. They had not been in contact since the claimant's last session in August. She thought the claimant was already

back at work. The claimant didn't ask her to put anything in writing about the hours he could do. However, he did discuss with her that his employer was querying the hours he could do. She told the claimant to speak to his consultant.

38. The claimant tried to do so. He got through to his consultant's secretary. He explained that the respondent wouldn't let him return to work for his proposed 4-hour shifts. The consultant's secretary advised him that, as he had been discharged from the consultant's care on 30 June 2022, the consultant wouldn't provide anything in writing. She told him that, by law, he didn't need anything more after having been discharged.

39. At some point between 22 Sep 2022 and 5 October 2022, the respondent identified a candidate for the advertised Sprayer role and offered him a position.

40. On or about 29 September 2022, the claimant tried to call Gavin Anderson. He didn't get him but spoke to his colleague, Karen Mortimer. He told her he wanted to know if Mr Anderson wanted him back to work on Monday 3 October 2022. The claimant's sick line was due to expire over the intervening weekend (on 30 September). The claimant had, by this time, exhausted his SSP.

41. On Sunday 2 October, Mr Anderson emailed the claimant. He said:

> *Thank you for your calling on Friday and apologies for the delay in coming back. As you can imagine I need to take advice on issues such as your return to work.*
>
> *In summary, I do not want you to return to work tomorrow. I have concerns over your readiness to return and I feel we need further discussions regarding this.*
>
> *I am only in the office on Monday and Tuesday, so I will come back to you by return to discuss it further.*
>
> *I will come back to you ASAP.*
> *…*

42. On Wednesday 5 October 2022, the respondent sent the claimant a letter by email in the following terms:

> *Dear David,*
>
> *We understand the following:*
>
> - *You have been off work since August 21…*
>
> *…*
> - *Your most recent fit note expired on 30/09/2022 which stated a phased return to work was required*

- *In our discussion on 22nd September to* [sic] *told me that the phased return suggested by the physio was 1-2 hours per day*
- *In July we wrote to you with regard to our intentions to advertise to fill your role and would assess what work we have available at the point you are ready to return*

We have waited over 14 months for you to be able to return to work and, as outlined in our letter in July, we have held open your position for as long as possible. We have continued to manage our workload …. However, the demand is changing imminently and, as a result, I require a full time experienced sprayer.

I am aware that 1-2 hours of work does not work for you personally, given the travel costs involved and you have suggested returning to work for half days, which is going against your medical advice, however I have made you aware that because of the nature of your work, half days are not suitable for your role. The amount of set up and clean down time required and reduced hours would greatly lengthen order completion times in an unprecedented period of demand on production.

Having met with you on 22 Sep my non-medical assessment is that you are some way off full time work. You informed me on 2 Oct that your physio was unwilling to document anything to the contrary. Your mobility is still significantly restricted and pushing you back into the full-time role which is more demanding than ever given our current and upcoming workload too soon presents too much of a risk of failure or further set backs in your rehabilitation.

We have advertised for a while as we have said that we would and as the volume of orders is now increasing. We will need to a hire a third sprayer for the factory and so I have had no option other than to offer the position to an ideal candidate who will be able to work full time in the spray booth in order to meet demand.
…

43. The letter went on to explain that at such time as the claimant deemed himself able to return to work full time, "*I will again assess your health and if I agree you are ready for a return, I will then assess what work we have available at that point*."

44. On 14 October 2022, the claimant sent Mr Anderson an email in the following terms:

Morning Gavin,

I would just like to confirm the receipt of your letter,

I know my own body and what I'm capable of doing but your non medical assessment is all that seems to count, it's a pity you didn't

do a non medical assessment before the operations instead of seeing me struggling and some days nearly falling as mentioned in the zoom meeting.

The 1-2 hours phased return to work mentioned by the physio was on the 10/08/22 which was 9 weeks ago which I wasn't ready for and a lot can change in 9 weeks which I don't see as going against medical advice.

I recognise the business demands of the company as stated in your letter.

In response to your non medical assessment I think this should have been done by your appointed occupational health professional to asses [sic] *my abilities to return to work under an appropriate phased return as per the recommendations of my consultant but like you've said this isn't an option.*

Like you've stated in your letter you have found the ideal candidate to fill my role in the spray booth.

As Steve your HR consultant mentioned in the zoom meeting on 7/7/22 my job would be advertised and my job would be held open until my sicknote expired on 30/09/22 and if my role was filled your first threat of finishing my employment on the grounds of ill health was made.

I'm at a loss as to what further reasonable actions I can take to satisfy you other than wait around for your next non medical assessment to see if you asses [sic] *me fit to return to work, it's been a stressful enough time going through the 2 major operations and the money worries this has left me with without the constant threat of finishing me on the grounds of ill health, it's been 14 weeks now since the zoom meeting and I just think there needs to be a line drawn under this Gavin. I think it's pretty clear you don't want me back so maybe it's a good time for parties to go their separate ways.*

So if you could let me know by the end of today if you will be terminating my contract due to ill health or agree on a severance package to allow me to walk away then I can start looking for something else…"

45. On 17 October 2022, the claimant called the respondent and spoke to Karen Mortimer again as Gavin Anderson was unavailable. He asked for Mr Anderson to pay him his holidays and also asked that Mr Anderson 'finish his employment if he was going to do it'. On the same date, Mr Anderson sent an email to the claimant. This dealt with the issue of the claimant's holiday pay request. Regarding the other matters, the email said:

I will come back with a response to your other various pieces of correspondence – including your telephone call with Karen - this morning in due course.

46. By this time, the candidate who had been offered the full-time spraying post had taken up the role.

47. On 20 October 2022, Gavin Anderson had a call with the claimant. During the call, he offered the claimant a position with the respondent as a labourer on minimum wage (£9.50 per hour). He proposed that the claimant work two hours a day to begin with, leading to 16 hours a week in due course or between 16 and 24 hours per week in the respondent's busy periods. The claimant did not give a response during the call.

48. On 26 October 2022, the respondent sent the claimant a letter by email in the following terms, so far as relevant:

Dear David,

I write following our recent telephone conversation.

As outlined in previous meetings and correspondence, we have been trying to keep employment options open for you as long as possible …

In our meeting on 22nd September you told me your physiotherapist had recommended a return of 1-2 hours per day only a couple of weeks earlier. You've subsequently clarified this date as 10th August. In my opinion as Operations Director – 1-2 hours work a day in the spray booth is not feasible due to the time to set up, carry out any meaningful spraying, clean down and to be accountable for the work produced – it's not a piecemeal job and while I would be very happy to try something your job was different to spraying - but 1-2 hours per day in the spray booth will not work operationally from my perspective. You also informed me that this would not work financially for you.

