EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4102549/2023 (formerly 8000093/2022)

Hearing held in Glasgow over 4 days on 27, 30 and 31 October 2023 and 1 November 2023

Employment Judge M Whitcombe
Tribunal Member Mr P O'Hagan
Tribunal Member Mr S Singh

Mr Craig Alexander — **Claimant**
In person

Royal Mail Group Limited — **Respondent**
Represented by:
Dr A Gibson
(Solicitor)

JUDGMENT

The unanimous judgment of the Tribunal is as follows.

(1) The claimant is entitled to be paid unlawful deductions from wages in the sum of £3,234.38 (gross), and the respondent is ordered to pay that sum to the claimant.

(2) None of the other claims are well-founded and so they are all dismissed.

REASONS

Introduction and background

1. The claimant was formerly employed by the respondent from 17 January 2022 until 1 December 2022 as an Engineering Team Coach ("ETC") on the "Late Shift" at the respondent's Glasgow Mail Centre. The nature of the respondent's business activities are well-known and require no further explanation.

2. It is common ground that the claimant was at all relevant times a disabled person for the purposes of section 6 of the Equality Act 2010 ("EqA 2010") by reason of spinal injuries suffered in 2011. The effects were summarised in the grounds of claim as follows: "*lower back pain and pain radiating into his left leg with restricted movement in his shoulder and arm as a result. The said impairment affects his ability to bend, twist and carry heavy weights.*"

3. The claimant was dismissed for "*failure to demonstrate your suitability for employment*". The respondent's reasoning was essentially that the claimant was not capable of completing a wide range of physical tasks that were required for his role and that the suggested adjustments to the role were not reasonable in all the circumstances.

Claims and issues

4. By claim forms presented to the Tribunal on 5 October 2022 and 23 February 2023 the claimant alleged that:
    a. the respondent had committed various forms of disability discrimination, harassment and victimisation during his employment and in the dismissal process.
    b. the respondent had unlawfully deducted sums from the claimant's wages in respect of paid breaks and unsocial hours payments.

5. No jurisdictional time points arose, nor did the respondent rely on any of the defences potentially arising from a lack of knowledge of the disability or its

effects.

6. The parties' consolidated cases were eventually set out in documents referred to as "further amended papers apart". At that time the claimant was represented by specialist trade union solicitors. Matters also evolved during this hearing and by the end of the hearing the claims and issues were as follows:

   a. **Direct disability discrimination** contrary to s.13 EqA 2010 comprising:

      i. dismissal;
      ii. a failure to carry out a risk assessment or a display screen equipment assessment (referred to by the claimant as a "workplace assessment"), although the latter element was abandoned during the hearing;

   b. That the claimant's dismissal amounted to **discrimination arising from disability** contrary to s.15 EqA 2010. The respondent admits dismissal, admits that dismissal was unfavourable treatment and admits that the reason for dismissal arose from disability. It follows that the sole live issue was whether dismissal was a proportionate means of achieving a legitimate aim. That aim was defined by the respondent as "*to have people in post who are capable of performing the role they are employed to do*".

   c. **Indirect disability discrimination** contrary to s.19 EqA 2010 based on the following provisions, criteria or practices ("PCPs"):

      i. That an ETC must be able to push a "York" roll cage weighing up to 250kg.
      ii. That an ETC must be able to lift more than 10kg.
      iii. That an ETC must be physically able to carry out each and

every component task of their job.

The respondent admitted those PCPs and also that they placed the claimant and others with his disability at a particular disadvantage. The sole live issue is therefore whether they were a proportionate means of achieving a legitimate aim. That aim is defined by the respondent as "*that an Engineering Team Coach carries out each and every component task of his job during his employment*".

d. A **failure to make reasonable adjustments** contrary to ss.20 and 21 EqA 2010 based on the same PCPs as are listed above, with the additional PCP that an ETC must be able to replace the motor on an ILSM sorting machine. The respondent admitted those PCPs and that they placed the claimant at a substantial disadvantage. The sole live issue was therefore whether the adjustments contended for by the claimant were reasonable. Those adjustments were as follows:

   i. reallocating some of the claimant's duties and tasks to AMEs;
   ii. breaking down loads for lifting where possible;
   iii. breaking down loads for pushing and pulling;
   iv. allowing the claimant to carry out certain tasks and duties along with another member of staff;
   v. requiring another member of staff to carry out aspects of a task that the claimant could not perform, while the claimant completed all other aspects of the task;
   vi. in relation to the ILSM, dividing up the task, working alongside another team member and providing a back support, socket extension bar and supports to take the weight of the motor.

e. Disability related **harassment** contrary to s.26 EqA 2010 by Raymond Sharp in an email of 22 August 2022 and at meetings on 23 and 25 August 2022.

f. **Victimisation** contrary to s.27 EqA 2010 based on protected acts

done by the claimant on 26 May 2022 (when the claimant informed the respondent that he believed their actions breached EqA 2010) and 18 August 2022 (a grievance relating to Raymond Sharp). By the end of the hearing the respondent admitted both protected acts. At the start of the hearing the relevant alleged detriment was confined to dismissal. However, in submissions the claimant seemed to broaden it once again to include also the communications and meetings with Raymond Sharp on 21, 23 and 25 August 2022.

g. **Unlawful deductions from wages** contrary to s.13 of the Employment Rights Act 1996 in that:

   i. the claimant's written contractual terms entitled him to be paid for 35.5 hours per week including breaks, but he was expected to attend for 38 hours per week for the same pay, which effectively meant that his breaks totalling 2.5 hours per week were unpaid.

   ii. The claimant was entitled to "unsocial hours shift allowance" but it was not paid to him.

