EMPLOYMENT TRIBUNALS

Claimant: **Mr L A Sheikh**

Respondent: **CIS Security Ltd**

Heard at: **London South Employment Tribunal**

On: **27 November 2023 – 30 November 2023**

Before: **Employment Judge Macey**
Mr Mardner
Mr Peart

Representation
Claimant: In person
Respondent: Mr Hussain, Litigation Consultant

JUDGMENT having been sent to the parties on 23 January 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

CLAIMS AND ISSUES

1. The claimant brought claims for unfair dismissal, direct disability discrimination, discrimination arising from disability, a failure to make reasonable adjustments and victimisation. At the start of the hearing the respondent conceded the claimant's claims for unlawful deductions from wages and non-payment of holiday pay. The claimant withdrew his claims for unlawful deductions from wages and non-payment of holiday pay on the third day of the hearing and these claims were dismissed on withdrawal.

2. At the start of the hearing the respondent conceded that the claimant did have a disability as defined in section 6 of the Equality Act 2010 at all relevant times. At the start of the hearing the respondent also conceded knowledge of the claimant's disability at all relevant times.

3. The outstanding issues from the agreed list of issues in the Case Management Order dated 13 January 2023 were as follows:

3.1. Unfair dismissal

3.1.1. Can the respondent show that the reason or principal reason for the claimant's dismissal was capability?

3.1.2. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The tribunal will usually decide, in particular, whether:

3.1.2.1. The respondent genuinely believed the claimant was no longer capable of performing their duties;

3.1.2.2. The respondent adequately consulted the claimant;

3.1.2.3. The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

3.1.2.4. Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;

3.1.2.5. Dismissal was within the range of reasonable responses.

3.2. Direct disability discrimination (Equality Act 2010 section 13)

3.2.1. Did the respondent do the following things:

3.2.1.1. Dismiss the claimant on or about 28 July 2021?

3.2.1.2. Not allow the claimant to work 6-hour shifts with occasional 12-hour shifts in case he had went off sick during a shift due to this disability?

3.2.2. Was that less favourable treatment?
The tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the tribunal will decide whether he was treated worse than someone else would have been treated.

3.2.3 If so, was it because of disability?

3.3. Discrimination arising from disability (Equality Act 2010 section 15)

3.3.1. Did the respondent treat the claimant unfavourably by:
requiring the claimant to work [all- ET1] 12-hour shifts on a 4 on 4 off pattern (allegation one)?

3.3.2 requiring the claimant to work day and night shifts (allegation two)?

3.3.3 requiring the claimant to commit to working for [fixed – in ET1] shifts which would only be offered as 12-hour shifts (allegation three)?

3.3.4 requiring the claimant to be signed off work sick as the claimant was not able to work for consecutive 12-hour shifts on a permanent basis (allegation four)?

3.3.5 suggesting to the claimant he worked on a zero hours' contract, which meant the claimant was not guaranteed any work (allegation five)?

3.3.6 did the respondent refuse to offer the claimant his previous shift pattern of six-hour shifts with occasional 12-hour shifts (allegation six)?

3.3.7 did the respondent dismiss the claimant (allegation 7)?

3.3.8 Did the following things arise in consequence of the claimant's disability:

3.3.8.1 Did allegation one arise from the claimant been unable to work 12-hour shifts because it aggravated his back condition?

3.3.8.2 Did allegation two arise from the claimant's back condition in that his back condition was aggravated by standing for prolonged periods and lifting?

3.3.8.3 Did allegation three arise from the claimant's disability as the claimant is not able to work all 12-hour shifts as it aggravated his back condition?

3.3.8.4 Did allegation four arise from the claimant's disability as he was not able to work all 12-hour shifts back-to-back as this aggravated his back condition?

3.3.8.5 Did allegation five arise from the claimant's disability as he was not able to work all 12-hour shifts back-to-back as this aggravated his back condition?

3.3.8.6 Did allegation six arise from the claimant's disability as it directly relates to his back condition and the symptoms the claimant suffered?

3.3.8.7 Did allegation seven arise from the claimant's disability as he was not able to work all 12-hour shifts?

3.3.9 Was the unfavourable treatment because of any of those things?

3.3.10 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

3.3.10.1 To fulfil its contractual obligations to supply security to its client.

3.3.10.2 To maintain regular attendance of employees.

3.3.10.3 To ensure a fair and equitable method of attendance management was applied to employees.

3.3.10.4 To protect the health and safety of its employees.

3.3.11 The tribunal will decide in particular:

3.3.11.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.3.11.2 could something less discriminatory have been done instead;

3.3.11.3 how should the needs of the claimant and the respondent be balanced?

3.4 Reasonable Adjustments (Equality Act 2010 sections 20 &21)

3.4.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

3.4.1.1 Requiring the claimant to work 12-hour shifts on a 4 on, 4 off pattern (the first PCP)?

3.4.1.2 Requiring the claimant to work day shifts (the second PCP)?

3.4.1.3 Requiring the claimant to obtain a sick note if he was not able to work 12-hour shifts on a 4 on 4 off pattern (the third PCP)?

3.4.2 Are all or any of the above PCP's in law?

3.4.3 Did the first PCP disadvantage the claimant in that it aggravated his back condition?

3.4.4 Did the second PCP disadvantage the claimant as day shifts involved more lifting and standing which aggravated the claimant's back condition?

3.4.5 Did the third PCP disadvantage the claimant as it meant he was signed off sick when he could have returned to work on a different shift arrangement/ pattern?

3.4.6 Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

3.4.7 What steps could have been taken to avoid the disadvantage? The claimant suggests:

- 3.4.7.1 Put the claimant on six-hour shifts;
- 3.4.7.2 Move the claimant to the night bench team/ standby team;
- 3.4.7.3 Roster the claimant so that there were the combination of six and 12-hour shifts;
- 3.4.7.4 alter the claimant's shift pattern so he had time to recover between shifts;
- 3.4.7.5 Place the claimant on a minimum hours' contract so that he could choose what hours that he was able to work;
- 3.4.7.6 At the start of the hearing the tribunal indicated that it was not limited to the claimant's suggestions and that another potential step could have been to transfer the claimant to an alternative position.

3.4.8 Was it reasonable for the respondent to have to take those steps and when?

3.4.9 Did the respondent fail to take those steps?

3.5 Victimisation (Equality Act 2010 section 27)

3.5.1 Did the claimant do a protected act as follows:

- 3.5.1.1 Did the claimant assert to Mr De Sousa on 7 and 27 May 2021 that the respondent was failing to make reasonable adjustments (that had previously been in place) and that was preventing him from returning to work?

3.5.2 Did the respondent do the following things:

- 3.5.2.1 Fail to deal with the claimant's grievances raised orally on 7 and 27 May with Mr De Sousa?
- 3.5.2.2 Fail to hear the claimant's appeal regarding the termination of his employment?
- 3.5.2.3 Fail to pay the claimant the correct amount of his final pay?

3.5.3 By doing so, did it subject the claimant to detriment?

3.5.4 If so, was it because the claimant did a protected act?

PROCEDURE

4. For the claimant, the tribunal heard evidence from the claimant. For the respondent, the tribunal heard evidence from Mr Domingo De Sousa (Account Manager at the respondent) and Mr Alex Morvan (Employee Relations Advisor at the respondent).

5. There was an agreed bundle of 341 pages. At the start of the second day of the hearing the respondent applied to include an additional document that comprised emails from 24 March 2021 to 25 March 2021 between various managers at the respondent concerning shifts at Euston Tower. We decided that to allow this document to be added to the bundle as we decided that the balance of prejudice to the respondent in not allowing it outweighed the balance of prejudice to the claimant in allowing it to be added to the bundle. As the claimant had already given evidence we recalled the claimant to give further evidence about this additional document.

6. The respondent then applied in the afternoon of the second day of the hearing for another document to be added to the bundle. We decided not to allow this application. The prejudice to the claimant in allowing it in and further delaying the hearing was greater than the prejudice to the respondent in now allowing the document to be added to the bundle. The document showed the claimant's shifts on the respondent's Timegate App, but the relevant shifts were marked as sickness absence not with the original shifts that had been placed onto the Timegate App for April 2021.

FACTS

7. The claimant was employed by the respondent as a security officer. He commenced employment on 25 September 2017 (his contract of employment [60] confirms the claimant's start date as 25 September 2017) for Ultimate Security Services. The claimant's employment transferred to the respondent on 1 April 2019. This was a TUPE transfer.

8. The respondent is a Security Industry Authority approved contractor for the provision of security services including security guarding, door supervision and public space CCTV and has approximately 1800 employees. The respondent has multiple sites across the United Kingdom.

9. The claimant's main location of work was at a client's site, Regents Place. The security team at Regents Place consisted of 68 security staff. Mr De Sousa in evidence explained that the respondent has contracts with its clients to provide the security for their sites. The respondent is under a contractual obligation to its clients to provide that security.

10. In the contract of employment [60] the hours of work clause 6.2 states:

> *"The company does not guarantee a minimum hours of work on a weekly, monthly or annual basis. You will be required to work such hours as*

necessary for the proper performance of your duties at any of the Company's sites. Your working hours will include both day and night shifts".

11. Clause 6.3 states:

> "*You will be required to work the shift pattern notified to you by the Company. Such shift patterns will include a requirement that you attend for work on Saturday's, Sunday's and Public Bank holidays. The Company may vary shift patterns operated by the Company either on a temporary or continuing basis."*

12. Prior to 30 March 2019 the claimant says he was on a roster of working for 12 hours, day and night shifts, with four days off between these shifts. The respondent says the claimant's role typically involved working night shifts,12 hours in duration, 4 shifts on 4 shifts off, pattern.

13. There is a separate job description for security officer issued by the respondent and the claimant accepted in cross-examination that this was his job description [69-71]. The job description states that the hours were an average of 42 hours per week and that the shifts would be as per the roster four on four off, day and nights.

14. We find that the claimant was required to work both day and night shifts prior to 30 March 2019. The job description [69-71] supports the claimant's evidence.

15. In the contract of employment [63] clause 3 states the claimant's job title is security officer.

16. The respondent says the claimant's duties included delivering a consistently high standard of customer service, conducting patrols of the building internally and externally, issuing keys, monitoring CCTV, providing a physical presence within the reception area, access control and preventing unauthorised persons from entering the building. This is supported by the content of the job description [69-71] and we accept the respondent's evidence on this point.

