**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107167/2023**

**Held in Glasgow on 23, 24, 28, 29 and 30 May 2024**

**Employment Judge L Wiseman**
**Members R McPherson & A Matheson**

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| **Mr A Fisher** | **Claimant**<br>**Represented by:**<br>**Ms A Bowman - Solicitor** |
| **Kwik Fit (GB) Ltd** | **Respondent**<br>**Represented by:**<br>**Mr D Bunting - Solicitor** |

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the tribunal is:-

(i) the claimant was unfairly dismissed and discriminated against because of the protected characteristic of disability. The tribunal ordered the respondent to pay to the claimant compensation in the sum of £18,376 (being compensation of £13,376, which includes the basic award, and injury to feelings of £5000) and

(ii) to dismiss the claims of automatically unfair dismissal (section 103A Employment Rights Act) and failure to provide rest breaks (regulation 12(1) Working Time Regulations) because they were withdrawn by the claimant.

## REASONS

1. The claimant presented a claim to the Employment Tribunal on 31 July 2023 alleging he had been unfairly dismissed, discriminated against because of the protected characteristic of disability and that he had been dismissed and subjected to detriment because of making protected disclosures.

2. The respondent entered a response admitting the claimant had been dismissed for reasons of capability, but denying the dismissal had been unfair. The respondent sought clarification of the remaining claims before responding to them.

3. The case was the subject of case management and it was clarified that the claimant brought claims of unfair dismissal, automatically unfair dismissal because of making protected disclosures, breach of the working time regulations in respect of the provision of rest breaks and disability discrimination in terms of sections 15 and 20 of the Equality Act.

4. The representatives clarified at the start of the hearing that the claims had been further refined and were as follows:

   - unfair dismissal; and
   - disability discrimination in terms of sections 15 and 20 of the Equality Act. The respondent conceded the claimant was a disabled person at the relevant time because of a physical impairment concerning his left knee.

5. The claims in respect of automatic unfair dismissal (section 103A Employment Rights Act) and failure to provide rest breaks (regulation 12(1) of the Working Time Regulations) were no longer insisted on. These claims were dismissed by the tribunal.

6. The parties produced a List of Issues (page 102) and this is set out later in the Judgment.

7. The tribunal heard evidence from the following witnesses:

- the claimant,
- Mr Mark McKnight, Operations Manager who line managed the claimant from October 2021 to June 2022;
- Mr Karl Billington, Customer Care and Experience Director, who heard the grievance appeal;
- Mr Wayne Coats, Operations Manager who took on responsibility for the claimant's branch in June 2022 and who took the decision to dismiss and
- Mr Paul Smith, Divisional Director – Northern, who heard the appeal against dismissal.

8. The parties produced a joint file of documents for the hearing.

9. The tribunal, on the basis of the evidence before it, made the following material findings of fact.

**Findings of fact**

***Background***

10. The respondent is a car servicing and repair company specialising in tyres, brakes, exhausts, MOT testing, air conditioning recharge, oil changes and windscreen repair.

11. The respondent has 695 centres across the United Kingdom and Ireland, with over 100 centres in Scotland.

12. The claimant had an accident in 2012 which necessitated reconstruction surgery to his left knee.

13. The claimant commenced employment with the respondent on the 24th November 2014. He was initially employed as a Trainee Centre Manager and gained promotion to Centre Manager in 2015. The claimant moved branch on several occasions and had experience of working in Paisley, Anniesland,

Milngavie and Maryhill. He also had two periods of working as a Floating Manager covering a variety of branches.

14. The claimant had an accident whilst cycling home in October 2019 and damaged his left knee, left hand, left toe and back. This injury aggravated the earlier injury to his left knee.

15. The claimant did not take any sickness absence until June 2020 when his left knee gave way whilst walking down stairs. The claimant was advised he required an operation to repair the anterior cruciate ligament.

16. The claimant returned to work on the 1 October 2020. The claimant was placed on light duties and moved to be Centre Manager at the Yoker branch. The Yoker centre was a small 4 person centre. The decision to move the claimant to Yoker was taken by Mr Wayne Coats, Operations Manager and Ms Purdie, HR, because the Yoker branch was not a busy branch. The claimant was fit to carry out all aspects of managerial duties, but he was restricted from doing manual tasks such as tyre fitting, quality control procedures, exhaust fitting, brake fitting, servicing and wiper fitting.

17. The role of Centre Manager included doing manual tasks when required, for example if the branch was busy or to cover absence. The claimant's Contract of Employment (page 107) made this clear, albeit the Job Description did not specify the manual duties.

***The issues in the Yoker centre***

18. The Yoker centre was not in a good state of repair and the claimant regularly reported various health and safety issues. The most serious issue related to flooding of the car park and the centre. The claimant reported this constantly for approximately a year until it was resolved towards the end of 2022. There were two occasions, when the flooding was so bad or smelled like it may be sewage, that the centre had to close.

19. In March 2022 the claimant raised issues regarding wheel alignment and stopped this work being done in the branch from March 2022 until August 2022. The issue related to wheel alignment being done correctly in terms of

the technical information relevant for each vehicle: for example, some vehicles required a full tank of petrol before wheel alignment could be done correctly.

20. The wheel alignment issue raised by the claimant led to some machinery requiring to be updated in a number of branches including Yoker.

21. The Yoker centre was a 4 person centre and should have operated with the claimant, a Supervisor and two others. The claimant, following his return to work in August 2022, had a staffing problem in the branch. Two employees (one of whom had been the Supervisor) had been dismissed and this meant that only the claimant and DB, a tyre fitter, were left in the branch. The claimant continually raised the requirement to recruit staff.

22. The procedure to recruit staff was for the claimant to raise it with the Operations Manager, who could authorise the recruitment and inform the Recruitment Team to place an advert. The claimant did not have authority to recruit albeit he may be part of the interview process.

23. The fact there was only the claimant and one other employee in the centre severely limited the work which could be done in the branch: if both employees were present at work, tyre fitting, wiper fitting and light bulbs could be done, but when one employee was on a day off, the other employee could not be lone-working and either no work was done in the centre, or it had to close. The Yoker centre was closed for 4 days a week for 7 weeks until another tyre fitter was employed in November 2022.

24. The claimant continually asked the Operations Manager to arrange cover in the Yoker centre. The Operations Manager did this for a limited period but it became difficult because other employees did not understand the need for cover to be provided and did not want to continually cover another centre.

25. The staffing issues in the Yoker centre continued. The claimant and DB were the only employees in the period between August and November 2022. JD was recruited in November 2022 and JMcA was subsequently recruited as a Supervisor in January 2024, but he resigned in March. The work in the centre

throughout this period was limited to fitting tyres and batteries. The Yoker centre was only fitting 3 – 5 tyres a day.

26. The claimant had a number of Operations Managers line-managing him during the course of his time at Yoker. He was managed by Mr Mark McKnight, Mr Craig Robbie and Mr Wayne Coats.

27. The claimant's annual performance review was not carried out for a period of two years and the respondent did not carry out any formal process, or Performance Improvement Plan (PIP) in respect of the performance of the centre or the claimant.

***Capability procedure***

28. The claimant was invited by Mr Wayne Coats, Operations Manager, to attend a wellbeing meeting. This took place on the 20 April 2021 and a note of the meeting was produced at page 141. The purpose of the meeting was to obtain an update regarding the claimant's health and wellbeing and to discuss the adjustments in place.

29. The claimant confirmed the issues with his knee meant that he had continuing difficulty with twisting, turning and bending. He was waiting for an operation on his knee, but due to the pandemic the waiting lists were lengthy. He confirmed the duties he currently performed, that is, running the centre without doing any manual work on cars, were manageable. The claimant provided Mr Coats with a document he had prepared (page 567) confirming the duties he could not perform.

30. The claimant was referred to Occupational Health and a report was obtained in May 2021 (page 144). The report confirmed the claimant was waiting for an operation on his left knee (left knee anterior cruciate ligament reconstruction). The claimant had difficulty with motions involving twisting, turning and bending of the knee and had difficulty getting down to floor level. He also had difficulty lifting heavy weights.

31. The report noted the claimant had been on light duties since October 2020 and did not carry out work on vehicles such as tyre fitting, exhaust fitting, wiper

fitting, brake fitting, servicing or working on vehicle suspensions or repairs: these were practical tasks which were difficult due to the ongoing functional impairments. The report also noted the claimant experienced an exacerbation of pain if he worked more than 4 days in a row.

32. The respondent continued with the claimant on light duties at Yoker, with him taking every Monday and Tuesday as his days off. Employees had two days off per week, but it was unusual for employees to have two consecutive days.

33. The claimant had an accident at work in April 2022 when he had a fall caused by a pothole in the building. The fall caused further injury to the claimant's knee and he had a period of sickness absence for four months. The claimant returned to work in August 2022.