Evidence

7. We were provided with a joint file of documentary evidence totalling 405 pages. Witness statements were not used and evidence in chief was given orally. We heard from the following witnesses in the following order, all of whom gave evidence on oath or affirmation and were cross-examined:

   a. Stewart Ross, an Automation Maintenance Engineer at the Glasgow Mail Centre (attending under a witness order);
   b. Craig Alexander (the claimant);
   c. Mark Hobin (CWU trade union Engineering Representative, on full time release covering a large area including the Glasgow Mail Centre);
   d. Raymond Sharp, Technical Maintenance Manager and the claimant's

immediate line manager;

e. Allyn Steele, (at the relevant time) Head of Engineering and the claimant's second line manager, who took the decision to dismiss;

f. Ross Anderson, General Manager for Scotland and Northern Ireland, who confirmed the claimant's dismissal on appeal.

Credibility of witnesses

8. In general, we found all of those witnesses to be straightforward, helpful and credible. However, in some respects we had less confidence in the claimant's evidence. He was inconsistent on some key points, for example, how much he could lift, or whether he accepted the accuracy of the evidence of the Occupational Therapist, and it seemed to us that he sometimes altered his evidence to suit the point he wanted to make at the time. He also had some firmly held beliefs that he was unable to support by reference to any objective evidence, for example, that the reason for dismissal was disability itself rather than matters arising from it, or that the decision to dismiss had been taken jointly by Mr Steele and Mr Sharp (something which he had not put to either of them when asking his own questions). At some points the claimant adopted a strained reading of documents (for example, certain sentences in the Occupational Therapist's report, or the email of 21 August 2022) in order to bend their meaning to fit his arguments. He also argued that unlawful discrimination had caused him to be awarded a non-honours degree, even though he had already failed a module prior to the earliest allegation of discrimination in this case and did not submit a dissertation at all. The claimant appeared unable to acknowledge the possibility of any other explanation for his failure to achieve honours than unlawful discrimination.

9. In contrast, we did not detect any contradictions, inconsistencies or strained interpretations of events in the evidence given by the respondent's witnesses. The evidence given by management witnesses regarding the technical and physical requirements of the claimant's role was supported by the personal experience of those witnesses not only earlier in their careers, but also when

carrying out the roles themselves during recent periods of industrial action. The evidence of the respondent's witnesses was also generally consistent with the documentation produced at the time. We felt able to trust it.

10. For those reasons, where the claimant's evidence was at odds with that of the respondent's witnesses, we preferred the latter.

The facts on which this judgment is based

11. We made the following findings of fact. Unless facts were agreed or at least undisputed, we made our findings on the "balance of probabilities", in other words a "more likely than not" basis. If we thought that a fact was more likely to be true than untrue, then for the purposes of our decision it was taken to be true. Conversely, if it appeared to us more likely that a fact was untrue than true, then for the purposes of our decision the fact was not proved. In an Employment Tribunal, nothing has to be proved "beyond reasonable doubt".

Maintenance roles

12. Automation Maintenance Engineers ("AMEs") worked on a rotating 4 week shift pattern. There were three shifts: early, late and night. The fourth week was a rest week. On each shift there was an Engineering Team Coach ("ETC"). One was allocated to each shift on a "static" basis and they did not rotate between shifts. The respondent had ETCs in any plant where there were two or more engineers on shift.

13. The claimant was the ETC allocated to the late shift. The ETC had a maintenance role, responsible for responding to breakdowns and completing maintenance on shift. The ultimate goal was to ensure that the operational side of the business had the maintenance support necessary to succeed and meet its targets. We accept the cogent evidence of the respondents' witnesses that it was mainly a "hands on" role. When the claimant started in the ETC role he was informed that he would be expected to do manual tasks. There was also a leadership aspect to the role. In the Tribunal's view (drawing

partly on the industrial experience of the non-legal members) it is more appropriately regarded as supervisory than managerial and the ETC was effectively the team leader on shift.

14. If an AME could not fix a fault within ten minutes they were required to contact the ETC. The ETC allocated and prioritised the work. The ETC had responsibility for the distribution of work among the team, analysis of machine performance and the preparation of shift reports. Mr Steele said that the ETC was "normally the technical expert". While 20% of the role might be taken up with attendance at meetings and preparing shift reports, the remaining 80% was "hands on". Since ETCs were expected to be the technical expert on shift, it was important that they were able to undertake all of the maintenance and repair tasks themselves if required, otherwise they would not build up the necessary expertise. The team was small and every engineer needed to be able to do every task.

15. The AMEs also had a maintenance role but without the leadership element described above. They concentrated on carrying out repairs and maintenance. They were paid less than the ETCs.