17. The grievance policy, and other relevant policies and procedures are in the respondent's handbook, [110-188]. This is the CIS Security handbook 2021 version which was introduced in the latter half of 2021. This is not the version that was applicable between March 2021 and July 2021. Mr Morvan gave evidence that he did not think there were many amends between the one in the bundle and the previous handbook. The claimant did not sign for the receipt of the respondent's handbook. The respondent's employees are notified of the respondent's handbook via email. When an updated version is produced employees are either sent the respondent's handbook as an attachment in an email or there is a link in the email to the document.

18. The respondent's handbook is available to all employees, at any time, on the respondent's Timegate software platform and The Hub software platform.

19. Although the respondent's handbook contains an absence policy [132-135] it is not a policy for managing long-term sickness. There is a paragraph [133] in respect of prolonged and persistent absence. This states:

"The *Company will be sympathetic to employees who are genuinely ill and unable to come to work due to sickness, injury or disability. In situations where this results in prolonged absence, the Company may require an expert medical opinion…*
… The Company will discuss the outcome of the report with you, which will assist the Company in reaching a fair and appropriate decision about your continuing employment…

… If, on full investigation, there appears to be no underlying reason for prolonged or persistent short-term absences , then disciplinary action may be taken against you."

20. The respondent has another absence policy [261-264].

21. This states that periods of absence that exceed 28 days are regarded as long-term sickness. It further states:

"*However, CIS will only consider dismissing an employee on long-term sick leave after we have made all reasonable and practicable attempts to support your return to work…"*

22. The family friendly policy [135] in the respondent's handbook is the only place where flexible working is mentioned.

23. The equal opportunity, diversity and inclusion policy [176] in the respondent's handbook has a paragraph on disabled workers [179] which states:

"Any worker that is disabled or becomes disabled, either physically or mentally during their employment with CIS will not be treated less favourably than a non-disabled employee. Under the Disability Discrimination Act 1995, CIS will take reasonable steps to accommodate the disability. Wherever possible, the Company will adjust their existing employment or offer redeployment opportunities. Appropriate training will also be available to enable them to remain in employment with the Company."

24. The respondent's handbook contains a grievance policy [161 – 164]. This states when an employee has a formal grievance they should raise it in writing. A formal grievance meeting will be arranged without delay. There is a section about simultaneous disciplinary and grievance matters [163]. This states:

"*The Company will decide on how to progress matters when an employee raises a grievance about a disciplinary procedure involving them. ACAS guidance suggests that disciplinary hearings may be suspended for a short duration while the grievance is investigated…"*

25. On 30 March 2019 the claimant sustained a serious back injury at work. The claimant had a muscle tear in his backbone/ spine because of the injury. The back injury resulted in the claimant being off work for five and a half months

from 5 April 2019 to 20 September 2019 [242-255]. During this time almost all the claimant's pay was Statutory Sick Pay.

26. The claimant was referred to Occupational Health on 17 April 2019 [79-80]. The claimant attended the Occupational Health appointment on 26 April 2019. The recommendations of the OH report were that he was not fit to return to work at that time [81-84]. And that when he did return to work the claimant would benefit from a gradual return, increasing the hours worked over a period [82].

27. Amal Dhillon emailed the claimant on 30 July 2019 explaining the phased return [93], this email states:

"*Thank you for taking my phone call earlier this morning.*

The last time we spoke I suggested that I refer you to the occupational health advisor to support your return to work… I note that the health advisor has already planned a phased return to work for you.

During today's telephone call, we went through the occupational health advisor's recommendations for your return to work which you found suitable. I advised you that should you at anytime feel that you need the phased return to work adjusted you should let your management and myself know straight away."

…

"Your phased return will be as follows:

You will return to work at 50% of your normal working hours and increasing in intervals over 3 to 4 weeks. IN addition where possible walking and standing will be limited initially and you will also be given the ability to sit down when required…

…On your return Hakan and Mario will go through a return to work interview with you to ensure your welfare is being looked after. Please inform your line management of any medical appointments you have so they can ensure you are not scheduled to work. Your line management will also meet with you regularly during your phased return to work…

We note that you wish to work during the nights, your line management are working on this and will let you know if this is a possibility."

28. The claimant says he returned to work on 20 September 2019, and the claimant says an agreement called Return to Work ("RTW"), was signed with the claimant's then manager Mr Kyprianou. This document is not in the bundle. The claimant says the RTW gave the claimant a "standby shift" which was not strictly the 12 hour shifts as per the claimant's job description. A "standby shift" is where the standby officer attends the workplace at the normal shift start time to cover any absence on the shift and if he is not needed to cover for anyone else then he can return home and he is paid for 6 hours whether or not he was present at work for 6 hours. If the standby

officer is needed to cover for someone then he works for the full 12 hours and is paid for 12 hours.

29. Mr De Sousa in cross-examination also explained that a standby officer (i.e. someone working standby shifts) can sometimes be notified in advance that they are expected to cover 12-hour shifts. This would be through the Timegate App. Further that a standby officer after being allocated 12-hour cover shifts in advance could request that they not work some of the days that they had been allocated and that this would be accommodated.

30. The respondent says the claimant returned to work on 20 September 2019 and performed his normal duties. That the claimant had informal discussions with his line manager, Mr Kyprianou. He was happy to continue working as normal and would advise further if he began to struggle. From 20 September 2019 to January 2020 all the shifts worked by the claimant were of no less than 12 hours, a total of 48 shifts. The respondent says in January 2020, the claimant had further informal discussions with Mr Kyprianou, reporting that he was now struggling to work his normal duties [100, 102-105]. In response to this, the claimant was allocated some 6-hour standby shifts.

31. In cross-examination both the claimant and Mr De Sousa referred to the email from Amal Dhillon to the claimant on 30 July 2019 [93].

32. We find that on the claimant's return to work in September 2019 the respondent made the following reasonable adjustments:

    32.1. it put the claimant onto night shifts;
    32.2. and further on his return to work he was a standby officer and he was allocated standby shifts.

33. In fact, the shifts that the claimant worked between 21 September 2019 and 1 January 2020 were all 12-hour shifts and they were night shifts, this is demonstrated by the employee schedule [242- 255].

34. We accept the claimant's evidence that there was a RTW agreement and its content. Mr Kyprianou has not attended tribunal to give evidence to the contrary and the email [93] from Amal Dhillon supports the claimant's version.

35. Between January 2020 and March 2020, the claimant worked a total of 38 shifts, 18 of which were shifts where he returned home and received 6 hours pay, this is demonstrated by the employee schedule [242-255]

36. The claimant was absent due to back pain between 12 March 2020 to 8 May 2020 [104-107]. Due to the Covid-19 pandemic and a reduction in business, the claimant agreed to be placed on Furlough Leave from 11 May 2020. The claimant was recalled from Furlough Leave and returned to work on 1 August 2020, working predominantly 12-hours shifts for the remainder of 2020, without complaint.

37. In August 2020 all the shifts were day shifts for 12-hours, but not at Regent's Place. The claimant's pay slip for the period from 1 August 2020 to 31 August 2020 [286] shows that these shifts were at other locations (Bow Bells House

and Helix – Fleet Place). In September 2020 the claimant returned to night shifts.

38. Between January 2021 and March 2021 the claimant worked 40 shifts in total. 17 of these shifts were for a full 12 hours and 23 shifts the claimant received 6 hours payment and did not work the full 12 hours. The 12-hour shifts were all night shifts. This is demonstrated by the employee schedule [242-255].

39. An email dated 24 March 2021 between the managers at the respondent from Hakan Kagan [additional document of the respondent] references the Euston Tower duty, that the duty is for 2 months and says, "*Please can we start rostering Ali Sheikh and Usman Farzand into the night shifts on alternating shifts".*

40. Euston Tower is an empty building (unlike Regent's Place). This means it is less demanding to be a security officer at Euston Tower compared to Regent's Place. It is a light duty to work there. The security officer is present in the building to deter crime.

41. In cross-examination the claimant said at the end of March 2021 he was notified that he would be working 12-hour shifts, both day and night, four on four off, via his Timegate App. That he called Mr De Sousa and said there was a RTW agreement and that because of his back ache he cannot do straight 12 hours day and night. Further, that there was no conversation with the claimant about working at Euston Tower instead of Regent's Place.

42. In cross examination Mr De Sousa said that he (Mr De Sousa) did not roster the claimant onto day shifts. Further Mr De Sousa said in cross-examination that the Timegate App for the shifts shows the place of work, start time and end time and that other managers were doing the rostering, not Mr De Sousa.

43. There is no screenshot of the Timegate App showing the roster at Euston Tower in April 2021 from either the claimant or the respondent. The other managers who were completing the roster did not attend tribunal to give evidence and the additional document is hearsay evidence (i.e., second hand evidence), we find that it shows what the plan was, not necessarily what actually happened. We, therefore, find that the claimant's Timegate App did show night and day shifts in April 2021 and that the place of work on the Timegate App was Euston Tower.

44. The employee schedule [242- 255] has a gap for the claimant's shifts between 28 March 2021 and 1 July 2021

45. The claimant sent an email to Mr De Sousa, Mr Kyprianou and Mr Kagan on 29 March 2021 [206], in which he says, "*I have been working as standby, I have been taking medication to complete the shifts.*

Now I feel I will not be able to manage these new roster of shifts which are 12 hour by 4 days."

46. The claimant emailed Mr De Sousa, Mr Kyprianou, Mr Kagan on 1 April 2021 [205-206]. This states:

"*Dear All,*

Could you please revert my roster to standby on health grounds from tomorrow, please."

47. We find the claimant at the start of April 2021 asked to be put back onto a standby shift (the shift that has a minimum payment of six hours, but that can become a 12 hour shift if the officer is required to cover), we find the claimant did not ask to work just six hours.

48. The claimant struggled working on daytime shifts due to the amount of standing involved because there is more standing on the daytime shifts. This aggravates his back and causes him to have back ache.

49. The claimant's viewpoint was that the roster from April 2021 was a return to what he had been doing prior to his back injury because it was all 12-hour shifts four on four off with both day and night shifts and that it was a permanent change.