34. The claimant was advised by Mr Mark McKnight, Operations Manager, that he would not be paid company sick pay (two months full pay and two months half pay) and that he may face an investigation upon his return to work regarding a potential failure to manage the risk at work. The claimant raised a grievance regarding the decision not to pay company sick pay, and was successful. The claimant did not face any investigation upon his return to work.

35. The claimant learned that Mr Tony Newby, Divisional Director, had instructed Mr Craig Robbie, Operations Manager, to carry out a secret investigation into him. The claimant learned of this when a friend reported to him that he had been interviewed and why. The notes of the investigation were produced at pages 245 – 263. The focus of the interviews was the claimant and whether the person had ever witnessed him telling other team members not to carry out a job, whether the person had ever witnessed him turning work away from a centre, whether he had ever shown them anything on the computer to do with Geometry machine or intimated they should not be doing Geometry adjustments and whether he had said anything about rules and policies. (The reference in the interviews to Geometry was to wheel alignments.)

36. The claimant attended a meeting with Tony Newby and Doug McAllister (HR) on the 16 November 2022. The claimant was advised that Craig Robbie had

been suspended and demoted for allowing lone-working. The claimant was questioned about his involvement in a workers' rights group and whether he had been telling staff about their rights regarding lunch and rest breaks. He was also asked about lone-working and the need to employ more staff.

37. The claimant received a letter from Mr Newby dated 12 December 2022 (page 281) summarising the points which had been discussed. Those points were messaging on external forums; lone working; rest breaks; annual leave and Geometry. The letter confirmed arrangements had been made for the Divisional Trainer to attend the branch to train people on the wheel alignment system.

38. Mr Newby asked Wayne Coats to take on responsibility for the Yoker centre and the claimant, and to look at whether light duties could be continued. Mr Coats met with the claimant for a wellbeing meeting on 23 December 2022 (page 283). Mr Coats was accompanied by Doug McAllister, HR.

39. A second Occupational Health report had been obtained in October 2022 (page 265). The report confirmed the issues with the left knee were ongoing and the claimant remained on the waiting list for an operation. The claimant remained fit for work with restrictions. The report further confirmed that there would be a recovery period post-operation of three to four months. The Consultant recommended the current adjustments should remain in place, or redeployment could be considered.

40. This report was discussed at the wellbeing meeting. Mr Coats noted the claimant had been on light duties for 2 years. He also noted there had been operational difficulties in the Yoker centre and that in a 4 man centre, with the claimant being on light duties, it caused difficulties. The claimant referred to previously having been in a Floating Manager role, and that he would still be open to doing that, or working in another centre. Mr Coats also made reference to the claimant having two days off together and whether this was necessary.

41. The claimant was, by letter of 27 February 2023 (page 311) invited to attend a capability meeting. The meeting referred to light duties having been put in

place as a temporary measure in order to allow the claimant to remain in his role whilst awaiting surgery, but there was no indication when surgery may take place. There was also reference to the Yoker centre making a significant loss. The purpose of the meeting was to review the situation and confirmed one outcome of the meeting may be dismissal.

42. A note of the capability meeting held on 29 March 2023 was produced at page 315. Mr Coats was accompanied by Mr McAllister and the claimant was accompanied by a trade union representative. The first issue raised at the meeting was clarification regarding the policy and procedure being used by the respondent. Mr Coats, following a short adjournment, confirmed there was no specific policy labelled medical capability and the sickness absence policy was the closest most relevant policy.

*43.* The Sickness Absence Policy was produced at page 132. The policy included a section called *"Continued Long Term Absence"* and provided that *"where medical reports and or a report by an independent occupational health physician have been obtained and you are still not able to return to work, we may arrange a capability meeting. The purpose of the meeting will be:*

- *to discuss your continued absence and the contents of the medical reports that have been obtained;*
- *to consider if a return to work is foreseeable and discuss with you any reasonable adjustments that can be made to facilitate your return to work,*
- *to consider the possible termination of you employment on the grounds of capability.*

*Termination will normally be with full notice or payment in lieu of notice."*

44. Mr Coats asked for an update regarding the position with the left knee and the claimant advised he was still waiting for the operation/for a 24 hour bed.

45. The claimant queried the level of loss sustained by the Centre and confirmed hr had calculated that it amounted to £380 per day which was "nothing" when

consideration was taken of the fact the centre was shut for a long time, had no Supervisor from July until January and was closed 54 times in the year. The claimant referred to not having had a review for over 2 years and noted that no-one had spoken to him regarding performance and he had not been put on a Performance Improvement Plan (PIP).

46. Mr Coats had produced a profit and loss account for April 2022 – January 2023 (page 295 – 310). The document showed losses being made in the first and second quarters of the year, with profits being made in the third and fourth quarters. Mr Coats accepted that in the period April to July 2022 (the first quarter) the claimant had been off sick and when he returned to work in August 2022, the centre returned to profit. The claimant plus one were the only employees at the centre during October and the claimant was off on three weeks' annual leave during November.

47. The claimant argued that fitting tyres was not part of his duties because it was not in his job description and further argued that not all Centre Managers fitted tyres, and he named two such managers. Mr Coats did not agree with the claimant although he accepted that managers in larger centres had less requirement to fit tyres.

48. There was discussion about alternative employment and Mr Coats informed the claimant that the position of Floating Manager was not an option. Mr Coats questioned the claimant about a role in Customer Care, but the claimant was not interested in a position where his salary would be reduced.

49. The meeting adjourned until 10 May. The claimant updated Mr Coats that he was now 21st on the waiting list. He understood 2/3 operations were done per week, and so he believed the operation would take place shortly. There was a discussion about fitting tyres and Mr Coats confirmed that after the operation he would be expected to fit tyres. The claimant identified there were mechanical aids which could be provided by the respondent which would assist and enable him to fit tyres.

50. The claimant made clear that he was willing to look at all alternatives but it would need to be something that he liked and with no reduction in salary. The

claimant referred to training, moving to another branch and travelling all being options for him.

51. Mr Coats summarised that the issues were partly about mechanical aspects but also the two days off back to back which had been causing problems because Mr Coats was struggling to get other employees to provide cover at Yoker.

52. The claimant was notified of the outcome of the meeting by letter of 16 May (page 328). Mr Coats confirmed the claimant was dismissed on grounds of capability. Mr Coats referred to the length of time the claimant had been on light duties and the fact the company considered the restrictions on him undertaking manual tasks negatively impacted on the performance of the centre.

53. The claimant appealed against the decision to dismiss him (page 333). The main points of appeal were (i) a failure to follow policy and procedure regarding the PIP and capability policy; (ii) failure to seek an updated medical assessment; (iii) failure to understand and apply the correct job description; (iv) failure to continue the adjustments which had been agreed and allowed him to continue with his job; (v) failure to follow the provisions of the Equality Act; (vi) failure to support him in his role by ignoring his legitimate concerns regarding training, equipment and staffing; (vii) failure to fully consider alternatives and (viii) failure to adequately explain the reasons for dismissing him.

54. Mr Paul Smith, Divisional Director – Northern, was appointed to hear the appeal, which took place on the 2 June 2023. A note Mr Smith's meeting with the claimant was produced at page 356. The issues set out by the claimant in the letter of appeal (points (i) to (viii) above) were discussed at the appeal hearing together with issues relating to wheel alignment, health and safety concerns and lone working. The claimant advised Mr Smith that he had, that day, attended for his pre-operative and although he did not have a date for the operation, he thought he must be at the top of the list. The claimant also advised Mr Smith that the reason Yoker had made a loss had nothing to do

with his disability and not being able to fit tyres, but was because there had not been a Supervisor, MOT tester, service technician in the branch and he had been the only member of staff with a driving licence. Further, there had been a period of 7 weeks when the branch had been closed 4 days a week due to lack of staff.

55. Mr Smith interviewed Claire Ferguson, Learning and Development Partner. He spoke with her because the claimant had suggested he had supported her in compiling user guides to teach other managers and supervisors how to work company systems. Ms Ferguson rejected that suggestion and gave a scathing description about the claimant, saying he was negative, hated the job, behaved appallingly in front of other staff and was quite rude to another member of staff.

56. Mr Smith interviewed Doug McAllister, People Business Partner (page 435); Mark McKnight, Operations Manager, who had line managed the claimant from October 2021 to June 2022 (page 445); Tony Newby, Divisional Director (page 486) and Wayne Coats, Operations Manager, who was the claimant's line manager from October 2022 and took the decision to dismiss (page 492). The general theme from the interviews, and from Mr Newby in particular, was that the claimant, due to his performance and light duties, was to blame for the losses at Yoker.

57. Mr Smith confirmed the outcome of the appeal hearing to the claimant in a letter dated 8 August 2023 (page 501). Mr Smith addressed each of the points raised by the claimant in his appeal and decided to reject the appeal because he was satisfied a fair process had been followed in line with the company's sickness absence policy, and there had been no link between the decision to dismiss and any of the disclosures regarding health and safety made by the claimant.