Additionally, in the same meeting I requested that you get an update from your Physiotherapist and I understand that you had a discussion with her, however she provided no further update of your ability to work. When I saw you in the factory that day – in my opinion the way you looked, walked and carried yourself, I assessed that you were in reality a long way away from returning

to work in a factory especially in a spray booth, which requires a full time role …

As you know we have now had to employ a new sprayer into you [sic] *role as the volume of work had demanded that. This allows me to consider other roles … as discussed last week I do have a role available … which can accommodate such a phased return. This would be a Labourer position, and as this is a lower level role than a sprayer it does not attract the same salary; its* [sic] *paid in line with National Minimum Wage.*

The nature of the role would allow for working 2 hours per day to start you off and as you feel comfortable this could be increased. It isn't however a full time position and the maximum requirement would be 3 days / 24 hours in busy periods …

…If you can let me know whether or not you'd like to work in the role we have available we can organize your return to work to be started …

Or if you do not wish to take up this offer … please let me know and we will proceed with termination on the grounds of ill health…

49. On 27 October 2022, there was an exchange of emails between the claimant and Gavin Anderson. The claimant sent an email at 12.26 pm as follows:

Afternoon Gavin

I would just like to confirm receipt of your letter.

I'm ready willing and available for work your [sic] *not letting me so you need to be paying me in full from 3rd October 2022 onwards, I give you 7 days to make the payment to me. If not I'll seek further legal advice.*

Your [sic] *not willing to make any reasonable adjustment for me to return to work as required by the equality act 2010.*

You've stated I've been replaced by somebody else, the reason for this seems to be because I'm disabled which is discrimination under the equality act 2010.

The role youe [sic] *offering as a labourer isn't sufficient enough it's a lot less hours and a lot less pay which seems like I'm being punished for being disabled.*

Regards

…

50. Mr Anderson responded on the same day, disputing the allegations that the Equality Act 2010 had not been complied with**.** He suggested a phased return was a suitable adjustment as was finding the claimant alternative work. He ended with the following paragraph:

> *The offer of alternative work still stands as outlined in my letter dated 26th October and if you do not attend within the next 7 days, I will take it that you do not wish to accept the alternative role offered, at which point I will proceed to termination as outlined in previous correspondence.*

51. The claimant emailed Gavin Anderson again on 4 November 2022 in the following terms:

> *Morning Gavin,*
>
> *Like I said in my last email you stopped me returning to work from the 3rd of October you need to pay me in full from this date, the 7 days to make this payment has now passed and no payment has been received, like I said, I'll be seeking further legal advice.*
>
> *Like I said the role your* [sic] *offering as a labourer isn't sufficient enough it's a lot less hours and a lot less pay which you have stated is the only work you have available as outlined in your letter dated 26th October and you also said in your email dated 27th October if I do not attend within the next 7 days which has now passed and at which point you will proceed to termination as outlined in your previous correspondence.*
>
> *Can you give me an update to where things are at as like I've said in previous emails Christmas is just around the corner and this needs resolved ASAP so I can move on.*
>
> *Regards*
> *…'*

52. On 5 November 2022, the claimant received a call from his brother's employer, Rosebirch Limited. His brother had discussed with his employer the claimant's situation with the respondent. The claimant agreed to meet them that day to discuss potential employment. At the meeting, which took place between the claimant and Stephen Flynn, Managing Director of Rosebirch, the claimant explained the position he was in with the respondent regarding his work. He became emotional about the matter. Mr Flynn was impressed with the claimant and was interested in offering a position.

53. On 7 November at 17:35, Gavin Anderson sent by email a letter to the claimant dismissing him, in the following terms:

Termination on grounds of ill health

Dear David,

This is to summarise the decision to terminate your employment on the grounds of ill health following you not attending work to undertake an alternative role that we had offered to you and gave you 7 days to attend work (which you failed to do).

I have reviewed all the information at the end of this offer period (ended on 4th November 2022) in which we reviewed your recent sickness and ability to attend work.

You have been absent from work for a prolonged period (over 1 year) with hip replacement issues and subsequent problems after a fall. We have kept your original (sprayer job) open as long as we could and kept in contact with you.

You presented yourself to work on 22nd September saying you had been advised to do 2 hours per day but in my opinion you were not even close to being ready to work as a sprayer. We offered you alternative work but you have declined to attend work to try this phased return in an alternative role, and so it is unfortunate that I have made the decision to terminate your employment on the grounds of your ill health. The reason for your dismissal is "capability" (on the grounds of ill health)

In reaching this decision I have taken into account the fact that you were not fit for work in my opinion (as a sprayer), I believe that spraying work is not suitable for a phased return, we have since had to replace your role with a new hire sprayer due to the increased volume of work but we do have alternative work that is

suitable for a phased return (labouring) which was offered to you but you are refusing to do that.

So the only option I see is to terminate you on the grounds of ill health, as noted in my email dated 27 October 2022.

The date of this letter is your date of termination and we will pay (in lieu) to you your notice monies due (5 weeks') and also any outstanding holiday that is due to you (both payments are taxed).

I am sorry that we have had to end your employment however we could see no feasible way to continue your employment given your state of health. I hope you can find employment that may fit with your condition and I wish you all the best.

If your condition improves and you feel able to work again in our business in the future then please let me know and if there are any vacancies we will consider your application.

I remind you of your right to appeal against this disciplinary action to Julia Brown … within 5 working days of the date of this letter and of your right to be accompanied at any appeal interview.

Yours sincerely,

Gavin Anderson
…

54. The respondent's principal reason for dismissing the claimant at the time it took the decision to do so on 7 November 2022 was not a concern that the claimant was unfit to undertake the duties of a sprayer role on a full time or a part time basis. The principal reason for the dismissal was that, by that date, the respondent did not have a requirement for the claimant to work as a sprayer, having previously recruited a full-time sprayer the preceding month. The respondent had a requirement for a labourer at the material time but the claimant had declined this work. This was not the work the claimant was employed to do. The respondent decided to dismiss the claimant because a return to spraying duties was not operationally required and because the claimant had rejected the alternative vacancy proposed by the respondent.

55. At the time of his dismissal, the claimant was 53 years' old. He had over five years' continuous service with the respondent. His (gross) hourly rate at the

time of termination was £12.50 per hour and he was contracted to work 40 hours per week. His gross weekly pay was £500.

56. The claimant called Stephen Flynn following receipt of the letter on 7 November 2022. Mr Flynn offered the claimant a role as a spray polisher which he started on 8 November 2022. In his first week of employment by Rosebirch, the claimant worked 39 hours without any requirement for additional rest periods. Within 3 months of 8 November 2022, Rosebirch subjected the claimant to a medical check, a measure they take for all direct employees. No adverse issues were identified or special working practices suggested.

57. The claimant had no loss of earnings arising from his dismissal by the respondent. His income from Rosebirch replaced in full the income he lost from the respondent.

Relevant Law

Breach of Contract (Pay Increase)

89. The Employment Tribunal has jurisdiction to consider claims for recovery of damages for breach of contract pursuant to the 1994 Order. There are limits on the Tribunal's jurisdiction and certain types of contract claim are excluded, including claims for personal injury. The claim must arise or be outstanding on termination of the employment and the damages available are capped at £25,000.

90. In line with ordinary contract law the parties may conclude an oral contract or oral terms as well as written ones. These might, in principle, arise from discussions at the recruitment stage or at interview.

91. Where a breach of contract is serious enough, the innocent party may elect to treat himself as discharged from the duty to perform the contract further. Alternatively, he may work under protest and treat the beach as continuing and actionable. If he does not protest and continues to accept the other party's repudiatory breach, the innocent party risks affirming the contract and losing the right to treat themselves as having been constructively dismissed. If the innocent party conducts themself in a way so as to lead the party in breach to believe that they will not seek a remedy for the breach, then the innocent party may waive the right to claim damages by waiver estoppel.