50. Mr De Sousa did not view it as a return to what the claimant had been doing prior to his back injury because he was privy to the email that stated that the Euston Tower duty was for two months [the respondent's additional document].

51. On receipt of these emails from the claimant on 31 March 2021 and 1 April 2021 there is nothing in the evidence that proves Mr De Sousa or Mr Krypriano or Mr Kagan explained to the claimant what the work at Euston Tower would entail and that it would just be night shift work, that it should not and would not include day shifts and that it was a 2-month duty. We find there was no such conversation.

52. The claimant says on 2 April 2021 he was forced by Mr De Sousa to produce a doctor's note to justify that he could not work the 12-hour shifts permanently. In cross-examination Mr De Sousa says he asked the claimant to get a doctor's note that he could not work the 12-hour shifts.

53. On 1 April 2021 Mr De Sousa emailed the claimant, Mr Kyprianou and Mr Kagan [204-205]. This states:

"*Please could I ask you to submit a doctor's note that says you should only work 6 hour shifts? You know a standby shift is 6 hours on the basis that it could turn into a 12 hour shift if you are required to do so.*

This is a concern to us and I feel that it maybe best for us to actually remove you from shift completely if you feel you cannot do a 12 hour shift because of your health until this doctor's note has been produced and we can review."

54. We find essentially this email [204-205] was an ultimatum, for the claimant to either do the roster of 12-hour shifts or to take sick leave. The claimant had made it clear to the respondent that he was happy and willing to work on the standby shifts that he had been rostered to work previously.

55. We also find that it was Mr De Sousa who first referred to the standby shift as being a "6 hour shift" and we find that Mr De Sousa as at March 2021 did know that the claimant meant the standby shift (that had the potential to turn into a 12-hour shift) when the claimant used the phrase six hour shift.

56. From 2 April 2021 the claimant was absent from work due to back pain.

57. The claimant was referred to a second Occupational Health review on 8 April 2021 [192-193].

58. The referral [192] says, "*Mr Sheikh has stated that due to medication that he is taking for his lower back pain he is unable to undertake a shift beyond 6 hours of work during the day due to side effects affecting his sleep. Mr Sheikh has stated that after the 6 hour mark he begins to feel pain and requires medication to get through the remainder of his shift*."

59. The claimant had a fit note from his GP for the period from 13 April 2021 until 30 June 2021 stating that he was not fit for work due to low back pain [210]. He sent this to Mr De Sousa, Mr Krypriano, Mr Kagan and Ms Blair on 24 May 2021 [209].

60. There is an Occupational Health report for the claimant dated 22 April 2021 [194- 198].

61. Under Occupational History [195] it states:

"I understand that he was asked to do 12 hour shifts, which he struggles with and feels unable to do alongside daytime work.

He reported that the reasons for not being able to do daytime work is because there are more standing duties in the daytime at the reception, which he will struggle with due to his back pain, rather than specifically as a side-effect of the medication."

62. Under Relevant medical history and current position [195] it states:

"*He reported that he simply cannot do work of more than 6 hours in a shift due to being unwell due to back problems and a significant amount of pain*…"

63. The claimant says he could stand/ walk for longer than 15 minutes at a time.

64. The respondent says in the OH assessment, the claimant reported that he could only manage standing/ walking for 10 to 15 minutes at a time.

65. In the Occupational Health report [195] it states:

"He reports that he is unable to carry anything heavy and in terms of walking he can manage 10 minutes at a time and stand for 10 to 15 minutes at a time. If he does more activity than above then his back pain can get worse and it can spread up to his neck."

66. We find that the claimant did say in his OH assessment that he can manage 10 minutes of walking at a time and standing for 10 to 15 minutes at a time.

67. The recommendations of the Occupational Health Report dated 22 April 2021 were [194- 198]:

" I understand that some adjustments have been put in place already such as reduced standing hours and moving to the Night Bench Team; in addition to that, no lifting of items is required. Therefore, the only other additional adjustments to suggest are, in my opinion, what he has requested, i.e., no more than 6 hours shifts at a time and to be continued on night shift work due to the more physical demands of standing in the daytime shift.
It is also advisable that management carry out their own personal risk assessment with Ali's cooperation to have a practical understanding of what activities he can carry out safely and for how long and what he may need to avoid or have assistance with."

68. In cross-examination the claimant said the respondent never carried out the personal risk assessment. Mr De Sousa also confirmed that the personal risk assessment was not carried out following the Occupational Health report in April 2021.

69. Under Work capability & Fitness in the Occupational Health report [196] it states:

"*Ali feels able to return to work but does not feel able to carry out daytime duties or more than 6 hours in a shift. In my opinion, based on available evidence, he is fit to return to work with restrictions."*

70. Under Barriers to a Successful Return to Work in the Occupational Health report [196] it says, "*No barriers were identified or reported*."

71. Under Future attendance/ performance potential in the Occupational Health report [196] it states:

"*With the above adjustments he is likely to be able to achieve a better health, work and life balance at work, in my opinion. His back condition carries a risk of occasional flare-up; this risk could be mitigated to some extent with the adjustments in place with restricted or reduced working hours, as explained above."*

72. The claimant admitted that he probably did not explain to the Occupational Health Doctor what was meant by the phrase "six hour shift".

73. On 24 May 2021 the claimant was invited to a formal review meeting to discuss his long-term sickness absence [207].

74. On 27 May 2021 the respondent had a formal review meeting with the claimant. Mr De Sousa conducted the meeting and the notetaker was Ms Stocker (Regional HR Advisor).

75. The claimant says that on 27 May 2021 he never said, "*I cannot work 12-hour shifts*" in the formal review meeting with Mr De Sousa. The respondent says at this meeting, the claimant said he could not work 12-hour shifts.

76. The respondent further says at the meeting on 27 May 2021, the claimant said that he can suffer pain at any time so could not commit to working a six hour shift. The claimant says he never said that "*I can suffer pain at any time so could not commit to working a 6-hour shift*".

77. There are minutes for the formal review meeting on 27 May 2021 [211-213].

78. The minutes [212] state:
"*LS Last time we spoke I said I could do 6 hour shifts and I am happy to do that. I still can't do 12 hour shifts"*
DD So we can support you, but it is not a permanent solution as we will not always have the 6 hour shifts available.
LS I don't know then
DD The 6 hours shifts are standby shifts, and they can be extended to 12 hours if someone can't cover or goes sick. You do understand that?"
LS Yes I do understand that …

… DD You are on a 12 hour shift contract and we will do everything we can to support you but we cannot as a business permanently offer you 6 hour shifts…

… DD So you are happy to work but for how long? You have previously said that your back can go at any time. It could be 2 minutes into a shift or 6 hours in but you cannot predict when the pain will come."
LS "Yes it can happen at any time. I cannot work 4 days on of 12 hours and then have 4 days off all the time…

..DD so if we offered you a zero hour contract you could work as and when you wanted to and would not be tied down to working 12 hour shifts 4 days on 4 days off. This would be a standby role and shifts could go from 6 hours to 12 hours. You would have to take responsibility for your shifts.
LS Am I not on a zero hour contract already?
DD We will double check your contract and come back to you on that…

… DD But what I am saying now is, if we agree to start a new contract today of zero hours and you choosing what shifts you decide to work, then you would have to take ownership for your health and your back injury.
LS Yes – I have already said that…

DD … While you are off we will do all the background work and we will present to Tracy that we will put you on a zero hour contract which has a clause in it stating that any 6 hours can become longer and become 12 hour shifts. You would need to take ownership of that?"
LS "Yes, I am happy with that."

79. We find that the minutes demonstrate that the claimant said he could not work four days on of 12 hours and then have four days off all the time. In the minutes he was referring to working the 12-hour day shifts. We also find that he did say the pain can happen at any time but the claimant did not say he could not commit to working six hour shifts. The claimant said he could not work four days on of 12 hours and then have four days off all the time.

80. We also find that although the claimant makes the statement that he cannot work 12-hour shifts at the start of the meeting by the end of the meeting it is clear that he says he can manage a zero hours' contract with a clause that 6 hours can become longer and become 12-hour shifts and that the claimant agreed that he would need to take ownership of that.

81. The claimant says the respondent never discussed with the claimant that "*the business would not be able to support, temporarily, with 6-hour standby shifts and this could not be sustained as a permanent adjustment*." Nor is this in the minutes of any meeting except 7 July 2021 [232]. The respondent says the claimant was informed that the respondent would be able to support, temporarily, with 6-hour standby shifts, but that this could not be sustained as a permanent adjustment.

82. We find that the minutes of the meeting on 27 May 2021 demonstrate that Mr De Sousa did say the standby shift was not a permanent solution and that Mr De Sousa did explain how the standby shift works to the claimant.

83. Mr De Sousa confirmed when questioned by the tribunal that his belief was that following the formal review meeting on 27 May 2021 they did check want contract the claimant had with the respondent and that the claimant was on the standby officer contract.

84. Following the meeting on 27 May 2021 Mr De Sousa spoke to the respondent's HR Director (Tracy) and it was decided that the risk to claimant was not based around a zero hour contract, but it was based around the length of the shift. The zero hour contract option was not taken further by the respondent.

85. The claimant was sent the meeting notes via email on the 28 May 2021 [215].

86. The claimant emailed Mr De Sousa and Ms Stocker on 27 May 2021 at 5.05 pm [216-217 and 340-341]. In this email he refers to the return to six hour shifts and that he wants to be compensated for being forced to take SSP, anxiety caused to him and injury sustained to him. In this email the claimant says,

    "*Because I refused to work 12 hour shifts , I was asked by Domingo to produce a sick note to justify that I am not able to work the 12 hour shift. Now I have got this sick note until 30 June 2021.*

    This sick note has nothing to do with working the 6 hour shifts, I have been working the 6-hour shifts a long time.

    I should have been working the 6 hour shifts from 2nd April, I was told to go "off sick" by getting a sick note for refusing to work 12 hour shifts."

87. Mr De Sousa emailed the claimant on 27 May 2021 [340] stating, "*you are getting sick pay as per your contract.*" We find that although the time stamp for this email is 16.11 this email was a reply to the claimant's email above [216-217 and 340-341].