58. The claimant also raised a grievance regarding Tony Newby (page 330). The grievance was investigated by Mr Karl Billington (Customer Care and Experience Director). Mr Billington met with the claimant on the 19 June (page 339). Mr Billington interviewed Mark McKnight (page 377); Wayne Coats

(page 389); Doug McAllister (page 404) and Tony Newby (page 416). The outcome of the grievance was sent to the claimant by letter of 27 July 2023 (page 453). The grievance was not upheld.

59. The claimant, since dismissal, has taken time to complete his CIPD qualification (level 5) online. He started this in 2021 and gained his qualification in August/September 2023.

60. The claimant applied for 4 jobs prior to leaving the employment of the respondent. The claimant applied for no jobs in the period from dismissal to January 2024. He started applying for HR jobs in January 2024 to May 2024 but he has not yet been successful in securing alternative employment.

61. The claimant has been in receipt of Personal Independence Payment (PIP) at the lower rate of £101 per week.

62. The claimant assists his partner in her beauty salon business: he does paperwork and invoices. The claimant does not earn anything for this work.

**Credibility and notes on the evidence**

63. The tribunal found the claimant to be, on the whole, a credible witness who gave his evidence in a straightforward manner. The claimant was very well prepared and had dates, chronology and explanations at his finger-tips. The claimant had clearly formed the view that the respondent wanted to dismiss him and used the fact of the light duties to achieve this. The claimant, in support of his position, pointed to the comments made about him during the grievance and appeal process and the secret investigation instructed by Mr Newby.

64. There was one issue where the tribunal could not accept the claimant's position and that was in respect of the job description. The claimant readily agreed that he had initially undertaken all of the manual duties and it was not until he received a copy of the job description that he took the view manual duties were not part of his role because they were not specifically stated to be part of the duties. The tribunal found as a matter of fact that the claimant's Contract of Employment made clear that as Centre Manager he may be

required to undertake any work within his capability and which the company reasonably required from time to time. The practice was for Centre Managers to help out with manual tasks when required and the fact this was not set out within the job description did not change or undermine that. We were satisfied that undertaking manual tasks was part of the claimant's role and it was precisely for that reason that being placed on light duties was an adjustment to remove that part of the role.

65. The other issue where the tribunal found the claimant lacked credibility was in relation to what he had done following dismissal. The claimant did not apply for any jobs in the period after his dismissal until January 2024. The claimant's explanation for not applying for jobs (that is, he was concerned with the grievance and appeal procedure) could not be accepted in circumstances where all but one stage of those processes had concluded at the time of dismissal.

66. The tribunal found the evidence of Mr McKnight and Mr Billington to be straightforward but not particularly relevant to the issues to be determined by the tribunal. The evidence of Mr Coats and Mr Smith was, on the whole, confusing and they each undermined their evidence by constantly changing their position. For example, each time they were challenged regarding an assertion made about the claimant's performance, they would change their position.

67. Mr Mark McKnight line managed the claimant from October 2021 until June 2022. His evidence was of limited relevance because he had no part in the decision to dismiss the claimant. Mr McKnight was a manager who liked to address things informally: accordingly there were no records of any meetings Mr McKnight may have had with the claimant. Mr McKnight, whilst having no issues with the claimant during the period he managed him, gave a less than favourable view of the claimant when interviewed by Mr Billington (grievance) and Mr Smith (dismissal appeal). Mr McKnight told Mr Billington that he thought the claimant *"invested a lot of energy in finding new and inventive ways not to be responsible for the centre"* and that he *"does everything by the book".* Further, that the claimant *"passed this on to his team and made them*

*difficult to manage"*; *"performance was never great in the centre" and* the claimant *"did the minimum he could get away with".* Mr McKnight did not raise these issues with the claimant and took no action to address any performance issues in the centre.

68. Mr Billington's evidence regarding the handling of the grievance was not relevant to the issues to be determined by the tribunal. The value of being taken through the grievance interviews at this hearing was in highlighting the views expressed by those interviewed regarding the claimant.

69. Mr Coats' evidence was confused and contradictory in many parts. We say that principally because it was clear the respondent placed the blame for the underperformance of the centre on the claimant, either because he was on light duties or generally; however, each time he was challenged about this, he either conceded the point or changed his position. For example, Mr Coats accepted the issues with flooding, the issues with staffing, the centre being closed or only open for part of a week all impacted on the financial position of the centre, but notwithstanding this he kept returning to the claimant, and light duties, being the problem in the centre. Mr Coats had to accept in cross examination that he had not carried out any analysis of the factors impacting on the financial position of the centre.

70. Similarly, the tribunal heard a lot of evidence about the claimant getting two days off consecutively causing problems, but when Mr Coats was cross examined about this, he could give no explanation why it caused any more difficulty than having two days off at different times in the week. The reason why he could not give an explanation was because the issue related to the underlying problem of lack of staff. Further, when Mr Coats spoke of it causing difficulty, he meant it caused him difficulty because there were insufficient staff at Yoker to cover the days off, and Mr Coats had to find people from other Centres to provide cover.

*71.* Mr Coats told the tribunal that it got to the stage where people did not want to go to Yoker to provide cover. Mr Coats said this was because people did not want to work with the claimant, but the need for cover was for the claimant's

days off and the fact there was no supervisor to cover him. Further, Mr Coats accepted the biggest challenge for Yoker was lack of staff, and whilst he put that down to no-one wanting to work with the claimant there were two flaws in that position. Firstly, new staff would not know the claimant and secondly Mr Coats, by his own admission, accepted the respondent *was "tight for staff at the best of times"* and you *"could not employ MOT testers for love nor money".* Mr Coats also appeared to contradict himself because whilst recognising that lack of staff was the biggest issue for Yoker, he stated that *"Yoker was loss making for 3 years and putting extra bodies in was not an option".*

72. The tribunal found it clear from Mr Coats' evidence that he was placed in the position of having to conduct the capability meeting without having authority to properly consider and use options for alternative employment. Mr Coats had to refer to Mr Newby regarding the option of creating a Floating Manager position, or moving the claimant to another/larger centre (which Mr Coats considered reasonable), and Mr Newby simply vetoed these options. Mr Newby had asked Mr Coats to take on management of the Yoker centre, and the claimant, and to *"look at whether we could keep light duties going".* The tribunal inferred from this and the fact no alternative options for the claimant were agreeable to Mr Newby, that the decision he wished Mr Coats to make was clear.

73. Mr Newby did not give evidence but he was interviewed by Mr Billington and Mr Smith and the notes of those interviews were produced and illustrated Mr Newby's position regarding the claimant and the Yoker centre. Mr Newby was the Divisional Director: the Operations Managers report to him and he received all financial reports for the centres in his area. Mr Newby, at the grievance interview, stated *"[the claimant] never got managed as he should have done and his performance had never been at an acceptable level".*

74. Mr Newby told Mr Smith that prior to the claimant's return from long term sickness, he did not know the claimant could not fit tyres, and he did not know the claimant had a disability until he left. The tribunal considered both of those statements difficult to believe given the position Mr Newby held, the fact he

knew the claimant was on light duties and the fact he met with the claimant on several occasions.

75. Mr Newby told Mr Smith the claimant's light duties had a "massive impact on the ability to manage the centre and make it profitable". He put the losses down to poor people development, lack of leadership, attitude, poor service regarding the services offered to customers, irregular service levels, poor managerial decision making and lack of staff retention and staff turnover. All of these matters were implicitly blamed on the claimant.

76. Mr Newby also confirmed to Mr Smith that no other centre could accommodate the claimant because he would still need to fit tyres.

77. Mr Newby considered the Operations Managers should have put the claimant on a PIP and that things should have been looked at sooner.

78. The tribunal also noted that Mr Coats and HR made the decision to place the claimant at Yoker on light duties because it was a small branch which was not busy. Mr Coats, having made that decision and in the knowledge the claimant could not carry out manual duties, was then critical of the fact the claimant did not undertake manual duties and blamed this for causing the underperformance of the centre.

79. Mr Smith's evidence followed the same pattern as above. Mr Smith, for example, agreed that one solution (alternative to dismissal) would have been to move the claimant to a larger centre. However, when it was suggested the claimant could have been accommodated in a larger centre, he responded "no". Furthermore, when asked about swapping the claimant and a centre manager from a larger centre, he replied that this would not make good business sense, but could not explain why not.

**Claimant's submissions**

80. Ms Bowman invited the tribunal to find the claimant a credible and reliable witness and that he had been a knowledgeable manager. In contrast to this, Ms Bowman suggested Mr McKnight's evidence had been helpful as to background; Mr Billington's evidence had not been particularly relevant; Mr

Coats' evidence had not been credible because he had been evasive and focussed on what "would have" happened rather than what did happen and Mr Smith's evidence had also lacked credibility because he had been evasive and kept changing position.

81. Ms Bowman submitted the first issue for the tribunal was whether there had been a fair reason for dismissal. Ms Bowman referred to the cases of ***Abernethy v Mott, Hay and Anderson 1974 ICR 323; Maund v Penwith District Council 1984 ICR 143*** and ***James v Waltham Holy Cross UDC 1973 ICR 398.*** Mr Coats said there had been restrictions on the claimant's capabilities; he referred to capability being the reason for dismissal but he could not define this and he also referred to staff being annoyed at having to cover at Yoker and the claimant using policies and procedures against the company.