Burden of Proof in EA claims

103. Section 136 of EA deals with the burden of proof in claims concerning prohibited conduct under the EA. It provides, so far as material, as follows:

"**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.

…

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

…"

104. The effect of section 136 is that, if the claimant makes out a *prima facie* case of discrimination, it will be for the respondent to show a non-discriminatory explanation.

Duty to make Reasonable adjustments

92. There is a duty in certain circumstances on an employer to make reasonable adjustments in relation to a disabled employee. The relevant provisions are contained in the EA and are 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 persons who are not disabled, to take such steps as it is reasonably practicable to have to take to avoid the disadvantage.

….

21 Failure to comply with duty

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

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

93. The claimant need not identify the particular adjustment at the time the adjustment falls to be made (See EHRC Code para 6.24). At that stage the onus to comply with the requirements of the EA is on the employer.

94. However, the EAT has confirmed that, by the time of the Tribunal hearing, there should be some indication of what adjustments the claimant alleges should have been made (**Project Management Institute v Latif** [2007] IRLR 579). What is necessary is that the respondent understands the broad nature of the adjustment proposed and is given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not (para 55).

95. The adjustment must have a real prospect of preventing the disadvantage. The EHRC Code lists factors which might be taken into account in deciding if a step is a reasonable one to take, as follows.

a. whether taking any particular steps would be effective in preventing the substantial disadvantage

b. the practicability of the step

c. the financial and other costs of making the adjustment and the extent of any disruption caused

d. the extent of the employer's financial and other resources

e. the availability to the employer of financial or other assistance to help make an adjustment , and

f. the type and size of the employer

Unauthorised deduction / Breach of Contract (Wages)

89. Under section 13 of ERA, a worker has the right not to suffer unauthorised deductions from his wages. Under section 23 of that Act, he may complain to an Employment Tribunal that an employer has made a deduction in contravention of section 13. Where a tribunal finds such a complaint is well founded, it shall make a declaration to that effect and order the employer to pay the amount of the deduction (section 24 ERA).

90. The definition of wages is broad but it is limited by the requirement that the payment must be 'payable under contract or otherwise'. It is necessary for the worker to show some legal entitlement to the sum in question, though this may not necessarily arise from an express term in the contract (**New Century Cleaning Co Ltd v Church** [2000] IRLR 27 at para 345).

91. **In Miles v Wakefield Metropolitan District Council** [1987] IRLR 193, [1987] ICR 368, HL, Lord Templeman stated:

> *"In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work."*

92. The case involved a deliberate refusal to work normally. However, the co-dependency between work and pay is always subject to the terms of the contract. It has been judicially acknowledged that this postulated 'work / pay codependency' can be a blunt tool in the modern context (**North West Anglia NHS Foundation Trust v Gregg** [2019] IRLR 570).

93. In **Beveridge v KLM UK Ltd** [2000] IRLR 765, the EAT considered a situation where an employee who had been on sick leave had obtained a medical certificate pronouncing her fully fit and wished to return to work. However, she was prevented from returning for six weeks by her employer whilst it waited for its own medical report. As her entitlement to contractual sick pay had run out by this stage the employer did not pay her any wages for this six-week period. The contract did not state whether wages could be withheld during this time. The EAT held that in the absence of a contractual term to the contrary, wages were payable for the six-week period. The employee was willing to work and had done all she could to perform her part of the bargain.

94. In **Miller v 5pm (UK) Ltd** UKEAT/0359/05 (1 December 2005, unreported), however, the EAT considered the position where, unlike in **Beveridge**, the claimant could not offer full performance but could only do light duties on his return. The Tribunal concluded that, because in the material period, the employee was no longer offering his services to carry out the work required under his contract, there was no unauthorized deduction of wages. The EAT agreed. The claimant had produced a medical certificate which said he should undertake light duties. The facts were in contrast to **Beveridge** because here the employee was only offering to carry out part of his work (para 9). Lord Pugsley observed : '*Underlyling the Appellant's contention is the implicit premise, which never quite rises to an explicit submission, that the employer has to find an employee a light job. Although as a matter of reality employers may well create a light job which is within an injured employee's capacity I find it an audacious claim that an employee has the right to compel an employer to create a light job for him without giving the employer time to make further enquiries as to what is appropriate light work in the light of medical advice*' (para 10).

95. As noted above, the Employment Tribunal also has jurisdiction to consider claims for recovery of damages for breach of contract pursuant to the 1994 Order. To succeed, an employee must show a breach of a contractual term (express or implied).

Discrimination arising from disability

96. The claimant also brings a complaint of discrimination arising from disability under section 15 of EA. The provisions are as follows:

> *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.

58. Where an employee has been treated unfavourably because of something arising in consequence of their disability, it is for the employer to prove justification. The test of justification is an objective one to be applied by the Tribunal. When assessing proportionality, the Tribunal must reach its own judgment based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer (**Hensman v Ministry of Defence** [2014] UKEAT/0067/14 at para 44).

59. The Tribunal's role when assessing proportionality for the purposes of a section 15 claim is not the same as its role when assessing the fairness of a dismissal for unfair dismissal purposes. It is not confined to asking whether the decision was in the range of views reasonable in the particular circumstances. The exercised is one to be performed objectively by the Tribunal itself (per Singh, J in **Hensman**, para 43). There is no general proposition that the test under s.15(1)(b) of EA and the test for unfair dismissal are the same; they are plainly distinct albeit in some factual situations they may have similar effect (**City of York Council v Grosset** [2018] IRLR 746).

Direct Discrimination

97. Section 13 EA is concerned with direct discrimination and provides as follows:

*"**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."

98. According to section 23 EA, "on a comparison for the purposes of section 13, … there must be no material difference between the circumstances relating to each case". The relevant "circumstances" are those factors which the respondent has taken into account in deciding to treat the claimant as it did, with the exception of the element of the protected characteristic (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11). A person can be an appropriate comparator even if the situations compared are not precisely the same (**Hewage v Grampian Health Board** [2012] UKSC 37). The claimant does not need to point to an actual comparator at all and may rely only on a hypothetical comparison. Very little direct discrimination today is overt and it is necessary to look for indicators from a time before or after a particular decision which may demonstrate that an ostensibly fair-

minded decision was, or equally was not, affected by bias on the grounds of a protected characteristic (**Anya v University of Oxford** [2001] IRLT 377, CA). Sometimes evidence is led of so-called 'evidential comparators'. These are actual comparators but whose material circumstances in some way differ from those of the claimant. Their evidential value is variable and is inevitably weakened by differences in material circumstances from the claimant's (**Shamoon**).