16. The late shift tended to be the busiest shift for maintenance personnel. While all shifts were a mixture of planned maintenance procedures and reactive maintenance and repairs following machine breakdowns, the late shift had a greater emphasis on the latter. First class mail had to be processed and despatched by 2200, otherwise customers might not receive their mail on time and the respondent would potentially be in breach of Ofcom targets. A failure to process all first class mail by 2200 was referred to as the mail "failing". Mr Sharp was unsure how many times the mail had failed while the claimant was employed but described it as "fairly frequent".

17. The late shift was theoretically covered by 3 AMEs and the claimant as ETC, making a total engineering team of 4. However, annual leave and other absences could often mean that the team was actually formed of 2 AMEs and the claimant as the ETC. We accept Mr Sharp's estimate that the

maintenance team would actually be 3 people (2 AMEs and the ETC) for at least a third of the year.

18. The respondent decided on the appropriate staffing level for each shift by using an "Engineering Resource Tool", which calculated the required number of engineers based on the numbers and types of machines and any additional work required. That was a nationally agreed method. The staffing level assigned to the late shift was the minimum number of engineers required to do the work. The workload was sufficient to require all of them. There was no spare capacity.

19. The claimant accepted in cross-examination that it would be "unfeasible" for a late shift ETC to have no "hands on" role at all, because the team was too small and the workload was too great.

Maintenance and repair tasks

20. As Mr Steele put it, the machines were designed to be ergonomically suitable for operators, but also to be as small as possible. Unfortunately, that meant that they were not built with ease of maintenance in mind. Similarly, Mr Sharp said that "*they are not ergonomically set up for maintenance…maintenance seems almost to be an afterthought*". Maintenance and repair tasks required AMEs and ETCs to kneel down, crouch down, bend down, lift and support fairly heavy weights and crawl into tight spaces. Fault finding and fault analysis also required those movements and activities. Most maintenance or repair tasks involved unfavourable postures, for example reaching out or reaching in. Virtually all tasks on all machines would have some element of bending or crouching.

21. When machines broke down the respondent needed engineers to be able to attend quickly, to diagnose the fault quickly and to fix the fault quickly. Demand could result in three individuals being required to cover 4 different sets of machinery and 7 different pieces of machinery. It was by no means unusual for more than one machine to break down at the same time. The late shift was regarded as a demanding shift for maintenance teams. The late shift

manager had also complained of slow responses to breakdowns on that shift. Breakdowns could be mechanical, electrical or simply a jam. First, it was necessary to analyse the symptoms and to have a good look around the broken-down machine. That would often mean getting under the machine bedplate to look for dust, oil leaks or something out of place. It might well be necessary to take readings from electrical components. Once the fault had been found it had to be repaired.

22. Some components were light, but some were heavy. Lots of components weighed more than 10kg and some weighed more than 20kg. Power transmission belts could weigh 25-30kg, and the effective weight was doubled if and when a new belt was used to pull a broken belt out of the machine. Importantly, for the reasons already set out above, often it would not simply be a question of lifting a weight in ideal conditions and the engineer would have to bend or stretch when lifting, or lift at height, leading to a cantilever effect with greater physical demands.

23. Many of the loads that maintenance staff needed to lift could not realistically be broken down. To take the example of an electric motor, it had to be changed as a whole assembled unit. It was not practicable to strip it down into its component parts for removal and then to build up a replacement in position from replacement component parts. It is not possible to strip down a motor, a gearbox or a conveyor belt to make it easier to remove or install. While “York” trolleys containing up to 250kg of parcels or mail certainly *could* be unloaded and re-loaded one item at a time, it would be a very slow process.

Medical assessment and evidence

24. The medical evidence available to the Tribunal is the same as the medical evidence that was available to the respondent at the time of dismissal. The claimant has had an opportunity to produce additional medical evidence both during the dismissal process and also during these proceedings. Although the claimant sometimes described the occupational health evidence as

"conservative" in its assessment of his capacity, after some equivocation he accepted that the occupational health evidence was reliable and accurate. That final position was consistent with the one taken by the claimant at a trial review meeting with Mr Sharp on 25 May 2022 and also at the much later dismissal appeal hearing on 12 May 2023, at which he said "*I don't dispute anything*" in relation to the occupational therapy assessment referred to below.

25. The claimant also argued that in some respects the medical evidence merely recorded things that, for whatever reason, he was not doing at the time of the report and should not be read as recording things that he *could not* do. We do not accept that argument. An occupational therapist would understand that the purpose of their assessment was to establish the claimant's physical capacity. Tasks that the claimant was not carrying out for other reasons, or by pure chance, would be irrelevant and we very much doubt that they would be referred to at all. The report should be read in that context, and we find that it is an accurate summary of the claimant's physical capacity and restrictions at the relevant time.

26. The first medical report prepared by Ms Marie Lawless, Occupational Health Advisor of Optima Health, was in response to a referral dated 22 February 2022. The report is dated 16 March 2022. It noted that the symptoms of the claimant's spinal injury included lower back pain, pain radiating into his left leg and sciatica which could impact on his sleep pattern. Movement was restricted and the claimant could lose function in his right arm if he had poor posture. He found it difficult to tolerate "static postures, lifting bending etc.". In order to ensure full assessment and optimum information the author requested an occupational therapy assessment in order to establish safe work limits and to make any other appropriate recommendations.