82. Mr McKnight said that he would have been very surprised if the reason for dismissal was inability to fit tyres. He referred to the claimant making staff militant and that it had been better to contain that in Yoker.

83. Ms Bowman submitted that the real reason for the dismissal had been the respondent's perception that the claimant was difficult to manage: he was a thorn in their side and seen as a troublemaker. In support of this Ms Bowman reminded the tribunal of the secret investigation carried out in October 2022 and submitted the respondent had been looking for evidence to dismiss the claimant.

84. Ms Bowman submitted, with regards to the issue of fairness, that at the capability meeting, there had been no consideration given to the fact the claimant was twenty first on the list for the operation. Further, he had not been placed on a PIP to address performance issues and Mr Coats had only considered alternative roles in his area and did not ask the claimant about travelling. The claimant had put forward costed and reasonable alternatives. There had been great confusion about the policy and procedure being used and whilst it appeared the sickness absence policy had been used, there had

been reference to the capability procedure in the letter of dismissal. An up to date occupational health report should also have been obtained.

85. There had been no real investigation into the reasons why the Yoker branch was failing. Mr Coats had accepted in cross examination that there was no direct evidence regarding the claimant's contribution to this. The claimant explained that under-performance was due to lack of staff, staff sickness, lack of training and being unable to offer the full range of services; flooding and lone working causing the centre to have to close.

86. The profit and loss account produced by Mr Coats for the capability hearing showed profits had been increasing in 2023. The tribunal should have regard to the fact Mr Coats could not explain how the claimant's light duties had contributed to the loss: his evidence had been unconvincing.

87. Mr Newby had, in the appeal investigation, listed a number of factors causing poor performance of the branch. It was submitted that none of the factors related to the claimant's disability or light duties. There was no evidence to indicate how much the claimant's light duties contributed to the under performance of the branch. The tribunal had heard evidence regarding the claimant having two days off consecutively, but it appeared to be agreed that this did not impact on the performance of the centre.

88. The claimant had not been taken through any procedure in respect of warnings or PIP. The Operations Managers had not carried out the claimant's review for 2 years.

89. Ms Bowman submitted the respondent did not have a genuine belief in the inability of the claimant to perform his duties.

90. Ms Bowman submitted the respondent knew the claimant was 21st on the waiting list and they knew this position was improving. There was no good reason why the respondent could not wait any longer.

91. The claimant believed he was dismissed because he could not fit a tyre, but other managers did not have to do this. The respondent used the claimant's reasonable adjustments as a convenient way to dismiss him. They used light

duties as a scapegoat. The dismissal was not procedurally or substantively fair.

92. Ms Bowman referred to the EHRC Code and the case of ***Archibald v Fife Council 2004 UKHL 32*** regarding reasonable adjustments. The respondent accepted the provision, criterion or practice of (i) requiring employees to attend work to perform a range of duties including fitting and fixing cars and (2) requiring employees to achieve a certain level of profitability had been applied; and accepted these PCPs put the claimant at a substantial disadvantage compared with persons who are not disabled. The substantial disadvantage was being subjected to capability procedures and being dismissed. The issue for the tribunal was whether the respondent had taken such steps as it was reasonable to have to take to avoid the disadvantage.

93. Mr Coats and Mr Smith had not received any training regarding disability and dealing with disabled employees. It was submitted that Mr Coats only superficially considered alternative employment. He accepted that managers in larger centres did not do tyre fitting as much and that if he had been permitted to move the claimant to Anniesland, it would have been reasonable. Mr Smith told the tribunal that it would not have made business sense to swap the claimant into Anniesland and move the Centre Manager from there to Yoker, yet he could not explain why not.

94. The tribunal had heard much evidence about the Floating Manager role. Ms Bowman submitted there was no real reason why this role could not be created for the claimant. It appeared to simply be the case that there was no budget for it and therefore it could not be done. However, the claimant had costed it and at a cost of £192 per month per centre, it was submitted this would have been reasonable.

95. Mr Coats only considered centres within his division. The respondent has over 100 centres in Scotland and thousands of employees. It would have been reasonable to create a role or move the claimant to a larger centre.

96. Mr Smith told the tribunal that if he had been Operations Manager, he would have used a PIP and that this would have helped the respondent to identify

the issues in the branch and would have supported the claimant in dealing with those issues. There was no real reason why a PIP had not been used beyond the fact some Operations Managers did not like them and because the claimant was on light duties.

97. The claimant had made reference to mechanical aids to assist with tyre fitting. Mr Coats told the tribunal that he spoke to the relevant person about this but he could not give a timeframe and it was submitted there had been no real consultation or consideration about this.

98. Ms Bowman submitted there was no real reason why the respondent could not have allowed the status quo to continue and to recruit more staff.

99. The respondent, with regards to the claim brought under section 15 Equality Act, accepted the something arising in consequence of the claimant's disability was his inability to do any manual work including tyre fitting and fixing cars. The respondent also accepted it had treated the claimant unfavourably because of something arising in consequence of disability when it dismissed him and subjected him to capability procedures. The issue for the tribunal was whether the respondent could show that the treatment was a proportionate means of achieving a legitimate aim, which was the efficient and profitable running of the Yoker centre.

100. Ms Bowman submitted the question of whether the treatment was proportionate had to be objectively assessed. The legitimate aim must be reasonably necessary. The tribunal required to carry out a balancing act.

101. Ms Bowman submitted the aim could have been achieved by ensuring sufficient staff were employed at the centre. Further, it had been disproportionate to dismiss the claimant where the job description did not say the claimant was required to do manual work.

102. Ms Bowman invited the tribunal to uphold the claim and to make an award of compensation as detailed in the schedule of loss, including an award for injury to feelings of £15,000. It was submitted the claimant had been more than reasonable in mitigating his losses: he had been applying for roles and gaining

additional qualifications. There could be no issue of a Polkey reduction because if a fair procedure had been followed, there would not have been a dismissal.

**Respondent's submissions**

103. Mr Bunting noted the claimant's initial injury had occurred in 2012. He had then joined the employment of the respondent as a trainee centre manager in 2014 and had worked at various centres including Anniesland, Milngavie and Maryhill with two periods as a Floating Manager.

104. The claimant had had an accident in 2019 and had been off on sickness absence from June to October 2020. The claimant returned to work on light duties: the claimant had suggested this because he knew he was required to do tyre fitting. The claimant was placed at the Yoker branch because it was less busy and he could do light duties.

105. A wellbeing meeting was held in April 2021 and the claimant produced a document detailing the duties he could not do. This suggested the claimant knew he was required to do the duties on the list.

106. An occupational health report was obtained in May 2021. The respondent reasonably allowed the claimant to have both days off per week together.

107. A wellbeing meeting was arranged for July 2021 but this did not take place. There was no dispute the claimant was raising various issues at this time, for example, flooding, potholes, wheel alignment. Mr Bunting submitted that whilst these issues may not have cast the claimant in a favourable light, the people who held that view were not involved in his dismissal. In any event the issues which the claimant raised regarding wheel alignment resulted in machinery being updated.

108. In August 2022 when the claimant returned to work there was just the claimant and DB in the branch because two other employees had been dismissed. It was accepted that not all of the problems at Yoker were because of the claimant's light duties. JD was recruited in October 2022 and JMcA in January 2023. This demonstrated that the respondent addressed staffing issues.

109. A wellbeing meeting took place in December 2022. The claimant expressed an openness to alternative positions but did not want to accept a reduction in salary. The claimant had been on light duties for 2.5 years and the Yoker centre was not performing: the respondent could not sustain it. Mr Bunting submitted the claimant, at that meeting, accepted his restrictions affected the centre's performance: accordingly it was not unreasonable for the respondent to think the light duties were a contributory factor.

110. The capability meeting was held in March 2023 and it was submitted the respondent had been right to address the fact the claimant's restrictions were contributing to the centre's performance directly and indirectly. Mr Bunting submitted the cross examination regarding the profit and loss account did not inform the tribunal.

111. The sickness absence policy had been the most relevant policy and it had been reasonable to use it. It was submitted there was no need for warnings prior to a dismissal for capability.

112. Mr Bunting submitted there were no alternative roles for the claimant and it would not have been reasonable for the respondent to create a role for the claimant.

113. The reason for the dismissal was capability and the respondent had followed a fair procedure in dismissing the claimant for this reason. There was no requirement for an up to date medical report in circumstances where the claimant's condition had not changed. Further, it would not have been reasonable for the respondent to wait any longer in circumstances where there was no clarity when the operation would take place.

114. Mr Bunting submitted, with regards to the claim brought under section 15 Equality Act, that dismissal was a proportionate means of achieving the legitimate aim. It had been reasonable for the respondent to address the capability issues when the view was that the claimant could no longer perform his duties.