99. For a direct discrimination complaint to succeed, it must be found that any less favourable treatment was because of the claimant's disability, though the discriminatory reason need not be the sole or even the principal reason for the respondent's treatment. In **JP Morgan Europe Ltd v Chweidan** [2011] IRLR 673, CA, LJ Elias summarised the position as follows:

> *"5 direct disability discrimination occurs where a person is treated less favourably than a similarly placed nondisabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial - must be the claimant's disability. …"*

100. The burden of proof provisions set out above apply to all types of discrimination complaint but can be particularly important in direct discrimination claims, given that direct discrimination is rarely overt in modern times. There are two stages. Under Stage 1, the claimant must show facts from which the Tribunal could decide there was discrimination. This means a 'reasonable tribunal could properly conclude' on the balance of probabilities that there was discrimination (**Madarassy v Nomura International plc** [2007] IRLR 246, CA). The Tribunal should take into account all facts and evidence available to it at Stage 1, not only those which the claimant has adduced or proved. If there are disputed facts, the burden of proof is on the claimant to prove those facts. The respondent's explanation is to be left out of account in applying Stage 1. However, merely showing a protected characteristic plus less favourable treatment is not generally sufficient to shift the burden and progress to Stage 2. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed un unlawful act of discrimination. 'Something more' is required (**Madarassy**).

101. There are cases where it is unnecessary to apply the burden of proof provisions. These provisions will require careful attention where there is room for doubt as to the facts necessary to prove discrimination, but they have nothing to offer where the Tribunal is in a position to make positive findings one way or the other (**Hewage v Grampian Health Board** [2012] UKSC 37).

Discriminatory Dismissal contrary to the EA

102. Section 39 of EA provides as follows at sub paragraph (2):

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

(a) ….

(b);

(c)by dismissing B;

(d)…

103. The different ways in which an employer, A, can discriminate against an employee B are set out in Chapter 2 of the EA. These include direct discrimination (section 13), discrimination arising from disability (section 15) and failing to comply with a duty to make reasonable adjustments (sections 20 *et seq*).

Unfair dismissal

104. Section 94 of ERA provides that an employee has the right not to be unfairly dismissed. It is for the employer to show the reason or the principal reason (if more than one) for the dismissal (s98(1)(a) ERA). A reason that relates to the capability of the employee for performing work of the kind he was employed to do is one of the 'potentially fair reasons' listed (s98(2)(b) ERA).

105. A "reason for dismissal" has been described as a "*set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee*." (**Abernethy v Mott Hay and Anderson** [1974] ICR 323).

106. An employer can rely upon more than one reason, but if he does so each should be specifically pleaded and argued before the employment tribunal (**Murphy v Epsom College** [1983] IRLR 395, [1983] ICR 715, EAT). If the reason relied upon by he employer is found not to justify the dismissal, it follows that the dismissal will be unfair even if another reason might successfully have been argued (**Robinson v Combat Stress** UKEAT/0310/14 (5 December 2014, unreported))

107. If a potentially fair reason for dismissal is shown, the Tribunal must be satisfied that in all the circumstances the employer was acted fairly in dismissing for that reason (Section 98(4) of ERA). There is no burden of proof on either party when it comes to the application of section 98(4).

108. In applying section 98(4), the Tribunal reminds itself that it must not substitute its own decision for that of the employer in this respect. Rather, it must be decided whether the respondent's response fell within the range of reasonable responses open to a reasonable employer in the circumstances of the case (**Iceland Frozen Foods Limited v Jones** [1982] IRLR 439). In a given set of circumstances one employer may reasonably decide to dismiss, while another in the same circumstances may not. The test of reasonableness is an objective one.

109. ‘Capability’ is defined in the legislation as meaning an employee’s capability “assessed by reference to skill, aptitude, health or any other physical or mental quality” (s.98(3)(a)). In **Spencer v Paragon Wallpapers Ltd** [1976] IRLR 373, [1977] ICR 301 the EAT emphasised the importance of scrutinising all the relevant factors in capability dismissals.

> *''Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?''*

110. The relevant circumstances include:

> *'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'.*

111. The band of reasonable responses test applied both to the substantive decision to dismiss and to procedural steps taken. Tribunals should not consider procedural fairness separately from substantive issues (**Taylor v OCS Group Ltd** [2006] ICR 1602). The question is whether, in all of the circumstances of the case, the employer acted reasonably in treating their reason for dismissal as a sufficient reason to dismiss the employee (s.98(4)).

112. In the House of Lords case, **Polkey v Dayton Services** [1987] All ER 974, Lord Bridge emphasised the importance of procedural safeguards:

> *‘…an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as ‘procedural’, which are necessary in the circumstances of the case to justify that course of action. … If the employer has failed to take the appropriate procedural steps in any particular case, the one question the tribunal is not permitted to ask in applying the test of reasonableness … is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken … this question is simply irrelevant. It is quite a different matter if the Tribunal is able to conclude that the employer himself, at the time of the dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile …’*

113. **Polkey** makes clear, however, that how an employee would have been treated in the event of a fair procedure, though not relevant to the fairness of the dismissal, is relevant to the issue of what compensation should be awarded, as discussed further at paragraph **118** below.

Remedy: unfair dismissal

114. An award of compensation for unfair dismissal consists of a basic award and /or a compensatory award. The formula for calculating the basic award is prescribed by legislation. However, where the Tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award, the Tribunal shall reduce that amount accordingly (s.122(2) of ERA).

115. The employer need not discover the said conduct until after the dismissal and, unlike the position with respect to reducing the compensatory award, the basic award may be reduced for conduct which did not cause or contribute to the dismissal. It is a prerequisite of a reduction of a basic award under s 122(2) (as it is with a compensatory award) that the conduct is found to be to be culpable or blameworthy in some way and that it is just and equitable to make the reduction (**Sanha v Facilicom Cleaning Services Ltd 2020** UKEAT/0250/18 (25 February 2020, unreported) (Auerbach J).

116. The compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the employee as a result of dismissal insofar as attributable to actions of the employer. The compensatory award is to be assessed so as to compensate the employee, not penalise the employer and should not result in a windfall to either party (**Whelan v Richardson** [1998] IRLR 114).

117. An unfairly dismissed employee is subject to a duty to make reasonable efforts to obtain alternative employment to mitigate his losses and sums earned will generally be set off against losses claimed (**Babcock FATA v Addison** [1987] IRLR 173). The duty is to act as a reasonable man would do if he had no hope of receiving compensation from his employer (per **Donaldson J in Archibold Freightage Ltd v Wilson** [1974] IRLR 10).

118. Where a Tribunal concludes a dismissal was unfair, it may find that the employee would have been dismissed fairly in any event, had the employer acted fairly, either at the time of the dismissal or at some later date. The Tribunal must assess the chance that the employee would have been dismissed fairly in any event then the reduce the losses accordingly. Such reduction may range from 0% to 100% (**Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL).

119. In an unfair or wrongful dismissal case to which the ACAS Code applies, where it appears to the Tribunal that an employer has unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, the tribunal may, if it considers it just and equitable in all the circumstances, increase any award to the employee by up to 25%. It may likewise reduce any award where there has been an unreasonable failure to comply on the employee's part (s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA")).

120. If it is found that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount as it considers just and equitable (s. 123 (6), ERA). The conduct need not be in the character of gross misconduct to warrant a reduction (**Jagex Ltd v McCambridge** [2020] IRLR 187*)*

121. It is customary to include in the compensatory award a sum for loss of statutory rights to reflect the fact it will take the employee some time in the new job to acquire the right not to be unfairly dismissed, the right to a statutory redundancy payment and the right to statutory minimum notice.

Submissions

122. The claimant elected not to give a submission.

123. Mr Sangha handed up a written skeletal submission to which he spoke. This has been appended to the judgment. In his oral remarks, Mr Sangha addressed us on certain factual aspects of the case.