27. The occupational therapy assessment followed on 20 April 2022 and the results are set out in the report of Marie O'Malley, Registered Occupational Therapist, dated 22 April 2022. The report had been discussed with the claimant who consented to its release to management. In cross-examination

the claimant ultimately accepted that this was a detailed and comprehensive assessment.

28. The claimant had suffered significant spinal injuries in 2011 which had affected both the upper and lower spine. He experienced lower back pain and pain radiating into his left leg. He had restricted movement in his right (dominant) arm and right shoulder. The claimant reported that he was not completing all of his duties because he was unable to lift, bend or twist for the role. While the claimant was able to sit, reach forward and use both hands frequently, and to walk and stand occasionally, he was never able to lift, push, pull, carry, kneel, crouch, balance, climb or work overhead. For the purposes of analysis "frequently" meant for 34-66% of the working day, "occasionally" meant for 1-33% of the working day and "never" obviously meant 0% of the working day.

29. Correctly, the claimant reported that he was expected to bend and crouch down to fix machines, often in tight spaces. He was limited in his range of movement in the lower back when bending and crouching. He also had a limited range of movement in his right shoulder and arm when squeezing into tight spaces or trying to reach forward. The recommendation of the report was clear, "*It is recommended that Mr Alexander does not carry out any task that involves bending, crouching, and adapting to unfavourable posture as this will aggravate his spinal condition.*"

30. Additionally, the claimant reported that he required significant push and grip strength to handle the machines. He was not lifting anything heavier than 10kg. In cross-examination the claimant eventually accepted that this meant that he could not lift anything heavier than 10kg on his own. He had weakened grip strength in his right hand and the recommendation was that, "*Mr Alexander does not lift any weights which he perceives too difficult for him, he is advised to ask for assistance or break loads down*".

31. The claimant struggled to push or pull heavy loads and was not completing those sorts of tasks due to the physical limitations of his shoulder, arm and

lower back. The recommendation was that, "*Mr Alexander does not push or pull any loads that he perceives too difficult for him, he is advised to ask for assistance or break loads down.*"

32. There was no prognosis for significant improvement in the claimant's symptoms or restrictions and for practical purposes they were permanent. The claimant accepted that no amount of coaching or training could reduce the degree of pain or restriction he experienced when carrying out the activities summarised above. It was not a training issue.

Risk assessment

33. A recurring theme of the claimant's case was that the respondent should also have carried out a formal risk assessment "in a workplace setting" in relation to his ability to carry out the physical aspects of his role. We accept the respondent's evidence that this would have added nothing of value to the occupational health evidence already available. Mr Sharp held the Institute of Occupational Safety and Health qualification "Managing Safely" and was experienced in risk assessment. He was qualified to make that judgment and we accept his evidence.

34. We also accept the respondent's evidence that the only way to carry out the risk assessment envisaged by the claimant would have been to require him to undertake the very tasks that the occupational health evidence said that he could not do, exposing him to a risk of injury.

Equipment and auxiliary aids

35. The respondent made a variety of aids available to maintenance staff including the claimant. All were available from stores in a central area of the shop floor. Lifting devices were clearly available in prominent places within the workshop. Socket extension bars were found on standard tool trolleys. Back supports or "creeper boards" to make it easier to lie under a machine were available. A variety of lifting equipment was available including a battery-operated lifting device. However, some of the lifting equipment itself

weighed more than 10kg. We heard no evidence to suggest that the respondent could have obtained other types of useful lifting equipment in addition to that already available.

Significant events and meetings

36. On 17 January 2022, the claimant's first day, he was informed that there were "hands on" aspects to his role. He met Mr Sharp the next day to discuss those aspects and his ability to perform them. They met again on 15 February 2022 to discuss the need for an occupational health referral, which was subsequently made. The reports that followed are summarised above.

37. On 25 May 2022 the claimant and Mr Sharp met for a 6 month trial review meeting. The Occupational Therapy report was discussed at that meeting. Mr Sharp decided not to carry out personal risk assessments because of the risk of injury that would entail. No meaningful risk assessment could be carried out without requiring him to carry out tasks that occupational health said should not be carried out.

Redeployment possibilities

38. The claimant's interest in alternative positions was understandably limited to engineering roles. Unfortunately, there were simply none available while the claimant's dismissal and the appeal against it were under consideration, nor were any vacancies of that type expected in the foreseeable future. The claimant was free to apply for management grades but did not identify any of interest and we heard no evidence about any of those posts. The claimant only asked Mr Sharp to search for alternative "front line" engineering roles. The "maintenance team leader" role was not open for permanent recruitment because the substantive post holder was on temporary secondment elsewhere and was expected to return.

39. From this point onwards the claimant began to make statements or

allegations about breaches of the Equality Act 2010 by the respondent's management.

40. In mid-June 2022 Mr Sharp referred the claimant to Allyn Steele for consideration of dismissal. The meeting was much delayed by the claimant's requests for documents but eventually took place on 16 August 2022. On 14 September 2022 the claimant was given an opportunity to supply additional medical evidence if he wished to do so. He did not.