115. Mr Bunting submitted, with regards to the claim brought under section 20 Equality Act, and the adjustments suggested by the claimant that putting the claimant on a PIP would not have resolved the fact the claimant could not do the job. Employing additional staff would not have been cost effective. There were no suitable roles for redeployment. The respondent had applied the capability procedure flexibly. The respondent had re-allocated the claimant's manual duties for 2.5 years. The mechanical aids would have been costly and would not have enabled the claimant to fit tyres.

116. Mr Bunting invited the tribunal to dismiss the claim. However, if the tribunal upheld the claim it was submitted that the award for injury to feelings should be at the top end of the lower band. It was submitted the claimant had not evidenced his loss of earnings: no information had been provided regarding any earnings from his wife's business or the CIPD qualification. The claimant had not mitigated his losses and had said in evidence that he did not need the money.

**Discussion and Decision**

***List of Issues***

117. The issues for the tribunal to determine are:

- Discrimination arising from disability (section 15 Equality Act)
    - The respondent conceded the claimant was a disabled person at the relevant time because of the physical impairment relating to his left knee.
    - The respondent conceded the something arising in consequence of the claimant's disability was his inability to do any manual work, including tyre fitting and fixing cars.
    - The respondent conceded it treated the claimant unfavourably because of something arising in consequence of disability when it dismissed him and subjected him to capability procedures.

The issue to be determined was whether the respondent could show the treatment of the claimant was a proportionate means of achieving a legitimate aim (that aim being the efficient and profitable running of the Yoker centre).

- Failure to make reasonable adjustments (section 20 Equality Act)

    - The respondent conceded (i) the requirement to attend work to perform a range of duties including fitting and fixing cars and (ii) the requirement to achieve a certain level of profitability were PCPs which were applied and which put the claimant at a substantial disadvantage in comparison with persons who were not disabled.

The issue to be determined was whether the respondent had taken such steps as it was reasonable to have to take to avoid the disadvantage. The claimant contended the respondent should have (a) put the claimant on a performance improvement plan; (b) hired additional staff at the Yoker centre to assist the claimant; (c) redeployed the claimant; (d) reallocated the claimant's duties; (e) applied the capability procedure flexibly and (f) provided mechanical aids to assist the claimant repair cars.

- Unfair dismissal (section 98 Employment Rights Act)

    - what was the reason for the dismissal;
    - did the respondent adequately consult with the claimant;
    - did the respondent carry out a reasonable investigation including finding out about the claimant's up-to-date medical position;
    - did the respondent genuinely believe the claimant was no longer capable of performing his duties;
    - could the respondent have been reasonably expected to wait any longer before dismissing the claimant and

- did the respondent act reasonably in treating capability as a sufficient reason for dismissing the claimant.

**Unfair Dismissal**

118. The tribunal had regard to section 98 Employment Rights Act which sets out how a tribunal should approach the question of whether a dismissal was fair. There are two stages:

- first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2) and
- second, if the employer is successful at the first stage, the tribunal must then determine whether the dismissal was fair or unfair under section 98(4). This requires the tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

119. The above section makes clear that it is for the employer to show the reason for the dismissal and that the reason was a potentially fair one capable of justifying the dismissal of the employee. In ***Abernethy v Mott, Hay and Anderson*** (above) it was said that a reason for dismissal was "a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee".

120. The burden of proof at this stage is not a high one: the employer does not have to prove the reason actually did justify the dismissal because that is a matter for the tribunal to assess when considering the question of reasonableness. In the case of ***Gilham v Kent County Council 1985 ICR 233*** it was said that *"The hurdle over which the employer has to jump at this stage of any inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to section 98(4) and the question of reasonableness".*

121. The respondent in this case asserted the reason for dismissal was capability, which is a potentially fair reason falling within section 98(2)(a) Employment Rights Act. The claimant challenged that position and argued the real reason for his dismissal had been because he was a thorn in the side of the respondent because of all the issues he raised and because he was seen as doing everything by the book and being militant.

122. There was no dispute regarding the fact the claimant did raise numerous issues whilst at the Yoker centre, and that he continued to raise those issues until they were resolved. There was also no dispute regarding the fact that in raising some issues, for example, wheel alignment, it had a financial impact on the Yoker centre and wider business. The evidence of the respondent's witnesses, however, regarding these matters was either neutral or positive insofar as they accepted the claimant had been right to raise the issues regarding the flooding of the premises and wheel alignment because they were health and safety issues. The tension appeared to arise from the claimant's real or perceived inflexibility: for example, whilst it was correct some vehicles required a full tank of petrol before wheel alignment could be carried out correctly, this could be simulated using weights in the car rather than turning customers away because they did not have a full tank of petrol.

123. The claimant was described by the respondent as being someone who "did everything by the book" and who knew what the relevant policies and procedures were. We formed the impression from the evidence that this was not seen as a bad thing except where it led to inflexibility and operating in a way different to the practice in other centres. The claimant was described as being *"militant"* and this related to his knowledge of policies and procedures.

124. The tribunal also had regard to the fact Mr Newby instructed a secret investigation to be carried out regarding the claimant. The focus of this investigation appeared to be a search for information about how people felt about working with the claimant and whether any evidence could be found about the claimant being "militant" or turning customers/work away from the centre. The investigation came to nothing but we considered it illustrative of

Mr Newby's approach to the claimant and it is a matter to which we return below.

125. The tribunal, having had regard to all of the witness evidence and the statements gathered during the grievance and appeal investigations, concluded that whilst the claimant may have been an irritation/thorn in the side of the respondent, we were not satisfied this was the reason for the dismissal. We say that because we believed that if the Yoker centre had been making money, the respondent would have tolerated the claimant.

126. We concluded that the reason operating on the respondent's mind at the relevant time was capability relating to the claimant's capability to perform the role of Centre Manager because he was on light duties. We were satisfied the respondent had shown the reason for the dismissal of the claimant was capability, which is a potentially fair reason for dismissal falling within section 98(2)(a) Employment Rights Act.

127. The tribunal must now continue to consider the fairness of the dismissal for that reason. We turned to consider the respondent's argument that the claimant being on light duties had impacted on/caused the losses at the Yoker centre.

128. We firstly had regard to the fact the respondent did not specify the length of time the Yoker centre had been making losses. Mr Coats produced a profit and loss account for one year (2022/2023) but referred to the centre having made a loss for three years. There was no evidence to support this and no evidence to explain to the tribunal whether the business had been trading during the pandemic. We concluded that as evidence for one year had been produced we should limit our considerations to this period.

129. There was no dispute regarding the fact losses had been made. The profit and loss account for April 2022 – January 2023 showed losses being made in the first and second quarters of the year, with profits being made in the third and fourth quarters. Mr Coats accepted that in the period April to July 2022 (the first quarter) the claimant had been off sick and when he returned to work in August 2022, the centre returned to profit. The claimant plus one other were

the only employees at the centre during October and the claimant was off on three weeks' annual leave during November.

130. The respondent's witnesses each accepted that the fact the Yoker centre had had to close due to flooding and the fact there had been issues with lack of staff would have had an impact on the financial position of the centre. The lack of staff would have impacted on the centre in two ways: (i) the centre was closed for 4 days a week for 7 weeks and (ii) the lack of staff restricted the services which could be offered to customers and resulted in only tyre fitting and wiper fitting being offered. Mr Coats confirmed the centre was only fitting four tyres a day. He also confirmed that Yoker was not the only centre making a loss.

131. The respondent carried out no analysis of the financial position. The respondent was content to blame the claimant for the losses at Yoker notwithstanding the fact they knew a variety of factors beyond the claimant's control, caused or contributed to the losses.

132. The tribunal noted there was reference on several occasions to the fact the Yoker centre would be profitable if there was a good manager and four competent tyre fitters in the centre, yet there was no dispute regarding the fact that Yoker had not been staffed at that level throughout 2022. The claimant was, again, blamed for this notwithstanding the fact he was not responsible for hiring the staff the centre needed.

133. The tribunal next had regard to notes of the interviews with Mr Newby during the investigations into the grievance and appeal. He put the losses down to poor people development, lack of leadership, attitude, poor service regarding the services offered to customers, irregular service levels, poor managerial decision making and lack of staff retention and staff turnover. All of these matters were implicitly blamed on the claimant. The respondent, however, brought forward no evidence to support these points or, indeed, to support any argument that the claimant was to blame for the financial position of the Yoker centre.

134. The respondent carried out no analysis of the reasons for the poor performance at Yoker notwithstanding the fact various Operations Managers and the Divisional Director were aware the performance of the centre was poor. The Operations Managers did not review the claimant's performance, did not identify with the claimant any concerns they may have had regarding his performance, did not put a plan in place to address any concerns and did not make use of the respondent's own capability procedure and PIP process to identify and address concerns.

135. The respondent compounded their failure to address these (alleged) issues by failing to give any evidence regarding these matters. There was no evidence, for example, to explain how the claimant had failed to develop people or the lack of leadership or poor managerial decision-making. In fact, when Mr Coats was asked about the claimant's leadership skills, he replied his "motivation of staff was quite good" notwithstanding the fact Yoker was a difficult place to work.