Discussion and Decision

Breach of contract (£1.25 pay increase)

124. We begin with the claimant's beach of contract complaint for damages for alleged short paid wages arising from the failure of the respondent to award a pay rise of £1.25 per hour from the date falling three months after his employment commenced.

125. The respondent asserts that there was no agreement to pay at a higher rate of pay and, further, that, if there was, then the claimant has waived or affirmed the rate of pay that he was paid.

126. We considered carefully the evidence before us to identify whether there was a contractual term which obliged the respondent to increase the claimant's hourly rate in the amount alleged at the time alleged. The claimant did not cover the relevant discussions said to have given rise to the term in his written witness statement. This was, therefore, the subject of supplementary evidence in chief given by the claimant in response to questions from the Employment Judge. We accepted the claimant's evidence, on the balance of probabilities, that during his interview Mr Anderson said that the claimant's salary would be reviewed after 12 weeks when the claimant was up to speed with the job, following the claimant having disclosed his rate of pay with his former employer of £12.75 per hour.

127. We do not find that this oral exchange gave rise to a contractual term which obliged the respondent to increase the claimant's hourly rate after 12 weeks in the role. The claimant did not give any evidence that Mr Anderson gave a commitment to do so, orally or otherwise. The commitment given, on the claimant's own evidence, was to review the claimant's salary at that time.

That was the extent of the agreement. Mr Anderson indeed reviewed the position at the appointed time and declined to alter or increase the claimant's hourly rate. There was no evidence before us that the respondent agreed during the interview that an increase would be granted after 12 weeks irrespective of performance or that it would be granted subject to the claimant achieving certain specified key performance indicators.

128. We find that the respondent did not breach any contractual term by omitting to increase the claimant's hourly rate to £12.75 from October 2017. No such term had been agreed between the parties. The claimant's claim for damages for breach of contract in this regard is, therefore, dismissed.

Reasonable adjustments

129. It is admitted by the respondent that it knew or reasonably ought to have known at all material times that the claimant had a disability (namely osteoarthritis affecting his hips).

130. The respondent accepts that, from 3 October 2022 – 7 November 2022, it applied the provision criterion or practice (PCP) of requiring the claimant to work his full contracted hours or not to work at all. It further accepts that the PCP would put the claimant at a disadvantage compared to someone who did not have osteoarthritis in their hips and who was not recovering from consequential operations. We find that the disadvantage specifically would be that the claimant may be caused pain or tiredness in carrying out his duties with consequent distress and the risk or fear of injury. We accept this disadvantage was substantial in the sense of not being 'trivial' or 'minor'.

131. The respondent further accepts that the respondent knew or reasonably ought to have known at the material times that the claimant was likely to be placed at the disadvantage.

132. The reasonable adjustment for which the claimant contends is that "the respondent should have permitted the claimant to work four-hour shifts".

133. Mr Sangha submitted it would not have been a reasonable adjustment to have offered / allowed the claimant a phased return to work as a Painter / Sprayer on 03.10.2022. He suggests this would have been on the basis of 1-2 hours per day (and not 4 as the claimant contends), but even that, he says, would not have been a reasonable adjustment because of a number of matters including:

a. Mr Anderson's observation of the claimant on 22.09.2022 was that he was some way off full-time work as his walking was "very laboured" and he had concerns about his ability to undertake manual work which required him to be standing/kneeling at all times;
b. In any event, Mr Sangha argued that the nature of the role meant that working such low hours was impracticable because:
    i. The set up and clean down time is significant with the respondent estimating that this takes 45 minutes for both.

ii. One person must carry out each individual production order to ensure QA traceability;
iii. Given the nature of the job, many jobs take in excess of a week to spray. Given that one sprayer needs to carry out the production job, a significant reduction in hours would extend overall production days way beyond lead time requirements;

c. The respondent considered that half days were unsuitable for the claimant's role operationally and the respondent had offered a labourer's post which could be done on a suitably phased basis.

134. The central question for the Tribunal is whether the adjustment contended for was a reasonable step for the respondent to have to take. The reasonableness of the step is to be assessed objectively. The relevant circumstances at the material time are not confined to questions about the operational impact of reduced hours for the type of role and the claimant' fitness or the respondent's beliefs about the claimant's fitness or otherwise to work 4-hour shifts. Additional material factors include the following:

d. The respondent was a small employer with a total workforce of around 30 and only 16 employees on the shop floor.

e. In the period between 3 and 5 October 2022, the respondent had offered a full-time position to a candidate as a spray polisher. This was a third spray polisher employee (excluding the claimant). It is not known when they started but it was understood they were due to start imminently in early October.

f. At the time when the offer was made to that newly recruited spray polisher, the claimant had been absent for 14 months. The respondent had received a record number of orders in the period between March and July 2022 which was causing pressures on production.

g. The respondent had, therefore, undertaken a recruitment exercise with a significant lead in time. Sprayers were in demand with relatively low numbers available. The respondent had advertised for a new Sprayer some months previously and latterly contracted to employ a full-time sprayer who could cover the work available, working full eight hour shifts

h. Full time hours were regarded by the respondent as the optimum basis for performing the role from a purely operational perspective, having regard to the following issues:

i. The set up and clean down time for the claimant's role was significant. There was dispute between the parties about the exact length of time on each shift that might be spent on this, but we accept the principle there would inevitably be some set up and clean down time, making shorter shifts operationally more problematic.

ii. One person must carry out each individual production to ensure QA traceability.

iii. Many jobs take in excess of a week to spray. We accept that some smaller jobs would come up too like spraying individual drawers, but these were not the mainstay of the respondent's operation.

i. There was not sufficient sprayer work to sustain both the claimant and the newly recruited sprayer (whether the claimant returned initially on a part-time or full-time basis). If the claimant was to be provided work as a sprayer between 3 October and 7 November 2022, the respondent would have had a surplus of sprayers and would likely have required to dismiss the newly appointed sprayer or withdraw his job offer (or dismiss one of its other sprayer employees).

j. On 20 October 2022, Mr Anderson offered the claimant a labourer role which was confirmed on 26 October 2022. He could do this on a phased basis. The role was, however, lower paid.

135. Taking all relevant circumstances into account, we do not accept that allowing the claimant to return to work as a spray polisher for 4 hours shifts on a phased basis between 3 October and 7 November 2022 would have been a reasonable step for the respondent to have to take. The main reason for this is that the respondent's spraying requirements were already internally resourced or would imminently be so during this time window, following the recruitment of a new full-time Sprayer earlier in October after a long period of advertising. This recruitment, in turn we find was reasonable at the time it was pursued (with the recruitment process beginning around July / August 2022) against the background of the claimant's lengthy absence and the steep rise in orders received by the respondent in the material period. We also find it was reasonable to proceed with the recruitment of the new sprayer in October 2022 against the backdrop of the claimant's continuing inability as of 3 October to return (immediately) to full time hours.