41. On 10 November 2022 Mr Steele informed the claimant that his employment would be terminated with effect from 25 November 2022.

42. The claimant appealed the decision to dismiss him and the appeal was heard by Ross Anderson. Once again, the hearing was rescheduled several times before finally taking place on 12 May 2023. Mr Anderson did not uphold the appeal and confirmed the decision to dismiss.

Legal principles and the parties' submissions

43. While the judgment writing convention is usually to set out all relevant legal principles in a dedicated section, we think that in this case our reasoning will be easier to understand, especially for a non-lawyer, if we approach each type of discrimination separately, setting out the relevant law together with our reasoning and conclusions.

44. Similarly, we think that little useful purpose would be served by setting out the parties' submissions in a case where those submissions were made primarily in writing. Instead, we will deal with them as appropriate during the course of our reasoning.

Burden of proof

45. At all times we have borne in mind the burden of proof and the wording of section 136 of the Equality Act 2010. However, we will neither set it out in full

nor analyse any of the voluminous case law dealing with the burden of proof because it actually had little role to play in our conclusions. We found that the evidence enabled us to make clear findings about the reasons for the claimant's treatment and also the essential building blocks of each type of discrimination. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 the Supreme Court observed that it was important not to make too much of the burden of proof provisions. They required careful attention where there was room for doubt as to the facts necessary to establish discrimination, but they had nothing to offer where the tribunal was in a position to make positive findings on the evidence one way or the other. In our judgment this case falls into the latter category.

Reasonable adjustments

46. It is convenient to deal with the reasonable adjustments claim first.

Legal principles

47. By virtue of section 20(3) of the Equality Act 2010, where a provision, criterion or practice ("PCP") 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, then A is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

48. Where a "physical feature" puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, then section 20(4) provides that A is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. By virtue of section 20(10), "physical feature" means for these purposes a feature arising from the design or construction of a building, a feature of an approach to, exit from or access to a building, a fixture or fitting, furniture, furnishings, materials, equipment or other chattels in or on premises, or any other physical element or quality.

49. By virtue of section 20(5), where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, then A is under a duty to take such steps as it is reasonable to have to take to provide the auxiliary aid.

50. Section 21 of the Equality Act 2010 provides that a failure to comply with any of those duties is a failure to comply with a duty to make reasonable adjustments, and that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Reasoning and conclusion

51. As noted at the start of this judgment, the only live issue is simply stated. The respondent accepts that the duty to make adjustments arose because the relevant PCPs placed the claimant at a substantial (in the sense of more than minor or trivial) disadvantage. That disadvantage was the increased likelihood of capability proceedings and dismissal. In fact, it seemed to us that the claimant's case could also easily have been framed in terms of physical features of premises or (in part) a lack of auxiliary aids. Either way, the sole live issue is whether the adjustments identified by the claimant were reasonable, or not.

52. Removing the need to lift more than 10kg could potentially have reduced the disadvantage faced by the claimant, although we note that the need to adopt unfavourable postures during fault finding and repair would have remained regardless.

53. We find that it would *not* have been reasonable to have broken down loads for lifting, pushing or pulling, though we acknowledge that this was qualified by the claimant in one respect, by adding the phrase "where possible". Even so, we are concerned with that which would have been *reasonable*, not just

that which would have been *possible*. The only specific evidence of a problematic load which could have been broken down was of a "York" trolley of mail weighing up to 250kg. However, while unloading would have been possible, the process of unloading and reloading would have taken an unreasonably long time in the context of a demanding shift where speed of response to breakdowns was a very important issue. Otherwise, the items which required to be lifted and manipulated by the claimant were either single items or assemblies which could not reasonably be stripped down before removal or built up from components when refitted.

54. In summary, the proposed adjustment of breaking down loads would have been partially efficacious in terms of reducing the disadvantage to which the claimant was put. However, it would often have impossible or excessively difficult, and it would have caused unreasonable delay. On balance, it was not a reasonable step to have to take to alleviate the disadvantage to the claimant.

55. We also find that it would not have been reasonable to have reallocated some of the claimant's duties to one or more AMEs (whether on a planned basis or an 'as and when required' basis), or to arrange matters so that AMEs could work with the claimant on certain tasks where necessary. We have accepted the respondent's evidence that the maintenance team was at full capacity. A planning tool had been used to match the staffing level to the workload. There was no spare capacity and all of them were required to cover the necessary work. The suggested adjustments would all have resulted in work being done more slowly, or remaining undone at the end of the shift. That was not reasonable in the respondent's business environment since it would impair performance on a key shift and increase the risk of failed mail. The only way in which that consequence could be avoided would be to add another AME to the shift, but the total cost to the respondent would have been £60,000 per annum and the claimant accepted in cross-examination that this would not have been a reasonable step to take.

56. Further, the degree to which those adjustments would have been required

was considerable. Almost every maintenance task involved at least some physical movements which were outside the claimant's capabilities, based on the available and unchallenged medical evidence. A great many components exceeded the weight that the claimant could safely lift, and even if lifting equipment were used it would be necessary to manoeuvre the item into position. Often that would have involved sub-optimal manual handling postures. The claimant would have been grossly underemployed if he undertook only those parts of his role that required none of the problematic movements. It amounted to only 20% of his role and the claimant accepted that it would be "unfeasible" for him to have no hands-on role at all, and that it would not have been reasonable to assign him to a full time coaching or analytical role.