136. The respondent carried out no investigation or appraisal of the claimant's performance or identification of the problems. The respondent, essentially, simply placed the blame for the performance of the Yoker centre on the claimant and linked that to the fact he was on light duties.

137. There was no dispute in this case regarding the fact the claimant was a disabled person for the purposes of the Equality Act, and the disability related to a physical impairment concerning his left knee. The physical impairment meant the claimant had difficulty bending, turning and twisting the knee, getting to ground level and lifting heavy weights. The impairment limited his ability to undertake the manual duties involved in his role, such as tyre fitting, brake fitting, servicing and quality control.

138. The respondent put reasonable adjustments in place in 2020 when it placed the claimant on light duties at the Yoker centre. The term "light duties" meant there was no requirement on the claimant to perform manual tasks. The claimant was placed at Yoker because it was a small 4 person centre which was not overly busy.

139. This was not a case where the claimant was absent from work on a short term or long term basis. The claimant was attending work as required and carrying out the duties he was fit to do. The respondent labelled the issue as one of capability because they considered the claimant was not able to perform all of the duties of the role of centre manager and they no longer wanted to continue to make reasonable adjustments for the claimant.

140. The respondent did consult with the claimant insofar as Mr Coats invited the claimant to attend wellbeing meetings and, at those meetings, discussed the situation with the claimant in terms of his health and the prognosis. Mr Coats also obtained two occupational health reports, the latest of which was some 5 months prior to the dismissal. The claimant was critical of the respondent for not obtaining an up-to-date medical report but the medical position had not changed and there was no suggestion the respondent would have learned anything new from an up-to-date report.

141. The medical position was clear: the claimant required an operation to his left knee, which would involve a recovery time of between 3 – 4 months. The problem was that due to a backlog with NHS waiting times, no date could be given for the operation, albeit the claimant was moving up the waiting list and informed Mr Coats he was 21st on the list, with 2/3 operations being done each week.

142. The real issue in this case was alternative employment/reasonable adjustments. The respondent conceded it had applied two PCPs, namely (i) the requirement to attend work to perform a range of duties including fitting and fixing cars and (ii) the requirement to achieve a certain level of profitability. The respondent also conceded those PCPs put the claimant at a substantial disadvantage in comparison with persons who are not disabled. The substantial disadvantage was being subjected to capability procedures and dismissal. If an employer fails to make a reasonable adjustment that would have avoided the need to dismiss an employee, the dismissal may well fall foul of the test of reasonableness set out in section 98(4) Employment Rights Act. The tribunal approached this issue by looking firstly at alternative

employment and secondly at whether there were reasonable adjustments the respondent could have made to avoid the need for dismissal.

143. The claimant had previously, on two occasions, taken on the role of Floating Manager. This role appeared to have been created to fill a gap between the claimant moving from one Centre Manager role to another. It was a role the claimant enjoyed and was good at. The claimant asked the respondent to create this role for him as an alternative to being at Yoker. Mr Newby refused to do so. The tribunal accepted the evidence of Mr Smith when he told the tribunal that a change of senior management had made the decision that the Floating Manager role was no longer to be used because the duties covered by that role were the responsibility of each Centre Manager. The tribunal accepted that as this decision had been taken by the new Chief Executive, Mr Newby did not have authority to create a Floating Manager role for the claimant. We were satisfied there was no option for alternative employment in such a role. We were further satisfied that it would not have been a reasonable adjustment to create such a role in the circumstances.

144. Mr Coats did identify a Customer Care role but this was at a lower salary and the claimant would have to be interviewed for the role. Mr Coats discussed the possibility that the claimant's salary could be gradually reduced to the salary for the Customer Care role. There was no discussion regarding an adjustment to remove the need for the claimant to attend for interview. The respondent's witnesses were asked if they had considered making an adjustment to remove the need for the claimant to attend for interview for this post, and slotting him into the vacancy. The respondent's witnesses appeared surprised by this suggestion and it was clear no guidance had been sought from HR regarding the making of reasonable adjustments and what that may mean.

145. The claimant did not discount this role as a possibility, but it was clear that his focus was on adjustments to allow him to continue in the role of Centre Manager and accordingly the discussion regarding a Customer Care role petered out.

146. There was discussion regarding moving the claimant to a bigger centre where the need for him to do manual tasks would be removed or significantly reduced. Mr Coats accepted moving the claimant to a bigger centre, for example, Anniesland would have been reasonable (as an adjustment or alternative employment), but Mr Coats was not able to do so because Mr Newby would not allow the move.

147. The claimant had previously worked as Centre Manager at Anniesland in 2015. He was one of two Centre Managers based there. He had also worked as one of two Centre Managers at Milngavie in 2016. There was no evidence to suggest that having two Centre Managers in larger centres had been discontinued. Mr Coats, when asked about this, simply said that if he moved the claimant he would have to find another Centre Manager for Yoker, and other Centres had managers and did not need a second one. There was, however, no evidence to explain whether any of the larger centres currently had two managers or whether this could have been accommodated even for a temporary period until the claimant had his operation.

148. The respondent is a large employer with over 100 centres in Scotland. The evidence before the tribunal suggested that Centre Managers were moved frequently: the claimant, for example, had been in Paisley, Anniesland, Milngavie and Maryhill before moving to Yoker. There was no suggestion this amount of movement was unusual. The claimant was able to drive without difficulty and made Mr Coats aware of this. The claimant was not, accordingly, limited to working in a Centre in the Glasgow area. Mr Coats, however, limited his search for alternative employment to the eight centres for which he was responsible.

149. The respondent has a number of larger centres where the need for the centre manager to undertake manual tasks was greatly reduced. The tribunal accepted the requirement for centre managers to undertake manual tasks still existed even in larger branches, but the reality was that in practice the centre managers in larger branches either did not do manual tasks, or rarely had to do manual tasks. There was, accordingly, scope for the respondent to move the claimant to a larger branch where his light duties would not have had an

impact, or would have had a greatly reduced impact. The respondent failed to properly consider this because Mr Newby would not allow the claimant to be moved to a larger branch.

150. Mr Smith was asked about the option of swapping the claimant to a larger branch and moving the centre manager from that larger branch to Yoker. He replied that that would not make good business sense, but could not explain why not. It was clear from his evidence that this type of adjustment had not been considered, even for a temporary period of time until the claimant had had his operation.

151. The respondent did not give consideration to continuing the claimant on light duties at Yoker for a longer period of time. Mr Coats, when asked about this, referred to the length of time the claimant had been on light duties being a problem because it impacted on the profitability of the centre and the respondent could not sustain the claimant not being able to do the full role of centre manager.

152. The tribunal formed the impression from the evidence of the witnesses and the notes of the grievance and appeal interviews that the respondent did not want to accommodate the claimant's light duties any longer and did not want to consider options for alternative employment or reasonable adjustments which would have avoided the need for dismissal. We say that because the respondent believed the claimant being on light duties had (in Mr Newby's words) a "massive impact" on the profitability of the centre. This matter is dealt with above and not repeated here beyond stating the respondent provided no evidence to demonstrate the claimant's light duties massively impacted on the profitability of the Yoker centre and this was particularly so given there were other factors which did impact on the profitability of the centre and which had nothing whatsoever to do with light duties.

153. The tribunal concluded from all of the above evidence that the respondent failed to properly consider alternative employment and failed to make reasonable adjustments which would have avoided the need for dismissal (for example, moving the claimant to a larger branch). There was no real search

for alternative employment because the proposals made by the claimant and which Mr Coats took to Mr Newby, were rejected without consideration.

154. The tribunal next had regard to the procedure followed by the respondent when reaching the decision to dismiss. The tribunal heard a great deal of evidence regarding the procedure followed by the respondent in dismissing the claimant because the respondent used the Long Term Sickness Absence procedure even though the claimant was not off on long term sickness absence. The tribunal concluded that the procedure followed by the respondent was reasonable insofar as the respondent met with the claimant for two wellbeing meetings and a capability meeting and obtained advice regarding the medical position. The tribunal considered the fairness of a procedure is determined by what steps the employer took, rather than the name of the procedure.

155. The tribunal next considered the issue of whether the respondent could reasonably have been expected to wait longer before dismissing the claimant. The respondent's reasons for not wanting to wait longer were because there was no certainty when the operation may occur and because of the financial impact on the performance of the centre.

156. The performance of the centre is dealt with above and not repeated here: suffice to say the respondent did not bring forward evidence to support their position that the claimant's light duties caused the losses made by the Yoker centre. This was particularly so in circumstances where there was direct evidence that other factors impacted on the profitability of the centre.

157. There was no dispute regarding the fact there was no firm date for the claimant's operation, but there was evidence to support the fact the claimant was moving up the list. The tribunal did not however consider this of itself was sufficient. We did however conclude that the fact the claimant was near the top of the list for the operation, taken with the fact there was no evidence to support the respondent's position that the claimant's light duties impacted on the centre's financial performance, supported a conclusion that the respondent could have waited longer before taking their decision.