136. There was a focus during the hearing on whether the claimant was or was not fit to work two hours or four hours a day in this period and on whether four-hour shifts would have been in line with the claimant's medical advice. There was no up to date medical advice on that question at the material time (though the claimant had diligently made contact with his physiotherapist and consultant's office as he was requested to do). In the particular circumstances of this case, we consider it unnecessary to make any finding about how many hours the claimant was or was not medically capable of working in the sprayer role in the period from 3 October 2022. On the particular facts, this is something of a distraction. The claimant accepts he was not capable of returning immediately to full-time hours (reduced hours on a phased basis being the adjustment contended for). The most material consideration for the respondent at the time was that they had, following the recent recruitment, sufficient sprayers to cover their workload. In those circumstances, whether the claimant could initially work two or four hours, we do not find it was an objectively reasonable step for them to release one of the other full-time sprayers in order to partially cover their requirements using the claimant. The respondent was entitled to consider the practicability of the step and the

implications of the step for its other sprayer employees, including its recent recruit. Given its size and type, we also find it was reasonable for it to consider the high demands of its orderbook and the preferability that the spraying work be delivered through full time hours. It was relevant too that, latterly in the period between 3 October and 7 Nov 2022, the respondent did offer the claimant an alternative role which would permit a phased return on lower pay, albeit that the terms of that role were, perhaps understandably, unacceptable to the claimant. We find that the adjustment for which the claimant contends, namely the acceptance of part-time hours, was not in all the circumstances an objectively reasonable one for the respondent to have to make.

137. The claim for a failure to make reasonable adjustments, therefore, does not succeed and is dismissed.

Unauthorised deductions / Breach of contract (wages in period 3 October to 7 November 2022).

138. It is convenient to turn next to the claimant's complaint that the respondent did not pay him in full or at all for the period from 3 October to 7 November 2022 (with the exception of 9 days' holiday pay which he agreed was paid to him in respect of that period).

139. It is not disputed that the claimant did not undertake any work for the respondent during this period. The claimant's claim is that he was ready and willing to work four-hour shifts on a phased basis from 3 October 2022 following the expiry of his fit note on 30 September 2022. His position, as we understand it, is that he should have been paid for his contracted 8 hour shifts throughout this period, notwithstanding that he was not able or offering to work 8-hour shifts.

140. The respondent asserts that there is no breach of contract or unlawful deduction from wages because the claimant is to be paid for the hours he works and he was not, in fact, performing any work in the period claimed for. Mr Sangha maintained there was no unreasonable failure to make a reasonable adjustment and it was reasonable for an employer to make a reasoned assessment of an employee's fitness to work. In any event, in Mr Sangha's submission, the claimant asserts that at this time he was able to work 4 hours per day, so if there was supporting medical evidence of him being able to work those hours, then the respondent's submission is that his entitlement would be limited to pay for 4-hour shifts.

141. We began by considering the claimant's unauthorised deductions complaint. We required to decide whether wages were 'payable' during the material period either 'under the claimant's contract of employment or otherwise'. We reviewed the terms of the claimant's offer letter and written statement of employment particulars. We also reviewed the terms of the respondent's Company Handbook and its provisions, in particular, relating to sick pay. These documents were silent on the question of payment of wages in circumstances where an employee was offering partial performance of the contract. They included no express obligation to accept partial performance in such circumstances, much less an obligation to accept partial performance while paying for full performance. We were satisfied that no such legal

entitlement could be inferred either from the written terms or the conduct or the parties or from any other evidence that was before us.

142. In line with the decision in **Miller**, we conclude that there was no obligation on the respondent to accept the reduced 4- hour shifts the claimant proposed at the time. Matters might have been different, had we found that the respondent was subject to a statutory obligation under sections 20 and 21 of the EA to do so (although we doubt that full-time wages would be payable in such circumstances). We have, however, dismissed the reasonable adjustments complaint which the claimant pursued to this effect.

143. This is not a case akin to the facts of **Beveridge**. Although the claimant's sick line had expired, he did not offer to return to full-time working from 3 October or suggest he was fit to do so. He specifically proposed to work reduced hours at 50% of his contractual commitment. In the absence of any obligation on the respondent to accept such partial performance, they declined to do so. In such circumstances, we find there was no legal entitlement to wages either for the 4-hour shifts the claimant proposed or for his full-time contractual commitment of 8-hour shifts.

144. The claimant's claim for unauthorised deductions from wages is, therefore dismissed. Likewise, the alternative breach of contract complaint fails. The claimant had no contractual right to insist upon working 50% of his agreed contractual hours and to be paid for these (or to be paid in full for partial performance). The respondent did not breach a contractual term in declining to accept the reduced working hours or in declining to pay for the offered partial performance.

Discrimination arising from disability (section 15, EA)

60. The list of issues characterized the unfavourable treatment of the claimant as the claimant's dismissal. The 'something arising in consequence' is identified as the claimant's absence.

145. The respondent accepts they dismissed the claimant on 7 November 2022 because of his absence.

146. The respondent puts forward the legitimate aim of ensuring sufficient paint spraying capacity to ensure the company could meet the steep rise in demand for orders. The claimant did not meaningfully challenge that this was, as a matter of fact, the respondent's aim. He suggested that the factory was not so busy as the respondent asserted on the occasion when he visited on 22 September 2022. However, as Mr Sangha points out, this was the briefest of snapshots into the respondent's operation at the material time and did not offer the claimant a detailed insight into the respondent's orderbook and resourcing requirements. The contemporaneous correspondence suggests the claimant accepted at the time, in October '22, the respondent's assertions about its spraying resource deficit. In his email dated 14 October 2022, the claimant wrote: '*I recognise the business demands of the company as stated in your letter.'*

147. On the evidence before us, we accept that, as a matter of fact, the respondent had a requirement for additional spraying resource in the period between August and November which arose from the claimant's absence and from a sharp upturn in orders. We accept as a matter of fact that the respondent decided to dismiss the claimant because it wished to ensure sufficient paint spraying capacity to ensure the company could meet the steep rise in demand for orders. There was substantial evidence before us that this aim had led the respondent to advertise for and employ a full time Sprayer in the latter months of the claimant's absence.

148. We accept, further, that this was a legitimate aim for the respondent to pursue. No arguments were put forward by the claimant to the contrary.

149. The question for the Tribunal is, therefore, whether the respondent has shown the claimant's dismissal was a proportionate means of achieving that aim.

150. Mr Sangha invited the Tribunal to have regard to the following factors (summarized for brevity):

a. The length of the claimant's absence at time of dismissal and the fact that towards the end of that period, the need for a full-time sprayer grew to such a level that the respondent had to recruit a new member of staff;
b. His contention that the available medical evidence did not support a phased return to work above 1-2 hours per day;
c. That, by the time the claimant was pressing for termination of his employment, there was no painter/sprayer vacancy;
d. That, short of waiting for the claimant's condition to improve, or being in receipt of medical evidence saying that the claimant could work additional hours, the respondent could not reasonably do more;
e. That, when a vacancy arose, it was promptly offered to the claimant; and
f. Nothing short of dismissal has really been identified as potentially being more proportionate.

151. Given the length of the claimant's absence, we accept it was objectively reasonable for the respondent to have advertised for a sprayer from August and to have recruited one further to that process around one month before the dismissal to meet the steep demand the respondent was experiencing. The respondent had been candid with the claimant that they proposed to do this in July. Irrespective of what the medical evidence showed or did not show come October / November 2022 about the claimant's capability to undertake shorter or longer hours, the respondent no longer had a requirement for the claimant's resource as a sprayer because of the recent addition to their workforce.