88. The claimant on 27 May 2021 asked in an email for Mr De Sousa to escalate the matter to someone else [340]. The claimant says this was due to Mr De Sousa's assertiveness. This email was sent to Mr De Sousa and Ms Stocker and states:

    "*I am sorry to say you are missing the points!*

    Please read the yellow highlighted lines below.

    Could you please escalate this matter to someone."

89. Mr De Sousa did not respond to the second email of the claimant on 27 May 2021 [340].

90. Nor after Mr De Sousa's discussion with the HR Director (in which they abandoned the zero hours' contract solution) was any contact made with the claimant about their decision not to move forward with a zero hours' contract with the claimant. Further there was no contact by the respondent with the claimant managing his long-term sickness absence after the meeting on 27 May 2021 prior to July 2021.

91. The last day of the claimant's fit note [210] was 30 June 2021. We find that from 1 July 2021 (a Thursday) the claimant was no longer signed off by his GP as being not fit to work.

92. No personal risk assessment was carried out as advised by the Occupational Health Doctor prior to the 5 July 2021 meeting.

93. On 2nd July 2021, the claimant was invited to attend a review meeting on 5 July 2021 with Mr De Sousa, to discuss the claimant's condition, the result of the Occupational Health referral, and the temporary adjustments in place [220].

94. The claimant says the meeting (5 July 2021) was called a "Return to work meeting." The claimant says he was told the following about the meeting on 5 July 2021, "*The purpose of this meeting is to discuss the likely length of your ongoing absence and what, if any, steps can be taken to assist you in returning to work (such as a phased return, amended job duties, altered hours of work or workplace adaptations)*." That is supported by the invite to the meeting on 5 July 2021 [220]. The claimant says that none of these were discussed at the meeting on 5 July 2021.

95. The invite to the meeting on 5 July 2021 [220] did not inform the claimant that a possible outcome of the meeting could be his dismissal, nor was the claimant informed of his right to be accompanied.

96. The invite [220] also stated "*As your doctor's note expired on 30 June, we would like to discuss in more detail your return to work."*

97. The claimant says he asked Mr De Sousa on 4 July 2021 to invoke the respondent's Grievance Procedure. We find he did this by an email to Mr De Sousa and Ms Stocker (Regional HR Advisor) dated 4 July 2021 [226-227]. The subject line of this email is "Invoke the grievance procedure" and in the

email the claimant states, "*I want to invoke the grievance procedure*". Further in this email the claimant states:

"*2. I had been working a "6-hour" shift since September 2019. Then from 2nd April 2021 I was asked to work 12- hour shift without consulting me. No consideration was given that I have a back injury and not able to work the 12-hour shifts. I was forced to take sick leave, this reduced my income, for past three months I have been under threat of losing my job and this has increased my anxiety and medication.*
3. Why did CIS fail that I had to ask ACAS to intervene to arrange a meeting via Alex Morgan.

In my email of 27 May 2021 I did ask that that 6 hour / 12 hour shift situation should be escalated."

98. We find that in this last sentence the claimant is referring to his second email on 27 May 2021 [340].

99. The claimant and Mr De Sousa had a meeting on 5 of July 2021 [222-225]. Ms Stocker also attended as notetaker.

100. The respondent says at the meeting on 5 July 2021, the claimant reiterated that he could not stand/ walk for more than 10 to 15 minutes. The claimant says Mr De Sousa in the meeting on 5 July 2021 cornered the claimant to one point, "I could not stand/ walk for longer than 15 minutes at a time".

101. The respondent says at the meeting, the claimant was given the opportunity to suggest further adjustments, but the claimant could not offer any.

102. The claimant says the discussion about his grievance was omitted from the minutes of the meeting of 5 July 2021.

103. In the minutes [222-225] it states,

"*DD So what has changed now, as you have done a lot of 12 hour shifts this year and last year.*
LS I have mostly done 6 hour standby shifts and some 12 hour. My base is 6 hour shift and the shifts you gave me around April are all 12 hour and no provision of 6 hour shifts.
DD The 6 hour shifts are standby, they are not permanent…

…DD Now we have to discuss how best to move forward with you. We have gone through the points from your email. Now looking at your occupational health report which states you cannot stand for more than 10-15 minutes at a time.
LS Yes that's correct.
DD How would you complete patrols on site if you cannot stand?
LS I will manage the pain like I have been and I will continue to manage it.
DD But if you were on site and required to complete 2 patrols how would you complete this and how would this affect your back?

LS Yes the pain would be managed.
DD If we had to put you on standby shifts and we needed you to stay longer, how would you cope with this?
LS With difficulty. I would go sick myself. I would not go home sick on my shift, I would have to manage with medication and would not go off sick while on shift. I would have to say I cannot work the next day."

104. We find that in the meeting Mr De Sousa read out what was said in the occupational health report about the claimant not being able to stand for more than 10-15 minutes at a time and the claimant confirmed that was correct.

105. We further find that the claimant was not asked at this meeting (5 July 2021) to suggest further adjustments.

106. The claimant says "the temporary adjustments in place," were not discussed in the meeting on 5 July 2021. There is no reference to the temporary adjustments in place being discussed in the minutes of the meeting. The minutes focus on a discussion around the 12-hour shifts and the claimant's ability to stand and walk.

107. The claimant also says Mr De Sousa acknowledged the grievance in the meeting on 5 July 2021 and the claimant's request to invoke the grievance procedure but it's not in the minutes of the meeting. We accept the claimant's evidence on this point.

108. The claimant in his later email on 21 July 2021 [238-240] says that the claimant asked if his contract was going to be terminated in the meeting on 5 July 2021 and that the answer was not affirmative. The claimant says this was not in the minutes of the meeting on 5 July 2021.

109. On this point the minutes [22-225] state:

"*LS Only that I fear for my contract that it might be terminated"*
DD I cannot confirm at this time about that now but we will have a meeting with you on Wednesday morning and discuss further."

110. We find that the minutes are slightly different to what the claimant says was stated in the meeting on 5 July 2021 and we accept the claimant's evidence on this point.

111. The meeting was adjourned and scheduled to be reconvened on 7 July 2021.

112. The claimant received an invite by email to attend the reconvened meeting [226]. The invite did not warn the claimant that a possible outcome of the meeting could be his dismissal. He was not informed of his right to be accompanied to the meeting. The claimant was not informed prior to the meeting on 7 July 2021 that termination of his employment was a possible outcome of the meeting.

113. The claimant was issued with verbal notice of termination of his employment at the meeting on 7 July 2021 [232-234].

114. The minutes [232-234] state:

"DD Ok, we have taken into consideration all aspects of your case, the adjustments we have tried, reducing your hours, trying to find a solution for you to carry on working, occupational health referral, had various meetings about your pain and reviewed your case, we can see no further ways to support you in continuing your duties. You have told us in previous meetings that your back pain can happen in 10 minutes without doing a full shift and you have also said you would not be able to cover all shifts as a bench officer as the pain would be too much. After taking all things into consideration, including your physio, doctor advice and you telling us that your back causes you too much pain to work full shifts. As an employer we would not be able to follow our diligence and duty of care towards you that we were not risking your health by allowing you to work. In order to protect you and follow our duty of care towards you for your own welfare, today we will be terminated your contract and serve you your notice period for capability. Do you understand all that I have said?"
LS One thing that I would like to clarify is that I have not refused to work standby shifts and duties. I can do 12 hours, I have done it and can still do it.
DD At our last meeting you said you would go sick if you worked a full shift.
LS I can go sick, but I have never refused to work a duty. I take medication to control it…

…DD I will not disregard the advice of the doctor and I could not allow you to work when a medical professional has said you are unfit for work because of your back. We have a duty of care towards you and you do for yourself…

DD… You can appeal against this decision, please do so in writing."

115. The claimant says the reference to being able to appeal was not in the minutes and that this is an addition. We find it is not credible to suggest that the respondent would give the claimant notice of termination and then not tell the claimant about his right to appeal. We find that Mr De Sousa did tell the claimant about his right to appeal in the meeting on 7 July 2021.

116. Mr De Sousa says he was advised by HR that the grievance of 4 July 2021 could be dealt with in any appeal by the claimant against his dismissal. It's not clear when Mr De Sousa was advised this by HR.

117. The claimant was sent an email by Ms Stocker on 19 July 2021 confirming termination of his employment and a copy of 7 July 2021 meeting notes were attached [235-236].

118. This email states:

"*During this meeting we discussed your back pain causing you to be unable to stand for more than ten to fifteen minutes and your inability to work for more than 6 hours at a time. We also took into account the medical opinion from your doctor that you are not currently fit for work. You informed us that your view of this opinion is that you cannot work more than 6 hours at time and your back could cause you pain any time which could result in you being unable to work for any amount of time.*
…

We also discussed the operational needs of the Company and I informed you that your absence was causing operational difficulties for the business in continuing to cover your absence. We came to the conclusion that there was no prospect of your returning to work within the foreseeable future.

Under these circumstances, I have regretfully been left with no alternative other than to terminate your employment on the grounds of incapability due to ill health."

119. The claimant's right to appeal was in this email. The claimant was informed he would receive 3 weeks' pay in lieu of notice as he was not expected to work during this period and that he would be able to access his final pay slip on Timegate and that his P45 would be sent to his home address.

120. The claimant sent an email to Ms Stocker and Mr De Sousa on 21 July 2021, in which he mentioned that there are additions and omissions which amount to fabrication in the minutes of the meetings on 5 and 7 July 2021. The claimant also explained in this email that he was willing to work the short shift as before and that the six-hour standby shift was allocated to him by management when he returned to work after his back injury. In this email the claimant also raised that he was not informed he could bring a representative to the meetings before they took place, he was only asked at the start of the meeting.

121. Ms Stocker acknowledged the claimant's email and that he was appealing and that an independent manager would be appointed to investigate the matter.

122. The claimant sent an email to Ms Stocker and Mr DeSousa on 26 July 2021 objecting to the actions taken. [259-260].

123. The claimant's employment terminated on 28 July 2021.

124. Mr Alex Morvan (Employee Relations Manager) responded to the claimant's email on 28 July 2021, informing him that he would consider the claimant's email of 26 July 2021 as an appeal against his dismissal [257]. An invitation was sent to attend an online appeal meeting on 30 July 2021 to be led by Francois Reynders (Account Director) [257]. The claimant failed to respond to this meeting invitation.