**158.** The tribunal, having regard to the fact the respondent failed to properly consider both alternative employment and the making of reasonable adjustment which would have avoided the need for dismissal, and having regard to all of the other points set out above, decided the dismissal of the claimant was unfair.

**Reasonable adjustments (section 20 Equality Act)**

159. The tribunal firstly had regard to the relevant statutory provisions set out in section 20 Equality Act. The section provides that where a provision, criterion or practice (PCP) of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

160. The respondent accepted it had applied two PCPs, namely (i) the requirement to attend work to perform a range of duties including fitting and fixing cars and (ii) the requirement to achieve a certain level of profitability. The respondent further accepted the claimant had been put at a substantial disadvantage as a result of the PCPs in comparison with persons who were not disabled. The substantial disadvantage was being subjected to capability procedures and being dismissed. The issue for the tribunal was whether the respondent had taken such steps as it was reasonable to take to avoid the disadvantage.

161. The claimant argued that it would have been reasonable for the respondent to make the following adjustments:

- put the claimant on a performance improvement plan;
- hire additional staff at the Yoker centre to assist the claimant;
- redeploy the claimant;
- reallocate the claimant's duties;
- apply the capability procedure flexibly and
- provide mechanical aids to assist the claimant repair cars.

162. We considered each of these points and asked whether the adjustment would have been reasonable and whether it would have removed the substantial disadvantage.

163. There was no dispute regarding the fact the respondent had a Performance Improvement Plan and Capability Procedure (page 568) and that the Operations Managers could have used this policy to address any shortcomings in the claimant's performance. There was also no dispute regarding the fact they did not do so. The claimant was not placed on a PIP at any time during his employment and, in fact, no review of his performance was carried out for two years.

164. The tribunal was satisfied that if there were issues regarding the claimant's performance (that is, his competence to do the job), it would have been reasonable to place him on a PIP to address these issues and allow the claimant to understand that improvement was necessary.

165. The purpose of making the reasonable adjustment is to remove or minimise the disadvantage caused by the application of the PCP. The tribunal concluded that placing the claimant on a PIP would not have removed or minimised the disadvantage of the first PCP because that had nothing to do with the claimant's performance. The adjustment of placing the claimant on a PIP would have minimised the disadvantage caused by the second PCP because the plan would have considered and addressed all issues affecting the financial position of the centre.

166. The second proposal that it would have been a reasonable adjustment for the respondent to hire additional staff at the Yoker centre to assist the claimant referred to hiring more than a full complement of staff. The tribunal accepted that such an adjustment would have removed the disadvantage of dismissal and being subjected to the capability procedures because the additional staff would have been able to cover the manual duties the claimant was unable to cover. However, the reasonableness of this adjustment would be dependent on the cost and there was no evidence to suggest the respondent had considered any such adjustment or costed it. There was information in the

appeal investigation interview with Mr Newby (page 487) that he estimated 0 – 25% of the role would be tyre fitting. In cross examination of Mr Coats it was suggested this equated to an average of 12.5%, which was a few hours each week. If these calculations are correct, it would suggest that the cost to the respondent of putting additional staff into the centre for a few hours each week would not have been very high.

167. The tribunal concluded that whilst it was arguable this would have been a reasonable adjustment, we were not prepared, without further information as to cost, to reach such a conclusion. We accordingly decided this proposal would not have been a reasonable adjustment.

168. The third proposal made by the claimant was that it would have been a reasonable adjustment to redeploy him. There were a number of options for redeployment of the claimant: moving him to a larger centre, creating a Floating Manager position or moving him to another role different to the Centre Manager role.

169. We have already set out much of this above and we do not seek to repeat it here: suffice to say, that the respondent had a number of larger centres where the claimant could have been placed and which would either have removed or greatly reduced the need to do manual tasks. We acknowledge the claimant would still have been in the position of being unable to do manual tasks, but in a larger centre it is much easier for this to be covered because there are more staff available. Further, the claimant had experience of moving centres and had been centre manager at a number of the larger centres. We concluded that it would have been reasonable for the respondent to move the claimant to a large centre and this would have removed/reduced the disadvantage of having to do manual work. The move would also have impacted the requirement to achieve a certain level of profitability because the claimant would be supported by a larger staff.

170. There was also the option of placing the claimant in a larger centre and having two centre managers in place at the centre. This had previously been done when the claimant worked at Anniesland and Milngavie. There was no

evidence to suggest why this would not have been a reasonable adjustment even for a temporary period of time until the claimant had had the operation.

171. We concluded (above) that it would not have been a reasonable adjustment to create a Floating manager role for the claimant in circumstances where it had been decided at the highest level that such roles were not to be used within the organisation.

172. The option of alternative employment was explored by Mr Coats and there could have been an opportunity to move the claimant to a Customer Care role. The claimant did not discount this possibility but the matter was not taken forward because the focus was on adjustments to allow the claimant to remain in the role as Centre Manager.

173. We concluded, having regard to all of the above points, that there was scope for redeployment of the claimant and that this would have been a reasonable adjustment for the respondent to make. We reached that conclusion because redeployment would have removed the disadvantage of the PCPs and because the respondent could not explain why redeployment would not have been reasonable beyond the fact that Mr Newby would not permit it.

174. The fourth adjustment proposed by the claimant was to reallocate his duties. This was the reasonable adjustment which the respondent had put in place in 2020. The respondent's position was that it was no longer a reasonable adjustment because the claimant being on light duties was impacting on the financial performance of the centre. We considered there were two weaknesses in the respondent's position: firstly, they brought forward no evidence to support their position that the claimant's light duties impacted on the performance of the centre. There was no analysis to show what the performance of the centre would have been if the claimant had been fit to do manual duties. The only financial information provided was a profit and loss account for 2022/2023 which showed two quarters of losses and two quarters of profits. Secondly, the respondent's position totally ignored the fact that if the centre had been staffed correctly with four people, there would have been cover for the claimant.

175. We did acknowledge the adjustment for light duties made by the respondent had been in place for some time and it was apparent that at the time that decision had been made there was a belief it would be temporary until the claimant had the knee operation. The claimant was still waiting for the operation 3 years later, but things had progressed to him being 21st on the waiting list, with an estimate that the operation may take place in 7-10 weeks. We considered that with progress being made towards getting the operation, it would have been reasonable to continue to reallocate the claimant's duties and ensure the centre was fully staffed to cover those duties (see above). This adjustment would have removed or reduced the disadvantage of both PCPs.

176. The fifth proposed adjustment was to apply the capability procedure flexibly. There was no clarity regarding what was meant by this proposal and accordingly we concluded it would not have been a reasonable adjustment.

177. The sixth proposed adjustment was to provide mechanical aids to assist the claimant repair cars. The claimant, during the capability meeting, had suggested to Mr Coats that there were aids which could assist him to fit tyres. The claimant provided the name of one such aid. Mr Coats told the tribunal he made enquiries of the equipment team but was told the aid mentioned by the claimant was just a joist which would only assist with one aspect of tyre fitting. There would also be issues associated with getting the equipment, introducing it into the centre and training.

178. The respondent took no action to explore whether there was equipment/aids which would allow the claimant to undertake the manual duties required of him (principally fitting tyres). The onus is not on the claimant to identify what is required. It is for the respondent to ascertain whether there was equipment or aids which could assist the claimant to fit tyres and to cost that and reach a decision whether it would be a reasonable adjustment to purchase/hire/obtain that equipment. The respondent did not do this.

179. We decided, having regard to all of the above points, that the respondent failed to make reasonable adjustments (redeployment to a larger centre,

continuing with light duties and mechanical aids) to remove or minimise the substantial disadvantage caused by the PCPs.

**Discrimination arising from disability (section 15 Equality Act)**

180. The tribunal had regard firstly to the statutory provisions set out in section 15 of the Equality Act. The section provides that a person discriminates against a disabled person if they treat the disabled person unfavourably because of something arising in consequence of the disabled person's disability and they cannot show that the treatment is a proportionate means of achieving a legitimate aim.

181. The respondent conceded the something arising in consequence of the claimant's disability was his inability to do any manual work, including tyre fitting and fixing cars. The respondent also conceded it treated the claimant unfavourably when it dismissed the claimant and subjected him to capability procedures. The issue for the tribunal to determine was whether the unfavourable treatment was a proportionate means of achieving the legitimate aim of the efficient and profitable running of the Yoker centre.

182. The aim pursued by the employer must be legal, not in itself discriminatory and must represent a real, objective consideration. We noted the claimant did not seek to challenge the legitimacy of the respondent's aim and we concluded the efficient and profitable running of the Yoker centre was a legitimate aim.

183. We had regard to the EHRC Employment Code which makes clear that the measures adopted by the employer do not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective. The tribunal must carry out a balancing exercise.