152. We do not find, on the balance of probabilities, that the matter of the claimant's medical evidence and his disputed capacity to undertake four hours' work per day was a factor which weighed strongly in the respondent's

considerations as at the date of dismissal on 7 November 2022. We highly doubt this was a critical consideration for the respondent at that point, given the evidence before us. By that stage, the respondent had already recruited and had its spraying requirements covered. Even if the claimant had tendered up to date medical evidence assessing his fitness to return to full-time working on or before that date, based on the evidence before us, we highly doubt that this would have altered the respondent's stance in relation to dismissal.

153. In the respondent's letter of 11 July 2022, Mr Anderson indicated in terms that if he had recruited a new sprayer, he did not intend to displace that individual in the event the claimant became fit thereafter to return to his old role. He said:

> *As a result, if we have filled your role in your absence, when you return to work (in about 12 weeks) we will see what other work is available and vacancies we have and try to find you a role we feel is suitable and that you are happy with. It is hard to predict what that role might be, but we will look at that problem at the time you are ready to return**. I don't feel it would be fair on any new permanent sprayer employee that we may have hired, to finish them and give you their job and so if we have hired a new person then I plan to stick with them**.* [emphasis added]

154. In assessing the proportionality of the respondent's treatment in dismissing the claimant, we have considered the overall circumstances in which the respondent did so. We accept the position may have been that, as the claimant contends, he was fit to return as a sprayer for 4 hours per day from 3 October 2022 and it may also have been that he would imminently thereafter have become fit to work full time hours, quite possibly on or around 7 November 2022 when he was dismissed. Notwithstanding that improved capability for the role, we find it was objectively reasonable for the respondent to dismiss the claimant because of its legitimate aim of ensuring sufficient spraying capacity, which aim had previously led the respondent to initiate a recruitment process some months earlier when the claimant was indisputably unfit to return to work.

155. We considered whether the respondent could have approached the matter in a less discriminatory manner, potentially by recruiting the new sprayer on a temporary contract or by terminating the new sprayer's employment in early October 2022 when the claimant indicated his ability to return on reduced hours. We concluded that, in all of the circumstances of the case, the claimant's dismissal was an appropriate and reasonably necessary way for the respondent to achieve its aim of ensuring cover for its paint spraying requirements. It was objectively proportionate for the respondent to recruit a permanent member of staff and to retain the services of that new sprayer. We find this was so, in particular, because of:

a. the size of the undertaking;
b. the upturn in orders;

c. the length of the claimant's absence when recruitment was initially advertised;
d. the difficulty recruiting sprayers on a temporary basis (or at all) because of their scarcity in the labour market;
e. the disruptive impact for the respondent and the new sprayer if the respondent were to dismiss them within a few days or weeks of their commencement;
f. the operational issues militating against short hours in the spraying role;
g. the claimant's continued inability to undertake full time hours at the time when the new recruit started employment in early October 2022; and
h. that the respondent offered the claimant a labourer vacancy when this became available, albeit the role was less well paid and less attractive to the claimant.

156. Accordingly, while acknowledging the claimant's medical progress and imminent capability to return to the full-time demands of the role, we accept the respondent's overall approach in dismissing him was a proportionate means of achieving its aim of ensuring sufficient spraying capacity to meet demand in the particular circumstances of the case.

157. We dismiss the complaint under section 15 of the EA.

Direct discrimination (section 13)

158. The dismissal is admitted. The claimant maintains it amounted to less favourable treatment because of his disability.

159. Mr Sangha submitted that a hypothetical comparator (who was not a disabled person) who was off for the same length of time and unable to carry out their role would have been treated in exactly the same manner. In Mr Sangha's submission, the claimant was dismissed due to capability reasons as he was absent from work for a long period and was unable to carry out his role due to his capability.

160. We have found as a matter of fact on the balance of probabilities that the reason the respondent dismissed the claimant was because, when he sought to return to work, it had sufficient spraying resource in place to cover its sprayer requirements (having recruited a new sprayer to ensure capacity to meet its increased orders against the backdrop of the claimant's lengthy absence). The evidence before us did not give rise to any inference that the claimant was dismissed wholly or in part because he had a disability. We accept that a hypothetical comparator who had been off for a similar length of time would equally have been dismissed in materially similar circumstances.

161. As this is a case where we are in a position to make a positive finding that the respondent's reasons for dismissing the claimant did not include the

claimant's disability, it is unnecessary to apply the burden of proof provisions (**Hewage**).

Unfair dismissal

162. Dismissal is admitted. The respondent asserts it dismissed the claimant for a reason relating to the claimant's capability for performing work of the kind which he was employed to do.

163. We acknowledge it is not a heavy burden for most employers to establish the reason.

164. Mr Sangha submits that, since ERA refers to a reason which "relates to" [capability], it is sufficient that the respondent genuinely believed on reasonable grounds that the claimant was incapable. He points out that the respondent is not required to prove the claimant's lack of capability.

165. We agree with this characterization of the position so far as it goes. However it is also necessary (1) that the Tribunal accepts on the balance of probabilities that the respondent indeed genuinely believed that the claimant was incapable at the point of dismissal; and (2) that this was the reason or principal reason for the dismissal (if there was more than one).

166. In the respondent's letter dismissing the claimant, Mr Anderson said: '*in my opinion you were not even close to being ready to work as a sprayer. We offered you alternative work but you have declined to attend work to try this phased return in an alternative role, and so it is unfortunate that I have made the decision to terminate your employment on the grounds of ill health. The reason for your dismissal is "capability" (on the grounds of ill health)…"'*

167. Notwithstanding this purported reason for dismissing the claimant we have found as a matter of fact that the claimant's capability for performing the role at the point of dismissal was not the respondent's principal reason for dismissing him. Indeed, we do not accept that any perceived incapability of the claimant was, by that stage, a genuinely significant factor which weighed strongly in the respondent's decision to dismiss.

168. A number of aspects of the evidence influenced this finding. In Mr Anderson's letter sent 11 July 2022, he was clear that he did not feel it would be fair on any new permanent sprayer employee to finish them and give the claimant their job and that he didn't intend to do so. Further, there were elements of evidence that tended to undermine the importance the respondent purported to attach to the claimant's perceived fitness (or lack of it) to work as a sprayer when dismissing him. In September 2022, before the respondent had managed to recruit another full-time sprayer, Mr Anderson asked the claimant to return to work part-time when he was still recovering from his operation, before his fit note expired. When making that request, he did not indicate concern that the claimant still had some way to run on his sick line or that he may not be fit to return to spraying duties. The respondent had also observed the claimant struggling with mobility problems prior to going off

sick in July 2021 and had been willing to let him continue working at that time, without insisting on evidence of the claimant's fitness to continue working. Additionally, the respondent would have been willing to accept the claimant back in November 2022 to a physical labourer role without the requirement for further medical evidence.

169. We concluded, on the balance of probabilities, that the true reason and the principal reason that the respondent dismissed the claimant on 7 November 2022 was that the respondent did not, by that time, have a requirement for the claimant to work as a sprayer, having recruited a full-time sprayer in early October 2022. Any perception Mr Anderson had about the claimant's physical limitations, we find, weighed light in his dismissal decision, if at all. In any event, any such perception of the claimant's fitness to work was not based on reasonable grounds in circumstances where Mr Anderson had not seen the claimant for around a month and a half at the time he dismissed him and had made no attempt to obtain medical evidence after being told this would not be forthcoming from the consultant or physiotherapist.