125. On 28 July 2021, the claimant sent another email at 21.59 to Alex Morvan [256] claiming to have not been informed of the right to appeal against the decision to dismiss him. In this email he specified three points that he wanted on the agenda for the appeal hearing and that he wanted confirmation that they would be included and then the claimant would confirm the proposed meeting on 30 July 2021.

126. Mr Morvan and Mr Reynders waited on the call for 13 minutes on 30 July 2021, for the claimant to attend the meeting. The claimant did not attend the online appeal meeting and failed to contact the respondent to discuss any

issues he had with attending the meeting. Later the same day, on 30 July 2021, the claimant sent an email to the respondent's Board of Directors [265], highlighting the decision to terminate his employment, and included a copy of his previous email from 28 July 2021.

127. The claimant says the reason why he did not participate in the meeting on 30 July 2021, was, the claimant put three conditions to the respondent (in his email dated 28 July 2021 [256]) (to be added to the agenda) to which the respondent did not respond. The three conditions were; resolve the claimant's personal injury at work; the claimant challenged his dismissal on the grounds of incapacity due to ill health and that his dismissal was in fact dismissal on grounds of refusal to work permanent 12-hour shifts. The third condition was that the respondent admit to fabrication of the minutes of the meetings.

128. The respondent did not respond to the claimant's grievance dated 4 July 2021.

129. The claimant's last pay slip for the period 1 July to 31 July 2021 [298] had a uniform deduction of £150. The respondent repaid this deduction in November 2023.

130. The claimant says an alternate role was not discussed with him.

131. The respondent says it considered whether the claimant could be employed in the Control Room, however, the claimant did not have the relevant licence and training to carry out the role in the Control Room. Working in the Control Room entails watching screens from CCTV feeds. It mostly is a seated job position and does not require long periods of standing.

132. On being questioned by the tribunal panel Mr De Sousa's confirmed that the training for the role would entail a four/ five day course on Control Room CCTV and then another four/ five day course about the law associated with CCTV monitoring. Then the claimant would need to be on site for three or four days learning on the job. In total it would take eight/ nine shifts to train the claimant to be in the Control Room. The respondent did not present any evidence that the courses and licence are expensive.

133. The claimant was not consulted with about the possibility of working in the Control Room.

134. ACAS early conciliation commenced on 29 June 2021 and finished on 26 July 2021.

135. The claimant presented his claim on 27 November 2021.

LAW

Unfair dismissal

136 Section 94 of the Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

137 Section 98 of the ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

138 Section 98(2)(a) states a reason falls within subsection 98(2) if it relates to the capability or qualifications of the employee performing the work of the kind which he was employed by the employer to do.

139 Further in section 98(3) it states that "capability" in relation to an employee means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

140 Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

141 Capability means capability assessed by reference to skill, aptitude, health or any other physical or mental quality. The employer needs to establish an honest belief on reasonable grounds that the employee was incapable (**Taylor -v- Alidair [1978] ICR 445)**.

142 A fair procedure should be followed including adequate consultation with the employee. The employer should follow procedures agreed with or notified to the employee.

143 Consideration should be given to offering alternative work. But there is no general principle that an employer will be acting unreasonably if he does not provide the opportunity of employment in a less demanding role. **Awojobi -v- London Borough of Newham (UKEAT/0243/16/LA (20 April 2017), unreported** held whether this is required or not depends upon what is reasonable in all the circumstances.

144 In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the tribunal would have handled the events or what decision it would have made, and the tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439, Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, and London Ambulance Service NHS Trust v Small [2009] IRLR 563**).

Disability discrimination – Equality Act 2010

145. The prohibition on discrimination against employees is found in s39(2) of the Equality Act 2010. Employers must not discriminate:

1.1. in the terms of employment;

1.2. in the provision of opportunities for promotion, training, or other benefits;

1.3. by dismissing the employee;

1.4. by subjecting the employee to any other detriment.

146. Employers are prohibited from victimising employees in those same ways, s39(4).

147. Under s13(1) of the Equality Act 2010 read with s6, direct discrimination takes place where a person treats the claimant less favourably because of their disability than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

148. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of the claimant's disability. However, in some cases, for example, where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as he was.

149. In **Aitken -v- Commissioner of Police of the Metropolis [2012] ICR 78** the Court of Appeal upheld the Employment Tribunal's decision that the proper hypothetical comparator was someone who did not have the claimant's disability but used aggressive words and behaviour frightening to a reasonable person.

150. In **Cordell -v- Foreign and Commonwealth Office (UKEAT/0016/11)** the Employment Appeal Tribunal (EAT) stated it was better to look at the reason why rather than getting bogged down with constructing a hypothetical comparator.

151. Decisions are frequently reached for more than one reason. Provided the protected characteristic or, in a victimisation claim, the protected act, had a significant influence on the outcome, discrimination is made out (**Nagarajan v London Regional Transport [1999] IRLR 572, HL**).

152. The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

153. Section 15 Equality Act 2010 provides:

(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.

154. Section 15 may be relied upon by persons who are dismissed while on long-term sick leave, if the absence is due to the disability.

155. Langstaff P explained the two step test required for a section 15 claim in **Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305**. He said it did not matter in which order the tribunal approaches these two steps:

"*It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability.***"**

156. In **Pnaiser v NHS England and anor [2016] IRLR 170 EAT**, Mrs Justice Simler considered **Weerasinghe** and other authorities and summarised the proper approach to determining s.15 claims as follows in paragraph 31:

"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is

emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or

no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

157. In respect of whether the treatment is a proportionate means of achieving a legitimate aim cost alone is not sufficient (**Woodcock -v- Cumbria PCT [2012] ICR 1126**.

158. In considering the principle of proportionality the tribunal's task is to strike an objective balance between the reasonable needs of the respondent against the discriminatory effect of its measure in order to assess whether the former outweigh the latter; that is an objective test (**Jones -v- Post Office [2001] ICR 805 and Hardys & Hansons -v- Lax [2005] IRLR 726**). There is no room to introduce into the test the 'range of reasonable responses' which is available to an employer in cases of unfair dismissal.

159. The Equality and Human Rights Commission's statutory code of practice ("EHRC code") guidance states that if an employer has failed to make reasonable adjustments which would have prevented or minimised the unfavourable treatment, it will be very difficult for the employer to show that the treatment was objectively justified.

160. Section 20 of the Equality Act 2010 provides:

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

161. Section 21 of the Equality Act 2010 provides:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

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

162. The EAT in **Doran v DWP [2014] UKEAT0017/14** held that there was no duty to make reasonable adjustments when an employee, Ms Doran, was certified as unfit for any work and had not given any indication of when she might be able to return to work. Her medical certificates stated that she was not fit for any work.

163. In **Archibald -v- Fife [2004] IRLR 651** the comparator for a failure to make reasonable adjustments claim are employees who were not disabled, who could carry out the functions of their job and therefore were not at risk of dismissal.

164. It is not a requirement in a reasonable adjustment case that a claimant would have to prove that the suggestion made would remove the substantial disadvantage but that the reasonable adjustment if made would give the employee a chance to return to work (**Cumbria Probation Board -v- Collingwood [2008] 8 WLUK 75**).

165. In **Brown -v- Her Majesty's Revenue and Customs ET2510511/09** the employer relied on the medical report even though the claimant said they were fit enough to return to work and the tribunal held there was no failure to make reasonable adjustments. The claimant in this case was suffering from stress and had been absent on long-term sick for a long period with no prospect of return which was confirmed by the medical evidence. The managers in that case were genuinely surprised when the claimant stated that they may be able to return to work, but contradictorily also stated that they still wished to pursue ill-health retirement.

166. The test of reasonableness is an objective one (**Smith -v- Churchills Stairlifts plc [2006] ICR 524**).

167. Making a reasonable adjustment may necessarily involve treating a disabled employee more favourably that the employer's non-disabled workforce.

168. Once a potential reasonable adjustment is identified, the onus is cast on the respondent to show that it would not have been reasonable in the circumstances to have had to take the step (**Project Management Institute -v- Latif [2007] IRLR 579**).

169. The question of whether it was reasonable for the respondent to take the step depends on all relevant circumstances, which will include the following:

a. The extent to which taking the step would have prevent the effect in relation to which the duty is imposed;
b. The extent to which it is practicable to take the step;
c. The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of the respondent's activities;
d. The extent to of the respondent's financial and other resources;
e. The availability to it of financial or other assistance with respect to taking the step;
f. The nature of its activities and the size of its undertaking.

170. Employers need to take proper advice and consult with an employee before making decisions about reasonable adjustments.

171. Section 27 Equality Act 2010 provides:

(1) (a) A person (A) victimises another person (B) if A subjects B to a detriment because-

(a) B does a protected act, or

A believes that B has done, or may do, a protected act.

172. Protected acts are defined in subsection (2) as:

1.1. Bringing proceedings under the Equality Act 2010

1.2. Giving evidence or information in connections with such proceedings

1.3. "doing any other thing for the purposes of or in connection with this Act" and

1.4. "making an allegations (whether or not express) that A or another person has contravened this Act".

173. It is not a protected act to make a false allegation in bad faith.

174. The claimant is not protected against victimisation for simply complaining about unfairness in a general sense.

175. S136 of the Equality Act 2010 sets out the burden of proof. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or another. (**Hewage v Grampian Health Board [2012] IRLR 870, SC.**)

176. Under s136, if there are facts from which a Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the Tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

177. Guidelines on the burden of proof were set out by the Court of Appeal in **Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258**. Once the burden of proof has shifted, it is then for the respondent to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof.

CONCLUSIONS

178. There is a degree of overlap between the complaints presented by the claimant and the tribunal has considered each of those complaints.

179. We have decided that it is appropriate to address first the complaint that the respondent failed to comply with the duty to make reasonable adjustments as our decisions in respect of that complaint will inform our decisions in respect of the other two complaints of discrimination arising from disability and unfair dismissal.

180. That approach is also consistent with the decision of the Court of Appeal in **Griffiths -v- Secretary of State for Work and Pensions [2017] ICR 160** and it is also consistent with the with the EHRC code.

The duty

181. As indicated above, section 20(3) of the 2010 Act provides that the duty to make reasonable adjustments arises where an employer's PCP "puts a disabled person at a substantial disadvantage in relation to a matter in comparison with persons who are not disabled.