184. We also had regard to the fact there is a close connection between justification and the duty to make reasonable adjustments. The EHRC Employment Code states "If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable

treatment, it will be very difficult for them to show that the treatment was objectively justified."

185. We decided (above) that the respondent had failed to make reasonable adjustments which would have prevented or minimised the unfavourable treatment of subjecting the claimant to capability procedures and dismissing him. We considered there were less discriminatory measures which could have been taken to achieve the same objective. For example, if the claimant had been redeployed to a larger centre or if the Yoker centre had been fully staff and the claimant's duties had been reallocated. We concluded, for this reason, that the respondent had discriminated against the claimant for something arising in consequence of his disability.

186. The tribunal, in conclusion, found the claimant had been unfairly dismissed and discriminated against because of disability. The tribunal must now consider the issue of remedy.

**Remedy**

187. The claimant did not seek the remedy of reinstatement or reengagement in respect of the unfair dismissal and accordingly the remedy in this case will be an award of compensation. We noted that where the complaint before the tribunal relates to a dismissal which is both unfair and discriminatory, the heads of compensation will largely overlap and cannot be awarded twice (section 126 Employment Rights Act). The EAT, in the case of ***D'Souza v London Borough of Lambeth 1997 IRLR 677*** held that tribunals should award compensation under the discrimination legislation thereby avoiding the cap on unfair dismissal compensation. We adopted this approach.

188. The tribunal had regard to the provisions of section 124 Equality Act which provides that a tribunal may order the respondent to pay compensation to the claimant where the claimant has succeeded in a claim of discrimination. The aim of such compensation is to put the claimant into the position he would have been in but for the unlawful discrimination.

189. The claimant produced a schedule of loss (page 581) in which he sought an award of compensation for the unfair dismissal comprising a basic award and a compensatory award for loss of wages between the date of dismissal and the date of the hearing, loss of statutory employment rights and loss of pension contributions. He also sought an award for injury to feelings in respect of the discrimination. The claimant also sought payment of full wages for the period May, June and July 2023 when, it was said, he had been off on sickness absence and was paid SSP. The tribunal did not hear any evidence regarding this absence or the payment of SSP and there was no evidence to support the claimant's assertion that full pay should have been paid for this period. We accordingly made no award for the difference between SSP and full pay.

190. The parties agreed the figures for the gross weekly wage (£597.64) and net weekly pay (£466.96). The employer's pension contribution rate was also agreed at 2.4%. The parties also agreed the calculation of the basic award was £4781 and agreed the loss of statutory employment rights at £400.

191. The respondent argued the claimant had failed to mitigate his losses. It is for the employer to show that the claimant has failed to mitigate his loss and must adduce evidence in relation to mitigation. The issue of whether an employee has mitigated his loss is a question of fact for the tribunal. The question to be asked is not whether the employee has behaved reasonably in general terms, but whether he has taken reasonable steps to mitigate. The issue of mitigation is addressed below following the calculation of the loss between the date of dismissal and the date of this hearing.

192. The tribunal noted there was agreement regarding the calculation of the basic award of £4781.

193. The tribunal next calculated the loss of earnings and pension loss between the date of dismissal and the date of this hearing. This is a period of 43 weeks. The claimant lost earnings in this period of £20,079 (being 43 weeks x £466.96 net per week) plus loss of pension contributions of £648. This gives a total of £20,727.

194. The tribunal, in considering the respondent's argument that the claimant had failed to mitigate his losses, had regard to the case of ***Gardiner-Hill v Roland Berger Technics Ltd 1982 IRLR 498*** where the EAT held that where there is a substantial issue as to failure to mitigate, an employment tribunal should ask itself:

- what steps were reasonable for the claimant to have to take in order to mitigate his loss;
- whether the claimant did take reasonable steps to mitigate loss and
- to what extent, if any, the claimant would have actually mitigated his loss if he had taken those steps.

195. The claimant's position was that he had taken reasonable steps to mitigate his loss by gaining additional qualifications and making various applications for jobs. The list of positions for which the claimant had applied was set out at page 17 of the additional documents. This list demonstrated that the claimant, who was dismissed in July 2023, did not apply for any jobs until January 2024. The claimant, when asked about this in cross examination, stated he had been busy with the grievance and dismissal appeal.

196. We noted the claimant submitted his letters of grievance and dismissal appeal on the 22 May 2023. The claimant attended a grievance meeting with Karl Billington on the 19 June. The claimant appealed against the outcome of the grievance and attended a meeting with Mr Lucas on the 13 September. The claimant attended a dismissal appeal meeting with Mr Smith on the 22 June 2023. The claimant thereafter had no further involvement in the process.

197. The tribunal further noted the claimant gained his CIPD qualification in August/September 2023.

198. The tribunal also noted that prior to gaining the CIPD qualification the claimant applied for a range of positions, for example, trainee train driver. The claimant then applied predominantly for HR positions after gaining his qualification, albeit many of the positions applied for were managerial HR positions in circumstances where the claimant had no HR experience.

199. The tribunal considered the claimant's explanation for not applying for any jobs in the period July 2023 to January 2024 lacked credibility in circumstances where his involvement in the grievance and appeal hearings concluded before the effective date of termination and therefore could not be said to have impacted his efforts to find alternative employment following his dismissal.

200. The tribunal asked itself what steps were reasonable for the claimant to have to take in order to mitigate his loss, and we answered that question by confirming it would have been reasonable for the claimant to apply for a range of jobs. The claimant did not do so in the period July to January 2024. We next asked ourselves to what extent the claimant would have actually mitigated his loss if he had taken those steps. We concluded that if the claimant had applied for a range of jobs in this period, he would have been successful. We say that because the claimant has a variety of valuable skills, qualifications and experience. The tribunal, for these reasons, concluded the claimant failed to take reasonable steps to mitigate his loss during the six month period July 2023 to January 2024.

201. The claimant was cross examined regarding whether he was truly looking for new employment and this included in the period January 2024 onwards when he was applying for jobs. This suggestion was made because the claimant told the tribunal he was in a comfortable position and well supported by his family. He helped his partner in her business and benefitted from his partner's mother also owning and running a business. This suggestion, coupled with the tribunal's finding that the claimant's explanation for not applying for jobs in the period July to January 2024 lacked credibility, did raise a doubt in the mind of the tribunal regarding the authenticity of the claimant's efforts to find employment. However, the tribunal reminded itself that the onus is on the respondent to adduce evidence in relation to mitigation and we concluded we did not have sufficient evidence from the respondent to make these findings. We accordingly concluded there had not been a failure by the claimant to mitigate his losses in the period January 2024 to the date of the hearing.

202. The effect of the tribunal's decision that the claimant failed to mitigate his losses in the period July to January 2024 is that the losses in this period must be deducted from the total set out above. The claimant failed to mitigate his loss during the period from the date of dismissal to January 2024 when he started applying for jobs: this is a period of 26 weeks. The claimant lost wages during this period of £12,141 and pension contributions of £391. This gives a total of £12,532. The revised calculation of loss in the period from the date of dismissal to the date of the hearing is £8,195 (being £20,727 less £12,532).

203. The tribunal made an award of £400 for loss of statutory employment rights.

204. The award of compensation is £13,376 (being a basic award of £4781, loss of earnings and pension contributions of £8195 and loss of statutory employment rights of £400).

205. The tribunal next considered an award for injury to feelings and we had regard to the case of ***Vento 2003 IRLR 102*** and the subsequent annual updates to the bands set out in that case. We noted the claimant, in the schedule of loss, sought an award of injury to feelings of £15,000. The respondent submitted the award should be at the top of the lower band. We, in considering this award, had regard to the claimant's evidence that he had spent most of his working life with the respondent and in a job he had enjoyed. He had found the dismissal stressful and it had affected his sleep. The claimant had been proud of the job he had done and his pride had been affected by the dismissal. The claimant also spoke of having a supportive family and being able to assist in the businesses of his partner and her mother.

206. The tribunal also had regard to the fact the claimant had, in 2021, started to do his CIPD qualification. He had also, some months prior to dismissal, applied for a number of jobs outwith the respondent. We acknowledged these facts could either support that the claimant wished to leave the respondent's employment, or that he suspected the respondent was going to dismiss him.

207. The tribunal must focus on the effect of the unlawful discriminatory treatment on the claimant. We acknowledged the claimant had been hurt at losing his job, and had found it stressful, but there was no suggestion he had required

to visit the GP to deal with the stress or the impact on his sleep. We decided, having had regard to, and balancing all of the evidence before us, to make an award of injury to feelings of £5000. We considered the evidence before us did not support the award of a higher amount.

208. The tribunal, in conclusion, decided the claimant had been unfairly dismissed and discriminated against because of the protected characteristic of disability. The tribunal order the respondent to pay compensation to the claimant in the total sum of £18,376 (being compensation of £13,376, which includes the basic award, and injury to feelings of £5000).

**Employment Judge:** **L Wiseman**
**Date of Judgment:** **22 July 2024**
**Entered in register:** **22 July 2024**
**and copied to parties**