170. We considered whether the principal reason as we have found it to be could yet be characterised as a reason which 'relates to the capability … of the employee for performing work of the kind he was employed by the employer to do'. We acknowledged that the words 'relates to' in the legislation might allow a degree of elasticity in the connection. We acknowledge that the respondent's recruitment decision in relation to the new sprayer which was taken some months earlier was made against the backdrop of the claimant's accepted incapability at that time to perform the work he was employed to do. However, we do not consider the statute allows this degree of latitude. The legislative test is not whether the earlier decision to recruit related to the claimant's capability but whether the decision to dismiss did so. On balance, the principal reason for the decision to dismiss was the respondent's lack of requirement for another working sprayer.

171. The respondent has not pleaded or argued any alternative potentially fair reason and, as such, its defense must fail (**Murphy v Epsom College**, **Robertson v Combat Stress**).

172. If we are wrong in our finding that the principal reason cannot be properly charcterised as one relating to the claimant's capability on the facts of this case, we would, in any event, have found that the respondent acted outside the range of reasonable responses in dismissing the claimant for this reason in all of the circumstances.

173. When he was dismissed on 7 November 2022, the claimant's sick line had expired over a month earlier on 30 September. At the time of his dismissal, he had been asking to return to work for over a month. There was no medical evidence that he was unfit to do so beyond Mr Anderson's observations of the claimant's mobility on 22 September 2022. No effort had been made to secure medical advice by the respondent either from OH advisers or from the claimant's GP, when it was known that nothing would be forthcoming from other sources.

174. We would have found that the consultation carried out by the respondent prior to the dismissal did not fall within the range of reasonable responses. The respondent, when it came to the time when the claimant sought a return to work, lacked the candour it had shown earlier in the summer about its position. In its latter communications with the claimant, Mr Anderson purported to attach considerable significance to the question of whether the claimant was capable of working 1-2 hours or 4 hours. We don't accept, on the balance of probabilities, that the respondent would have altered its decision to dismiss even if the claimant had furnished them with medical evidence that he was capable of working full 8-hour shifts by 7 November. The reality was that the respondent did not have a role for the claimant as a sprayer to return to, and there was a lack of straightforwardness about this in the respondent's latter communications which we would have found was not objectively reasonable. Though there was mention of the recent recruit, the respondent's resourcing reality and its implications for the claimant irrespective of his improving health did not feature as prominently in its communications with the claimant in October / November 2022 as it ought reasonably to have done in the circumstances.

Remedy: Unfair dismissal

175. The claimant has no loss of earnings, having secured new employment the day after his dismissal. Had there been economic loss arising from the dismissal, we would have considered whether to apply a **Polkey** reduction in this case. The question for the Tribunal would have been: what is the percentage chance that the claimant would have been dismissed fairly in any event if a fair procedure had been followed? We would have assessed that, if the respondent had consulted with the claimant about the situation with reasonable transparency and candour about its lack of requirement for a sprayer at the point of the proposed return, and in the weeks that followed, there is a 100% chance that the claimant would have been dismissed fairly in any event.

176. The claimant's compensatory award for loss of earnings is restricted to his loss of statutory rights on that basis. The parties have agreed a figure of **£500 for loss of statutory rights** which we award.

177. Subject to any reduction for conduct before the dismissal, the claimant is entitled to a basic award for unfair dismissal. The calculation is 5 x 1.5 x £500 = £3,750.

178. We considered whether the claimant engaged in conduct before the dismissal which was such that it would be just and equitable to reduce the amount of the basic award. Mr Sangha gave an oral submission on this issue. He submitted that the claimant indeed engaged in culpable or blameworthy conduct prior to his dismissal which he said warranted a reduction in the basic award of 100% of its value. He referred to this conduct as being the "the claimant's insistence on termination of his employment on a few occasions in October 2022 on a few occasions". Mr Sangha also relied upon the claimant's

remarks to his brother after the online meeting with the respondent on 7 July 2022 which he also said showed an indifference on the claimant's part as to whether his employment continued. He asserted that if the claimant had not been so insistent on 'wanting termination' he could have been left on the respondent's books until 'something happened'. The claimant, for his part, pointed out that after the July meeting he was under stress, which he said should be taken into account. He submitted that, in any event, a reduction to the tune of 100% was not warranted.

179. After the meeting on 7 July 2022, the claimant conversed with his brother and unwittingly recorded their exchange. During this conversation, his brother asked him "If you're honest with yourself, you don't want to go back full stop do you?" to which the claimant replied "Well to be honest, I couldn't give a fuck". This comment from the claimant was made in what he intended and understood at the time to be a private conversation with a family member. The claimant had just completed a meeting with his employer after about a year of sickness absence and poor health. During the meeting the respondent had informed him for the first time of its intention to advertise to recruit a full-time sprayer to meet the customer demand it faced. The respondent had further informed the claimant that, depending on its requirements when the claimant was fit to return, he may face the termination of his employment as a result. While we have found that this was a reasonable step for the respondent to take at that stage, it was no doubt a significant blow to the claimant. The claimant was experiencing a difficult recovery from his second operation and from a recent fall in late June which had resulted in his sick line being extended. In all of the circumstances, we do not accept that the claimant's intended private remarks to his brother amounted to culpable conduct such that it would be just and equitable to reduce the basic award.

180. With respect to the claimant's communications in October 2022, we understand the respondent refers to the following three comments:

a. On 14 October 2022, in an email, the claimant said " *think it's pretty clear you don't want me back so maybe it's a good time for both parties to go their separate ways, So if you could let me know by the end of today if you will be terminating my contract due to ill health* …"

b. On 17 October 2022, the claimant asked Karen Mortimer that Mr Anderson 'finish his employment if he was going to do it'.

c. On 4 November 2022, the claimant said in an email '… *this needs resolved ASAP so I can move on*.'

181. All of these comments were made by the claimant against the background that, at the meeting on 7 July 2022 and in the letter issued shortly after it, the respondent had informed the claimant that, if it had recruited a new sprayer, then when the claimant was fit to return, if it had no other work available, it would envisage terminating his employment. The claimant's expectations had been set by the respondent's own statements in this regard.

In the event, when the claimant sought to return to work in early October, the respondent did not permit his return to his role (or, initially, to any role) but did not dismiss him. In all of the circumstances and having regard to the terms of the parties' communications taken in their entirety, we do not accept that these comments by the claimant were culpable or blameworthy so as to justify a reduction in the basic award.

182. Accordingly, we do not find the claimant engaged in any conduct before the dismissal such that it would be just and equitable to reduce the amount of the basic award pursuant to s.122(2) of ERA. We award a basic award of **£3,750**.

183. The total sum awarded for unfair dismissal is thus £**4,250** (A basic award of £3,750 and a compensatory award of £500 for loss of statutory rights).

I confirm that these are the Tribunal's written reasons in the case of Case No: 2500074/2023 Kelly v Mowlem & Co Manufacturing Ltd and that I have signed the Judgment by electronic signature.

L Murphy

_____

Employment Judge Murphy (Scotland), acting as an Employment Judge (England and Wales)

Date 18 August 2023