182. In that context, the tribunal first considered the submission made by Mr Hussain that (at the risk of oversimplification) there is no duty to consider reasonable adjustments until there is a return to work.

183. On the facts above we found that the claimant did return to work. The claimant's fit note from his GP [210] expired on 30 June 2021. The claimant from 1 July 2021 was no longer being certified by his GP as being unfit to work. The claimant was then invited to a meeting on 5 July 2021 which the claimant was informed was a return to work meeting. The duty to make reasonable adjustments was, therefore, engaged at this point. The facts of this case are different to **Brown** because the claimant here had in fact being working 12-hour shifts at night on a number of occasions before he was absent on sick leave for three months and the Occupational Health report in April 2021 [194-198] had confirmed there were no barriers to the claimant returning to work on the proviso that the night time work continued and other reasonable adjustments were made by the respondent. The respondent has conceded that it did know about the claimant's disability at all relevant times.

The PCP and the substantial disadvantage

184. Firstly, the PCP's the respondent is said to have applied are in the agreed list of issues, being as follows:
    a. Requiring the claimant to work 12-hour shifts on a four on, four off pattern (the first PCP).
    b. Requiring the claimant to work day shifts (the second PCP).
    c. Requiring the claimant to obtain a sick note if he was not able to work 12 hour shifts on a four on four off pattern (the third PCP).

The first PCP

185. We have found above that the respondent did require the claimant to work 12-hour shifts on a four on, four off pattern from April 2021.

186. We conclude that it was a PCP in law as it was ongoing from April 2021.

The second PCP

187. We found above that the claimant was rostered onto day shifts from April 2021. The referral to occupational health [192-193] also refers to daytime working.

188. We conclude that it was a PCP in law as it was ongoing from April 2021.

The third PCP

189. We found above that the claimant was required to obtain a sick note if he was not able to work 12-hour shifts on a four on, four off pattern.

190. We conclude that this was not a PCP in law because it was a one-off incident. Mr De Sousa asked the claimant to provide the sick note on 2 April 2021. He did not continue asking the claimant to provide sick notes. We conclude that this was not a practice and it does not have a continuing effect.

191. We turn to consider the nature and extent of the substantial disadvantage suffered by the claimant.

192. The first PCP – We conclude that the first PCP did not substantially disadvantage claimant. The claimant has said throughout his evidence to this tribunal that the four on, four off 12- hour shifts per se is not the issue. It is also clear from the evidence that the claimant has been working at least four shifts in a row on a number of occasions prior to April 2021.

193. The second PCP - We conclude that the second PCP did substantially disadvantage the claimant. The day shifts involved more standing which aggravated the claimant's back condition. There is clear evidence from the claimant that standing aggravated his back condition and that day shifts required more standing. The Occupational Health report in April 2021 [194-198] also refers to this daytime work and there being more standing in the day shifts.

194. The next question is did the respondent know or could it have reasonably be expected to know that the claimant was likely to be placed at a disadvantage?

195. We conclude that because of what the claimant said during the meetings on 27 May 2021 and 5 July 2021 and also the content of the Occupational Health report of April 2021 [194-198] the respondent did know that the claimant was likely to be placed at a substantial disadvantage by being rostered onto daytime shifts because of the amount of standing involved and the aggravation of his back condition by this standing.

196. Section 20(3) requires the employer to take such steps as it is reasonable to have to take to avoid the disadvantage.

The adjustments

197. We considered firstly the adjustments contended for by the claimant in this case, which the tribunal addresses in turn below.

Put the claimant on six hour shifts

198. It has become clear throughout the claimant's evidence and submissions that this suggested adjustment is not actually the claimant's case. The claimant's case is that he be put onto the standby team which is considered below.

Move the claimant to the night bench team/ standby team

199. We found above that the claimant was already on the standby team and the respondent had rostered him in advance to work 12-hour shifts for a two-month period.

200. We conclude that there was not a failure to take this step as the claimant was not taken off the standby team by the respondent. This is not a step that would have avoided the substantial disadvantage.

Roster the claimant so there were a combination of six and 12-hour shifts

201. We conclude that the claimant has abandoned his case that he be given six hour shifts. The claimant has just been focusing on the standby shifts.

202. Again, we conclude that this is not a a step that would resolve the substantial disadvantage to the claimant.

Alter the claimant's shift pattern so he had time to recover between shifts

203. We conclude although the respondent could have taken this step the claimant has being clear during his evidence that the four on, and four off shift pattern per se was not the problem and that the problem was the daytime shifts.

204. We conclude, therefore, that this step would not have avoided the substantial disadvantage.

Place the claimant on a minimum hours contract so he could choose what hours that he was able to work

205. We found above that this was considered by the respondent and that the respondent abandoned this option. In fact this step was suggested by the respondent in the meeting on 27 May 2021 and the claimant said he would agree to a minimum hours contract.

206. We have concluded that this step would have avoided the substantial disadvantage because if the claimant is choosing which shifts he works he can clearly avoid working on the daytime shifts. If the claimant was on the minimum hour contract with a clause stating that a six hour shift could become a 12-hour shift he would still be able to choose which of those shifts he worked. In that event he would be able to avoid daytime shift working and could choose to just work on the night shifts. Further if he worked a 12-hour shift and it was too long then he would be able to stop accepting the shifts until he recovered.

207. We concluded that this step would have avoided the substantial disadvantage.

208. We also concluded that this step would have been practicable to put into place and given the size of the respondent it would not be too expensive or disruptive to have the claimant on a minimum hours contract. We conclude that it was reasonable for the respondent to take this step.

Transferring the claimant to an alternative job position

209. We also considered whether an alternative job role in the Control Room was a step that would remove the substantial disadvantage. This is in the respondent's evidence and we made it clear at the beginning of the hearing that the tribunal is not limited to what steps the claimant has suggested. We also said that evidence and submissions should be put forward about this issue and we did specifically question Mr De Sousa about the Control Room.

210. Taking into account what working in the Control Room involves. It entails sitting in a Control Room looking at CCTV and clearly does not involve long periods of standing or walking. We found above that the issue the claimant has with daytime shifts is the amount of standing involved. We conclude that working in the Control Room instead would have avoided that substantial disadvantage.

211. In respect of whether it would have been reasonable to take this step we considered the length of time it would have taken to train the claimant. We found above that it would have taken eight or nine shifts in total. No evidence was presented to the tribunal by the respondent that the licence or the training was particularly expensive.

212. We conclude it would have been practicable ant not too costly to take this step and, therefore, it would have been reasonable to have consulted with the claimant about the Control Room job role and to offer it as a possible alternative role to what he was currently doing.

213. We conclude that the respondent did fail to take these steps because although initially the respondent suggested the minimum hours contract it then abandoned that option and no one informed the claimant that this was no longer an option and the reason why it was no longer an option. Secondly, in respect of the Control Room job role there was no discussion with the claimant whatsoever about this job role, this is something that the respondent considered and discounted on their own.

214. We conclude that the respondent failed to make reasonable adjustments in contravention of sections 20 and 21 Equality Act 2010.

Discrimination arising from disability – section 15 of the 2010 EA.

Did the respondent treat the claimant unfavourably?

Allegation 1 – requiring the claimant to work 12 hour shifts on a 4 on 4 off pattern.

215. We concluded that this was not unfavourable treatment because firstly it is clear that the claimant after September 2019 up to the end of March 2021 did on a number of occasions work at least four night shifts in a row. Also, it became clear during the evidence that the claimant had abandoned this part of his case and this was confirmed in his submissions when he said that the issue was not the 12-hour shifts being on a four on four off pattern per se, but it was the fact that from April 2021 the roster had included day shifts too.

Allegation 2 – requiring the claimant to work day and night shifts

216. We found as a matter of fact that the claimant was rostered to work both day and night shifts from April 2021. Previously, in August 2020 he had worked day shifts during that month only, but at different sites to Regent's Place. He had not worked any day shifts since then prior to April 2021.

217. We concluded that this was unfavourable to the claimant because it meant he could not work those rostered shifts due to the amount of standing involved in a day shift and that the standing aggravated his back condition.

Allegation 3 – requiring the claimant to commit to working for shifts which could only be offered as 12 hour shifts

218. We concluded that this was not unfavourable treatment for the same reasons as allegation 1 above. It was not the 12-hour shifts per se that aggravated the claimant's back, it was the inclusion of the 12-hour day shifts.

Allegation 4 – Requiring the claimant to be signed off work sick as the claimant was not able to work for 12 hour shifts on a permanent basis

219. We concluded that this was unfavourable treatment and that Mr De Sousa did require the claimant to produce a sick note and Mr De Sousa did not request that this sick note just cover the two months for which the duty at Euston Towers was rostered. This was unfavourable because ultimately the claimant would only be paid Statutory Sick Pay once he had exhausted the respondent's company sick pay.

Allegation 5 – suggesting to the claimant that he worked on a zero hour contract which meant the claimant was not guaranteed work

220. We have concluded above that this was a reasonable adjustment the respondent could have made and that they failed to make that reasonable adjustment. It would have enabled the claimant to carry on his employment with the respondent so to suggest a zero hour contract to the claimant in May 2021 was not unfavourable treatment.

Allegation 6 – The respondent refusing to offer the claimant his previous shift pattern of six-hour shifts with occasional 12 hour shifts

221. We found above that between September 2019 and January 2021 the pattern of shifts was 12-hour shifts with occasional standby minimum payment of six hours. There were more six hour minimum payments between January 2021 and March 2021, but the 12-hour shifts even during that period were more than just occasional. We concluded that rostering the claimant to work 12-hour shifts per se was not unfavourable treatment.

Allegation 7 – Dismissal

222. We conclude that the respondent did dismiss the claimant and this is unfavourable treatment because he has lost his employment.

Did the allegations arise ("the something") in consequence of the claimant's disability? Was the unfavourable treatment because of these things?

Allegation 2 – did allegation 2 arise from the claimant's back condition in that his back condition was aggravated by standing for a prolonged period and lifting?

223. We concluded that it is clear from the claimant's evidence and the Occupational Health report in April 2021 [194-198] that the claimant's back condition was aggravated when standing for a long time and that the day shifts required him to stand for longer periods of time than the night shifts.