57. In summary, while there is little doubt that the reallocation of something approaching 80% of the claimant's duties to AMEs, and/or the provision of an AME to help the claimant with those tasks, would each have alleviated the disadvantage to which the claimant was put, those steps would not have been reasonable. The additional costs, whether financial or in terms of reduced productivity, outweighed the advantage to the claimant.

58. The suggested adjustments in terms of auxiliary aids were already in place and there was no breach of the respondent's duty to make adjustments in that regard. The claimant did not challenge the evidence that lifting equipment, back supports and extension bars were all provided and available for him to use.

59. In summary, the proposed adjustment in relation to auxiliary aids was made, so the respondent was not in breach of its duties. Otherwise, the adjustments contended for by the claimant would not have been reasonable, so there is no breach of the duty to make reasonable adjustments.

60. For all of those reasons, the claim for a failure to make reasonable adjustments is not well-founded.

Direct discrimination

61. Section 13 of the Equality Act 2010 defines direct discrimination as follows: 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.

62. By virtue of section 23(1) of the Equality Act 2010, when carrying out that comparison there must be "no material difference" between the circumstances relating to each case.

63. It is an elementary feature of direct discrimination law that discrimination may be subconscious as well as conscious (see e.g. ***Kohli v Department for International Trade*** [2023] EAT 82).

Reasoning and conclusion

64. We are entirely satisfied that the reasons for the respondent's treatment of the claimant had nothing whatsoever to do with disability *itself*.

65. The reason for the failure to carry out a risk assessment was the respondent's genuine belief that doing so would place the claimant at a risk of injury.

66. The reason for the claimant's dismissal was the respondent's genuine belief that the claimant's physical restrictions made it impossible for him to perform the majority of this role, there were no viable redeployment options, and the role could not reasonably be adjusted. Those considerations are not the same thing as disability itself.

67. We do not think that analysis by reference to comparators really adds anything useful in this case, but we are satisfied that a hypothetical non-disabled comparator who was also unable to perform around 80% of the role without any prospect of improvement or effective adjustment would also have been dismissed. Similarly, we are satisfied that the respondent would not have carried out a risk assessment for a hypothetical non-disabled

comparator if it believed that by doing so they would be exposed to a risk of injury.

68. The claim for direct disability discrimination is not well-founded.

Discrimination arising from disability

Legal principles

69. Section 15(1) of the Equality Act 2010 provides that 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.

70. By virtue of section (2), those provisions do not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability, though that is not an issue in this case.

Reasoning and conclusion

71. The relevant unfavourable treatment is limited to dismissal, which is admitted. As noted at the start of this judgment, the sole live issue is whether the claimant's dismissal was a proportionate means of achieving a legitimate aim, said to have been "*to have people in post who are capable of performing the role they are employed to do*".

72. We accept that the respondent genuinely had that aim, and also that it is legitimate. It is logically and rationally connected to the needs of the respondent's business.

73. We also find that the claimant's dismissal was a proportionate means of achieving that aim, because all other realistic options had been exhausted.

There was no less drastic way of achieving the aim, because the claimant's role could not reasonably have been adjusted, there was no prospect of the claimant ever being able to perform the unadjusted role and there was no viable redeployment option. If the claimant had not been dismissed, important work would have gone undone, and the claimant would not have been performing the important role of the ETC on shift in an effective manner. There was no budget to hire an alternative ETC who could discharge the responsibilities of the role effectively unless the claimant was dismissed.

74. The claimant acknowledged the logic of this reasoning in cross-examination, accepting that, subject to reasonable adjustments, if there were no redeployment options it was proportionate to dismiss an employee who could not perform the role so that the respondent could hire a replacement employee who could perform the role. Effectively, this claim stands or falls with the reasonable adjustments claim. That claim has failed, so this one must too.

75. As the respondent acknowledged, the effect on the claimant of dismissal was severe in terms of loss of livelihood and all the other benefits that employment brings. Nevertheless, the reasonable needs of the business required it in all the circumstances because no less drastic alternative was sufficient to achieve the aim. The respondent has established its justification defence and this claim fails.

Indirect discrimination

Legal principles

76. Section 19(1) of the Equality Act 2010 provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ("PCP") which is discriminatory in relation to a relevant protected characteristic of B's.

77. Section 19(2) provides that a PCP is discriminatory for those purposes if –

a. A applies, or would apply, it to persons with whom B does not share

the characteristic;

b. it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;
c. it puts, or would put, B at that disadvantage; and
d. A cannot show it to be a proportionate means of achieving a legitimate aim.

78. Section 23(1) applies to the comparisons in section 19, so there must be no material difference between the circumstances relating to each case.

Reasoning and conclusion

79. Once again, the sole live issue is the justification defence since the respondent concedes all other aspects of the test.

80. The legitimate aim is said to be "*that an Engineering Team Coach carries out each and every component task of his job during his employment*". We accept that the respondent genuinely had that aim and also that it was legitimate. It is rationally connected to the needs of the respondent's operation. Not only is it connected to the basic need to cover the necessary amount of maintenance with a small team, but it is also connected to the need for the ETC to become the technical expert on shift.

81. There was no less drastic way of achieving that aim, given that the role could not reasonably be adjusted and there was no viable redeployment option which might release funds to hire a replacement employee. Dismissal was proportionate because all other reasonable options had been exhausted. Unfortunately, the reasonable needs of the business required it in all the circumstances, despite the severe impact on the claimant. The justification defence is established and the claim fails.

Harassment

82. Section 26 of the Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. When deciding whether conduct had the relevant effect it is necessary to take into account the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

83. We have seen the email sent on 22 August 2022. We think it is unobjectionable and that the claimant has not established the proscribed purposes or effects. It is sent to all Mail Centre Management including the claimant. It did not only relate to the claimant's shift. Both the late shift and the night shift were showing unsatisfactory ILSM performance. That is an important machine. The claimant, along with the other "relevant ETCs", was simply asked to work with the operations team on actions to improve performance. We think that was an entirely reasonable instruction expressed in appropriate terms. It was Mr Sharp's job to improve and maintain engineering standards and if they were genuinely felt to require improvement he was fully entitled to raise that in appropriate terms with other relevant people in the chain of command. We do not think it is reasonable to regard this email as having the proscribed purposes or effects, whatever the claimant's subjective view might have been.

84. In our assessment this fails to satisfy the definition of harassment, whether examined in isolation or as part of a course of behaviour. Additionally, we are not satisfied that the gist of the email or the words used were related in any way to disability. There is no coherent argument to explain why that might be the case.

85. In our assessment the meetings between the claimant and Mr Sharp on 23 and 25 August 2022 are not appropriately characterised as "unscheduled performance reviews", as the claimant put it. They were follow up

conversations to the email of 22 August 2022 and also dealt more generally with the requirements of the claimant's ETC role. We find that it was appropriate in principle to hold those discussions provided that Mr Sharp expressed himself in appropriate terms and behaved in an appropriate way. On that, we prefer Mr Sharp's evidence to that of the claimant for the reasons set out above. There was no requirement for union representation or an agenda. We do not accept that Mr Sharp became irate or that he acted in a way which could reasonably have caused the claimant to fear physical aggression, as the claimant suggested. We base that finding not only on our general observations regarding the relative credibility of witnesses, but also on the claimant's failure to refer to key aspects of the allegations now made in his own correspondence at the time.

86. There is no reference Mr Sharp being irate in the first email sent by the claimant to Mark Hobin on 23 August 2022 at 19:44. The claimant refers generally to "an even greater level of harassment" in the final sentence, but nothing else in the letter reflects the allegations now made about Mr Sharp's conduct on 23 August 2022. In relation to the meeting on 25 August 2022, the claimant alleges that he even feared that Mr Sharp would subject him to physical aggression, but he makes no specific reference to that important detail in his emails of 25 August 2022 or 1 September 2022.

87. If Mr Sharp required the claimant to focus on a broken-down machine rather than work related to his own employment dispute using a computer then we think that he was entitled to do so, given the respondent's legitimate priorities and the claimant's job function. We find that the claimant's account of those meetings is likely to be a distortion of events. On the balance of probabilities, we find that the relevant meetings were probably as unobjectionable as the email of 22 August 2022, which the claimant mischaracterised as harassment.

88. While the grounds of claim suggested that the claimant was also harassed by Philip Hulme and Tony Nicholls, those allegations were expressly abandoned at the hearing.

89. In summary, we find that the relevant meetings and communications did not have the proscribed purposes or effects. Additionally, we are not persuaded that they related in any way to the protected characteristic of disability. The claimant has not explained why that might be the case. While there is evidence that the Mr Sharp was concerned about the performance of certain machines on two shifts including the late shift (and that he was entitled to be concerned about that), there is no credible evidence that his concern or the style of the communications related in some way to the claimant's disability.

90. The claim of disability related harassment is not well-founded.

Victimisation

91. Section 27 of the Equality Act 2010 provides that a person (A) victimises another person (B) if A subjects B to a detriment because A has done, or may do, a protected act. The definition of protected act includes making an allegation that another person has contravened the Equality Act 2010.

92. By the end of the hearing the respondent accepted that the claimant did protected acts on or about 26 May 2022 when he informed Mr Sharp that he thought that his actions were a breach of the Equality Act 2010, and also on 18 August 2022 when he lodged a grievance about Mr Sharp.

93. In opening the case, we understood the claimant to say that the detrimental treatment relied on was dismissal by Mr Steele rather than any action taken by Mr Sharp. We are quite satisfied that the protected acts did not influence Mr Steele in any way, and it was Mr Steele who took the decision to dismiss, not Mr Sharp. Mr Steele's focus was solely on the evidence available to him and a conscientious desire to give full weight to the impact of dismissal on the claimant while balancing that against the needs of the business. We were impressed by his diligent focus on the evidence and we believed him when he says that he considered that alone, and was not consciously influenced by any protected acts. No basis has been suggested on which he might have

been subconsciously influenced by the protected acts either. We reject the argument faintly raised by the claimant in his closing submissions that Mr Steele took the decision to dismiss jointly with Mr Sharp. That proposition had not been any part of the case advanced up until that point.