224. We conclude that the unfavourable treatment in allegation 2 was because of the aggravation of the claimant's back condition by standing for prolonged periods.

Allegation 4 – did allegation 4 arise from the claimant's disability as he was not able to work all 12 hour shifts as it aggravated his back condition?

225. We found above that the claimant was rostered from April 2021 to work on day shifts as well as night shifts which meant he could not work all the 12-hour shifts from April 2021 as the day shifts aggravated his back condition due to the longer periods of standing.

226. The requirement to get the sick note was because of this and we conclude that the unfavourable treatment in allegation 4 was because the claimant was not able to work all the 12-hour shifts as the day shifts aggravated his back condition.

Allegation 7 – dismissal – did allegation 7 arise from the claimant's disability as he was not able to work all 12 hour shifts

227. We found above that the claimant was rostered from April 2021 to work on day shifts as well as night shifts which meant he could not work all the 12-hour shifts from April 2021 as the day shifts aggravated his back condition due to the longer periods of standing. The unfavourable treatment in allegation 7 (his dismissal) was because of this, the Occupational Health referral [192-193] clearly refers to daytime shifts.

228. Further the discussion with the Occupational Health Doctor around standing and walking with the claimant was in the context of daytime shift working and the respondent cherry-picked the Occupational Health report [194-198] to draw out the claimant reporting to the Occupational Health Doctor that the claimant could only stand for 10-15 minutes and walk for 10 minutes. The respondent then used this as a basis for deciding that the claimant was not capable of doing his job and this was the reason for dismissing the claimant.

Was the treatment a proportionate means of achieving a legitimate aim?

229. In respect of the legitimate aims put forward by the respondent in the agreed list of issues the respondent did not present any evidence to the tribunal about maintaining regular attendance of employees or ensuring a fair and equitable method of attendance management being applied to employees.

230. Evidence was put forward by the respondent by Mr De Sousa about the respondent needing to fulfill its contractual obligations to supply security services to its clients.

231. Evidence was put forward about protecting the health and safety of the claimant in particular, but not the respondent's employees in general. We have still considered this where relevant.

Allegation 2 - requiring the claimant to work day and night shifts

232. In respect of allegation 2 although the need to fulfil the respondent's contractual obligations to its clients is a legitimate aim we concluded that in the context of requiring the claimant to work day shifts and night shifts that it was not proportionate, particularly given the size of the respondent. The respondent could have just allocated the claimant night shifts and it still would have been able to meet its contractual obligations.

233. We concluded that protecting the health and safety of the claimant is not relevant to allegation 2. We concluded that requiring the claimant to work on day shifts was not to protect his health and safety.

Allegation 4 - Requiring the claimant to be signed off work sick as the claimant was not able to work for 12 hour shifts on a permanent basis

234. The aim of fulfilling the respondent's contractual obligations is not relevant to allegation 4.

235. The aim of protecting the claimant's health and safety is legitimate, but not proportionate on the facts. We concluded it would have been less discriminatory to just require the sick note to cover the two months that the duty at Euston Tower was going to last. Mr De Sousa knew that duty at Euston Tower was just for two months as he had seen the email dated 24 March 2021 [respondent's additional document] stating that the duty at Euston Tower was for two months. Mr De Sousa could have asked the claimant to provide a sick note for two months rather than a sick note on an indefinite basis.

Allegation 7 – dismissing the claimant

236. The aim of the respondent fulfilling its contractual obligations is relevant to allegation 7.

237. We have concluded that it was not proportionate because the respondent could have taken less discriminatory action than dismissing the claimant by placing the claimant on a minimum hours' contract or moving him to the Control Room. Mr De Sousa's evidence to the tribunal was that it would take eight or nine shifts to train the claimant to work in the Control Room and this is not a disproportionate number of shifts. There was no evidence presented to the tribunal that either the training or the licence for the Control Room were disproportionately expensive.

238. We also concluded, given the size of the respondent, that it was more likely than not that there were other vacancies at the respondent that did not require standing or walking. No evidence was presented to the tribunal that the respondent considered other vacancies for the claimant other than considering the Control Room.

239. In respect of the aim of protecting the claimant's health and safety we have concluded that the respondent cherry-picked the Occupational Health report in April 2021 [194-198]. The Occupational Health report contained information concerning the claimant's inability to stand or walk for long periods and the other hand it stated that adjustments could be made and there were no barriers for a return to work. The respondent did not look at the entire content of the Occupational Health report and neither did it consider the context of what the claimant had worked between September 2019 and March 2021. Nor did the respondent take into account everything the claimant said in the meetings on 27 May 2021 and 5 July 2021. The claimant was very clear that he could use medication to control the back pain he experienced while he was on shift. We conclude that this was not, therefore, a legitimate aim in the respondent's decision to dismiss the claimant.

240. We have also concluded that it would have been less discriminatory to move the claimant to the Control Room or to another vacancy that did not require as much standing or walking. We have concluded that dismissing the claimant was not proportionate.

241. We conclude that the respondent did subject the claimant to discrimination arising from disability in contravention of section 15 Equality Act 2010.

Direct disability discrimination – section 13 Equality Act 2010

242. The two potentially unlawful acts in the agreed list of issues are:
   a. Dismiss the claimant on or about 28 July 2021.
   b. Not allow the claimant to work six hour shifts with occasional 12 hour shifts in case he went off sick during a shift due to this disability.

243. Firstly, we concluded that the claimant during the hearing has abandoned the second unlawful act by confirming that the 12-hour shifts per se were not problematic.

244. We do conclude that the respondent did dismiss the claim on or about 28 July 2021.

245. There are two ways of approaching the direct disability claim. The first approach is in **Aitken -v- Commissioner of Police of the Metropolis** which is to create a hypothetical comparator. The relevant circumstances, including abilities, of the person with whom the comparison is made must be the same or not materially different from those of the disabled person (but without the disability).

246. The second approach is in **Cordell -v- Foreign Commonwealth Office**. In this case the EAT said it was much better to look at the reason why the treatment occurred instead of getting bogged down with constructing a hypothetical comparator.

247. We considered the reason why the respondent dismissed the claimant. We considered the meeting on 7 July 2021 and the email sent to the claimant on 19 July 2021.

248. We concluded that in the meeting on 7 July 2021 it was clear that the respondent's focus was on whether the claimant was actually capable of carrying out the job role and it was his ill health. Whereas in the email sent to the claimant on 19 July 2021 [235-236] the claimant was informed that the dismissal was because of his absence, but in fact the claimant's absence had not been discussed in the meetings on 5 July 2021 and 7 July 2021 the focus had been just on what the claimant could do.

249. Although the respondent did not look at the entire context when it decided to dismiss the claimant (i.e., the entirety of the Occupational Health Report [194-198] and the shifts the claimant had worked prior to his sickness absence) we have concluded that the claimant has not proven facts from which a tribunal could conclude, in the absence of any other explanation, that the respondent has contravened section 13 of the Equality Act 2010. There has to be "something more" than a difference in treatment and that "something more" is not present.

250. The respondent did not subject the claimant to direct disability discrimination and this complaint is not upheld.

Victimisation – section 27 Equality Act 2010

Did the claimant do a protected act?

251. The protected act the claimant identified in the agreed list of issues was that he asserted to Mr De Sousa on 7 May 2021 and 27 May 2021 that the respondent was failing to make reasonable adjustments (that had previously been in place) and that was preventing him from returning to work.

252. We noted firstly that the claimant has not presented any evidence about 7 May 2021. We have, therefore, concluded there was no protected act on 7 May 2021.

253. We also noted that when referring to 27 May 2021 there is no specific meeting or email being referred to in the issue. In deciding whether there was a protected act we have considered the meeting on 27 May 2021 and the two emails that the claimant sent to Mr De Sousa on 27 May 2021 [216-217 and 340-431]. We considered the meeting and the emails in the context of the Occupational Health report in April 2021 [194-198] which was available to the respondent prior to the meeting on 27 May 2021.

254. The content of the minutes of the meeting on 27 May 2021 demonstrate that there was a discussion about the claimant not wanting to work on day shifts and the claimant does mention “days” in that meeting. We found above that one of the adjustments put into place by the respondent in September 2019 was that the claimant only work on night shifts. The minutes also show a discussion about the claimant being moved onto a minimum hours contract instead of being rostered on 12-hour shifts all the time.

255. Further the claimant’s email on 27 May 2021 [340-341] again raises the issue that the claimant has been working on standby shifts and essentially asks “why am I not doing it now?”. The claimant is referring to the standby shift where the claimant attends the site and if he is not needed he returns home and he receives the minimum payment of six hours but if is needed to cover another colleague the claimant is then required to work the full 12 hour shift. We also found above that Mr De Sousa knew what the claimant meant when he was referring to six hour shifts, i.e., that the claimant meant the standby shifts (though it is not clear the Occupational Health doctor knew that the claimant meant the standby shift when he was referring to the six hour shifts).

256. Taking all of the above together we have concluded that there was a protected act on 27 May 2021 this was through the minutes of the meeting of 27 May 2021 in combination with the email sent on 27 May 2021 by the claimant, set in the context of the Occupational Health report [194-198] the claimant did assert to Mr De Sousa that the respondent was failing to make reasonable adjustments (that had previously been in place) and that was preventing him for returning to work. This was a protected act under section 27(2)(d) Equality Act 2010.

257. The potential unlawful acts of the respondent in the agreed issues are:

a. Did the respondent fail to deal with the claimant's grievances raised orally on 7 May 2021 and 27 May 2021 with Mr De Sousa?
b. Did the respondent fail to hear the claimant's appeal regarding the termination of his employment?
c. Did the respondent fail to pay the claimant the correct amount of his final pay?

Did the respondent fail to deal with the claimant's grievances raised orally on 7 May 2021 and 27 May 2021 with Mr De Sousa

258. Firstly, the claimant has not presented any evidence to the tribunal about a grievance being raised orally on 7 May 2021.

259. The panel specifically questioned the claimant about the grievance and asked whether the grievance was raised on the 27 May 2021 and the claimant answered that his grievance was raised on 4 July 2021 and that he raised it in his e-mail on 4 July 2021.

260. We conclude that the claimant did not raise any grievances orally on either 7 May 2021 and/ or 27 May 2021. The respondent, therefore, did not fail to deal with grievances raised orally on 7 May 2021 and 27 May 2021.