94. If Mr Sharp's actions are relevant at all, we are not persuaded that the protected act on 26 May 2022 played any part in the decision to refer the potential dismissal to Mr Steele. Rather, it was the obvious next step in a case where the claimant had a very significant physical restriction that prevented him from carrying out around 80% of his role, with no prospect for any change or improvement in the future. There were obvious, non-discriminatory reasons for referring the case on to Mr Steele.

95. To the extent that the claimant reiterates the allegations of harassment by Mr Sharp as allegations of victimisation by him:

a. we find that there was no detrimental treatment, because Mr Sharp's actions were within acceptable parameters and would not be regarded by a reasonable person as putting them at a disadvantage (see the more detailed reasoning set out above);

b. in any event we find that the reason for the alleged detrimental treatment was not the fact that the claimant had done one or more protected acts, but rather the fact that the performance of a certain machine on the claimant's shift was problematic, and the claimant appeared uncertain about the proper scope of his role and wished to discuss it.

96. While we would not necessarily hold a lay person representing themselves to the basic rules of evidence and advocacy, we did remind the claimant of the need to put the whole of his case to the key witnesses, and we also encouraged him to use the summary of claims towards the end of the grounds of claim as a reminder of the topics he needed to cover in cross-examination. It was notable that despite those reminders the claimant did not suggest to Mr Steele in cross-examination that any of his actions amounted to

detrimental treatment because the claimant had done a protected act.

97. The claim of victimisation is not well-founded.

Deductions from wages

Shift allowance

98. We are not persuaded that the claimant was entitled to shift allowance in addition to his specified rate of basic pay. There is no express term in the claimant's written statement of terms entitling him to shift allowance. It is not referred to in clause 5, "Rate of Pay and Other Benefits". There is no reference to an entitlement to shift allowance in the offer letter either.

99. The salary table we were shown reveals three very different salaries for the three ETCs on each static shift and the only explanation appears to be the consolidation of shift allowance into basic pay. The three ETC roles are the same grade, so they would otherwise be expected to receive the same pay. The difference between them is the number of hours (if any) worked after 2100, and therefore the incidence of shift allowance, payable for attendance falling outside the period 0700-2100. This fits with the extract from a relevant collective agreement with the CWU in 2010, quoted in an email from Glyn Rees dated 20 October 2023.

100. For other purposes the claimant referred to adverts for similar roles in other parts of the country. While we do not think that those documents are a reliable guide to the claimant's own contractual terms, we note that the advert for AMEs in Nottingham dated 1 November 2022 expressly refers to an entitlement to shift allowance, whereas the advert for a late shift ETC in Birmingham dated 4 January 2023 does not.

101. We find that the claimant was not contractually entitled to shift allowance in addition to basic pay, and so the claim for unlawful deductions from wages is not well-founded in this respect.

Payment for breaks

102. The claimant was paid for 35.5 hours of work a week, but was instructed that this meant that he had to attend for a total of 38 hours a week, because 2.5 hours of breaks a week were unpaid. However, that is not what clause 9.1 of the written statement of terms said. It provided that the claimant's weekly hours of attendance would be 35.5 hours "including meal breaks". That suggests to us that breaks formed part of the 35.5 hours and there is no express statement that they would be unpaid. The contract did not distinguish between paid and unpaid portions of the working week and so the natural reading of the document is that all 35.5 hours of attendance would be paid. The respondent interprets "*your weekly hours of attendance will be 35.50 hours per week (including meal breaks)*" as though it said, "*your weekly hours of attendance will be 35.50 hours per week (plus unpaid meal breaks*)".

103. The respondent was (subject to reasonable notice) entitled to instruct the claimant to attend for more hours than 35.5, as it did. The claimant was instructed that he must attend for 38 hours each week. What the respondent was *not* contractually entitled to do was to instruct the claimant to attend for 38 hours a week but to pay him for only 35.5 hours a week, effectively turning paid breaks into unpaid breaks.

104. The respondent relied on a national agreement for the ETC role allegedly stating that breaks would be unpaid. However, that agreement was not produced to us at all, and we are not prepared to accept Allyn Steele's hearsay summary or interpretation of its effect when it was reasonably open to the respondent to have produced the collective agreement itself.

105. We therefore conclude that the claimant is entitled to be paid for an additional 2.5 hours for each of the 45 weeks that he worked. Unlawful deductions from wages are normally awarded on a gross basis. That is 112.5 hours at the gross rate of £28.75 (derived from payslips). The total is £3,234.38 gross. No doubt the respondent will put that sum through the payroll and the net amount received by the claimant will be less.

Conclusion

106. In conclusion, the only claim that we find proved is the claim for unlawful deductions from wages in so far as it relates to paid breaks and the requirement to work a 38 hour week. The claimant will be awarded £3,234.38. All other claims are dismissed.

Employment Judge: **M Whitcombe**
Date of Judgment: **22 November 2023**
Entered in register: **22 November 2023**
and copied to parties