Did the respondent fail to hear the claimant's appeal regarding the termination of his employment?

261. We concluded that the respondent did not fail to hear the claimant's appeal regarding the termination of his employment. The respondent clearly offered the claimant an appeal. The claimant wanted certain points to be included on the agenda for the appeal hearing, but we have concluded that it was not reasonable for the claimant not to attend the appeal hearing. It would have been reasonable for the claimant to attend the appeal hearing and inform the person conducting the hearing that he had sent an email with points that he wanted to be included on the agenda for the hearing and to check that those would be included.

Did the respondent fail to pay the claimant the correct amount of his final pay?

262. We have concluded that the respondent did fail to pay the claimant the correct amount of his final pay by making the deduction for the claimant's uniform (£150). The respondent conceded at the start of the hearing that this was an unlawful deduction from wages. Although the complaint for unlawful deduction from wages has been withdrawn by the claimant, the issue still remains in the complaint of victimisation.

263. The respondent made the deduction in July 2021 and the claimant has only received this payment now in November 2023.

Was the failure to pay the claimant the correct amount of his final pay a detriment?

264. We conclude that this was a detriment, because the claimant has not had this wage between July 2021 and November 2023 and so has not been able to make use of that money so, that is sufficient to be a detriment.

Did the respondent subject the claimant to this detriment because the claimant made a protected act?

265. Here we considered the burden proof under section 136 of the Equality Act 2010. It's not clear who at the respondent decided that a deduction for the uniform should be made to the claimant's final pay. Mr De Sousa did state in cross-examination that he was in consultation with HR throughout and Mr De Sousa is the respondent's account manager. We, therefore, reached the conclusion that both HR and Mr De Sousa were involved in the decision to deduct the claimant's pay for the uniform.

266. We also concluded that both HR and Mr De Sousa were aware of the protected act because Ms Stocker was present as the HR advisor in the meeting on 27 May 2021 and Mr De Sousa conducted the meeting on 27 May 2021. The claimant's email on 27 May 2021 was sent to both Ms Stocker and Mr De Sousa. We also noted that in Ms Stocker's email on 19 July 2021 she actually refers to the claimant's P45 and his final pay slip and we concluded that she was involved in that process.

267. There does need to be "something more" for the burden of proof to be shifted to the respondent.

268. We considered the time-frame and we found that the protected act was raised at the end of May 2021 and the claimant suffered the detriment with the deduction in his final pay in July 2021.

269. The "something more" can arise from the fact that the detriment happens soon after the protected act. On these facts the detriment occurred two months after the protected act which we conclude is close in time.

270. We concluded that the claimant has proven facts from which the tribunal could decide (in the absence of any other explanation) that failure to pay the claimant the correct amount in his final pay was because of the protected act. The burden of proof has shifted to the respondent to prove that the detriment was in no way whatsoever because of the protected act.

271. There was nothing in the ET3, or the evidence presented to the tribunal by the respondent to demonstrate that the detriment was in no way whatsoever because of the protected act.

272. We, therefore, conclude that the claimant was subjected to victimisation in respect of the failure to pay the claimant the correct amount in his final pay in contravention of section 27 Equality Act 2010.

Unfair dismissal

273. The claimant was given verbal notice of termination on 7 July 2021 and the claimant's employment terminated on 28 July 2021.

Can the respondent show that the reason or principal reason for the claimant's dismissal was capability?

274. In Mr Hussain's submissions he put forward two potential reasons, either capability on the grounds of ill health or, some other substantial reason being the refusal of the claimant to work the 12-hour shifts.

275. We note that the first time the some other substantial reason was advanced was during the respondent's submissions. It is not in the respondent's ET3, it was not included in the agreed list of issues and it was not really considered during the evidence or cross-examination. We have concluded that the respondent has not demonstrated the some other substantial reason as being the reason for the claimant's dismissal.

276. The other reason advanced by the respondent is the claimant's incapability on the grounds of ill-health.

277. This is a substantial reason of a kind which could potentially justify dismissal. Whether it did so on the particular facts, we shall discuss below.

Did the respondent genuinely believe the claimant was no longer capable of performing his duties?

278. Clearly the respondent considered parts of the Occupational Health report [194-198] and what the claimant had said in the various meetings about his inability to stand or walk for long periods.

279. In respect of the reason for the termination there is some confusion caused by the content of the email on 19 July 2021 [235-236]. The part of the minutes of the meeting on 7 July 2021 in which Mr De Sousa explains the reason for the dismissal to the claimant clearly refers to the claimant's ability to do his job and specifically refers to the respondent's view that the claimant's back pain could happen in 10 to 15 minutes and that the claimant could leave the shift at any time due to the back pain. Whereas the email of 19 July not only mentions these points but also mentions the claimant's absence and the operational needs of the respondent.

280. There's nothing in the minutes of the meeting on 7 July 2021 about the operational needs of the respondent and the absence of the claimant.

281. We conclude that the reason for the claimant's dismissal was the respondent's belief that the claimant was incapable of doing the job role.

282. But the question is whether that reason was an honest belief based on reasonable grounds following a reasonable investigation.

283. We have concluded that the Occupational Health report in April 2021 [194-198] was contradictory in itself. In places the report indicates the claimant would struggle to complete his job role because he could not stand or walk for longer than 10 to 15 minutes. On the other hand the report stated that there were no barriers to the claimant returning to work and the report recommended adjustments be made to his job role such as

continuing on night shift work and working no more than six hour shifts at a time.

284. We conclude that a reasonable employer on receipt of that Occupational Health report would have requested clarification from the doctor to really understand whether the claimant could continue in his job role. The respondent's failure to do this takes the decision to dismiss outside the range of reasonable responses.

285. The respondent also did not consider the entire context of what had happened up to 7 July 2021. Mr De Sousa did not consider what had in fact been happening since September 2019 to March 2021, i.e., the claimant had worked a large number of full 12-hour shifts. Mr De Sousa also ignored what the claimant said about his pain management in the meeting on 5 July 2021. During that meeting the claimant made it clear that although he suffers back pain while on shift he is able to manage the pain with medication, although it might mean he would not be able to work the following day. In addition, the claimant was not actually signed off work on 7 July 2021 when he was given verbal notice of his dismissal because his fit note stating that he was not fit to work had expired on 30 June 2021. This failure also takes the decision to dismiss outside the range of reasonable responses.

286. We conclude that the respondent did not consider the entire context and focused on specific parts of the Occupational Health report [194-198] and we conclude that the respondent did not have a genuine belief based on reasonable grounds that the claimant was no longer capable of performing his duties.

287. We conclude that the dismissal was substantively unfair and was outside the range of reasonable responses.

288. We conclude that there were also issues with procedural fairness too.

289. Usually in a capability dismissal there will be consultation with the employee about not only whether the employee can continue in their current job role but actually what they are capable of doing for the organisation per se in another job role.

290. A clear recommendation had been made by the occupational health doctor (in the Occupational Health report of April 2021 [194-198]) to carry out a personal risk assessment for the claimant. The respondent did not carry out a personal risk assessment for the claimant when the claimant returned to work in July 2021 (following the expiry of the claimant's fit note on 30 June 2021). In cross-examination Mr De Sousa said the respondent would have conducted the personal risk assessment on the claimant's return to work. The claimant's fit note expired on 30 June 2021 so that was the time to carry out the personal risk assessment.

291. The personal risk assessment would have highlighted to the respondent what the claimant was actually was capable of doing for the respondent.

292. In considering the minutes of the various meetings with the claimant we observed that these meetings were not so much consultation with the claimant about a possible solution but rather was pressuring the claimant to comment on what the Occupational Health report [194-198] had said about the claimant not being able to stand or walk for more than 10 to 15 minutes at a time.

293. The respondent did not consult with the claimant about what the claimant was capable of doing for the respondent in his current job role or another position.

294. Given the size of the respondent we also find it difficult to believe that there were no other vacancies that the claimant could be moved to within the organisation. The respondent has 1800 employees. We heard evidence from Mr De Sousa about a potential job role with the Control Room. We were not presented with evidence as to whether there was actually a vacancy available, but we conclude that if the respondent was considering a job role within the Control Room and then did not consult with the claimant about this potential job role this failure to consult undermines the procedural fairness of the dismissal.

295. We conclude that the claimant was not informed of his right to be accompanied by another employee or a trade union official prior to the meetings on 5 July 2021 and 7 July 2021. The claimant was at risk of being dismissed and his right to be accompanied was engaged.

296. At the start of both of those meetings the claimant was asked if he wanted to be accompanied but technically the right to be accompanied is a right to be accompanied by another employee or a trade union official. Mentioning the right to be accompanied at the start of a meeting is not sufficient and it should have been included in the invite to the meetings. We conclude that this renders the dismissal procedurally unfair.

297. We conclude that another reason why the dismissal was procedurally unfair was the failure to warn the claimant prior to the meetings on 5 July 2021 and 7 July 2021 that he was at risk of dismissal. We conclude that the respondent did consider that dismissal was a possible outcome of at least the meeting on 7 July 2021 and, therefore, the respondent should have been warned the claimant because then he would have understood the seriousness of those meetings.

298. Further considering the slight difference in the minutes of the meeting on 5 July 2021, in which we found above that claimant's version was correct, i.e., that the claimant asked "is my contract going to be terminated" and answer was not affirmative. We conclude that this meant the claimant did not appreciate the seriousness of the meetings and the potential outcome.

299. In respect of the appeal hearing we have concluded above that the claimant's reason for not attending the appeal hearing was unreasonable. The fact that an appeal hearing did not take place does not make the dismissal unfair.

300. We found above that Mr De Sousa was advised by HR that the claimant's grievance could be dealt with in the appeal hearing. We have not seen any evidence or documentation demonstrating that the claimant was informed by the respondent that his grievance was going to be considered at the appeal hearing.

301. When the claimant did not attend the appeal hearing the respondent did not progress the claimant's grievance either so, we have also concluded this failure to consider the claimant's grievance taints the fairness of the dismissal procedurally.

302. We conclude that the claimant's dismissal was both substantively unfair and procedurally unfair. The respondent unfairly dismissed the claimant.

Employment Judge Macey

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Dated: 6 March 2024